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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1172 CD 2024

REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA; WASHINGTON COUNTY BOARD OF ELECTIONS

APPELLANTS

v.

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

APPELLEES

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BRIEF OF APPELLANTS REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA

Appeal from the August 23, 2024 Opinion and Order of the Court of Common Pleas of Washington County, Pennsylvania, Civil Division, No. 2024-3953

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I. Introduction

Intervenors-Appellants, Republican National Committee and Republican Party of Pennsylvania (collectively, "Intervenors-Appellants"), appeal the erroneous decision ("Order" and/or "Opinion") of the Court of Common Pleas of Washington County, Pennsylvania (the "Trial Court").

For the 2024 Primary Election, consistent with the precedent of this Court and the Supreme Court, the Washington County Board of Elections ("Board") adopted a policy that did not provide for notice or an opportunity to cure defective mail-in ballots ("Policy").[1] Although it proceeded under the guise of procedural due process, the Trial Court effectively did precisely what the Supreme Court in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (hereinafter, "*Pa. Dems.*") said it cannot do: mandate that a county board of elections adopt a notice-and-cure procedure for absentee and mail-in ballots (hereinafter collectively "mail ballots").

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The Trial Court attempted to sidestep the ruling in *Pa. Dems*. by claiming this is a "case of first impression." But this is belied by the terms of the Order itself:

> Defendant Washington County Board of Elections is hereby ordered to notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects." Tr. Ct. Order at 4.

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[1] Copies of the Minutes of the public meetings where the Policy was discussed and adopted are attached as Exhibit A.

That is substantively what the Supreme Court refused to mandate in *Pa. Dems*. 238 A.3d at 373 ("Upon review we conclude that the Boards are not required to implement 'notice and opportunity to cure' procedures for absentee and mail in ballots that voters have filled out incompletely or incorrectly."). Regardless of the semantics employed by the Trial Court, the relief granted is a notice and opportunity to cure. That contravenes *Pa. Dems*.

Additionally, the Trial Court failed to properly analyze Appellees' procedural due process claim on the merits. Specifically, the Trial Court's analysis failed to properly consider the following: (i) the Policy cannot give rise to a viable procedural due process claim because it is a legislative act, rather than an adjudicative act, (ii) the claim fails at the threshold because Appellees do not have a purported "right" to receive notice to cure, and (iii) the balancing of the *Mathews* factors, even if applicable (which they are not) would weigh in favor of dismissal. The Trial Court's Order improperly impedes on the sole jurisdiction of the Board over the manner and conduct of elections – substituting the court's view of what is good election policy for that of the Board.

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Further, in order to reach its desired result on procedural due process grounds, the Trial Court erroneously construed the Election Code, including, in particular, 25 P.S. 3050.16 (Voting by mail-in electors) in holding that the term "voted" as used in Section 3150.16(b)(2) was ambiguous. Lastly, in order to reach its desired result,

the Trial Court ignored the uncontradicted testimony of the Director of Elections so that it could avoid the fundamental procedural defects in Appellees Complaint.[2]

Based on its erroneous legal analysis and conclusions, the Trial Court ordered the Board (1) to "notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects"; (2) to "input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested"; and (3) "to properly document in the poll books that the elector has not "voted" when an elector's mail in packet is segregated for a disqualifying defect in accordance with 25 P.S. § 3150.16 (which will allow the elector the opportunity to cast a provisional ballot) and choose the most appropriate selection in the SURE system to reflect as such." Order, p. 4. As discussed herein, each of these directives is impermissible under Pennsylvania law, far exceeds the Trial Court's authority, and contravenes *Pa. Dems*. The Trial Court Order and Opinion should be reversed.

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[2] Intervenors-Appellants requested a transcript of the proceedings before the Trial Court on an expedited basis on August 26, 2024, the first business day after the entry of the Court's Order. See Request for Transcript, attached as Exhibit B to the Notice of Appeal. Intervenors-Appellants, however, have yet to receive the transcript as of the date of the filing of this Brief and must, therefore, use their best recollection of testimony on that date and will amend or supplement this Brief as appropriate. The lack of a transcript to cite to severely impedes Intervenors-Appellants' ability to advance their appellate rights.

II. Statement of Jurisdiction

This Court has jurisdiction over this appeal pursuant to 42 Pa. C.S.A. § 762(a)(4).

On September 9, 2023, the Trial Court took the unusual step of issuing a 1925 Opinion advocating that Intervenor-Appellants' appeal be dismissed. The Trial Court suggested that this appeal is governed by the ten-day deadline for appeals of matters "arising under the Pennsylvania Election Code" and, thus, that Intervenors-Appellants' notice of appeal was untimely. *See* Sept. 9, 2024 1925 Opinion. The Trial Court is wrong.

As the Pennsylvania Supreme Court has explained, an appeal in a "declaratory judgment action" raising constitutional claims "does not 'arise under' the Election Code." *Working Families Party v. Commonwealth*, 209 A.3d 270, 278 (2019). Rather, where a party brings a declaratory judgment action alleging that a provision of the Election Code or its implementation violates the Constitution, "the thirty-day appeal period for a declaratory judgment matter is appropriate," and the appeal is not governed by the ten-day deadline applicable to matters that "arise under" the Election Code. *Id*.

That holding squarely applies here. Plaintiffs-Appellees filed a Complaint for Declaratory Judgement alleging only a violation of the Pennsylvania Constitution's Procedural Due Process guarantee. *See* Compl. ¶¶ 148-160. The Complaint is not

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predicated upon any violation of the Election Code. Rather, the Complaint is expressly predicated on alleged constitutional violations arising out of the Board's policy. Hence the Court's Order and Opinion - regardless of its basis - does not arise under the Election Code. Accordingly, "the instant appeal [is] timely" because it was filed within thirty days of the Trial Court's August 23, 2024 Opinion and Order. *Working Families Party*, 209 A.3d at 278; Pa.R.A.P. 903(a). And if there is any doubt whether the 10-day or 30-day appeal deadline applies—which there cannot be under Working Families Party—the Rules of Judicial Administration dictate in favor of the more liberal result. *See* Pa.R.J.A. 108(c)(1) and 109(b) and (e).

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III. <u>Order in Question</u>

This is an appeal from the August 23, 2024 Order entered by the Honorable Brandon P. Neuman of the Court of Common Pleas of Washington County (Case No. 2024-3953), which states:

> AND NOW, this 23rd day of August, 2024 upon consideration of the cross-filed motions for Summary Judgment, the materials attached thereto, the Parties' Joint Stipulation of Facts, the deposition transcripts provided to the Court, and the arguments of Counsel, the Court ORDERS, ADJUDGES, and DECREES that the Plaintiff's Motion for Summary Judgment against Defendant Washington County Board of Elections is GRANTED in part and DENIED in part and Plaintiff's request for a permanent injunction is GRANTED in part. Defendant Washington County Board of Elections' and Intervenors Republican National Committee and Republican Party of Pennsylvania's Motions for Summary Judgment are DENIED. Defendant Washington County Board of Elections is hereby ordered to notify any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects. The Washington

County Board of Elections shall input the accurate status of the mail-in packet in the SURE system and provide the status to the elector if requested.

Defendant Washington County Board of Elections is hereby ordered to properly document in the poll books that the elector has not "voted" when an elector's mail in packet is segregated for a disqualifying defect in accordance with 25 P.S. § 3150.16 (which will allow the elector the opportunity to cast a provisional ballot) and choose the most appropriate selection in the SURE system to reflect as such.

IV. Statement of Scope and Standard of Review

On appeal from a trial court's order granting or denying summary judgment, the "standard of review is de novo and [the] scope of review is plenary." *Seda-Cog Joint Rail Auth. v. Carload Express, Inc.*, 185 A.3d 1232, 1235 n.3 (Pa. Commw. 2017) (citing *Brewington v. City of Phila.*, 149 A.3d 901 (Pa. Commw. 2016).

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V. Statement of Questions Involved

Appellants present the following questions for review:

1. Whether the Trial Court erred in finding that Appellees' claims are justiciable where the Washington County Election Director offered uncontradicted testimony that the complained-of Policy was only adopted for the 2024 Primary Election, and such Policy will not be in place for the 2024 General Election without a meeting of the Board to consider and adopt it.

   Suggested answer: Yes.

2. Whether the Trial Court erred in finding that the Board's Policy for the 2024 Primary Election violates Appellees' claimed procedural due process right to challenge the canvass board's decisions and to submit a provisional ballot to remedy a defective mail ballot.

   Suggested answer: Yes.

3. Whether, given the Pennsylvania Supreme Court's explicit holding in *Pa. Dems.* that voters have no legal right to notice of a defect in a mail-in ballot, the Trial Court erred in ordering the Board to notify any elector whose mail-in ballot is segregated for a disqualifying error despite.

   Suggested answer: Yes.

4. Whether the Trial Court mandating notice-and-cure procedures usurps the province of the General Assembly.

   Suggested answer: Yes.

5. Whether the Trial Court erred in mandating compliance with the Secretary's SURE Instruction because neither the SURE Instruction nor the Secretary's Guidance are binding, and the SURE Instruction directly contradicts the express provisions of the Election Code and is thus void ab initio.

   Suggested answer: Yes.

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VI. Statement of the Case

A. The Complaint

Plaintiffs-Appellees initiated this case on July 1, 2024, seeking declaratory and injunctive relief against the Board regarding its handling of mail ballots during the 2024 Pennsylvania Primary Election.

Plaintiffs-Appellees ("Appellees") include two voter interest groups, the Center for Coalfield Justice ("CCJ") and the Washington Branch NAACP ("NAACP") (together, "Organizational Appellees"); as well as a group of individual

voters—Bruce Jacobs, Jeffrey Marks, June DeVaughn Hython, Erika Worobec, Sandra Macioce, Kenneth Elliott, and David Dean (together, "Voter Appellees").

Voter Appellees each allege that they applied for, received, and submitted mail ballots that the Board rejected because they did not comply with the requirements for mail ballots under the Election Code. July 1, 2024 Complaint ("Comp."), ¶¶ 83-132. Appellees contend that the Board's actions – as described below – misled and harmed Voter Appellees by depriving them of a "right" to receive notice that their mail ballots were defective, as well as the "right" "to cure a defective mail ballot by voting a provisional ballot and have that provisional ballot count." *See id.* ¶¶ 37-51, 55-62, 159.[3] As such, Appellees allege that the Board violated Article I, § 1 of the Pennsylvania Constitution's Procedural Due Process Guarantee by not providing Voter Appellees with notice and an opportunity to cure the defects in their mail ballots. Comp. ¶¶ 148-160; *see also* Pa. Const. Art I, § 1.

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B. The Board's Policy For The Primary Election.

On March 12, 2024, the Board met to consider what notice-and-cure policy it would adopt for the Primary Election.[4] Deposition of Melanie Ostrander, Washington County Director of Elections ("Ostrander Dep."), July 18, 2024, pp. 51-

[3] Contrary to the verbiage used by the Trial Court, Appellees Complaint indicates a clear acknowledgment that what they ask for is a form of curing a defective mail ballot.

[4] The Board previously permitted limited notice and cure procedures in Washington County for the 2023 Primary and General Elections. *See* Opinion at 5.

53 (attached as Ex. 1); Joint Stipulation of Facts ("JSOF"), ¶ 29 (attached as Ex. 2). No resolution was reached during this initial meeting, however, and the Board met a second time on April 11, 2024. *See* JSOF, ¶ 33, Exs. L-N (Minutes of March 12, 2024 and April 11, 2024 Board Meetings) (the "Minutes"). The Minutes reflect that the Board ultimately voted 2-1 to adopt the Policy. Under the Policy, the Board chose ***not*** to provide notice of, or an opportunity to cure, defective mail ballots. *Id.*; *see also* Ostrander Dep., 67:24-71:4.

The uncontroverted record demonstrates that the Board adopted the Policy ***only*** for the Primary Election, and the Board has not yet adopted a policy regarding notice or curing for the 2024 General Election ("General Election"). Director Ostrander testified during her deposition that the Board's "past practice is that [the policy] is reviewed prior to each election," meaning the Board will have a public meeting where "absentee and mail-in ballot procedure will be on the agenda" for the November 2024 General Election. *Id.*, pp. 126:13-127:18. She testified at the hearing before the Trial Court that a new vote will be taken in September. *See* n. 2, *supra.*

Accordingly, while in 2023 the Board carried over its policy from the primary election to the general election, that is not guaranteed to occur in 2024. *Id.* Nonetheless, the Trial Court – without citing any support in the record – opined that

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"there has been no indication that the policy will be changed and therefore the policy used in the April primary is still in effect." Opinion at 9, n. 32.

C. The SURE System

The Election Code expressly states that Pennsylvania Department of State ('DOS") is required to implement a Statewide Uniform Registry of Electors ("SURE") system, which is to be used as the single, uniform integrated computer system governing the database of registered electors in the Commonwealth. 25 Pa. C.S.A. § 1222

Deputy Secretary of the Commonwealth, Jonathan Marks, testified that a county is required to enter into SURE the following information: (a) whether a voter was sent a mail ballot, and (b) whether that voter's ballot was received by the county board of elections. Marks Dep., p. 35:10-23. <u>This is all that a Board is required to do</u>. The Board complied with these requirements in the 2024 Primary Election by noting in the SURE system whether a mail ballot was sent to a voter, and whether such ballot was subsequently received by the Board. Ostrander Dep., pp. 23:1-24; 27:14-28:5. This was recorded by the Board by selecting the "Record-Ballot Returned" code for each returned mail ballot from the dropdown menu in SURE. *See id.,* 67:9-23; JSOF, ¶ 42.

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D. DOS Created Guidance and SURE Instructions Require Notice and Cure Procedures.

On March 11, 2024, the Secretary issued guidance to the county boards of elections entitled "Pennsylvania Provisional Voting Guidance" (the "Guidance") concerning how to process mail ballots. JSOF Ex. J. In addition to the Guidance, DOS also issued a document entitled "Changes to SURE VR and PA Voter Services as of March 11, 2024" (hereinafter, "SURE Instruction"). JSOF Ex. D. The SURE Instruction informs county boards of elections of new codes which the boards ***may*** use when receiving and logging the return of mail ballots. Ostrander Dep., pp. 56:24-57:14.

While the Secretary has authority to promulgate regulations governing SURE, the SURE Instruction **does not constitute such a regulation**. *See* 25 P.S. § 2621; *see also* Marks Dep., p. 30:24-31:23 (explaining SURE Instruction is not a guidance, directive, or regulation). The SURE Instruction therefore is ***not binding*** on county boards of elections. *See id.*, pp. 14:19-15:3 (acknowledging Secretary's guidance to boards "does not have the force and effect of law").

SURE provides boards the option to use one of multiple codes from the dropdown menu other than "Record-Ballot Returned." JSOF Ex. D. Such other codes permit, *but do not require*, boards to record any further determination the board made regarding the ballot. *Id.*, *see also* Marks Dep., pp. 38:23-40:13 (agreeing codes were "**optional**," explaining "the very first sentence [of the SURE Instruction]

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actually spells that out very clearly in all caps," and stressing that boards "may select one of those status reasons **if that is consistent with their county's practice**" (emphasis added)).

The SURE Instruction further explains that selecting the codes triggers an automatically generated e-mail from DOS to the voter if the voter provided an e-mail address when registering to vote. *See id.* Notably, the recording board is neither the author nor the sender of the auto-generated e-mail which is transmitted via the SURE system, and boards do not have the ability to change the content of such emails or otherwise control their transmission. *Id.*; Ostrander Dep., pp. 78:23-79:11; 161:13-162:16.

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DOS's auto-generated e-mails provide Washington County voters with inaccurate and contradictory information when compared to the Policy. Ostrander Dep., pp. 162:17-167.2. The Policy, which is in legal conformity with the Election Code's pre-canvass provisions, does not provide voters with notice of and/or an opportunity to cure defective mail ballots, but the SURE System emails tell them the opposite. Ostrander Dep., pp. 214:9-216:5, Ex. 1.

Further, the Board's Elections Director testified that while Washington County poll workers will typically allow anyone to submit a provisional ballot on request, it is the Board's general practice to not count provisional ballots after a mail ballot was returned by a provisional ballot voter. *Id.*, pp. 89:11-90:8. This practice

specifically conforms with the terms of the Election Code, which states that a provisional ballot "shall not be counted" if a mail ballot cast by that voter "is timely **received** by a county board of elections." 25 P.S. § 3050(a.5)(5)(ii)(F).

Consistent with its Policy not to provide notice-and-cure procedures, the Board chose to use the "Record Ballot-Return" option to record all mail ballots received. *See* JSOF Ex. M. Accordingly, during the 2024 Primary Election, upon receipt, Board employees stamped the outer envelope of each received mail ballot as "received." Board employees further examined the declaration for any defects (*i.e.*, lack of signature or date), segregated the envelopes by defect during the pre-canvass, and then entered the ballot into the SURE system as "Record-Ballot Returned." *See* Ostrander Dep., pp. 73:7-76:20; Marks Dep., p. 18:14-19:10 ("[O]nce [the board has] recorded the ballot, they are required by statute to keep those ballots securely until pre-canvassing begins", which is at 7:00 a.m. on election day). If Washington County voters called to inquire about the status of their mail ballot, the county's election personnel were instructed to explain that every received mail ballot was locked as required by the Election Code and would be reviewed during the canvass. Ostrander Dep., pp. 90:20-92:5; *see also* JSOF ¶ 44.

E. Procedural History

Appellees filed the Complaint on July 1, 2024 and a motion for preliminary injunction on July 3, 2024. Opinion at 6. On July 9, 2024, the parties appeared

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before the Trial Court and engaged in a scheduling conference. *Id*. Upon motion, which was not opposed, the Trial Court granted Intervenor-Appellants leave to intervene in this matter. *Id*. Thereafter, on July 26, 2024, the parties filed a Joint Stipulation of Facts, along with their respective Motions for Summary Judgment and accompanying briefs. *Id*. On August 5, 2024, the Trial Court conducted a hearing on the parties' Motions. *Id.* at 6-7. On August 23, 2024 the Trial Court filed its Opinion and Order, concluding that Appellees were entitled to notice that their submitted mail ballots were defective and an opportunity to cast a provisional ballot on Election Day. *See generally id.* This timely appeal followed on September 5, 2024.

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F. The Trial Court's Opinion and Order

In a matter of what it calls "first impression," the Trial Court finds that the Policy "seemingly violates" an elector's right to challenge the determination that there is a defect in that voter's mail-in ballot and that the Policy, therefore, violates that elector's procedural due process rights. Opinion, pp. 1-2. In so holding, the Trial Court concludes that because a deficient mail-in ballot may not ultimately be counted, the voter, in effect, never voted at all. *Id*., at 3. Based on this logic, the Trial Court instructs the Board to mark a voter whose mail-in ballot has been segregated as having not voted and mandates that such a voter be permitted to vote provisionally. *Id*.

In doing so, the Trial Court cites to section 3157 of the Election Code, which provides, *inter alia*, that "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision shall have been made[.]" *Id*., at 17. Based on this provision, the Trial Court concludes that the act of segregating a mail-in ballot that is suspected of containing a defect constitutes a challengeable "decision" for the purposes of section 3157. *Id*. According to the Trial Court, therefore, because electors were not provided with an opportunity to "challenge" the "decision" to segregate the ballots, the Policy deprives electors of a "right to be heard by a fair and impartial tribunal" and therefore violates those voters' procedural due process rights. *Id*., at 2. Moreover, the Trial Court holds that voters whose mail-in ballots are segregated for potential defects must be permitted to cast provisional ballots, pursuant to section 3150.16(b)(2) of the Election Code. *Id*., at 3. The Court concludes that the policy adopted by the Washington County Board of Elections clearly violated the statutory right to allow a person checks and balances against the government. *Id*., at 2

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VII. Summary of Argument

In plain disregard of the record, controlling Supreme Court precedent, and the Election Code , the Trial Court erroneously found that the Board's Policy implicated protected liberty interests and violated Appellees' procedural due process rights.

Based on these erroneous findings, the Trial Court impermissibly ordered the Board to (1) notify voters of potential defects in their mail ballots; (2) comply with the Secretary's non-binding SURE Instruction when entering the status of returned mail ballots in SURE and, thus, trigger the sending of inaccurate automated emails to voters; and (3) "properly document in the poll books that the elector has not "voted" when an elector's mail in packet is segregated for a disqualifying defect in accordance with 25 P.S. § 3150.16 (which will allow the elector the opportunity to cast a provisional ballot) and choose the most appropriate selection in the SURE system to reflect as such." The Trial Court abused its discretion and/or committed errors of law in at least five ways.

First, Appellees' claim is not ripe and justiciable and should have been dismissed because – as established by undisputed testimony – the Policy was only in place for the 2024 Primary Election.

Second, on the merits, the Trial Court failed to properly analyze Appellees' procedural due process claim in several outcome-determinative ways. The Trial Court's specific errors on this issue include: (i) the Policy cannot give rise to a viable procedural due process claim, as it is a legislative act, rather than an adjudicative one; (ii) the claim fails at the threshold because Appellees do not have a purported "right" to receive notice to cure, and (iii) the balancing of the *Mathews* factors, even if applicable (which they are not) would weigh in favor of dismissal.

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Third, the Trial Court disregarded the Supreme Court's clear mandate in *Pa. Dems.* holding that Pennsylvania voters have no constitutional, statutory, or legal right to notice of a defective mail ballot or an opportunity to cure. *See Pa. Dems.*, 238 A.3d at 372-74. That clear mandate forecloses Appellees' claim.

Fourth, the Trial Court's mandating a notice-and-cure procedure usurps the province of the Legislature, and, accordingly, violates the separation of powers doctrine of the Pennsylvania Constitution, *see* Pa. Const. art. II, § 1, well as the Elections and Electors Clause provisions of the United States Constitution. U.S. Const. art. I, § 4, cls. 1,2.

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Finally, by mandating compliance with the SURE Instruction and/or guidance of the Secretary and DOS, the Trial Court improperly constitutionalized the Board's compliance with unenforceable – and legally impermissible – ministerial instructions. The Trial Court thus acted in contravention of the Election Code and has usurped the powers of both the Board and the General Assembly.

For each and all of these reasons, the Court should reverse.

VIII. Argument

A. This Case Was Not Justiciable Because Appellees' Claim Is Not Ripe.

The Trial Court erred in finding that this matter was ripe. The doctrine of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010). "[Ri]peness [] reflects the

[] concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). "Under the ripeness doctrine, '[w]here no actual controversy exists, a claim is not justiciable and a declaratory judgment action cannot be maintained.'" *Carter v. Degraffenreid*, No. 132 M.D. 2021, 2021 WL 4735059, at *6 (Pa. Commw. Oct. 8, 2021) (quoting *Cherry v. City of Philadelphia*, 692 A.2d 1082, 1085 (Pa. 1997)). As this Court explained: "[a] declaratory judgment must not be employed to determine rights in anticipation of events [that] may never occur[.]" *Id.* (quoting *Gulnac by Gulnac v. S. Butler Cty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991)).

The Pennsylvania Supreme Court confirmed in a pair of 2020 election cases that a claim is not ripe—and must be dismissed—where it rests on speculation regarding future events. *See Disability Rights Pa. v. Boockvar*, 660 Pa. 210, 211 (2020) (Wecht, J., concurring); *Delisle v. Boockvar*, 660 Pa. 253, 254 (2020) (Wecht, J., concurring). In these cases, voters brought petitions seeking relief from the Election Code's received-by deadline for mail ballots in the lead-up to the 2020 Primary Election, based on the effect of the COVID-19 pandemic and its perceived impact on the Commonwealth's ability to administer the election. *See id*. The Supreme Court dismissed the petitions because the allegations regarding the effect of the COVID-19 pandemic on the Primary Election were speculative since the election had not yet happened. *Id.*

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Here, Appellees' Complaint and the Trial Court Opinion are predicated on alleged harm that might be suffered in the yet to occur November General Election. Both are based on an assumption that the Policy adopted by the Board in conjunction with the 2024 Primary Election will likewise be adopted for the 2024 General Election. In deciding that this matter was ripe for adjudication, the Trial Court erroneously found that, "although the Board may change its policy, the policy used at the April 2024 primary election is still in effect[.]" Opinion at 12. This finding is incorrect and contrary to the unrebutted facts of record.

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Director Ostrander testified during deposition that, prior to each election, the Board conducts a public meeting to review its policies and holds a formal vote for any policy to be adopted; she testified that a new vote on what the policy will be for the November 2024 General Election will be held in September [2024]. Ostrander Dep. at 126-127 (the Board's "past practice is that [the policy] is reviewed prior to each election," meaning the Board will have a public meeting where "absentee and mail-in ballot procedure will be on the agenda" for the November 2024 General Election); *see* n. 2 *supra*. Nothing in the record is to the contrary.

Contrary to the Trial Court's unsupported assertion that "although the Board may change its policy, the policy used at the April 2024 primary election is still in effect" (Opinion at 12), **until the Board schedules a public meeting and adopts a policy through a formal vote, no policy exists, and the relief requested by**

Appellees (and granted by the Trial Court) is entirely speculative. The underlying claims are, consequently, not justiciable. *See Carter*, 2021 WL 4735059, at *6. The Trial Court should be reversed.

B. The Trial Court Erred in Finding the Board's Policy for the 2024 Primary Election Violates Appellees' Procedural Due Process Rights.

The Trial Court erred in finding that the Board's Policy could be challenged under a procedural due process theory, and in holding that the Policy interfered with a constitutionally protected life, liberty, or property interest.

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1. Pennsylvania Procedural Due Process Standard.

Pennsylvania courts analyze procedural due process challenges in two steps. The first step is to determine "whether there is a life, liberty, or property interest with which the state has interfered[.]" *J.P. v. Dep't of Hum. Servs.*, 170 A.3d 575, 580–81 (Pa. Commw. 2017). The second examines whether the procedures attendant to that deprivation were constitutionally sufficient. *Id.* If the court determines that no constitutionally protected liberty or property interest has been impacted, **the procedural due process analysis ends**. *See Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 255–56 (Pa. 1995).[5]

[5] The due process standards of the United States and Pennsylvania Constitutions are essentially the same. *Muscarella v. Commonwealth*, 87 A.3d 966, 973 (Pa. Commw. 2014).

The protections of procedural due process (as opposed to substantive due process) do not extend to legislative actions. *South Union Tp. v. Com.*, 839 A.2d 1179, 1186-87 (Pa. Commw. 2003) (citing *Bi–Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915) in sustaining preliminary objection to due process claim). In other words, "[i]t is well settled that procedural due process concerns are implicated **only by adjudications**, not by state actions that are legislative in character." *Small v. Horn*, 722 A.2d 664, 671 (Pa. 1998) (emphasis added).

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Procedural due process rights "are implicated **only by adjudication**, not by state actions that are legislative in character, *i.e.*, a procedural due process claim necessarily requires an adjudicative agency action." *Vega v. Wetzel*, No. 39 M.D. 2022, 2023 WL 4853004, at *3 (Pa. Commw. July 31, 2023) (quoting *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (emphasis added)). As this Court has previously explained:

> Adjudicative agency actions are those that affect one individual or a few individuals and apply existing laws or regulations to facts that occurred prior to the adjudications. Agency actions that are legislative in character result in rules of prospective effect and bind all, or at least a broad class of citizens.

Sutton, 220 A.2d at 1032 (citing *Small v. Horn*, 722 A.2d 664, 671 n.12 (Pa. 1998)); *Ondek v. Allegheny County Council*, 860 A.2d 644, 649 (Pa. Commw. 2004). The rationale for this law is clear – courts do not have authority to make legislative

policy. As the Supreme Court stressed in *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 104 (Pa. 2008):

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

961 A.2d at 104 (*quoting Daniel v. Family Security Life Insurance Co.*, 336 U.S. 220, 224 (1949)). Thus, where an action of an agency is legislative, a claim that the agency violated a person or group's procedural due process rights fails as a matter of law.

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2. Appellees' Claim Fails as A Matter of Law Because the Board's Policy was a Legislative Act.

Appellees procedural due process claim fails because the Board's Policy was a legislative, not an adjudicative, action. It need go without stating that the Board's adoption of the Policy was a legislative act of a public body. The Board's Policy affected the interests of all Washington County voters in conjunction with the 2024 Primary Election. As a matter of law, discussed thoroughly *supra*, it cannot be challenged on procedural due process grounds.

To avoid this clear restriction, the Appellees and Trial Court endeavored to find an adjudicative act on which he could build a procedural due process claim, and found sufficient adjudication in "the series of individual determinations the election

staff have made and will make going forward" concerning to set aside or segregate a suspected defective mail in ballot when it is received. *See* Trail Court Opinion at 14-15. But all these ministerial workers are doing is enforcing the Policy. Thus, it remains the Policy – a clear legislative act – that is being challenged.

And, in any event, the employees in the Elections Office do not determine whether or not a given ballot is defective and will not be counted – that is done by the Computation Board. Ostrander Dep., at p. pp. 183-184; 197-198. The **ministerial actions** of the Elections Office staffers are not adjudicatory, in nature and, thus, cannot support Appellee's procedural due process claim. Contrary to the Trial Court's conclusion, the fact that a legislative policy ultimately "affects a small portion" (Trial Court Opinion at 15) is immaterial to the analysis of whether the challenged action is legislative or adjudicative. The point is that the Policy *affects the rights of the public in general*. *Accord Ondek*, 860 A.2d at 648; *see also, Pittsburgh Palisades Park*, 888 A.2d at 660 ("[I]t is not sufficient for the person claiming to be 'aggrieved' to assert the common interest of all citizens in procuring obedience to the law."); *Kauffman*, 271 A.2d at 239 (stressing it is "hornbook law that a person whose interest is common to that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing").

Simply, Plaintiffs' due process claim challenges a legislative act, the Policy. The Trial Court's grant of summary judgment is erroneous and should be reversed.

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3. The Policy Does Not Interfere with Any Constitutionally Protected Life, Liberty, Or Property Interest.

The Trial Court also erred because Appellees' due process claim fails at the first step of the required analysis. Simply, the Board did not interfere with a constitutionally protected life, liberty, or property interest. The reason is plain: Appellees claim a right to notice of defects in their mail ballots and an opportunity to cure—but Pennsylvania law is clear that *no such right exists*. *See Pa. Dems.*, 238 A.3d at 374 (finding "no constitutional or statutory basis that would countenance imposing [notice and cure procedures] (*i.e.*, having boards contact those individuals whose ballots the Boards have reviewed and identified as including "minor" or "facial" defects—and for whom the Boards have contact information—and then afford those individuals the opportunity to cure defects"). Thus, by failing to provide notice and an opportunity to cure, the Policy necessarily did not interfere with any constitutionally protected life, liberty, or property interest.

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Nonetheless, the Trial Court erroneously found that the Board's Policy impacted two state-created liberty interests: (1) the "right to challenge the decisions made by the canvass board under 25 P.S. § 3157[,]" and (2) the "right to cast a provisional ballot if they are not shown on the district register as having voted." Opinion at 17. The Opinion's attempt to avoid *Pa. Dems.* by couching the "rights" at-issue as ones "to challenge the decisions [of] the canvass board" and "to cast a provisional ballot" fails as a matter of law.

"The range of deprivations implicating a cognizable state-created liberty interest is narrow." *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 686 (M.D. Tenn. 2020); *see also Richardson v. Texas Sec'y of State*, 978 F.3d 220, 230 (5th Cir. 2020) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995) ("[S]tate-created liberty interests are 'generally limited to freedom from restraint[.]'")).The Trial Court offers no case law or analysis to explain why the supposed statutory rights the Opinion focuses on fit within the "narrow category of state-created liberty interests" typically recognized in the procedural due process context. *Richardson,* 978 F.3d at 230. Instead, the Trial Court simply states, *with no explanation*, that these "statutory rights" constitute a liberty interest. *See* Opinion at 17.

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However, the existence of a right under a statute does not mean that a corresponding liberty interest exists for purposes of procedural due process. If that were the law, then **every** action taken under **every** statute or regulation would potentially give rise to a procedural due process claim. The law is clearly to the contrary. *E.g., Sandin v. Conner*, 515 U.S. 472, 484 (1995) ("[S]tate-created liberty interests are 'generally limited to freedom from restraint[.]'")) Neither Appellees below or the Trial Court cite any authority to the contrary.[6]

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[6] Even fundamental rights, like the fundamental right to vote, do not automatically give rise to a corresponding liberty interest for purposes of procedural due process. *See Richardson*, 978 F.3d at 231 ("For procedural due process, the question is not whether the plaintiffs assert a fundamental

Further, even if the Trial Court were correct that Appellees have a liberty interest in statutory rights, the supposed statutory rights identified by the Trial Court do not exist and its relief does not match even the Court's (incorrect) reasoning. The Trial Court found that voters have a liberty interest under 25 P.S. §3157, in the "right to challenge the decision made by the county board at the canvass" and Ordered notice to an elector "whose mail-in packet is segregated for a disqualifying error, so that the voter has an opportunity to challenge (not cure) the alleged defect," Trial Court Opinion at 4, 17. This lacks any congruity to the actual terms of Section 3157.

Section 3157 applies only to the actions of the canvass board taken during canvassing and computation **after** the polls close on Election Day: "[a]ny person aggrieved by any order or decision of any county board regarding the computation or canvassing of the returns of any primary or election . . . may appeal therefrom within two days after such order or decision shall have been made[.]" 25 P.S. § 3157(a). Prior to that, any disclosure, would violate the secrecy requirements that are imposed by law during the pre-canvass. 25 P.S. 3146.8(g)(1.1).

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right, but instead whether the right they assert is a liberty interest."); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) ("That Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process . . . the League has not alleged a constitutionally protected interest."). This law was cited to the Trial Court in response to Appellees' contention that the "right to vote" was the protected liberty interest at issue. **CITE OUR TRIAL COURT BRIEFS or THE BOARDS.** The Trial Court Opinion does not base its holding on the "right to vote" being a protected liberty interest, rather, only on the two purported "statutory right[s]" noted above. Since no Reply Brief is permitted in this appeal, if Appellees argue their right to vote theory, Appellants submit that the decisions in *Richardson* and *League of Women Voters* should control.

In effect, the Court's true consideration is the decision by the Elections Office staff to initially segregate potentially defective mail ballots and the related inputting of information into the SURE System. However, that process definitively is **not** covered by Section 3157. And, if it is not coved by Section 3157, then the foundation for the Court's finding of a required liberty interest to invoke procedural due process crumbles. Because 25 P.S. § 3157 does not apply to the "decision" to segregate potentially defective ballots that is the subject of the Trial Court's Order (i.e., the decision of the Elections Office staffer), Appellees clearly do not have a statutorily created protected liberty interest in the right to challenge that decision. A procedural due process claim based on a purported statutory right cannot exist if the purported statutory right has no applicability to the relief imposed by the court – that is exactly what we have here. The Trial Court order should be reversed.

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And, if the Trial Court means to say the decision of the computation board/canvass board to ultimately count or not count a mail ballot can be challenged, then that decision would be challenged under Section 3157 and any procedural concerns would be addressed by sounder process that does not conflict with *Pa. Dems*. For example, a list of voters whose mail ballots were not counted could be placed on the Board's website. This was argued to the Trial Court at the hearing (*see* n. 2 *supra*) but not considered in the Opinion, as it conveniently avoids the Trial Court's true objective – to provide notice and curing.

The Trial Court's other statutory right on which it builds its Opinion – that pursuant to 25 P.S. § 3150.16(2), electors have a protected liberty interest in their "right to cast a provisional ballot if they are not shown on the district register as having voted" – fares no better. First, under the Court's Opinion, the second right is not implicated absent a violation of the first right, but, critically, as above the first right is erroneous and does not exist. Thus, the second right, standing alone, cannot support the Trial Court's relief. Second, the provisional voting "right" cited by the Trial Court is inapplicable.

The Election Code authorizes provisional voting only in limited circumstances. 25 P.S. § 3050(a.2)(1)-(2); (a.4)(1); 25 P.S § 3050.16(b)(2). The Code contains no provision permitting an elector to vote provisionally after submitting a mail ballot that is defective. *See generally Pa. Dems.* at 373-74; *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) ("[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say.") (internal quotes omitted). Recognizing this, the Trial Court tries to create such a right by determining that use of the term "voted" in Section 3150.16(b)(2) is ambiguous. But it is not.[7]

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[7] Section 3150.16(2) (emphasis added) reads: "[a]n elector who requests a mail-in ballot and who is not shown on the district register as having **voted** may vote by provisional ballot under Section [3050(a.4)(1)]." In light of this Court's recent decisions in *BPEP* and *Genser*, both of which are being appealed to the Supreme Court, this Brief does not address in detail the Trial Court's erroneous conclusion that as to mail voting the Election Code does "not define the word voted" as used in Section 3150.16(2), which the Trial Court erroneously leverages to hold that an

The title of Section 3150.16 is "**Voting** by mail-in electors." 25 P.S. § 3150.16 (emphasis added). Subsection (a) of Section 3150.16 – **which the result-oriented Trial Court totally ignored** – describes in detail, step-by-step, how an elector votes by mail. Consistent with the title of Section 3150.16, the steps listed in subsection (a), which include how to fill out and deliver a ballot (by mail or in person) to the Board, define was it means to "vote" by mail. Subsections (a) and (b) of Section 3150.16 must be read *in pari materia*, but the Trial Court ignores Section (a). 1 Pa.C.S. § 1932(a)). The Trial Court also improperly ignores the title of the full Section, "**Voting** by mail in electors," which inherently demonstrates that this statutory section is defining what it means to vote by mail. *See* 1 Pa.C.S. § 1924 ("The Title and preamble of a statute may be considered in the construction thereof).

Simply put, there is no ambiguity and, indeed, Section 3150.16(a) clearly defines what it means to "vote" by mail. Here, there is no doubt that each Voter Plaintiff "voted" under Section 3150.16(a). Therefore, because the electors here had "voted" as set forth in Section 3150.16, they were not even eligible to file a provisional ballot per the **express** terms of Section 3150.16(b)(2).

Each of the purported statutory rights on which the Trial Court builds its due process conclusion are either nonexistent, or do not support the conclusion. Absent

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elector who submitted a defective mail-in ballot has not "voted" and, therefore, is not prohibited from casting a provisional ballot under 25 P.S. § 3150.16(2).

both – and here we have neither – the reasoning of the Opinion fails. Thus, because Appellees cannot show that the Board interfered with any legally protected right, the balancing of interests under *Mathews* is irrelevant. *See Pennsylvania Game Com'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (explaining that courts only "employ the methodology" of *Mathews v. Eldridge*, 424 U.S. 319 (1976) after first determining "that a protected liberty of property right was involved"). The Trial Court Opinion should be reversed.

4. The Policy is Constitutional Proper Under *Mathews*

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Even if *arguendo* the Trial Court were correct in finding an adjudicative act is at issue and finding a deprivation of a protected interest, a balancing of the *Mathews* factors demonstrates that the Board's procedures were constitutionally sufficient. *Marich*, 666 A.2d at 256, n.7 (explaining that the *Mathews* analysis consists of three distinct factors which must be considered: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3), the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).[8]

[8] Since this matter involves issues relating to elections, the Court should consider applying the *Anderson/Burdick* framework not the *Mathews* test. *See Richardson,* 978 F.3d at 230-33. Clearly, the Policy passes muster under *Anderson/Burdick.* Since the Trial Court applied *Mathews*, this Brief discusses *Mathews*.

With respect to the first *Mathews* factor, the Trial Court states that the right to appeal the Board's decision under Section 3157 "is the private interest affected under *Mathews*[;]" that the "risk of erroneous deprivation of that interest is high because electors are not notified that their ballot has been segregated"; and that the burden on the Board to provide such notice would be "low". Opinion at 21. As stated above, Appellees' ability to challenge the Board's decision is not impacted by the Policy at issue and the Court's relief in this regard is incongruous. This "right" under Section 3157 would be adequately protected procedurally by another solution: the publication of a list of voters whose mail ballots were not counted by the computation/canvassing board. But the Trial Court improperly goes much further in order to impose court-mandated notice and curing.

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Additionally, the Board's Policy is compliant with the Pennsylvania Supreme Court's holding in *Pa. Dems*. and the Election Code and does not result in the erroneous deprivation of Voter Appellees' private interests. Upon receipt of a mail ballot, the Board is only required to enter the ballot into the SURE system to show that it has been received; which is exactly what the Board did.

Lastly, the imposition of additional procedures places a burden on the Board and impairs its ability to effectively run elections. As discussed in a related argument *infra*, it is also a usurpation of the Board's powers despite clear statutory entitlement to enact the Policy, and Supreme Court precedent affirming the same. The judiciary

may not disregard legally implemented election rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g.*, *Ins. Fed'n of Pa.*, 970 A.2d at 1122 n.15 ("Our role is distinctly not to second-guess the policy choices of the General Assembly."); *Pa. Env't Def. Found.*, 161 A.3d at 938 n.31.

Therefore, the Board did not infringe on a protected interest and even if such a protected interest did exist, application of the *Mathews* factors demonstrates that the Board's procedures were constitutionally sufficient.

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C. The Trial Court's Order Violates the Pennsylvania Supreme Court's Ruling in *Pa. Dems.*

The Pennsylvania Supreme Court's holding is clear: Pennsylvania voters have no constitutional, statutory, or legal right to notice of a defect in a mail ballot or an opportunity to cure. *See Pa. Dems.*, 238 A.3d at 372-74. To the contrary, the decision whether and in what form to allow notice-and-cure procedures presents "open policy questions," including "what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots." *Id.* at 374. Thus, the question whether to mandate notice and curing resides exclusively with "the Legislature," not the courts. *Id.* The Trial Court's Order **plainly disregards** this Pennsylvania Supreme Court precedent but attempts to hide its doing so by claiming

this matter as a case of first impression. A review of what was at issue in *Pa. Dems.* negates the Trial Courts claim.

In identifying the issue before it, the Supreme Court stated:

> In Count III of its petition, Petitioner seeks to require that the Boards contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them with an opportunity to cure those defects. More specifically, the Petitioner submits that when the boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector's contact information, the Boards should be required to notify the elector using the most expeditious means possible and provide the elector a chance to cure the facial [***51} defect up until the IPCAVA deadline of November 10, 2020, discussed *supra*.

Id. at *371*. Hence, the relief sought by the Petitioners in *Pa. Dems* is the exact relief the sought by Appellees and granted by the Trial Court - a requirement that the Board provide notice to a voter of a potential defect in a timely submitted mail ballot in order to allow the voter to cure the defect via a provisional ballot. The Supreme Court however rejected the petitioners, unequivocally finding that there is "**no constitutional or statutory basis**" to require county boards to permit notice and curing of defective mail ballots. *Id.* at 374. The Court further reasoned that "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Id.*

In refusing to order boards of elections to engage in notice-and-cure procedures in the absence of any statutory authority to do so in the Election Code,

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the Supreme Court recognized longstanding precedent that "[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government." *Id.* at 366 (internal citations omitted). The judiciary "may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court's] proper role under our constitutionally established tripartite form of governance." *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018); . Further, "[w]here a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster." *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984). In other words, it is a violation of the division of power undergirding our system of government for the courts to rewrite a statute even if it has found it to be unconstitutional. Despite this, the Trial Court rewrote the Policy of the Board.

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Under *Pa. Dems.*, Pennsylvania voters have no *right* to notice of a legally deficient mail ballot or to cure the same and, thus, Pennsylvania courts cannot *order* county boards to adopt notice-and-cure procedures. *See* 238 A.3d at 373-74; *see also Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Mar. 23, 2023) (Ceisler, J.) (attached as **Exhibit 3**), pp. 20, 25 (noting responsibility for conduct of primaries and elections rests with county boards and

Secretary's interests are not essential in determining whether county boards are unlawfully implementing notice and cure procedures).

Accordingly, the Board alone, as the local agency with sole and exclusive jurisdiction to administer elections in Washington County, is empowered to choose whether to adopt notice and cure procedures and the parameters of those procedures. *See* 25 P.S. § 2642. That is exactly what it did when, prior to the April 2024 Primary Election, it exercised its legislative authority and duly enacted the Policy.

Nonetheless, the Trial Court orders the Board "to **notify** any elector whose mail-in packet is segregated for a disqualifying error, so the voter has an opportunity to challenge (not cure) the alleged defects." Opinion at 4 (emphasis added). Under *Pa. Dems.* it is plainly impermissible for the Trial Court to order the Board to do so. In addition, while the Trial Court couches its Order as requiring the voter the opportunity "to challenge (not cure)" defects in their mail ballots, the effect is the same curing, regardless of any attempt to claim *Pa. Dems.* is not implicated. What the Trial Court is mandating *is*, in fact, an illegal notice and opportunity to cure, which the Supreme Court has explicitly prohibited courts from imposing on county boards. And it goes further by essentially writing its own policy for Washington County, instead of simply holding the present one to be infirm (which it is not).

The Trial Court improperly distinguishes *Pa. Dems.* by asserting that Appellees "do not argue that relief should be granted under the Free and Equal

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Elections Clause, rather the action of the Board are a violation of Plaintiffs due process rights," and because the Supreme Court "did not conduct a due process analysis, their holding does not bar [Appellees'] claim before this Court." Opinion at 20. Putting aside for a moment that the Policy is in strict compliance with the *Pa. Dems.*, the Court's attempt to escape binding precedent is nonetheless unavailing.

Justice Wecht did, in fact, address procedural due process in his "full" concurrence. *Pa. Dems.*, 238 A.3d at 386. (Wecht, J concurring). In doing so, Justice Wecht stated, "[s]o long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—*pre-deprivation notice is unnecessary*." *Id.* (emphasis added). Justice Wecht's explicit rationale as applied to the instant matter negates the Trial Court's finding that the Board's Policy results in a pre-deprivation due process claim.

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The mail ballot package here included a detailed instruction sheet which explains every action a voter must take to complete the ballot and the declaration envelope properly, as well as instructions for how to timely return the ballot, including an express warning that a ballot would not be counted if the instructions were not followed. *See* Ostrander Dep., pp. 27-28, 189-192, Ex. 1. Thus, the exact type of instructions Justice Wecht found would negate a need for pre-deprivation

notice – and which the Trial Court ignored – are exactly the type of instructions the Board provides to all voters in Washington County. While Justice Wecht's concurrence is not controlling, it nonetheless sets forth guidance on the exact issue before the Trial Court. Guidance which the Trial Court ignored.

The judiciary may not disregard election rules, rewrite them, or declare them unconstitutional simply because a voter failed to follow them and, accordingly, had his or her ballot rejected. *See, e.g.*, *Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) ("Our role is distinctly not to second-guess the policy choices of the General Assembly."); *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) ("When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.' Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot. 'Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.'" (quoting *Brnovich v. DNC*, 594 U.S. 647, 669 (2021)); *Pa. State Conf. of NAACP Branches v. Sec. Com. of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (agreeing with Justice Alito on this point). Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules the General Assembly enacted for completing or casting it.

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The Trial Court's Opinion flies in the face of this well-established law. In substance, the Trial Court has created a *per se* illegal election scheme where voters have the right to have their vote counted without regard for any ballot-casting rules. In order to function properly, however, elections must have rules, including ballot-casting rules. For these reasons, this Court should reverse the Trial Court's Order, which is legally erroneous and contrary to *Pa. Dems*.

D. The Trial Court Mandating Notice-and-Cure Procedures Improperly Usurps the Province of the General Assembly.

In *Pa. Dems.*, the Supreme Court refused to order boards of elections to provide notice-and-cure procedures that were totally absent from the Election Code, thereby recognizing the longstanding precedent that "[t]he power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government." *Id.* at 366 (internal citations omitted). The Supreme Court clearly held that the Free and Equal Elections clause "cannot create statutory language that the General Assembly chose not to provide." *Pa. Dems*,. 238 A.3d at 372-374.

The Supreme Court's reasoning in that regard is well-founded; while construing the meaning of Election Code provisions concerning curing and the use of provisional ballots, the judiciary "may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court's] proper role under our constitutionally established tripartite form of governance." *In re Fortieth Statewide*

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Investigating Grand Jury, 197 A.3d 712, 721 (Pa. 2018). "It is not our Court's role under our tripartite system of governance to rewrite a statute once we have fulfilled our constitutional duty of judicial review; that is a function reserved to the policymaking branch." *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962) ("We are not a Supreme, or even a Superior Legislature, and we have no power to redraw the Constitution or to rewrite Legislative Acts or Charters, desirable as that sometimes would be.").

Unequivocally, "editing" a statute "would amount to judicial legislation." *State Bd. of Chiropractic Exam'rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971). A court's assumption of "the power to write legislation would upset the delicate balance in our tripartite system of government." *Pap's A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), rev'd on other grounds, 529 U.S. 277 (2000). Courts cannot take unilateral action to rewrite the law, as that would overstep the bounds of their authority. *See Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016). As the Supreme Court explained, the court may not "rewrite a statute in order to supply terms which are not present therein," as such conduct would be impermissible "judicial legislation". *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020). In other words, courts are strictly prohibited from amending statutory language and must instead read the statute as written by the General Assembly."

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Matter of Nomination Papers of Mlinarich, 266 A.3d 1189, 1201 (Pa. Commw. 2021) (citing *Holland v. Marcy*, 883 A.2d 449, 456-57 (Pa. 2005).

In this regard, the Trial Court Notice and Cure scheme usurps the General Assembly's constitutional primacy over "ballot and election laws." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914); *McLinko v. Dep't of State*, 279 A.3d 539, 543 (Pa. 2020) ("[T]he power to regulate elections . . . has been exercised by the General Assembly since the foundation of the government."); *Pa. Democratic Party*, 238 A.3d at 374 ("While the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature.").

In granting Appellees' motion for summary judgment, the Trial Court improperly weighed in on the political policy judgments regarding the administration of elections – which falls solely within the province of the Board and General Assembly. In order to reach its finding that the Board's policy constitutes a procedural due process violation, the Trial Court had to bypass multiple provisions of the Election Code. For example, the Trial Court's evisceration of the pre-canvass provisions of the Election Code is clear judicial revision of the Election Code. The pre-canvass is defined as "the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the

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ballots." *See* 25 P.S. §§ 2602(q.1). The Election Code specifies the day and time when the pre canvass may begin and how it is to be conducted:

> (1.1) The county board of elections **shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting.** A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting **may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.**

25 P.S. 3146. (8) g (1.1) (emphasis added).

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Further, Director Ostrander testified that, upon receipt of a mail ballot, the Board can only record the ballot as received and secure it until election day. (Ostrander Deposition Transcript, at 150:24-151:4). She further testified that the pre-canvass inspection of mail ballots **cannot** begin until 7:00 a.m. on Election Day, and the results of the pre-canvass <u>cannot be disclosed prior to the close of the polls</u>. (Ostrander Deposition Transcript, 184:11-16; 156:19-157:3).

The Trial Court forces the Board to adopt a notice-and-cure scheme by effectuating a change to the unambiguous requirements of 25 P.S. 3146.8(g)(1.1). Pursuant to the Order, the Board must now **inspect mail ballots <u>prior</u> to 7:00 a.m. on election day and disclose those results** to the voter via the SURE Instruction prior to the close of the polls, such that the voter may submit a provisional ballot to

cure their mail ballot's defect. The Trial Court clearly is out of bounds in the relief it has ordered.

Furthermore, voters who both "receive and vote" via mail ballots "shall not be eligible to vote at a polling place on election day." 25 P.S. §§ 3146.6(b)(1); 3150.16(b)(1). To ensure such voters do not vote at the polling place, "[t]he district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place." 25 P.S. §§ 3146.6(b)(1); 3150.16(b)(1). The Trial Court holding renders this provision a nullity because it requires the poll books to show the elector who received and submitted a mail ballot as eligible to vote. Again, the Trial Court overstepped its bounds.

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If allowed to stand, the Court's decision reduces Pennsylvania's constitutional separation of powers to precatory musings. *See* Pa. Const. art. II, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly."); *id.* art. IV, § 15 (recognizing the Governor's veto power). The General Assembly's primacy and power to establish the Commonwealth's ballot and election laws would be completely neutered if a court could impose via judicial fiat a new election regime, rewriting provisions of Pennsylvania's Election Code at will, and ignoring the precedential decisions of this Court and longstanding prohibitions on judicial

legislation. Instituting the Trial Court's preferred notice-and-cure procedure which not only has no foundation in the Election Code but is expressly contradicted by key provisions therein strips the General Assembly of its powers under each of these fundamental constitutional clauses. The Trial Court Opinion cannot stand and should be reversed.

E. The Trial Court's Order Improperly Constitutionalizes and Mandates Compliance with the Secretary's SURE Instruction.

Consistent with the Board's obligations under the Election Code, and in order to ensure that the poll books are accurate, the Board was required to enter into SURE (a) whether a voter was sent a mail ballot, and (b) whether that voter's ballot was received by the county board of elections. 25 Pa. C.S.A. § 1222; *see also* Marks Dep., p. 35; Ostrander Dep., pp. 204-205. **That is all a county board of elections is required to do**. Indeed, upon receipt of a mail ballot, all a board can do until the pre-canvass is enter receipt of the mail ballot into the SURE system and lock the mail ballot up. *See* 25 P.S. § 3146.8. Of course, that is exactly what the Policy mandated, and what the Board did.

The Trial Court sidesteps the Legislature by using the SURE Instruction to impose notice-and-cure procedures in Washington County. Not only is this usurpation in direct contravention of the Election Code, it also does not provide grounds for the Trial Court's recognition of a protectable interest for procedural due process purposes as discussed further in section B, *supra*. The county boards of

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elections alone, and not the Secretary, have jurisdiction over the conduct and manner of elections.

Contrary to *Pa. Dems.*, the Secretary has improperly coopted the SURE System to provided notice to voters that they may have submitted and can cure defective mail ballots by voting provisionally. However, "the Secretary has no authority to definitively interpret provisions of the Election Code," *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020), much less to override the Pennsylvania Supreme Court's holding in *Pa. Dems*.

The SURE Instruction, therefore, has no legal impact and is not binding on the Board—as the Assistant Secretary Marks admitted in this case. *See* Marks Dep., pp. 14-15 (acknowledging any guidance issued to boards by Secretary "does not have the force and effect of law"); *See Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Mar. 23, 2023) (Ceisler, J.) (guidance issued by the Secretary of the Commonwealth is not binding on county boards of elections) (attached as **Exhibit 3**).[9] In fact, Secretary Marks referred to the SURE Instruction

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[9] *Accord RNC v. Schmidt*, Ex. 3 at 20 ("not[ing]" that the Secretary's "duties and responsibilities" under the Election Code "are limited"); *see also* Marks Dep., pp. 13-14 (acknowledging Boards and the Secretary "have their separate scope[s] of authority [as] outlined in the Pennsylvania Election Code," and stressing that responsibility of handling and processing mail ballots, as well as whether to permit curing, lies with the Boards). Moreover, "the Secretary has no authority to definitively interpret the provisions of the Election Code." *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1078 n.6 (Pa. 2020). In fact, the Secretary has *admitted* to lacking authority to direct county boards in their administration of elections, to direct county boards to

as non-authoritative and akin to a user manual. **CITE.** Hence, the Board is not bound by the SURE Instruction or required to follow it.

Despite this, the Trial Court orders, upon receipt of a defective ballot, that the Board had a legal obligation to select certain codes in the SURE system as set forth in the SURE Instruction that would trigger the automatic notification to the voter. *See* Opinion at 27 (requiring the Board to "choose the most appropriate selection in the SURE system"). In doing so, the Trial Court bypasses the legislative process and mandates compliance with changes the Secretary made to the SURE system via the SURE Instruction that, on their face, are designed to provide for notice and curing of defective amil ballots. That is legally erroneous.

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The SURE Instruction is also in direct contravention of the pre-canvass provisions of the Election Code in two respects: (1) it requires the boards to conduct an "inspection" of a mail ballot prior to the pre-canvass and (2) it requires the boards to disclose the findings of that "inspection" prior to the close of the polls on election day. *See* 25 P.S. §§ 2602(q.1), 31468(g)(1.1). In that regard, the SURE Instruction

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follow any guidance from the Secretary, or even to direct county boards to comply with a court order. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Aug. 19, 2022) (acknowledging Secretary "does not have the authority to direct the Boards to comply with [a court order]"); Pa. House of Representatives, State Gov't Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State's Election Guidance* (Jan. 21, 2021), at pp. 23-25 (previous Secretary acknowledging that a Secretary's guidance is not directory), available at https://tinyurl.com/4wxjvd4c.

is not only not controlling, but *void ab initio* because it mandates violating the Election Code and inherently exceeds the scope of the Secretary's authority. *See, e.g.*, *Hempfield School Dist. v. Election Bd. of Lancaster County*, 574 A.2d 1190, 1191 (Pa. Commw. 1990) ("It is a priori that a governmental body such as an election board has only those powers expressly granted to it by the legislature.").

As voters have no right to notice of and the right to cure a defective mail ballot, and given that such notification is a violation of the pre-canvass and that county boards cannot be required to adopt notice-and-cure procedures, any finding by the Trial Court that a voter is nonetheless entitled to be notified of fatal defects in a mail ballot is simply wrong. The SURE Instruction informs county boards of new codes which the county boards "may" use when receiving and logging the return of mail-in ballots. Ostrander Dep., Ex. 1; Marks Dep., pp. 13-14, 39-40. Therefore, the Secretary's SURE Instruction cannot oblige county boards to provide notice or an opportunity to cure where no such obligation exists. *See* Marks Dep., pp. 13-14. Such an action would exceed the Secretary's and the Department's authorities, while at the same time undermining the Board's sole authority to determine how it will conduct elections. But, that is what the Trial Court Order does. Accordingly, it should be reversed.

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IX. Conclusion

Based on the foregoing, Appellants respectfully request that this Court reverse the Order of the Trial Court. The Washington County Board of Elections' Policy for the 2024 Primary Election was based on the clear mandates of the Pennsylvania Election Code and controlling precedent of the Pennsylvania Supreme Court and did not violate the Pennsylvania Constitution. Accordingly, the Trial Court's Order and grant of summary judgment was erroneous and should be reversed.

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September 10, 2024

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 127

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

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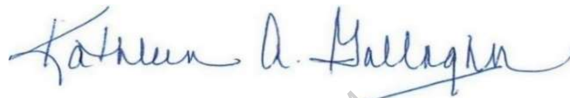

Dated: September 10, 2024

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 2135

I hereby certify that this Brief, which is 11,752 words in length, does not exceed 14,000 words, and is therefore in compliance with Pennsylvania Rule of Appellate Procedure 2135 regarding the length of briefs.

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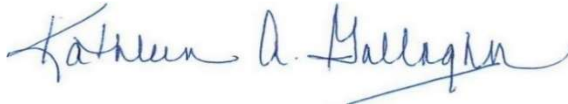

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the ***BRIEF OF APPELLANTS REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN PARTY OF PENNSYLVANIA*** was served via PACFile, this 10th day of September 2024, on the following counsel of record:

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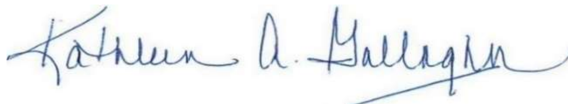

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