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ELECTION MATTER

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100 MAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 100 MAP 2022

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Appellants

v.

LEIGH M. CHAPMAN, ACTING SECRETARY OF THE COMMONWEALTH, ET AL.,

Appellees

BRIEF FOR APPELLEES LEIGH M. CHAPMAN AND JESSICA MATHIS

Appeal from the Order of the Commonwealth Court at No. 447 MD 2022 dated September 29, 2022

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STATEMENT OF JURISDICTION

This Court may review the Commonwealth Court's order denying the request for a preliminary injunction under 42 Pa.C.S. § 723 and Pennsylvania Rule of Appellate Procedure 311(a)(4). But the Commonwealth Court lacked jurisdiction over this case and was therefore powerless to grant the requested relief. *See infra* at 15-20. This Court should therefore vacate the Commonwealth Court's order with instructions to dismiss the matter for lack of jurisdiction, or, alternatively, affirm the Commonwealth Court's denial of Petitioners' request for a preliminary injunction because the Commonwealth Court did not have subject matter jurisdiction to grant such relief.

STANDARD OF REVIEW

Appellate courts review "an order granting or denying a preliminary injunction for an abuse of discretion." *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501 (Pa. 2014). Abuse of discretion is a "highly deferential standard of review," limited to a determination only of whether "there were any apparently reasonable grounds for the action of the court below.'" *Id.* (quoting *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1000 (Pa. 2003)). "Apparently reasonable grounds" exist to support a lower court's denial of injunctive relief where the lower court has properly found that any one of the six "essential prerequisites' for a preliminary injunction is not satisfied." *Id.*

Those prerequisites are:

1) An injunction must be necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;

2) 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;

3) The injunction must restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.

4) The party seeking an injunction must show that it is likely to prevail on the merits;

5) The injunction must be reasonably suited to abate the offending activity; and

6) The preliminary injunction must not adversely affect the public interest.

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). The moving party "faces a heavy burden of persuasion" to show that the six prerequisites are met. *Singzon v. Commonwealth, Dep't of Pub. Welfare*, 436 A.2d 125, 127 (Pa. 1981).

STATEMENT OF QUESTIONS

1. Does the Commonwealth Court have jurisdiction over this case?

Suggested answer: No.

2. Does any Petitioner have standing?

Suggested answer: No.

3. Was there any apparently reasonable ground for the Commonwealth Court to conclude that Petitioners failed to establish all six of the prerequisites needed for a preliminary injunction to issue?

Suggested answer: Yes.

INTRODUCTION

With their lawsuit and application for a preliminary injunction, Petitioners aim to upend the Commonwealth's longstanding policy of protecting the elective franchise. They ask this Court to disenfranchise qualified Pennsylvania electors who made an error when initially submitting their mail-in or absentee ballots—by, for example, neglecting to sign the declaration on the outer ballot-return envelope—and who want to correct their mistake and ensure that their vote will be counted. In Petitioners' view, even if these citizens ultimately cast a timely ballot that complies with all applicable requirements, those valid ballots must be discarded. By Petitioners' logic, because a voters' *initial* submission was deficient, the citizen has irrevocably forfeited the right to vote.

As the Commonwealth Court correctly concluded, the Election Code does not require such a harsh result. Under Petitioners' view of the law, county boards of elections must close their eyes to the fact that some absentee and mail-in ballot submissions contain defects and may not provide electors with an opportunity to have their vote counted by remedying those defects before the polls close. Likewise,

Petitioners urge that if an elector returns a mail-in ballot *in person*, a board of elections employee who notices an error may not give the elector an opportunity to fix it. Even an elector who realizes that she had forgotten to sign the envelope, for example, would not be allowed to ask for it back to add the missing signature. The moment a voter hands an unsigned envelope to the employee across the counter, the elector is disenfranchised.

Not only have Petitioners failed to establish that the Election Code requires such a draconian result, they also have failed to establish that equitable considerations permit granting their requested relief even if their legal claim had any merit. As Petitioners are well aware, some counties have been allowing voters to correct their initially deficient ballot submissions since at least the November 2020 election. This lawsuit is not the first to challenge such procedures. One Petitioner—the Republican National Committee—even called a press conference after the November 2020 election to decry the very policies they now challenge.[1] Yet Petitioners waited until the eve of the 2022 General Election, and now, only a month before Election Day, with counties boards of election already receiving mail-in and absentee ballots from voters, Petitioners seek to disrupt counties' administration of

[1] *Kayleigh McEnany & Ronna McDaniel Press Conference Transcript: Lawsuits Over Election Disputes*, Rev Transcription (Nov. 9, 2020) (emphasis added), https://tinyurl.com/2p8x7dun; *see also* Video of RNC Chair McDaniel and White House Press Secretary McEnany News Conference, C-SPAN (Nov. 9, 2020), https://tinyurl.com/2p8s6krs.

an election that is already underway. Given the timing, Petitioners' demand for an immediate injunction banning all notice-and-cure procedures used or planned in any of Pennsylvania's 67 counties—an injunction that is tantamount to a summary award of relief on the merits—would both disenfranchise electors who might otherwise have had their vote counted and inject an unacceptable degree of confusion into counties' administration of the on-going election.

Petitioners' request for relief suffers from two more fatal flaws, both of which they fail to address in their brief even though multiple Respondents raised each issue below. Petitioners seek relief based theories of injury that have been resoundingly rejected by courts across the country, including courts in Pennsylvania. And, Petitioners fail to establish that the Commonwealth Court had the authority to grant their requested relief. Because no Commonwealth entity is an indispensable party here, the Commonwealth Court lacked subject matter jurisdiction, and therefore could not grant Petitioners any injunctive relief.

For all of these independent reasons, the Commonwealth Court's order should be affirmed.

STATEMENT OF THE CASE

I. Notice-and-Cure Procedures Are Not New

"Notice and cure" is not a recent developed in Pennsylvania election administration. Since before Pennsylvania permitted no excuse mail-in voting,

certain county boards of elections have provided electors with notice of deficient absentee ballot submissions and allowed electors to cure those deficiencies. For example, notice-and-cure procedures for absentee ballots were in place in Montgomery County for "years prior" to the 2020 general election. *See* Tr. of Hearing at 56:20-24, *Barnette, et al. v. Lawrence, et al.*, No. 20-cv-05477 (E.D. Pa. Nov. 4, 2020), ECF No. 43.

The Commonwealth Court record reveals that boards of elections in multiple counties have utilized various notice-and-cure procedures since at least 2020. R. 505a-509a, 548a-559a. Although the goal of these procedures is the same—to prevent an initially deficient ballot submission from resulting in disenfranchisement, and to provide voters an opportunity to cast a timely, fully compliant ballot—the procedures themselves are vary, consistent with the Election Code's assignment of primary responsibility for election administration to the county boards. *Ibid.*

Notice-and-cure procedures were thrust into the spotlight as a result of litigation around the 2020 General Election.

In one earlier case, the Pennsylvania Democratic Party alleged, among other things, "that the Pennsylvania Constitution and spirit of the Election Code *require* the [county] Boards to provide a 'notice and opportunity to cure' procedure." sought declaratory and injunctive relief concerning five mail-in-voting-related issues of statutory and constitutional interpretation. *Pa. Democratic Party v. Boockvar*, 238

A.3d 345, 373 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (emphasis added). The Secretary opposed the petitioner's request for an order requiring all county boards to implement notice-and-cure procedures, arguing that "there is no statutory or constitutional basis for *requiring* the Boards to contact voters when faced with a defective ballot and afford them an opportunity to cure defects." *Id.* (emphasis added).[2]

This Court agreed, concluding "that the Boards are not *required* to implement a 'notice and opportunity to cure' procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly." *Id.* at 374 (emphasis added). The Court added that, "[p]ut simply, as argued by the parties in opposition to the requested relief, Petitioner … cited no constitutional or statutory basis that would

[2] The Acting Secretary's position here is consistent with the Secretary's position in *Pennsylvania Democratic Party*: Counties are not *required* to implement notice-and-cure procedures, but may choose to do so.

Petitioners, citing an answer to a single "Frequently Asked Question" (FAQ) on the Department's website stating that because "your mail-in ballot *can't be opened* until Election Day," "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election," insist that the Department of State agrees with them that county boards of elections are categorically prohibited from implementing notice-and-cure procedures. Br. at 12, 17-18, 55-56. But the challenged notice-and-cure procedures do not involve opening a ballot.

Moreover, Petitioners overlook the purpose of the FAQ. One of the Department's primary goals is to protect the right to vote and to maximize the ability of qualified electors to have their votes counted. Some county boards apparently have elected *not* to offer any notice-and-cure procedures, and voters in those counties therefore will not be given notice of a deficient submission. Accordingly, to minimize the risk of disenfranchisement, the Department has consistently urged voters to vigilantly comply with all requirements applicable to mail-in and absentee ballot submissions. The FAQ identified by Petitioners is consistent with that approach.

countenance *imposing* the procedure Petitioner seeks to require," *i.e.*, mandatory notice and cure. *Id.* (emphasis added).

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

While the court concluded that plaintiffs lacked standing to sue, it nonetheless addressed the merits of plaintiffs' equal protection claim. *Id.* at 914, 916. The court determined that the complaint failed to state a claim as to both the Trump Campaign and the individual-elector plaintiffs. *See id.* at 918-23. As for the individual-elector plaintiffs, it emphasized that county boards' implementation of notice-and-cure procedures "'imposes no burden' on [the] Individual Plaintiffs' right to vote…. Defendant Counties, by implementing a notice-and-cure procedure, have in fact

lifted a burden on the right to vote, even if only for those who live in those counties. Expanding the right to vote for some residents of a state does not burden the rights of others." *Id.* at 919. The court concluded that "it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920.

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

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

Id. at 922-23 (quotation marks and footnotes omitted).

II. Proceedings Below

Although notice-and-cure procedures are not new, and have been in the spotlight for nearly two years, Petitioners waited until two months before a general election to bring an action challenging them.

Petitioners—made up of a group of individual voters and a group Republican Party committees, R. 10a-17a—advance two theories why counties are categorically prohibited from implementing any notice-and-cure procedures (a concept the Petition for Review never defines). First, they argue that the Election Code does not explicitly authorize counties to implement any notice-and-cure procedure. R. 30a-32a. Second, because the Election Code allegedly does not authorize those

procedures, they claim that implementing them violates Article I, § 4 of the U.S. Constitution. R. 32a-33a.[3] Petitioners named two Department of State officials—Acting Secretary Leigh M. Chapman and Jessica Mathis—as Respondents. R. 18a. They also named every county board of elections. *Id.*

A week after filing the petition, Petitioners moved for a preliminary injunction that would prohibit "the Respondent Boards from developing and implementing cure procedures and [would require] the Acting Secretary to take no action inconsistent with such an order." R. 83a.

Following briefing and a lengthy hearing on Petitioners' request for a preliminary injunction, the Commonwealth Court denied the motion. The court concluded that Petitioners had not satisfied a single one of the six prerequisites for granting a preliminary injunction. R. 1120a-1139a. Specifically, the court found that Petitioners did not demonstrate that they are likely to succeed on the merits of their claims; that granting the relief requested would disrupt the status quo and would result in greater harm than denying it; that the requested relief was not narrowly tailored to abate the offending activity; and that granting an injunction would adversely affect the public interest because an injunction would inflict considerable damage to the public's interest in having all lawful votes counted and in having on-

[3] A third count in the Petition for Review seeks only injunctive relief, but without any independent legal theory. R. 33a-34a.

going elections administered without changing the rules mid-stream. While noting the arguments that the court lacked subject matter jurisdiction, R. 1110a, it did not rule on this question.

SUMMARY OF ARGUMENT

This Court may affirm the Commonwealth Court's order denying Petitioners' request for a preliminary injunction (or vacate it with instructions to dismiss this action) for any of a multitude of reasons.

First, the Commonwealth Court lacked subject matter jurisdiction over the underlying action and thus was powerless to grant Petitioners' desired relief. Commonwealth Court has exclusive original jurisdiction over actions against the "Commonwealth government." 42 Pa.C.S. § 761(a)(1). An action is against the Commonwealth government only if the Commonwealth, or its officers, is an indispensable party. *In re Petition for Enf't of Subpoenas*, 214 A.3d 660, 664 (Pa. 2019).

Neither the Commonwealth nor any of its officers is an indispensable party to this litigation, which challenges only the discretionary decisions of county boards of elections and seeks relief only against those county boards. And county boards are not part of the "Commonwealth government" for purposes of § 761, as the "Commonwealth government" excludes "any officer or agency of any such political subdivision or local authority." 42 Pa.C.S. § 102. Petitioners have never disputed

that this text describes county boards of elections. Finally, this Court should not exercise its King's Bench power to consider Petitioners' request for injunctive relief in the first instance. Any alleged exigency in this case is purely a product of Petitioners' unjustifiably delaying the filing of this action.

Second, neither set of Petitioners—voters or the various Republican Party committees—has standing. The voter Petitioners claim to be injured by other counties allowing their own residents to fix mistakes made during the initial submission of a mailed ballot because such practices dilute the Petitioners' votes. But an unbroken line of precedent rejects that very theory: One voter does not suffer any particularized injury merely because another person has been allowed to vote. *E.g.*, *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970); *see also, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356-60 (3d Cir. 2020), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021); *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022).

The Republican committee Petitioners, for their part, claim to be injured because they do not have sufficient information about some county boards' notice-and-cure procedures. But the committee Petitioners are not challenging inadequate access to information about county procedures, or seeking an order requiring county boards to better publicize their procedures. They instead challenge the substance of

certain county boards' procedures and ask that the procedures themselves be enjoined. Separately, the committee Petitioners claim that notice-and-cure procedures interfere with their interest in electing Republican candidates, but have not made any allegation that notice-and-cure procedures actually impair that interest.

Third, the Commonwealth Court had a reasonable basis to conclude that Petitioners have not established that the Election Code forbids county boards from developing rules for voters to correct defects made when returning a mailed ballot. Pennsylvania law requires that county boards conduct an initial review of all envelopes in which a mailed ballot is received. County boards must perform that review because they are statutorily obligated to record who has voted in an election, how a ballot was submitted, and the date a ballot was returned. 25 Pa.C.S. § 1222(c)(20); 25 P.S. § 3146.9; 25 P.S. § 3150.17. And county boards must have compiled by Election Day a poll book with a list of "electors who have [1] received and [2] voted" absentee or mail-in ballots. 25 P.S. § 3146.6(b)(1); 25 P.S. § 3150.16(b)(1).

But the Election Code is silent about what county boards may do if an election official notices during this mandatory review that a voter has made an identifiable mistake when returning the ballot. County boards may use their statutorily delegated power "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine

custodians, elections officers and electors," 25 P.S. § 2642(f), in order to fill this gap left by the Election Code's silence.

Each of the reasons that Petitioners give for why such rules or regulations are "inconsistent with law" relies on fundamental mistakes about either this Court's precedent, about the statutory provisions on which their arguments rely, about actual election practices, or about governing principles of statutory interpretation. Petitioners also overlook that this Court has repeatedly held that the Election Code must be interpreted to achieve its overarching purpose: promoting voters' ability to choose their elected representatives. *Pa. Democratic Party*, 238 A.3d at 356. And while Petitioners also argue in this Court that counties' varying practices violate Article VII, § 6 of the Pennsylvania Constitution, they have not actually pleaded such a claim. In any event, the argument is without merit.

Fourth, the Commonwealth Court had a reasonable basis to conclude that Petitioners cannot meet a single one of the equitable considerations that dictate whether a party is entitled to a preliminary injunction. While on the one hand, Petitioners' have not identified *any* cognizable harm that granting an injunction would remedy —let alone an immediate and irreparable harm—granting Petitioners' requested relief would inflict significant harm and would undermine the public interest. In particular, ordering, with just a month until Election Day and with the 2022 General Election already underway, that several counties must alter how they

administer elections would be massively disruptive and would likely disenfranchise thousands of voters. And the consequence of such an order on any voter who could have fixed mistakes with their initial ballot submission will likely be irreversible.

Finally, a broad order to end notice-and-cure procedures, as Petitioners request, is not reasonably tailored to any allegedly unlawful activity. Indeed, while Petitioners speak generally about the unlawfulness of notice-and-cure procedures, that moniker does not describe a single practice and Petitioners have never particularly defined what conduct they believe is unlawful. Granting the requested injunction would therefore likely introduce tremendous confusion and embroil the courts in further litigation.

ARGUMENT

I. The Commonwealth Court Lacked Jurisdiction to Grant Petitioners' Requested Relief

The Commonwealth Respondents argued below that the Commonwealth Court did not have subject matter jurisdiction, and therefore could not grant Petitioners' requested relief. R. 354a-359a, 904a-910a. Although the Commonwealth Court did not consider its jurisdiction to grant Petitioners' requested injunction, its lack of jurisdiction is an alternative basis to determine that Petitioners cannot obtain a preliminary injunction.

A. No Commonwealth Official is an Indispensable Party to this Litigation

"The Commonwealth Court has original jurisdiction in only a narrow class of cases. That class is defined by … 42 Pa.C.S. § 761, which provides that, as a general rule, the court has original jurisdiction in cases asserted against 'the Commonwealth government, including any officer thereof, acting in his official capacity.'" *Stackhouse v. Commonwealth*, 832 A.2d 1004, 1007 (Pa. 2003) (quoting 42 Pa.C.S. § 761(a)(1)).

For the Commonwealth Court to exercise original jurisdiction under 42 Pa.C.S. § 761(a)(1), "the Commonwealth must be *an indispensable party* to the action." *In re Petition for Enf't of Subpoenas*, 214 A.3d at 664 (emphasis added). A Commonwealth party is indispensable only if the specific "claim and the relief sought" implicates a "right or interest" of the Commonwealth party that is "essential to the merits of the issue." *Centolanza v. Lehigh Valley Diaries, Inc.*, 658 A.2d 336, 339 (Pa. 1995). The Commonwealth government is not indispensable unless meaningful relief cannot conceivably be afforded without the sovereign itself becoming involved. *Pa. State Educ. Ass'n v. Dep't of Educ.*, 516 A.2d 1308, 1310 (Pa. Commw. Ct. 1986). And "neither naming nor serving a Commonwealth party alone is sufficient to establish indispensability." *In re Petition for Enf't of Subpoenas*, 214 A.3d at 667; *accord Rachel Carson Trails Conservancy, Inc. v. Dep't of Conservation & Nat. Res.*, 201 A.3d 278, 281 (Pa. Commw. Ct. 2018). It is

Petitioners' burden to show that the Commonwealth or its officers are indispensable parties, *City of Lebanon v. Commonwealth*, 912 A.2d 338, 341 (Pa. 2006), and where they fail to carry that burden, the Commonwealth Court is "divested of jurisdiction," *Rachel Carson Trails*, 201 A.3d at 281.

The two Commonwealth officials named by Petitioners in this lawsuit—the Acting Secretary of the Commonwealth and Director of the Bureau of Elections—are not indispensable parties. The Petition for Review does not allege any unlawful action by the Department of State. Nor do Petitioners challenge any Department of State requirement or statewide practice. Instead, Petitioners contest discretionary, county-level practices, alleging that "several County Boards of Elections …, *acting on their own initiative*, are [allegedly] departing from [purported statutory] rules." R. 6a. (emphasis added). The rest of the Petition for Review sounds the same unchanging note. *E.g.*, R. 8a, 14a, 17a, 31a.

By contrast, nowhere do Petitioners allege that any Commonwealth official has committed any unlawful act. Petitioners can plainly obtain adequate relief without the involvement of the Department of State. Their own prayer for relief effectively concedes that point, failing to seek any meaningful relief from either Department of State Respondent. R. 34a. While the prayer for relief asks that any order direct the "Acting Secretary to take no action inconsistent with" any relief, R. 34a, the Commonwealth Court properly observed that "Petitioners have not

sufficiently alleged what, if any, type of action the Acting Secretary might take in the event this Court granted the requested relief in this case." R. 1134a.

To be sure, the Commonwealth Respondents have an *opinion* about whether county boards of elections have discretionary authority to implement notice-and-cure procedures—an opinion that Petitioners have consistently misrepresented. *Supra* at 7 n.2. But having a view about a legal issue presented in a case, without more, does not make a person or entity an indispensable party. *See Centolanza*, 658 A.2d at 339.

Put simply, Petitioners improperly attempted to bootstrap a case against certain local agencies, *i.e.*, county boards of elections, into the Commonwealth Court's original jurisdiction. The participation of Commonwealth officials is not necessary for Petitioners to obtain effective relief in the event they prevail in this litigation.[4] Petitioners' claims must be asserted, if at all, separately against each county board allegedly implementing notice-and-cure procedures in the court of

[4] Indeed, it is no accident that, when this notice-and-cure issue was (repeatedly) litigated during the 2020 election cycle, the cases were generally brought as challenges to the particular procedures of particular county boards in the courts of common pleas sitting in each board's respective county. *See, e.g.*, *Donald J. Trump for President, Inc. v. Bucks Cnty. Bd. of Elections*, No. 2020-05627 (C.P. Bucks Cnty. Nov. 3, 2020). Those proceedings not only recognized and respected the statutory limits on the Commonwealth Court's subject-matter jurisdiction; they also recognized the importance—from the standpoint of achieving a just and correct adjudication of challenges that seek to prevent the votes of qualified Pennsylvania electors from being counted—of examining the particular procedures of the particular county board at issue. *See Blount v. Philadelphia Parking Authority*, 965 A.2d 226, 232 (Pa. 2009) (explaining that one purpose of requiring local entities to be sued in the courts of common pleas rather than the Commonwealth Court is that the former "courts will be more familiar with the issues surrounding the entity's operations and organizational make-up").

common pleas of that county. *See* Pa.R.C.P. 2103(b) ("Except when the Commonwealth is the plaintiff or when otherwise provided by an Act of Assembly, an action against a political subdivision may be brought only in the county in which the political subdivision is located.").

B. County Boards of Elections Are Not Commonwealth Agencies

Below, but not in this Court, Petitioners maintained that county boards are part of the "Commonwealth government" for purposes of jurisdiction. R. 1076a. But for purposes of the Commonwealth Court's original jurisdiction, the "Commonwealth government" is defined to *exclude* "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. While Petitioners urged the Commonwealth Court to conclude that county boards are not a "local authority," and thus are not excluded from the Commonwealth government under this definition, they wholly ignored that the statutory definition also excludes "any officer or agency or any such political subdivision or local authority. 42 Pa.C.S. § 102. County boards fit this latter category, and Petitioners have never argued differently.

Accepting that the Commonwealth Court had original jurisdiction over this matter would conflict with hundreds, if not thousands, of previous judicial decisions. As this Court is well aware, for decades, the courts of common pleas have heard and decided cases in which the board of elections of that county is named as a

respondent. Moreover, going forward, *the Commonwealth Court would be required to hear, in its exclusive original jurisdiction, every single case brought against any county board of elections*—or, for that matter, any other organ of county government. That cannot be—and is not—the law. Unsurprisingly, Petitioners fail to cite a single case holding that county boards are Commonwealth agencies.

C. This Court Should Not Grant Petitioners' Requested Relief in the First Instance

Petitioners have seemingly abandoned any argument that the Commonwealth Court had jurisdiction to grant Petitioners' requested relief, and now urge this Court to exercise its King's Bench power and grant Petitioners' requested relief in the first instance. Br. at 1-2. But this Court should not invoke an extraordinary jurisdictional power to permit a party that could have, but failed, to file their lawsuit in a court with jurisdiction to "bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court." *In re Bruno*, 101 A.3d 635, 670 (Pa. 2015).

This Court's extraordinary exercises of jurisdiction are reserved for questions of exceptional public importance that must be resolved with urgency. *Id.* at 671. Parties should not be permitted to invoke this Court's power after sitting on their hands, after initiating a lawsuit at the most disruptive possible occasion, and after failing to file their lawsuit in a court vested with original jurisdiction over it. Any urgency here is purely of Petitioners' own making.

II. No Petitioner Has Standing

Independently, as argued below, R. 360a-367a, the Commonwealth Court's order may be affirmed because neither the Voter Petitioners nor the Republican Committee Petitioners have the "substantial, direct, and immediate interest" needed to establish standing to challenge counties' notice-and-cure procedures. *See Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). The voters do not have an interest that "surpass[es] 'the common interest of all citizens in procuring obedience to the law.'" *See id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). And the political committees have not shown that the challenged procedures are the cause of any alleged harm. *See id.*[5]

A. The Voters Lack Standing

The Voter Petitioners' alleged injury—that their "validly cast" votes will supposedly be "canceled out and diluted by the counting of ballots" submitted

[5] Separately, no Petitioner has standing to pursue Count II of the petition, which alleges that county boards' use of notice-and-cure procedures "usurp[s] the exclusive legislative authority of the General Assembly" to regulate elections. R. 8a, 32a-33a; *see also Fumo v. City of Philadelphia*, 972 A.2d 487, 502 n.7 (Pa. 2009) (agreeing that standing is appropriately analyzed "on a claim-by-claim basis"). Voters, candidates, and political organizations do not have a particularized interest in alleged violations of the General Assembly's supposed prerogatives under the Elections Clause of the U.S. Constitution. Those private parties therefore lack standing to "seek[] to compel state officials to follow what those citizens perceive to be the demands of the Elections Clause." *Toth v. Chapman*, No. 22-208, 2022 WL 821175, at *7, 9-12 (M.D. Pa. Mar. 16, 2022) (three-judge panel). Only the General Assembly may vindicate an infringement of any powers it possesses under the U.S. Constitution. *See, e.g.*, *Corman v. Torres*, 287 F. Supp. 3d 558, 573-74 (M.D. Pa. 2018) (three-judge court); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 349-50 (3d Cir. 2020), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021) (same); *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019) (one house of a bicameral legislature lacks standing to assert interest of the legislature).

pursuant to the challenged notice-and-cure procedures, R. 17a—overwhelmingly has been rejected as a basis for standing. In Pennsylvania and elsewhere, courts have repeatedly explained that this "vote dilution" theory of standing asserts only a generalized grievance.

In *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970), for example, several voters sought to challenge statutes allowing certain electors to vote absentee, insisting that their votes would be "diluted by the [allegedly invalid] absentee votes." *Id.* at 239. That is precisely the injury the voter Petitioners allege here. But this Court concluded that "the interest which appellants claim is nowise peculiar to them but rather it is an interest common to that of all other qualified electors." *Id.* at 240.

Federal courts across the country have consistently come to the same conclusion, reasoning that one voter does not suffer any particularized injury from another person being allowed to vote (particularly where, as here, that other person is an indisputably qualified elector). *E.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356-60 (3d Cir. 2020), *cert. granted and judgment vacated on other grounds*, 141 S. Ct. 2508 (2021); *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161, 2022 WL 1699425, at *2 (10th Cir. May 27, 2022); *Election Integrity Project Cal., Inc. v. Weber*, No. 21-32, 2021 WL 4501998, at *4 (C.D. Cal. *June* 14, 2021); *King v.*

Whitmer, 505 F. Supp. 3d 720, 735-36 (E.D. Mich. 2020); *Moore v. Circosta*, 494 F. Supp. 3d 289, 312-13 (M.D.N.C. 2020).

Indeed, a separate group of voters' prior challenge to Pennsylvania counties' differing curing procedures was dismissed because "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." *Trump I*, 502 F. Supp. 3d at 919.

The judicial consensus makes sense. No county's notice-and-cure practices "is preventing [any Petitioner] from voting, and [Petitioners'] votes are not otherwise disadvantaged relative to those of the entire population of Pennsylvania." *Toth v. Chapman*, No. 22-208, 2022 WL 821175, at *7 (M.D. Pa. Mar. 16, 2022) (three-judge panel).

Nor can the voters contrive standing by contending that "[t]he implementation of cure procedures by some Boards" and not others "has interfered with Voter Petitioners' right to 'equal elections.'" R. 17a. Indeed, the Petition for Review does not seek relief based on alleged violation of equal protection or uniformity clauses in the Pennsylvania or U.S. Constitution. R. 30a-34a. If it did, the claim would fail as a matter of law. *See infra* at 40-43.

Moreover, the voters still must show that any notice-and-cure procedure inflicts a particularized injury on them. Yet, for a voter living in a county that permits some form of curing minor defects, that opportunity *removes* a burden on the right

to vote by ensuring that they will not irretrievably forfeit the ability to vote if they make a mistake returning their ballot. *Trump I*, 502 F. Supp. 3d at 919. And for voters living in counties that do not provide for notice and cure of ballot-submission defects, the divergence in county procedures inflicts no injury because "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." *Id.*

Finally, the voters here have not actually alleged that they have (or will) cast a ballot with a defect that they should be permitted to correct. The voters here deny that their ballots will ever be disqualified as the result of the lack of notice-and-cure procedures, *see* R. 17a, and they seek relief against counties that *do* offer such procedures.

Elections are not a competition between voters to see who can demonstrate perfect compliance with all of the rules on the first attempt. Elections are the "essence of a democratic society" through which people express their will for the shape of representative government. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). No single voter is injured because an election is made accessible to another qualified voter, or because representative government has been made a better reflection of the will of the people.

B. The Political Committees Lack Standing

The political committee Petitioners likewise do not have standing. They have alleged that "[t]he various approaches taken by the counties regarding cure procedure are not routinely published and thus not readily known," thereby "thwart[ing]" the Republican Committees' "ability … to educate voters regarding the cure procedures." R. 14a. Even if such an allegation amounted to a cognizable injury, it still fails to satisfy the causation element of standing.

Any harm to the committees' purported need for clarity about each county's procedures is not caused by the substance of the procedures themselves. Rather, any harm would be caused by how counties *publicize* their procedures. Yet, the committees have challenged the procedures themselves, and have requested an order enjoining the use of notice-and-cure procedures altogether. R. 34a, 78a, 83a. They have not sought an order that counties must publicize certain information. The disconnect between the committees' supposed injuries and the conduct they challenge defeats standing. *See Wm. Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 289, 282 (Pa. 1975) ("[T]he person claiming to be aggrieved must show causation of the harm to his interest *by the matter of which he complains*" (emphasis added)). What is more, the Petition for Review makes clear that the committees *can* access the information that is supposedly being withheld. R. 24a-30a.

The committees' interest in electing Republican candidates is likewise insufficient for standing. The committee Petitioners have not so much as alleged that notice-and-cure procedures put Republican candidates at a competitive disadvantage or otherwise impair their ability to win votes. They claim they are injured only because the Election Code allegedly prohibits such procedures. *See* R. 10a-14a. Such a claim does nothing more than restate a generalized interest in adherence to the law. *Bognet*, 980 F.3d at 351-52 (concluding a candidate that failed to plead any non-speculative facts showing that certain election rules would disadvantage his likelihood of success did not have standing).

* * *

This action is premised on alleged injuries that courts have held time and again are not cognizable. Petitioners' brief in this Court fails to engage with (or even acknowledge) any of that precedent, precedent that requires denying their request for a preliminary injunction.

III. Petitioners Are Not Likely to Prevail on the Merits

Next, the Commonwealth Court had a reasonable basis to conclude that Petitioners have not established that they are likely to succeed on any of their claims.[6] *See* R. 1126a-1130a. The Election Code empowers county boards to devise

[6] Count II of the Petition for Review, which asserts a claim under the Elections Clause of the U.S. Constitution, is entirely derivative of the state-law claim asserted in Count I. That is, if the Election Code does not prohibit county boards from allowing electors to cure defective

rules and regulations that guide electors and elections officers so long as those rules are "not inconsistent with law." 25 P.S. § 2642(f). No provision of the Election Code prohibits county boards of elections from developing rules for notifying voters of, and providing an opportunity to correct, absentee and mail-in ballot submissions with minor defects. And neither the Pennsylvania nor U.S. Constitutions forbid boards of elections' implementation of notice-and-cure procedures, notwithstanding that different counties may make different choices and employ different procedures.

A. The Election Code Permits County Boards to Implement Notice-and-Cure Procedures

The Election Code endows county boards of elections with fairly "extensive powers." *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Commw. Ct.), *aff'd*, 938 A.2d 401 (Pa. 2007). Specifically, the Election Code empowers county boards to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f). As this Court has explained, county boards' statutorily assigned rulemaking power allows them to prescribe the manner of administering elections when the General Assembly has left gaps to fill. *In re Canvassing Observation*, 241 A.3d 339, 346-51 (Pa. 2020)*, cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021).

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absentee and mail-in ballot submissions, then, *ipso facto*, there is no violation of the Elections Clause.

Although county boards' powers under § 2642(f) have limits, those limits do not prohibit notice-and-cure procedures. First, county boards are empowered to make rules "necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f). Rules for election officials to inform voters how to complete an absentee or mail-in ballot and rules for how voters may correct an initially defective submissions are self-evidently "guidance of … elections officers and electors."

Second, county boards' rules must not be "inconsistent with law." *Id.* That limitation is inapplicable here as well.

County boards of elections receive absentee and mail-in ballots through the mail, in person at a county office, and through "drop boxes." 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a); *Pa. Democratic Party*, 238 A.3d at 361. However a ballot is received, counties must process it upon receipt so that the county may "[i]dentify registered electors who vote in an election and the method by which their ballots were cast." 25 Pa.C.S. § 1222(c)(20). That includes scanning the ballots into the Statewide Uniform Registry of Electors (SURE) and recording "the date, return method, and ballot status for all voter ballots received." *Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes*, Version 3.0 (Sept.

26, 2022)[7]; *see also* 25 P.S. § 3146.9; 25 P.S. § 3150.17. Further, county boards have a statutory obligation under the Election Code to review those ballots and prepare before Election Day a poll book with a list of "electors who have [1] received and [2] voted" absentee or mail-in ballots. 25 P.S. § 3146.6(b)(1); 25 P.S. § 3150.16(b)(1).

These obligations demand that the county boards review absentee and mail-in ballots upon receiving them, before pre-canvassing or canvassing. Yet the Election Code does not describe what to do if a county official, during this initial review, observes a deficiency that, if left unresolved, would prevent the ballot from ultimately being canvassed and counted (such as failing to sign the return envelope or failing to place their ballot in the secrecy envelope).[8] *See Pa. Democratic Party*, 238 A.3d at 374; *Trump I*, 502 F. Supp. 3d at 907. Nor does the Election Code direct what an election official who receives a ballot in person may say to a voter if the official notices the voter's submission has some deficiency.

[7] https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-09-26-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-3.0.pdf.

[8] In the Commonwealth Court, Petitioners repeatedly identified the failure to sign a declaration envelope and the failure to place a ballot in its secrecy envelopes as the defects that might be cured. *E.g.*, R. 115a-117a, 119a, 129a, 131a-132a, 135a-137a. In this Court, they add the failure to date a declaration envelope to the list. *E.g.*, Br. at 6, 22, 31, 33-34, 39 n.4, 40, 43, 46, 48-49, 54. While no issue in this case turns on what issues may disqualify a mailed ballot, the Commonwealth Court recently ruled, in a decision no party appealed, that counties *may not* disqualify ballots because the voter forgot to write a date on the return-envelope declaration. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998 (Pa. Commw. Ct. Aug. 19, 2022).

Faced with this statutory silence, some county boards have developed rules for notifying voters of a mistake and for allowing voters to fix the error—whether having been informed by the county of the mistake or having independently discovered it—prior to the ballot being finally canvassed and counted. The rulemaking power delegated to counties under § 2642(f) permits them to fill in statutory gaps in just this fashion.

This Court's decision in *In re Canvassing Observation* confirms as much. There, this Court considered whether the Philadelphia County Board of Elections had violated the Election Code by enacting rules that did not permit canvass watchers to come within a certain distance of canvassing operations. 241 A.3d at 346-51. The Court observed that, although the Election Code "contemplates an opportunity to broadly observe the mechanics of the canvassing process, … these provisions do not set a minimum distance between authorized representatives and canvassing activities occurring while they 'remain in the room.' The General Assembly, had it so desired, could have easily established such parameters; however, it did not." *Id.* at 350. As a result, the Court concluded it "would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.*

Instead, the Court "deem[ed] the absence of proximity parameters to reflect the legislature's deliberate choice to leave such matters to the informed discretion of

county boards of elections, who are empowered by Section 2642(f) of the Election Code 'to make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.'" *Id.* (quoting 25 P.S. § 2642(f)). Because the Philadelphia Board had "promulgated regulations governing the locations in which authorized representatives were permitted to stand and move about while observing the pre-canvassing and canvassing process," the Supreme Court could "discern no basis for the Commonwealth Court to have invalidated these rules and impose[d] arbitrary distance requirements." *Id.*

The same analysis and conclusion applies with equal force in this case. The Election Code does not explicitly prohibit the county boards from implementing notice-and-cure procedures. "The General Assembly, had it so desired, could have easily established such parameters; however, it did not." *Id.* Thus, "the absence of [notice-and-cure] parameters" in the Election Code "reflect[s] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections." *Id.*

Petitioners fail to identify any way in which the challenged notice-and-cure procedures are beyond counties' statutory powers under 25 P.S. § 2642(f).

First, Petitioners insist those procedures are inconsistent with the Election Code because they are not specifically authorized by it. Br. at 28-31. But that treats

the beginning of the analysis as if it were the end. In all cases in which a county board has adopted a gap-filling rule, the Election Code will not have explicitly authorized the county's rule.

Therefore, this Court's conclusion that the Election Code does not expressly *require* county boards to implement notice-and-cure procedures does not resolve whether the Election Code *allows* counties to implement such procedures under their rulemaking authority. *Pa. Democratic Party*, 238 A.3d at 374. And judicial review of whether certain counties may continue to execute existing notice-and-cure procedure—as opposed to judicial review of whether counties without any such procedure must be ordered to adopt some—does not require this Court to decide any "policy questions" about "what the precise contours of the procedure would be," as would have been required of the Court in *Pennsylvania Democratic Party*. *Id.* County boards that are statutorily authorized to develop gap-filling rules that guide electors and election officials already have made the policy-laden judgments that the General Assembly has empowered them to make under § 2642(f).

Second, Petitioners misuse the *expressio unius* canon of statutory construction to argue that a standalone statutory provision permitting electors to belatedly provide—after Election Day—proof of identification omitted from their absentee and mail-in ballot *applications* somehow necessarily implies that the General Assembly intended to prohibit counties from allowing voters to take any steps, at

any point in time, to remedy an initially deficient mail-in or absentee *ballot submission*. Br. at 31-32 (citing 25 P.S. § 3146.8(h)). The *expressio unius* canon of construction has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand." *Id.*

Here, 25 P.S. § 3146.8(h) authorizes electors to provide, *after Election Day*, missing identification that was required for ballot *applications*.[9] That does not "go hand in hand" with the procedures at issue here, which relate to curing, *before polls close on Election Day*, initially deficient *ballot submissions*. Moreover, § 3146.8(h) does not contain a group or series of cure provisions. Instead, the provision stands alone, addressing only the deadline for providing proof of identification. Without a "series of terms," there is no "omission [that] bespeaks a negative implication." *Peabody Coal*, 537 U.S. at 168. Thus, even if Petitioners were correct that 25 P.S. § 3146.8(h) is properly understood as some sort of "cure" provision (despite its

[9] *See* 25 P.S. § 3150.12b(a) (for mail-in ballot applications, county boards must "determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card."); 25 P.S. § 3146.2b(a) (stating same for approval of absentee ballot applications).

fundamental differences compared to the "notice and cure" procedures at issue in this case), because § 3146.8(h) is not part of any *series* of cure provisions, it could not create any "negative implication" regarding county boards' authority to adopt other cure procedures.

Third, Petitioners misapply this Court's recent decision in *In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020). *See* Br. at 32-36. There, this Court ruled that counties cannot *disqualify* mailed ballots based on signature verification because the Election Code does not permit them to do so. *In re November 3 Election*, 240 A.3d at 609-11. That decision has no application here, where the issue is not one of disqualification. Section 2642(f) does not invest counties with discretion to determine whether a ballot may be canvassed and counted (or must be thrown out) under 25 P.S. § 3146.8(g). It gives counties power to issue "rules, regulations and instructions … *for the guidance* of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f) (emphasis added). Consistent with that limitation, counties' power under § 2642(f) was not at issue, or even mentioned, in *In re November 3 Election*.[10]

Further, Petitioners ignore that the practice at issue in *In re November 3 Election*—using signature verification to disqualify ballots—was antithetical to "the

[10] Petitioners' suggestion that this Court could have used powers given to county boards under § 2642(f) to order them to count "naked" ballots makes the same mistake (among others).

well-established public policy of [Pennsylvania] to favor enfranchisement." *Com., State Ethics Comm'n v. Baldwin*, 445 A.2d 1208, 1211 (Pa. 1982). The practices at issue in this litigation—notice and cure procedures—are the opposite, as they ensure voters are *not* disenfranchised for minor ballot defects.

Fourth, Petitioners argue in this Court that notice-and-cure procedures violate counties' duty to keep mailed ballots secure. Br. at 36-37. But Petitioners have not alleged that any county's practice exposes any ballot or violates a county's obligation to keep a ballot safe. *See generally* R. 24a-30a. Nor is there anything in the parties' joint stipulation that would permit the Court to conclude Petitioners' have clearly established as much. R. 505a-509a, 548a-559a. Indeed, there is no evidence in the record regarding this argument at all, because Petitioners did not raise it below.

Moreover, Petitioners neglect that county boards must review and process mailed ballots upon initial receipt, must log those ballots in the SURE system, and must prepare a poll book before Election Day. *See supra* at 29. Each obligation precedes a county board securing the ballot. Petitioners' view of the law is that county boards cannot observe during their initial receipt and review that a voter made an immediately identifiable mistake—even if the voter is standing in front of them. Nor could a voter, as Petitioners conceive of the Election Code, independently act

after receiving an automated notification from the SURE system that there ballot was cancelled.

Fifth, Petitioners make stunningly selective use of the statutory definition of "pre-canvass" to conclude that any notice-and-cure procedures constitute pre-canvassing, which cannot begin under the Election Code until 7 a.m. on Election Day. Br. at 37-39. The actual definition of "pre-canvass" makes unequivocally clear that it does not encompass notice-and-cure procedures. It reads:

> The word "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.*** The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.i) (emphasis added and denoting Petitioners' omissions).

Pre-canvassing thus occurs when counties open ballots and start counting them. *See also* 25 P.S. § 3146.8(g). No notice-and-cure procedure described in this case involves counties opening a ballot's secrecy envelope or reviewing the ballot itself.

Sixth, Petitioners insist that someone who has returned a mailed ballot with a defect cannot be permitted to vote provisionally because doing so would require the voter to "make[] a knowingly false, sworn statement"—namely, that the provisional ballot is the only one she has "cast" in the election. Br. at 40-42. According to Petitioners, the prior, defective ballot that will *not* be counted must still be

considered a "vote cast" such that the voter cannot truthfully sign the declaration and therefore cannot vote at all. *Id.* Fortunately nothing in law or logic requires this absurd result; instead, the Election Code uses the phrase "votes cast" to refer to votes submitted by the voter *and counted*. *See, e.g.*, 25 P.S. § 3154(g)(i) (setting recount threshold at "one-half of a percent or less of the votes cast for the office").

More importantly, whether the Election Code allows certain provisional ballots to be counted is a separate issue that has no relationship to Petitioners' challenges to notice-and-cure procedures. Indeed, Petitioners' argument about the alleged unlawfulness of certain provisional ballots was never raised below and is therefore waived. *See* Pa.R.A.P. 302(a); *Cash Am. Net of Nev., LLC v. Dep't of Banking*, 8 A.3d 282, 288 (Pa. 2010). Finally, Petitioners' requested relief sweeps far beyond an order that individuals who initially returned a defective ballot may not vote provisionally.

B. The Election Code Must Be Read to Enfranchise Electors

Any doubt about whether the Election Code authorizes county boards to implement notice-and-cure procedures must be resolved in favor of preventing inadvertent forfeiture of electors' right to vote. In interpreting the Election Code, the Court applies "interpretive principles" of statutory construction specific to "election matters." *Pa. Democratic Party*, 238 A.3d at 360. Because the Election Code promotes freedom of choice, it "should be liberally construed so as not to deprive,

inter alia, electors of their right to elect a candidate of their choice." *Id.* at 356. The "goal must be to enfranchise and not to disenfranchise the electorate," *id.* at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)), in accordance with the "longstanding and overriding policy in this Commonwealth to protect the elective franchise," *id.* (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

"This interpretive direction is not newly minted but has been recognized by the courts for more than 70 years, through different administrations and throughout decades of economic, political, and social changes in Pennsylvania." *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *13 (Pa. Commw. Ct. Aug. 19, 2022). Thus, as established by well-settled Pennsylvania precedent:

> [T]he power to throw out a ballot for minor irregularities … must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disenfranchised at an election **except for compelling reasons**…. The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.2d 64, 67 (Pa. 1954).

Consequently, when a Pennsylvania court is provided with two reasonable interpretations of the Election Code, one which would enfranchise electors and one

which would "disenfranchise[]" and "restrict[] voters' rights," the Court must adopt the "construction of the Code that favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate." *Pa. Democratic Party*, 238 A.3d at 361.

The following example demonstrates how thoroughly Petitioners' position violates these fundamental principles. The Election Code permits an elector to sign the declaration on her absentee or mail-in ballot "at any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election," and to return the completed ballot to the county board of elections by "deliver[ing] it in person to [the] board of election." 25 P.S. § 3146.6(a) (absentee ballots); 25 P.S. § 3150.16(a) (mail-in ballots). Yet, Petitioners propose that if an elector personally delivers her mail-in ballot with an unsigned declaration to a county board of elections before Election Day, once she hands the unsigned ballot to a county board employee, that employee is prohibited from informing the elector of the ballot's deficiency or allowing the elector to sign the declaration. The elector seemingly could not even ask for the ballot back if she independently realized her oversight. Even where qualified electors and county employees are standing directly across from each other, and even though the Election Code permits electors to sign ballot envelopes "at any time" before Election Day, Petitioners ask the Court to tie

the county boards' hands, muzzle their mouths, and effectively disenfranchise qualified electors who are affirmatively attempting to exercise their right to vote.

Petitioners do not even attempt to identify a reason that the General Assembly could possibly have intended that absurd result—or intended to prohibit any other specific notice-and-cure procedure implemented by the counties. Put simply, Petitioners' interpretation cannot be reconciled with the governing rules of statutory interpretation.

C. Petitioners' Uniformity Argument Is Waived and Meritless

Finally, Petitioners now argue that permitting some counties to continue communicating with voters that made an error when returning their mailed ballot violates Article VII, § 6 of the Pennsylvania Constitution if not all counties similarly communicate with voters. Br. at 42-44. But Petitioners did not plead any violation of Article VII, § 6 and they cannot now set forth a claim on appeal not asserted in their Petition. *See Steiner v. Markel*, 968 A.2d 1253, 1258-59 (Pa. 2009). This Court should not—and indeed cannot—reverse the Commonwealth Court's order based on a claim not actually raised in this case.[11]

[11] Before this Court, Petitioners try to repackage their uniformity claim as reason that notice-and-cure procedures are categorically "inconsistent with law" for purposes of 25 P.S. § 2642(f). But it cannot be that whether notice-and-cure procedures are categorically "inconsistent with law" depends entirely on whether, as a factual matter, the number of counties that have chosen to implement a procedure or not.

In any event, Petitioners misconstrue the uniformity requirement in Article VII, § 6. As this Court said about the same provision when it was part of Article VIII, § 7 of the Constitution, "[a] law is general and uniform, not because it operates upon every person in the state, but because every person brought within the relations provided for in the statute is within its provisions." *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914). In other words, the Constitution ensures that when county boards opt to provide notice of, and an opportunity to cure, deficient ballot submissions, they cannot do so only for some groups of voters in that county and not others. Pennsylvania courts have long recognized that the Commonwealth's Constitution does not require that all election-related enactments "must be *identical* in each minute detail for each election district." *Meredith v. Lebanon Cnty.*, 1 Pa. D. 220, 221 (Pa. Com. Pl. 1892), *aff'd sub nom. De Walt v. Bartley*, 146 Pa. 529 (Pa. 1892). Here, Petitioners have not even alleged that some counties' implementing of notice-and-cure procedures would result in "disparate treatment of any group of voters." *Banfield v. Cortes*, 110 A.3d 155, 178 (Pa. 2015) (rejecting challenge to voting machines under uniformity requirement of Art. VII, § 6). There would be no evidence for such a claim in any event.

Analogously, in the related equal protection context, "[m]any courts" have shown that it is well-established—and inevitable—that "counties may, consistent with equal protection, employ entirely different election procedures and voting

systems within a single state." *Trump I*, 502 F. Supp. 3d at 922 (collecting cases). That is because "[a] violation of the Equal Protection Clause requires more than variation from county to county." *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania* ("*Trump II*"), 830 F. App'x 377, 388 (3d Cir. 2020).

In *Trump I*, the court specifically held that it is consistent with equal protection principles for some but not all counties to implement notice-and-cure procedures: "[t]hat some counties may have chosen to implement [notice-and-cure] guidance (or not), or to implement it differently, does not constitute an equal-protection violation." *Trump I*, 502 F. Supp. 3d at 922. "'[C]ounties may, consistent with equal protection, employ entirely different election procedures and voting system within a single state.' … Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations." *Id.* at 922-23 (quoting *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-90 (W.D. Pa. 2020)). Thus, even if Petitioners had brought an election uniformity claim, it would plainly fail, just as similar equal protection claims have failed.

Moreover, even if Petitioners had a viable claim, the injunction they seek would be an improper remedy. Instead of asking this Court to "extend a benefit to [voters who live in counties that do not offer notice-and-cure procedures], thus leveling up and bringing [those voters] on par with others who already enjoy the

right," Petitioners demand that this Court "level down by withdrawing the benefit from those who currently possess it." *Trump I*, 502 F. Supp. 3d at 920. But "the preferred rule in a typical case is to extend favorable treatment and level up." *Id.* (internal quotation marks omitted). Put differently, uniformity principles do not subject voting rights to a lowest-common-denominator straitjacket, where all Pennsylvania electors are at the mercy of the county that does the least to protect the voting rights of its residents.

IV. The Equities Require Denying the Injunction

Not only are there reasonable grounds for the Commonwealth Court's conclusion that Petitioners failed to show a clear right to relief, there also are reasonable grounds for the Commonwealth Court's conclusion that Petitioners did not establish any of the other essential prerequisites of a preliminary injunction. R. 1130a-1139a. These failures independently require affirming the denial of their application for relief.

A. Granting an Injunction Would Not Remedy Any Harm and Would Substantially Harm Electors and the Public Interest

Petitioners have failed to identify any cognizable injury, *see supra* at 21-26, let alone the immediate and irreparable injury they must demonstrate to obtain a preliminary injunction. *Summit Towne*, 828 A.2d at 1001. Instead, Petitioners primarily urge this Court to consider the alleged violations themselves to constitute *per se* harm, Br. at 45-49, but, as the Commonwealth Court reasonably concluded,

they have failed to carry their heavy burden of showing that notice-and-cure procedures clearly violate the law, R. at 1136a-1137a. Petitioners criticize the Commonwealth Court for failing to "explain how a voter in a county that does not offer a cure procedure could ever reverse the harm inherent in having a vote not count when a neighboring county in the exact same circumstance may get a mulligan." Br. at 48. Setting aside that there is no such Petitioner in this case, the answer is obvious: the voter could sue the county that failed to provide the opportunity to fix the disqualifying defect.

While Petitioners have failed to show any actual harm an injunction would remedy, granting the requested injunction would result in substantial harm and would adversely affect the public interest. Both represent independent reasons why the Commonwealth Court's order must be affirmed. *Summit Towne*, 828 A.2d at 1001.

It is "the well-established public policy of [Pennsylvania] to favor enfranchisement." *Baldwin*, 445 A.2d at 1211; *see supra* at 37-40. Granting Petitioners' request to deprive electors of their right to vote is therefore "contrary to the public's interest." *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *15 (Pa. Commw. Ct. June 2, 2022); *accord Oliviero v. Diven*, 908 A.2d 933, 941 (Pa. Commw. Ct. 2006). Denying the application for injunction, however, and allowing electors the opportunity to cure deficient absentee and mail-

in ballot submissions—and cast votes that would otherwise be thrown out—irrefutably accords with Pennsylvania's strong public interest in allowing qualified electors to elect candidates of their choice.

Only two years ago, the U.S. Court of Appeals for the Third Circuit refused to enter an injunction sought in part because of county boards' notice-and-cure procedures. *See Trump II*, 830 F. App'x at 382. As the court observed, the "public interest favors counting all lawful voters' votes." *Id.* at 390. "Democracy depends on counting all lawful votes promptly and finally, not setting them aside without weighty proof. The public must have confidence that our Government honors and respects their votes." *Id.* at 390-91. Because "[t]echnicalities should not be used to make the right of the voter insecure…, unless there is evidence of fraud, Pennsylvania law overlooks small ballot glitches and respects the expressed intent of every lawful voter." *Id.* at 391. To disenfranchise voters, not only in the absence of any fraud, but based merely on expedited, *preliminary* proceedings, before a full and complete adjudication of the merits of Petitioners' claims, would contravene inveterate principles of Pennsylvania law and equity.

Given the timing of Petitioners' lawsuit, granting preliminary relief would irreparably disenfranchise electors irrespective of whether Petitioners' claims are ultimately rejected on the merits. Voters across the Commonwealth have already

started submitting mailed ballots for the 2022 General Election.[12] Thus, as the Commonwealth Court reasonably concluded, the election "is already well underway" and "[e]njoining the various County Boards' procedures at this point in time would further deprive voters in counties who have been privy to such procedures for the past two years since the enactment of Act 77 the opportunities to have their votes counted, thus resulting in almost certain disenfranchisement of voters." R. 1132a. Prohibiting notice-and-cure procedures now "would likely invalidate ballots already cast." R. 1134a.

Beyond disenfranchising electors directly, entering an injunction now will also cause confusion and uncertainty, altering established election administration procedures in many counties. As the Supreme Court of the United States has repeatedly reaffirmed, "[w]hen an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). This "important principle of judicial restraint" is aimed at preventing two separate types of prejudice: (1) "voter confusion," and (2) "election administrator confusion." *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141

[12] Over 22,000 mailed ballots have already been returned to counties for the 2022 General Election.

S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Avoiding late judicial intervention in elections "protects the State's interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election." *Id.*

Here, county boards with notice-and-cure procedures have had them in past years and communicated them to the public. R. 505a-509a, 548a-559a. The Commonwealth Court thus had a reasonable basis to hold that "an order prohibiting notice-and-cure procedures in the November 2022 election would likely . . . confuse and upset electors, and disrupt the ongoing administration of the election." R. 1134.

Of course, Petitioners could have avoided some of the confusion that would result from granting their requested relief had they acted diligently in bringing this case. Petitioners were aware that some counties engaged in notice-and-cure procedures no later than the 2020 general election. R. 1134 (citing R. 24a-25a). But they waited 667 days to file suit. R. 1134a.

Even if Petitioners had not inexcusably delayed bringing this lawsuit, fundamental principles of equity would preclude this Court from granting the relief Petitioners seek prior to the November 2022 General Election. *See* Order, *McLinko v. Degraffenreid*, No. 244 M.D. 2021 (Pa. Commw. Ct. Sept. 24, 2021) ("prospective relief, as requested by petitioners, is not available for the November 2021 election because it is already underway"); *see also Kuznik v. Westmoreland Cnty. Bd. of*

Com'rs, 902 A.2d 476, 489 (Pa. 2006) (injunctive relief is unavailable where greater injury would result from granting the injunction than from denying it).

B. The Injunction Sought by Petitioners Is Not Reasonably Tailored to the Alleged Violations

The Court also cannot grant the injunction Petitioners seek because it is "not narrowly tailored to correct the alleged wrong." *Wheels Mech. Contracting & Supplier, Inc. v. W. Jefferson Hills Sch. Dist.*, 156 A.3d 356, 361 (Pa. Commw. Ct. 2017); *accord Weeks v. Dep't of Hum. Servs.*, 222 A.3d 722, 740 (Pa. 2019) (Wecht, J., dissenting). Petitioners broadly request "an order prohibiting the Respondent Boards from developing and implementing cure procedure and for the Acting Secretary to take no action inconsistent with such an order." R. 83a.

Yet, Petitioners never define the "cure procedures" they believe are unlawful. And the request that the Acting Secretary be ordered not to take action inconsistent with any relief does not indicate "what, if any, type of action the Acting Secretary might take in the event this Court granted the requested relief in this case." R. 1134.

Granting such nebulous relief would almost certainly embroil this Court in further litigation before the November 2022 election. It is simply not feasible to craft an injunction prohibiting "notice and cure" procedures—particularly on the timeline Petitioners have forced on the Court, and without an evidentiary hearing—that will not give rise to further litigation regarding the proper interpretation and scope of the order. It is virtually inevitable that some voter, candidate, or party will assert that

certain procedures not expressly described in the order constitute prohibited "notice and cure," and/or will contend that a county board has wrongly concluded that it is prohibited from engaging in certain practices that actually fall outside the injunction's scope.

That likelihood was vividly illustrated in the hearing on September 22, 2022, when one of Petitioners' counsel asserted that allowing an elector whose outgoing mail-in ballot was returned as "undeliverable" to vote could constitute a prohibited "cure" procedure. By way of example only, the following questions (and many others) are also likely to arise between entry of the injunction sought by Petitioners and the close of the polls on Election Day:

- Does the injunction prohibit an elector from curing a ballot when a voter hand-delivers it to a county board of elections if a board employee immediately identifies a defect on the outer envelope of the ballot (e.g., a missing signature)?
- Are county boards prohibited from allowing voters to "cure" deficient submissions on their own initiative, even if the counties do not provide "notice"?
- Are county boards prohibited from entering the results of their pre-canvassing activities into the SURE system, *see* 25 Pa.C.S. § 1222, since that system will provide an automatic notice of ballots flagged as invalid to voters who have provided their email address?
- Are county boards prohibited from canceling and replacing mail-in ballots at the request of a voter who realizes she made a mistake, where the voter states that she has mailed the ballot, but the county has not yet received it?

- If not, may the county boards cancel and replace mail-in ballots before the voter has mailed them?
- If not, does that mean that voters who spill coffee on their ballot, or whose ballot never reaches them, have forfeited the right to vote

Put differently, the difficulties would not end upon entry of the injunction sought by Petitioners. If this Court grants preliminary relief, there will be an open injunction that will require the courts to play election referee for each of the 67 county boards of election for the next month—stepping into a role typically filled by the 67 courts of common pleas. As courts answer each question put to them, county boards will have to further modify their practices and procedures in response, all while absentee and mail-in balloting are underway. This is exactly the sort of confusion and prejudice that must be avoided.

Additionally, given the closeness to Election Day, granting Petitioners' requested injunction might well serve, as a practical matter, as a final adjudication of the county boards' ability to implement notice-and-cure procedures for this election cycle. That, in turn, would ensure that every qualified elector whose ballot submissions contained deficiencies will be disenfranchised, even though the Court may ultimately conclude notice-and-cure procedures are permissible.

Even if Petitioners could demonstrate a clear right to relief and satisfy every other element, they would still not be entitled to the injunction they seek.

CONCLUSION

For any of the reasons set forth above, the Commonwealth Court's order should be affirmed.

October 6, 2022

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CERTIFICATE OF COMPLIANCE

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

Dated: October 6, 2022

/s/ *Jacob B. Boyer*
Jacob B. Boyer

CERTIFICATE OF LENGTH

I certify that this brief complies with the word count requirement set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Excluding matters identified in Pennsylvania Rule of Appellate Procedure 2135(b), this brief is 11,997 words. I have relied on Word's word count function to determine the length of this brief.

Dated: October 6, 2022

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