

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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No. 516 MD 2024

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ROBERT ROSSMAN, *in his official capacity as member of the Potter  
County Board of Elections,*

*Petitioner,*

v.

DEPARTMENT OF STATE OF THE COMMONWEALTH OF  
PENNSYLVANIA *and* AL SCHMIDT, *in his official capacity as  
Secretary of the Commonwealth,*

*Respondents.*

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**BRIEF OF PETITIONER IN OPPOSITION TO PRELIMINARY  
OBJECTIONS**

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## I. INTRODUCTION

At every turn, Respondents have fundamentally mischaracterized or misunderstood the governing law. With regard to their first preliminary objection challenging standing, Respondents ignore—without any justification or explanation—a slew of allegations in the petition for review alleging interference with specific statutory responsibilities assigned to individual commissioners. This alone is enough to defeat Respondents’ half-baked argument against Petitioner’s standing. Respondents’ second preliminary objection fares no better, as it, too, mischaracterizes Pennsylvania law. Specifically, Respondents maintain that applicants to register to vote are not required to provide either a driver’s license number or the last four digits of their social security number on a voter registration application. But this argument ignores entirely the regulations that Respondents themselves promulgated. And because those regulations are binding on review, Respondents’ second preliminary objection also cannot be sustained.

## II. COUNTERSTATEMENT OF THE CASE

### A. Form of Action and Procedural History of the Case.

On November 4, 2024, Petitioner Robert Rossman, who is a duly elected member of the Potter County Board of Commissioners, commenced the present original action by way of a two-count petition for review in the nature of a complaint (PFR) against Respondents Pennsylvania Department of State (the Department), and the Secretary of the Commonwealth (the Secretary). Specifically, as set forth in his PFR, Commissioner Rossman alleges that Respondents' 2018 "directive" purporting to govern review and approval of voter registration applications is unlawful because it is: (a) contrary to Pennsylvania's voter registration law (Count I); and (b) an unenforceable *de facto* regulation (Count II).

On December 23, 2024, Respondents lodged preliminary objections to the PFR, arguing that this action should be dismissed for lack of standing and because Commissioner Rossman has failed to state a claim for relief. Following submission of a timely response to that pleading, this Court issued the present briefing schedule.

In addition, on March 31, 2025, Commissioner Rossman filed an Application for Summary Relief, requesting entry of final judgment in his favor relative to each of the two counts he has alleged.

Respondents, however, have neglected to file a response within the fourteen-day period prescribed by Rule of Appellate Procedure 123(b).

See Pa.R.App.P. 123(b).

**B. Pennsylvania’s voter registration statute.**

On January 31, 2002, the Governor signed into law Act 3 of 2002 (the Registration Act),<sup>1</sup> which substantially amended Pennsylvania’s voter registration laws and created the Statewide Uniform Registry of Electors (the SURE system). Shortly thereafter, in December 2002, the Secretary promulgated the requisite regulations (the SURE Regulations), which have remained unchanged since their inception.<sup>2</sup> And together with the Registration Act, these regulations established a comprehensive set of requirements governing voter registration in Pennsylvania. Of particular relevance here are the provisions relating

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<sup>1</sup> Act of Jan. 1, 2002, P.L. 18, No. 3, *see* 25 Pa.C.S. § 1101, *et seq.*

<sup>2</sup> *See* Pa. Bull., Vol. 32, No. 52, at 6340-59 (Dec. 28, 2002) (citing 25 Pa.C.S. § 1222(f) (directing the Department to promulgate regulations necessary to administer the SURE system)); *see also* 4 Pa. Code. Ch. 183.

to the submission, review, and disposition of voter registration applications.

*First*, in keeping with the overarching aim of uniformity, the Registration Act provides for the creation of a single voter registration application form throughout the Commonwealth, the form of which is to be prescribed by the Secretary. *See* 25 Pa.C.S. § 1327(a) (“The secretary shall prescribe the form of an official voter registration application.”). In turn, under the SURE Regulations, that “Statewide voter registration application form” must include, among other things, a request for the applicant’s driver’s license number (DLN), and the last four digits of the applicant’s Social Security number (partial SSN). *See* 4 Pa. Code § 183.1(a) (providing that “[t]he Statewide voter registration application form” prescribed by the Registration Act, which is referred to as the “VRMA” in the SURE Regulations, must contain a request for, *inter alia*, an applicant’s driver’s license number and the terminal four digits of the social security number). Importantly, while the regulations specify that some of the information requested in an “approved voter registration form” is “additional or optional”—and, thus, “may not be considered when determining the acceptance or rejection of the

application”—an applicant’s DLN is not included in the list of such “additional or optional information.” 4 Pa. Code § 183.5(f). Similarly, an applicant’s partial SSN *may* be optional, but only “***if the applicant’s driver’s license number is provided.***” *Id.* at § 183.5(f)(8) (emphasis added).<sup>3</sup> In other words, one of these two numbers is mandatory and thus “necessary information.”

*Second*, the Registration Act also sets forth the parameters for reviewing and approving voter registration applications. Specifically, Section 1328 provides that, “[u]pon receiving a voter registration application, ***a commissioner***, clerk or registrar of a commission shall . . . [e]xamine the application to determine[,]” *inter alia*, “[w]hether the application is complete,” 25 Pa.C.S. § 1328(a)(2)(i), and “[w]hether the applicant is a qualified elector.” *Id.* at § 1328 (a)(2)(ii). If, upon such examination, it appears that the application, *inter alia*, “contains the required information indicating that the applicant is a qualified elector of the county[,]” the application must be approved and the information

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<sup>3</sup> As noted in the PFR, the current version of the Pennsylvania official voter registration application form created by the Department, *see* PFR, Ex. A, as well as the National Voter Registration Form, *see* PFR, Ex. B, confirms that an applicant’s correct DLN or Partial SSN is a necessary datapoint. *See* PFR, ¶¶ 26-30.

contained therein logged into the SURE system. *See* 25 Pa.C.S. §§ 1328(b)(3)(ii), (4)(ii), (5)(ii), (6)(ii), (7)(ii), (8)(iii).<sup>4</sup>

If, on the other hand, the application was not properly completed, the commission may not accept it but must use “reasonable efforts to ascertain information that is necessary for voter registration . . .[.]” which “shall include mailing a notice to the applicant or calling the applicant, if a phone number is available.” 4 Pa. Code. § 183.5(c). And where “the application remains *incomplete or inconsistent*[.]” despite such “reasonable efforts by the commission to ascertain the necessary information,” the application must be rejected.<sup>5</sup>

### **C. The Federal Help America Vote Act of 2002 (HAVA).**

Approximately ten months after the Registration Act was enacted, President George W. Bush signed into law the Help America Vote Act of 2002 (HAVA), 52 U.S.C. §§ 20901-21145 (formerly 42 U.S.C. §§ 15301-15545). As relevant here, HAVA generally provides that “an application

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<sup>4</sup> Once the information is entered, the applicant is also assigned a unique identification number and added to the county’s general register. *See* 25 Pa.C.S. §§ 1328(c), 1328.1; *see also* 25 Pa.C.S. § 1222(c)(3), (6), (10).

<sup>5</sup> *See* 25 Pa.C.S. § 1328(b)(2)(i) (emphasis added) (providing that a commission “shall” reject a voter registration application if “[t]he application was not properly completed and, after reasonable efforts by the commission to ascertain the necessary information, the application remains incomplete or inconsistent”).

for voter registration for an election for Federal office may not be accepted or processed by a State unless” it contains either: (1) the applicant’s DLN; or (2) the applicant’s partial SSN. *See* 52 U.S.C. § 21083(a)(5)(A)(i). Furthermore, under HAVA, States must “match” and “verify[]” that information with information from the “State motor vehicle authority” and the Social Security Administration. 52 U.S.C. § 21083(a)(5)(B)(ii) (citing 42 U.S.C. § 405(r)(8)). Notably, although HAVA does not expressly mandate rejection of applications in the event of a mismatch, or if a voter’s identity cannot be confirmed, it does expressly provide that states “shall determine whether the information provided by an individual is sufficient to meet the [matching] requirements . . . *in accordance with State law.*” 52 U.S.C. § 21083(a)(5)(A)(iii) (emphasis added).<sup>6</sup>

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<sup>6</sup> *See also id.* at § 21084 (“The requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law described in section 21145 of this title.” (citing 52 U.S.C. § 21145)).

#### D. The Department's shifting interpretation of HAVA.

The Department's initial reading of HAVA, quite naturally, was that its provisions—when coupled with Pennsylvania law—*require* the counties to ensure that the information provided by an applicant **match** information in either the Commonwealth's driver's license database or the database of the Social Security Administration. Indeed, in December 2003, the Department published a Notice in the Pennsylvania Bulletin, providing that:

For applications for voter registration received on and after January 1, 2006, section 303(a)(5) of HAVA will prohibit the acceptance or processing of the application unless (i) the application includes the driver's license number of an applicant who has been issued a current and valid driver's license, or if the applicant does not have a current and valid driver's license, the last four digits of the applicant's social security number (except for an applicant who declares in his application that he has neither a current and valid driver's license nor a social security number); *and* (ii) elections officials determine that the number provided by the applicant is valid.

Pa. Bull., Vol. 33, No. 50, at 6340-59 (Dec. 13, 2003) (emphasis added).

On August 9, 2006, however, the Department issued a document directed to county election commissions entitled, "*Alert re: Driver's License and Social Security Data Comparison Processes Required by the Help America Vote Act (HAVA)*" (hereafter, the 2006 Alert), a copy of

which is attached hereto as Exhibit A. This new alert baldly declared that “failure to achieve a match between a voter registration application and a record in the Commonwealth’s driver’s license database or the database of the Social Security Administration *is not a reason to reject the application.*” *Id.* at 5 (emphasis added).

Notably, the 2006 Alert purported to recognize—in bolded, underlined, and italicized language—that “**the disposition of an application for voter registration must be made solely by the county voter registration commission under the standards and procedures prescribed by Pennsylvania law.**” *Id.* (emphasis in original). Conspicuously absent from 2006 Alert, however, was any mention or discussion of Pennsylvania law. In fact, the 2006 Alert did not cite any Pennsylvania legal authority whatsoever—not a statute, not a regulation, not even a common pleas court decision. Instead, the 2006 Alert cited *Washington Ass’n of Churches v. Reed*, 492 F.Supp.2d 1264, 1268 (W.D. Wash. 2006) (*Reed*), a never-appealed judicial opinion

purporting to interpret HAVA, which was issued in the context of a preliminary injunction by a federal court in Washington State.<sup>7</sup>

Next, in 2018, the Department issued a document directed to county election commissions entitled, “*Directive Concerning HAVA-Matching Drivers’ Licenses or Social Security Numbers for Voter Registration Applications*” (hereafter, the 2018 Directive), a copy of which is attached hereto as Exhibit B. The 2018 Directive relayed the same basic message as the 2006 Alert: a mismatch resulting from cross-checking the DLN or Partial SSN is not a proper basis for rejecting a new voter registration application. But unlike the 2006 Alert, which was somewhat more circumspect in its characterization of the law, the 2018 Directive purports to have been issued pursuant to Section 1803(a) of Registration Act,<sup>8</sup> and claims that “**Pennsylvania and federal law**

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<sup>7</sup> Importantly, the 2006 Alert does not provide any empirical data (or even estimates) on how often a record was mistakenly identified as a mismatch.

<sup>8</sup> *See id.* at 1 (citing 18 Pa.C.S. § 1803(a) (“The department shall have the authority to take any actions, including the authority to audit the registration records of a commission, which are necessary to ensure compliance and participation by the commissions.”)). Notably, Section 1803(a) permits the Department to “take **any actions**, . . . necessary to ensure” a commission’s compliance with Registration Act, *see id.* at § 1803(b), including recourse to Section 1804, which **requires** the State Treasurer, upon notice from the Secretary, to withhold **all money** appropriated to a county by the Commonwealth. *See id.* at § 1804(b) (providing that, upon receiving the requisite notification “the State Treasurer shall . . . withhold any part or all of the State appropriations to which a

are clear that voter registrations may *not* be rejected based solely on a non-match between the applicant’s identifying numbers on their application and the comparison database numbers.” *Id.* (emphasis in original). Thus, according to the 2018 Directive, such applications “**may not be rejected and must be processed like all other applications.**” Ex. B at 1 (emphasis in original).

Moreover, the 2018 Directive also expressly prohibits counties from placing any application “in ‘Pending’ status while a county is doing follow-up with an applicant whose driver’s license or partial SSN could not be matched” and provides that such applications “**MUST** be accepted, unless the county has identified another reason to decline the application.” *Id.* (emphasis in original). According to the 2018 Directive, approving voter registration despite a mismatch is required to “**comply with state and federal law[.]**” *Id.* (emphasis in original).<sup>9</sup>

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county is entitled, including funding for the court of common pleas but excluding funding for human services”).

<sup>9</sup> Importantly, the Secretary has never attempted to promulgate either the 2006 Alert, or the 2018 Directive as a final-form regulation. In fact, neither document has ever even been published in the Pennsylvania Bulletin. As explained by the Pennsylvania Supreme Court:

Notwithstanding the certainty with which it describes the law, the 2018 Directive—much like the 2006 Alert—is largely devoid of any legal analysis. To begin, like the 2006 Alert, the 2018 Directive fails to cite **any Pennsylvania law** in support of its interpretation of the Registration Act’s matching requirement. As for Federal law, the 2018 Directive purports to rely on *Reed*. But aside from quoting its description of the alleged intent underlying HAVA, the 2018 Directive fails to explain how *Reed* fits into an analysis of Pennsylvania law. And critically, nowhere in the 2018 Directive does the Department acknowledge that the sole authority on which it relies (*i.e.*, *Reed*), was rejected by the Eleventh Circuit Court of Appeals in *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153 (11th Cir. 2008) (*Browning*).

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The Pennsylvania Bulletin is the official gazette of the Commonwealth of Pennsylvania. It is published weekly and, *inter alia*, the temporary supplement to the Pennsylvania Code, which is the official codification of agency rules and regulations and other statutorily authorized documents. Courts are required to take judicial notice of the Pennsylvania Bulletin.

*Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 483 (Pa. 2006).

### III. SUMMARY OF THE ARGUMENT

As a threshold matter, this Court should have little difficulty in overruling the first preliminary objection. Specifically, notwithstanding Respondents’ mischaracterizations, the Registration Act specifically vests individual commissioners with the power and duty of not only examining voter registration applications for completeness, but also determining applicants’ qualifications. Because the PFR contains ample allegations regarding the 2018 Directive’s immediate and substantial impact on these statutory responsibilities, the Respondents’ standing challenge fails. Indeed, even under the more exacting framework of “legislative standing”—were it even applicable to this case as Respondents maintain—the Registration Act’s specific reference to individual members of the commission is sufficient to confer standing on Commissioner Rossman.

Respondents’ second preliminary objection is similarly without merit. To begin, Respondents’ argument relative to Count I is—once again—premised on a gross misconception (if not mischaracterization) of Pennsylvania law. Specifically, while not mandated in statute, the Registration Act’s attendant regulations, which have the force and

effect of law, specifically require all applicants to supply either a DLN or Partial SSN. Thus, under settled interpretive principles, the 2018 Directive is contrary to Pennsylvania law and should be declared as such.

And finally, because the 2018 Directive announces a review procedure that conflicts with the existing regulatory scheme, the framework it purports to establish constitutes a new binding norm. Accordingly, even if the 2018 Directive could somehow be squared with existing law governing voter registration, it is an unlawful (and unenforceable) *de facto* regulation. As a result, Respondents' challenge to the legal sufficiency of Count II is also unavailing.

## IV. ARGUMENT

### A. **Because the Registration Act vests individual commissioners with specific duties, Commissioner Rossman has standing to challenge the 2018 Directive.**

Respondents' standing argument borders on the frivolous. Most fundamentally, the entirety of Respondents standing challenge rests on a single faulty premise: that individual members of county registration commissions do not exercise any powers or duties under the Registration Act and that no action can be taken relative to voter registration applications without the concurrence of a majority of the members.

But try as they might, Respondents cannot change the fact that the Registration Act—which is the only statutory scheme at issue here—expressly authorizes individual commissioners to exercise certain powers independent of the commission. Most notably, as relayed above, Section 1328 provides that “[u]pon receiving a voter registration application, **a commissioner**, clerk or registrar of a commission shall . . . [i]nitial and date the receipt of the application[,]” 25 Pa.C.S. § 1328(a)(1), and then “[e]xamine the application to determine[,]” *inter alia*, “[w]hether the application is complete,” *id.* at § 1328(a)(2)(i),

“[w]hether the applicant is a qualified elector[,]” *id.* at § 1328 (a)(2)(ii), and “[w]hether the applicant has an existing registration record[,]” by searching the SURE System. *Id.* at § 1328(a)(2)(iii). An individual commissioner’s authority to exercise certain powers independent of the commission itself is also confirmed by the definitions created under the Registration Act. Specifically, under Section 1102, the term “[c]ommissioner,” when used in the Registration Act, means “[a] member of a commission[,]” while a “[c]ommission” is separately defined as “[a] registration commission established under section 1203 (relating to commissions).” *Id.* at § 1102. As such, Respondents’ warped interpretation of the Registration Act violates basic precepts of statutory construction. *See generally Gouwens v. Indiana Twp. Bd. of Supervisors*, 260 A.3d 1029, 1040 (Pa. Cmwlth. 2021) (“Where a legislative body defines the words or terms it uses in a statute, those definitions are binding.”); *accord McCloskey v. Pennsylvania Pub. Util. Comm’n*, 219 A.3d 1216, 1225 (Pa. Commw. Ct. 2019) (“[A]n interpretation that disregards and/or contradicts an explicitly stated

statutorily defined meaning *cannot* be reasonable.” (emphasis added)).<sup>10</sup>

Other provisions of the Registration Act also confirm that individual commissioners have distinct duties that may be exercised independent of “the commission.” For example, in addition to the specific responsibilities outlined in Section 1328(a), individual commissioners are also vested with the general power of investigating “irregularities in registration.” *Id.* at § 1203(i)(2) (“A commission or a commissioner has the power . . . [i]nvestigate irregularities in registration.”). Along these same lines, any individual commissioner who neglects the duties imposed by Sections 1328(a) faces stiff criminal penalties. Specifically, Section 1706 provides that “[a]ny commissioner . . . that intentionally delays, neglects or refuses to perform a duty imposed by this part commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not more than

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<sup>10</sup> Indeed, even if the two terms were not defined, Respondents’ attempt to collapse the distinction between the powers of “commissioners” violates established rules of statutory construction. See *HTR Restaurants, Inc. v. Erie Ins. Exch.*, 307 A.3d 49, 67 (Pa. 2023) (“Where the legislature has used two different words, rules of statutory construction require courts to give those words distinct meanings.”).

\$5,000 or to imprisonment for not more than two years, or both.” *Id.* at § 1706; *see also id.* at §§ 1702(a); 1702(b). ,

In short, under the Registration Act, Commissioner Rossman—acting individually and without the concurrence of his fellow commissioners—has the power and duty to examine a voter registration application for completeness, ensure that the applicant is a qualified elector, ascertain whether the applicant has an existing registration, and otherwise investigate registration irregularities. And if Commissioner Rossman fails to comply with his duties under that provision, it is he—and not the Potter County Commission—that violates the law and faces criminal penalties.

Against this statutory backdrop, Respondents’ standing argument falls apart at the seams. Generally, to establish standing, “the individual initiating the legal action must show that he is aggrieved by the matter that he seeks to challenge.” *Firearm Owners Against Crime v. City of Harrisburg*, 218 A.3d 497, 506 (Pa. Cmwlth. 2019) (*en banc*) (“*FOAC*”). In turn, to be “aggrieved,” the party’s interest in the outcome of the litigation must be: (i) substantial, (ii) direct, and (iii) immediate. Each of these three requirements are easily satisfied here.

*First*, Commissioner Rossman’s interest in the outcome of this action is “substantial” because it “surpass[es] the common interest of all citizens in procuring obedience to the law.” *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1215 (Pa. Cmwlth. 2018); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975) (“[T]he requirement of a ‘substantial’ interest simply means that the individual’s interest must have substance—there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.”). To reiterate, under Section 1328(a), individual members of a registration commission are authorized to take certain actions relative to voter registration applications. And because the 2018 Directive itself, as alleged in the PFR,<sup>11</sup> interferes with those statutorily-prescribed duties, Commissioner Rossman’s interest in this action is far from an abstract and generalized interest of all citizens in obtaining compliance with the law. *See, e.g., Krasner v. Henry*, 319 A.3d 56, 71 (Pa. Cmwlth. 2024) (holding that a county official had a substantial interest to prevent alleged interference with statutorily prescribed duties).

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<sup>11</sup> *See, e.g., PFR*, at ¶¶ 32; 40; 78; 80; 81; 83; 98-100.

*Second*, because the “harm complained” of—*i.e.*, interference with Commissioner Rossman’s statutory duty—is directly linked to the “asserted violation,”—*i.e.*, the issuance and threatened enforcement of the 2018 Directive—Commissioner Rossman’s interest is also direct. *Phantom Fireworks Showrooms*, 198 A.3d at 1215 (“A direct interest requires a causal connection between the asserted violation and the harm complained of.”).<sup>12</sup>

*Third*, Commissioner Rossman’s interest is immediate, rather than “a remote consequence of the judgment[,]” since the 2018 Directive has a current and ongoing impact on the powers vested in him by the Registration Act. *See Wm. Penn Parking Garage*, 346 A.2d at 282 (explaining that the immediacy prong of the standing analysis is concerned “with the nature of the causal connection between the action complained of and the injury to the person challenging it”). Accordingly, Commissioner Rossman’s duties under Section 1328(a)—without more—are sufficient to confer standing.

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<sup>12</sup> Not only is the causal effect self-evident, but it is also explicitly spelled out in the PFR. *See* PFR ¶¶ 98-101.

Commissioner Rossman’s standing, however, becomes even more pronounced when viewed in light of the potential criminal penalties outlined in the Registration Act. As an *en banc* panel of this Court emphasized in *FOAC*, it is well-settled that the dilemma created by Section 1706 is sufficient to confer standing. *See FOAC*, 218 A.3d at 513 (holding standing exists where a litigant faces “a Hobson's Choice—either comply with a law you believe is unlawful or subject yourself to possible criminal prosecution”) (internal citations and quotation marks omitted); *accord id.* at 514 (“[R]elief from uncertainty and insecurity with respect to rights ... and other legal relations,’ [is] a core and remedial purpose behind the Declaratory Judgments Act.” (quoting 42 Pa. C.S. § 7541(a))).

Indeed, in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services*, 309 A.3d 808 (Pa. 2024), a decision that is prominently featured in Respondents’ filings, the State Supreme Court reiterated that, where “the parties at issue must choose between equally unappealing options,” they have a legally cognizable interest sufficient to establish standing. *See Allegheny Reproductive Health*, 309 A.3d at 835 (citing *Robinson Twp., Washington Cnty. v. Commonwealth*,

83 A.3d 901, 924 (Pa. 2013)). Commissioner Rossman must choose between two equally unappealing options: violate the Registration Act, or violate the 2018 Directive. *See FOAC*, 218 A.3d at 512 (quoting *Robinson Twp.*, 83 A.3d at 924).

With the three-prong test for standing satisfied, Respondents' remaining arguments are easily dismantled. First, citing various instances in which courts have declined to permit elected officials to pursue claims alleging "institutional injury," Respondents maintain that "individual members of an elected body lack standing to represent the interests of that body." Br. at 12. Not only is Respondents' argument premised on an inaccurate summary of Pennsylvania law, but it is also utterly irrelevant to the present standing inquiry, since Commissioner Rossman does not purport to represent the interests the Potter County Registration Commission as a whole. Nor does he seek redress for institutional harm to that body. Rather, as alleged in the PFR, *see* note 11 *supra*, the 2018 Guidance has interfered with powers and duties vested in Commissioner Rossman—as an individual commissioner—under Section 1328(a).

Next, Respondents insist that Commissioner Rossman lacks standing because he “does not satisfy the narrow circumstances in which an individual member of an elected body has standing on his own behalf, because the [2018] Directive does not infringe on his authority as a board member.” Br. at 16. This argument also falls flat.

To begin, as stated throughout this filing, under Section 1328(a), individual commissioners are responsible for reviewing registration applications for completeness and verifying the applicant’s eligibility. Accordingly, notwithstanding Respondents’ misdirection, as alleged in the PFR, *see* note 11 *supra*, the 2018 Directive **does** “infringe on [Commissioner Rossman’s] authority as a board member.” *Id.*

More fundamentally still, Respondents are mistaken that standing for an individual member of an elected body has been confined to certain “narrow circumstances.” Rather, the limited standing principle they identify applies exclusively to individual members of **legislative** bodies. In fact, each and every decision Respondents cite on this point involved individual members of legislative bodies. But as the Pennsylvania Supreme Court recently clarified, “legislative standing ... is its own topic[.]” *Shirley v. Pennsylvania Legislative Reference*

*Bureau*, 318 A.3d 832, 857 (Pa. 2024) (internal quotation marks and citations omitted). And Respondents, for their part, offer no authority for the proposition that the distinct set of principles that have emerged within the “legislative standing” framework apply to individual members of other *non-legislative* public bodies.

Indeed, a review of the principles undergirding the “legislative standing” framework confirms that this rubric has no application here. To begin, as the Court explained in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016)—a decision Respondents repeatedly cite—“legislative standing” is narrowly construed, as “separation-of-powers problems are inherent in legislative standing,” and because “claims of institutional injury [by individual members of the General Assembly], are often ‘fully susceptible to political resolution.’” *Markham*, 136 A.3d at 145–46 (quoting *Chenoweth v. Clinton*, 181 F.3d 112, 116 (D.C.Cir.1999)). In addition, courts have explained that the narrow “legislative standing” construct is also a byproduct of the difficulties in establishing a discernable limiting principle when individual legislators resort to the

judiciary, since virtually every law and governmental act can be easily traced to legislative action.<sup>13</sup>

Against this backdrop, Respondents' attempt to convert "legislative standing" into "elected body standing" should not be countenanced, as none of the prudential concerns animating legislative standing are implicated here.

*First*, because a county registration commission is not a co-equal branch of government, litigation initiated by its individual members like Commissioner Rossman does not raise separation-of-powers issues, which were central to *Markham*'s limited framework.

*Second*, the harm alleged here—even if it could be characterized as "institutional"—is not "fully susceptible to a political resolution."

*Markham*, 136 A.3d at 145-46 ("[L]ike our federal counterparts, we are leery to recognize such uncabined and broad-based standing for

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<sup>13</sup> See, e.g., *Allegheny Reproductive Health Center*, 309 A.3d at 847 (finding "no discernible limiting principle to individual legislator intervention" and cautioning that "[t]o endorse the Commonwealth Court's rationale would broaden the scope of individual legislator intervention to such a degree that any of the 253 state legislators would be permitted to intervene in virtually any case in which the constitutionality of a piece of legislation is being challenged."); *Markham*, 136 A.3d at 145 ("Appellants offer no limiting principle which would permit their intervention in the instant matter, but constrain their ability to initiate litigation, seek declaratory relief, or to intervene in any matter which does not, under the principles we express today, impact them in their role of legislators.").

legislators, as separation-of-powers problems are inherent in legislative standing, and claims of institutional injury, such as those before us, are often fully susceptible to political resolution.” (internal quotation marks and citations omitted)). In fact, Commissioner Rossman has no recourse through the ordinary political channels at all.

Finally, registration commissions serve a limited executive and administrative function—not a legislative one; thus, recognizing an individual commissioner’s standing to seek redress for injuries to a specific statutory power is does not risk an unbridled enlargement of standing for individual commissioners.

Moreover, Respondents’ reliance on legislative standing principle is misplaced for yet another reason. Specifically, the “legislative standing” rubric, even if applicable, is satisfied in light of Section 1328(a) plain language. Specifically, as an *en banc* panel of this Court has previously explained, where a statute vests an individual legislator with certain responsibilities, that legislator has standing to pursue a claim based on alleged interference with those duties. *See Corman v. Nat’l Collegiate Athletic Ass’n*, 74 A.3d 1149, 1162 (Pa. Commw. Ct. 2013) (holding that an individual legislator had standing to challenge

certain expenditures because “he ha[d] been conferred statutorily-mandated oversight responsibilities” relative to such funds). Thus, even under the more exacting “legislative standing” principles advanced by Respondents, Commissioner Rossman would have standing since he—and not merely the Potter County Registration Commission—has certain “statutorily-mandated oversight responsibilities” relative to voter registration.

Finally, the Department’s reliance on *Black Political Empowerment Project v. Schmidt*, No. 283 M.D. 2024 (Pa. Cmwlth. July 18, 2024) (Ceisler, J.) (single-judge op.) (*BPEP*) is misplaced. As a threshold matter, because it is a single-judge unpublished opinion, *BPEP* is not binding and, at most, may have some utility as persuasive authority. See *Mixon v. Com.*, 759 A.2d 442, 448 (Pa. Cmwlth. 2000) (cautioning that “unpublished decisions by **any** court may have limited, if any, precedential value” (emphasis added)), *aff’d*, 783 A.2d 763 (Pa. 2001); see Comm. Ct. I.O.P. § 414, 210 Pa.Code § 69.414, (“Parties may also cite an unreported panel decision of this court issued after January 15, 2008, for its persuasive value, but not as binding precedent.”). But *BPEP*’s standing analysis wholly unpersuasive, as it thoroughly

misconstrues this Court’s *en banc* decision in *McLinko v. Department of State*, 270 A.3d 1243, 1266-67 (Pa. Cmwlth. 2022) (*McLinko I*) (*en banc*). In this regard, although it acknowledges that, under *McLinko I*, an individual member of a county election board has standing to pursue relief for alleged harm arising from his membership on the board—even in the absence of interference with a specific statutory duty, Judge Ceisler’s single-judge opinion in *BPEP* concludes that *McLinko I*’s holding relative to standing is no longer controlling, in light of the State Supreme Court’s decision in *McLinko v. Commonwealth*, 279 A.3d 539 (Pa. 2022) (*McLinko II*), which reversed *McLinko I* in part. *See BPEP*, slip op. at 26-29 (discussing *McLinko I* and *McLinko II*).

But *BPEP*’s assessment of the interplay between *McLinko I* and *II* is untenable on several levels. For starters, *BPEP*’s analysis contravenes settled juridical precepts of interpretation. Specifically, Judge Ceisler’s single-judge opinion in *BPEP* readily concedes that *McLinko I*’s holding on standing was not expressly reversed on appeal, but concludes that *McLinko II*’s silence on the issue should be construed as reversal. *See BPEP*, slip op. at 28-29 (“Although [*McLinko II*] could have discussed, and even affirmed or explicitly reversed, [*McLinko I*]’s

determination on standing, it did not do so. In fact, [*McLinko II*] is **silent** on [*McLinko I*]’s standing analysis.” (emphasis in original)). Yet *BPEP* offers no support for drawing such an inference. To the contrary, the absence of any developed discussion of standing in *McLinko II* suggests that *McLinko I*’s standing analysis has not been disturbed. See *Gibraltar Rock, Inc. v. Dep’t of Env’t Prot.*, 286 A.3d 713, 724 (Pa. 2022) (“An appellate court can only pass upon the legal question involved in any case which comes before it.” (cleaned up)).

Moreover, *BPEP*’s holding cannot be squared with *McLinko II*’s ultimate mandate, which explicitly states: “The order of the Commonwealth Court is affirmed as to the reviewability of the challenged statutory provisions. Otherwise, the decision is reversed.” *McLinko II*, 279 A.3d at 582. The *BPEP* court concluded—unconvincingly—that “reviewability” in this context referred only to the statute of limitations. But that reading strains credulity, particularly given that the Pennsylvania Supreme Court proceeded to issue a lengthy merits opinion rather than dismissing on standing grounds. Indeed, later that same month, the Commonwealth Court cited *McLinko I*’s standing analysis as still-valid authority, clarifying it had

been reversed only “on other grounds.” See *Chapman v. Berks Cnty. Bd. of Elections*, 2022 WL 4100998, at \*9 (Pa. Cmwlth. Sept. 1, 2022) (single-judge op.) (noting that the petitioner in *McLinko I* had standing based on duties under the Election Code and the obligation to certify election results under a statute he alleged was unconstitutional).<sup>14</sup>

And finally, *BPEP*'s persuasive value is further diminished by the fact that *McLinko I*'s standing analysis is firmly grounded in precedent. Specifically, in *Robinson Twp.*, this Court held that a council member and a township supervision had standing because “[a]s local elected officials acting in their official capacities for their individual municipalities and being required to vote for zoning amendments they believe are unconstitutional, [the public officials] have standing to bring this action.” *Robinson Tp. v. Com.*, 52 A.3d 463, 476 (Pa. Cmwlth. 2012).<sup>15</sup>

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<sup>14</sup> And in any event, although the term “reviewability” is seldom used, standing, at its core, involves an inquiry into whether courts have the power to address the issue presented for its consideration. In other words, standing implicates the court’s power to review (*i.e.*, the reviewability of an issue). Moreover, at least one Pennsylvania Supreme Court decision suggests that reviewability is synonymous with justiciability—a term that subsumes standing.

<sup>15</sup> Insofar as the Secretary and Petitioners’ suggestion that this aspect of *Robinson Twp.* was somehow reversed, diminished, or otherwise undermined on appeal, that argument is unavailing. On appeal from this Court’s decision in *Robinson Twp.*, the Supreme Court merely held that it was unnecessary to address

More fundamentally still, even if this Court were to disregard the pervasive flaws in *BPEP*'s and find its reasoning persuasive, its largely inapposite here. Specifically, *BPEP* did not involve, as Respondents assert, “a situation identical to this one in all relevant respects[.]” Br. at 18. Far from it, in fact. Specifically, *BPEP* addressed a county commissioner’s standing to vindicate his interests as a member of the county election board—an entity whose powers and duties are governed by *the Election Code*. See 25 P.S. § 2601, *et seq.* Commissioner Rossman, on the other hand, has alleged injury to his interest as a member of a county registration commission—an entity created and governed by the Registration Act.

And this distinction is crucial here because an individual member of a county election board is not specifically vested with *any* duties under the Election Code; rather the county-related duties under the

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the standing of the local officials in their respective capacities as members of an elected board. See *Robinson Twp.*, 83 A.3d at 918. (“[B]ecause [the officials] both have standing to sue as landowners and residents and they assert the same claims in both individual and official capacities, we need not address whether they have a separate interest as local elected officials sufficient to confer standing.”). To the contrary, despite its holding, the Court emphasized that “to the extent that the Commonwealth Court addressed the interests in the outcome of this litigation of [the officials], the court did so persuasively.” *Id.* at 918 n.9. Thus, far from disapproving of *Robinson Twp.*’s standing analysis, the Court expressly signaled its endorsement.

Election Code may be exercised only by the board as an entity. Indeed, *BPEP*'s central rationale for denying standing was that the only injury alleged by the proposed intervenor was to the interests of the county election board—not to any duties or powers that he could exercise as an individual member of that board. On the other hand, as detailed above, Commissioner Rossman is vested with specific powers and duties relative to voter registration. Accordingly, despite the superficial similarities between a county election board and registration commission, for present purposes, the two bodies could not be more different.

In the end, Respondents' standing argument is nothing more than an amalgamation of misstatements of law and inapposite authorities. The preliminary objection to Commissioner Rossman's standing should be overruled.

**B. Respondents' demurrer should be overruled because the 2018 Directive directly contradicts the Department's own regulations, which were duly promulgated pursuant to the Registration Act and, thus, have the force and effect of law.**

Respondents' second preliminary should likewise be overruled because, much like their challenge to Commissioner Rossman's

standing, Respondents' demurrer is predicated on a gross mischaracterization of Pennsylvania law.

With regard to Count I, Respondents argue that the 2018 Directive does not conflict with Pennsylvania law because "state law does not require applicants to submit driver's license numbers or partial social security numbers to register to vote[,]” and instead, according to Respondents, “[t]hat requirement comes entirely from HAVA, which is a federal statute.” Br. at 20. Respondents' mischaracterization of Pennsylvania law is astonishing.

Specifically, while Respondents are correct that the Registration Act itself does not explicitly require applicants to provide a DLN or a Partial SSN, it does require applications to be “complete” and “[c]onsistent” and the SURE Regulations *promulgated by the Department* expressly requires such information. 25 Pa.C.S. § 1328(a)(2)(i), (b)(2)(i). Specifically, subject to certain exceptions not relevant here (*e.g.*, applications submitted contemporaneously with a driver's license application pursuant to the “Motor Voter” law), under Section 183.1 of the SURE Regulations, all voter registration

applications must include a request for among other things, the applicant's DLN, and partial SSN.<sup>16</sup>

The importance of this information is further underscored by Section 183.5 of the SURE Regulations, which provides that some of the information requested in an application is “optional”—and, thus, “may not be considered when determining the acceptance or rejection of the application.” *See generally* 4 Pa. Code § 183.5(f). Critically, however, an applicant's DLN is not included in the list of “additional or optional information[,]” *id.*, and an applicant's Partial SSN is optional **only** “if the applicant's driver's license number is provided[.]” *Id.* at § 183.5(f)(8) (emphasis added). In other words, one of these two numbers is mandatory and thus “necessary information.”

Against this backdrop, Respondents' argument that Count I should be dismissed borders on the frivolous, since it is well-settled that promulgated regulations “have the force and effect of law.” *Corman v. Acting Sec'y of Pennsylvania Dep't of Health*, 267 A.3d 561, 572 (Pa.

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<sup>16</sup> *See* 4 Pa. Code § 183.1(a) (defining the “VRMA” as the “[t]he Statewide voter registration application form, in accordance with section 1327(a) of [Registration Act,]” which requests, inter alia, an applicant's driver's license number and the terminal four digits of the social security number (citing 25 Pa.C.S. § 1327(a) (providing that “[t]he secretary shall prescribe the form of an official voter registration application.”))).

Cmwlth.), *aff'd*, 268 A.3d 1080 (Pa. 2021). In fact, regulations adopted pursuant to grant of specific statutory authority are binding on a reviewing court and are treated as an indispensable component of that statutory regime. *See Bailey v. Zoning Bd. of Adjustment of City of Philadelphia*, 801 A.2d 492, 501 (Pa. 2002) (“Where an administrative agency is specifically authorized to adopt rules under a statute, the rules adopted by an agency are binding upon a reviewing court as part of the statute as long as they are (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.”). Having been adopted pursuant to the General Assembly’s specific directive, the SURE Regulations are as much a part of Pennsylvania law as the Registration Act itself.<sup>17</sup>

Yet, Respondents do not even attempt to square the 2018 Directive with the SURE Regulations. Instead, they simply ignore this inconvenient aspect of Pennsylvania law. In short, Respondents’ demurrer relative to Count I is specious and should be overruled.

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<sup>17</sup> Notably, Respondents do not suggest that HAVA somehow prohibits matching. To the contrary, Respondents acknowledge that, under HAVA, as interpreted by *Browning*, “a state may require boards to verify driver’s license or social security numbers before registering an individual to vote[,]” Br. at 11, but insist that “Pennsylvania law, by contrast, contains no such requirement that voters provide—or that county boards verify—[a DLN or Partial SSN].” Br. at 21.

As for Count II, Respondents’ arguments fail for largely the same reasons. Specifically, incorporating by reference the warped construct of Pennsylvania law presented in their challenge to Count I, Respondents maintain that the 2018 Directive “simply informed county boards of their obligations under current law.” And since Pennsylvania law does not require applicants to supply their DLN or SSN, Respondents maintain that the 2018 Directive is not a *de facto* regulation that establishes a binding norm because it does not “create[] a new controlling standard of conduct.” Br. at 25 (quoting *Slippery Rock Area Sch. Dist. v. Unemployment Comp. Bd. of Rev.*, 983 A.2d 1231, 1236 (Pa. 2009)). But again, this argument ignores the SURE Regulations, which, as discussed above, have the force of law and, for purposes of judicial review, are part of the Registration Act. And, while Respondents certainly have the power to amend the SURE Regulations, any such changes to the regulatory scheme must be made through the regulatory review process—not by fiat. Unless and until that occurs, however, Respondents are bound by the SURE Regulations. *See Med. Marijuana Access & Patient Safety, Inc. v. Johnson*, 317 A.3d 1106, 1113 (Pa. Cmwlth. 2024) (“Duly authorized and promulgated

regulations of an administrative agency have the force of law and are ***binding on the agency.***” (cleaned up)).

Moreover, the 2006 Alert, which Respondents sought to reinforce and entrench through the 2018 Directive, expressly acknowledges the prohibition on matching was a new standard of conduct. Specifically, the 2006 Alert relays that the matching requirement had initially been implemented “as a component of the [SURE] system[,]” but directs counties to refrain from adhering to the established procedures because, according to Respondents, they were not “well designed” to comply with the law. Ex. A at 2. The directives conflict with the *status quo ante*, the 2003 Notice published in the Pennsylvania Bulletin,<sup>18</sup> which prohibited officials from accepting applications with DLNs or partial SSNs that officials were unable to determine were valid. In short, therefore, the 2006 Alert, by its very terms, announced a new “standard of conduct.” And 2018 Directive purports to make that newly-announced standard of conduct “controlling.” *Slippery Rock Area Sch. Dist*, 983 A.2d at 1236 (“Generally, a legislative regulation establishes ‘a substantive rule

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<sup>18</sup> See Pa. Bull., Vol. 33, No. 50, at 6340-59 (Dec. 13, 2003).

creating a controlling standard of conduct.” (internal citations and quotation marks omitted)).

Accordingly, the 2018 Directive is an invalid *de facto* regulation.

## V. CONCLUSION

Respondents’ preliminary objections are predicated on a gross mischaracterization of Pennsylvania law and should therefore be overruled. With regard to standing, Respondents make no effort to explain why the specific duties entrusted to Commissioner Rossman by statute are insufficient to confer standing and, instead, rely on caselaw that has no relevance here. As for their demurrer, Respondents’ misstatements of law are—if anything—even more egregious. Ignoring the SURE Regulations, which were specifically referenced and discussed in the PFR, Respondents present a legally untenable conception of Pennsylvania law. And based on this warped characterization of reality, Respondents urge this Court to dismiss Commissioner Rossman’s claims. These arguments should not be countenanced.

Respectfully submitted,

Dated: April 28, 2025

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## **WORD COUNT CERTIFICATION**

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