

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

<p>CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT, AND DAVID DEAN,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>WASHINGTON COUNTY BOARD OF ELECTIONS,</p> <p style="text-align: center;">Defendant.</p>	<p>CIVIL DIVISION</p> <p>2024 No. 3953</p> <p>Judge Brandon P. Neuman</p> <p>Motion for Special Relief and Preliminary Injunction</p> <p>Filed on behalf of Plaintiffs, CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT, AND DAVID DEAN</p> <p>Counsel of Record for these Parties: see next page</p>
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KENNETH ELLIOTT, AND DAVID
DEAN,**

Plaintiffs,

v.

**WASHINGTON COUNTY BOARD
OF ELECTIONS,**

Defendant.

CIVIL DIVISION

No. 2024-3953

JUDGE BRANDON P. NEUMAN

**PLAINTIFFS' MOTION FOR
SPECIAL RELIEF AND
PRELIMINARY INJUNCTION**

Filed on behalf of Plaintiffs

Counsel of Record for these
Parties:

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**PLAINTIFFS' MOTION FOR
SPECIAL RELIEF AND PRELIMINARY INJUNCTION**

Pursuant to Rule 1531 of the Pennsylvania Rules of Civil Procedure, Plaintiffs, through their counsel, hereby move for an order for special and preliminary relief that: (1) declares that that the policy and practice of the Washington County Board of Elections' ("Board") of concealing information and misleading voters about their mail-in ballot status violates the rights of Plaintiffs and all voters under the Pennsylvania Constitution's Due Process Guarantee, Article

I, Section 1; (2) enjoins the Board from concealing information and misleading voters about their mail-in ballot status; and (3) directs the Board to provide accurate, timely information to voters about mail-in ballots containing disqualifying errors, including by promptly and accurately entering voters' ballot status into the Pennsylvania statewide online registry called the SURE system, and responding to telephonic, email and in-person voter inquiries, so that at a minimum, voters have an opportunity to cast a provisional ballot on Election Day. Plaintiffs' counsel advised the Court and opposing counsel on July 2 that they intend to present the motion in person on Tuesday, July 9 at 9:15 a.m.

In support of their motion, Plaintiffs hereby incorporate the Verified Complaint and Memorandum of Law filed along with this motion. Plaintiffs further state the following:

BACKGROUND

1. As stated in the Verified Complaint and Memorandum of Law, Defendant's enforcement of its policy and practice of concealing information and misleading voters about the status of their mail-in ballots¹ violates the procedural due process guarantees in the Pennsylvania Constitution.

¹ For brevity, this Motion will use the term "mail-in ballots" to refer to both absentee ballots, *see* 25 P.S. § 3146.6, and mail-in ballots, *see id.* § 3150.16.

2. In 2019, Pennsylvania adopted “no excuse” absentee or mail-in voting, allowing all eligible, registered voters to submit a mail ballot without having to justify why they cannot go to the polls on Election Day. Act of Oct. 31, 2019, P.L. 552, No. 77, § 3150.11. *See* Compl. ¶¶ 24-26.

3. Where a mail-in voter has made any of three technical mistakes—failing to sign or date the ballot’s outer Declaration Envelope, writing a date that is deemed “incorrect,” or omitting the inner secrecy envelope—the ballot is disqualified. *See, Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Compl. ¶¶ 30-36.

4. Mail-in voters who submit such disqualified ballots are entitled to cast provisional ballots at their polling place on Election Day and have them counted. *See e.g.*, Sept. 21, 2023 Order at 3, *Keohane v. Delaware County Board of Elections*, CV-2023-004458 (Del. Cnty. Ct. Common Pleas). Compl. ¶ 51.

5. Counties must record returned mail-in ballots into the Pennsylvania Statewide Uniform Registry of Electors (“SURE System”). Counties must promptly and accurately enter data into SURE by law and because as a practical matter it is how accurate pollbooks are generated for Election Day. *See* Compl. ¶¶ 37-40.

6. The SURE System provides specific codes that election offices can use to record a mail-in ballot as disqualified. Entering information accurately and

promptly into SURE is critical to ensure that voters receive timely and accurate information about their mail-in ballot status, including about a disqualifying error that will result in their vote not being counted. Compl. ¶¶ 37-43.

7. For example, counties should code a ballot returned with an error using specific “CANC”—or “cancelled” codes—such as “CANC – NO DATE”, “CANC – INCORRECT DATE”, “CANC – NO SECRECY ENVELOPE” or “CANC – NO SIGNATURE”—which generates an automatic SURE System email to voters advising them of their options to request a new ballot or vote provisionally on Election Day. Compl. ¶ 44-45.

8. The SURE system also has the option to mark ballots with disqualifying errors “pending” when the county “offers ballot curing.” Compl. ¶¶ 46-47. Entry of a “PEND” code triggers a corresponding email for “voters to replace or correct [the] submission error.” Compl. ¶ 47. The email also advises the voter “[i]f you cannot fix your ballot return envelope in time, you can go to your polling place on election day and cast a provisional ballot.” Compl. ¶ 47.

9. If a county does not use the correct error code and instead records the ballot as simply received, via the “RECORD – BALLOT RETURNED” code, the SURE System not only does not reflect that the ballot was disqualified, but also generates an email to the voter suggesting that the ballot will be counted and that the voter is prohibited from voting in-person on Election Day. Compl. ¶ 50.

10. Most Pennsylvania counties adhere to Pennsylvania Department of State (“DOS”) guidance about updating the “ballot return status” in SURE to reflect any disqualifying errors. Compl. ¶ 52. In fact, before the April 2024 primary election, Defendant Washington County election office did just that, enabling voters to request new ballots or vote provisionally on Election Day. Compl. ¶¶ 55-56.

11. However, in the lead-up to the April 2024 primary, the Washington County Board of Elections voted 2-1 to reverse course and implement a new policy that disqualified ballots in secret, concealed those determinations even from voters who inquired, and deprived voters of their right to vote a provisional ballot on Election Day. Compl. ¶¶ 57-66.

12. In the April primary, 259 eligible mail-in voters who returned timely but defective ballots—a full 2% of all mail-in ballots—were disenfranchised. They were both Republicans and Democrats. Nearly three-quarters were over age 65, and 30% were over age 80. Compl. ¶¶ 76-77.

INJUNCTIVE RELIEF

13. Pursuant to Pennsylvania Rule of Civil Procedure 1531, this Court may issue a preliminary injunction after notice and a hearing. Pa. R. Civ. P. 1531(a).

14. In considering whether to grant special relief or a preliminary injunction, the Court considers whether (1) the petitioner “is likely to prevail on the merits”; (2) an injunction “is necessary to prevent immediate and irreparable harm”;

(3) “greater injury would result from refusing the injunction than from granting it”, and granting it “will not substantially harm other interested parties”; (4) the injunction “will not adversely affect the public interest”; (5) the injunction “will properly restore the parties to their status” immediately prior to the passage of the law; and (6) the injunction is reasonably suited to abate the offending activity. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501-02 (Pa. 2014).

15. Here, each of these elements has been met and the Court should issue a preliminary injunction.

A. Plaintiffs Are Likely to Succeed On the Merits of Their Claims.

16. To establish likelihood of success on the merits, the moving party “need not prove the merits of the underlying claim, but need only show that substantial legal questions must be resolved to determine the rights of the parties.” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610-11 (Pa. Commw. Ct. 2020) (quoting *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. 2009)).

17. Here, Plaintiffs can demonstrate not only that there is a “substantial legal question,” but that the Board’s policy violates Article I, Section 1’s procedural due process guarantee.

B. Plaintiffs Will Likely Succeed In Establishing That Defendant’s Policy and Practice Violates Procedural Due Process Under Article I, Section 1 of the Pennsylvania Constitution.

18. The Pennsylvania Supreme Court has long recognized that the “guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights,” including Article I, Section 1. *Khan v. State Bd. of Auctioneer Examiners*, 842 A.2d 936, 945 (Pa. 2004).

19. “The central demands of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (internal citation and quotations omitted). These rules are intended to “minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.” *Washington v. PA Dep't of Corr.*, 306 A.3d 263, 285 (Pa. 2023) (quoting *Carey v. Piphus*, 435 U.S. 247, 259 (1978)).

20. To ascertain what process is due, Pennsylvania courts rely on the three-part test first developed in *Mathews v. Eldridge*, balancing (1) the private interest affected by the official action; (2) the risk of erroneous deprivation through the procedures used and the probable value of additional safeguards; and (3) the government’s interest, including the fiscal and administrative burden that the additional procedures would entail. *Id.* (citing *Mathews*, 424 U.S. 319, 335 (1976)).

21. Under this test, Washington County’s disqualification of mail-in ballots without notice and an opportunity to remedy the disqualification through the casting of provisional ballots on Election Day yields a clear due process violation.

i. Factor 1: Plaintiffs Will Likely Succeed In Establishing That Defendant’s New Policy Violates the Right to Vote Under the Pennsylvania Constitution.

22. The private interest affected by Washington County’s policy is the complete loss of the right to vote, which the Pennsylvania Supreme Court has characterized as “sacred,” “fundamental,” and “the most treasured prerogative of citizenship.”² See, e.g., *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012).

23. Voters whose mail-in ballots are deemed defective by the Board are entitled to cast a provisional ballot on Election Day. Compl. ¶¶ 51, 73-75. But Washington County’s policy to withhold from voters information about those disqualifications before Election Day deprives them of that fundamental right, with no available remedy. The first *Mathews* factor weighs heavily in favor of Plaintiffs.

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

24. The second *Mathews* factor weighs heavily in favor of Plaintiffs. The Board’s policy is the epitome of a “secret, one-sided determination of facts decisive of rights” condemned by the Pennsylvania Supreme Court. *Washington*, 306 A.3d at

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

266. It guarantees that qualified, eligible voters who timely return their ballots will inexcusably be deprived of their right to vote. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964).

25. The Board’s policy is especially unreasonable because an additional, easily implemented safeguard—timely accurate entry of ballot determinations into SURE and truthfully providing ballot status information to inquiring voters—would greatly lower the risk of disenfranchisement. *See Washington*, 306 A.2d at 296-97 (citations omitted).

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

26. Requiring the Board to enter timely and accurate ballot status information into SURE would not burden the county, but only require it to comply with the Election Code. *See Compl.* ¶¶ 37-40. In fact, that is what Washington County was doing before the April 2024 primary (among other procedures to inform voters about their ballot status) and what most other counties around Washington County and the state do. *Compl.* ¶¶ 52-56. Nor can the County claim any legitimate interest in concealing truthful information about voters’ ballot statuses or misleading voters about their rights to vote provisionally.

E. Plaintiffs Will Suffer Immediate and Irreparable Harm That Damages Cannot Compensate.

27. It is well settled that deprivation of a constitutional or statutory right constitutes *per se* irreparable harm. See *Wolk v. Sch. Dist. Of Lower Merion*, 228 A.3d 595, 610-11 (Pa. Commw. Ct. 2020) (citing *Pa. Pub. Util Comm'n v. Israel*, 52 A.2d 317 (Pa. 1947)).

28. Because the Pennsylvania Constitution expressly guarantees the right to vote, and because there is no adequate remedy for disenfranchisement, the Board's new policy of concealing its determinations on whether a voter's mail-in ballot will be counted and actively misleading many voters will cause the individual Plaintiffs irreparable harm.

29. Moreover, organizational Plaintiffs will be irreparably harmed absent injunctive relief because Washington County's unconstitutional policy regarding defective mail-in ballots would force them to waste resources to carry out their missions. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *7-8 (Pa. Commw. Ct. Jan. 17, 2014); Compl. ¶¶ 135-141, 144-147.

F. Public Interest Favors a Preliminary Injunction.

30. The injunction will not adversely affect the public interest. To the contrary, preserving citizens' constitutional right to vote and right not to be misled by the government's false notification could only promote the public interest.

G. Greater Injury Would Result from Denying the Injunction Than From Granting It.

31. The balance of harms weighs heavily in favor of a preliminary injunction. Ordering the Board of Elections to stop concealing from voters whether their mail ballot will count and to stop misleading voters harms no one.

32. But allowing the Board to continue its new practice will expand the disenfranchisement witnessed in the spring primary. *See ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir. 2000) (“the government lacks an interest in enforcing an unconstitutional law”) (*vacated on other grounds by Ashcroft v. ACLU*, 535 U.S. 564 (2002)).

33. As noted in the verified complaint, the Board’s new policy unnecessarily disenfranchised 2% of primary voters who submitted timely mail-in ballots. Compl. ¶ 77. Turnout in the November presidential general election will be significantly higher and so would the harm from the county’s deceptive policy. The disenfranchisement of even a relatively small percentage of mail ballots could impact the outcome of close races, sow election distrust and further highlight the harm done by denying qualified voters their voice in an election.

H. The Preliminary Injunction Will Restore The Status Quo Ante.

34. The requested injunction seeks to place the parties in the position they were in prior to the Board’s April 11, 2024, policy change, which is “the last actual, peaceable and lawful, noncontested status which preceded the pending

controversy.” *Valley Forge Hist. Soc’y v. Washington Mem’l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981).

I. The Injunction is Reasonably Suited to Abate the Constitutional Violation

35. Issuing the requested preliminary injunction would be reasonably suited to abate the offending activity. The injunction would simply require the county to stop concealing its mail-in ballot disqualification decisions and to enter accurate codes into SURE so that at a minimum the voter may vote by provisional ballot on Election Day. The requested relief would not affect any other requirement for mail-in voting or impinge on the county’s efforts to promote a free and fair election on November 5, 2024.

EXPEDITED TIMING

36. The Pennsylvania general election is scheduled for November 5, 2024. The 50-day pre-election statutory deadline to start processing mail-in ballot applications is September 16, 2024, and immediately thereafter the Washington County election office will start to receive and process those ballots under the county’s illegal policy. Plaintiffs respectfully submit that the interests of all parties as well as the general public will be best served by a schedule that allows this Court to resolve Plaintiffs’ application for a preliminary injunction as soon as possible, leaving time for the almost-certain need for appellate review prior to the commencement of voting on September 16.

37. Plaintiffs request that this Honorable Court therefore set an expedited schedule for briefing and hearing in this application, and propose the following schedule:

- Defendant file a brief in opposition to Plaintiff's preliminary injunction Memorandum of Law by July 15, 2024.
- Plaintiffs file any reply in support of their motion by July 19, 2024.
- Preliminary injunction hearing, or just oral argument, held at the Court's convenience, if the Court determines that a hearing or argument is warranted.

WHEREFORE, for all these foregoing reasons, and those stated in the Verified Complaint and Memorandum of Law, Plaintiffs respectfully request that this Honorable Court grant their application for special relief and preliminary injunction, and enter an order that:

- a. Declares that the Washington County Board of Elections' policy and practice of concealing information and misleading voters about their mail-in ballot status is unconstitutional and invalid because it violates the rights of Plaintiffs and all voters under the Pennsylvania Constitution's Due Process Guarantee, Article I, Section 1;

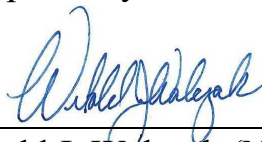
- b. Enjoins the Washington County Board of Elections from concealing information and misleading voters about their mail-in ballot status;
- c. Directs the Washington County Board of Elections to provide accurate, timely information to voters about mail-in ballots containing disqualifying errors, including by promptly and accurately entering voters' ballot status into the SURE system, so that at a minimum, voters have an opportunity to cast a provisional ballot on Election Day; and
- d. Provides such other and further relief as this Honorable Court deems just and appropriate.

FURTHERMORE, Plaintiffs respectfully request that this Honorable Court set a schedule for expedited briefing and hearing on this application in accordance with the proposed order submitted with this application.

Dated: July 3, 2024

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Respectfully Submitted,

/s/ 

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CIVIL DIVISION

No. 2024-3953

JUDGE BRANDON P. NEUMAN

**[PROPOSED] ORDER
GRANTING MOTION FOR
SPECIAL RELIEF AND
PRELIMINARY INJUNCTION**

THIS MATTER having been presented by Plaintiffs upon their Motion for Special Relief and Preliminary Injunction, and the Court having considered the motion and the materials attached thereto and to the Complaint, Defendant's opposition brief, as well as the argument from counsel, and it appearing that Plaintiffs will suffer irreparable harm if the restraints set forth herein are not granted, and for good cause shown,

IT IS on this ___ day of _____, 2024, HEREBY ORDERED THAT the motion is GRANTED.

- a. The Washington County Board of Elections' policy and practice of concealing information and misleading voters about their mail-in ballot status is unconstitutional and invalid because it violates the rights of Plaintiffs and all voters under the Pennsylvania Constitution's Due Process Guarantee, Article I, Section 1;
- b. The Washington County Board of Elections is hereby enjoined from concealing information and misleading voters about their mail-in ballot status; AND
- c. The Washington County Board of Elections is hereby directed to provide accurate, timely information to voters about mail-in ballots containing disqualifying errors, including by promptly and accurately entering voters' ballot status into the SURE system and responding truthfully to voters' ballot-status inquiries, so that at a minimum, voters have an opportunity to cast a provisional ballot on Election Day.

SO ORDERED,

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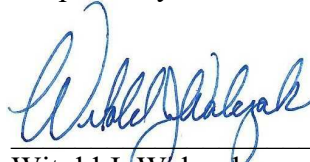
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CERTIFICATE OF PRESENTATION

1. The undersigned, Witold J. Walczak, represents Plaintiffs, the moving party herein.
2. The attached Motion for Special Relief and Preliminary Injunction will be presented to the Hon. Brandon P. Neuman, on July 9, 2024 at 9:15 am in Courtroom No. 4.
3. The attached motion is not consented to by all parties. A Certification of Compliance is attached to this motion.
4. The applicable authority on which the Court may rely to provide the relief sought are as follows: Article I, Section 1 of the Pennsylvania Constitution.

Respectfully submitted,



Witold J. Walczak

July 3, 2024

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CIVIL DIVISION

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CERTIFICATE OF COMPLIANCE

1. The undersigned, Witold J. Walczak, represents Plaintiffs, the moving party herein.
2. I certify that I have complied with Wash.L.R.C.P. 208.2(3)(a) and conferred with opposing counsel, Washington County solicitor, Gary Sweat, in an attempt to resolve the subject matter of this motion as noted below:

- Talked by phone: July 2, 2024



Witold J. Walczak

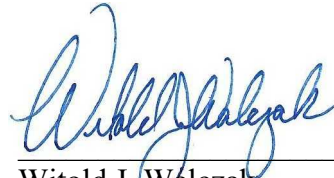
July 3, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Special Relief and Preliminary Injunction has been served upon all other parties at the address(es) listed in the manner of service specified below, this 3rd day of July, 2024.

Gary Sweat, Esq.
Washington County Solicitor
95 West Beau Street, Suite 605
Washington, PA 15301
via U.S. Mail

Courtesy Copy via electronic mail: gsweat@sweatlaw.com



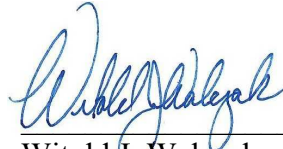
Witold J. Walczak

Counsel for Plaintiffs

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: July 3, 2024



Witold J. Walczak
Counsel for Plaintiffs