

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

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

Plaintiffs,

v.

**WASHINGTON COUNTY BOARD
OF ELECTIONS,**

Defendant.

CIVIL DIVISION

No. 2024-3953

JUDGE BRANDON P. NEUMAN

**PLAINTIFFS' CONSENTED-TO
MOTION FOR LEAVE TO
EXCEED BRIEF WORD LIMIT
OF LOCAL RULE 210(1)**

Filed on behalf of Plaintiffs

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**PLAINTIFFS' CONSENTED-TO MOTION FOR LEAVE TO
EXCEED BRIEF WORD LIMIT OF LOCAL RULE 210(1)**

Plaintiffs, through their counsel, hereby respectfully move this Court for leave to file the attached Memorandum of Law in Support of Their Motion for Special Relief and Preliminary Injunction exceeding the word limit of Local Rule 210(1). Defendant Washington County Board of Elections consents to this motion.

In support of this motion, Plaintiffs state as follows:

1. Local Rule 210(1) provides that, “[a]bsent a court order for cause shown, the body of a brief shall not exceed 3,000 words.” The body of Plaintiffs’


Memorandum of Law, attached hereto as Exhibit A, comprises **5,749** words from the title through the conclusion.

2. Good cause exists for allowing Plaintiffs additional words for their Memorandum of Law. The memorandum supports Plaintiff's Motion for Special Relief and Preliminary Injunction to enjoin Defendant's violations of Plaintiffs' due process rights under the Pennsylvania Constitution, including to be notified about any disqualifications of their mail-in ballots so that they may exercise their rights to vote a provisional ballot at the polls on Election Day. Given the complexity of the background of this case and the importance of Plaintiffs' constitutional rights at issue, Plaintiffs cannot reasonably and adequately detail the relevant facts and legal authorities and present their arguments in the space ordinarily permitted under the rule. Granting this motion would enable Plaintiffs to fully present arguments in support of their fundamental constitutional rights, and ensure that the Court is fully informed of all pertinent facts, as well as legal authorities and arguments.

3. Plaintiffs have met and conferred with counsel for Defendant and Defendant has advised that it does not contest this motion. Accordingly, Plaintiffs respectfully request that the Court grant this Motion and provide leave to file its brief in excess of the word limit. Dated: July 3, 2024

Respectfully Submitted,

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Attorneys for Plaintiffs

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No. 2024-3953

JUDGE BRANDON P. NEUMAN

**[PROPOSED] ORDER
GRANTING PLAINTIFFS'
CONSENTED-TO MOTION
FOR LEAVE TO EXCEED
BRIEF WORD LIMIT OF
LOCAL RULE 210(1)**

THIS MATTER having been presented by Plaintiffs upon their Consented-To Motion for Leave to Exceed Brief Word Limit of Local Rule 210(1), and it appearing that Plaintiffs have established good cause,

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

SO ORDERED,

EXHIBIT

A

**IN THE COURT OF COMMON PLEAS
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<p>CENTER FOR COALFIELD JUSTICE, WASHINGTON BRANCH NAACP, BRUCE JACOBS, JEFFREY MARKS, JUNE DEVAUGHN HYTHON, ERIKA WOROBEK, SANDRA MACIOCE, KENNETH ELLIOTT, AND DAVID DEAN,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>WASHINGTON COUNTY BOARD OF ELECTIONS,</p> <p style="text-align: right;">Defendant.</p>	<p>CIVIL DIVISION</p> <p>24 No. 3953</p> <p>Judge Brandon P. Neuman</p>
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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR SPECIAL RELIEF AND PRELIMINARY INJUNCTION**

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INTRODUCTION

In the weeks leading up to the April 2024 primary election, the Washington County Board of Elections (“Board of Elections” or “Board” or “County”) deliberately concealed information from voters and from the public about which voters had made disqualifying errors on their mail-in ballot envelopes. In many cases, the Board affirmatively misled voters into thinking their mail-in ballots would count, when in fact the Board had already determined that they would not. And when panicked voters reached out to the election office to ask about the status of their mail-in ballots, the Board simply refused to tell them.

The Board’s new policy is a complete reversal from its prior policy under which it had informed mail-in voters if they made errors when completing their ballot envelope packet and gave them an opportunity to remedy the mistake. By contrast, in the weeks leading up to the April primary, the Board made determinations about which voters’ mail-in ballots would be rejected, kept those determinations secret, and deprived voters of any opportunity to take advantage of the longstanding failsafe to protect the right to vote: voting a provisional ballot at the polling place on Election Day. In sum, the Board disenfranchised 259 qualified, eligible voters—about 2% of all timely received mail-in ballots, and enough to change a close election.

The Board’s conduct not only violates our most basic notions of fairness; it violates the procedural due process protections guaranteed by Article I, Section 1 of the Pennsylvania Constitution. *See Washington v. Pa. Dep’t. of Corr.*, 306 A.3d 263, 285 (Pa. 2023) (“[A] democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)).

Absent emergency declaratory and injunctive relief, the Board will again implement its unlawful policy in the upcoming November general election. Accordingly, Plaintiffs, a bipartisan group of Washington County voters who were disenfranchised in the April 2024 primary, and two organizations whose operations have been disrupted by the County’s actions, seek emergency relief to ensure the Washington County Board of Elections does not disenfranchise voters without affording them constitutionally required due process. Given the near certainty that this Court’s order will be appealed, regardless of outcome, time is of the essence to ensure appellate review before mail-in voting begins in mid-September.

BRIEF HISTORY OF THE CASE

Plaintiffs commenced this case on July 1, 2024, seeking injunctive and declaratory relief against the Washington County Board of Elections, the local government agency responsible for overseeing elections in the County and

ensuring that they are “honestly, efficiently, and uniformly conducted.” 25 P.S. § 2642(g).

The Plaintiffs are (a) seven Washington County voters who were denied procedural due process and disenfranchised by the Board of Elections pursuant to its unlawful new policy; (b) the Center for Coalfield Justice (“CCJ”), a non-profit organization that advocates to advance policies that benefit county residents relating to the health and environmental impacts of the local energy industry; and (c) Washington Branch NAACP, a non-profit organization dedicated to eliminating racial hatred and racial discrimination in the County. Compl. ¶¶ 13-22.

STATEMENT OF ISSUES INVOLVED

Plaintiffs ask the Court to find that the Board’s policy and practice of concealing information and misleading voters about the status of their mail-in ballots violates the procedural due process protections in Article I, Section 1 of the Pennsylvania Constitution. The instant Motion for Special Relief seeks an order from the Court enjoining the Board from implementing its unlawful policy in the upcoming November general election. Further, Plaintiffs seek an order requiring the Board to provide accurate, timely information to voters by promptly and accurately entering voters’ ballot status information into the Statewide Uniform Registry of Electors (SURE) system, and by sharing that information with inquiring voters, so that, at a minimum, voters have an opportunity to cast a

provisional ballot on Election Day. Plaintiffs have satisfied the required elements for a preliminary injunction—most importantly, that they are likely to succeed on the merits and that they will be irreparably harmed absent emergency preliminary injunctive relief.

BACKGROUND FACTS

I. Voting by Mail in Pennsylvania

In 2019, Pennsylvania adopted “no excuse” mail-in voting, allowing registered voters to apply for and submit a mail-in ballot without having to provide a reason why they cannot go to the polls on Election Day. Accordingly, since the 2020 primary election, all registered, eligible Pennsylvania voters have had the right to vote by mail-in ballot and hundreds of thousands of voters have taken advantage of the opportunity.¹ Act of Oct. 31, 2019, P.L. 552 No. 77, § 3150.11. *See* Compl. ¶¶ 24-26.

A voter seeking to vote by mail must complete and submit an application to the county board of elections. 25 P.S. §§ 3146.2, 3150.12. Once the county board verifies the voter’s identity and eligibility, the county sends the voter a mail-in ballot packet that contains: (1) the ballot; (2) a “secrecy envelope” marked with the words “Official Election Ballot”; and (3) a pre-addressed outer return envelope,

¹ Identical procedures govern how voters apply for, complete, and return both absentee and mail-in ballots. For ease of reference, the term “mail-in ballots” is used to encompass both absentee and mail-in ballots.

which contains the voter declaration and spaces to sign and handwrite the date (“declaration envelope”). *Id.* §§ 3146.6(a), 3150.16(a). *See* Compl. ¶¶ 27-28.

After receiving the mail-in ballot packet, the voter must mark the ballot, place it in the secrecy envelope, and then place the secrecy envelope in the outer declaration envelope. Next, the voter must “fill out, date and sign” the printed declaration on the declaration envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). To be considered timely, the county board of elections must receive the completed mail-in ballot packet by 8:00 p.m. on Election Day. *Id.* §§ 3146.6(c), 3150.16(c). *See* Compl. ¶ 29.

Under current Pennsylvania law, mail-in ballots are not counted if the voter fails to sign or correctly date the declaration envelope or forgets to include the secrecy envelope. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). In every election since 2020, thousands of otherwise qualified Pennsylvania voters are disenfranchised because they make these minor mistakes when completing their mail-in ballot packet. *See* Compl. ¶¶ 30-36.

II. Recording of Mail-in Ballot Status in the SURE System Must Be Accurate and Prompt.

Upon receipt of a voter’s mail-in ballot, county boards of elections process that ballot using the SURE system, “a single, uniform integrated computer system” developed and established by the Pennsylvania Department of State (“DOS”)

pursuant to its obligations under the federal Help America Vote Act (“HAVA”), 52 U.S.C. § 21083(a)(10)(A), and the Pennsylvania Election Code, 25 Pa.C.S. § 1222. Counties are required to work in and through the SURE system. *See* 25 Pa.C.S. § 1222(c) (“All [county election] commissions shall be connected electronically to the SURE system and shall maintain their registration records in the system.”); *see also id.* § 1222(e) (“[E]ach commission shall be required to use the SURE system as its general register.”). And counties must enter data into the SURE system, including data identifying “registered electors who have been issued absentee ballots,” *id.* § 1222(c)(19), and data identifying “registered electors who vote in an election and the method by which their ballots were cast.” *Id.* § 1222(c)(20). *See also* 4 Pa. Code §183.4(b)(2) (“A commission shall enter. . . voting history for registrants.”). As a practical matter and in order to comply with other Election Code provisions, counties must also promptly and accurately enter this data into SURE in order to generate accurate poll books for Election Day.² *See* Compl. ¶¶ 37-40.

To “promote consistency across the 67 counties,” DOS has developed protocols for processing mail-in ballots, which includes steps for mail-in ballots

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

that are received with disqualifying errors. *Id.* ¶¶ 41-50. According to current DOS guidelines, upon receiving a mail-in ballot, counties are expected to stamp the receipt date on the outer envelope and record the receipt in the SURE system. DOS also instructs county boards to examine the declaration envelope for disqualifying errors such as a missing date or signature. If the county “determines that a ballot should not be counted, the final disposition should be noted in [the] SURE [system].” *Id.* ¶ 41.

The SURE system provides a number of codes that election offices can use when they receive a mail-in ballot with a disqualifying error. *Id.* ¶ 43. The guidance emphasizes that “[i]t is important that the ballot return status is promptly and accurately recorded in SURE using the specific response type as to the disposition for each ballot received.” *Id.* ¶ 42. This step is critical to ensure that voters receive timely and accurate information about the status of their mail-in ballots, including if they have made an error that will result in their vote not being counted.

For example, boards of elections at a minimum should mark a ballot returned with an error as “cancelled” in the SURE system using one of the following codes:

- a. CANC – NO DATE
- b. CANC – INCORRECT DATE

- c. CANC – NO SECRECY ENVELOPE
- d. CANC – NO SIGNATURE

Entering the “cancelled” codes into the SURE system will trigger an automatic email notification to the voter about their options to “request a new ballot” or “go to [their] polling place on election day and cast a provisional ballot.”³ *Id.* ¶ 45.

However, if the county does not enter the correct, corresponding error code and instead records the ballot as received via the “RECORD – BALLOT RETURNED” code, the SURE system does not show that the ballot has been disqualified. Significantly, entry of this code generates an automated email to the voter suggesting their ballot will be counted and that they are no longer permitted to vote in-person on Election Day. *Id.* ¶ 50.

But a mail-in voter whose ballot has been rejected due to a technical error, such as a missing (or incorrect) date, signature, or secrecy envelope, is entitled to cast a provisional ballot at their local polling place on Election Day and have it counted. *See e.g., Keohane v. Del. Cnty. Bd. of Elections, CV-2023-004458, at *3* (Del. Cnty. Ct. Common Pleas Sept. 21, 2023) (ordering the Delaware County

³ The “CANC” code is intended to be used when the voter returns the ballot packet with an error and the county “has made a final decision as to the ballot, or it does not offer the opportunity to cure.” Compl. ¶ 45. The SURE system also provides the option to mark Ballots with disqualifying errors “Pending” when the county “offers the opportunity for voters to replace or correct [the] submission error.” Compl. ¶¶ 46-47. If the election office selects one of the “PEND” codes, the SURE system will automatically send the voter a corresponding email 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.” *Id.*

Board of Elections to count provisional ballots cast by voters who were notified of their mail-in ballot's rejection). Compl. ¶ 51.

Recognizing this fact, the majority of counties update the “ballot return status”—including information about a voter’s disqualifying error—“promptly and accurately” in the SURE system after receiving the mail-in ballot packet at the election office. *Id.* ¶ 52. This gives a voter the opportunity to take the necessary steps to cast a valid vote. *Id.* In fact, most counties, including nearly all of Washington County’s neighboring counties, go much further and take other straightforward steps to reduce the number of mail-in voters who are disenfranchised due to minor errors. *Id.* ¶¶ 53-54.

III. Mail-in Voting in Washington County

In the lead-up to both the 2023 primary and general elections, Washington County was one of the many counties that promptly and accurately recorded defective mail-in ballots in the SURE system as “CANC – NO DATE” and “CANC – NO SIGNATURE,” and allowed voters to correct the error in the packet or complete a replacement mail-in ballot at the election office, or cast a provisional ballot on Election Day. *Id.* ¶¶ 55-56. In the weeks before the April 2024 primary, however, the Board of Elections voted 2-1 to reverse course, implementing a policy in which they concealed which voters had made disqualifying errors on their

mail-in ballots and, in many cases, affirmatively misled voters into thinking their ballot would be counted. *Id.* ¶¶ 57-66.

A week before the election, the election office had already identified and segregated 170 ballots that would not be counted. *Id.* ¶ 66. The Board instructed the election office to code these disqualified ballots in SURE as “received” instead of “cancelled,” which is the same code used for mail-in ballots that will ultimately be counted. *Id.* ¶ 67. As a result, rather than being notified that the election office had determined their ballots were defective and would not be counted, voters received a misleading email advising them that their ballot “has been received” and that they “may receive another notification” if Washington County “identifies an issue” preventing the ballot from being counted. “Otherwise, you will not receive any further updates on the status of your ballot . . . and you are no longer permitted to vote at your polling place location.” *Id.* ¶ 68. Voters checking the DOS online mail-in ballot tracker to determine the status of their vote received a similar misleading message. *Id.*

In addition, the Board directed the election office not to disclose to mail-in voters who inquired before Election Day whether the election office had decided to count their mail-in ballot. *Id.* ¶¶ 69-70. Washington County also refused to provide a publicly available list of voters with deficient mail-in ballots as required by the Election Code, 25 P.S. § 3150.17(a) (mail-in ballots); *id.* § 3146.9(a) (absentee

ballots), “upon request within 48 hours of the request” *id.* § 3150.17(c) (mail-in ballots); *id.* § 3146.9(c) (absentee ballots). *See* Compl. ¶ 72.

Because the Board and its employees were the only ones who knew which voters’ mail-in ballots would not be counted, and deliberately concealed that information from voters and the public, voters with disqualifying errors on their ballots were deprived of the opportunity to exercise their right to vote by provisional ballot. Compl. ¶¶ 73-75.

In the end, Washington County disenfranchised 259 eligible mail-in voters whose ballot packets had disqualifying defects, which represents 2% of all timely-received mail-in ballots. These voters are both Democrats and Republicans. Nearly three quarters of the voters whose mail-in ballots were rejected by Washington County were over age 65, and 30% were over the age of 80. *Id.* ¶¶ 76-77.

IV. The November Election

Counties will begin processing mail-in ballot applications for the November 5, 2024, general election on September 16, 2024. 25 P.S. § 3150.12a(a). *See* Compl. ¶¶ 79-80. The Washington County Board of Elections has given every indication that it intends to again apply its policy of concealing its unilateral determination about which voters make disqualifying mistakes on their mail-in ballot envelopes, and affirmatively misleading voters into thinking their vote will count, in November. *Id.* ¶ 81. As a result, hundreds of qualified, eligible mail-in

voters in Washington County will once again have their vote canceled without their knowledge, and will once again be disenfranchised by the Board of Elections without any due process. Compl. ¶¶ 82-147.

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

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, 502 (Pa. 2014). Because all six factors weigh in Plaintiffs’ favor, injunctive relief should issue.

A. Plaintiffs Are Likely to Prevail on the Merits

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, 611 (Pa. Commw. Ct. 2020) (quoting

Commonwealth ex rel. Corbett v. Snyder, 977 A.2d 28, 43 (Pa. Commw. 2009).

Here, Plaintiffs can demonstrate not only that there is a “substantial legal question,” but that the Board’s decision to deliberately conceal its determination of which voters’ mail-in ballots would be canceled, to affirmatively mislead voters into believing their votes would be counted, and to deprive voters of an opportunity to preserve their right to vote violates Article I, Section 1’s procedural due process guarantee.

1. Plaintiffs Are Likely to Prevail in Demonstrating That Washington County Voters Are Entitled to Due Process Protections.

The “guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights,” including Article I, Section 1. *Khan v. State Bd. of Auctioneer Exam’rs*, 842 A.2d 936, 945 (Pa. 2004). “The central demands of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” *Bundy v. Wetzel*, 184 A.3d 551, 557 (Pa. 2018) (internal citation and quotations omitted). These rules are intended to “minimize substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.” *Washington v. PA Dep’t of Corr.*, 306 A.3d 263, 285 (Pa. 2023) (quoting *Carey v. Phipus*, 435 U.S. 247, 259 (1978)). Notice

that is misleading or confusing is patently unfair and thus plainly violates due process.⁴

Our Supreme Court recently reaffirmed that procedural due process is an “axiom of American jurisprudence” that “imposes constraints on governmental decisions which deprive individuals’ of any fundamental rights.” *See Washington*, 306 A.3d at 284 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). Voting is one such fundamental right, guaranteed to all Pennsylvania citizens by the Pennsylvania Constitution.⁵ *See, e.g., Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012). Because voting is a protected interest, its “deprivation . . . must comport with due process principles.” *See Washington*, 306 A.3d at 289.⁶

⁴ *Turk v. Com., Dept. of Transp.*, 983 A.2d 805, 818 (Pa. Commw. Ct. 2009) (“A notice of [driver’s license] suspension may violate an individual’s due process rights if it contains information that is misleading and impairs preparation of the individual’s defense” quoting *Dunn v. Dept. of Transp. Bur. Of Driver Licensing*, 819 A.2d 189, 192-93 (Commw. Ct. 2003)); *In re R.M.*, 790 A.2d 300, 306-07 (Pa. 2002) (trial court committed procedural due process violation by transferring child custody based on proof materially varying from charged misconduct, citing *Walters v. Reno*, 145 F.3d 1032, 1043 (9th Cir. 1998) for proposition that notice which is confusing, misleading or inaccurate is insufficient to meet procedural due process requirements).

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

⁶ *Accord Zessar v. Helander*, 2006 WL 642646 at *5 (N.D. Ill. Mar. 13, 2006) (“[O]nce the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot”); *Frederick v. Lawson*, 481 F. Supp. 3d 774, 793 (S.D. Ind. 2020) (“[O]nce a state creates an absentee voting regime, the state has enabled a qualified individual to exercise her fundamental right to vote in a way that she was previously unable to do and then must administer [that regime] in accordance with the Constitution and afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot.”); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 229 (M.D.N.C. 2020) (Finding that plaintiffs had demonstrated a likelihood of success on their procedural due process claim and enjoining the state from “rejecting absentee ballots without due process as to those ballots with a material error that is subject to remediation”).

2. Plaintiffs are Likely to Prevail in Demonstrating that the Washington County Board of Elections' Policy Violates Voters' Procedural Due Process Rights.

To ascertain what process is due, Pennsylvania courts have long applied the three-part balancing test from the U.S. Supreme Court's seminal decision in *Mathews v. Eldridge*. See *Washington*, 306 A.3d at 284-85; *R v. Dep't of Pub. Welfare*, 636 A.2d 142, 152-53 (Pa. 1994). Under *Mathews*, courts balance the following three factors: 1) the private interest affected; 2) the risk of an erroneous deprivation coupled with the value of additional or substitute safeguards; and 3) the state's interest, including the burdens the additional or substitute procedural requirements would impose on the state. *Washington*, 306 A.3d at 300 (citations omitted).

Washington County's unilateral, secret determination to cancel qualified voters' mail-in ballots deprives voters of a fundamental right, thereby mandating procedural due process protections. Considering the substantial interests at stake, the value of additional safeguards, and the *de minimis* burden those safeguards would impose on the County, the Board's decision to conceal mail-in ballot determinations and mislead mail-in voters through inaccurate SURE codes, thus depriving them of any opportunity to exercise their right to vote, yields a clear due process violation.

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

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,”⁷ “fundamental,”⁸ and “the most treasured prerogative of citizenship.”⁹ The policy directly impairs that interest by instructing the County’s election office to secretly determine which mail-in ballots should be disqualified, and then systematically and deliberately concealing those determinations from voters – and in many cases, affirmatively misleading voters into foregoing their fundamental right to vote. Compl. ¶¶ 67-72.

Voters whose mail-in ballots are deemed defective by the Board are entitled to vote by casting a provisional ballot on Election Day. *Id.* at ¶¶ 51, 73-75. But voters must receive notice of the mail-in ballot cancellation in order to exercise that right. By deliberately withholding that information, the Board leaves “no recourse for the voter and no way to remedy the loss of that vote in that election.” *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 228 (M.D.N.C. 2020) (“[W]hen the ballot is rejected for a reason that is curable . . . and the voter is not given notice or an opportunity to be heard on this

⁷ *Page v Allen*, 58 Pa. 338, 347 (1868).

⁸ *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 488 (Pa. 2006); *Applewhite*, 54 A.3d at 3.

⁹ *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955).

deficiency. . . this facially effect[s] a deprivation of the right to vote.”) (internal quotations omitted).

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

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

The second *Mathews* factor, the risk of erroneous deprivation coupled with the probable value of additional safeguards, also weighs heavily in Plaintiffs’ favor. The Board’s policy creates a system rife with risk by rendering unilateral determinations about which mail-in ballots should be disqualified, and then blocking any means for voters to learn about those decisions before Election Day. The Board’s policy is the epitome of a “secret, one-sided determination of facts decisive of rights” recently condemned by the Pennsylvania Supreme Court. *Washington*, 306 A.3d at 266. It makes disenfranchisement a foregone conclusion and guarantees that qualified, eligible voters who timely return their ballots will nevertheless be deprived of their right to vote – an inexcusable result. *See Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (Pa. 1964) (“the

disfranchisement of even one person validly exercising his right to vote is an extremely serious matter”).

The Board’s policy is especially unreasonable because additional safeguards would greatly reduce the risk of disenfranchisement. *See Self Advoc. Sols. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1053 (D.N.D. 2020) (“value of additional procedures to safeguard against erroneous ballot rejections” becomes “apparent” where “[t]he result is the outright disenfranchisement of otherwise qualified electors”). As our Supreme Court recently held, the “controlling inquiry” under the second *Mathews* factor is “whether the state is in a position to provide for pre-deprivation process.” *Washington*, 306 A.2d at 296 (citations omitted). Here, the Board is well-positioned to provide that process simply by timely and accurately entering mail-in ballot determinations into the SURE system and answering voter’s queries about their ballot status honestly.

The prompt and accurate recording of mail ballot cancellations would provide voters with several valuable safeguards. First, voters would receive an email about the status of their mail-in ballot and their options to “request a new ballot” or “go to [their] polling place on election day and cast a provisional ballot.” Compl. ¶ 45. Second, voters could learn that their ballot was disqualified by checking the online mail ballot tracker. *Id.* ¶ 48. Third, political parties and nonprofit organizations, like Plaintiffs CCJ and Washington Branch NAACP,

could reach out to affected voters and notify them of their disqualifying mistake and their options for preserving their right to vote. *Id.* ¶ 49.

Putting in place these additional safeguards is valuable because they reduce the risk that voters will be deprived of their right to vote. Thus, the second *Mathews* factor also weighs in favor of Plaintiffs.

c. Factor 3: Requiring the Board to Tell Voters the Truth About Flawed Mail-in Ballots Would in no Way Burden the Board or Impair its Interests.

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

First, entering timely, accurate ballot status information into the SURE system would not impose any additional administrative burden because county boards of elections are already required to maintain this data in the SURE system in order to comply with numerous statutory obligations under the Election Code. *See* Compl. ¶¶ 37-40. Nor would the consequence of timely entering accurate information into SURE – allowing voters the opportunity to take advantage of an existing statutory remedy to vote at the polls by provisional ballot – impose any additional burden on the Board. *Id.* ¶ 51.

Indeed, prior to April 2024, Washington County not only timely entered accurate ballot information into SURE, enabling voters to exercise their right to

cast a provisional ballot, but also had additional procedures in place to support voters who had returned defective mail-in ballots. *Id.* ¶ 55-56. The widespread use of effective notification procedures by counties across the state, including Washington’s neighbors, further underscores the *de minimis* burden imposed by the proposed alternate due process protections. *Id.* ¶¶ 52-54. *See Democracy N. Carolina*, 476 F. Supp. At 229 (burden to state of providing pre-rejection notice “minimal” where “several counties have processes in place already”).

Moreover, the County cannot claim any legitimate interest in concealing mail-in ballot determinations and misleading voters into believing their mail-in ballot will be counted. To the contrary, maintaining timely, accurate information in the SURE system about those determinations would ultimately promote the County’s interests in ensuring the fair and orderly administration of elections – including by enabling the County to comply with its statutory obligation to “clearly identify” voters who have received and voted mail-in ballots, 25 P.S. § 3150.16(b)(1), and to generate accurate poll books for Election Day that identify voters who requested and voted by mail-in ballot. *See* 25 Pa.C.S § 1222(c)(13); Compl. ¶¶ 37-40. *See also Frederick*, 481 F. Supp.3d at 796 (state has important interest in “maintaining election integrity” and “providing mail-in absentee voters notice and the opportunity to cure . . . by confirming their identity in fact promotes these important governmental interests”); *Jaeger*, 464 F. Supp. 3d at 1053-54

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

In sum, Plaintiffs are likely to prevail in demonstrating that Article I, Section 1 entitles qualified, eligible voters to know when their mail-in ballot is disqualified, during the window of time when they can still rescue their right to vote by casting a provisional ballot. As in *Washington*, here the Board's "infrastructure is already in place to provide both notice and an opportunity to be heard...." *Washington*, 306 A.3d at 299, n. 53. Even if "fairness in the process does not guarantee substantive relief" for all voters who make a disqualifying error, *id.* at 301, the fact that the due process protection sought by Plaintiffs would give hundreds of qualified, eligible voters the opportunity to preserve their fundamental right to vote requires Washington County to provide it.

Plaintiffs are likely to prevail on the merits of the procedural due process claim.

B. Plaintiffs Will Be Irreparably Harmed Absent the Requested Declaration and Injunction

Washington County's new policy will irreparably harm Plaintiffs in at least two ways.

First, Washington County's policy has already resulted in the disqualification of 259 votes, including those of the seven voter Plaintiffs, and will

disenfranchise far more in the upcoming much-higher-turnout general election.

Compl. ¶¶ 67-82.

It is well-settled that deprivation of a constitutional or statutory right constitutes *per se* irreparable harm. *See Wolk*, 228 A.3d at 610-11 (citing *Pa. Pub. Util. Comm'n v. Israel*, 52 A.2d 317 (Pa. 1947)); *see also SEIU*, 104 A.3d at 508; *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1180 (Pa. Commw. Ct. 2016); *Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa. Commw. Ct. 2014) (en banc). The right to vote cannot be bought, sold, or quantified, and once taken away, it cannot be repaired or replaced. “[T]here is no possibility of meaningful postdeprivation process when a voter’s ballot is rejected.” *Jaeger*, 464 F. Supp. 3d at 1052; *see also Zessar*, 2006 WL 642646 at *9 (In the absence of notification procedures, “[t]he voter’s right to vote would have been irremediably denied”). Thus, “[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles*, 202 A.2d at 540.¹⁰

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, and even misleading voters about its determinations on whether their ballot will be counted inflicts irreparable harm.

¹⁰ Other courts routinely deem restrictions on fundamental voting rights irreparable injury. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986).

Second, an organization is harmed in its own right if an unconstitutional statute forces it to waste resources to carry out its mission. *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at *7-8 (Pa. Commw. Ct. Jan. 17, 2014). Absent an injunction, that will be the case here.

Plaintiffs CCJ and Washington Branch NAACP share a mission of mobilizing and educating Pennsylvania voters to advance their respective organizational priorities. Compl. ¶¶ 134, 143. The County's actions have directly impaired CCJ's and Washington Branch NAACP's ability to fulfill their missions and will force these Plaintiffs to divert scarce resources to educating voters regarding compliance with these curable requirements, rather than devoting those resources to the substantive matters that are central to their respective missions. Comp. ¶¶ 135-141, 144-147. The expenditure of organizational resources to educate voters in the face of election-administration policies that violate the Pennsylvania Constitution gives rise to per se irreparable harm. *Ball v. Chapman*, 289 A.3d 1, 19-20 (Pa. 2023).

C. The Public Interest Weighs in Favor of Granting the Injunction.

Ordering the Board of Elections to accurately and promptly enter the correct codes into the SURE system is decidedly in the public interest because it gives voters an opportunity to vote a provisional ballot if their mail-in ballot has been rejected. "By definition, the public interest favors permitting as many qualified

voters to vote as possible.” *Democracy N. Carolina*, 476 F. Supp. 3d at 237 (citations and quotations omitted) (public interest “weighs heavily” in plaintiffs’ favor on the procedural due process claim because “the infringement of the fundamental right to vote poses a far greater risk”).¹¹

The County’s new policy actually contravenes the public’s interest because it unnecessarily disenfranchises hundreds of registered and qualified county voters. *See One Three Five, Inc. v. City of Pittsburgh*, 951 F. Supp. 2d 788, 825 (W.D. Pa. 2013) (“injunctive relief is in the public’s interest when governmental action is likely to be declared unconstitutional ‘because the enforcement of an unconstitutional law vindicates no public interest.’”) (quoting *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013); *see also ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003), *aff’d*, 542 U.S. 656 (2004) (“public interest was ‘not served by the enforcement of an unconstitutional law.’”).

¹¹ Courts nationwide repeatedly have found that a preliminary injunction that ensures voters can exercise their constitutional right to vote is in the public interest. *Obama for Am.*, 697 F.3d at 436–37 (issuing a preliminary injunction and finding “the public has a strong interest in exercising the fundamental political right to vote” that “is best served by favoring enfranchisement and ensuring that qualified voters’ exercise of their right to vote is successful”) (citations and quotations omitted); *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (finding that a preliminary injunction that allows citizens to “participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy”) (citations and quotations omitted); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (finding that a preliminary injunction that ensures voters “can exercise their constitutional right to vote thus promotes the public interest.”) (citations and quotations omitted).

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

The balance of harms weighs heavily in favor of granting a preliminary injunction. Ordering the Board of Elections to stop concealing from voters whether their mail-in ballot will be counted by entering accurate SURE system codes harms no one. But allowing the Board of Elections to continue its new practice will continue and significantly 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)). As noted in the verified complaint, the Washington County Board’s new policy unnecessarily disenfranchised 2% of all timely-received mail-in ballots in the last primary by giving affected voters “no opportunity to oppose the rejection or to demonstrate that it was erroneous.” *Zessar*, 2006 WL 642646, at *6; Compl. ¶ 77. The turnout in the November presidential general election will be significantly higher; the resulting harm to those voters and the system at large is significant. When even a relatively small number of mail-in ballots are set aside, the Board’s policy can impact the outcome of close races,¹² sowing distrust in election results and further highlighting the harm done by denying qualified voters their voice in a given election.

¹² *See, e.g.*, Katherine Reinhard and Robert Orenstein, *Cohen wins Lehigh County judicial election by 5 votes*, PENNSYLVANIA CAPITAL-STAR (June 17, 2022), <https://penncapital-star.com/election-2022/cohen-wins-lehigh->

At the same time, the Board’s new policy is unsupported by any countervailing public interest. The election office knows upon receipt precisely which ballots will not be counted due to disqualifying defects on the outer envelope. Hiding that determination from voters during the window when there is still an opportunity to remedy the loss of the right to vote violates due process.

E. An Injunction Will Restore the Status Quo Ante.

Preliminary injunctive relief is designed to place the parties in the position they were in prior to the commencement of the unlawful conduct. The Board adopted its new policy and practice in April 2024, shortly before the primary election. 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). Where important constitutional questions are raised and there is a “threat of immediate and irreparable harm,” there are “reasonable

county-judicial-election-by-5-votes/ (noting impact on municipal election results after counting 257 mail-in ballots received in undated envelopes following *Migliori v. Cohen*, 36 F.4th 153, 162-64 (3d Cir. 2022), *vacated as moot*, 143 S. Ct. 297 (2022)); Dan Sokil, *Towamencin supervisors race tied after Montgomery County election update*; THE REPORTER ONLINE (Nov. 27, 2023), <https://www.thereporteronline.com/2023/11/27/towamencin-supervisors-race-tied-after-montgomery-county-election-update/> (noting impact on Towamencin Township supervisor results after counting six impacted mail-in ballots following *Pa. State Conference of NAACP v. Schmidt*, -- F. Supp. 3d --, No. 1:22-CV-00339, 2023 WL 8091601 (W.D. Pa. Nov. 21 2023), *rev’d*, 97 F.4th 120 (3d Cir. 2024)); Borys Krawczeniuk, *Court says six mail-in ballots in state 117th House District race should count*, WVIA NEWS (May 8, 2024), <https://www.wvia.org/news/local/2024-05-08/050824luz-117thhouse> (noting potential impact on outcome of state house race if six outstanding mail-in ballots are counted in Luzerne County).

grounds for the entry of a preliminary injunction preserving the status quo.”

Fischer v. Dep’t of Pub. Welfare, 439 A.2d 1172, 1175 (Pa. 1982).

F. The Injunction is Reasonably Suited to Abate the Unconstitutional Offense

The requested injunctive relief is reasonably tailored to the constitutional violation here. Plaintiffs’ requested relief is simple: Require Washington County to input accurate codes into the SURE system upon receipt of a mail-in ballot, so if the ballot has a disqualifying defect, at a minimum, the voter may vote by provisional ballot on Election Day. Plaintiffs are not asking the Court to order Washington County to implement the more robust “notice and cure” procedures implemented by its neighbors – they certainly can and should as a service to their constituents – but only to take the *minimal* steps under the SURE system that will alert voters to a minor but disqualifying defect that threatens a fundamental right. Whether the Board institutes the *de minimis* relief plaintiffs seek or implements a more robust process, the constitution requires pre-deprivation notice and *some* process.

The requested relief will not impact any other requirement for mail-in voting and is the only way to prevent further unwarranted disenfranchisement in violation of the voters’ procedural due process and voting rights under the Pennsylvania constitution. *See Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 48-49 (Pa.

Commw. Ct. 2009) (granting preliminary injunction noting that the injunction was a reasonable way to prevent the possibility of future harm).

CONCLUSION


The Washington County Board of Elections' policy violates Pennsylvania constitutional due process guarantees. Plaintiffs respectfully request that the Court enter an order in the form attached hereto, pending final adjudication of the matter.

Dated: July 3, 2024

Respectfully submitted,

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

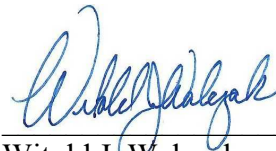
CIVIL DIVISION

<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>2024 No. 3953</p>
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CERTIFICATE OF PRESENTATION

1. The undersigned, Witold J. Walczak, represents Plaintiffs, the moving party herein.
2. The attached Motion for Leave to Exceed Brief Word Limit will be presented to the Hon. Brandon P. Neuman, on July 9, 2024 at 9:15am in Courtroom No. 4.
3. The attached motion is consented to by all parties. A Certification of Consent is attached to this motion.
4. The applicable authority on which the Court may rely to provide the relief sought are as follows: Washington County Local Rules of Civil Procedure Rule 210(1).

Respectfully submitted,



Witold J. Walczak

July 3, 2024

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

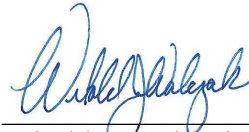
CIVIL DIVISION

<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 style="text-align: center;">2024 No. 3953</p>
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CERTIFICATE OF CONSENT

1. The undersigned, Witold J. Walczak, represents Plaintiffs, the moving party herein.
2. Pursuant to email correspondence on July 2, 2024, Defendant's counsel consented to Plaintiffs' request to file an overlength brief, a courtesy Plaintiffs will reciprocate.

Respectfully submitted,



Witold J. Walczak

July 3, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Consented-To Motion for Leave to Exceed Brief Word Limit of Local Rule 210(1) 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



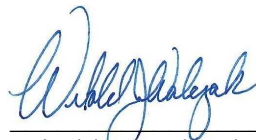
Witold J. Walczak

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