

IN THE SUPREME COURT OF PENNSYLVANIA

108 MM 2024

**REPUBLICAN NATIONAL COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,**

Petitioners,

v.

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

Respondents.

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

heads; it claims, for instance, that a county clerk who is handed a ballot by a voter missing a declaration signature *is precluded from pointing out the error to be remedied on the spot*. See Hrg. Tr. at 127-29, *RNC v. Chapman*, 447 MD 2022 (Pa. Cmwlth. Sept. 22, 2022), Supp. App. 7-9.²

* * *

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

I. Provisional Voting in Pennsylvania

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

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

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

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

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

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

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

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

II. “Notice and Cure”

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

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

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

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

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

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

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

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

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

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

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

III. Mail Ballot Status Codes in the SURE System

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

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

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

To facilitate the effective administration of elections, the Secretary worked closely with the county boards of elections to develop SURE codes that reflect the various reasons why a county board would not count a mail ballot, and to draft the associated email templates received by voters. *See* A96-98; Marks Dep. Tr. at 34:12-35:2, 36:21-37:2, Supp. App. 113.⁵

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

ARGUMENT

I. The Application Seeks to Abuse Judicial Process

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

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

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

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

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

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

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

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

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

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

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

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

II. The Secretary Has Not “Imposed Curing”

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

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

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

A. SURE Codes Are an Optional Recordkeeping Mechanism

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

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

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

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

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

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

B. Provisional Voting is Not “Curing”

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

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

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

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

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

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

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

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

III. The Application’s Challenge to Counties’ “Notice and Cure” Policies is Meritless

A. The Application Does Not Present Necessary Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As used in Election Code, pre-canvass means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 922-23 (cleaned up).

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

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

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

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

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

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

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

CONCLUSION

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

September 20, 2024

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CERTIFICATE OF COMPLIANCE

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

Dated: September 20, 2024

/s/ Jacob B. Boyer

Jacob B. Boyer

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

Dated: September 20, 2024

/s/ Jacob B. Boyer

Jacob B. Boyer

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :
National Republican Senatorial Committee; :
National Republican Congressional :
Committee; Republican Party of :
Pennsylvania; David Ball; James D. Bee; :
Debra A. Biro; Jesse D. Daniel; :
Gwendolyn Mae Deluca; Ross M. Farber; :
Connor R. Gallagher; Lynn Marie Kalcevic; :
Linda S. Kozlovich; William P. Kozlovich; :
Vallerie Siciliano-Biancaniello; :
S. Michael Streib, :
Petitioners :

v.

No. 447 MD 2022

Leigh M. Chapman, in her official capacity :
as Acting Secretary of the Commonwealth; :
Jessica Mathis, in her official capacity as :
Director of the Pennsylvania Bureau of :
Election Services and Notaries; :
Adams County Board of Elections; :
Allegheny County Board of Elections; :
Armstrong County Board of Elections; :
Beaver County Board of Elections; :
Bedford County Board of Elections; :
Berks County Board of Elections; :
Blair County Board of Elections; :
Bradford County Board of Elections; :
Bucks County Board of Elections; :
Butler County Board of Elections; :
Cambria County Board of Elections; :
Cameron County Board of Elections; :
Carbon County Board of Elections; :
Centre County Board of Elections; :
Chester County Board of Elections; :
Clarion County Board of Elections; :
Clearfield County Board of Elections; :
Clinton County Board of Elections; :
Columbia County Board of Elections; :
Crawford County Board of Elections; :
Cumberland County Board of Elections; :
Dauphin County Board of Elections; :
Delaware County Board of Elections; :
Elk County Board of Elections; :
Erie County Board of Elections; :
Fayette County Board of Elections; :
Forest County Board of Elections; :
Franklin County Board of Elections; :
Fulton County Board of Elections; :
Greene County Board of Elections; :

1 Huntingdon County Board of Elections; :
 Indiana County Board of Elections; :
 2 Jefferson County Board of Elections; :
 Juniata County Board of Elections; :
 3 Lackawanna County Board of Elections; :
 Lancaster County Board of Elections; :
 4 Lawrence County Board of Elections; :
 Lebanon County Board of Elections; :
 5 Lehigh County Board of Elections; :
 Luzerne County Board of Elections; :
 6 Lycoming County Board of Elections; :
 McKean County Board of Elections; :
 7 Mercer County Board of Elections; :
 Mifflin County Board of Elections; :
 8 Monroe County Board of Elections; :
 Montgomery County Board of Elections; :
 9 Montour County Board of Elections; :
 Northampton County Board of Elections; :
 10 Northumberland County Board of Elections; :
 Perry County Board of Elections; :
 11 Philadelphia County Board of Elections; :
 Pike County Board of Elections; :
 12 Potter County Board of Elections; :
 Schuylkill County Board of Elections; :
 13 Snyder County Board of Elections; :
 Somerset County Board of Elections; :
 14 Sullivan County Board of Elections; :
 Susquehanna County Board of Elections; :
 15 Tioga County Board of Elections; :
 Union County Board of Elections; :
 16 Venango County Board of Elections; :
 Warren County Board of Elections; :
 17 Wayne County Board of Elections; :
 Westmoreland County Board of Elections; :
 18 Wyoming County Board of Elections; and :
 York County Board of Elections; :
 19 Respondents :

20
21

22 TRANSCRIPT OF PROCEEDINGS

23 Before: THE HONORABLE ELLEN CEISLER, Judge
 24 Date: September 22, 2022, 10:03 a.m.
 25 Place: Proceedings held via videoconference

1 APPEARANCES:

2 Kathleen A. Gallagher, Esquire
3 Thomas W. King, III, Esquire
4 For - Petitioners

5 Robert A. Wiygul, Esquire
6 For - Leigh M. Chapman, in her official
7 capacity as Acting Secretary of the
8 Commonwealth; and Jessica Mathis, in her
9 official capacity as Director of the
10 Pennsylvania Bureau of Election Services and
11 Notaries, Respondents

12 George M. Janocsko, Esquire
13 Lisa G. Michel, Esquire
14 For - Allegheny County Board of Elections,
15 Respondent

16 Cody L. Kauffman, Esquire
17 For - Berks County Board of Elections,
18 Respondent

19 Anna S. Jewart, Esquire
20 For - Bedford County Board of Elections,
21 Centre County Board of Elections, Columbia
22 County Board of Elections, Dauphin County Board
23 of Elections, Fayette County Board of
24 Elections, Jefferson County Board of Elections,
25 Huntingdon County Board of Elections, Indiana
County Board of Elections, Lawrence County
Board of Elections, Lebanon County Board of
Elections, Northumberland County Board of
Elections, Venango County Board of Elections,
and York County Board of Elections, Respondents

Amy M. Fitzpatrick, Esquire
Daniel D. Grieser, Esquire
For - Bucks County Board of Elections,
Respondent

Faith A. Mattox-Baldini, Esquire
Nicholas J. Stevens, Esquire
For - Chester County Board of Elections,
Respondent

Nicholas M. Centrella, Jr., Esquire
For - Delaware County Board of Elections,
Respondent

1 APPEARANCES (cont'd):

2 Catharine M. Roseberry, Esquire
3 For - Lehigh County Board of Elections,
4 Respondent

5 Joseph M. Cosgrove, Esquire
6 For - Luzerne County Board of Elections,
7 Respondent

8 Maureen E. Herron, Esquire
9 For - Montgomery County Board of Elections,
10 Respondent

11 Michael J. Vargo, Esquire
12 For - Northampton County Board of Elections,
13 Respondent

14 Benjamin H. Field, Esquire
15 For - Philadelphia County Board of Elections,
16 Respondent

17 Adam C. Bonin, Esquire
18 Alexander F. Atkins, Esquire (pro hac vice)
19 Daniela Lorenzo, Esquire (pro hac vice)
20 Uzoma N. Nkwonta, Esquire (pro hac vice)
21 For - Democratic Senatorial Campaign Committee
22 and Democratic Congressional Campaign
23 Committee, Possible Intervenors-Respondents

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

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

26 ALSO PRESENT:

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

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

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

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

15 Do you want to, Ms. Gallagher, chime in on number
16 3, the injunction would -- would restore their status quo?
17 You've heard a lot of arguments that it would cause great
18 disruption in different counties.

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

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

1 out; your ballot will be counted.

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

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

8 MS. GALLAGHER: Right.

9 THE COURT: All right.

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

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

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

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

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

9 MS. GALLAGHER: Your Honor --

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

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

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

17 MS. GALLAGHER: That's different.

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

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

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

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

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

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

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

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

1 benefit? That's the essence of this litigation.

2 MR. LEVINE: Your Honor --

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

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

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

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

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

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

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

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

13 THE COURT: All right. So --

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

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

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, POWER INTERFAITH,
MAKE THE ROAD PENNSYLVANIA,
ONEPA ACTIVISTS UNITED, NEW
PA PROJECT EDUCATION FUND,
CASA SAN JOSÉ, PITTSBURGH
UNITED, LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, AND
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD
OF ELECTIONS, AND ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL
COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,
Intervenors.

Case No. 283 MD 2024
Original Jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: September 19, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

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

/s/ Kathleen A. Gallagher

Counsel for Republican Intervenors

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CERTIFICATE OF COMPLIANCE

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

/s/ Kathleen A. Gallagher

Counsel for Republican Intervenors

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

- - -

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

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

BEFORE THE HONOFABLE TIMOTHY J. SAVAGE

APPEARANCES:

FOR THE DILLION MCCANDLESS KING COULTER &
PLAINTIFFS: GRAHAM LLP
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Proceedings taken stenographically and prepared utilizing
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Witness Direct Cross Redirect Recross

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1 THE WITNESS: If you are.

2 THE COURT: Are you okay with it on?

3 THE WITNESS: I am.

4 THE COURT: All right, fine.

5 DIRECT EXAMINATION

6 BY MS. HANGLEY:

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

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

10 Q. And does that position involve election responsibilities?

11 A. Yes, it does.

12 Q. Broadly, what are those?

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

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

17 BY MS. HANGLEY:

18 Q. How long have you had that role?

19 A. Approximately three years.

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

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

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

1 in past elections?

2 A. When ballots were received into voter services, either --
3 well, in the past by mail, they would be reviewed by county
4 voter services staff for general completeness of the
5 declarations page.

6 And in the cases where ballots were observed to be
7 potentially deficient in some way with regard to the
8 declarations, the ballot was returned to the voter by mail.

9 Q. And what would the voter do with that ballot?

10 A. They were provided instructions as to what their options
11 were to fill in the deficiency that was identified on the
12 exterior envelope or that they could vote provisionally.

13 Q. And do you have any reason to believe one way or the other
14 whether the parties, political parties in Montgomery County,
15 were aware of this practice?

16 A. I believe they were.

17 Q. And what's the basis for that?

18 A. That this has been a practice, like I said, years leading
19 up to this election. And it's my understanding that both
20 parties have, over the years, requested information along these
21 lines with regard to ballots that were set aside for
22 potentially not being able to be counted.

23 Q. And by information along these lines, do you mean the list
24 of ballots set aside?

25 A. Correct.

1 Q. And in this election, in the November election, did the
2 Republican party make that request to you?

3 A. They did.

4 Q. Do you recall approximately when that was?

5 A. Some day last week. I apologize on the exact date.

6 Q. Okay. Was it before Election Day?

7 A. It was before Election Day, yeah.

8 Q. And what did you do in response?

9 A. We supplied the list of voters whose ballots fell into
10 this category to both parties.

11 Q. And what's your understanding of why the parties -- what
12 the parties did with that information?

13 A. I understand parties reached out. I don't know exactly
14 how they handled the list or in what manners they reached out,
15 but they were contacting voters to let them know of the
16 deficiency potentially in their ballot and that they can come
17 into the county office building to correct it or that they
18 could vote provisional.

19 Q. That was going to be my next question.

20 For every voter who gets this kind of communication,
21 either from the county or from a party, what are the options
22 that a voter has if they've been notified that there's
23 something wrong with their ballot?

24 A. Well, I can speak to the communication from the county
25 that we made directly to voters. And that is that they can

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

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

No. _____ MD 2022

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

Filed on behalf of Petitioners

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

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

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

Respondents.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, *et al.*,

No. _____ MD 2022

Petitioners,

v.

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

Respondents.

NOTICE TO PLEAD

To Respondents:

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

Dated: September 1, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Russell D. Giancola

Gallagher Giancola LLC

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p style="text-align: center;">Respondents.</p>	<p>No. _____ MD 2022</p>
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**PETITION FOR REVIEW
DIRECTED TO COURT'S ORIGINAL JURISDICTION
SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

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

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

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

4. The Supreme Court “express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.” *Id.*

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

PARTIES

A. Republican Committees

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

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

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

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

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

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

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

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

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

B. Voter Petitioners

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Respondents

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

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

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

FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

46. The Supreme Court unanimously agreed. It held that “[w]hile the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature.” *Id.* It further noted that “although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the ‘notice and opportunity to cure’ procedure sought by the Petitioner.” *Id.*

47. Importantly, the Supreme Court further agreed that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk [of a voter having his or her ballot rejected due to minor errors] is one best suited for the Legislature.” *Id.* It reasoned that the Legislature was best positioned to resolve the “open policy questions” attendant with a notice and opportunity to cure procedure, including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.*

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

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

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

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

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

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

53. Governor Wolf vetoed House Bill 1300.

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

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

How do I know if my ballot was accepted or counted?

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

Pennsylvania Department of State, *Mail and Absentee Ballot*, at

<https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>

(emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;
- Provide notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as “Naked Ballots”); and
- Provide the names of all voters whose Naked Ballots are discovered prior to 8:00 p.m. on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT I

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

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

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

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

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

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

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

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

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

COUNT II

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

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

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

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

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

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

COUNT III

INJUNCTION PROHIBITING BOARDS FROM DEVELOPING OR IMPLEMENTING CURE PROCEDURES

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

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

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

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

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

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

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

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

Respectfully submitted,

Dated: September 1, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

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tking@dmkcg.com

tbreth@dmkcg.com

Counsel for Petitioners

EXHIBIT A

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

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

Below is a summary of our “curing process”

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

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

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

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



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



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



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



RETRIEVEDFROMDEMOCRACYNET.COM

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

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

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

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

PLEASE CONTACT THE BUCKS COUNTY BOARD OF
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YOU ARE UNABLE TO CORRECT THIS YOU MAY
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PLACE.

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

EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

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

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

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

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

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

Hi Sarah,

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

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

Good Evening Ladies

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

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

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

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

One Voter in particular has been calling quite distressed about how to proceed, can you help us?
Ballot # 110832073 [REDACTED]

Thank you,

Sarah Batipps

Sarah Batipps, MSS

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



Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, forwarding, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

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

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

EXHIBIT C

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Presidential General Election

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

1 DAYS
20 HRS **45** MINS

Election Calendar

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

11/ 3/2020
GENERAL ELECTION

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

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

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

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

[Read more](#)

Cancelled Ballot Notification Information

[Share on Facebook](#) | [Print](#)

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

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

Voters whose ballots have been cancelled can vote by provisional ballot on Election Day; alternatively they may request a replacement ballot at a satellite election office through 3:00 PM on Election Day.

Información sobre el Aviso de Boleta Cancelada

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

- ✓ CANCELACIÓN-FAJTA DE FIRMA: la boleta del votante se envió sin una firma en el sobre de declaración.
- ✓ CANCELACIÓN-VOTO CANCELADO: se determinó, sin abrir el sobre de declaración, que la boleta del votante no contenía el sobre secreto.
- ✓ CANCELACIÓN-IMPOSIBILIDAD DE ENTREGA: USPS devolvió la boleta del votante a la Junta Electoral del Condado.

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

[Tweet](#)

EXHIBIT D

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

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

Kind Regards,

Pam

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

Notice: This confidential message/attachment contains information for a specific individual(s) and purpose. Any inappropriate use, distribution, or copying is prohibited. If received in error, please notify the sender and immediately delete the message. The Mifflin County Department of Elections and Voter Registration cannot provide legal, tax, or accounting advice. All candidates for public office should solicit advice from a licensed professional in the appropriate field in advance of statutory deadlines and before filing documents with this office. Filers are responsible for ensuring the correctness and completeness of all documents; the Mifflin County Department of Elections and Voter Registration is not responsible for errors and omissions.

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

EXTERNAL EMAIL: Please use caution when opening attachments and links.

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

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

EXHIBIT E

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

RUTHANN BAUSCH, MARCIA DAY
DONDIEGO, JUDITH REED, RHODA
EMEFA AMEDEKU, DANIEL
STROHLER, SHARON STROHLER,
BERNARD BOAKYE BOATENG,
LORI RIEKER and LISA DANNER,

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF
ELECTIONS, NORTHAMPTON
COUNTY BOARD OF ELECTIONS
and LEIGH M. CHAPMAN,
in her capacity as Secretary of the
Commonwealth of Pennsylvania

Defendants.

JURY TRIAL DEMANDED

Civ. No. 5:22-cv-02111

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

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

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

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

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

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

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

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

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

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

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

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

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

- a. During the pre-canvass which begins on or after 7 a.m. on Election Day, the County shall provide the names of all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters; and
- b. Explore changing the color of the secrecy envelope to something more conspicuous than white, so that the secrecy envelope stands out to the voter and is easily discernable from other materials provided to them with their mail-in ballot.

Date: 6/15/22

Matthew Mobilio

Matthew Mobilio, Esquire
Attorney for Plaintiff

Date: 6/15/22

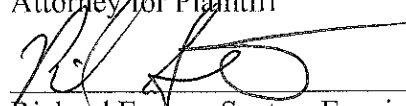

Richard Eugene Santee, Esquire
Assistant Solicitor, Office of the Solicitor
Attorney for Northampton County
Board of Elections

EXHIBIT F

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

RUTHANN BAUSCH, MARCIA DAY
DONDieGO, JUDITH REED, RHODA
EMEFA AMEDEKU, DANIEL
STROHLER, SHARON STROHLER,
BERNARD BOAKYE BOATENG,
LORI RIEKER and LISA DANNER,

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF
ELECTIONS, NORTHAMPTON
COUNTY BOARD OF ELECTIONS
and LEIGH M. CHAPMAN,
in her capacity as Secretary of the
Commonwealth of Pennsylvania

Defendants.

JURY TRIAL DEMANDED

Civ. No. 5:22-cv-02111

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

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

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

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

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

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

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

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

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

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

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

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

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

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


- a. During the pre-canvass, which begins on or after 7:00 am on Election Day, the Office shall notify all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day and/or provide the names of such voters to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the voters can be notified;
- b. Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;
- c. Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election; and

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

Date: June 15, 2022

By: 
Matthew Mobilio, Esquire
Attorney for Plaintiffs

Date: June 15, 2022

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

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EXHIBIT G

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

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

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

Sent via the paelectiondirectors@gaggle.email email group by
jcbyers@franklincountypa.gov - [reply to sender](#)

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

2024 MAY -7 AM 10:18

PROthonotary's
OFFICE - BUTLER CO.
ENTERED & FILED

FAITH GENSER and FRANK MATIS,

CIVIL DIVISION

Petitioners,

No. 24-40116

v.

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

BUTLER COUNTY BOARD OF
ELECTIONS,

Respondent.

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

Counsel of Record for this Party

Kathleen A. Gallagher (PA #37950)

kag@gallagherlawllc.com

Brian M. Adrian (PA #81461)

bma@gallagherlawllc.com

THE GALLAGHER FIRM, LLC

436 Seventh Avenue, 31st Floor

Pittsburgh, PA 15219

412.308.5512 (Phone)

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E. Stewart Crosland

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Thomas E. Breth (PA #66350)

tbreth@dmkcg.com

DILLON, McCANDLESS, KING,

COULTER & GRAHAM, LLP

128 W. Cunningham Street

Butler, PA 16001

724.283.2200 (Phone)

* *Pro hac vice application forthcoming*

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

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

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

Proposed Intervenor-Respondents, the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”), by and through their undersigned counsel, submit this Brief in Support of their Motion to Dismiss¹ Petitioners Faith Genser (“Petitioner Genser”) and Frank Matis’ (“Petitioner Matis”) (hereinafter collectively referred to as the “Petitioners”) Petition for Review in the Nature of a Statutory Appeal (the “Petition”).

I. INTRODUCTION

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

III. LEGAL STANDARD

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

Dated: May 7, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

Dated: May 7, 2024

THE GALLAGHER FIRM, LLC


Kathleen A. Gallagher

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CERTIFICATE OF SERVICE

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

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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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Transcript of Jonathan Marks
Conducted on July 23, 2024

1	3
1 IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, 2 PENNSYLVANIA 3 -----x 4 CENTER FOR COAL FIELD JUSTICE, : 5 WASHINGTON BRANCH NAACP, : 6 BRUCE JACOBS, JEFFREY MARKS, : 7 JUNE DEVAUGHN HYTHON, ERIKA : 8 WOROBEK, SANDRA MACIOCE, : 9 KENNETH ELLIOT, and DAVID : 10 DEAN, : 11 Plaintiffs, : 12 v. : Case No. 2024-3953 13 WASHINGTON COUNTY BOARD : 14 OF ELECTIONS, : 15 Defendant. : 16 -----x 17 18 Deposition of JONATHAN MARKS 19 Harrisburg, Pennsylvania 20 Tuesday, July 23, 2024 21 10:01 a.m. 22 23 Job: 546180 24 Pages: 1 - 132 25 Transcribed by: Robert Krebs	1 A P P E A R A N C E S 2 ON BEHALF OF THE PLAINTIFF: 3 KATHLEEN A. MULLEN, ESQUIRE 4 OFFICE OF CHIEF COUNSEL DEPARTMENT OF 5 STATE 6 306 North Office Building 401 North Street 7 Harrisburg, PA 17120 8 (717) 783-0839 9 10 ON BEHALF OF THE PLAINTIFF: 11 MARTIN BLACK, ESQUIRE 12 DECHERT, LLP 13 Cira Centre, 2929 Arch Street 14 Philadelphia, PA United States of America 15 19104-2808 16 (215) 994-2222 17 18 ON BEHALF OF THE DEFENDANT: 19 KATHLEEN A. GALLAGHER, ESQUIRE 20 THE GALLAGHER FIRM, LLC 21 3100 Koppers Building 436 Seventh Avenue 22 Pittsburgh, PA 15219 23 (412) 308-5512 24 25
2	4
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 8 (717) 783-6563 9 10 11 Pursuant to Notice, before KYLAN BARRY, Notary 12 Public in and for PENNSYLVANIA. 13 14 15 16 17 18 19 20 21 22 23 24 25	1 A P P E A R A N C E S 2 ON BEHALF OF THE DEFENDANT: 3 DAVID J. BERARDINELLI, ESQUIRE 4 DEFOREST KOSCELNIK & BERARDINELLI 5 436 Seventh Avenue 30th Floor 6 Pittsburgh, PA 15219 7 (412) 227-3135 8 9 ALSO PRESENT: 10 Brad Sydorick - Videographer 11 Konly Harding -Planet Depos Tech 12 Sara-Paige Silvestro - Public interest law 13 Claudia De Palma - Public interest law 14 Mimi Mckenzie - Public Interest Law 15 Marian K. Schneider, Esquire 16 Kate Steiker-Ginzberg, Esquire 17 Witold Walczak, Esquire 18 19 20 21 22 23 24 25

5	7
1 C O N T E N T S	1 ACLU Pennsylvania for Plaintiffs.
2 EXAMINATION OF JONATHAN MARKS PAGE	2 MS. MULLEN: Kathleen Mullen, Deputy Chief
3 By Ms. Gallagher 7	3 Counsel, Pennsylvania Department of State for the
4 By Mr. Berardinelli 81	4 Witness, Deputy Secretary Marks.
5 By Mr. Black 85	5 THE VIDEOGRAPHER: The court reporter
6 By Mr. Berardinelli 113	6 today is Kylan Barry, representing Planet Depos. The
7 By Ms. Gallagher 120	7 witness will now be sworn.
8 By Mr. Black 125	8 Whereupon,
9	9 JONATHAN MARKS,
10 E X H I B I T S	10 being first duly sworn or affirmed to testify to the
11 (Retained by counsel.)	11 truth, the whole truth, and nothing but the truth,
12 MARKS DEPOSITION EXHIBIT PAGE	12 was examined and testified as follows:
13 Marks' 1 Release Notes SURE System 30	13 THE REPORTER: Thank you. We may begin.
14 Marks' 2 PA Provisional Voting 33	14 EXAMINATION BY COUNSEL FOR THE DEFENDANT
15 Guidance	15 BY MS. GALLAGHER:
16 Ostrander's 5 Email example from SURE 69	16 Q Can you state your name, please?
17 System	17 A Yes. First name is Jonathan, J-O-N-A-T-H-
18 Ostrander's 9 Meeting Invitation 75	18 A-N, last name Marks M-A-R-K-S.
19 Marks' 3 Guidance absentee 89	19 Q Mr. Marks, I'm Kathy Gallagher. And we'll
20 ballots 04/03	20 be asking you some questions today. Preliminarily,
21 Ostrander's 10 Ballot Instructions 119	21 thank you and your counsel for being available for
22	22 us. We know it was relatively short notice.
23	23 Hopefully we're not going to get -- take too long,
24	24 too long today and be to get you through and out of
25	25 here. Could you tell us, please give us some of your
6	8
1 P R O C E E D I N G S	1 educational background?
2 THE VIDEOGRAPHER: Here begins media	2 A So my educational background was actually
3 number 1 in the videotaped deposition of Jonathan	3 a adult student, I attended Ashford University
4 Marks in the matter of Center for Coalfield Justice	4 remotely in Iowa for two years. My work history
5 et al, v. Washington County Board of Elections in the	5 since February of 2019, I've been Deputy Secretary
6 Court of Common Pleas, Washington County,	6 for Elections and Commissions. Prior to that I was
7 Pennsylvania, case number 2024-3953.	7 the commissioner for the Bureau of Commissions
8 Today's date is July 23rd, 2024. And the	8 Elections and Legislation at the Department of State.
9 time on the video monitor is 10:11 a.m. the	9 That was from 2011 through 2019. Do you need me to
10 videographer today is Brad Sydorick, representing	10 go back further than that?
11 Planet Depos. This video deposition is taking place	11 Q I think that would do it.
12 at 333 Market Street on the 17th floor in Harrisburg,	12 A All right.
13 Pennsylvania, 17101.	13 Q And if you could tell us briefly, please,
14 Would counsel please voice identify	14 what are your duties now as Deputy Secretary of
15 themselves and state whom they represent?	15 Elections and Commissions?
16 MS. GALLAGHER: Kathleen Gallagher on	16 A So I oversee the Bureau of Elections, also
17 behalf of the Republican National Committee and for	17 the Bureau of Campaign Finance and Lobbying
18 purposes of this deposition, I'll also be asking	18 Disclosure, as well as the Bureau of notaries and
19 questions on behalf of the Republican Party of	19 legislation.
20 Pennsylvania.	20 Q And with respect to overseeing elections,
21 MR. BERARDINELLI: David Berardinelli for	21 given February, 2019, you were -- you held your
22 the Washington County Board of Elections.	22 position when Act 77 was enacted in October of that
23 MR. BLACK: And Martin Black from Dechert,	23 year. Is that correct?
24 LLP for the plaintiffs.	24 A I did, yes.
25 MS. SCHNEIDER: Marian Schneider from the	25 Q Okay. Did you have any input Deputy

<p style="text-align: right;">9</p> <p>1 Secretary with or work with the General Assembly in 2 the creation of Act 17? 3 MS. MULLEN: Objection. Go ahead. 4 A The Department of State did provide input 5 on the legislation through its legislative staff. 6 Q And could you also tell us please, what 7 you did, if anything, to prepare for today? 8 A I read a copy of the complaint and the 9 attached appendices, also reviewed some emails the 10 previously sent regarding the SURE status codes. 11 THE VIDEOGRAPHER: Sorry, I don't mean to 12 interrupt, but I did drop out of the Zoom due to 13 connection error, so I don't know if you want to go 14 off the record. 15 MS. GALLAGHER: Yeah, let's -- yeah, we 16 want to go on -- we'll wait. 17 THE VIDEOGRAPHER: All right. One minute. 18 We're going off the record. The time is 10:14. 19 (Off the record.) 20 THE VIDEOGRAPHER: We are back on the 21 record. The time is 10:16. 22 MS. GALLAGHER: Could you read back the 23 last question, please? 24 (Playback as requested.) 25 THE REPORTER: Were you able to hear that?</p>	<p style="text-align: right;">11</p> <p>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 --</p>
<p style="text-align: right;">10</p> <p>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</p>	<p style="text-align: right;">12</p> <p>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.</p>

<p>13</p> <p>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?</p> <p>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.</p> <p>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?</p> <p>12 MS. MULLEN: Objection.</p> <p>13 Q Or responsibility?</p> <p>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.</p> <p>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?</p> <p>24 MS. MULLEN: Objection to vagueness. 25 MR. BLACK: Objection to form</p>	<p>15</p> <p>1 it does not have the force and effective law. If 2 that's -- if that's your question. That's my 3 layman's understanding of it.</p> <p>4 Q Anyway, you anticipated the question, so 5 that was great. Are you familiar with the term 6 directive?</p> <p>7 A Yes.</p> <p>8 Q Could you tell us please what a directive 9 is?</p> <p>10 A A directive is something that the 11 Secretary of the Commonwealth has explicit authority 12 to issue on matters of election administration. An 13 example would be directive on the use and 14 implementation of voting systems, for example.</p> <p>15 Q With respect to mail-in ballots, what is 16 the authority of the secretary with respect to mail- 17 in ballots as -- go ahead.</p> <p>18 MS. MULLEN: Objection.</p> <p>19 Q To the ballot itself, and the envelope -- 20 declaration envelope.</p> <p>21 A Well, I -- to the ballot itself, well, 22 I'll start with the envelope. The secretary does 23 have the statutory authority to prescribe the form of 24 the balloting envelopes as well as the instructions 25 that are included with those envelopes.</p>
<p>14</p> <p>1 Q As to -- let me re-ask the question. Who 2 administers or has responsibility at the county level 3 for handling and processing a voter's mail-in ballot?</p> <p>4 A That would be the County Board of 5 Elections.</p> <p>6 Q Okay. And with respect to the term 7 curing, are you familiar with that, that term?</p> <p>8 A I am, yes.</p> <p>9 Q And what's your understanding of the term 10 curing?</p> <p>11 A My understanding of the term curing is 12 giving a voter who has made a fixable error on ballot 13 envelope, an opportunity to cure that defect before 14 election day.</p> <p>15 Q Who makes the decision as to whether or 16 not a voter gets that opportunity?</p> <p>17 A That would also be the County Board of 18 Elections.</p> <p>19 Q And as we just spoke guidance, is a 20 guidance finding, and I don't mean that in a legal 21 sense or is it -- could you describe what authority 22 guidance has from the Department of State level?</p> <p>23 MR. BLACK: Objection to form.</p> <p>24 A It is our expectation when we issue 25 guidance that counties will follow that guidance, but</p>	<p>16</p> <p>1 Q And I believe earlier you referred to 2 something commonly referred to as a secrecy envelope.</p> <p>3 A Correct.</p> <p>4 Q Is that also the design or that envelope 5 also a responsibility of Department of State?</p> <p>6 A Yes.</p> <p>7 Q With respect to what refer to as the 8 declaration envelope or the outside envelope, I 9 believe you testified that's within the secretary's 10 authority. Does that -- what does that authority 11 extend to with respect to the declaration envelope?</p> <p>12 MS. MULLEN: Objection.</p> <p>13 THE WITNESS: I'm not sure what you're 14 asking. I mean, it's a -- 15 BY MS. GALLAGHER: 16 Q Okay. Yeah, that was probably not a good 17 way to ask it. On the -- could you tell us what 18 appears on a declaration envelope?</p> <p>19 A So it's the declaration of the voter 20 essentially affirming that they're qualified to vote 21 in the election, and that they haven't cast another 22 ballot in the election. And then under that 23 affirmation or perhaps next to the affirmation, 24 depending on given county's envelope layout is an 25 area for the voter to sign affirming that information</p>

<p style="text-align: right;">17</p> <p>1 and also insert a date for when they completed that. 2 Q And is that -- is the envelope that you've 3 just discussed, the envelope that is mailed to the 4 County Board of Election? 5 A By the voter -- 6 Q Yes. 7 A -- yes. 8 Q The other one I would ask -- so we talked 9 about guidance and directive. What about a 10 regulation, what's a regulation? 11 A A regulation is essentially a -- it is 12 something that an agency has been authorized to 13 issue. And it usually accompanies a statute that for 14 the Department of State, the best example would be 15 the regulations related to the use of the Statewide 16 Uniform Registry of Electors. 17 Q When you say -- I want to get that 18 regulation related to the use, I just want to make 19 sure I use your word. What do you mean by that? 20 A Well, it's -- so -- and those regulations 21 sometimes cover not only the activities of, so in the 22 example of SURE, it's not just activities of the 23 county, but also may include activities related to 24 the -- to SURE of the department and even outside 25 entities that may be requesting information regarding</p>	<p style="text-align: right;">19</p> <p>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 canvass.</p>
<p style="text-align: right;">18</p> <p>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</p>	<p style="text-align: right;">20</p> <p>1 Q And when does the official canvass start? 2 A The official canvass of all of the votes 3 from the election starts on Friday morning, the 4 Friday after election day. 5 Q Right. 6 A So the pre-canvass and canvass of mail-in 7 ballots is distinct from the official canvass. I know 8 the term is used a lot, but -- 9 Q That's what I would -- 10 A -- they're different -- 11 Q -- trying to get -- 12 A -- distinct. 13 Q -- trying to breaking down. Could you 14 tell us what those differences are? 15 A Well, the pre-canvass and canvass of mail- 16 in ballots applies strictly to ballots cast -- 17 absentee or mail-in ballots cast by voters. The 18 official canvass is actually the process of going 19 through all of the votes cast. Those include 20 election ballots cast at a polling place on election 21 day, as well as mail-in ballots. It includes a 22 little further downstream, the actual, you know, the 23 canvass and tabulation of any military and oversea 24 civilian ballots that may have come in up to seven 25 days after the election.</p>

<p style="text-align: right;">21</p> <p>1 In the case of a -- of an absentee or 2 mail-in ballot where the voter's ID could not be 3 verified prior to election day, voters within six 4 days have an opportunity to provide a valid form of 5 ID and have those counted. So that official canvass 6 includes all of those activities. It also includes 7 reconciling all of the records of the counties during 8 the -- during the election. So it's a -- it's a long 9 tedious process to get to the end. 10 Q Are you familiar with the term provisional 11 ballot? 12 A I am, yes. 13 Q And when are provisional ballots processed 14 or canvassed? 15 A Provisional ballots are canvassed during 16 the official canvass period. 17 Q Subsequent -- upon completion of the 18 canvass process, is that what process then begins, or 19 what is the next step in the responsibility of the 20 Board of Elections? 21 A Once the official canvass has completed, 22 the next step is the process of certifying the 23 official election results. 24 Q And what does that mean? 25 A So the County Board of Elections, after it</p>	<p style="text-align: right;">23</p> <p>1 A So -- and you can see this on our website, 2 so it'll be broken down by election day votes cast 3 for candidates, votes cast by mail, as well as votes 4 cast by provisional ballot. 5 Q With respect to mail-in ballots, is there 6 a breakdown of ballots which were -- for this, we'll 7 say, counted and ballots which were not counted for a 8 potential defect or a defect? 9 MS. MULLEN: Objection. 10 A Those can be reported by the county 11 election officer. I wouldn't -- I wouldn't say 12 that's necessarily part of the certification of the 13 official results. The certification of the results 14 of the election is the certification of the vote 15 totals, so that would only include vote totals from 16 ballots that were ultimately counted, but the county 17 can report on ballots that were not counted and the 18 reason they were not counted. And the same is true 19 of, you know, whether it's mail ballots or 20 provisional ballots, the county can provide an 21 accounting of why certain ballots were not counted, 22 or the votes on certain ballots were not counted to 23 be very particular. 24 Q Thank you. I'd like to talk a little bit 25 about the SURE system. For the record, could you</p>
<p style="text-align: right;">22</p> <p>1 is -- it is done, all of the activities that we just 2 talked about, will basically provide an unofficial 3 tabulation of the votes for the election. And at 4 that point, most counties call it their first 5 signing, where they'll sign off, the board will sign 6 off on the official returns, and then that starts a 7 five-day clock within which individuals -- individual 8 voters can request recount, for example, if they -- 9 if they believe that any of the election results are 10 in error for any reason. And then once that five-day 11 clock ends, the county will sign off on the official 12 return. 13 Q And with respect to the official return, 14 so a voter in Pennsylvania, you did objection to form 15 here, can either vote at the polls on the machine, or 16 by mail-in ballot. Correct? Are they reported 17 differently or are they reported in the same manner? 18 MS. MULLEN: Objection. 19 A I'm not sure what you mean by reported. 20 Q Are the results of the election -- of any 21 election on the -- in the certification process, does 22 the totals, are they broken down by how the voter 23 cast a ballot? 24 A They are, yes. 25 Q Okay. Could you -- and how is that?</p>	<p style="text-align: right;">24</p> <p>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,</p>

<p style="text-align: right;">25</p> <p>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</p>	<p style="text-align: right;">27</p> <p>1 answer is, some of it is, not all of it. Obviously 2 the personal identifying information, like the 3 driver's license number and the partial social 4 security number are not public records. But a lot of 5 the information is public record. 6 BY MS. GALLAGHER: 7 Q And just the last part, would that -- what 8 would that include, just to get through this? 9 A It would include -- I will probably forget 10 some specific things, but it certainly can include 11 the name of the registered voter, the voter's 12 political party affiliation, their address of 13 registration. Unless for some reason they are a 14 confidential voter whose address cannot be disclosed. 15 It would include vote history showing whether they 16 voted in an election and also includes the method of 17 voting in that election. 18 Q Okay. Fair enough. 19 A Includes their precinct as well, and -- 20 Q Does it show votes being recorded for -- 21 let me strike -- let me ask it this way. With 22 respect to the upcoming general election, I'll go 23 backwards to make sure within the prior election, the 24 April, 2024 primary. I cast my mail-in ballot. It's 25 in, assume it's received by my county board,</p>
<p style="text-align: right;">26</p> <p>1 specific precinct within the county which is then 2 linked to voting district. So, you know, their 3 congressional district, their state senate district, 4 their state house district. So all of that 5 information is contained on a voter's record in the 6 SURE system. 7 Q Is registration information -- political 8 party registration information contained? 9 A Yes. Their political party registration, 10 yes. 11 Q Is the information contained in the SURE 12 system publicly available? 13 MS. MULLEN: I'm going to object to this 14 line of questioning. We're getting a little farfield 15 from the categories of information that you talked 16 about meeting for this case. So I'll let him answer 17 the question. But, you know, we've talked about time 18 limitations here, and you're going to keep wasting 19 time then. 20 MS. GALLAGHER: I understood. For 21 purposes of the record, there are allegations or 22 discussions about information gleaned from the SURE 23 system. 24 THE WITNESS: So I believe your question 25 was, is that information, public information and the</p>	<p style="text-align: right;">28</p> <p>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</p>

<p style="text-align: right;">29</p> <p>1 about to go out. When do ballots go out in 2 Pennsylvania, mail ballot? 3 A Well, the answer is it depends on the 4 individual county. So -- 5 Q Well, the earliest date that they can go 6 out. 7 MS. MULLEN: Talking about for a general 8 election? 9 MS. GALLAGHER: General election of 10 November. 11 A About 50 days. There are some exceptions. 12 Certain military and overseas civilian ballots 13 actually have to go out earlier than that. But 14 generally, it wouldn't be earlier than 50 days before 15 an election depending on when a county has all of its 16 balloting materials printed, it's -- it's going to be 17 the answer to your question about when they go out in 18 an individual county. And sometimes that can vary 19 because of things like litigation or other things 20 that may hold up the process of finalizing the 21 ballot. 22 Q Is there a date by which they have to go 23 out? 24 A There is, yes. It is the second Tuesday. 25 It's basically two weeks before election day is the</p>	<p style="text-align: right;">31</p> <p>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</p>
<p style="text-align: right;">30</p> <p>1 absolute latest that counties can begin delivering 2 mail ballots. 3 Q Okay. And I think we can go on. I'd like 4 to use the -- it would be this document. Yes. We'll 5 mark this as Marks' 1. 6 Martin, you guys gave (indiscernible) 00:32:22, 7 didn't you? 8 MS. MULLEN: That's from Ostrander? 9 MS. GALLAGHER: Excuse me. 10 MR. BLACK: No, it's fine. She just 11 remarking it Marks' 1. 12 MS. SCHNEIDER: You're remarking the 13 Ostrander case. 14 MS. GALLAGHER: I would just -- was going 15 to leave those as Ostrander just to keep it more 16 simple. 17 MS. SCHNEIDER: Okay. 18 MS. GALLAGHER: I thought it would be 19 easier. 20 MS. SCHNEIDER: Thank you. 21 (Marks' 1 was marked for identification 22 and is attached to the transcript.) 23 BY MS. GALLAGHER: 24 Q Showing you what's been marked as your 25 Exhibit 1. Could you take a look at that for us</p>	<p style="text-align: right;">32</p> <p>1 changes that we've made to the SURE system. So it is 2 developed with our election staff in concert with 3 the IT staff that is developing the changes to the 4 SURE system. But it is really designed to summarize 5 for the counties what is -- what is being changed in 6 the SURE system. 7 Q Almost a user manual, is that -- is that 8 if -- 9 A I don't know that I would call it a user 10 manual so much as it's -- it's kind of a -- trying to 11 think of a good analogy, it would be almost like a 12 product notification. So for example, if Microsoft 13 make changes to one of its products, they may issue a 14 document that summarizes those changes. That's what 15 this is. 16 Q Okay. 17 A It is sometimes accompanied with updated 18 guidance if the process has changed and the guidance 19 that it's been issued previously needs to be changed 20 as a result. 21 Q Was the March 11th, 2024 release notes, 22 were they accompanied by a guidance? 23 A It would be referenced here, and I'm not - 24 - we may have updated a job aid that goes through the 25 process of processing absentee and mail-in ballots as</p>

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

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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**

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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

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

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1 to the SURE system are the result of requests made by
2 county election officials. It also involves our own
3 staff in our division of SURE who work with our IT
4 staff to actually define and then ultimately develop
5 the systematic changes to the SURE system.
6 Q And without asking what they -- what any
7 opinions are, do you also obtain legal opinions
8 during the course of the process?
9 A If it is necessary to consult our counsel
10 about a change to the SURE system, yes.
11 Q Okay. And were legal opinions required
12 for this document?
13 MS. MULLEN: Objection.
14 Q For the -- excuse, strike that. For the
15 changes to the SURE system.
16 A I believe -- I believe we did consult with
17 our counsel. The department consulted with counsel
18 regarding the addition of the pending codes to the
19 SURE system.
20 Q Thank you. If you could turn to page 2 of
21 the document. I apologize to -- first page,
22 following information outlines the changes which will
23 be deployed after the close of business on March
24 11th, 2024. Do you agree that that's what that
25 portion of the document reads?

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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

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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

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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

<p style="text-align: right;">41</p> <p>1 correctly, but I believe you testified that when a 2 ballot's received, it's stamped, entered into the 3 SURE system, and then it's supposed to be kept 4 secure, locked for whatever -- until the pre-canvass. 5 A Correct. 6 Q Would you agree with me that the pre- 7 canvass is the inspection of ballots? 8 MS. MULLEN: Objection. 9 A I -- the pre-canvass might include the 10 inspection of ballots. 11 Q Can mailing ballots to the best of your 12 knowledge be inspected prior to the pre-canvass? 13 A I'm not aware of, I mean, I guess, it 14 depends on what you mean by the -- by inspected, but 15 I'm not aware of anything that would preclude a 16 county from looking at the outer envelope on a ballot 17 to make a determination as to, for example, whether 18 it was dated or signed. 19 Q Let me ask this question then. If the 20 ballot is not -- the declaration envelope does not 21 bear the voter's signature, can that ballot be 22 counted during the final canvass? 23 MS. MULLEN: Objection. 24 A If at the time -- if the ballot during the 25 canvass is not signed, the County Board of Elections</p>	<p style="text-align: right;">43</p> <p>1 can that ballot be counted? 2 A If at the -- if at the time of the canvass 3 the ballot does not contain a signature, then the 4 board would have to set that ballot aside. 5 Q I believe the next pending is no secrecy 6 envelope. 7 A Correct. 8 Q And if a ballot does not contain a secrecy 9 envelope, can that ballot ultimately be counted? 10 A No. 11 Q All right. At the time that a ballot is 12 received -- strike that. 13 Could you describe for us for the record, so 14 it's clear where the secrecy envelope is with respect 15 to a mail ballot 16 A Where it is when it's returned by the 17 voter? 18 Q Yes. 19 A It is enclosed inside the outer 20 declaration. 21 Q And is the ballot itself then in turn 22 inside the secrecy envelope? 23 A Yes. 24 Q Can declaration envelopes be opened or the 25 contents of the envelope determine the declaration</p>
<p style="text-align: right;">42</p> <p>1 would not be able to -- they would be required to set 2 that ballot aside because it did not contain a 3 signature of the voter. 4 Q Would this same be true as to a mail-in 5 ballot where the declaration envelope did not bear 6 the date or signature? 7 A It would, yes. 8 Q And recently, just to clear this up, has 9 the department issued a directive with respect to 10 assisting voters as to the year, the full year that 11 appears on the declaration envelope? 12 MS. MULLEN: Objection. 13 A Yes. If you're -- if you're referring to 14 our updated envelope that the secretary prescribed 15 under the statute, yes, we did update the directive 16 indicating that moving forward county should include 17 the full year in the dating area of the declaration 18 envelope. 19 Q Thank you. And as we go down, no date, 20 the next one would be no signature. If a ballot -- a 21 mail-in ballot is submitted without a signature at 22 the end of the finals canvas, can that ballot be -- 23 strike that. I apologize, it was an articulate. 24 If the mail-in ballot is received and the 25 declaration envelope does not contain a signature,</p>	<p style="text-align: right;">44</p> <p>1 envelope prior to the pre-canvass? 2 MS. MULLEN: Objection. 3 A Can they be determined, yes. 4 Q Okay. On what basis? 5 A Well, a lot of counties will use -- they 6 have a whole punch in there that will enable them, 7 you know, and it serves a couple of purposes. One 8 of, of course, is it enables the county to determine 9 whether there's a secrecy envelope inside that 10 declaration envelope. It also helps them on the back 11 end of the process to verify that they've actually 12 removed all the secrecy envelopes from the 13 declaration envelope. 14 Other counties are able to determine that 15 based on the equipment that they use to process 16 incoming mail ballots. In some cases they can 17 actually weigh the ballot to determine whether it 18 contains a secrecy envelope and the ballot inside the 19 declaration envelope. 20 Q Would you agree with me, Deputy Secretary 21 Marks that, and again, not asking for a legal 22 conclusion, but it does come out of the -- my 23 question is, practice and that comes out of the 24 election vote. When is the first time that a mail-in 25 ballot that is received can be opened?</p>

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1 MS. MULLEN: Objection.
2 **A The first time that a ballot can be**
3 **removed from its secrecy envelope, or?**
4 **A I mean, let's -- I want to be very clear.**
5 **Now, the ballot arrives in the declaration envelope.**
6 **A Right.**
7 Q When is the first time under the election
8 code, if you're aware, that that declaration envelope
9 can actually be opened?
10 **A My understanding is that the declaration**
11 **envelope cannot be opened until the pre-canvass or**
12 **the canvass of mail-in ballots.**
13 Q Would you agree with me that the opening
14 of the envelope allows the county to board to know on
15 whether or not the -- excuse me, whether or not a
16 secrecy envelope is included?
17 MR. BLACK: Objection to form.
18 **A I mean, certainly that is one way to**
19 **determine, it's not the only way, though.**
20 Q Okay. We'll get back to that. But by
21 opening it, that would be the way -- one way to
22 determine it, correct?
23 **A Correct.**
24 Q Okay. And we've agreed that a ballot that
25 does not contain a secrecy envelope or is not

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1 enclosed in a secrecy envelope to be more precise,
2 cannot at the end of the canvass be counted, correct?
3 **A Correct.**
4 Q Okay. So at the final canvass process, if
5 that -- from what I understood, if the declaration
6 envelope did not contain a signature or a date or the
7 appropriate date, which you say that, that ballot
8 cannot be counted?
9 MS. MULLEN: Objection,
10 Q Correct?
11 **A That's correct. If the -- if we're at the**
12 **end of the canvass and, you know, I'm not sure**
13 **exactly what you mean by end of canvass, but if --**
14 Q At the tabulation.
15 **A If we're making the ultimate determination**
16 **at that point, yes, that ballot cannot be counted.**
17 Q Can that termination be made any time to
18 the best of your knowledge prior to the actual board
19 decision during the final canvass process?
20 MS. MULLEN: Objection.
21 **A Can the determination whether to count the**
22 **ballot be made prior to?**
23 Q Yes.
24 **A No, not to my knowledge.**
25 Q Is there a difference between a

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

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

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1 same day, one has a signature, one does not have a
2 signature. Those ballots at that time are reviewed.
3 One is marked. Does Allegheny County have, and let's
4 say one of your codes, your code is entered pending,
5 no signature.
6 **A Right.**
7 Q All right. Okay. The other one is
8 obviously correct, let's assume it's correct, and it
9 has everything in it gets to the pre-canvass and
10 there is a -- there are secrecy envelopes. There is
11 no contact of the voter that's -- the Allegheny
12 County does not cure. Will the ballot without a
13 signature count?
14 MS. MULLEN: Objection.
15 **A If -- the ballot would not count, no.**
16 Q And that is as the result of a deficiency,
17 we'll say, or an error on the date that it was
18 submitted?
19 MS. MULLEN: Objection.
20 Q Received. Received.
21 MS. MULLEN: Objection.
22 **A Correct, yes.**
23 Q Okay. So as we go down the list, pending
24 no ID, and we agree that the voter has the chance, I
25 believe it's six days after the election, to provide

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1 ID to correct that, pending other, what would that
2 mean?
3 **A Pending other would basically capture**
4 **anything that's not -- and I can't think of a -- an**
5 **example, perhaps a ballot that came back in the mail**
6 **damage, for example, might fall into that category.**
7 **I think the first five categories capture the**
8 **overwhelming majority of errors or issues with**
9 **ballots. But pending other there is there in the**
10 **event that for some other reason that -- and the one**
11 **that comes to mind is, I'm sure you've gotten mail**
12 **before that was damaged in the process of mail**
13 **making, its way through the mail stream. So it might**
14 **include that.**
15 Q Okay. If we go to the next step, the new
16 response types are available for selection for each
17 of the following ballot labels. If you could just
18 walk us through those, please.
19 **A Absentee ballot label, mail-in ballot**
20 **label, PA bedridden veteran ballot label, PA email**
21 **bedridden veteran ballot label, email, military and**
22 **civilian overseas ballot label, email remote isolated**
23 **bedridden veteran ballot label. If it helps, I can**
24 **explain, you know --**
25 Q That would -- please.

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1 **A I mentioned military and overseas civilian**
2 **voters. They are -- there are special provisions in**
3 **the election code and also in federal law that allow**
4 **them to submit a request for a ballot electronically**
5 **and also receive balloting materials electronically.**
6 **And we do that by sending a secure email to the voter**
7 **that contains their -- basically a PDF of their**
8 **balloting materials along with instructions and an**
9 **envelope template that they can use to download the**
10 **ballot, fill it out, and return it to their county**
11 **election office. And this is just basically saying**
12 **that these -- that the response types that we've**
13 **added are available for all these types of voters, if**
14 **applicable.**
15 Q Deputy Secretary, I have a question, there
16 may be an objection to it for, let me -- try to ask
17 it more slowly giving your counsel time to object if
18 necessary. You testified earlier that you became the
19 deputy secretary in 2019 prior to the enactment of
20 Act 77. Were you in that -- in your current position
21 at the time -- strike that. Are you available or
22 familiar with the case known as Pennsylvania
23 Democratic Party versus Boockvar in 2020?
24 **A I am. If I'm not getting them mixed up,**
25 **there's a lot of litigation. So I am, I believe I**

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1 **know which one you're referring to.**
2 Q Okay.
3 **A Which I -- is that the one that resulted**
4 **in a Pennsylvania Supreme Court ruling on September**
5 **11th, 2020?**
6 Q I believe so.
7 **A Okay.**
8 Q Now I know the page numbers of that
9 opinion by now, but I don't know the date it was
10 actually entered. Do you recall, if you recall, that
11 the -- in that case there was a request by the
12 petitioners for the Court to mandate what's now
13 curing? Do you recall that?
14 **A I do recall that that was -- that was**
15 **certainly one of the issues addressed in that case.**
16 Q Do you recall what the position of the
17 secretary was in that case with respect to the issue
18 of curing?
19 MS. MULLEN: Objection again, we're going
20 outside the scope of this deposition.
21 MS. GALLAGHER: Last question.
22 **A I don't -- I don't recall exactly what the**
23 **-- what the secretary's opinion. I -- what I recall**
24 **is what ultimately the PA Supreme Court's opinion is**
25 **on the matter. And that -- that is what we've been**

<p style="text-align: right;">53</p> <p>1 operating under since then. 2 Q Okay. I'd like you to turn to page 3 of 3 Marks' 1. You can get through the rest of this 4 pretty quickly, I believe. I believe that first line 5 there, is the last response types are available in 6 the following areas with the SURE VR system. If you 7 could tell us what that -- 8 A What's in the SURE VR system? 9 Q Uh-huh. 10 A Yeah. That -- that's the statewide voter 11 registry. 12 Q Okay. So record mailings, bulk ballot 13 response. What's a bulk ballot response? 14 A It's basically a utility that counties can 15 use. So if they're using, you know, a machinery to 16 scan their ballots as they come in, they can actually 17 upload the -- those ballots recorded into the system 18 in bulk as opposed to having to scan them one at a 19 time. 20 Q Okay. And the next page, page 2, is that 21 just the availability of the various tabs on the 22 absentee and mail-in voting screen, effectively a 23 dropdown menu? 24 A Yes. 25 Q Is that what that is?</p>	<p style="text-align: right;">55</p> <p>1 the disposition of a ballot? 2 A Well, it could happen, you know, during 3 the intake where they notice something about the 4 ballot. It could happen during the pre-cavass or 5 cavass, or even after the cavass, so that the -- so 6 that the county is accurately capturing the 7 disposition of the ballot. 8 Q And again, I'm -- this is an 9 argumentative, I'm just trying to -- when you say 10 disposition, what does that mean? 11 A Well, whether it's the interim disposition 12 or final disposition of the ballot, it's basically 13 the status of the ballot. So we talked earlier about 14 ballots that weren't signed. If the county provides 15 notice and cure and wants to notify the voter that 16 that ballot is pending some action from the voter, 17 they would use the pending status. If the voter does 18 not cure that, then ultimately the county will have 19 to update the disposition to cancel no signature to 20 properly record it in the SURE system. 21 Q Fair enough. At the bottom, additionally, 22 the response type of CANC, I think that's canceled, 23 vote canceled, has been removed as a dropdown 24 selection? 25 A Correct.</p>
<p style="text-align: right;">54</p> <p>1 A Yes. 2 Q Okay. And turning to page 5, it says, by 3 current design changing the status reason from the 4 absentee mail-in voting screen ballots tab will not 5 properly update the correspondence tab on the voter 6 record. Could you tell us what that means? 7 A Yeah, I think you have to read on it will 8 -- it goes on to say if you are using the record 9 mailing screens, it is necessary for you to access 10 the response history tab to clear the previous 11 response before you can proceed to update the new 12 response type. 13 Q Could you explain for us in practical 14 terms what that means for County Board of Elections? 15 A Well, it -- it's basically telling them 16 that there's a right way to do this process. If they 17 want to clear a label response type and update it. 18 Q Okay. If you're aware, why would be there 19 -- why would there be a need to update a label 20 response type? 21 A Well, either the county initially made a 22 mistake or the county needs to update the disposition 23 of the correspondence, the ballot. 24 Q And for what reason would, if you know, 25 would a county need to update the correspondence of</p>	<p style="text-align: right;">56</p> <p>1 Q Do you know why that was removed? 2 A It was -- it was kind of a being used as a 3 catchall, so we removed it. 4 Q Okay. I'd like to go through -- look at - 5 - turn to page 6 and very quickly if we can go 6 through, I'm not going to ask you for every category, 7 but I'd just like to, so the response type where they 8 say pending, does that -- that's what's reflected in 9 the new changes, is that fair enough to say? 10 A It is, yes. 11 Q Okay. On the very first one or the second 12 pending incorrect date to be used when a county 13 offers the opportunity for voters to replace or 14 correct the submission error, and the county has 15 noticed that the voter used the wrong date, a date's 16 missing or incorrect date, and the county offers 17 curing, would this be the correct tab? 18 A Yes, they could -- 19 Q Okay. 20 A They could use that response type. 21 Q And when the county enters it under that 22 ballot scans, under that tab, then what occurs? 23 A Well, the -- so you'll see in this far 24 right column it refers to the second paragraph email 25 verbiage. So this would be the notice, the</p>

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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**

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1 earlier ultimately determine the language with input
2 from county election officials as well as other folks
3 within the department state.
4 Q Do you obtain the consent from each county
5 as to whether -- as to the language that's included?
6 MS. MULLEN: Objection.
7 **A From each individual county, no. It is a**
8 -- it's a uniform system, so we do try to, as we
9 engage with counties, reach consensus if possible
10 among the counties. But that is not possible in all
11 cases.
12 Q And who made the determination that a
13 voter whose ballot did not have the -- did not bear
14 an incorrect date, I apologize if I do -- could cast
15 a provisional ballot to cure that ballot -- to cure
16 the existing ballot?
17 MS. MULLEN: Objection.
18 **A Well, I -- again, keeping in mind I'm not**
19 a lawyer, it's my understanding that voter is
20 entitled to cast a provisional ballot if they believe
21 they're qualified to vote. And that certainly would
22 apply to somebody who may have submitted their ballot
23 to the county, but knows that that ballot has an
24 error.
25 Q So let me ask you this hypothetical, you

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1 may be able to answer, you may be not. Understanding
2 your response, I go into vote in the polls on
3 election day, I'm qualified to vote, I fill up my
4 ballot, it's busy, I walk out and I realized I didn't
5 vote for school board. I recognize I failed to vote
6 for school board. Do I have an opportunity to
7 correct that?
8 MS. MULLEN: Objection
9 **A Once you've -- once you've inserted the**
10 ballot into the -- into the scanner, no. You do have
11 an opportunity to correct that up to that point. You
12 could -- it's called spoiling the ballot. You could
13 receive a replacement ballot, but once you've
14 actually inserted that into the -- into the scanner,
15 which that goes into the secure ballot box, no.
16 Q Okay. But I just made a mistake. I mean,
17 it was an error and I've realized it. I don't get to
18 correct my error.
19 **A You do up to a certain point. That's what**
20 the ballot curing process or the ballot spoiling
21 process is for.
22 Q Okay. But at the time I hit that button
23 and confirm in the ballots process, I no longer have
24 that right. Would you agree?
25 **A At the time -- you're talking about, at**

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1 the time that you take your ballot and insert it into
2 the scanner?
3 Q I hand it over to that machine and it's
4 scanned in. I no longer have the opportunity to fix
5 an error.
6 **A Correct.**
7 Q That I recall -- know that I made --
8 **A Correct. Yeah. Up until that point**
9 though, you can spoil the ballot and receive a new
10 ballot.
11 Q If I submit a mail-in ballot, do I have
12 the right to call and find out from -- well, strike
13 that. I'd like to go to the next page. When it says
14 it would be the third block down, cancel email
15 ballot, I don't -- UND batch. What does that mean?
16 **A Undeliverable.**
17 Q Okay.
18 **A This would apply to those military and**
19 overseas civilian voters we were talking about
20 earlier. They may have had their balloting materials
21 --
22 Q Okay.
23 **A -- sent electronically.**
24 Q So it says cancel is that -- is the CANC
25 that means cancel, correct?

<p style="text-align: right;">61</p> <p>1 A Correct.</p> <p>2 Q Okay. Is that a term of art with respect</p> <p>3 to a mail ballot?</p> <p>4 A I-- cancel, I don't know that it's a term</p> <p>5 of art. It's a -- it's a term that is used within</p> <p>6 the SURE system, and it could mean rejecting a</p> <p>7 ballot. It really depends on the response type. It</p> <p>8 could also -- you could also cancel, replace for</p> <p>9 example, which isn't necessarily a rejection, but and</p> <p>10 I believe that's on the next page, cancel label,</p> <p>11 cancel replace, maybe it's not.</p> <p>12 Q Well, let's go to page 8. Maybe that'll</p> <p>13 help.</p> <p>14 A Anyway, it -- so it's not a term of art so</p> <p>15 much as it is a technical term that we've been stuck</p> <p>16 with in the SURE system for many years.</p> <p>17 Q Okay. Is it -- can a cancel ballot be</p> <p>18 counted?</p> <p>19 A It would depend on why it's been canceled.</p> <p>20 Q Why don't I ask this? Can you tell --</p> <p>21 A I mean, I think we have to distinguish</p> <p>22 here between recording things in the SURE system and</p> <p>23 the official canvass. The Board of Elections makes</p> <p>24 the determination as to whether a ballot is counted,</p> <p>25 whether that's a mail-in ballot or a provisional</p>	<p style="text-align: right;">63</p> <p>1 ballot at the time they're recording it into -- as</p> <p>2 received into the SURE system?</p> <p>3 A Well, that would mean that after the --</p> <p>4 after the pre-canvass or canvass, the county's final</p> <p>5 determination is that that ballot cannot be counted</p> <p>6 because of an incorrect date. We are telling them</p> <p>7 that is the --</p> <p>8 Q Final decision. Right.</p> <p>9 A And we're telling them that's the code</p> <p>10 that they -- that's the response type they should</p> <p>11 record in the SURE system for that ballot.</p> <p>12 Q Great. So let's look --</p> <p>13 A Whether they do that or not is up to them.</p> <p>14 Q But again, that would -- and the record</p> <p>15 will be what it is. That's the final decision as to</p> <p>16 that ballot. But if you look at the next block then,</p> <p>17 your ballot may not be counted because you did not</p> <p>18 correctly date the declaration on your return</p> <p>19 envelope -- on your ballot return envelope. If you</p> <p>20 do not have time to request a new ballot before</p> <p>21 ballot application deadline date, or if the deadline</p> <p>22 has passed, you can go to your polling place on</p> <p>23 election day and cast a provisional ballot.</p> <p>24 What I don't understand Deputy Secretary</p> <p>25 Marks is from your testimony, you've just add that</p>
<p style="text-align: right;">62</p> <p>1 ballot. That is -- the process of recording that</p> <p>2 activity in the SURE system supports that. But it's</p> <p>3 not necessarily one and the same.</p> <p>4 So, you know, if a county, for example</p> <p>5 recorded a ballot as canceled in the SURE system, but</p> <p>6 subsequently the voter was able to correct that,</p> <p>7 there's nothing that would prevent the county from</p> <p>8 updating that disposition if necessary.</p> <p>9 Q Okay. That's not a discussion but --</p> <p>10 A I just -- I just want to make sure that we</p> <p>11 understand that the process of recording these things</p> <p>12 in the SURE system and the process of determining</p> <p>13 whether a ballot is counted or not are not</p> <p>14 necessarily one and the same thing. It supports that</p> <p>15 activity, but the County Board of Elections</p> <p>16 determination is ultimately the determination that</p> <p>17 matters.</p> <p>18 Q Well, we'll get back to that, but let's</p> <p>19 look at again, cancel incorrect date on page 8 of --</p> <p>20 page 8. This cancels the ballot if it is returned to</p> <p>21 the county with an incorrect date on the ballot</p> <p>22 envelope. It goes on to say, it should only be used</p> <p>23 when the county has made a final decision as to the</p> <p>24 ballot. Let's stop there. What final decision can a</p> <p>25 -- can the county make at the -- about a mail-in</p>	<p style="text-align: right;">64</p> <p>1 canceling correct date is for a final decision on a</p> <p>2 ballot. So if a final decision has been made, how</p> <p>3 can a voter then go in and correct that decision?</p> <p>4 MS. MULLEN: Objection.</p> <p>5 A Well, if it is up -- if it is prior to</p> <p>6 8:00 p.m. on election day, it is still possible for</p> <p>7 the voter to go in and request a provisional ballot.</p> <p>8 Q Okay.</p> <p>9 A And then that determination on that</p> <p>10 provisional ballot will be made by the Board of</p> <p>11 Elections at a later time.</p> <p>12 Q So is it your testimony --</p> <p>13 A Two different ballots, I mean, it's --</p> <p>14 we're talking about the mail-in ballot and the</p> <p>15 disposition of that versus a provisional ballot that</p> <p>16 may have been cast by the same voter.</p> <p>17 Q Correct. And I'm only referring to the</p> <p>18 original, not the provisional ballot, but the final</p> <p>19 disposition of a mail-in ballot. Wouldn't you agree</p> <p>20 with me that then that final disposition as to that</p> <p>21 mail-in ballot --</p> <p>22 A Right.</p> <p>23 Q -- is being made at the time this dropdown</p> <p>24 option is corrected?</p> <p>25 MS. MULLEN: Objection.</p>

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

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

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

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

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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**

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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

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1 -- this is what a non-curing county would select. Do
2 you know, as you sit here today, the date of this
3 email, I believe from -- at the top, from the
4 Department of State, was Monday, April 15th, 2024.
5 Within that time period, was that directly prior --
6 shortly prior to the 2024 primary election?
7 **A It was. It was about eight days before**
8 **the April 23rd primary.**
9 Q Subject, your ballot has been received.
10 If you could go down to the second paragraph. Do you
11 know if Washington County had a noticed and cure
12 policy in place for the April, 2024 primary?
13 **A It is my understanding that they did not**
14 **for the April, 2024 primary.**
15 Q And it say, please know if Washington
16 County observes an issue with your ballot envelopes,
17 you may receive another email from this account with
18 additional information. Are you aware of what other
19 information the Department of State would be sending
20 to that voter, if any?
21 MS. MULLEN: Objection.
22 **A Well, the county, it says you may receive**
23 **another email from this account with additional**
24 **information.**
25 Q Right.

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1 **A So ultimately it would be the county's**
2 **decision whether they were going to update the ballot**
3 **response type, thus kicking off another email to the**
4 **voter. Or if, let's say that this is -- that**
5 **Washington County was a county that provides notice**
6 **and cure, they may actually receive communication**
7 **directly from the county about the status of their**
8 **ballot.**
9 Q I'd like you to turn your attention to
10 what we will mark -- what was previously been marked
11 as Marks' 2. And I believe that you had testified
12 this was a guidance which the department issued in
13 March -- on March 11th, with respect to provisional
14 ballot. I'd like you to turn to -- well, if you
15 could identify this document.
16 **A Yes. Just refreshing my memory. Yes.**
17 **This is Pennsylvania provisional voting guidance**
18 **issued March 11th, 2024.**
19 Q Okay. I'd like you to look at page 1 at
20 the bottom. Actually, in the middle, using
21 provisional ballots. I believe it states provisional
22 ballots are utilized when a voter believes that
23 they're eligible voter but the poll worker is unable
24 to confirm the voter's eligibility. The next
25 paragraph, voters are entitled to a provisional

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

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

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

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1 **A The ballot response types, yes.**
2 Q -- from the change in the SURE system?
3 **A Correct.**
4 Q And the date of this is, do you agree, May
5 10th, 2024?
6 **A Yes.**
7 Q And it would have been after the primary -
8 - the 2024 primary, correct?
9 **A It would have been, yes. I don't know if**
10 **the date of the meeting notice was May 10th. The**
11 **first -- this was a meeting notice. So the first**
12 **meeting was held on May 10th.**
13 Q Okay. Did you receive questions, or
14 emails, complaints with respect to the changes to the
15 SURE system and the new response type?
16 **A We did. We did receive feedback from**
17 **counties both anecdotally and then obviously in this**
18 **series of feedback sessions as well.**
19 Q Do you recall any of the feedback that you
20 received?
21 **A I'm not going to claim that I'll recall**
22 **all of it, but, you know, certainly there were --**
23 **there were concerns by a number of counties regarding**
24 **some of the wording and the emails that voters were**
25 **receiving. So we listened to them, got some feedback**

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1 from them. They were primarily concerned about
2 things that they believe might be misleading to
3 voters under certain circumstances. And they offered
4 some suggestions on how we might change that.
5 Q And in what way did these -- whoever
6 reported this believed that information might have
7 been misleading?
8 A Some counties believe that, you know, for
9 example, indicating that the voter may receive an
10 additional communication from the county as I recall,
11 they wanted sort of different message there, or
12 actually not so much different as less words, was
13 certainly one of the -- one of the concerns that was
14 raised by the counties. Other counties had some
15 specific feedback regarding the portion of the
16 message that -- well, I'd have to -- I'd have to go
17 back through to know, but it was -- a lot of it was
18 about how we were saying things in the email messages
19 and county's had suggestions for how that might be
20 changed.
21 Q With respect to the misleading, would that
22 -- information that you said was discussed, would
23 that have been, if you recall, from a non-curing
24 county who believed that the email --
25 MS. MULLEN: Let her finish.

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1 Q That's okay.
2 A Sorry.
3 Q Who may have believed that an email that
4 was sent was misleading voters?
5 A I can't recall whether it was -- whether
6 it was specifically a non-curing county. You know, I
7 think, one example that sticks out is, you know, the
8 email for record ballot returned. Ultimately what
9 counties wanted was just simply a message that says
10 your ballot has been received.
11 Q Prior to the changes in the SURE systems,
12 was that, at one time, what was -- that that was all
13 that was entered, received?
14 A I would have to go back to review to
15 recall exactly what may have been said there. But it
16 was probably similar to that. But I can't say for
17 sure exactly what it said back at that point in time.
18 Q Deputy Secretary Marks, would the
19 department maintain, or does the department maintain
20 records as to the various dropdown options or
21 recording options that were available to the county
22 since the inception of mail of Act 77?
23 A I'm sure we would have release notes for
24 any of our releases, the changes that we made to the
25 SURE system.

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1 MS. GALLAGHER: Attorney Mullen, I would
2 ask if you would mind producing those in conjunction
3 with Mr. Marks' testimony here today.
4 THE VIDEOGRAPHER: Counsel, do you mind
5 putting your --
6 MS. GALLAGHER: Oh gosh, I'm sorry.
7 THE VIDEOGRAPHER: It's okay. I can still
8 hear everything.
9 MS. MULLEN: Just put something in
10 writing.
11 MS. GALLAGHER: And we have -- for
12 purposes of the record, I made a request to counsel
13 for the state to produce all of the SURE system
14 release document since the date of enactment of Act
15 77.
16 MS. MULLEN: Do you mean with respect to -
17 -
18 MS. GALLAGHER: With respect to --
19 MS. MULLEN: -- dropdown menu?
20 MS. GALLAGHER: -- dropdown menu, yes.
21 BY MS. GALLAGHER:
22 Q Are changes going to be made to the
23 dropdown menus, do you know?
24 A It is -- it is our intent to change not
25 necessarily dropdown menus, but to change the wording

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1 in the emails based on the feedback we received from
2 counties.
3 Q Do you know when those -- do you know what
4 the -- excuse, strike that. I apologize.
5 Do you know what types of changes, as you
6 sit here today, will be made to the emails?
7 A As I said the overarching message with
8 counties, this kind of less, not more, you know, one
9 other example is sometimes it was very specific words
10 that counties didn't like and they suggested
11 different words. So for example, on the message
12 related to provisional ballots they suggested that
13 you can request a provisional ballot as opposed to
14 cast a provisional ballot.
15 Q Are you aware of litigation, which was
16 filed in Butler County as a result of voters there
17 who received one of your emails and Butler County did
18 not count it because -- did not count the provisional
19 ballot because they had a non-curing policy as to
20 secrecy envelope. Are you aware of that?
21 A I am aware that litigation was filed in
22 Butler County.
23 Q Do you know when the new information will
24 be available?
25 A No later than 45 days before the election.

<p style="text-align: right;">81</p> <p>1 MR. BLACK: Just so the record is clear, 2 so information meaning what? 3 MS. GALLAGHER: I was going to get -- 4 MR. BLACK: I'm just going to -- objection 5 there. 6 Q I was going to -- I was going to go back 7 to that. So when the new, the updated emails? 8 A Correct. 9 Q And how will those be distributed to the 10 counties, or how will the counties be made aware of 11 them? Would be another release note? 12 A It'll be -- it'll be additional release 13 notes, yes. 14 Q Okay. Does the Department of State 15 maintain or compile information with respect to 16 ballots that are canceled, and the reasons they're 17 canceled, or ballots which are rejected? 18 MS. MULLEN: Objection. 19 A Well, there's information contained in the 20 SURE system. So that is available through the SURE 21 system. 22 MS. GALLAGHER: Okay. I think I may be 23 finished. In case I find that I have something else, 24 I'll reserve the right, but I believe I'm finished. 25 EXAMINATION BY COUNSEL FOR THE DEFENDANT</p>	<p style="text-align: right;">83</p> <p>1 dropdown menu they see, the menu that's pictured on 2 page 4? 3 A Yes. This is a depiction of the dropdown 4 menu they would -- they would see for status reason. 5 Q And when they're viewing this screen, it 6 doesn't automatically show them what email will be 7 sent, correct? 8 A It does not, no. 9 Q And mine is small, but I think I counted 10 23 different options that a county could choose. 11 Right? 12 A I'm not going to disagree. I'd have to 13 count them myself, but yes, it looks like about two 14 dozen. 15 Q And I used the word options because I 16 think you used that word because this release was 17 about putting six new options for counties to choose 18 from. 19 A Right. 20 Q And assume for my counting is correct, 21 that would mean there was 17 prior? 22 A Yes. 23 Q And the county, if I understand your 24 testimony, has the discretion which of those 23 it's 25 going to use?</p>
<p style="text-align: right;">82</p> <p>1 BY MR. BERARDINELLI: 2 Q Mr. Marks, my name's David Berardinelli, 3 and I just have a couple brief follow ups. I 4 represent the Washington County Board of Elections. 5 As to the new emails that are going to be used for 6 the November general election, is it the department's 7 intent to use an email for the received ballot 8 return, like which was suggested, and I think what 9 you testified to was some of the counties wanted 10 simply your ballot has been received. Will that be 11 an option? 12 A Yes. I -- based on what, you know, came 13 out of those feedback sessions, I believe we will 14 shorten the text in that email to simply say the 15 ballot's been received and that if the voter wants 16 additional information to reach out to the county 17 election office. 18 Q Can you get out the, I'm going to call it 19 the SURE release notes if I've got the right term of 20 art. 21 A Marks' 1? 22 Q Yeah, please. 23 A Yes. 24 Q Page 4, if you don't mind. When a county 25 is inputting information into the system, is this the</p>	<p style="text-align: right;">84</p> <p>1 A Correct. 2 Q I'm jumping around a little bit, I 3 apologize. But right at the start of your 4 deposition, I think you were talking about the 5 instructions that are sent to a voter, right, mail-in 6 voter? And those instructions are ultimately sent by 7 the County Board of Elections, right? 8 A Correct. 9 Q But the Department of State is essentially 10 the author of those instructions? 11 A Yes. The department prescribes that. 12 Q And at the top of those instructions, 13 there's language that tells the voter for you -- for 14 your ballot to count, you must follow all these 15 steps. You're aware of that, right? 16 A That sounds right. If -- I'd have to see 17 a copy to know if that's verbatim, but yes, we do -- 18 we do notify voters that -- to ensure that their 19 ballot is counted, they must do certain things. 20 Q And I think you may have just answered, 21 but why do you -- why do you have that language on 22 there? 23 A Well, we want voters to know how to 24 properly complete their balloting materials to ensure 25 that there -- that they will be counted.</p>

<p style="text-align: right;">85</p> <p>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</p>	<p style="text-align: right;">87</p> <p>1 else. 2 Q Okay. At this point, the election worker 3 has seen the ballot. If the signature's missing, 4 they know that the ballot is not countable, correct? 5 A Correct. 6 Q And at that point, they go to the SURE 7 system then, or sometime later that day, to enter a 8 code to be correlated with that ballot in the SURE 9 system, correct? 10 A Correct. 11 MS. MULLEN: Just objection to the -- 12 MR. BLACK: Asking -- form. 13 MS. MULLEN: He -- he can't say what each 14 county's going to do, but -- 15 THE WITNESS: Right. Okay. It -- yeah, 16 assuming that a county -- 17 MS. MULLEN: Maybe just -- 18 THE WITNESS: -- once has a notice and 19 cure process, and wants the voter to receive a 20 particular message, they would use it. 21 BY MR. BLACK: 22 Q Well, we didn't get there yet. I'm just 23 saying if somebody's in a county, let's say they 24 don't have a notice and cure policy. 25 A Right.</p>
<p style="text-align: right;">86</p> <p>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</p>	<p style="text-align: right;">88</p> <p>1 Q But the ballot comes in, the election 2 worker sees the ballot, they can immediately see 3 whether the signature is there or not, correct? 4 A Correct. 5 Q Okay. And that ballot then has to be 6 recorded in the SURE system, preferably that day, 7 right? 8 A Correct. 9 Q And the poll worker, excuse me, the 10 election worker looks into the SURE system and looks 11 at the dropdown menu that you just preferred to with 12 23 different codes, right? 13 A Correct. 14 Q And their job is to pick the best code to 15 reflect the status of that ballot at the time? 16 MS. GALLAGHER: Objection to form. 17 MR. BERARDINELLI: Object to the form. 18 A I would think -- it will depend on the 19 county's practice. If the county does not offer 20 notice and cure, it may be the county's practice to 21 leave it in the, I can never remember this, but 22 record ballot returned status until such time that 23 they enter the final disposition of the ballot. 24 Q But if they already know that it's missing 25 a signature, then the more accurate code would be one</p>

<p style="text-align: right;">89</p> <p>1 of the codes that says signature incorrect. Is that 2 right? 3 MR. BERARDINELLI: Objection. 4 MS. GALLAGHER: Objection to form. 5 MS. MULLEN: Objection; form. 6 MR. BERARDINELLI: Sorry. 7 MS. GALAGHER: You can go ahead. 8 A I mean, if you're asking my personal 9 opinion, what I would do or what I believe is the 10 most accurate code, but it really does depend on the 11 county's practice if they offer notice and cure. If 12 they don't -- then they may not be updating the 13 disposition of the ballot at that point, they may be 14 leaving it in the record ballot returned status. 15 Q Right. And you understand that's the 16 subject and part of this litigation, correct? 17 A It is. And it's a -- it's a question of 18 law that the Court's going to answer. 19 Q Okay. 20 A And I can't answer that, so. 21 Q Let's take a look at -- let's mark an 22 exhibit -- guidance exhibit from April 3rd, 2023. Is 23 this Marks' 3, I guess? 24 A Yes. 25 (Marks' 3 was marked for identification</p>	<p style="text-align: right;">91</p> <p>1 signed or dated or is dated with a date deemed to be 2 incorrect, that ballot return envelope must be set 3 aside and the ballot not counted, correct? 4 A Correct. 5 Q And is that an accurate statement of the 6 DOS guidance? 7 A It is, yes. 8 Q Okay. The last sentence says, it is 9 important that the ballot return status is promptly 10 and accurately recorded in SURE using the specific 11 response type as to the disposition for each ballot 12 received, correct? 13 A Correct. 14 Q And that refers to the 20 -- today 23 15 codes that are in the SURE system that could be 16 attached to a ballot, right? 17 A Correct. 18 Q And it's the DOS guidance that that code 19 should be accurate, correct? 20 MR. BERARDINELLI: Objection; form. 21 MS. GALLAGHER: Objection; form. Sorry. 22 Q Is the DOS's guidance that the code should 23 be accurate or inaccurately recorded in the SURE 24 uniform system designed by the state to record -- 25 A Well, our guidance says accurately</p>
<p style="text-align: right;">90</p> <p>1 and is attached to the transcript.) 2 Q Can you tell us what this document is? 3 A Yes, it's guidance concerning examination 4 of absentee and mail-in ballot return envelopes. 5 This is guidance issued on April 3rd, 2023 to the 6 county election. 7 Q And on the -- 8 A County Boards of Elections. 9 Q And on the second page, the first sentence 10 in the background says, the Pennsylvania election 11 code describes processes that a qualified voter 12 follows to apply for, receive complete, and timely 13 return, an absentee or mail-in ballot to their County 14 Board of Election. Do you see that? 15 A I do. Yes. 16 Q And then there are various processes in 17 here which are described that the county should 18 follow under DOS guidance, correct? 19 A Correct. 20 Q Item 3 says, examination of declaration on 21 mail ballot return envelopes. Do you see that? 22 A I do. That's on page 3? 23 Q Yes, that's correct. Yes. And if you 24 look at the fourth paragraph, which starts with, if 25 the voter's declaration on the return envelope is not</p>	<p style="text-align: right;">92</p> <p>1 recorded in SURE so. 2 Q So you would agree that the counties 3 should be selecting the most accurate code, correct? 4 MR. BERARDINELLI: Objection; form. 5 MS. GALLAGHER: Objection; form. 6 A I would agree that the county should be 7 selecting the most accurate code considering the 8 county's practice as it relates to notice and cure. 9 Q Well, the codes have statements associated 10 with them that go out to the voters, correct? 11 A Correct. 12 Q And some of those statements would inform 13 the voter of the status of their ballot if it's 14 incorrectly dated or is missing the signature, 15 correct? 16 A Correct. 17 Q And some of the status codes would not 18 provide that information to the voter, correct? 19 A Correct. 20 Q And if the county selects the one that is 21 most accurate, they would be providing information to 22 the voter about the status of the ballot and that 23 it's missing a signature? 24 MS. GALLAGHER: Objection as to form. 25 MR. BERARDINELLI: Join.</p>

<p style="text-align: right;">93</p> <p>1 MS. GALLAGHER: Calls for a legal 2 conclusion. 3 A Yeah, I'm not going to be able to answer a 4 legal question, if you're asking me, certainly we 5 encourage counties to provide notice to voters about 6 the disposition of their ballots. But we are -- the 7 current status quo is what the Supreme Court ruled 8 back in 2020, that notice and cures is allowed, but 9 it's not mandatory, so. 10 Q Did the Supreme Court address, if you 11 know, you may not know, the due process claim at 12 issue in this case? Do you know? 13 MS. MULLEN: Objection. 14 MS. GALLAGHER: Objection. 15 MS. MULLEN: He's not a lawyer. 16 THE WITNESS: I don't -- yeah, I don't 17 recall that, but okay. 18 BY MR. BLACK: 19 Q Are you aware of just -- strike that. 20 Just mechanically, when the ballot comes 21 in, the election worker sees that there's no 22 signature on the ballot, they need to enter a code 23 and they look at the dropdown menu with the 23 codes. 24 Do you see that? Do you have the codes in front of 25 you, by the way?</p>	<p style="text-align: right;">95</p> <p>1 MS. GALLAGHER: Objection to form. 2 A I think it's our view that the Supreme 3 Court has ruled on this and we are trying to offer 4 county's options under that reality. And if a county 5 does not wish to notify voters and offer them an 6 opportunity to cure, there's nothing we can do to 7 mandate that. 8 Q I understand that's a -- I'm just asking a 9 simpler question. Is it okay for counties to provide 10 inaccurate information to voters? 11 MR. BERARDINELLI: Objection. 12 MS. GALLAGHER: Objection to form. 13 MS. MULLEN: Objection. 14 THE WITNESS: I -- again, I think it's 15 accurate based on the county's practice. You know, 16 and I know it sounds like semantics, but I, you know, 17 if I were a county that did not provide notice and 18 cure, I may consciously not look at the outer 19 envelopes during the intake process so that I 20 wouldn't have to deal with that. 21 But those are all options that each 22 individual county has to consider. And, you know, 23 however I feel about it is irrelevant because we 24 can't mandate that. 25 BY MR. BLACK:</p>
<p style="text-align: right;">94</p> <p>1 A Yeah, well -- 2 Q I'm sorry. 3 A I do. Just to be clear, when the county 4 receives it, they're scanning it in and it -- the 5 default, as I understand it, is record ballot return. 6 Whether the county updates the disposition to another 7 ballot response type is going to depend on the 8 county's individual practice as it relates to notice 9 and cure. 10 Q But you would agree that practice should 11 be as accurate as possible in communicating to the 12 voters? 13 MR. BERARDINELLI: Object to the form. 14 MS. MULLEN: Objection. Asked and 15 answered. 16 MR. BERARDINELLI: Three times. 17 THE WITNESS: Right. Yeah, I may agree 18 that that is what -- 19 MR. BLACK: That's all we ask for. 20 THE WITNESS: -- I would do, but as noted, 21 that is a determination for each county to do. 22 BY MR. BLACK: 23 Q So it's your view that it's up to the 24 county to determine whether or not to provide 25 accurate information or not to the voters?</p>	<p style="text-align: right;">96</p> <p>1 Q Is the -- strike that. 2 Once the canvassing is concluded and the 3 final determinations have been made with respect to 4 whether or not a mail-in ballot is going to be 5 accepted, is the county required to update the code 6 at that point? 7 MR. BERARDINELLI: Object to the form. 8 Required. 9 A It is -- it is our expectation that they - 10 and it is our guidance that they do that so that 11 we, and they have good information contained in the 12 system about the ultimate disposition of the ballot. 13 Q Let's say a ballot comes in, doesn't have 14 a signature on it and is recorded in the system just 15 simply as received. Okay. Later the ballot goes 16 through canvassing and it's determined that it cannot 17 be counted and the ballot is therefore rejected. Do 18 you understand that? 19 A Yes. 20 Q Is the county obligated at that point to 21 update the SURE code to show that the ballot's been 22 rejected and why? 23 MR. BERARDINELLI: Objection; form. 24 Obligated. 25 A It is -- it is our guidance that counties</p>

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1 do that again, so that we have good information.
2 Certainly, we and the county, I would think, want to
3 know how many ballots are being rejected and for what
4 reason because it informs voter education that we may
5 do in the future.
6 Q Does it also impact the voting records of
7 the state as to whether somebody cast a ballot in
8 that election?
9 MR. BERARDINELLI: Form.
10 MS. GALLAGHER: Objection to Form.
11 A It could impact their vote history
12 depending on whether the county credited them as
13 having voted.
14 Q Can you explain that?
15 A Well, it -- the county records vote
16 history in the SURE system. And by method if a
17 county -- if a county, and I -- I'm not aware that
18 this is occurring, but if county consciously
19 determined that a voter who submitted a ballot should
20 not receive vote history in the SURE system, it
21 wouldn't show up on their voter record.
22 Q So it would -- it would show up as a vote
23 that was received but not counted? I'm not sure what
24 would -- what would show up on the voter record.
25 A Correct. It would not be clear. I -- it

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1 would not be an accurate description of the final
2 disposition of the ballot.
3 Q And so if someone looked to see whether or
4 not the person had voted in the last election, would
5 it show that they voted or didn't vote?
6 MR. BERARDINELLI: Object to the form.
7 MS. GALLAGHER: Objection; form.
8 A It -- I think it would ultimately depend
9 on what the county does --
10 Q Right.
11 A -- in terms of vote history. But it
12 wouldn't be clear that the voter's ballot wasn't
13 counted.
14 Q So I'm just totally ignorant of this. So
15 you'll may have to walk me through it, but if the --
16 if a ballot -- mail-in ballot comes in, it's missing
17 a signature and is ultimately rejected at the
18 canvass, the original label in the SURE system
19 would've been received, but -- or recorded rather,
20 but if it was ultimately rejected, is there something
21 that would tell the voter that it was rejected --
22 MS. GALLAGHER: Object to the form.
23 MR. BERARDINELLI: Join.
24 Q -- at the end of the day, or not?
25 MS. MULLEN: Object.

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1 A I -- after the election the voter would be
2 able to determine whether their ballot was counted or
3 not. And the email notifications, I guess, that
4 would really depend on when the county ultimately
5 recorded the disposition of the ballot. But, you
6 know, I believe the voter has the right to know
7 whether their ballot was counted or not. But how the
8 county handles requests from voters on the
9 disposition of ballots is unfortunately a decision
10 that each county is entitled to make under the
11 current status of the law, as I understand it.
12 Q So if they don't update the code after the
13 canvass, SURE will have inaccurate information in it;
14 is that right?
15 MS. GALLAGHER: Objection; form.
16 MS. MULLEN: Objection.
17 MR. BERARDINELLI: Join.
18 THE WITNESS: I -- it would certainly be
19 incomplete information, and I would argue that it's
20 inaccurate. For me as an election administrator, it
21 is important to have good information and good data
22 on this stuff because it informs our decision making.
23 So I would hope that at some point the county would
24 update the final disposition to accurately reflect
25 what the final disposition of the ballot was.

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1 BY MR. BLACK:
2 Q Going back to Marks' 1, which is the
3 release note. You were asked some questions about
4 the cancel incorrect date on page 8. Do you recall
5 that?
6 A I do, yes.
7 Q The email response that would go out if
8 that code is selected, is stated in the right-hand
9 column, it starts with your mail ballot may not be
10 counted, et cetera. Do you see that?
11 A I do, yes.
12 Q It says in the second sentence that if you
13 do not have time to request a new ballot before
14 ballot application deadline, or if deadline has
15 passed, and then it says you can go cast a
16 provisional ballot. Right?
17 A Right.
18 Q Under what circumstance would someone be
19 able to request a new ballot after having already
20 sent in a mail-in ballot?
21 MR. BERARDINELLI: Objection; form.
22 A If -- so if -- so, the counties that do
23 notice and cure actually have different practices,
24 probably not a surprise to anyone in this room. In
25 some cases, the county will actually cancel the

<p style="text-align: right;">101</p> <p>1 original ballot and issue a new ballot to the voter. 2 In other cases, they're asking the voter to perfect 3 their original ballot. So we tried to capture in 4 this language, and keep in mind we are -- we're 5 trying to capture in a message that all counties have 6 to use a variety of different practices in individual 7 counties. 8 So -- but that might be a circumstance 9 under which the voter becomes aware either from the 10 county or otherwise, that something is wrong with 11 their ballot. They reach out to the -- to the County 12 Board of Elections and the county's practice is to 13 cancel that initial ballot and reissue another one. 14 And that typically happens, you know, two, three 15 weeks before election day when there's still time to 16 facilitate that. 17 Q Has it struck you at all that the U in 18 SURE uniform is not really uniform? 19 MR. BERARDINELLI: Yeah, object to the 20 form. 21 MS. MULLEN: Objection. 22 A The system is uniform. County practices 23 are not in many cases, and this is one of those 24 cases. 25 Q So the system is uniform, but it's not</p>	<p style="text-align: right;">103</p> <p>1 reason, it says. 2 A Yeah, it's, we're basically telling 3 counties in this -- in this matrix under what 4 circumstances they'd be -- they would want to select 5 this ballot response type out of the dropdown list. 6 Q And so they should select cancel incorrect 7 date if the reason in the box on page 8 next to that 8 is -- 9 MS. GALLAGHER: I'm going to -- 10 Q -- true? Is that what the guidance is 11 trying to communicate? 12 MR. BERARDINELLI: Objection. 13 MS. MULLEN: Objection. 14 MS. GALLAGHER: Objection to the form. 15 THE WITNESS: Yeah, I, I think it speaks 16 for itself. I mean, you know, we're expecting that 17 counties will select this cancellation reason if a 18 final disposition -- if they determine what the final 19 disposition of the ballot is, that is why we added 20 the pending codes. It is if a county uses notice and 21 cure, it is our -- or has a notice and cure process, 22 it is our expectation that they would be using the 23 pending codes as opposed to the cancellation codes. 24 But that may not be the case in every county, 25 depending on the county's practice.</p>
<p style="text-align: right;">102</p> <p>1 uniformly used by all the counties? 2 MR. BERARDINELLI: Objection; form. 3 MS. GALLAGHER: Objection; form. 4 MS. MULLEN: Form. 5 MS. GALLAGHER: That's more than form. 6 That's a (indiscernible) 02:10:00 right. 7 MS. MULLEN: It's a uniform 8 (indiscernible) 02:10:03 of electors, so. 9 A No, we -- again, we -- and I think it says 10 it in this release notes or the accompanying email 11 that, you know, our goal here was to provide counties 12 with options that best met their specific practices, 13 acknowledging that their practices are not uniform 14 from county to county, that doesn't necessarily mean 15 that the system isn't but we certainly designed 16 flexibility into this process based on the Supreme 17 Court's ruling in 2020 on the issue of notice and 18 cure. 19 Q So under the cancel incorrect date code 20 that we were just referring to -- 21 A Correct. 22 Q -- the guidance is in the second column; 23 is that right? 24 MR. BERARDINELLI: Object to the form. 25 Q What is the second column, business</p>	<p style="text-align: right;">104</p> <p>1 BY MR. BLACK: 2 Q And it says here that the cancellation 3 incorrect date, "It should only be used when the 4 county has made a final decision as to the ballot, or 5 it does not offer the opportunity to cure it." 6 MS. GALLAGHER: I'm going to object to the 7 form. 8 MR. BLACK: What's the objection? I just 9 read the box -- read the -- 10 MS. GALLAGHER: I don't believe it -- I 11 don't believe it says should be. 12 MR. BLACK: I read the language -- 13 MS. GALLAGHER: May I -- 14 MR. BLACK: -- in the box. Please stop 15 interrupting my questions. 16 MS. GALLAGHER: Excuse me. If I -- you 17 believe -- I don't believe it says should. 18 MR. BERARDINELLI: Why don't we just -- 19 why don't we just -- 20 MS. GALLAGHER: Right. That's what you 21 just said -- 22 MR. BERARDINELLI: Why don't we just re- 23 ask the question, Martin? 24 BY MR. BLACK: 25 Q And it says, "It should only be used when</p>

<p>105</p> <p>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</p>	<p>107</p> <p>1 in no cure counties versus cure counties? Do you 2 study that? 3 A We looked at it, I can't recall what those 4 numbers look like, no cure versus cure counties. 5 Q We've seen some data that suggests that 6 curing processes in some counties can cure up to 60, 7 65 percent of the ballots. Does that seem correct? 8 A I believe that -- 9 MR. BERARDINELLI: Object to the form. 10 MS. GALLAGHER: Objection; form. 11 A I believe that may be the case in 12 Allegheny County, if I'm not mistaken. 13 Q Just talk a minute about the interaction 14 between the SURE system and the poll books. And 15 forgive me, I understand almost nothing about this. 16 So I know the pulpits are printed. I show up to vote 17 and they say my name's in it because they always 18 have. But if I were to cast a mail-in ballot and 19 show up to vote, what would be in the poll book? 20 A If -- it would depend on whether the -- 21 your ballot was returned to the county or not. So 22 it's -- and it's going to appear at a different 23 location in the poll book, depending on that factor. 24 So if you requested a ballot but didn't return it, 25 you can actually go into the polling place and the</p>
<p>106</p> <p>1 used. 2 Q And that opinion is that it should be used 3 when the county does not offer the opportunity to 4 cure; is that right? 5 A Correct. 6 Q Thank you. We haven't asked these 7 questions yet, and I don't expect you to have exact 8 numbers, but just generally, how many -- if you know, 9 how many mail-in ballots were cast in the primary 10 this year? 11 MR. BERARDINELLI: Objection; form. 12 Statewide or in Washington? 13 MR. BLACK: Statewide. Statewide. 14 THE WITNESS: Boy, that is a -- that is a 15 good question. It's hundreds of thousands, and I 16 don't recall off the top of my head. 17 BY MR. BLACK: 18 Q Several hundred thousand? 19 A Yes. 20 Q Do you have any sense of the number that 21 were rejected or percentage that were rejected? 22 A I think it was a little over 1 percent, as 23 I recall. It was certainly thousands of ballots that 24 were rejected ultimately. 25 Q Do you know how many ballots were rejected</p>	<p>108</p> <p>1 poll book will indicate that in one section. 2 You can actually take your ballot, your 3 unvoted ballot remit that to the local election 4 officials, sign the poll, and then you can vote in 5 the normal manner. If the poll book indicates that 6 you've already returned your ballot then your option 7 is to vote by provisional ballot. So the poll book 8 will indicate that you've already returned your 9 ballot and you're not entitled to vote the 10 traditional manner, would have to by provisional 11 ballot. 12 Q In an county that uses notice and cure, if 13 they sent a notice out of a defective ballot and that 14 person then shows up at the polling place, can they 15 vote a provisional ballot? 16 MR. BERARDINELLI: Object to the form. 17 A If that voter shows up the polling place, 18 and they affirm that they're qualified to vote, and 19 understand that their ballot may not have been 20 correctly submitted, they are entitled to vote by 21 provisional ballot. 22 Q Do canceled votes versus recorded -- 23 strike that. 24 In a county that does notice and cure, if 25 a voter sends in a ballot, which is rejected because</p>

<p style="text-align: right;">109</p> <p>1 it's missing a signature and they receive the email 2 stating that it was missing the signature, and they 3 show up at the polls, does their name show up in a 4 different part of the poll book than people who 5 recorded properly? 6 A Yes. If they return their ballot, it is - 7 - those are in a separate section of the poll book. 8 So basically anyone who returned their ballot to the 9 county are kind of segregated from the rest of the 10 voters so that counties can keep -- or local poll 11 workers can keep straight or distinguish between 12 folks who may be able to remit their balloting 13 materials versus those who've already submitted them 14 to the county. 15 Q Do you know roughly how many counties are 16 currently allowing notice and cure and how many are 17 not? 18 MR. BERARDINELLI: Object to the form. 19 MS. MULLEN: Objection. Do you want a 20 time period, primary, general, or? 21 Q Good point. For the last primary 22 election, do you have any sense of what the rough 23 number of counties that are -- 24 A I don't recall the -- the number of 25 counties. I know it is -- I believe it is at least</p>	<p style="text-align: right;">111</p> <p>1 A I don't believe so. I think it was a -- 2 it was a webinar. I don't believe that it was 3 recorded. I don't know that there are minutes 4 necessarily. The purpose of those was to give 5 counties kind of an open forum to share with the 6 department, their feedback regarding the ballot 7 response type codes, how it worked out for them in 8 their individual counties, and to get feedback on 9 what changes they might want to see moving forward. 10 MR. BLACK: Can we just take five minutes 11 off? I'm getting final questions. 12 MR. BERARDINELLI: Yeah, I might have some 13 brief. 14 MS. GALLAGHER: I have some too. 15 THE VIDEOGRAPHER: We're going off the 16 record. The time is 12:43. 17 (Off the record.) 18 THE VIDEOGRAPHER: We are back on the 19 record. The time is 12:47. 20 BY MR. BLACK: 21 Q Just a couple more questions on new topic. 22 The DOS mail-in ballot tracker, what is that? 23 A It's basically an online tool that a voter 24 could use to determine, you know, when their ballot 25 was mailed to them, when the county received their</p>
<p style="text-align: right;">110</p> <p>1 half the -- provide some -- 2 MR. BERARDINELLI: Excuse me. (sneezes) 3 MR. BLACK: Bless you. 4 MR. BERARDINELLI: Thank you. 5 A -- some form of notice and cure. 6 MR. BERARDINELLI: I'm sorry my sneeze 7 locked out the answer. What was the percentage? I'm 8 sorry. 9 THE WITNESS: I believe it is -- it is at 10 least half, probably little more than half of the 11 counties that provide some form of notice and cure. 12 MR. BERARDINELLI: Thank you. 13 THE WITNESS: Keeping in mind that there 14 are variations in that. 15 BY MR. BLACK: 16 Q You mentioned the feedback session that 17 you had with the county election officials. 18 A Yes. 19 Q Do you recall whether there were any 20 specific comments by representatives of Washington 21 County? 22 A I don't recall any comments by the 23 election director. 24 Q Are there minutes or any record of that 25 conversation?</p>	<p style="text-align: right;">112</p> <p>1 ballot as returned. 2 Q Is the information in the ballot tracker 3 available to third parties? 4 A Well, the information in the ballot 5 tracker will be contained in the mail ballot voter 6 file that we provide to third party requesters. 7 Q And that's updated every day? 8 A Yes, as we approach the election, it's 9 updated every day. 10 Q And if the code entered by a county is 11 record ballot returned, then that's what will show up 12 when the voter goes to look at his ballot status, 13 correct? 14 A I believe so, yes. I believe it would say 15 ballot returned or ballot received, something like 16 that. 17 Q And on the other hand, if a county enters 18 one of the canceled codes, it would show canceled to 19 the voter or any third party who has access to the 20 data on the -- 21 A Correct. 22 Q What happens if the code is pending, do 23 you know what the voter would see? 24 A I -- as far as I know, they would see the 25 pending code status.</p>

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1 Q Do the tracker -- does the tracker show
2 the text of the emails or does it just have the code
3 or?
4 **A It just has the code. It's very simple**
5 **matrix.**
6 MR. BLACK: Thank you for your time. I'll
7 pass the witness.
8 MS. GALLAGHER: Do you mind if I --
9 MR. BERARDINELLI: Yeah, if you don't
10 mind, just briefly, I want to talk about the feedback
11 sessions.
12 RE-EXAMINATION BY COUNSEL FOR THE DEFENDANT
13 BY MR. BERARDINELLI:
14 Q Okay. You mentioned that you don't recall
15 the director -- elections director for Washington
16 County speaking, testified to that?
17 **A Right.**
18 Q Don't recall has different connotations.
19 So I want to unpack this a little bit. Do you have a
20 recollection one way or the other, whether she spoke
21 or not?
22 **A I don't.**
23 Q Right. How many people spoke on the
24 meeting?
25 **A A lot of counties spoke on the meeting, so**

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1 **I can't recall if a specific one Melanie spoke.**
2 Q Right. So if Melanie Ostrander testified
3 under oath that she did speak, you don't have a
4 recollection that's contrary to that?
5 **A Correct.**
6 Q Can we pull out, hopefully for the last
7 time, Marks' Exhibit 1, and you were looking at page
8 8, and we can stay right there on page 8. Mr. Black
9 was asking you some questions about the cancel
10 incorrect date. I'm going to call it entry on this
11 spreadsheet type document. And the email that is
12 sent, if this code is selected, has language that
13 says, if you do not have time to request a new ballot
14 before, and that would be the application date for
15 that election, right?
16 **A Correct.**
17 Q Do you agree that implicit in that is if
18 that date hasn't passed, that someone reading this is
19 being told that they can request a new ballot?
20 **A Yes.**
21 Q Okay. And in a county that does not
22 permit curing, can they get a new ballot?
23 **A It -- again, it would depend on the**
24 **county's process exactly. But if it is -- if it is**
25 **not the county's process to cancel a ballot and**

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1 **reissue a ballot if there's an issue with that**
2 **ballot, then no.**
3 Q And do you know what Washington County's
4 policy was about issuing new ballots in the 2024
5 primary?
6 **A I do not, no.**
7 Q Let's assume that their policy was that
8 we're non-curing county, we're not going to issue a
9 new ballot if you made an Act 47 -- Act 77 mistake.
10 Assume that for sake of my question. Okay?
11 **A Okay.**
12 Q If that's their policy and a voter got
13 this email, would you agree that the email would be
14 misleading because it would tell a voter that they
15 could request a new ballot?
16 **A I would agree that that would certainly be**
17 **the county's perspective. That this email as it's**
18 **written, would be misleading under that circumstance.**
19 Q And that's not some outrageous
20 perspective. Right?
21 **A I don't want to represent it, but, you**
22 **know, I don't -- I certainly, if you read this and**
23 **match it up with the county's practice, I can**
24 **understand why there'd be concern about the language**
25 **of the message.**

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1 Q And what our goal here is, I think
2 collectively at least, is to make sure voters have
3 accurate information?
4 **A Correct.**
5 Q Can we pull out Marks' 3, the April 3rd,
6 2023 guidance. And I'm going to ask you some
7 questions about the same section on page 3 that Mr.
8 Black asked you some questions about. So under the
9 heading examination of declaration on mail ballot
10 return envelopes, are we at the same place?
11 **A Yes.**
12 Q Okay. And the first sentence of that
13 indicates that the county boards of elections is
14 responsible for approving ballots to be counted
15 during pre-canvassing and canvassing, right?
16 **A Correct.**
17 Q So this section is talking about conduct
18 during pre-canvassing and canvassing.
19 **A Correct.**
20 Q And pre-canvassing, I think we established
21 doesn't start until 7:00 a.m. on election day, right?
22 **A Correct.**
23 Q And canvassing doesn't start until the
24 Friday after election day?
25 **A Well, canvassing of mail ballots starts at**

<p>117</p> <p>1 8:00 p.m. on election day. 2 Q 8:00 p.m. 3 A Pre-canvassing and then canvassing. Then 4 the official canvass of all the votes starts on 5 Friday afterwards. 6 Q Either way, as far as canvassing goes, the 7 polls are closed. 8 A Correct. Yes. 9 Q And then if we look down in the third 10 paragraph, it's talking about when the status code 11 ought to be updated, correct? 12 A Correct. 13 Q Okay. And in the second sentence, 14 starting in the second word of the third line, it 15 says, if the board determines that a ballot should 16 not be counted. Do you see that language? 17 A I do, yes. 18 Q And that would -- that final 19 determination, whether to count or not count the 20 ballot happens during the canvassing, right? 21 A Correct. 22 Q Okay. So I'm canvassing, I say this guy 23 doesn't have a date, we're not going to count him, 24 right? 25 A Right.</p>	<p>119</p> <p>1 final disposition. I don't recall the exact 2 language, but certainly that issue was raised. And 3 what -- what we discussed and what is our intent is 4 to put clear language in there that some of this 5 information would only be applicable up to 8:00 p.m. 6 on election day. 7 Q And that's going to be in effect for the 8 November, 2024 election? 9 A That is the intent. Yes. 10 Q Let me show you what is already marked as 11 -- that was Ostrander Exhibit 10. You and I had some 12 discussions about the ballot instructions, right 13 A Correct. 14 (Ostrander's 10, previously marked, is 15 attached to the transcript. 16 Q And those are the ballot instructions from 17 the primary, correct? 18 A They are, yes. 19 Q And can you read the -- not the immediate 20 top line, but the second line of the document into 21 the record. 22 A "For your ballot to count, you must follow 23 all of these steps." 24 Q And that was the notice you were talking 25 about that you wanted to provide to people who are</p>
<p>118</p> <p>1 Q If I go into the SURE system, polls are 2 closed, right? Yes? 3 A Correct. Yes. 4 Q Okay. I go into the SURE system, I mark 5 canceled no date. Okay. Is the county voter going 6 to get this email that tells them to go vote a 7 provisional ballot? 8 A If -- yes. If the email notifications are 9 being sent out, yes. 10 Q Yeah. If Jane Smith has janesmith@yahoo 11 on file, she's going to get this email, right? 12 A Right. 13 Q And this email is telling her after the 14 polls have closed to go try and cast a provisional 15 ballot? 16 A Correct. 17 Q Has the department considered adopting a 18 code for use after the canvassing that will simply 19 say your ballot was canceled, for example, because of 20 an incorrect date? 21 A We -- what we've looked at and based on 22 our feedback during the feedback sessions while we 23 looked at, was adding clear language that if it's -- 24 if it's after election day at the -- the voters 25 receiving a notification that this is essentially the</p>	<p>120</p> <p>1 receiving mail-in ballots? 2 A Correct. 3 MR. BERARDINELLI: We couldn't remember 4 the verbiage, so I just wanted to make sure we had 5 it. I think that's all I have. Thanks, Mr. Marks. 6 MR. BLACK: I have some -- 7 MS. GALLAGHER: Okay. 8 MR. BLACK: I have some redirect. 9 MS. GALLAGHER: Well, so I'll wait till 10 you're done. Go ahead. 11 MR. BLACK: No. No. 12 MS. GALLAGHER: No, go ahead, Martin. 13 MR. BLACK: Definitely not. You're on the 14 same side. You guys go, go ahead. You have 15 questions. 16 RE-EXAMINATION BY COUNSEL FOR THE DEFENDANT 17 BY MS. GALLAGHER: 18 Q With respect to (indiscernible) 02:32:18 I 19 cast a mail-in ballot, secrecy envelope signed and 20 dated, gets received, you know, received, marked in, 21 I'm in Allegheny County, they cure. How does my 22 ballot under what your recommendation would be get 23 entered into the SURE system? 24 A Well, you said secrecy envelope, I'm 25 assuming you meant declaration envelope.</p>

<p style="text-align: right;">121</p> <p>1 Q No, everything. 2 A You wouldn't sign and date that. But -- 3 Q I didn't mean to sign. 4 A If you're -- 5 Q Everything I had said -- 6 A So you've submitted -- you've submitted 7 your ballot to the Allegheny County Board of 8 Elections. 9 Q Right. 10 A And -- 11 Q Contains a secrecy envelope, ballots in a 12 secrecy envelope, declaration envelope is signed and 13 dated. 14 A Right. 15 Q Stamped. It gets received. 16 A Right. 17 Q How does that get recorded? 18 A Returned ballot -- 19 Q Recorded. 20 A -- recorded, yeah. 21 Q Okay. 22 THE VIDEOGRAPHER: Counsel, it might be 23 best if you take the mic -- 24 MS. GALLAGHER: Oh, I'm sorry. 25 THE VIDEOGRAPHER: No, it's okay.</p>	<p style="text-align: right;">123</p> <p>1 MS. GALLAGHER: No. No, during the 2 canvass. 3 THE WITNESS: It's an excellent point. 4 MS. GALLAGHER: During the canvass. 5 MS. MULLEN: Okay. I'm going to let him - 6 -- 7 MS. GALLAGHER: Okay. 8 MS. MULLEN: Ask your question. 9 THE WITNESS: No, Counsel is correct. You 10 wouldn't be able to go back and you wouldn't be able 11 to determine whose voter's ballot that was at that 12 point. 13 MS. GALLAGHER: That's not -- 14 THE WITNESS: -- so you wouldn't be able 15 to update the disposition. 16 BY MS. GALLAGHER: 17 Q Okay. That's what I'm trying to figure 18 out. That was what my question was. Would there be 19 a way to go back and update that then? 20 A No, I -- because you've taken the ballot 21 out of the secrecy envelope, maintaining the secrecy 22 of the ballot, there would be no way to tie it back 23 to the declaration envelope. 24 Q What I would expect. And what does it -- 25 that it would show that my ballot was received and</p>
<p style="text-align: right;">122</p> <p>1 MS. GALLAGHER: I apologize. 2 MR. BERARDINELLI: I don't know if it's 3 good or bad. 4 MS. GALLAGHER: No one has -- 5 MR. BERARDINELLI: I'm the only one that 6 doesn't need the mic. 7 MS. GALLAGHER: No one has ever accused me 8 of not needing mic. 9 Q Anyway, during the canvassing process, 10 find out my actual ballot is blank. Is my -- then 11 what gets entered into -- in the SURE system? 12 A I would expect that a county would select 13 cancel other under that circumstance -- 14 MS. MULLEN: Objection. Objection. 15 A -- if the ballot was defected. 16 MS. MULLEN: Hold on. Hold on. 17 THE WITNESS: Sorry. 18 MS. MULLEN: You're talking about the 19 voter's actual ballot was blank? 20 MS. GALLAGHER: Where you fill in, right. 21 MS. MULLEN: Yeah. 22 MS. GALLAGHER: Okay. 23 MS. MULLEN: So they're separated. You 24 would never -- you have secrecy in voting. You -- 25 THE WITNESS: Thank you, Counsel.</p>	<p style="text-align: right;">124</p> <p>1 recorded, correct? That the SURE system would 2 received and recorded. 3 A It would. Correct. 4 Q Because there's a difference, would you 5 agree then between the count and whether or not the 6 ballot is received in the office, I mean, in the 7 county board? 8 A Well, I mean, there's a difference between 9 the disposition of the ballot based on the Board of 10 Elections determination during either the pre-canvass 11 or the canvass versus the active recording the 12 ballots status in the SURE system. 13 Q Is that -- 14 A The two should be connected and that is -- 15 Q Right. That's what I'm trying to 16 understand. 17 A That's the point of our guidance, but 18 they're two separate and distinct things. 19 Q Okay. And speaking of separate and 20 distinct things, would you agree that notice and cure 21 are two step -- two separate steps in the curing 22 process? 23 MS. MULLEN: Objection. 24 MR. BLACK: Objection to form. 25 Q So if the voter gets a notice with the</p>

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1 opportunity to cure, would be --
2 **A I mean, we're kind of having a**
3 **philosophical discussion now.**
4 Q No, I'm trying ask, is it --
5 **A If you're -- if you're asking me whether**
6 **notice and cure are two distinct things, there are**
7 **certainly two steps, I guess, in a process.**
8 Q Right. That's what --
9 **A First, notifying the voter, and secondly,**
10 **the voter actually curing the ballot.**
11 Q That's what I was asking. And would you
12 agree that, I believe you testified earlier that what
13 the PA Supreme Court refused to mandate were notice
14 and cure procedures?
15 MR. BLACK: Objection.
16 MS. MULLEN: Objection.
17 MR. BLACK: Calls for legal conclusion.
18 Q I can go back, I can type it.
19 **A I -- my understanding of the Supreme**
20 **Court's ruling is that it does not mandate that**
21 **counties provide for notice and cure.**
22 MS. GALLAGHER: Right. That's all I was
23 asking. Nothing further.
24 RE-EXAMINATION BY COUNSEL FOR THE PLAINTIFF
25 BY MR. BLACK:

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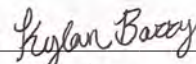
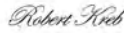
1 Q Just one last set of questions here. If
2 we go back to the SURE guidance, the March, 2024
3 guidance --
4 MR. BERARDINELLI: Object to the form.
5 It's not guidance.
6 THE WITNESS: The release notes.
7 BY MR. BLACK:
8 Q Point taken. If you take -- if you take a
9 look at the release notes, Marks' 1, you were asked
10 some questions a moment ago about cancel incorrect
11 date code. You recall that?
12 **A Yes.**
13 Q If you look on page 6 and take a look at
14 the pend-other code, you see that one?
15 MR. BERARDINELLI: Sorry, 6, Martin?
16 MR. BLACK: Yes.
17 **A Pend other?**
18 Q Yes.
19 MR. BERARDINELLI: Give me one second
20 please. Thank you.
21 Q You see that code?
22 **A Yes.**
23 Q And the language associated with the email
24 says, the county has noticed an error with your
25 ballot envelopes, which means your ballot may not be

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1 counted. Do you see that sentence?
2 **A Yes.**
3 Q And that would be accurate, for instance,
4 if you had a county that looked at the ballots,
5 noticed that the signatures or dates were missing or
6 wrong and then segregated them before the pre-
7 canvass, correct?
8 MR. BERARDINELLI: Object to the form.
9 **A I don't think that that would be the**
10 **response type that we would recommend using if there**
11 **was a signature missing, we would recommend using the**
12 **pending no signature code on the following page, page**
13 **7.**
14 Q The one on page -- let's say you're in a
15 county that doesn't offer cure, then the code on page
16 7, which says that the county offers you the
17 opportunity to fix your ballot, that wouldn't really
18 be appropriate, right?
19 **A Correct.**
20 Q Okay. But the language in the pend other
21 code, it just says, the county has noticed an error
22 with your ballot envelopes, which means your ballot
23 may not be counted. If you cannot fix the errors in
24 time, you can go to the poll -- your polling place on
25 election day and cast a provisional ballot, correct?

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1 **A Correct.**
2 Q So that language in and of itself would be
3 acceptable if a county wanted to use it to notify a
4 voter who had delivered a ballot without a signature?
5 MR. BERARDINELLI: Object to the form.
6 MS. GALLAGHER: Objection.
7 Q Not required, just acceptable.
8 MR. BERARDINELLI: Are you talking curing
9 county or non-curing county?
10 MR. BLACK: I'm just asking him a question
11 about this language. Curing, non-curing, whatever.
12 In my example, it's a non-curing --
13 MR. BERARDINELLI: Object to form.
14 Because it's ambiguous given the different county --
15 BY MR. BLACK:
16 Q In a non-curing in a county, would this
17 language be appropriate to send to a voter who would
18 return to ballot without a signature or an incorrect
19 date?
20 MR. BERARDINELLI: Objection; form.
21 Q Not required. Would it be --
22 MR. BERARDINELLI: Says, fix the errors.
23 MR. BLACK: You're being argumentative.
24 You're interrupting my question.
25 **A I would -- I would not expect that a non-**

<p style="text-align: right;">129</p> <p>1 curing county would use any of the pending codes, but 2 I cannot say that it would be inappropriate if the 3 county's process is to replace a ballot under certain 4 circumstances. Again, and it is -- it's all going to 5 come down to what a -- the specific county's practice 6 is. So I -- I can't say that would be inappropriate. 7 I think our expectation when we introduce the pending 8 codes is that they would only be used by counties who 9 offered some variation of notice and cure. 10 Q And with respect to the cancel codes, it's 11 expected that those would be used for counties that 12 don't offer the opportunity to cure; is that right? 13 MR. BERARDINELLI: Object to the form. 14 A I think generally, yes. 15 MR. BLACK: Okay. Thank you. No further 16 questions. 17 MR. BERARDINELLI: I'm good. 18 THE VIDEOGRAPHER: Anything else for the 19 record? 20 MS. GALLAGHER: You done? 21 MS. MULLEN: I'm done. 22 MS. GALLAGHER: All right. No questions. 23 MR. BERARDINELLI: Thank you, Mr. Marks. 24 THE VIDEOGRAPHER: This marks the end of 25 the videotaped deposition of Jonathan Marks. We're</p>	<p style="text-align: right;">131</p> <p>1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC 2 I, KYLAN BARRY, the officer Before whom the 3 foregoing proceedings were taken, do hereby certify 4 that any witness(es) in the foregoing proceedings 5 were fully sworn; that the proceedings were recorded 6 by me and thereafter reduced to typewriting by a 7 qualified transcriptionist; that said digital audio 8 recording of said proceedings are a true and accurate 9 record to the best of my knowledge, skills, and 10 ability; and that I am neither counsel for, related 11 to, nor employed by any of the parties to this case 12 and have no interest, financial or otherwise, in its 13 outcome. 14  15 _____ 16 KYLAN BARRY, 17 NOTARY PUBLIC FOR THE COMMONWEALTH OF PENNSYLVANIA 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">130</p> <p>1 going off the record. The time is 1:07. 2 (Off the record 1:07 p.m.) 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">132</p> <p>1 CERTIFICATE OF TRANSCRIBER 2 I, Robert Krieb, do hereby certify that 3 this transcript was prepared from the digital audio 4 recording of the foregoing proceeding; that said 5 transcript is a true and accurate record of 6 the proceedings to the best of my knowledge, skills, 7 and ability; and that I am neither counsel for, 8 related to, nor employed by any of the parties to 9 the case and have no interest, financial or 10 otherwise, in its outcome. 11 12  13 _____ 14 ROBERT KREB 15 7/24/2024 16 17 18 19 20 21 22 23 24 25</p>