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

<p>CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT, AND DAVID DEAN,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>WASHINGTON COUNTY BOARD OF ELECTIONS,</p> <p style="text-align: right;">Defendant.</p>	<p>CIVIL DIVISION</p> <p>24 No. 3953</p> <p>Judge Brandon P. Neuman</p> <p>PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT</p> <p>Filed on behalf of Plaintiffs, CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT, AND DAVID DEAN</p> <p>Counsel of Record for these Parties: see next page</p>
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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
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INTRODUCTION

In the weeks leading up to the April 2024 primary, the Washington County Board of Elections segregated voters' mail-in ballots that were returned without a signature or a date or were incorrectly dated, knowing these votes would not be counted. The Board then hid that information from the voters and the public, in many cases affirmatively misleading voters into thinking that their mail-in ballots would be counted, during a window when there was still an opportunity for the voters to remedy the loss of their right to vote by voting a provisional ballot on Election Day. Ultimately, the Board's actions disenfranchised 259 qualified, eligible Washington County voters in the April 2024 primary, who were never notified that their mail-in ballots would not be counted. And the Board has given every indication that it does not intend to change their policy and practice in the November 2024 general election; in fact, it is vigorously defending its right to continue it.

This case presents a narrow issue that has not been considered by any court in the Commonwealth: Does the Pennsylvania Constitution's right to due process of law require Washington County (the "County") to input accurate codes reflecting mail-in ballot status into the Statewide Uniform Registry of Electors ("SURE") system? Here, the undisputed facts demonstrate that the County's practice of intentionally entering inaccurate codes in the SURE system deprives

voters of the information they need to correct or challenge the rejection of their ballots. That is a violation of due process, and the Court should issue a permanent injunction enjoining the County from continuing its unconstitutional practice during the November election.

The relevant test is the three-part balancing test from the U.S. Supreme Court's seminal decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). See *Washington v. Pa. Dep't of Corrections*, 306 A.3d 263, 284-85 (Pa. 2023); *R v. Dep't of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994). Under *Mathews*, courts balance the following three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation and the value of additional or substitute safeguards; and 3) the state's interest, including the burdens the additional or substitute procedural requirements would impose on the state. *Washington*, 306 A.3d at 300 (citations omitted). That test is easily met here. Voting is a fundamental right, the risk of deprivation is certain if Washington County enters inaccurate codes into SURE, and the burden on the County in entering the right codes is nil.

In answer, the County and Intervenors Republican National Committee and the Republican Party of Pennsylvania have indicated that under *Pa. Democratic Party v. Boockvar*,¹ they have no legal obligation to tell voters the truth about the impending cancellation of their vote. But that is a twisted reading of *Boockvar*,

¹ 238 A.3d 345 (Pa. 2020).

which held only that the Court had no legislative guideposts from which to create a notice and cure regime. The Court did not consider a constitutional due process challenge there, much less sanction county boards of elections' misuse of the existing SURE system, which has evolved significantly since 2020.

Washington County's thinly veiled motive behind its abrupt April 2024 change in practice is to drive down mail-in voter participation, a goal which is noxious to the law and entitled to no weight in the constitutional analysis. The County provided timely notice to voters of disqualifying defects during the last election without qualm. The 2-1 April vote overturning the policy is a reflection of politics, not law. In short, the right to due process of law burns bright and cannot be snuffed out by a change in the political winds. The Pennsylvania Constitution takes precedence, and the County should be compelled to give voters timely pre-deprivation notice of facially defective ballot declaration envelopes.

BRIEF HISTORY OF THE CASE

Plaintiffs commenced this case on July 1, 2024, seeking injunctive and declaratory relief against the Washington County Board of Elections, the local government agency responsible for overseeing elections in the County and ensuring that they are "honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

The Plaintiffs are (a) seven Washington County voters who were denied procedural due process and disenfranchised by the Board of Elections pursuant to its unlawful actions; (b) the Center for Coalfield Justice (“CCJ”), a non-profit organization that advocates to advance policies that benefit county residents relating to the health and environmental impacts of the local energy industry; and (c) Washington Branch NAACP, a non-profit organization dedicated to eliminating racial hatred and racial discrimination in the County. Parties’ Joint Stipulation of Facts (“Stip. Facts”), ¶¶ 1-15.²

Following the filing of a motion seeking a preliminary injunction, the parties commenced a brief discovery period and agreed on a stipulated set of facts. Plaintiffs now seek summary judgment from this Court that the Board’s policy violates the Pennsylvania Constitution, and an order directing the Board to provide accurate, pre-Election Day information to voters about mail-in ballot declaration envelopes that contain disqualifying errors.

STATEMENT OF ISSUES INVOLVED

Plaintiffs ask the Court to find that the Board’s practice of concealing information and misleading voters about the status of their mail-in ballots violates the procedural due process protections in Article I, Section I of the Pennsylvania Constitution. Plaintiffs seek a judgment from the Court enjoining the Board from

² The Parties’ Joint Stipulation of Facts has been filed contemporaneously with this Motion.

implementing its unlawful practice in the upcoming November general election and ordering the Board to provide accurate, timely information to voters about the status of their mail-in ballots by promptly and accurately entering voters' correct ballot statuses into the SURE system, and by sharing ballot-status information with inquiring voters.

UNDISPUTED FACTS

I. Voting by Mail in Pennsylvania

In 2019, Pennsylvania adopted “no excuse” absentee or mail-in voting, allowing registered voters to submit a mail-in ballot without having to justify why they cannot go to the polls on Election Day. Accordingly, since the 2020 primary election, all registered, eligible Pennsylvania voters have had the right to vote by mail-in ballot without providing a reason why they could not vote in person.³ Act of Oct. 31, 2019, P.L. 552 No. 77 (“Act 77”).

A voter seeking to vote by mail must complete and submit an application to the county board of elections. 25 P.S. §§ 3146.2, 3150.12; *see also* Exhibit 1, July 23, 2024 Deposition of Deputy Secretary for Elections and Commissions Jonathan Marks (“Marks Tr.”) 10:14-24. Once the county board verifies the voter’s identity and eligibility, the county sends the voter a mail-in ballot packet that contains: (1)

³ Identical procedures govern how voters apply for, complete, and return both absentee and mail-in ballots. For ease of reference, the term “mail-in ballots” is used to encompass both absentee and mail-in ballots.

the ballot; (2) a “secrecy envelope” marked with the words “Official Election Ballot”; and (3) a pre-addressed outer return envelope, which contains the voter declaration and spaces to sign and handwrite the date (the “declaration envelope”). 25 P.S. §§ 3146.6(a), 3150.16(a).

After receiving the mail-in ballot packet, the voter must mark the ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer declaration envelope. Marks Tr. 11:11-21. Next, the voter must “fill out, date and sign” the printed declaration on the declaration envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). To be considered timely, the county board of elections must receive the completed mail-in ballot packet by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c).

Under current Pennsylvania law, mail-in ballots are not counted if the voter fails to sign or correctly date the declaration envelope or forgets to include the secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023); *Boockvar*, 238 A.3d at 380. In every election since the implementation of Act 77, thousands of voters across the Commonwealth have made disqualifying mistakes when submitting their mail-in ballot that result in their vote not being counted. *See* July 1, 2024 Verified Complaint (“Compl.”) ¶ 32.

II. The SURE System

In order to facilitate the election process, the Legislature directed the Department of State (“DOS”) to implement “a single, uniform integrated computer system,” the SURE system. 25 Pa.C.S. § 1222. *See also* Marks Tr. 24:3-12. The statute grants broad powers to DOS to effect uniformity across the Commonwealth and directed DOS to “promulgate regulations to establish, implement and administer the SURE system” including “[u]niform procedures for the commissions relating to the SURE system, including the process and manner of entering information into the SURE system, [and] the type and form of information entered” 25 Pa.C.S. § 1222(f)(1).

Use of the SURE system is not optional. *See* Marks Tr. 24:13-16, 25:10-15. Counties are required to work in and through the SURE system. *See* 25 Pa.C.S. § 1222(c) (“All [county election] commissions shall be connected electronically to the SURE system and shall maintain their registration records in the system.”); *see also id.* § 1222(e) (“[E]ach commission shall be required to use the SURE system as its general register.”); Exhibit 2, Jul. 18, 2024 deposition of Washington County Elections Director Melanie Ostrander (“Ostrander Tr.”) 203:24-204:1; 204:6-10. And counties must enter data into the SURE system, including data identifying “registered electors who have been issued absentee ballots,” 25 Pa.C.S. § 1222(c)(19), and data identifying “registered electors who vote in an election and

the method by which their ballots were cast.” *Id.* § 1222(c)(20). *See also* 4 Pa. Code §183.4(b)(2) (“A commission shall enter. . . voting history for registrants.”). As a practical matter and to comply with other Election Code provisions, counties must also promptly and accurately enter this data into SURE in order to generate accurate poll books for Election Day.⁴

To “promote consistency across the 67 counties” for the processing of mail-in ballots, DOS has developed protocols for processing mail-in ballots, including ballots that are received with disqualifying errors. *See Stip. Facts, Ex. I, Pa. Dep’t of State, Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes at 3 (Updated: Apr. 3, 2023); see also Marks Tr. 13:5-8 (“A guidance is basically the department’s . . . articulation of best practices to county election offices for how to process work in the administration of elections.”)*. According to current DOS guidelines, upon receiving a mail-in ballot, counties are expected to stamp the receipt date on the outer envelope and record the receipt in the SURE system. *Stip. Facts, Ex. I at 2; Marks Tr. 12:20-25; 18:20-19:1; 86:16-18.*

⁴ Specifically, county boards of election must promptly and accurately enter this data into SURE to “[p]ermit the timely printing and transmission” of “district registers,” more commonly known as poll books, “and all other information contained in the system as may be necessary for the operation of the polling places on election days.” 25 Pa.C.S. § 1222(c)(13). Without that up-to-date information, counties could not generate accurate poll books for Election Day that identify voters who requested a mail-in ballot and voted it and those who did not. For example, if the poll book shows that the voter was sent a mail-in ballot but has not voted it, the voter may vote by provisional ballot. *Id.* § 3150.16(b)(2) (mail-in ballots); *id.* § 3146.6(b)(2) (absentee ballots).

At the time that the ballots are scanned, the election worker is presented with a drop-down menu in SURE, which provides 23 options for coding the status of the mail-in ballots. DOS provides extensive instructions on how to use the codes. *See* Stip. Facts, Ex. D, Pa. Dep’t of State, SURE Project County Release Notes (Mar. 11, 2024) (“SURE County Release Notes”); *see also* Stip. Facts, Ex. I at 3 (“The ballot return status . . . should be noted using the appropriate drop-down selection”); Marks Tr. 31:6-18; 38:11-16. For each code, DOS provides a table entry identifying the code, DOS’s suggestion as to when the code should be used, and the text that will be automatically sent by email to the voter if the code is selected and an email address is on file. *See* Stip. Facts, Ex. D; *see also* Marks Tr. 105:12-16. The Board of Elections decides which code to use to indicate the ballot status, which triggers the corresponding automatic email notification to the voter. Stip. Facts ¶ 24; Marks Tr. 57:7-12; 69:25-70:6; Ostrander Tr. 34:25-35:12; 38:24-39:8. DOS guidance specifies that “[i]t 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.” Stip. Facts, Ex. I at 3.

DOS provides a “RECORD – BALLOT RETURNED” code to record the voter’s ballot as timely returned. Stip. Facts, Ex. D at 10. When a county board of elections selects this code, it automatically generates an email indicating that the

voter's ballot has been received and that if there is a problem, they may hear from the county later:

Your ballot has been received by [County Name] County as of [DateRecorded]. If your county election office identifies an issue with your ballot envelopes that prevents the ballot from being counted, you may receive another notification. Otherwise, you will not receive any further updates on the status of your ballot and you are no longer permitted to vote at your polling place location.

Id.

DOS provides a set of "CANC" codes – short for "CANCELLED" – for ballots with disqualifying errors on the declaration envelope. The "CANC" series of codes includes:

- a. CANC – NO DATE
- b. CANC – INCORRECT DATE
- c. CANC – NO SECRECY ENVELOPE
- d. CANC – NO SIGNATURE
- e. CANC – OTHER

Stip. Facts, Ex. D at 3. The SURE County Release Notes explain that the "cancelled" codes are intended to be used when a voter returns the ballot packet with an error and the county "has made a final decision as to the ballot, or it does not offer the opportunity to cure." *Id.* at 8-9. Selecting a particular "CANC" code generates a corresponding email notification to the voter. For example, if the

county selects the “CANC – NO DATE” code, the following email is automatically sent to the voter:

Your mail ballot may not be counted because you did not date the declaration on your ballot return envelope. and your ballot will not be counted. 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.

Id. at 8.

In March 2024, DOS also created a set of “PEND” codes, which it explained could be used by counties that offer “curing” procedures. *Id.* at 2; Marks Tr. 34:12-35:2; 39:24-40:23. The “PEND” series of codes is:

- a. PEND – INCORRECT DATE
- b. PEND – NO DATE
- c. PEND – NO SIGNATURE
- d. PEND – NO SECRECY ENVELOPE
- e. PEND – NO ID
- f. PEND – OTHER

Stip Facts, Ex. D at 2. For example, entering the “PEND-OTHER” code generates the following email to voters:

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 your

polling place on election day and cast a provisional ballot.

Id. at 6.

In addition to triggering an email that notifies voters that their ballot has a disqualifying error, coding a mail-in ballot with a disqualifying error as CANC or PEND allows each voter to “track” the status of their mail-in ballot at a DOS website. *Id.* at 15. This data is also made publicly available to requestors, enabling political parties and voting rights organizations to reach out to affected voters and notify them of their ballot status. Stip. Facts ¶ 24; Marks Tr. 28:19-22. *See* 25 P.S. §§ 3146.9, 3150.17. The codes also impact the way voters’ ballot status is listed in the poll books on election day: for example, a voter whose defective mail-in ballot is marked “cancelled” in the SURE system will be listed in the poll books as having been issued, but not returned, their mail-in ballot. *See* Ostrander Tr. 44:7-25.

III. Washington County’s Use of the SURE System for Mail-In Ballots

When Washington County receives an application for a mail-in ballot, it verifies the voter’s identity and eligibility using the SURE system. Stip. Facts ¶ 40; Ostrander Tr. 24:24-26:1. The County then prints a unique bar code label from the SURE system that is linked with the voter and affixed to the ballot packet. Ostrander Tr. 26:2-27:5. The County then sends the ballot packet to the voter,

using the SURE system to track the date when the ballot packet was mailed. *Id.* 27:14-28:9.

Once the voter returns the mail-in ballot packet, the election office date-stamps the ballot and scans the bar code on the outer declaration envelope into the SURE system to record that the ballot has been received. Stip. Facts ¶ 41; Ostrander Tr. 29:5-30:10. The office also visually inspects the ballot to determine whether the outer declaration envelope is correctly and completely dated and signed. Ostrander Tr. 41:4-9. It is immediately apparent whether the declaration, which is on the same side of the outer envelope as the bar code, is missing a signature, is dated improperly, or is missing a date. *Id.* 38:1-14; 41:10-13; *see also* Marks Tr. 85:24-86:7.

In the lead-up to both the 2023 primary and general elections, the Washington County elections office scanned mail-in ballots with disqualifying errors on the declaration envelopes into the SURE system and on the same day, coded them using one of the “CANC” codes in SURE. Stip. Facts ¶¶ 26-27; Ostrander Tr. 32:25-33:7; 34:15-35:12; 40:2-19. Based upon the type of “CANC” code that was selected by County staff, voters received an automatic email through the SURE system informing them that their ballot had been cancelled and would not be counted. Ostrander Tr. 38:24-39:17. The ballots with defective declaration envelopes were then segregated into bins, filed alphabetically by precinct name,

and placed in a separate area of the office’s secure mail ballot room. *Id.* 41:14-24; 47:4-48:19. In 2023, Washington County also permitted voters to “cure” mail-in ballots that lacked a signature on the declaration envelope by going to the election office to add the signature. Voters who forgot the date or wrote an “incorrect date” could request a replacement mail-in ballot or vote a provisional ballot at their local polling place on Election Day. Stip. Facts ¶ 28; *id.* Ex. K; *see also* Ostrander Tr. 40:2-19; 42:22-43:13; 49:1-11; 169:15-20.

However, in advance of the April 2024 primary, the Board of Elections reversed course, and instead enacted a policy that does not provide voters with any notice of disqualifying errors on their mail-in ballot declaration envelopes. Stip. Facts ¶¶ 29-35. The Washington County Board of Elections first met to discuss whether to continue its policy of providing notice and cure procedures on March 12, 2024. *Id.* ¶ 29. Director Ostrander provided the Board with information about the updates to the SURE system codes, which included the option to mark mail-in ballots as “pending” or “cancelled” if the voter made a disqualifying error. *Id.* ¶ 30; Ostrander Tr. 57:15-61:7. On April 11, 2024, the Board met again to discuss whether to change the existing “notice and cure” process for the April 2024 election. Stip. Facts ¶ 33. Director Ostrander explained the options for how counties can handle mail-in ballots with errors on the declaration envelopes. She told the Board that (1) counties can contact the voter to let them know about the

error and provide an opportunity to fix it at the election office; (2) the election office can mark the ballot “cancelled” so the voter will be notified by email that they need to request a new ballot or vote provisionally at their polling place; or (3) the election office can take no action and the voter will not learn about the error or have any opportunity to correct it. *Id.* ¶ 34. Director Ostrander provided the Board with an example of the email that voters would receive if the election office did not enter a code reflecting the voter’s error. *Id.* Ex. M at 1; Ostrander Tr. 63:7-64:2. Director Ostrander also told the Board that their office had already identified “60 defective ballots,” about half of which were missing the final two digits in the year on the declaration envelope. Stip. Facts ¶ 33.

Following the discussion, the Washington County Board of Elections voted 2-1 not to provide voters with notice of and the opportunity to cure mail-in ballots with disqualifying errors on the declaration envelope. *Id.* ¶ 35. A week later, at the County’s Commissioners’ meeting on April 18, community members, including representatives from Washington Branch NAACP, provided public comment criticizing the Board’s decision, with 27 individuals speaking in support of “curing” and seven speaking in favor of the Board’s decision. *Id.* ¶ 37. Following the comment period, Commissioner Maggi moved to reconsider the decision, but his motion did not receive a second from either Commissioner Janis or Commissioner Sherman, who stated, “My vote would not change.” *Id.* ¶ 38. As of

the April 18 meeting, a week before the election, the election office had already identified and segregated 170 ballots that would not be counted. *Id.* ¶ 39; Ostrander Tr. 86:14-87:4.

Throughout the April 2024 election cycle, election office staff scanned and coded mail-in ballots in the SURE system on the day they were returned, and segregated ballots with disqualifying errors on the declaration envelope in bins, alphabetized by precinct, just as they had in 2023. Stip. Facts ¶¶ 41, 43; Ostrander Tr. 74:16-75:8; *see also id.* 48:2-19. But instead of coding the segregated ballots as “CANC” as they did in 2023, the office marked every ballot in the SURE system as “Record – Ballot Returned,” whether or not the mail-in ballot declaration envelopes had disqualifying errors. Stip. Facts ¶ 42; Ostrander Tr. 67:9-23; 71:5-18. As a result, voters whose mail-in ballot declaration envelopes had disqualifying errors, such as Voter Plaintiffs Mr. Marks, Ms. Macioce, and Mr. Elliott, received a misleading email stating:

Your ballot has been received by WASHINGTON County as of [DATE]. If your county election office identifies an issue with your ballot envelopes that prevents the ballot from being counted, you may receive another notification. Otherwise, you will not receive any further updates on the status of your ballot from this email address and you are no longer permitted to vote at your polling place location.

Please note, if WASHINGTON County observes an issue with your ballot envelopes, you may receive another email from this account with additional information. To

get more information on your ballot's status, you can look it up at <https://www.pavoterservices.pa.gov/Pages/BallotTracking.aspx>. If you have questions about your ballot, please contact WASHINGTON County at (724) 228-6750.

See Stip. Facts, Exs. A, B, C; Ostrander Tr. 66:14-23; 123:18-124:24; 162:23-163:7; 218:5-219:4 (agreeing that the language in the SURE emails generated by Washington County's input of the "Record – Ballot Returned" code was "misleading"). Voters checking the DOS online tracker to determine the status of their mail-in ballot received a similar misleading message. Stip. Facts, Ex. D at 15.

Throughout the April 2024 election cycle, the Board of Elections directed the election office to tell voters who inquired about their mail-in ballot whether the ballot had been received, but did not provide any voters with information about whether their mail-in ballot had been segregated for a disqualifying error on the declaration envelope. Stip. Facts ¶ 44; Ostrander Tr. 91:20-92:5; 92:24-93:2; 93:5-12; 179:1-180:14. Washington County also rejected requests, including from Plaintiff Center for Coalfield Justice, to provide a list of voters whose mail-in ballots had been segregated. *See* Compl. ¶ 139; Ostrander Tr. 93:21-95:3.⁵ And on primary day, the poll books in Washington County reflected only which voters had

⁵ This information is required to be publicly available under the Election Code. *See* 25 P.S. § 3150.17(a) (mail-in ballots); *id.* § 3146.9(a) (absentee ballots); *id.* § 3150.17(c) (mail-in ballots); *id.* § 3146.9(c) (absentee ballots); Marks Tr. 28:19-22.

requested a mail-in ballot and whether each such voter's ballot had been received by the Board. Stip. Facts ¶ 46; Ostrander Tr. 89:5-10.

In the end, Washington County disenfranchised 259 eligible mail-in voters, including the seven Voter Plaintiffs, who timely returned ballot packets with defects, representing 2% of all timely-received mail-in ballots. *See* Stip. Facts ¶¶ 51-52; Ostrander Tr. 118:21-24. These voters are both Democrats and Republicans. *See* Stip. Facts ¶ 52.

IV. The November Election

Counties will begin processing mail-in ballot applications for the November 5, 2024, general election on September 16, 2024. 25 P.S. § 3150.12a(a). Washington County's Elections Director has testified that, in keeping with past practice, in the November 2024 general election the Washington County Board of Elections will most likely handle mail-in ballots with disqualifying errors on the declaration envelopes in the same way it did for the April 2024 primary. Ostrander Tr. 126:14-127:14. As a result, the Board's election office will continue to miscode mail-in ballots with disqualifying errors on the declaration envelope in the SURE system to conceal voters' ballot status, and hundreds and potentially thousands of qualified, eligible mail-in voters in Washington County will once again have their vote cancelled without their knowledge, in violation of procedural due process.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO A DECLARATION THAT WASHINGTON COUNTY’S PRACTICE OF CONCEALING INFORMATION AND MISLEADING VOTERS ABOUT THE STATUS OF THEIR MAIL-IN BALLOTS VIOLATES ARTICLE I, SECTION I OF THE PENNSYLVANIA CONSTITUTION.

Summary judgment is appropriate “where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Summers v. Certaineed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1221 (Pa. 2002)). Here, the indisputable facts demonstrate that Washington County’s decision to conceal from voters that their mail-in ballot would not be counted, to affirmatively mislead many voters into believing their votes would be counted, and to deprive voters of an opportunity to preserve their right to vote violates Article I, Section 1’s procedural due process guarantee.

A. Washington County Voters Are Entitled to Due Process Protections.

The “guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights,” including Article I, Section 1. *Khan v. State Bd. of Auctioneer Examiners*, 842 A.2d 936, 945 (Pa. 2004). “The central demands of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (internal citation and quotations omitted). These rules are

intended to “minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.” *Washington v. PA Dep’t of Corr.*, 306 A.3d 263, 285 (Pa. 2023) (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)). Indeed, “[n]otice is the most basic requirement of due process.... Notice should be reasonably calculated to inform interested parties of the pending action.... The form of the notice required depends on what is reasonable, considering the interests at stake and the burdens of providing notice.” *Bornstein v. City of Connellsville*, 39 A.3d 513, 519 (Pa. Commw. Ct. 2012) (quoting *Pa. Coal Mining Ass’n v. Ins. Dep’t*, 370 A.2d 685, 692–93 (Pa. 1977)). Notice that is misleading or confusing is patently unfair and thus plainly violates due process.⁶

Our Supreme Court recently reaffirmed that procedural due process is an “axiom of American jurisprudence” that “imposes constraints on governmental decisions which deprive individuals’ of any . . . fundamental rights.” *See Washington v. Pa. Dep’t of Corr.*, 306 A.3d 263, 284 (Pa. 2023) (citing *Mathews v.*

⁶ *Turk v. Com., Dep’t. of Transp.*, 983 A.2d 805, 818 (Pa. Commw. Ct. 2009) (“A notice of [driver’s license] suspension may violate an individual’s due process rights if it contains information that is misleading and impairs preparation of the individual’s defense”) (quoting *Dunn v. Dep’t. of Transp. Bur. Of Driver Licensing*, 819 A.2d 189, 192-93 (Pa. Commw. Ct. 2003)); *In re R.M.*, 790 A.2d 300, 306-07 (Pa. 2002) (holding the trial court committed a procedural due process violation by transferring child custody based on proof materially varying from the charged misconduct, citing *Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998) for the proposition that notice which is confusing, misleading, or inaccurate is insufficient to meet procedural due process requirements).

Eldridge, 424 U.S. 319, 332 (1976)). Voting is one such fundamental right, guaranteed to all Pennsylvania citizens by the Pennsylvania Constitution.⁷ See, e.g., *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012). Because voting is a protected interest, its “deprivation . . . must comport with due process principles.” See *Washington*, 306 A.3d at 289.⁸

B. The Washington County Board of Elections’ Practice Clearly Violates Voters’ Procedural Due Process Rights.

To ascertain what process is due, Pennsylvania courts have long applied the three-part balancing test from the U.S. Supreme Court’s seminal decision in *Mathews v. Eldridge*. See *Washington*, 306 A.3d at 284-85; *R v. Pa. Dep’t of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994). Under *Mathews*, courts balance the following three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation and the value of additional or substitute safeguards; and 3) the state’s

⁷ See Pa. Const. Article I, Section 5 (“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage”); Pa. Const. Article VII, Section 1 (“Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections. . .”).

⁸ *Accord Zessar v. Helander*, 2006 WL 642646 at *5 (N.D. Ill. Mar. 13, 2006) (“[O]nce the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot”); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020) (“[O]nce a state creates an absentee voting regime, the state has enabled a qualified individual to exercise her fundamental right to vote in a way that she was previously unable to do and then must administer [that regime] in accordance with the Constitution and afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot.”); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 229 (M.D.N.C. 2020) (finding that plaintiffs had demonstrated a likelihood of success on their procedural due process claim and enjoining the state from “rejecting absentee ballots without due process as to those ballots with a material error that is subject to remediation”).

interest, including the burdens the additional or substitute procedural requirements would impose on the state. *Washington*, 306 A.3d at 300 (citations omitted).

Washington County’s practice of segregating mail-in ballots with disqualifying errors on the declaration envelope prior to Election Day, miscoding those ballots in the SURE system, and never telling voters that their ballots will not be counted deprives voters of a fundamental right, thereby mandating procedural due process protections. Considering the substantial interests at stake, the value of additional safeguards, and the *de minimis* burden those safeguards would impose on the County, the Board’s decision to conceal disqualifying errors and mislead voters, thus depriving them of any opportunity to exercise their right to vote, yields a clear due process violation.⁹

1. Factor 1: The Private Interest Affected is the Fundamental, Even “Sacred,” Right to Vote.

The private interest affected by Washington County’s actions is the complete loss of the right to vote, which the Pennsylvania Supreme Court has

⁹ *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (2020), is not to the contrary. In that case, the Pennsylvania Supreme Court held that county boards were not legally required to implement the “notice and cure” procedures sought by petitioners in that case under the Election Code. *Id.* at 374. *Boockvar* did not consider whether voters are entitled to procedural due process protections under Article I, Section 1, and nothing in the Court’s ruling relieves Washington County of its constitutional duty to provide voters with due process. The Supreme Court in *Boockvar* declined to create a new notice and cure system, but it did not sanction Washington County’s practice of misusing the existing SURE system.

characterized as “sacred,”¹⁰ “fundamental,”¹¹ and “the most treasured prerogative of citizenship.”¹² The County’s practice directly impairs that interest by instructing the County’s election office to secretly determine which mail-in ballots will be disqualified, set them aside so that they will not be counted, and then systematically and deliberately conceal those determinations—and in many cases, affirmatively mislead voters into foregoing their fundamental right to vote. Stip. Facts ¶¶ 41-60; *id.* Exs. A, B, C; Ostrander Tr. 66:14-23; 67:9-23; 71:5-18; 91:20-92:5, 92:24-93:2, 93:5-12; 93:21-95:3; 123:18-124:24; 162:23-163:7; 179:1-180:14; 218:5-219:4.

Voters whose mail-in ballot packets are segregated pre-election by the county for disqualification as obviously defective are entitled to vote a provisional ballot on Election Day and have it counted. *See, e.g., Keohane v. Del. Cnty. Bd. of Elections*, CV-2023-004458, at *3 (Del. Cnty. Ct. Common Pleas Sept. 21, 2023) (ordering the Delaware County Board of Elections to count provisional ballots cast by voters whose mail-in ballots were rejected);¹³ *see also* 25 P.S. § 3050(a.4)(5);

¹⁰ *Page v Allen*, 58 Pa. 338, 347 (1868).

¹¹ *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 488 (Pa. 2006); *Applewhite v. Commonwealth*, 54 A.3d 1, 3 (Pa. 2012).

¹² *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955).

¹³ Similarly, voters in Butler County are currently challenging the County’s refusal to count their provisional ballots cast in the April 2024 primary after the county rejected voters’ mail-in ballots because they forgot to include their secrecy envelopes. The case is pending before President Judge Yeager in the Butler County Court of Common Pleas. A hearing has been held, briefing is complete, and the parties are awaiting a decision from the court on whether Butler County must

Stip. Facts, Ex. J, Pa. Dep't. of State, Pennsylvania Provisional Voting Guidance (Mar. 11, 2024), at 4 (providing that if a voter's mail-in ballot "was rejected for a reason unrelated to the voter's qualifications and the voter submitted a provisional ballot . . . , the provisional ballot shall be counted"). But voters cannot exercise this statutory right unless they have received notice that their mail-in ballot packet had an error that prevents their ballot from being counted. By deliberately withholding that information, the Board leaves "no recourse for the voter and no way to remedy the loss of that vote in that election." *Zessar*, 2006 WL 642646 at *7; *Democracy N.C.* 476 F. Supp. 3d at 228 ("[W]hen the ballot is rejected for a reason that is curable . . . and the voter is not given notice or an opportunity to be heard on this deficiency, . . . this facially effect[s] a deprivation of the right to vote.") (internal quotations omitted).

Washington County's policy forecloses voters' abilities to safeguard a fundamental right, with no way to remedy that denial. The profoundly unfair impact of the Board's policy on a substantial private interest weighs in favor of Plaintiffs under the first *Mathews* factor.

count these provisional ballots. *Genser v. Butler Cnty. Bd. of Elections*, No. 24-40116 (Butler Cnty. Ct. Common Pleas Apr. 29, 2024).

2. Factor 2: The Risk of Erroneous Disenfranchisement is Unreasonable in Light of Additional Safeguards That Would Preserve the Right to Vote.

The second *Mathews* factor, the risk of erroneous deprivation coupled with the probable value of additional safeguards, also weighs heavily in Plaintiffs’ favor. The Board’s actions, which preclude any means for voters to learn if their mail-in ballot declaration envelopes have a disqualifying error before Election Day, are the epitome of a “secret, one-sided determination of facts decisive of rights” recently condemned by the Pennsylvania Supreme Court. *Washington*, 306 A.3d at 266. The Board’s handling of mail-in ballots and misuse of the SURE system make disenfranchisement a foregone conclusion and guarantee that qualified, eligible voters who timely return their ballots will nevertheless be deprived of their right to vote—an inexcusable result. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (“The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.”).

The Board’s practice is especially unreasonable because additional safeguards would greatly reduce the risk of disenfranchisement. *See Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1053 (D.N.D. 2020) (holding the “value of additional procedures to safeguard against erroneous ballot rejections” becomes “apparent” where “[t]he result is the outright disenfranchisement of

otherwise qualified electors”). As our Supreme Court recently held, the “controlling inquiry” under the second *Mathews* factor is “whether the state is in a position to provide for pre-deprivation process.” *Washington*, 306 A.2d at 296 (internal citations omitted). Here, the Board is well-positioned to provide that process simply by timely and accurately entering mail-in ballot determinations into the SURE system and answering voters’ queries about ballot status honestly.

Making this information available would provide voters with several valuable safeguards. First, voters with an email on file in the SURE system would receive an email alerting them that their mail-in ballot declaration envelope has a disqualifying error and that they have an option to “go to [their] polling place on election day and cast a provisional ballot.” *See* Stip. Facts, Ex. D at 8-9. Second, voters could learn that their mail-in ballot declaration envelope had a disqualifying mistake by looking it up online. *Id.* ¶ 23; Ex. D at 15. Third, political parties and nonprofit organizations, like Plaintiffs CCJ and Washington Branch NAACP, could reach out to affected voters and notify them of their disqualifying mistakes and their option for preserving their right to vote by voting a provisional ballot at their polling place on Election Day. *Id.* ¶ 24; Marks Tr. 28:19-22. *See* 25 P.S. §§ 3146.9, 3150.17. Moreover, the poll books on Election Day would accurately reflect that voters whose mail-in ballot declaration envelopes had disqualifying errors had not successfully voted. *See* Ostrander Tr. 44:7-25 (explaining that if a

mail-in ballot is coded as “CANC,” the poll book will show that a mail-in ballot was issued but not returned); *id.* 44:7-21 (explaining that if a mail-in ballot is coded in SURE as “Record – Ballot Returned,” the poll book will indicate that a mail-in ballot has been returned, even though it has already been set aside and will not be counted).

Because the risk of deprivation is severe, and the value of additional pre-deprivation process is substantial, the second *Mathews* factor also weighs in Plaintiffs’ favor.

3. Factor 3: Requiring the Board to Tell Voters the Truth About Flawed Mail-in Ballots Would Not Burden the Board or Impair its Interests.

The third factor under *Mathews*, which considers the Board’s interests and the burdens of additional or substitute safeguards, also weighs decidedly in favor of Plaintiffs.

Timely entering accurate ballot status information into the SURE system would not impose any additional administrative burden because county boards of elections are already required to maintain this data in the SURE system to comply with numerous statutory obligations. *See* 25 Pa.C.S. § 1222; 4 Pa. Code § 183.4(b)(2); 25 P.S. § 3150.16(b)(1). Nor would the consequence of timely entering accurate information into SURE—allowing voters the opportunity to take

advantage of an existing statutory remedy to vote by provisional ballot—impose any additional burden on the Board.

The lack of additional burden is laid bare by comparing the Board’s practice in 2024 to its practice in 2023. In both election years, the election office stamped, scanned and coded mail-in ballots in the SURE system on the same day they were received. Ostrander Tr. 29:5-30:15; 34:7-14 (practice in 2023); 72:21-75:8 (practice in 2024). In both years, they looked at the ballot declaration envelopes to determine whether the declaration was missing a signature or date or contained an incorrect date—determinations that take “seconds.” *Id.* 30:25-11; 38:1-14; 41:4-13 (2023); 75:9-78:5 (2024). And in both years, they segregated the ballots whose envelopes contained errors into bins alphabetized by precinct. *Id.* 38:15-23 (2023); 74:16-75:8 (2024). The only difference in practice was which drop-down option the election office selected in SURE—a difference without any impact on the time, effort, or expense required by the Board. Stip. Facts ¶¶ 27; 42.

Indeed, until April 2024, Washington County not only timely entered accurate ballot information into SURE, enabling voters to exercise their right to vote a provisional ballot, but also had additional procedures in place to support voters that returned defective mail-in ballots. Stip. Facts ¶¶ 26-28; *id.* Ex. K; Ostrander Tr. 32:25-33:7; 34:15-35:12; 40:2-19; 42:22-43:13; 49:1-11; 169:15-20. The widespread use of effective notification procedures by counties across the

state, including Washington County’s neighbors, further underscores the *de minimis* burden imposed by the proposed alternate due process protections. Compl. ¶¶ 52-54. *See Democracy N.C.*, 476 F. Supp. at 229 (finding the burden to the state of providing pre-rejection notice to be “minimal” where “several counties have processes in place already”).

Moreover, the County cannot claim any legitimate interest in concealing mail-in ballots whose declaration envelopes contain fatal errors and misleading voters into believing their mail-in ballot will be counted. To the contrary, maintaining timely, accurate information in the SURE system about those determinations would ultimately promote the County’s interests in ensuring the fair and orderly administration of elections. Such a practice would enable the County to comply with its statutory obligation to “clearly identify” voters who have received and voted mail-in ballots, 25 P.S. § 3150.16(b)(1), and to generate accurate poll books for Election Day that identify voters who requested a mail-in ballot and voted it, voters who requested a mail-in ballot and did not return it, and voters who did not engage with the mail-in process at all. *See* 25 Pa.C.S. § 1222(c)(13); *see also Frederick*, 481 F. Supp.3d at 796 (finding the state has an important interest in “maintaining election integrity,” and “providing mail-in absentee voters notice and the opportunity to cure . . . by confirming their identity in fact *promotes* these important governmental interests”); *Jaeger*, 464 F. Supp. 3d at 1053-54

("[A]llowing voters to verify the validity of their ballots demonstrably advances—rather than hinders—these goals.”).

* * *

In sum, Article I, Section 1 of the Pennsylvania Constitution entitles qualified, eligible voters to know when their mail-in ballot is set aside for a disqualifying error on the declaration envelope, in time to rescue their right to vote by voting a provisional ballot.¹⁴ As in *Washington*, here the Board’s “infrastructure is already in place to provide both notice and an opportunity to be heard”

Washington, 306 A.3d at 299 n. 53. Even if “fairness in the process does not guarantee substantive relief” for all voters who make a disqualifying error on their declaration envelope, *id.* at 301, the fact that the due process protection sought by Plaintiffs would enable hundreds of qualified, eligible voters the opportunity to preserve their fundamental right to vote requires Washington County to provide it.

The Constitution’s procedural due process protections require Washington County to ensure that voters have notice as to whether or not their mail-in ballot will be counted by the Board. The Board’s actions misleading voters and refusing to provide this information violates those protections, and summary judgment is

¹⁴ Based on the testimony of Washington County Election Director Ostrander, Plaintiffs anticipate that Defendants will argue that the state Election Code forbids the counting of a provisional ballot voted by a qualified voter who returns a mail-in ballot with a disqualifying error on the declaration envelope. While Plaintiffs believe that the Defendants’ position is clearly wrong, the issue of whether provisional votes by those voters should count is not within the scope of Plaintiffs’ lawsuit and does not need to be decided by this Court.

warranted to ensure that citizens' right to vote by mail-in ballot is not curbed by the Board.

II. AN INJUNCTION IS NECESSARY TO AVOID FURTHER EROSION OF THE RIGHT TO VOTE BY MAIL-IN BALLOT IN PENNSYLVANIA.

“To justify the award of a permanent injunction, the party seeking relief must establish [1] that his right to relief is clear, [2] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [3] that greater injury will result from refusing rather than granting the relief requested.” *City of Philadelphia v. Armstrong*, 271 A.3d 555, 560-61 (Pa. Commw. Ct. 2022) (quoting *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 489 (Pa. 2006)).

“However, unlike a claim for a preliminary injunction, the party need not establish either irreparable harm or immediate relief and a court may issue a final injunction if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law.” *Id.* (quoting *Buffalo Twp. v. Jones*, 813 A.2d 659, 663-64 (Pa. 2003)).

As explained above, Plaintiffs have clearly established that the Board's practice violates the procedural due process rights of Pennsylvania voters. In addition, the gravity of the damage that has been and will continue to be inflicted upon voters' right to vote by mail-in ballot underscores the need for injunctive relief from this Court. The Board's actions threaten much greater injury to voters

than the Board would suffer if this Court orders the proper use of the SURE system to inform voters of their mail-in ballot status.

A. The Board’s Actions Concealing Information and Misleading Voters About the Status of Their Mail-in Ballots Has No Remedy at Law.

Washington County’s actions have already caused and will continue to cause significant harm to Plaintiffs and countless other Washington County voters—harm that has no remedy short of an order forcing Washington County to properly inform voters about the status of their mail-in ballots. Indeed, Washington County has already disenfranchised 259 voters in the April 2024 primary election without notice, including those of the seven Voter Plaintiffs, and will disenfranchise far more in the upcoming general election where turnout is expected to be much higher. Stip. Facts ¶¶ 9-15; 51-52. The Board has given every indication that it will employ the same or similar practice in the upcoming November 5, 2024, general election, including by vigorously defending its current practice. Ostrander Tr. 126:14-127:14.

The right to vote is the most precious right held by citizens of a free country. *See supra* at 23. Without a permanent injunction, the County will continue to strip that right from hundreds of Washington County voters without alerting them that their mail-in ballot declaration envelope contains a disqualifying error. It is hard to imagine a clearer or more devastating example of an injury that cannot be

compensated by damages. As courts in Pennsylvania have repeatedly established, “[t]he right to vote, fundamental in Pennsylvania, is irreplaceable Deprivation of the franchise is neither compensable nor reparable by after-the-fact legal remedies.” *Applewhite*, 2014 WL 184988, at *7. The right to vote cannot be bought, sold, or quantified, and once taken away, it cannot be repaired or replaced. “[T]here is no possibility of meaningful postdeprivation process when a voter’s ballot is rejected.” *Jaeger*, 464 F. Supp. 3d at 1052; *see also Zessar*, 2006 WL 642646, at *9 (finding that in the absence of notification procedures, “[t]he voter’s right to vote would have been irremediably denied”). Thus, “[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles*, 202 A.2d at 540.

Because the Pennsylvania Constitution expressly guarantees the right to vote, and because there is no adequate remedy for disenfranchisement, the Board’s practice of concealing, and even misleading, voters about whether their mail-in ballot will be counted inflicts harm on voters that has no remedy at law. Absent an order from this Court forcing Washington County to properly inform voters about the status of their mail-in ballots by entering accurate codes into the SURE System, this same disenfranchisement will continue in November, with no possible adequate remedy. *See Applewhite*, 2014 WL 184988, at *7.

B. The Board’s Actions Have Caused and Will Cause Greater Harm Than the Requested Relief.

The balance of harms weighs heavily in favor of granting permanent injunctive relief. Ordering the Board of Elections to stop concealing from voters whether their mail-in ballot will count and to stop misleading voters harms no one. But allowing the Board of Elections to continue its practice will significantly expand the disenfranchisement witnessed in the April 2024 primary. *See ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (“[T]he government lacks an interest in enforcing an unconstitutional law.”) (*vacated on other grounds by Ashcroft v. ACLU*, 535 U.S. 564 (2002)); *see also One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 825 (W.D. Pa. 2013) (finding that “injunctive relief is in the public’s interest when governmental action is likely to be declared unconstitutional ‘because the enforcement of an unconstitutional law vindicates no public interest’”) (citing *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013); *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003), *aff’d*, 542 U.S. 656 (2004) (finding that “the public interest was not served by the enforcement of an unconstitutional law”) (internal citations omitted). The resulting harm to those voters and the system at large is significant. *See Perles*, 202 A.2d at 540.

As established, Washington County unnecessarily disenfranchised two percent of voters who submitted timely mail-in ballots in the last election by giving

affected voters “no opportunity to oppose the rejection or to demonstrate that it was erroneous.” *Zessar*, 2006 WL 642646, at *6; Stip Facts ¶¶ 51-52. The turnout in the November presidential general election will be significantly higher; the resulting harm to those voters and the system at large is significant. When even a relatively small number of mail-in ballots are set aside, the Board’s policy can impact the outcome of close races,¹⁵ sowing distrust in election results and further highlighting the harm done by denying qualified voters their voices in a given election.

At the same time, the Board’s actions are unsupported by any countervailing public interest. The election office knows upon receipt, often weeks before the election, precisely which ballots will not be counted due to disqualifying defects. *See* Stip. Facts ¶¶ 31, 33, 39; *see also* Ostrander Tr. 74:16-75:8; 87:5-15. Hiding that determination from voters during the window when there is still an

¹⁵ *See, e.g.*, Katherine Reinhard and Robert H. Orenstein, *Cohen Wins Lehigh County Judicial Election by 5 Votes*, PA. CAP.-STAR (June 17, 2022), <https://penncapital-star.com/election-2022/cohen-wins-lehigh-county-judicial-election-by-5-votes/> (noting the impact on municipal election results after counting 257 mail-in ballots received in undated envelopes following *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022)); Dan Sokil, *Towamencin Supervisors Race Tied After Montgomery County Election Update*; THE REP. ONLINE (Nov. 27, 2023), <https://www.thereporteronline.com/2023/11/27/towamencin-supervisors-race-tied-after-montgomery-county-election-update/> (noting the impact on Towamencin Township supervisor results after counting six impacted mail-in ballots following *Pa. State Conf. of NAACP v. Schmidt*, No. 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. Nov. 21, 2023), *rev’d*, 97 F.4th 120 (3d Cir. 2024); Borys Krawczeniuk, *Court Says Six Mail-In Ballots in State 117th House District Race Should Count*, WVIA NEWS (May 8, 2024), <https://www.wvia.org/news/local/2024-05-08/050824luz-117thhouse> (noting the potential impact on the outcome of state house race if six outstanding mail-in ballots are counted in Luzerne County).

opportunity to remedy the loss of the franchise violates voters' procedural due process rights under the Pennsylvania Constitution.

Plaintiffs are not asking the Court to order Washington County to implement the more robust "notice and cure" procedures adopted by its neighbors; only to take the *minimal* steps under the SURE system that will alert voters to a disqualifying defect that threatens a fundamental right. Plaintiffs' requested relief is simple: Require Washington County to go back to its practice of a year ago of inputting accurate codes into the SURE system upon receipt of a mail-in ballot so that, if the ballot has an obvious disqualifying defect that will cause the county to segregate the ballot, at a minimum, the voter may vote by provisional ballot on Election Day.¹⁶

CONCLUSION

The Washington County Board of Elections is violating due process guaranteed by the Pennsylvania Constitution. Plaintiffs respectfully request that the Court grant summary judgment and enter an order in the form attached hereto.

Dated: July 26, 2024

Respectfully submitted,

¹⁶ In the alternative, the Court should order the use of the PEND-OTHER Code, which would result in informing the voters in a generic manner that their votes will not be counted unless action is taken to correct existing defects.

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Exhibit 1



Planet Depos[®]
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Transcript of Jonathan Marks

Date: July 23, 2024

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

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IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY,
PENNSYLVANIA

-----x

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

v. : Case No. 2024-3953

WASHINGTON COUNTY BOARD :
OF ELECTIONS, :
Defendant. :

-----x

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

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

1 Deposition of JONATHAN MARKS, held at the
2 offices of:

3

4

5

OFFICE OF GENERAL COUNSEL

6

333 Market Street, 17th Floor

7

Harrisburg, Pennsylvania 17101

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(717) 783-6563

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Pursuant to Notice, before KYLAN BARRY, Notary

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Public in and for PENNSYLVANIA.

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Marian K. Schneider, Esquire
Kate Steiker-Ginzberg, Esquire
Witold Walczak, Esquire

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(Retained by counsel.)

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1 MS. GALLAGHER: Yeah.

2 BY MS. GALLAGHER:

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

7 A No, just counsel.

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

12 A From the voter's perspective?

13 Q Uh-huh.

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

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

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

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

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

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

1 A Yeah.

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

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

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

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

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

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

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

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

12 MS. MULLEN: Objection.

13 Q Or responsibility?

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

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

24 MS. MULLEN: Objection to vagueness.

25 MR. BLACK: Objection to form.

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

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

6 A There is --

7 MS. MULLEN: Objection.

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

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

19 MS. MULLEN: Objection.

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

1 begin pre-canvassing or canvassing the ballots.

2 You know, in the interim, you know, they
3 may be organizing them, you know, by precinct, for
4 example, to prepare for the pre-canvassing. But
5 generally once they've recorded the ballot, they are
6 required by statute to keep those ballots securely
7 until pre-canvassing begins.

8 Q And when does the pre-canvass begin?

9 A It cannot begin earlier than election day
10 7:00 a.m., I believe, on election day.

11 Q Okay. What occurs during the pre-canvass?

12 A Basically, the county election office, or
13 the County Board of Elections will go through all of
14 the ballots that have been submitted by voters,
15 confirm that the information is accurate and
16 complete. They will set aside any ballots that may
17 have a defect at that time, the rest of the ballots
18 ultimately will be approved. And then the outer
19 envelope is opened exposing the secrecy envelope that
20 contains the ballot. Those are ultimately opened and
21 then tabulated by the Board of Elections.

22 Q And is there a name for the process when
23 they're tabulated?

24 A Well, it's -- they're tabulated as part of
25 the -- of the pre-canvass or the official canvas.

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

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

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

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

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

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

1 if you will, within a county.

2 Q And the county board maintains those?

3 A Yes.

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

6 A Yes. The county board maintains those.

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

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

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

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

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

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

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

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

18 Q Okay.

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

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

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

3 A Yes, I am familiar with this.

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

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

9 Q And what's a release note?

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

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

23 A It is not, no.

24 Q And how is a release note developed?

25 A A release note is essentially a summary of

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

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

8 A The release notes?

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

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

16 Q Could you explain that a little better?

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

1 need to do additional follow up with the County Board
2 of Elections to resolve that.

3 Q Fair enough. With respect to what the
4 board, putting aside the update and what's contained
5 in the release notes, which we'll get to in a moment,
6 what is the obligation of a county board to input
7 into the SURE system when it receives a mail-in
8 ballot?

9 MULLEN: Objection.

10 Q I'm not asking for a legal just to be
11 clear, but from a practical standpoint, what does the
12 SURE system have to reflect?

13 A The SURE system would at least have to
14 reflect that a ballot was received.

15 Q And again, not, I'm asking you legal
16 conclusion, I'm sure your counsel will object,
17 received, is there any other information that has to
18 be provided about that information to the best of
19 your knowledge?

20 MS. MULLEN: Objection.

21 Q About ballot, excuse me. Other than it
22 was received.

23 A The date I want you is received.

24 Q If you could take a look at, in the top
25 left hand corner, there is a -- I'm not sure what

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

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

6 A They were, yes.

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

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

17 Q What do you mean by disposition of ballot?

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

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

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

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

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

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

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

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

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

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

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

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

13 A Yes.

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

17 MS. MULLEN: Objection.

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

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

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

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

6 MS. MULLEN: Objection.

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

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

22 A Correct.

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

25 A Well, the department as I mentioned

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

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

7 MS. MULLEN: Objection,

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

10 Q Correct.

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

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

20 A I have, yes.

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

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

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

1 email that is generated from the SURE system.

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

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

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

11 A Recorded it as received, yes.

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

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

18 Q Is that --

19 A -- this email is general.

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

23 A Record ballot return.

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

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

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

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

8 THE VIDEOGRAPHER: Should I take the --

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

10 THE VIDEOGRAPHER: (indiscernible)

11 01:49:43

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

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

16 MR. BERARDINELLI: Thank you.

17 EXAMINATION BY COUNSEL FOR THE PLAINTIFF

18 BY MR. BLACK:

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

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

4 A Correct.

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

7 A Correct.

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

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

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

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

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

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

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

4 A That is correct, yes.

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

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

10 MR. BLACK: Thank you.

11 MR. BERARDINELLI: Form.

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

19 BY MR. BLACK:

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

22 A Correct.

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

25 A This is our opinion of when it should be

Exhibit 2

Transcript of the Testimony of

MELANIE OSTRANDER

July 18, 2024

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



412-261-2323
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www.akf.com

IN THE COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA

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

Plaintiffs,

-vs-

WASHINGTON COUNTY BOARD
OF ELECTIONS,

Defendant.

CIVIL DIVISION

Case No. 2024 3953

DEPOSITION TRANSCRIPT OF:
MELANIE OSTRANDER

DEPOSITION DATE:
July 18, 2024
Thursday, 9:41 a.m.

PARTY TAKING DEPOSITION:
Plaintiffs

COUNSEL OF RECORD
FOR THIS PARTY:
Mary M. McKenzie, Esq.
mmckenzie@pubintl.org
PUBLIC INTEREST LAW CENTER
1500 JFK Boulevard
Suite 802
Philadelphia, PA 19102

REPORTED BY:
Kristina Kozlowsky
Notary Public
Reference No. KK60820

1 DEPOSITION OF MELANIE OSTRANDER,
2 a witness called by the Plaintiffs, for examination,
3 in accordance with the Pennsylvania Rules of Civil
4 Procedure, taken by and before Kristina Kozlowsky, a
5 Court Reporter and Notary Public in and for the
6 Commonwealth of Pennsylvania, at the offices of AKF
7 Technologies, 445 Fort Pitt Boulevard, Suite 200,
8 Pittsburgh, Pennsylvania, on Thursday, July 18,
9 2024, commencing at 9:41 a.m.

10 - - - -

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17

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25

1 the steps that the office uses to process
2 the application?

3 A. The application is first reviewed
4 to ensure that the voter has completed all
5 the required sections, name, address,
6 birth date, if provided, either the last
7 four of their social or a Pennsylvania
8 driver's license number, and that the
9 application has been signed by the voter.

10 If everything has been filled out
11 correctly, then you can compare it with
12 the SURE system information by inputting
13 the voter's name to bring up their record
14 in the SURE system, and then from there,
15 you would verify that their address
16 matches, their birth date matches, their
17 identification, either their last four of
18 their social or driver's license number.

19 From there, you would input the
20 information, that they're requesting a
21 mail-in or absentee ballot. It does
22 verify through either the Social Security
23 Administration or the DMV records that
24 that identification number is correct for
25 that voter, that their name matches, that

1 the voter is not deceased.

2 And then once that, it will issue
3 them -- it will provide us a label to
4 print which we can then use to issue the
5 ballot.

6 Q. The process you just described,
7 that is the current process for processing
8 an application for a mail ballot?

9 A. Yes.

10 Q. Okay, was that process the same in
11 2023?

12 A. Yes.

13 Q. You said that once your office
14 takes all the appropriate verification
15 steps, the SURE system provides a label
16 for you to use on the ballot envelope; is
17 that correct?

18 A. Yes.

19 Q. Okay, what happens next in the
20 process with the mail-in or absentee
21 ballot after you have the label?

22 A. The label is printed from the SURE
23 system, and that enables us to pull an
24 appropriate ballot according to their
25 precinct and, if it was a primary

1 election, according to their party, label
2 the envelopes, insert the ballot into the
3 envelopes -- envelope along with the
4 additional information that is required
5 for the mail ballot package.

6 Q. What other additional information
7 would be in the packet?

8 A. In addition to the ballot, there
9 are two envelopes. One is the return
10 envelope for the voter with the voter's
11 declaration on it. You also have the
12 secrecy envelope, and the Department of
13 State issued instructions.

14 Q. Once the mailing packet is prepared
15 and is ready to be sent out, is the date
16 that your office sends out the mail packet
17 tracked?

18 A. Yes, in the SURE system.

19 Q. Okay, and is that by keying in a
20 date, or is it by scanning?

21 A. It's by the date that the labels
22 were printed. If the labels were printed
23 ahead of time, when we sent our first
24 mail-in out, I'm able to update that
25 address -- or, I'm sorry, update that date

1 so that it's the correct, exact date that
2 they were mailed.

3 Q. And you update that date in the
4 SURE system?

5 A. Yes.

6 Q. And was that the same process for
7 mailing out a ballot and tracking it in
8 2023?

9 A. Yes.

10 Q. So when a voter returned a mail
11 ballot or an absentee ballot -- and if I
12 say mail ballot, I'm talking about both
13 mail ballots and absentee ballots -- how
14 can a voter return the mail -- in 2023,
15 how could a voter return the ballot to the
16 elections office?

17 A. They could either mail through the
18 U.S. Postal Service or another service,
19 mail the ballot to our office, or they
20 could come in person and turn in their
21 ballot. And it's only -- the voter can
22 only return their own personal ballot in
23 person.

24 Q. Does Washington County use drop
25 boxes?

1 A. No.

2 Q. Has Washington County ever used
3 drop boxes?

4 A. No.

5 Q. So when mail ballots are returned
6 to your office, how is the return date
7 tracked?

8 A. They are first date stamped with
9 our office date stamp. Once they're date
10 stamped, they are then recorded in the
11 SURE system on the voter's record.

12 Q. Okay, and the office date stamp, is
13 that a physical stamp?

14 A. Yes.

15 Q. Where is that stamped on the
16 envelope?

17 A. On the -- not the side with the
18 declaration because there's not sufficient
19 room so that it's prominent. We date
20 stamp in the white space on the side of
21 the envelope that has our return
22 information, our office address, and the
23 postage markings.

24 Q. Okay, and in 2023 when you were
25 tracking the receipt of ballots in the

1 SURE system, was that through scanning or
2 keying in of data?

3 A. There's a label on the declarations
4 side of the envelope that contains the
5 voter's name and address as well as a bar
6 code. That bar code is scanned into the
7 SURE system. We have a handheld scanner
8 that we use to scan the bar code, and it
9 will record on the voter's record that
10 their ballot was returned.

11 Q. And mail ballots in 2023, were they
12 scanned the same day they arrived at your
13 office?

14 A. Yes. We don't leave until they've
15 been scanned.

16 Q. Where is the bar code on the return
17 envelope in relation to the voter
18 declaration?

19 A. It's on the same side as the voter
20 declaration. I believe the sticker -- the
21 label sticker is right below where the
22 voter would sign and date, and that label
23 contains their name, address, and the bar
24 code.

25 Q. Okay, so in 2023 when one of the

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

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

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

12 MR. BERARDINELLI: Great. Thank
13 you.

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

17 MR. BERARDINELLI: I appreciate
18 it.

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

21 - - - -

22 (The record was read by the reporter.)

23 - - - -

24 BY MS. McKENZIE:

25 Q. In 2023 if the declaration envelope

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

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

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

8 BY MS. MCKENZIE:

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

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

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

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

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

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

25 BY MS. MCKENZIE:

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

4 MR. BERARDINELLI: Object to the
5 form.

6 BY MS. MCKENZIE:

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

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

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

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

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

24 BY MS. MCKENZIE:

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

1 your office decide which code to select?

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

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

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

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

20 BY MS. MCKENZIE:

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

24 A. No.

25 Q. Okay, and your office did not take

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

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

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

10 BY MS. MCKENZIE:

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

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

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

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

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

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

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

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

9 BY MS. MCKENZIE:

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

12 A. For which code?

13 Q. The canceled, no date code.

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

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

20 MR. BERARDINELLI: Object to
21 form.

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

1 BY MS. MCKENZIE:

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

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

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

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

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

23 A. That is correct.

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

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

3 A. Can you repeat that?

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

7 A. On the declaration envelope?

8 Q. Ah-huh.

9 A. By examining it visually.

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

13 A. Yes.

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

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

25 Q. And after your office selected a

1 envelope?

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

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

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

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

18 A. No.

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

24 MR. BERARDINELLI: Object to
25 form.

1 A. I don't recall.

2 BY MS. MCKENZIE:

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

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

13 MR. BERARDINELLI: Object to
14 form.

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

22 BY MS. MCKENZIE:

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

25 A. No.

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

3 BY MS. MCKENZIE:

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

8 MR. BERARDINELLI: In 2023?

9 BY MS. MCKENZIE:

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

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

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

1 from the main election office.

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

4 A. Yes.

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

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

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

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

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

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

25 BY MS. MCKENZIE:

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

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

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

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

16 BY MS. MCKENZIE:

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

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

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

1 you seen this document before?

2 A. I have.

3 Q. Okay, and can you identify
4 document?

5 A. This is a document that was
6 provided to the counties by the Department
7 of State in reference to the SURE system
8 and changes for 2024 for mail ballots.

9 Q. And when you testified just a few
10 minutes ago about changes in the SURE
11 codes, are these the types of changes that
12 you're referring to?

13 A. Yes, this is what I was referring
14 to, correct.

15 Q. So in explaining to the Board about
16 the code options available in 2024, what
17 did you tell them at the March meeting?

18 A. I explained to them, to the Board
19 of Elections, if they wanted to allow
20 curing there were various codes that the
21 Department of State issued, updated in the
22 SURE system, and I explained the different
23 codes that can be used. If they wanted to
24 not cure, I also explained what codes
25 could then be used in the SURE system.

1 Q. Was there any discussion at that
2 board meeting about letting voters know if
3 there was a disqualifying error on their
4 declaration envelope?

5 A. Yes. The Board asked when these
6 codes are used how would the voter be
7 notified, and I explained that the
8 Department of State -- depending on the
9 code chosen, the Department of State
10 issues an email to the voter if there is
11 an email on file.

12 Q. Did you lay out for the Board at
13 the March 12th meeting the availability of
14 the canceled, no date code?

15 MR. BERARDINELLI: Object to
16 form. You can answer if you understand.

17 A. Yes, I informed the Board that the
18 Department of State has a code available
19 that says canceled, no date.

20 BY MS. MCKENZIE:

21 Q. And at the March 12th meeting, did
22 you inform the Board of Elections that
23 there was a canceled, incorrect date code
24 available?

25 A. Yes.

1 Q. And did you inform the Board of
2 Elections at the March 2024 meeting that
3 there was a canceled, no signature code
4 available?

5 A. Yes.

6 Q. Did you inform the Department --
7 sorry, I'll start over.

8 Did you inform the Board of
9 Elections that there were pending codes
10 available for ballots that had
11 disqualifying errors?

12 A. Yes.

13 Q. And would you have informed the
14 Board of Elections that there was a
15 pending, incorrect date code available?

16 A. Yes.

17 Q. And did you inform the department
18 -- I'm sorry. Did you inform the Board of
19 Elections that there was a pending, no
20 date code available?

21 A. Yes.

22 Q. And did you inform the Board of
23 Elections that there was a pending, no
24 signature code available to your office?

25 A. Yes.

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

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

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

19 A. Yes.

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

25 A. I informed the Board that there

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

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

10 - - - -

11 (The record was read by the reporter.)

12 - - - -

13 BY MS. MCKENZIE:

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

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

25 Q. And what did you tell the Board of

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

3 A. Yes.

4 Q. Have you seen this document before?

5 A. I have.

6 Q. And what is this document?

7 A. These are the approved Board of
8 Election minutes from April 11, 2024.

9 They're just not printed on the fancy
10 minute paper like the others and signed by
11 the chief clerk, but they were approved at
12 the -- they were approved by the Board of
13 Elections.

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

23 A. Yes.

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

1 email to the Board of Elections?

2 A. I did.

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

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

10 - - - -

11 BY MS. MCKENZIE:

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

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

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

5 MR. BERARDINELLI: Object to
6 form.

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

10 BY MS. MCKENZIE:

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

13 A. That's why I misunderstood.

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

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

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

1 received return code that is entered by
2 your office?

3 A. Yes, depending on the code -- the
4 SURE code. Depending on the SURE code that
5 my office was instructed by the Board of
6 Elections to use would have determined
7 which email was generated to the voter.
8 Is that what you meant? Yeah.

9 Q. If a voter returned a mail-in
10 ballot in April of 2024 and there were no
11 disqualifying errors, what code in the
12 SURE system would your office enter?

13 A. Recorded, ballot returned.

14 Q. Okay, if a voter returned a ballot
15 in April of 2024 with a disqualifying
16 error, which code in the SURE system would
17 your office enter?

18 A. Recorded, ballot returned.

19 Q. So whether a voter had a
20 disqualifying error or not, your office
21 would enter the same SURE code in the
22 system?

23 A. Yes.

24 Q. So looking again at Ostrander
25 Exhibit 3, Page 3 of the document, second

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

3 Q. And what was the vote?

4 A. The vote was two to one.

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

10 A. Yes. It was during the discussion.

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

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

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

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

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

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

12 BY MS. MCKENZIE:

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

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

19 A. I don't know.

20 BY MS. MCKENZIE:

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

25 A. Yes.

1 Q. And were they scanned into the SURE
2 system like they were in 2023?

3 A. Yes. But because the Board of
4 Elections voted, there were different
5 codes in 2024 that were used in the SURE
6 system by my staff as opposed to 2023.

7 Q. Okay, and I believe you testified
8 that the only code your office used in
9 April of 2024 was the returned received
10 code in the SURE system?

11 A. Yes, for all -- I'm sorry, did you
12 say 2023?

13 Q. 2024.

14 A. 2024, all ballots received by our
15 office were scanned in the SURE system
16 with the code record ballot returned. I
17 think that's what the code says.

18 Q. And that scanning and selection of
19 a SURE code was done on the same day that
20 the ballot was returned?

21 A. Yes.

22 Q. If a mail-in ballot or absentee
23 ballot was returned in April of 2024 and
24 it was undated, how was that ballot
25 handled?

1 MS. GALLAGHER: Object to form.

2 MR. BERARDINELLI: Can you read
3 that back? I'm sorry, I got lost.

4 MS. MCKENZIE: I can just repeat
5 it.

6 MR. BERARDINELLI: I'd
7 appreciate that.

8 BY MS. MCKENZIE:

9 Q. If a mail-in or absentee ballot was
10 returned to your office in April of 2024
11 and the declaration envelope was undated,
12 how did your office process that ballot?

13 A. The ballot was scanned into the
14 SURE system using the code record ballot
15 returned.

16 Q. Was that ballot set aside or
17 segregated in any way from the other mail-
18 in ballots that were returned that did not
19 have errors?

20 A. Yes.

21 Q. Were they similarly based in the
22 mail ballot room but segregated like they
23 were in 2023?

24 A. Yes. But it was different in 2024
25 as to 2023 because we were recording them

1 all as ballot returned, so those ballots
2 were -- each precinct in our mail ballot
3 room has two bins. So the ballots with the
4 properly completed declaration envelope
5 were in one bin for that precinct, and the
6 ballots with the declaration envelope that
7 contained a disqualifying error were in a
8 different bin for that precinct.

9 Q. For a mail-in or absentee ballot in
10 2024 that is undated, what did that look
11 like on the envelope?

12 A. Can you repeat that?

13 MR. BERARDINELLI: Object to the
14 form.

15 BY MS. MCKENZIE:

16 Q. What does it mean for a ballot to
17 be undated in April of 2024?

18 A. The area on the declaration
19 envelope that says today's date would be
20 blank.

21 Q. So it's missing a month and a day
22 and a year?

23 A. Correct.

24 Q. Or any one of those items, a month
25 a day or a year, or does it have to be

1 missing all three items to be undated?

2 A. Undated is all three items missing.

3 Q. Okay, what is an incorrectly dated
4 mail-in ballot in April of 2023?

5 A. You said '23.

6 Q. I'm sorry, I need more caffeine.
7 What is an incorrectly dated ballot in
8 April of 2024?

9 A. In 2024, an incorrect date would be
10 a date outside of the date April 1st,
11 2024, which is the date the first ballots
12 went out and election day which was April
13 23rd, 2024.

14 Q. If a ballot was missing the month
15 or the day on the declaration envelope, is
16 that an undated ballot or an incorrectly
17 dated ballot?

18 A. We classified those in a third
19 category called incomplete date, so the
20 date was not complete.

21 Q. So there are three categories of
22 disqualifying errors when it comes to the
23 date on the declaration envelope from the
24 Washington County Board's perspective?

25 A. In 2024, according to the date,

1 just the date part, yes.

2 Q. And that could be it's missing a
3 date altogether; is that correct?

4 A. Yes.

5 Q. It's outside of the April 1st to
6 April 23rd range that you described?

7 A. Yes.

8 Q. Or it's missing a month or the day
9 of the month or the year?

10 A. Yes.

11 MR. BERARDINELLI: Or some
12 combination thereof.

13 A. Or some combination thereof, yes,
14 because it could have been missing the day
15 and the last two digits of the year or --
16 yes.

17 BY MS. MCKENZIE:

18 Q. Okay, so if a -- let me start over.

19 In 2024 on the declaration envelope for
20 the year, 2-0 was prefilled; is that
21 correct?

22 A. Yes. The Secretary of the
23 Commonwealth, Department of State, designs
24 the envelope that is used by all counties,
25 and they prefilled in the 2-0 on the

1 template.

2 Q. And if 2-4 was missing on the
3 declaration envelope, that ballot was
4 considered incompletely dated?

5 A. Yes.

6 MR. BERARDINELLI: Can we take a
7 quick break?

8 MS. MCKENZIE: Ah-huh.

9 - - - -

10 (There was a recess in the proceedings.)

11 - - - -

12 BY MS. MCKENZIE:

13 Q. Ms. Ostrander, I just wanted to ask
14 you a question about Emails 4, 5, and 6,
15 and I had directed you to the sentence
16 about the fact that if the voter goes to
17 the app to --

18 MR. BERARDINELLI: The website.

19 MS. MCKENZIE: The website,
20 you're correct, to get more information on
21 their ballot status.

22 BY MS. MCKENZIE:

23 Q. Does the voter get different
24 information if a canceled code is entered
25 compared to a recorded, ballot returned

1 A. I do.

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

6 A. I believe it was 60.

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

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

13 A. Yes.

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

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

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

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

25 Q. There was a newspaper article in

1 The Herald Standard that reported the
2 number was 170 ballots. Does that refresh
3 your recollection?

4 A. Yes. Well said. I was right.

5 Q. These 170 ballots that were
6 returned with disqualifying errors, would
7 they be counted on election day during the
8 precanvass and canvass?

9 MR. BERARDINELLI: Object to
10 form. You can answer.

11 A. If the canvass -- when they were
12 canvassed, if the ultimate decision was
13 made by the canvassers that they had
14 disqualifying errors, they would not be
15 counted.

16 BY MS. MCKENZIE:

17 Q. If a ballot is returned in the
18 declaration envelope in 2024 and is
19 missing a signature, will anything change
20 between the time that ballot is returned
21 without a signature and the canvass that
22 would allow that ballot to be counted?

23 MR. BERARDINELLI: Object to
24 form.

25 A. I don't understand what you're

1 by the Third Circuit Court that the
2 declaration envelope needs a date, a
3 correct date.

4 BY MS. MCKENZIE:

5 Q. In April of 2024, what would the
6 poll books reflect for a voter who
7 returned a mail ballot with a
8 disqualifying error?

9 A. The poll book would say that their
10 mail ballot was returned.

11 Q. If a voter who returned a ballot
12 with a disqualifying error went to their
13 polling place on election day in April of
14 2024 and asked to vote a provisional
15 ballot, what would they have been told?

16 MR. BERARDINELLI: Object to
17 form. Go ahead.

18 A. All voters or anyone can vote a
19 provisional ballot.

20 BY MS. MCKENZIE:

21 Q. If a voter returned a ballot with a
22 disqualifying error in April of 2024 and
23 they went to the polling place and voted a
24 provisional ballot, would that ballot be
25 counted?

1 specific voters or any voter? I'm sorry,
2 I didn't catch the beginning of that
3 question.

4 Q. Yes, did any voters in April of
5 2024 call and ask about the status of
6 their mail-in ballot?

7 MR. BERARDINELLI: You're not
8 asking did John Smith call? You're asking
9 in general?

10 BY MS. MCKENZIE:

11 Q. Any voters.

12 A. Yes, voters would call and inquire
13 if their ballot had been received by our
14 office.

15 Q. Okay, did any voters call and ask
16 if their ballot had disqualifying errors
17 in April of 2024?

18 A. I can't recall if specifically they
19 asked that question.

20 Q. Did the Board of Elections instruct
21 your office how to respond to voter
22 inquiries about whether they had any
23 disqualifying errors?

24 A. We would inform voters when they
25 called and asked about their mail ballot

1 that if their ballot was received, we
2 would tell them that their ballot was
3 received and it was locked -- according to
4 the election law, it was locked and it
5 would be reviewed during the canvass.

6 Q. Would anyone in your office --
7 actually, no, I'll withdraw that question.
8 Were there any written instructions
9 to the employees working in your office
10 about how to respond to voter inquiries in
11 April of 2024 about whether or not they
12 had properly filled out their declaration
13 envelope?

14 A. No, no written instructions.

15 Q. In April of 2024, did your office
16 inform any voters who called that their
17 ballot was not signed or was incorrectly
18 dated?

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

21 A. Can you repeat that? I didn't
22 understand.

23 BY MS. MCKENZIE:

24 Q. In April of 2024, did your office
25 tell voters if their ballot had been

1 segregated because it was not signed or
2 not dated?

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

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

10 BY MS. MCKENZIE:

11 Q. Yes.

12 A. No.

13 Q. In April of 2024, did any voter or
14 -- I'll start over.

15 In April of 2024, did any voter,
16 Washington County voter, ask the election
17 office for a list of voters whose mail-in
18 ballots had disqualifying errors?

19 MR. BERARDINELLI: Object to the
20 form.

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

25 BY MS. MCKENZIE:

1 Q. Yes.

2 A. Yes.

3 Q. And when was that?

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

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

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

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

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

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

6 THE REPORTER: 7.

7 - - - -

8 (Exhibit No. 7 marked for identification.)

9 - - - -

10 BY MS. MCKENZIE:

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

14 A. I have.

15 Q. And what is this?

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

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

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

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

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

12 Q. Okay.

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

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

20 A. There were not.

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

24 A. I believe it was over 250.

25 Q. Did any ballots that had been

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

5 BY MS. MCKENZIE:

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

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

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

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

24 Q. You can refer to the exhibits.

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

1 the email in Exhibit 4, 5, and 6, the part
2 that does not reflect the decision by the
3 Washington County Board of Elections is
4 the sentence: If your county election
5 office identifies an issue with your
6 ballot envelope that prevents the ballot
7 from being counted, you may receive
8 another notification. Otherwise -- well,
9 I guess two sentences: Otherwise, you
10 will not receive any further updates on
11 the status of your ballot from this email
12 address, and you are no longer permitted
13 to vote at your polling place/location.
14 So the language in those two
15 sentences I do not agree with because they
16 do not reflect the decision made by the
17 Washington County Board of Elections.

18 Q. And what decision is that?

19 A. The decision is that the election
20 office does not identify and prevent your
21 ballot from being counted. That decision
22 is a made when they are canvassed. So to
23 voters in Washington County, the language
24 in the email is misleading.

25 Q. Did the representatives from the

1 Q. Does the Washington County Board of
2 Elections and your office intend to follow
3 that directive that was issued on July 1,
4 2024?

5 MR. BERARDINELLI: Object to the
6 form.

7 A. Yes, the Board of Elections will
8 follow the directive.

9 BY MS. MCKENZIE:

10 Q. Concerning the form of absentee and
11 mail-in ballot materials?

12 A. Yes.

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

19 MR. BERARDINELLI: Object to the
20 form. Go ahead.

21 A. I haven't spoken directly to the
22 Board of Elections in regards to this, but
23 our past practice is that it's reviewed
24 prior to each election. So we will have a
25 Board of Elections public meeting, and the

1 ballot procedure -- absentee and mail-in
2 ballot procedure will be on the agenda.

3 BY MS. MCKENZIE:

4 Q. Has the past practice been that the
5 absentee and mail-in ballot practice be
6 the same in the primary and the general
7 election in the same year, calendar year?

8 MR. BERARDINELLI: Object to the
9 form.

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

15 I can't speak for other years
16 because of all the various litigation that
17 has gone on, but in 2023, there was not
18 any.

19 BY MS. MCKENZIE:

20 Q. There was not any --

21 A. Any litigation. There were several
22 court rulings after the 2020 election,
23 after 2022.

24 Q. So the same process for processing
25 mail-in ballots in the April '23 primary

1 received this email from the Department of
2 State, the emails of 4 -- Exhibits 4, 5
3 and 6.

4 Q. Did the Washington County Board of
5 Elections have any input into the language
6 in that email?

7 A. No. To my knowledge, these emails
8 were drafted by the Department of State.

9 Q. Did the Department of State give
10 you prior review, an ability to review
11 these emails prior to the implementation
12 of the system?

13 A. The Washington County Board of
14 Elections did not have any input in the
15 language contained in the emails of
16 Exhibits 4, 5, and 6.

17 Q. I'd like you to look at the first
18 paragraph: Your ballot has been received
19 by Washington County as of April 22nd,
20 2024. Would that be an accurate statement
21 for this? I'm looking at Mr. Marks's.

22 A. Yes, that sentence.

23 Q. The next line: If your county
24 election office identifies an issue with
25 your ballot that prevents the ballot from

1 being counted, you may receive another
2 notification. As to Washington County for
3 the April 2024 primary election, is that
4 an accurate statement to that voter?

5 A. No. Based upon the decision made
6 by the Washington County Board of
7 Elections, that sentence is misleading.

8 Q. So to the extent a voter received
9 this email, could you stop -- strike that.
10 Could the Washington County Board of
11 Elections have stopped this email from
12 going to their voters, their mail-in
13 voters?

14 MS. MCKENZIE: Objection.

15 A. No, not to -- we could have not
16 included the email address in the voters'
17 --

18 BY MS. GALLAGHER:

19 Q. Well, that wouldn't have been
20 accurate, would it, though?

21 A. That wouldn't have been accurate.

22 Q. So --

23 MR. BERARDINELLI: Let her
24 finish, please.

25 A. That's the only way we could have

1 MS. MCKENZIE: Objection.

2 BY MS. GALLAGHER:

3 Q. -- in the election code?

4 MS. MCKENZIE: Objection.

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

12 BY MS. GALLAGHER:

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

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

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

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

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

1 jump around a little bit. At some point,
2 you were asked whether after the Board of
3 Elections voted in favor of a noncuring
4 policy and directed use of the received,
5 record code, whatever the right term of
6 art is which I apologize for messing up,
7 whether you provide any written
8 instructions to your employees. And I
9 believe your answer is no.

10 A. That's correct. I did not give
11 them written instructions.

12 Q. Did you give them instructions?

13 A. Yes, I did.

14 Q. Can you walk us through what you
15 did?

16 A. Okay, I provided them with verbal
17 instructions which then they took notes
18 for themselves, but I informed them after
19 the Board of Elections met on April 11th
20 and voted to not allow curing.

21 I informed my staff as to that
22 decision, and then I informed them that
23 for all ballots received, we would be
24 using the record, ballot return code in
25 SURE as that was the most appropriate code

1 that was provided and that if any voter
2 called asking if their ballot had been
3 received that we were to tell them, you
4 know, according to our system that, yes,
5 their ballot had been received if it was
6 on their record that had been recorded.
7 If they began to ask more detailed
8 questions on did I, you know, properly
9 complete the declaration envelope, they
10 would respond that according to the
11 election law their ballot was received and
12 it is locked and secure until the
13 canvassing begins 7 a.m. on election
14 morning.

15 Q. Did you have sort of like a staff
16 meeting?

17 A. Yes.

18 Q. You were asked some questions about
19 after the canvass whether you updated
20 voter status in the SURE system. Do you
21 recall that?

22 A. Yes, I do.

23 Q. Are you aware of anything in the
24 election code that would dictate that you
25 should update the SURE system post

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

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

5 A. After.

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

8 - - - -

9 RE-EXAMINATION

10 - - - -

11 BY MS. MCKENZIE:

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

18 A. Yes.

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

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

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

1 elections?

2 MR. BERARDINELLI: Objection.

3 MS. GALLAGHER: Object to form.

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

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

11 BY MS. MCKENZIE:

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

15 MR. BERARDINELLI: Object to
16 form.

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

19 BY MS. MCKENZIE:

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

23 A. Yes.

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

1 MS. GALLAGHER: She can answer.

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

4 BY MS. GALLAGHER:

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

13 MS. McKENZIE: Objection.

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

19 BY MS. GALLAGHER:

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

24 MS. McKENZIE: Objection.

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

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

5 BY MS. GALLAGHER:

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

10 MS. McKENZIE: Objection.

11 BY MS. GALLAGHER:

12 Q. Cancels, that's the word.

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

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

20 MS. McKENZIE: Objection.

21 BY MS. GALLAGHER:

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

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

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