

ELECTION MATTER

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IN THE SUPREME COURT OF PENNSYLVANIA

100 MAP 2022

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

Petitioners

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the
Commonwealth; Jessica Mathis, in her official capacity as Director of the
Pennsylvania Bureau of Election Services and Notaries; *et al.*,

Respondents

Appeal from the September 29, 2022, Order of Judge Ellen Ceisler,
Commonwealth Court of Pennsylvania, Docket No. 447 M.D. 2022

**BRIEF IN OPPOSITION BY THE CITY OF
PHILADELPHIA COUNTY BOARD OF ELECTIONS**

CITY OF PHILADELPHIA LAW DEPT.
DIANA P. CORTES, CITY SOLICITOR
Benjamin H. Field, Chief Deputy City Solicitor
Attorney ID No. 204569
Craig Gottlieb, Senior Attorney
Attorney ID No. 73983
Michael Pfautz, Deputy City Solicitor
Attorney ID No. 325323
Aimee D. Thomson, Deputy City Solicitor
Attorney ID No. 326328
Ryan B. Smith, Assistant City Solicitor

Attorney ID No. 324643
Zachary G. Strassburger, Assistant City Solicitor
Attorney ID No. 313991
Zachary.strassburger@phila.gov
One Parkway Building, 15th Floor
1515 Arch Street, Philadelphia, PA 19102
Tel (215) 683-2998 and Fax (215) 683-5299

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Counsel for Respondent Philadelphia County
Board of Elections

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COUNTERSTATEMENT OF JURISDICTION

Philadelphia acknowledges this Court's October 4, 2022 Order stating "probable jurisdiction is NOTED."

While we do not challenge this Court's appellate jurisdiction, we explain below that we do not believe that the Commonwealth Court had original jurisdiction.

COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

While “the scope of review in preliminary injunction matters is plenary,” *Warehime v. Warehime*, 860 A.2d 41, 46 n.7 (Pa. 2004), this Court’s standard of review is “highly deferential.” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000–01 (Pa. 2003) (citations omitted). The Court “do[es] not inquire into the merits of the controversy, but only examine[s] the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].” *Id.* at 1000 (citations omitted). “[A] trial court has ‘apparently reasonable grounds’ for its denial of relief where it properly finds that any one of the following “essential prerequisites” for a preliminary injunction is not satisfied.” *Id.* at 1001.

The RNC suggests that a lower court will abuse its discretion by merely misapplying the merits of the law. But none of the cases they cite in support of this questionable point are preliminary injunction matters. *E.g. Kline v. Travelers Personal Security Ins. Co.*, 223 A.3d 677, 685 (Pa. Super. 2006); *see also In re Estate of Strasheimer*, 54 A.3d 359, 363 (Pa. Super. 2012). In such matters, as noted, the Court “do[es] not inquire into the merits.” *Summit*, 828 A.2d at 1000.

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Where the RNC failed to properly raise several of their current contentions before the Commonwealth Court, should this Court conclude that the RNC waived those arguments?

Answer below: Not addressed

Suggested answer: Yes

2. Should this Court conclude that the Commonwealth Court had no jurisdiction over the RNC's claims when the Commonwealth is not a proper party and suits against county boards are vested in the courts of common pleas?

Answer below: Not explicitly addressed.

Suggested answer: Yes.

3. Should this Court conclude that the RNC lacks standing to challenge Philadelphia's voting practices because the RNC is not a Philadelphia voter and is therefore not directly affected by Philadelphia's practices?

Answer below: Not explicitly addressed.

Suggested answer: Yes.

4. Should this Court conclude in the alternative that the Commonwealth Court acted well within its broad discretion in denying the RNC's motion for a preliminary injunction when Commonwealth Court correctly found that: (i) the Election Code does not clearly prohibit notice and cure; (ii) there is no irreparable harm from the notice and cure procedures; and (iii) the harm to the disenfranchised voters in denying notice and cure procedures exceeds any potential harm to the RNC through allowing notice and cure procedures?

Answer below: Yes.

Suggested answer: Yes.

5. Is the RNC's claim barred by laches, where they have waited nearly two years, until the eve of an election, to challenge Philadelphia's publicly announced practices of providing replacement ballots to voters whose ballots have technical defects?

Answer below: No.

Suggested answer: Yes.

COUNTERSTATEMENT OF THE CASE

This case concerns a challenge by the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Republican Party of Pennsylvania, and thirteen individual Pennsylvania voters from outside Philadelphia (together, “the RNC”) to certain county board of election procedures relating to the Election Code’s signature and secrecy requirements for absentee and mail-in ballots. The RNC seeks to enjoin county boards from using long-established procedures to notify qualified voters of these obvious technical errors and enabling those voters to exercise the franchise.

A. Counterstatement of Facts

Pennsylvania allows qualified electors to vote in-person or by absentee or mail-in ballot. *See* 25 P.S. §§ 3146.1, 3150.11(a), 3050. Absentee ballots are paper ballots voted by qualified electors who meet certain statutory qualifications, such as being absent from the municipality on Election Day, while mail-in ballots are paper ballots voted by any qualified elector without any excuse needed. 25 P.S. §§ 3146.1, 3150.11. Qualified electors must apply to their county board of elections to vote by absentee or mail-in ballot. 25 P.S. §§ 3146.2, 3146.2a, 3150.12, 3150.12a. Once approved, the county board delivers a ballot packet to the qualified elector. 25 P.S. §§ 3146.5, 3150.15. Qualified electors must fill out and

return the absentee or mail-in ballot package by 8:00 p.m. on election day. 25 P.S. § 3146.6, 3150.16.

An absentee or mail-in ballot must meet certain mandatory requirements imposed by the Election Code. Pertinent here are the requirements that qualified electors enclose their ballot in a “secrecy envelope” and place that envelope in an exterior mailing envelope printed with a declaration, which the voter must sign if able. 25 P.S. §§ 3146.6(a), 3150.16(a). These envelopes are included in the ballot package provided to voters. 25 P.S. §§ 3146.4, 3150.14(a). Absentee and mail-in ballots not placed in a secrecy envelope or lacking a signature on the exterior mailing envelope are not validly cast and are not counted by the county board.

Since the adoption of no-excuse mail-in voting in Pennsylvania, the Philadelphia County Board of Elections (“Philadelphia”) has developed procedures to efficiently process the large volume of absentee and mail-in ballots it receives. When a qualified elector returns her completed absentee or mail-in ballot envelope, Philadelphia processes it in accordance with its obligations under the Election Code and consistent with guidance from the Department of State. Philadelphia must sort the absentee or mail-in ballot envelope and scan it to record in the Statewide Uniform Registry of Electors (SURE)¹ system that Philadelphia has

¹ The SURE system is established by statute for purposes including the “timely printing” of “district registers” (poll books) and the recording of which voters have received and voted by absentee and mail-in ballot. 25 Pa. C.S. § 1222(a), (c)(13), (c)(19)-(20).

received an absentee or mail-in ballot envelope from that voter. *See* 25 Pa. C.S. § 1402; Record (“Record”) 997a-998a (Decl. of Jonathan Marks ¶¶ 6-7). Scanning and sorting absentee and mail-in ballot envelopes in advance of Election Day is necessary to comply with several Election Code requirements:

- Philadelphia must update the poll books so that any qualified elector who voted an absentee or mail-in ballot is not permitted to also vote in person on Election Day. 25 P.S. §§ 3150.16(b)(1), 3146.6(b)(1). Poll books are tied to polling places, which exist in each election district. *See* 25 P.S. § 2726(a).
- For each qualified elector who applies for an absentee or mail-in ballot, Philadelphia must maintain a record of: 1) The elector’s name and address, the date on which the elector’s application was received by Philadelphia; 2) The date on which Philadelphia mailed or delivered the ballot package to the elector; and 3) The date on which the completed ballot package is received by Philadelphia. 25 P.S. §§ 3146.9(b), 3150.17(b). Philadelphia must make these records publicly available within 48 hours of receiving a request. 25 P.S. §§ 3146.9(c), 3150.17(c).
- Ahead of the pre-canvass, which cannot begin before 7:00 a.m. on Election Day, Philadelphia must provide a list of the names of qualified electors whose absentee or mail-in ballots will be pre-canvassed. *See* 25 P.S. §§ 3146.8(g)(1.1), (3); *see also* Pa. Dep’t of State, *Guidance Concerning*

Civilian Absentee and Mail-in Ballot Procedures, at 9 (Sept. 26, 2022)

(“The county board of elections must provide a list of the names of the voters whose absentee or mail-in ballots are to be pre-canvassed.”).²

Throughout this process, Philadelphia maintains the ballots securely for Election Day. *See* 25 P.S. § 3146.8(a).

Given the sheer number of absentee and mail-in ballot envelopes it receives, Philadelphia necessarily uses mechanical equipment to process the ballot envelopes, and that equipment can easily recognize a ballot envelope returned without a signature or that is too light or thin to contain the internal secrecy envelope. *Cf.* Record 54a (RNC Petition for Review Ex. F ¶ 7(b)). If a ballot envelope is determined to lack a signature or be missing a secretary envelope, that fact is then recorded in the SURE system, which issues a ballot notification to the elector. *See* Record 44a (RNC Petition for Review Ex. C); Record 997a-998a (Decl. of Jonathan Marks ¶¶ 6-7).

Philadelphia’s processing of absentee and mail-in ballot envelopes ahead of Election Day is entirely separate from the pre-canvass and canvass of the ballots themselves. This standard process does not involve opening the ballot envelopes or a final determination about whether the ballot has been validly cast and can be

² <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-DOS-Guidance-Civilian-Absentee-Mail-In-Ballot-Procedures.pdf>.

tabulated. *See* Aff. of Seth Bluestein ¶ 14, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-2078-MWB (M.D. Pa. Nov. 21, 2020) (ECF No. 193-2 at 3); 25 P.S. § 3146.8(g).

After the 2020 Primary Election, the first election in which no-excuse mail-in voting was permitted, the Pennsylvania Democratic Party along with several individuals (collectively, the “PDP”), brought suit in this Court against the then-Secretary of the Commonwealth regarding several provisions of the Election Code. Among other claims, the PDP sought a declaration that county boards of election in Pennsylvania were required, under the Pennsylvania Constitution, to contact electors whose ballots were known to be defective and provide them the opportunity to cure the defect until a week after Election Day. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 353 (Pa. 2020). This Court declined PDP’s request to impose a mandatory notice and cure regime. *Id.* at 374.

Subsequent to the Court’s decision, Philadelphia publicly announced a process by which qualified electors whose absentee and mail-in ballot applications had been approved could request replacement ballot packages if the Board had not yet received a valid ballot from that elector. *See* Record 26a (RNC Petition For Review ¶ 70); Record 44a (RNC Petition for Review Ex. C); Record 554a-555a (Joint Stip. Undisputed Facts Ex. G). For instance, if the qualified elector made an error while marking their ballot or spilled coffee on it, they could request a

replacement. Record 554a-555a (Joint Stip. Undisputed Facts Ex. G). In other cases, qualified electors who never received their original ballot package because it was returned to the Board by the postal service as “UNDELIVERABLE” could request a replacement package. Record 44a (RNC Petition for Review Ex. C). And qualified electors who mistakenly submitted a defective ballot envelope, such as one without a signature or internal secrecy envelope, could also request a replacement ballot package. *Id.*

Under no circumstances does Philadelphia permit qualified electors to access their absentee and mail-in ballot declaration envelopes after the Board of Elections receives them. Rather, when qualified electors return an absentee or mail-in ballot envelope which includes an observable error, Philadelphia records the relevant information in the SURE system, as it does with all ballot envelopes that are returned, including those that were undeliverable. Record 44a (RNC Petition for Review Ex. C); Record 554a-555a (Joint Stip. Undisputed Facts Ex. G); *see* Record 997a-998a (Decl. of Jonathan Marks ¶¶ 6-7). And just like qualified electors who do not receive the first ballot envelope sent to them because of a Postal Service delivery error or address issue, qualified electors whose ballots are deficient and will not be counted because of missing signatures or secrecy envelopes may cast a provisional ballot on Election Day or ask the Board to send a

replacement ballot. Record 554a-555a (Joint Stip. Undisputed Facts Ex. G). If valid, the Board counts such ballots.

Following its announcement, Philadelphia's practice and its variation from other counties were the subject of litigation during the 2020 election cycle. In *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, the Third Circuit noted that if an error is noticed before election day, "[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors." 830 F. App'x 377, 384 (3d Cir. 2020). The Third Circuit did not find a county board's ability to promulgate procedures to address such errors to be problematic, *id.*, and Philadelphia has continued its practice to this day.

Unfortunately, ballot defects impact a significant number of qualified electors, which Philadelphia documents publicly during the canvass in each election cycle. *E.g.*, Transcript of Meeting of the Commissioners at 6:4-7:4, 7:6-8:6, 8:8-9:7, 17:1-21:8 (May 25, 2022) (voting to not count 1,256 timely ballots from qualified voters);³ Transcript of Meeting of the Commissioners at 5:9-6:4, 6:5-6:23, 6:24-8:24, 9:1-10:13 (Nov. 12, 2021) (voting to not count 638 timely ballots from qualified electors);⁴ Transcript of Meeting of the Commissioners at

³ https://vote.phila.gov/files/announcements/MeetingTranscripts/052522_Meeting_Transcript.pdf.

⁴ https://vote.phila.gov/files/announcements/MeetingTranscripts/110821_Meeting_Transcript.pdf.

5:3-5:15, 5:17-6:5, 11:23-13:18 (Nov. 9, 2020) (voting to not count 4,724 timely ballots from qualified electors);⁵ Aff. of Seth Bluestein ¶ 17, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-2078-MWB (M.D. Pa. Nov. 21, 2020) (ECF No. 193-2 at 3) (noting that the board set aside 3,088 potentially deficient ballots prior to election day in November 2020, and those ballot submissions were then cancelled in the SURE system).

Procedural History The Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Republican Party of Pennsylvania, and thirteen individual Pennsylvania voters from outside Philadelphia filed their Petition for Review in the Commonwealth Court under its original jurisdiction on September 1, 2022, against the Acting Secretary of the Commonwealth, the Director of the Commonwealth’s Bureau of Election Services and Notaries (together, the “Commonwealth Respondents”), and every county board of elections in the Commonwealth, including Philadelphia. *See* Record 1a-74a. The Petition for Review brought three counts challenging certain county board of election procedures relating to the Election Code’s signature and secrecy requirements for absentee and mail-in ballots. Count I sought a declaratory judgment that these county procedures violate

⁵ https://vote.phila.gov/files/announcements/MeetingTranscripts/11920_Meeting_Transcript.pdf.

the Pennsylvania Election Code. Record 30a-32a. Count II sought a declaratory judgment that these county procedures violate the Elections Clause of the U.S. Constitution. Record 32a-33a. And Count III sought an injunction prohibiting counties from engaging in these procedures. Record 33a-34a. On September 7, 2022, the RNC filed an application for a preliminary injunction seeking to bar county boards' development or implementation of procedures relating to the Election Code's signature and secrecy requirements for absentee and mail-in ballots and to bar the Acting Secretary from taking "inconsistent" action. Judge Ceisler scheduled a hearing for September 28, 2022; ordered the parties to file a joint stipulation of facts indicating which county boards of election have implemented or plan to implement procedures relating to the Election Code's signature and secrecy requirements for absentee and mail-in ballots; and scheduled a status conference for September 22, 2022. Judge Ceisler subsequently converted the September 22 status conference into a hearing on the application, permitted one round of simultaneous supplemental briefing, and cancelled the September 28 hearing. On September 29, 2022, the Commonwealth Court (Ceisler, J.) denied the RNC's request for a preliminary injunction finding that the RNC had not met any of the prerequisites for preliminary injunctive relief. First, the Court found that the RNC had not demonstrated a substantial likelihood of success on the merits. Commonwealth Ct. Op. 9-10, 31-41. The Court concluded neither the Election

Code nor this Court's decision in *Pennsylvania Democratic Party* explicitly prohibited county boards from voluntarily adopting procedures under their delegated rulemaking authority pursuant to 25 P.S. § 2642(f). Commonwealth Ct. Op. at 9-10, 31-41. The Court then determined that the RNC's requested injunction would disrupt the status quo and impose greater harm on the public interest by disrupting the orderly administration of the upcoming election and disenfranchising voters. *Id.* at 10, 42-46. The Court also found the RNC had not shown immediate and irreparable harm because there was no explicit statutory prohibition on notice-and-cure procedures and alleged harms from lack of uniformity were speculative and not irreversible. *Id.* at 10-11, 46-50. Though not required, the Court analyzed the issue of laches but declined to apply it to RNC's application. *Id.* at 50-54. The Court did not address whether it had subject matter jurisdiction to consider the Petition as against the county boards or whether the Acting Secretary and Director were proper parties. *Cf.id.* at 21.

On September 30, 2022, the RNC filed a notice of appeal of the Commonwealth Court's denial of injunctive relief to this Court, which ordered responses to the jurisdictional statement and then set an expedited briefing schedule.

SUMMARY OF ARGUMENT

As this Court has consistently instructed, and the Commonwealth Court noted, the Commonwealth’s “longstanding and overriding policy” is “to protect the elective franchise.” Commonwealth Ct. Op. at 30 (citing *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004))). And when the Election Code is interpreted, it must be construed liberally “so as not to deprive electors of the right to elect a candidate of their choice,” and “to enfranchise and not to disenfranchise [the electorate].” Commonwealth Ct. Op. at 30-31 (citations omitted). As the Commonwealth Court emphasized, this case does not involve any allegations of fraud in the procedures at issue. *Id.* at 10-11 (noting that “Petitioners themselves do not allege any fraud is taking place with respect to such procedures,” and that “[i]mportantly . . . there is no assertion, or evidence, of fraud by the County Boards in any county in Pennsylvania”).

Despite these settled principles and the absence of any assertion of fraud, the RNC initiated this case in the Commonwealth Court arguing, *inter alia*, that it has original jurisdiction over decisions of any county board of elections and should enjoin their efforts to protect the franchise. The gravamen of the RNC’s claim is that procedures utilized by some county boards to ensure that qualified electors in that county are able to exercise the franchise to the best of their ability somehow

violate the Election Code. And although very practices at issue here have been well known since Act 77 was first in place for elections in 2020, *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App'x 377, 384 (3d Cir. 2020) (“Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.”), the RNC commenced this litigation a mere 62 days before the election. They did this, moreover, even though their initial theory of harm has been found wanting. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 912 n.50 (M.D. Pa. 2020) (“[T]he theory that Pennsylvania’s purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution . . . would be foreclosed under *Bognet*[.]”).

The timing of this case has necessitated an expedited schedule that asks this Court to adjudicate this important matter with a limited record. Adding to that challenge, the RNC have now shifted their arguments. Their initial focus on a limited argument that the Election Code does not permit notice and cure procedures has now been expanded into a new argument that *any* examination of mail-in ballot envelopes in advance of the pre-canvass is foreclosed by the Election Code. Not only is their argument clearly mistaken, it is contradicted by the myriad tasks the County Board must do in the lead up to the election that involve consideration of information from mail-in ballot envelopes that the County Board

has received. And despite their efforts to claim otherwise, the RNC has provided this Court with no basis to conclude that County Boards should not be able to provide voters with every opportunity to ensure their vote can be counted. This includes when it is apparent from their mail-in ballot envelopes that there may be an inadvertent error which could cause them to be disenfranchised.

Importantly, the RNC does not shy away from the fact that their requested injunction could cause some voters to be disenfranchised. They make it clear by highlighting “Philadelphia, Allegheny, Montgomery, and Bucks Counties,” as counties that that they allege employ notice and cure procedures, and arguing that more than half the population resides in counties that do so. RNC. Br. p. 20. Nor do they limit their narrative to the record or the law. Rather, they animate their Brief with unfounded accusations that only serve to undermine confidence in the integrity of Pennsylvania’s elections. For example, they suggest that a voter’s “membership in a political party” and “who happens to be processing their ballot” might be determinative. *Id.* And they contrast counties often seen as having a majority of Democratic voters (such as Philadelphia) with other counties (such as Butler) which are often seen as having a majority of Republican voters. *Id.* at 43. But County Boards are responsible for enfranchising voters and do not do so based on the party affiliation of those voters. There is no basis to suggest otherwise and the RNC’s efforts to characterize this case as involving unfair procedures that are

an alleged battle across party-lines should be rejected by this Court. *See Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x at 381 (“[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”).

Similarly, this Court should reject the RNC’s attempt to use uniformity as a cudgel to disenfranchise perceived opponents like voters in Philadelphia. The Election Code must be construed in favor of the right to vote, *see Pennsylvania Democratic Party*, 238 A.3d at 361, which includes allowing county boards to help residents with accommodations like notice-and-cure or drop boxes, which this Court has already held may vary between counties. *Id.* If voters in Butler County, of any party, want to have the same opportunity for notice-and-cure as Philadelphia voters, the solution is democracy: they can vote in a new board of elections that will prioritize their rights by providing notice-and-cure, protecting the franchise for more voters rather than attempting to disqualify innocent Philadelphians.

As explained in detail below, in addition to the fact that the RNC’s claim runs against the longstanding and overriding policy of protecting the franchise, this Court should uphold the Commonwealth Court’s denial of their injunction request for myriad other reasons. As an initial matter, the RNC’s claims should not have even been considered as the Commonwealth Court lacked subject matter jurisdiction over County Board procedures; those are the provenance of courts of

common pleas. Nor does the RNC have standing to challenge the Philadelphia County Board's practices as they are not directly affected by those practices and their other theories of harm have been repeatedly rejected. As a result, this Court should affirm a denial of the requested injunction.

Furthermore, to the extent the Court considers the likelihood of success on the merits, the Commonwealth Court was correct in finding that the Election Code does not clearly prohibit notice and cure procedures. Among other reasons, Section 2642 of the Election Code clearly empowers County Boards with the authority to enfranchise voters. Nor does the RNC's new argument based on pre-canvass procedures provide any support for their claim. The Election Code clearly requires county boards to consider information on the outside of mail-in ballot envelopes in advance of the pre-canvass and the RNC provides no credible basis for restraining those same county boards from actions that ensure voters are enfranchised.

Lastly, this Court should also affirm that Commonwealth Court's determination as to the lack of immediate irreparable harm, the preservation of the status quo, and the balancing of the equities. The overall harm claimed by the RNC is purely speculative and certainly is so in relation to any claim that they are harmed by procedures in Philadelphia. And the status quo in this case is clear. County boards have been utilizing these procedures since Act 77 first went into effect, a point that was discussed in multiple opinions arising from the 2020

General Election. Enjoining those procedures now would upend the status quo and unsettle the expectations of qualified registered electors across the Commonwealth. And by preventing qualified voters in Philadelphia and elsewhere from casting replacement or provisional ballots, an injunction here would effectively disenfranchise voters and therefore necessarily would cause greater harm to the public interest than the harm the RNC alleges they suffer here.

It is now a mere 33 days before the election and the settled practices and voter expectations should remain intact. For these reasons, and as discussed further below, this Court should dismiss the RNC's Application for Special Relief in the form of a Preliminary Injunction for lack of subject matter jurisdiction and lack of standing, or in the alternative, affirm the Commonwealth Court's September 29, 2022, Order denying the RNC's Application.

ARGUMENT

I. The RNC Has Waived Those Issues and Arguments It Failed to Raise Before the Commonwealth Court

Lacking conviction that their arguments made to the Commonwealth Court are sufficient to succeed before this Court, the RNC has now added four new issues and arguments not raised below. These arguments are waived, and as discussed later in this brief, meritless. *See* Pa. R.A.P. 302(a); *Com. v. Piper*, 328 A.2d 845, 847 (Pa. 1974) (“We have consistently held that issues not raised in the court below are waived and cannot be raised for the first time on appeal to this Court.”)

(internal quotation marks omitted)); *Com. v. Cline*, 177 A.3d 922, 927 (Pa. Super. 2017) (“The law is clear that issues, even those of constitutional dimension, are waived if not raised in the trial court. A new and different theory of relief may not be successfully advanced for the first time on appeal.” (internal quotation marks omitted)), *appeal denied*, 187 A.3d 210 (Pa. 2018). *See also* Pa. R.A.P. 2117(c) (requiring statement of the case to reference where issue was preserved or raised below); Pa. R.A.P. 2119(e) (requiring argument to reference where issue was preserved or raised below).

First, the RNC for the first time takes issue with defects in the handwritten date on the exterior mailing envelope. *See* RNC Br. at 6, 22, 31, 34, 39 n.4, 40, 43, 46, 48, 49, 54. But the RNC has never before challenged date defects in this case—and for good reason: the Republican National Committee and Republican Party of Pennsylvania were recently parties to a suit finding that disqualifying ballots for date defects likely violates Section 10101(a)(2)(B) of the Civil Rights Act and lacks a compelling reason under Pennsylvania law. *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9-15 (Pa. Cmwlth. Ct. June 2, 2022); *see also Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *12-29 (Pa. Cmwlth. Aug. 19, 2022) (reaching the same conclusion on application for summary relief); *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (holding that disqualifying ballots for date defects violates

Section 10101(a)(2)(B) of the Civil Rights Act). The Republican National Committee and Republican Party of Pennsylvania could have appealed the preliminary injunction decision in *McCormick* to this Court. They chose not to. Indeed, they were represented by the same counsel there as represent them here. This same counsel also represented Fayette County Board of Elections in *Chapman*, which also chose not to appeal that decision to this Court.

This case is not about missing or erroneous dates on the exterior mailing envelope. *See* RNC Petition for Review (not discussing date requirements); RNC Mem. of Law (same); RNC Reply (same); RNC Sur-Reply (same); Commonwealth Ct. Op. at 33 n.17 (noting that “the date requirement does not appear to be at issue in this case”). The Court should not countenance a backdoor appeal of a wholly separate case.

Second, the RNC for the first time argues that the challenged county ballot processing procedures are “inconsistent with law” because they purportedly constitute pre-canvass activities. RNC Br. at 36-39. The RNC never raised this claim to the Commonwealth Court and the Commonwealth Court never addressed it. *See* RNC Petition for Review (not addressing whether county procedures constitute improper pre-canvassing); RNC Mem. of Law (same); RNC Reply (same); RNC Sur-Reply (same); Commonwealth Ct. Op. (same). This argument is waived and the Court should dismiss it.

Third, the RNC for the first time challenges the casting of provisional ballots, arguing that permitting voters to cast a provisional ballot if their mail-in or absentee ballot will be disqualified is “inconsistent with law.” RNC Br. at 40-42. Again, the RNC never raised this claim to the Commonwealth Court and the Commonwealth Court never addressed it. *See* RNC Petition for Review (not addressing provisional ballots); RNC Mem. of Law (same); RNC Reply (same); RNC Sur-Reply (same); Commonwealth Ct. Op. (same). This argument is also waived.

Finally, the RNC attempts to bring a claim that the challenged county procedures violate the Pennsylvania Constitution. RNC Br. at 42-44 (citing Pa. Const. art. VII § 6 & art. I § 5). But the RNC did not bring any claim for violation of the Pennsylvania Constitution below. *See* RNC Petition for Review at 25-29 (Count I seeks declaratory judgment that county boards are violating the Election Code; Count II seeks declaratory judgment that county boards are violating the Elections Clause of the U.S. Constitution; Count III seeks an injunction). Although the RNC attempted to argue violations of the Pennsylvania Constitution in their briefing, the Commonwealth Court clearly recognized that the RNC waived these arguments. *See* Commonwealth Ct. Op. at 24 & n.15 (“Thus, even if Petitioners had brought an election uniformity or equal protection claim, it would plainly fail,

just as the equal protection claim in Trump I and Trump II failed.”). This claim is clearly waived and the Court should dismiss it as well.

II. The Commonwealth Court Lacked Subject Matter Jurisdiction and the RNC’s Suit Belongs in the Courts of Common Pleas

Separately, in bringing suit against local county boards directly in Commonwealth Court, the RNC seeks to turn nearly a century of election litigation, not to mention the structure of local governments in the Commonwealth, on its head. The Commonwealth Court lacked subject matter jurisdiction to consider the Petition and thus the Application because the Commonwealth Respondents are not proper parties and jurisdiction over suits against county boards is vested in the courts of common pleas. In considering the merits of the RNC’s Application without establishing jurisdiction, however, the Court erroneously “decide[d] the merits of a matter not properly before [it].” *Com. v. Maguigan*, 511 A.2d 1327, 1331–32 (Pa. 1986) (citing *In Re Estate of Pozzuolo*, 249 A.2d 540 (Pa. 1969); *In Re Petition of Acchione*, 227 A.2d 816 (Pa. 1967); *Stahl v. Ins. Co. of N. Am.*, 184 A.2d 568 (Pa. 1962); *Arrott v. Allegheny County*, 194 A. 910 (Pa. 1937)). Because “[i]t is axiomatic that subject matter jurisdiction is the indispensable foundation of a court’s power to adjudicate the issues in a particular case,” this Court must address subject matter jurisdiction before reviewing the merits of the Commonwealth Court’s decision. *In re J.M.Y.*, 218

A.3d 404, 415 (Pa. 2019). Moreover, it is critical that this Court do so now, in this case, lest it invite every complaint about every individual county board of elections to be brought in Harrisburg.

In attempting to establish original jurisdiction in Commonwealth Court, the RNC first claimed that jurisdiction was proper because of the presence of the Commonwealth Respondents. RNC Petition for Review ¶ 13. But when faced with fact that the Commonwealth Respondents were not proper parties because they were not responsible for instituting notice-and-cure provisions and the RNC had no claims against them, *see* Commonwealth Respondents’ Br. (Cmwlth. Ct.) at 10-15, they pivoted to the novel argument that *county* boards of elections are actually part of the Commonwealth government for purpose of the Commonwealth Court’s original jurisdiction as defined by 42 Pa. C.S. § 761 (giving that Court *exclusive* jurisdiction over, among others, civil actions “[a]gainst the Commonwealth government”).⁶ RNC Supp’l Mem. at 50-52. But the RNC identifies no court

⁶ The RNC’s invocation of 42 Pa. C.S. § 764 is entirely irrelevant. Election contests are a term of art in the Election Code used for challenging specific nomination and election results. *See* 25 P.S. §§ 3291-3473. As the election has not occurred yet, there can be no election contest, and the RNC does not challenge any specific results. “Contested nominations and elections of the second class,” moreover, refer only to election contests concerning “electors of President and Vice-President of the United States and all officers of this Commonwealth.” 25 P.S. § 3291.

Likewise, the RNC’s citation to *County of Fulton v. Secretary of Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2022), is specious. That a county board of elections is a “government agency” proves nothing, since a “government agency” encompasses both Commonwealth agencies and “any political subdivision or municipal or other local authority, or any officer or agency of any such political subdivision or local authority.” 42 Pa. C.S. § 102.

(footnote continued on the next page)

decision reaching that conclusion and the Court should not countenance the argument.

The RNC wholly misconstrue the definition of “Commonwealth government.” This defined term excludes “any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.” 42 Pa. C.S. § 102. The RNC fixates myopically on “local authority,” but this ignores that the statute also excludes “any . . . agency of any such political subdivision.” The Statutory Construction Act defines a “political subdivision” to include a “county” and a “city.” 1 Pa. C.S. § 1991. The plain language of the Election Code makes clear that county boards of election are agencies of their counties. *See* 1 Pa. C.S. § 1921(b). They exist “in and for each county,” 25 P.S. § 2641(a); have jurisdiction only over elections “in such county,” *id.*; are composed of “county commissioners,” *id.*; and are represented not by the Attorney General but by the county solicitor, *compare* 71 P.S. § 732-204(c) (“The Attorney General shall represent the Commonwealth and all Commonwealth agencies[.]”), *with* 25 P.S. § 2646 (“The county solicitor shall serve as counsel for the county board[.]”). As a city and county agency, Philadelphia’s Board of

In fact, the RNC’s counsel’s former client, the Trump Campaign, previously sued the Philadelphia County Board of Elections in the Philadelphia County Court of Common Pleas regarding access to board offices a month before Election Day. *See* Compl., Donald J. Trump for President Inc. v. Phila. County Bd. of Elections, No. 200902035 (C.P. Phil. Oct. 9, 2020), *aff’d*, No. 983 C.D. 2020, 2020 WL 6260041 (Pa. Cmwlth. Oct. 23, 2020).

Elections is therefore not a part of the Commonwealth government. *See also, e.g., In re Voter Referendum Petition Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009) (referring to the Allegheny County Board of Elections as a “local agency”); *Kerrigan v. Phila. Bd. of Election*, No. 07-687, 2008 WL 3562521, at *29 (E.D. Pa. Aug. 14, 2008) (“We find that Defendants have submitted ample authority to support their argument that the Board is a department of the Philadelphia city government and not a separate entity and that the City, through its Commissioners, administer voter registration and elections.”).

Moreover, even if the Court finds that county boards of election can fall only under the exception for “local authority,” *see Phila. Parking Auth. v. AFSCME, Dist. Council 33, Loc. 1637*, 845 A.2d 245, 248 (Pa. Cmwlth. 2004), the Philadelphia County Board of Elections qualifies. Pursuant to the authority granted by the First Class City Home Rule Act, 53 P.S. § 13101, the City of Philadelphia has created three City Commissioners and granted them the “powers, duties and functions of . . . the County Board of Elections relating to the conduct of primaries and elections.” Phila. Home Rule Charter § 2-112(4). The City has therefore “created . . . by statute” the local authority that carries out the functions of the board of elections. *See* 1 Pa. C.S. § 1991.

Perhaps recognizing that they cannot state a case for original jurisdiction, the RNC expressly requests (at 2)—for the first time—that this Court invoke King’s

Bench authority. But King's Bench is reserved for only most unique and extraordinary situations, *In re Bruno*, 101 A.3d 635, 696-97 (Pa. 2014) (Saylor, J., concurring), and only applies “where the record clearly demonstrates the petitioners’ rights,” *Bd. of Revision of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010). But, as explained further below, the RNC failed to make such a clear showing here. Moreover, they failed to file a formal petition pursuing this newly minted jurisdictional claim anyway, further negating their claim.

III. The RNC Does Not Have Standing to Challenge Philadelphia’s Practice Because They Are Not Directly Affected and Their Vote-Dilution Harm Theory Has Been Repeatedly Rejected

The RNC, party organizations and individual voters from other counties, lacks standing to challenge Philadelphia’s replacement ballot practice.

The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.

An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation. *A party has a substantial interest in the outcome of litigation if his interest surpasses that of all citizens in procuring obedience to the law.*

Fumo v. City of Philadelphia, 972 A.2d 487, 496 (Pa. 2009) (citations and internal quotation marks omitted) (emphasis added).

The RNC has failed to show they have any interest surpassing the interest of every other citizen in having ballots counted properly and boards of elections obey the law. Party organizations cannot show any particularized injury given that it is pure speculation at this time what parties' candidates any cured ballots will favor. *Cf. Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 380 (W.D. Pa. 2020) ("There is nothing in the record to establish that potential voter fraud and dilution will impact Republicans more than Democrats."). Nor can individuals claim any particularized injury surpassing others when, even if the alleged dilution occurs, it would affect all other voters equally. *Id.* at 390-91. Plaintiffs' claimed vote dilution harm (which seems to have been mostly abandoned) is brought in advance of the election on a theory that there is a potential risk of allegedly improper votes being counted. Just as the District Court found in 2020, this fails to establish concrete injury. *Id.* at 380; *see also Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 912 n.50 (M.D. Pa. 2020) ("[T]he theory that Pennsylvania's purportedly unconstitutional failure to uniformly prohibit the notice-and-cure procedure constitutes vote-dilution . . . would be foreclosed under *Bognet*[.]"). Moreover, the RNC is not Philadelphia voters who will be affected by Philadelphia's practice, and so harm done to them by other counties' failure to implement cure procedures cannot provide standing.

Because they are not cognizably injured, the RNC does not have the requisite interest to establish standing.

IV. The Commonwealth Court Did Not Abuse Its Discretion in Finding the RNC Failed to Satisfy Any of the Preliminary Injunction Prerequisites.

A court must deny if a preliminary injunction where the movant fails to meet any of the six prerequisites for relief:

First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.

Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings.

Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.

Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits.

Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity.

Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003) (citations omitted) (emphasis added).

In its thorough opinion addressing the merits, the Commonwealth Court correctly found that the RNC did not meet their burden to establish *any* of the necessary factors for preliminary relief because (a) the RNC’s merits theory that the Election Code and this Court’s *Pennsylvania Democratic Party* decision prohibited notice-and-cure procedures was not clearly correct, (b) the relief the RNC sought would disrupt the status quo and impose greater harm on Respondents and the public interest by disrupting the 2022 General Election and disenfranchising voters, and (c) the RNC’s claims of immediate and irreparable harm were factually speculative and legally unsupported. *See* Commonwealth Ct. Op. at 9-11, 31-50.

Because the opinion addressed only preliminary relief, that decision is reviewed only for abuse of discretion, and must be affirmed if the record can support a finding that any element is lacking. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000–01 (Pa. 2003). And as this Court has repeatedly noted, the Election Code “will be construed liberally in favor of the right to vote.” *Pa. Democratic Party*, 238 A.3d at 361 (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

A. *The Commonwealth Court Did Not Abuse Its Discretion in Finding the Election Code Does Not Clearly Prohibit Notice and Cure*

The Commonwealth Court correctly rejected the RNC’s claim that the Election Code, and this Court’s *Pennsylvania Democratic Party* decision

interpreting it, clearly prohibit county boards from voluntarily adopting notice-and-cure procedures. This is unsurprising since the Election Code affirmatively authorizes Philadelphia’s procedure, which even some of RNC’s counsel concede is unproblematic in some contexts. Record at 694a (Hearing Tr. 127:1-21). Far from an abuse of discretion, the Commonwealth Court’s modest holding on the merits must be affirmed if this Court finds subject matter jurisdiction.

In 2020, the PDP petitioned this Court under the Free and Equal Elections clause of the Pennsylvania Constitution to *require* county boards to notify voters of defects in their absentee and mail-in ballots and give them the opportunity to cure those defects even *after* Election Day. *See Pa. Democratic Party*, 238 A.3d at 353, 372 (quoting Pet. for Review at 52, ¶ 187). This Court determined that the Election Code did not provide for the specific “‘notice and opportunity to cure’ procedure sought by [the PDP].” *Id.* at 374. But whether county boards retained discretion to voluntarily adopt their own notice-and-cure procedures consistent with the Election Code was a “separate and distinct issue[.]” Commonwealth Ct. Op. at 38. As the Commonwealth Court correctly noted, this Court “did not explicitly decide whether County Boards’ implementation of notice and opportunity to cure procedures were **forbidden** under the Election Code, but only whether the Election Code **required** County Boards to implement” the procedure requested by the PDP. *Id.* Though the RNC now argues—two years later—that this Court’s decision

clearly prohibited the practice Philadelphia announced shortly thereafter, the RNC's silence during the intervening years betrays any claim that their newfound theory is clear.⁷

Turning to the Election Code itself, the Commonwealth Court also appropriately found the RNC had not shown that the Code clearly prohibited notice-and-cure. The Court first noted that Section 2642 of the Election Code provides county boards with “discretionary rulemaking authority delegated to them by the General Assembly.” Commonwealth Ct. Op. at 40-41 (citing 25 P.S. § 2642). The RNC suggested that this regulatory authority was the only possible source of power to provide notice-and-cure but did not encompass it because the practice was not explicitly detailed as a power or duty of county boards. Of course, the RNC offered no legal basis for the incredible proposition that where the Election Code does not affirmatively require a specific procedure it is affirmatively prohibited. And the Commonwealth Court followed controlling precedent that silence could not be definitely construed as a prohibition, thus fatally undermining any claim that the RNC's right to relief was clear or that they had a strong

⁷ The RNC also suggested that Respondents are somehow estopped from contesting the RNC's interpretation, but the RNC's argument is noticeably and fatally devoid of any actual reference to Philadelphia's position in that litigation. Further, because the decision does not bar boards from voluntarily adopting cure procedures, estoppel would not apply in any event.

likelihood of success on the merits. *See id.* (citing *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020)).⁸

And while the Commonwealth Court’s decision displays admirable judicial modesty, the Court could have gone much further because Section 2642 is a broad grant of authority and other Code provisions, rather than being silent, empower county boards to enfranchise voters as Philadelphia does. For instance, the Election Code allows eligible voters to request a ballot and vote by mail. *See generally* 25 P.S. § 3146.1 *et seq*; *id.* § 3150 *et seq.* Boards are required to mail absentee and mail-in ballots to qualified electors when they receive acceptable applications. *See* 25 P.S. §§ 3146.5(a)-(b)(1), 3150.15. And more recently, the General Assembly has permitted qualified electors to request and receive their absentee or mail-in ballot in person from the county board. *See* 25 P.S. § 3146.5(b)(2). There is no limitation on successive applications or replacement ballots: to the contrary, “a

⁸ Despite failing to plead a cause of action based on equal protection or uniformity, see Record at 25a-29a (RNC Petition For Review ¶¶ 86-103); Commonwealth Ct. Op. at 24 & n.15, the RNC suggested in their moving papers that the variations in county boards’ practices with respect to notice-and-cure was also illegal. The Commonwealth Court explained why that theory is nonstarter, having been repeatedly rejected because uniformity does not require perfect identity of procedures so long as ballots are ultimately judged by the same standard. *See* Commonwealth Ct. Op. at 24 n.15 (citing *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-90 (W.D. Pa. 2020) (Trump I)); *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020) (Trump II); *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App’x 377, 388 (3d Cir. 2020) (Trump III)). In fact, this Court in *Pennsylvania Democratic Party* recognized that county boards are permitted to have different procedures with respect to the collection and processing of ballots in permitting, but not requiring, county boards to employ drop boxes. 238 A.3d at 361.

county board of elections may not deny the voter’s request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application.” *Id.* And while Section 2642 understandably does not spell out every detail of every action a board may take—if it did, rulemaking authority would be unnecessary—it explicitly empowers county boards to instruct local election officials and voters where the Election Code does not explicitly provide for a necessary procedure. *See* 25 P.S. § 2642(f).⁹ This includes by providing a process for curing defective ballots that does not conflict with the rest of the Election Code.

Philadelphia’s procedures have always been consistent with these dictates, even as alleged by the RNC. Philadelphia permits qualified electors to request replacement absentee and mail-in ballot packages when the Board has not received a valid ballot from that elector. *See* Record at 26a (RNC Petition For Review ¶ 70); Record at 44a (RNC Petition for Review Ex. C). Though the RNC characterizes this as a “cure procedure,” their own exhibit shows that this is a misnomer. Among other reasons, replacement ballot packages may be issued because the original ballot was returned by the postal service as “UNDELIVERABLE.” Record at 44a (RNC Petition for Review Ex. C). Nor does the Election Code prohibit the issuance

⁹ The RNC’s reference to this Court’s decision in the *In re: November 3, 2020 General Election* is inapposite. 240 A.3d 591 (Pa. 2020) The signature analysis at issue there was found to have been “intentionally omitted,” whereas here no such basis has been presented. *Id.* at 611.

of replacement ballot packages where, for instance, all or part of the ballot package is misdelivered and never reaches the voter, or where the voter has made an error in the process of marking their ballot. In those cases, the voter does not “cure” an invalid ballot; instead, they submit a replacement ballot. As the RNC conceded during oral argument, the issuance of a replacement ballot is certainly a necessary capability where a voter did not receive their initial absentee or mail-in ballot. Record at 694a (Hearing Tr. 127:1-21). The very same authority enables Philadelphia to provide replacement ballots to voters who returned a declaration envelope with an inadvertent error that could prevent their vote from being counted. Were this Court to hold, as the RNC implicitly requests, that boards lack the power to issue replacement ballots, the Court would likely disenfranchise an even broader swath of voters who never received their ballot in the first place, received it damaged, spilled coffee on it while marking it at home, or any other number of circumstances in which a voter would need a replacement. The RNC’s narrow focus on only certain circumstances in which a voter may want a replacement ballot belies the legal infirmity of their argument.

The RNC’s argument that because the Election Code provides for a method for absentee and mail-in electors to provide proof of identity up to six days after an election in certain circumstances prohibits any other “cure procedures” misapplies a wholly unrelated provision to the challenged procedures here. The identity

verification provisions of the Code are to determine whether an individual is a qualified, register elector who may receive and cast a ballot. Those processes, including 25 P.S. § 3146.8(h), which provides an elector a post-election opportunity to provide proof of identity in some circumstances so that their ballot may be counted, have nothing to do with the challenged “cure procedures” here. There is no allegation of voting by unqualified, unregistered individuals. Nor is there any allegation of fraud. Instead, the challenged procedures involved technical deficiencies to envelopes observable without opening them.

New arguments raised by the RNC are similarly unavailing. The RNC argues, for the first time, that Philadelphia’s cure procedures violate pre-canvassing provisions in the Election Code. As an initial matter, as discussed above, this issue is waived because the RNC failed to raise it before the Commonwealth Court.¹⁰

Even if this argument was not waived, it belies a fundamental misunderstanding of the Election Code’s pre-canvass provision and an ignorance of the practical realities of election administration. In fact, the Election Code requires that Philadelphia promptly review the face of every absentee and mail-in

¹⁰ This argument is a stark example of where the RNC’s ever shifting narrative has brought this case far afield of specific cure procedures and now into the ambit of county boards’ entire pre-canvassing operations. The idea that this litigation is tailored to that issue or that it would not have a jarring deleterious effect on the upcoming General Election is false, baseless, and contradicted by the new arguments the RNC now alleges.

ballot it receives in advance of Election Day. Under 25 P.S. §§ 3146.9 and 3150.17, Philadelphia must record the date on which an elector's completed absentee or mail in-ballot is received. Philadelphia must further compile such information and make it publicly available on 48 hours' notice. 25 P.S. §§ 3146.9(c), 3150.17(c). The Election Code also requires Philadelphia to ensure that poll books at polling places reflect electors who have already submitted an absentee or mail-in ballot to ensure such electors are not permitted to also vote at their polling place. 25 P.S. §§ 3146.6(b)(1), 3150.16(b)(1). Such poll books must obviously be prepared prior to election day. These clear requirements mandate Philadelphia promptly check absentee and mail-in ballots that it receives *prior to* Election Day.

In addition to these requirements in the Election Code, state funding for a vast number of costs Philadelphia incurs in administering elections, such as the payment of the staff needed to pre-canvass absentee and mail-in ballots, is now dependent on Philadelphia's ability to have a record of all absentee and mail-in ballots it has received by 12:01 a.m. the day following the election. 25 P.S. § 3260.2-A(j)(3).

It is well known that Philadelphia receives tens-to-hundreds of thousands of absentee and mail-in ballots in primary and general elections. In the 2020 General Election, for example, 368,518 ballots were cast for a presidential candidate. *See*

Pennsylvania Department of State 2020 Presidential Election Returns.¹¹ In order to meet these obligations the Board must review information on received ballot envelopes prior to Election Day.

The provisions the RNC relies on refer to a specific pre-canvass process that is not begun until 7:00 a.m. on election day, separate from the above provisions. Further, the RNC omits a material portion of the pre-canvass definition in the Code: “‘pre-canvass’ shall mean the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the **envelopes and the counting, computing and tallying of the votes reflected on the ballots.**” 25 P.S. § 2602(q.1) (emphasis added). It is this counting, computing, and tallying of the votes which cannot be disclosed.

The RNC separately alleges that by informing voters whose mail-in ballot envelopes contain a facial defect that they may vote provisionally, boards are acting contrary to law and “suborning perjury.” RNC Br. 40-41. This is incorrect. First, a voter who has sent in their mail-in ballot only to learn that their ballot envelope contains a facial defect and therefore will be rejected has not “voted” or “cast a ballot.” Rather, they have made a failed attempt to vote or cast their ballot. A voter in these circumstances can truthfully fill out a provisional ballot and sign

¹¹ <https://www.electionreturns.pa.gov/General/CountyResults?countyName=Philadelphia&ElectionID=83&ElectionType=G&IsActive=0> (last visited Oct. 6, 2022).

an affidavit affirming that they “this is the only ballot that I cast in this election.”
See RNC Br. 41 (citing 25 P.S. § 3050(a.4)(2)).

Moreover, informing voters whose mail-in ballot envelopes contain a facial defect that they may vote provisionally does not introduce risk that a voter will vote twice. Provisional ballots are not counted automatically. Rather, they are subject to multiple layers of scrutiny and challenge before they are counted. At the outset, the county board must “examine each provisional ballot envelope that is received to determine if the individual voting that ballot was entitled to vote at the election district in the election.” 25 P.S. § 3050(a.4)(4). During this process, “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the determination is being made.” *Id.* Such representatives “shall be permitted to keep a list of those persons who cast a provisional ballot and shall be entitled to challenge any determination of the county board of elections[.]” *Id.*

If a provisional ballot is deemed to be cast by an eligible voter and survives any challenges to voter eligibility, *then* it undergoes a signature comparison, and *then* it may be counted *only if* the county board “confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” 25 P.S. § 3050(a.4)(5)(i). This means that the provisional ballots are checked against SURE and voter rolls to ensure that double voting does not occur. In other words,

even if a voter was incorrectly notified that their mail-in ballot contained a facial defect and their mail-in ballot was counted, an attempt to vote provisionally would fail because their provisional ballot would be rejected as belonging to a voter who, in fact, voted by mail.

Not allowing voters whose mail-in ballots are likely to be rejected to cast a provisional ballot would deprive those voters of any means of ensuring that they are able to exercise their franchise.

Finally, the RNC also claims (RNC Brief pp. 42-44) that the county cure procedures violate the Constitution's mandate of election administration uniformity by allowing counties to implement their own procedures. Assuming *arguendo* the RNC preserved this argument – they did not – they are also wrong. As Commonwealth Court correctly found, “federal courts have previously rejected the notion that variations in notice and opportunity to cure procedures from county to county” are constitutional violations. Commonwealth Ct. Op. at 24 n.15. Indeed, the Middle District allowed different procedures across counties because “[r]equiring that every single county administer elections in exactly the same way would impose untenable burdens on counties.” *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 922-23 (M.D. Pa. 2020), *aff'd*, 830 F. App'x 377, 388 (3d Cir. 2020).

Because Philadelphia’s issuance of replacement ballots is permitted by the Election Code, and because the RNC cannot show that the practice is clearly prohibited, they have not shown a clear right to relief necessary for injunctive relief.¹²

B. *The Commonwealth Court Correctly Found the RNC Would Not Suffer Immediate and Irreparable Harm from “Notice” and “Cure”*

The Commonwealth Court correctly found that, rather than providing “actual proof” of immediate and irreparable harm with “concrete evidence,” the RNC’s *per se* argument was unsupported and their claims of factual harm were speculative. Commonwealth Ct. Op at. 46, 49-50.

The RNC based their *per se* argument on language suggesting that unlawful action or conduct always constitutes irreparable harm where “a statute proscribes” that activity. RNC Br. p. 45 (quoting *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980)). Having failed to show that the county boards’ actions are unlawful, *see supra* Part IV.B.1.b, the RNC cannot rely on a *per se* theory to establish irreparable harm. But even assuming they had, as the Commonwealth Court

¹² The RNC hasve also failed to show a likelihood of success and clear right to relief on their federal Elections Clause claim. The RNC’s theory—recently used to challenge interpretations by state courts, *see, e.g., Moore v. Harper*, 142 S. Ct. 2901 (2022)—essentially rehearses their lack-of-authority and uniformity claims, and should be rejected for the same reasons. *See* Record at 0032a (Pet for Review ¶¶ 93-96. Because Philadelphia’s rulemaking authority is delegated and its practice is authorized—and certainly not prohibited—by the Election Code enacted by the General Assembly, there is no violation of the Elections Clause.

pointed out, no statute “proscribes” Philadelphia’s replacement ballot practice; the RNC’s merits argument is based entirely on the *absence* of statutory language. Commonwealth Ct. Op. at 47-48. Without an explicit proscription, there is no *per se* harm.

The Commonwealth Court also appropriately exercised its discretion in finding the RNC’s evidentiary presentation speculative and therefore insufficient. *Id.* at 49-50. While Voter Petitioners complained of an inchoate harm from a lack of uniformity, it is purely speculative that they would be harmed by their own county boards’ lack of notice-and-cure provision, since those voters obviously cannot prove that they will cast defective ballots in the future. Further, Voter Petitioners failed entirely to articulate how they were harmed by Philadelphia potentially counting other valid ballots, particularly since as discussed above, the Commonwealth Court correctly rejected their dis-uniformity and vote dilution theories of harm. *See supra* Part III. And to the extent the Party Petitioners complained of having to expend greater effort educating their members, they failed to explain how this was not, at best, a classic monetary injury insufficient to establish irreversible, irreparable harm. Commonwealth Ct. Op. at 49.

Without immediate and irreparable harm, there was no basis for injunctive relief, and the Commonwealth Court properly rejected the RNC’s request.

C. *The RNC’s Injunction Would Disrupt the Status Quo, Is Not Reasonably Tailored, and Would Impose Greater Injury on Disenfranchised Voters and the Public than the RNC*

The Commonwealth Court also correctly exercised its discretion in explaining why the RNC had failed to satisfy any of the other preliminary injunction requirements, regardless of the legality of notice-and-cure.

Commonwealth Ct. Op. at 43-46.

The Commonwealth Court began by detailing the harm an injunction would impose, in part by changing the status quo. The Court recognized that granting *preliminary* relief at this time would “almost certain[ly]” disenfranchise voters by depriving them of the opportunity to avail themselves of the cure procedures that have been in place for years,¹³ “likely invalidat[ing] ballots already cast.” *Id.* at 43-45 (internal quotation marks omitted).

The RNC’s argument that they merely seek to restore the last uncontested status quo by eliminating procedures that have been in place since the first General Election conducted after the enactment of Act 77 is nonsensical. These procedures were raised in courts in 2020 after the *Pa. Democratic Party* case and were found to be unremarkable. And they have been utilized in multiple elections since. In the context of the current election, voters have made plans to vote based on

¹³For instance, the RNC admits that Philadelphia’s practice has been public since 2020, and until now the RNC has not challenged it. *See, e.g.*, Record at 26a (RNC Petition For Review ¶ 70).

procedures they understand are available in their counties. The Commonwealth Court rightly determined that the requested injunction would upset the status quo. And as explained above, the RNC’s argument that they are just asking that mail in ballot [envelopes] not be handled until election day is similarly contrary to the Election Code. Indeed, there will necessarily be greater harm to the public interest from the RNC’s requested remedy than the harm alleged by the RNC because the remedy will not just cure the specious “dilution” of the RNC’s votes, but wholly prevent qualified voters from casting replacement or provisional ballots that would otherwise be counted. Further, were this Court to hold, as the RNC implicitly requests, that boards lack the power to issue replacement ballots, the Court would disenfranchise voters who never received their ballot in the first place, received it damaged, spilled coffee on it while marking it at home, or any other number of circumstances in which a voter would need a replacement.

The Commonwealth Court also recognized that county boards are currently in the midst of administering the 2022 General Election, and an injunction would require them to divert critical resources from mailing and processing tens of thousands of ballots to modify—potentially only temporarily—their practices. *Id.* at 43. The Court was particularly sensitive to the fact doing so—at this time, for the 2022 General Election—would “cause confusion and uncertainty [by] altering election administration in many counties” which had previously communicated

their existing procedures to the public. *Id.* at 44-45 (internal quotation marks omitted). This was decidedly not a preservation of the status quo that would “keep the parties in the same positions they had when the case began.” *Id.* at 44 & n.19. The Court also noted that the RNC’s arguments hinged on showing a clear statutory violation, which they had failed to do. *See id.* at 43, 45; *supra* Part IV.A.

The Court also properly took issue with the haphazard scope of relief the RNC requested. First, the RNC sought relief against county boards, who do not employ notice-and-cure procedures, and the Acting Secretary, who has taken no action in this respect. Commonwealth Ct. Op. at 45. And second, while the RNC’s claimed harm is the violation of law and dilution of votes from the counting of cured ballots, RNC Br. at 17, their proposed injunction goes far beyond addressing the actual counting of allegedly problematic ballots. The RNC seeks to enjoin the county boards from even developing *potential* procedures. Yet the RNC has not alleged how the development of procedures will harm them.

And although not explicitly addressed by the Commonwealth Court, the RNC’s suggestion that the public interest is harmed more by variation in procedure and the specious specter of fraud than by the disenfranchisement of real, qualified voters deserves an explicit rejoinder by this Court. The 2020 General Election was marked by a flurry of lawsuits challenging election practices and procedures in a manner that undermined voter confidence. Those cases alleged, without a scintilla

of evidentiary support, that Pennsylvania's elections were tainted by fraud and focused most specifically on unsupported allegations that mail-in ballot processes undermined the integrity of the elections. Courts considered those allegations and resoundingly denied them. *E.g.*, *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020) (“[C]alling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.”). And just as there were no actual facts showing fraud in the myriad of cases filed in Pennsylvania and across the country in 2020, there is no suggestion of wrongdoing in this case. *See* Mem. Op. at 10. The RNC does not allege that qualified voters are doing anything other than trying to ensure their votes are counted. Similarly, the RNC does not allege that county boards are doing anything other than taking steps to permit all qualified voters to exercise the franchise. Despite this, the RNC fearmonger that the best efforts of the County Board Respondents will somehow harm public confidence in the integrity of Pennsylvania's elections. Record at 126a (RNC Mem. of Law at 12).

The proposition that public confidence is damaged when voters and county boards work to make sure votes are validly cast and counted is remarkable and should not be indulged by this Court. It is the disenfranchisement of voters out of fear rather than neutral administration of the law that would raise questions about the integrity of Pennsylvania's elections.

* * *

Because it properly found the requested injunction would change the status quo, was not reasonably suited to abate the alleged harm, would impose far greater harm on disenfranchised voters, and would be against the public interest, the Commonwealth Court did not err in refusing the RNC's injunction.

V. The RNC's Request for Preliminary Relief Should Be Barred by Laches

Finally, the RNC strategically timed application for immediate relief on the eve of an election runs afoul of the doctrine of laches. Courts have denied preliminary injunctions based on laches or similar concepts where a movant's failure to act has prejudiced the targeted party. *E.g.*, *Kelly v. Commonwealth*, 240 A.3d 1255, 1256-57 (Pa. 2020) (per curiam); *Becker v. Lebanon & M. Ry. Co.*, 41 A. 612 (Pa. 1898). In this case, the RNC has waited nearly two years, until the eve of an election, to challenge Philadelphia's publicly announced practices of providing replacement ballots to voters whose ballots have technical defects. Nothing stopped the RNC from challenging this practice in 2020, in 2021, or even for the 2022 primary earlier this year. They could have sought the instant relief well in advance of this election, when Philadelphia and other counties would have had time to adjust their practices, retrain their staff, and educate voters for future elections based on the court's final ruling. Instead, the RNC waited until that time had passed, and then sought immediate preliminary relief. This Court should not

reward the RNC's legal gamesmanship and should instead deny the RNC's request outright because of the prejudice it would inflict on Philadelphia and its voters this election cycle.

The RNC cannot credibly dispute that the facts central to their claims have been well known since 2020. Indeed, in *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, the Third Circuit directly stated that if an error is noted before election day, “[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.” 830 F. App’x at 384. Notably, the Third Circuit considered a county board’s ability to promulgate procedures to address such errors as unproblematic under the Election Code—even though *Pennsylvania Democratic Party*, on which the RNC relies, had already been decided, *Donald J. Trump for President*, 830 F. App’x at 384. Nor can the RNC claim they were unaware of Philadelphia’s procedures. Those have been clearly publicized since the 2020 General Election. *See* Record 554a-555a (Joint Stip. Undisputed Facts Ex. G). Even if the Court credits the RNC’s argument that they waited because of potential legislation, even the RNC acknowledges that that legislation was foreclosed as of June 2021.¹⁴

¹⁴ The RNC’s reliance on *Dondiego v. Lehigh County Board of Elections*, No. 22-2111 (E.D. Pa. 2022), and Right to Know requests are wholly misplaced. Among other things, *Dondiego* and the referenced Right to Know requests did not provide any new or additional information regarding the practices of Philadelphia, or many other respondents; to the contrary, the RNC’s only fact averments about Philadelphia’s practices date to 2020.

Moreover, the RNC does not bring the instant litigation against one county board of elections based on the specifics of that county's procedures. Rather, the RNC has asked a broad legal question—are county boards of election permitted to take any action not expressly listed in the Election Code—and named every county. Based on their theory, the RNC has failed to put forward any reason why they could not have challenged Philadelphia's practices in the two years since this Court's *Pennsylvania Democratic Party* decision upon which the RNC incorrectly base their claims. As a result, the Commonwealth Court abused its discretion in crediting the RNC's claim that they needed to seek detailed information about individual counties' practices before filing suit and seeking immediate relief, since the RNC does not assert that those details affect their claims and do not explain why they could not have sued earlier those counties whose practices they were aware of. *Cf.* Commonwealth Ct. Op. at 53.

The RNC's delay was neither excusable nor due to a lack of due diligence; it was a strategic choice to wait to seek an injunction that would upend settled voter expectations and county board procedures in the midst of the 2022 General Election.

The RNC's delay also prejudices Philadelphia voters and the Philadelphia County Board of Elections in important ways. The types of errors the RNC seeks to enjoin county boards from addressing impact a significant number of voters,

which Philadelphia documents publicly during the canvass in each election cycle. *See supra* notes **Error! Bookmark not defined.**-5 and accompanying text (noting thousands of absentee and mail-in votes each election are rejected for defects).

At this point in the election cycle, just over a month before Election Day, those who choose to vote by mail have largely made their decision and plan. Two years ago, this Court recognized that courts can consider prejudice for laches based on obvious harms to the voting public. *Kelly*, 240 A.3d at 1256-57.¹⁵ That is equally true here, where the RNC’s requested preliminary relief would prevent eligible voters from requesting replacement ballots or casting provisional ballots and having their votes counted. For that reason alone, a finding of laches is especially appropriate as to the RNC’s request for preliminary injunctive relief.⁵

In addition, the RNC’s delay prejudices Philadelphia because its limited resources are now focused on election administration. It is now nearly one month before Election Day and the Philadelphia County Board of Elections—indeed all county boards across the Commonwealth—are hard at work on the numerous duties they must conduct under the Election Code to operate the election. They

¹⁵ In distinguishing *Kelly* and applying a more traditional laches analysis, the Commonwealth Court erred in considering whether “laches is a complete bar to the RNC’s action as a whole, which also seeks [declaratory relief].” Commonwealth Ct. Op. at 51. To the contrary, it is because the RNC requests *preliminary* relief for the imminent election that laches applies, because votes may already be being cast under county boards’ existing processes. While the magnitude of the harm in *Kelly* may have been greater, the underlying principle that harm to voters constitutes prejudice cognizable by laches applies here.

must process voter registration applications, including those handwritten and submitted in person. 25 Pa. C.S. §§ 1322, 1328. They must arrange for polling places, of which Philadelphia has over 700. *See* 25 P.S. § 2726(c). They must recruit and train thousands of poll workers to staff polling places on Election Day. 25 P.S. § 2642(d), (f), (g). They must extensively test voting machines for use in polling places and then arrange for delivery to polling places prior to Election Day. 25 P.S. §§ 2642(b), 3031.10, 3044. They must prepare the ballot in multiple languages where required by federal law. 52 U.S.C. § 10503. And they must process applications for and then deliver absentee and mail-in ballots, along with instructions, including to voters overseas and in the military. 25 P.S. §§ 3146.2b, 3146.5, 3150.12b, 3150.15.

Short of Election Day itself, there is no busier time for the Philadelphia County Board. An injunction now would require Philadelphia to implement new procedures and educate both workers and the public on the impact of the litigation—even as it continues to conduct all activities required by the Election Code and necessary for a free, fair, and effective election. Had the RNC sought relief even a few months earlier, an adverse final ruling might have issued in time for boards to change procedures regarding replacement and provisional ballots; retrain staff; and reallocate resources into a public education campaign. And that is to say nothing of the challenges the Board would face in determining how to

implement the vague injunction sought by the RNC. Indeed, even the scope of such an injunction is unclear as the RNC's counsel appear not to agree whether the issuance of replacement ballots to voters who never received their absentee or mail-in ballot package at all should—in their view—be enjoined.

It is important to note that the RNC's argument that Respondents and voters are not prejudiced asks the Court to impose a higher evidentiary burden on Respondents' laches defenses than on the RNC's own Application. The RNC has not pled any specific harm regarding Philadelphia and have not come forward with any evidence—*none*—that they will suffer vote dilution without an immediate injunction. Indeed, their entire claim is speculative and at best a generalized grievance shared equally by every other voter in the Commonwealth. The recording of a lawful vote *cannot* cause dilution. *See Donald J. Trump for Pres., Inc. v. Boockvar*, 493 F. Supp. 3d 331, 388-89 (W.D. Pa. 2020). And even if an unlawful vote was recorded, which is not at issue in this case, such a vote equally dilutes *all* lawful votes. *See id.* The Court should not consider the RNC's Application, which is based on speculative harms, while indulging the RNC's argument that Respondents must meet some higher evidentiary burden in their defense at this preliminary stage.

Because the RNC's delay is inexcusable, and because their delay in seeking preliminary relief will prejudice Philadelphia and the voters it serves, laches bars the request for preliminary relief.

CONCLUSION

For the foregoing reasons, Respondents Philadelphia County Board of Elections respectfully request that this Court either dismiss for lack of subject matter jurisdiction or affirm the Commonwealth Court's September 29, 2022 Order denying the RNC's request for injunctive relief.

Respectfully submitted,

CITY OF PHILADELPHIA LAW DEPT.
DIANA P. CORTES, CITY SOLICITOR

/s/ Zachary Strassburger
Zachary Strassburger

Benjamin H. Field, Chief Deputy City Solicitor
Attorney ID No. 204569

Craig Gottlieb, Senior Attorney
Attorney ID No. 73983

Michael Pfautz, Deputy City Solicitor
Attorney ID No. 325323

Aimee D. Thomson, Deputy City Solicitor
Attorney ID No. 326328

Ryan B. Smith, Assistant City Solicitor
Attorney ID No. 324643

Zachary G. Strassburger, Assistant City Solicitor
Attorney ID No. 313991

Zachary.strassburger@phila.gov

One Parkway Building, 15th Floor

1515 Arch Street Philadelphia, PA 19102

Tel (215) 683-2998 and Fax (215) 683-5299

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Counsel for Respondent Philadelphia County
Board of Elections

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Pennsylvania Rule of Appellate Procedure 2135 because this brief contains **13,400** words, excluding the Supplementary Matter exempted by Pa. R. App. P. 2135(b).

/s/ Zachary Strassburger

Zachary Strassburger
City of Philadelphia Law Department

Dated: October 6, 2022

CERTIFICATE OF SERVICE

I, Zachary Strassburger, hereby certify that I caused to be served today the foregoing **Brief for Respondents** upon counsel of record and the unrepresented counties by electronic filing and by first class mail, postage prepaid.

/s/ Zachary Strassburger _____

Zachary Strassburger
City of Philadelphia Law Department

Date: October 6, 2022

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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.

/s/ **Zachary G. Strassburger**

Zachary G. Strassburger
City of Philadelphia Law Department

Date: October 6, 2022