

ELECTION MATTER

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100 MAP 2022

**IN THE SUPREME COURT OF PENNSYLVANIA**

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Docket No. 100 MAP 2022

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REPUBLICAN NATIONAL COMMITTEE, *et al.*,  
Petitioners/Appellants,

v.

LEIGH M. CHAMPMAN, *et al.*,  
Respondents/Appellees.

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**BRIEF OF APPELEES BEDFORD COUNTY, CARBON COUNTY,  
CENTRE COUNTY, COLUMBIA COUNTY, DAUPHIN COUNTY,  
FAYETTE COUNTY, JEFFERSON COUNTY, HUNTINGDON COUNTY,  
INDIANA COUNTY, LAWRENCE COUNTY, LEBANON COUNTY,  
NORTHUMBERLAND COUNTY, SNYDER COUNTY, VENANGO  
COUNTY AND YORK COUNTY BOARDS OF ELECTIONS**

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Appeal from the September 29, 2022, Order of the Commonwealth Court (per Ceisler, J.), denying  
Petitioners' Application for Special Relief in the Form of a Preliminary Injunction

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## INTRODUCTION

The Republican National Committee and several other petitioners (collectively the “RNC”) filed suit against various state officials and the Boards of Elections for each of Pennsylvania’s 67 counties, claiming that this Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), precluded the Boards of Elections from developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Election Code’s signature and ballot secretary requirements, and seeking a statewide preliminary injunction prohibiting the same.

However, at least 15 of Pennsylvania’s 67 Counties—specifically, Bedford County, Carbon County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Lebanon County, Northumberland County, Snyder County, Venango County, and York County (collectively the “Respondent Counties”)—have ***not*** implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code. The Respondent Counties are therefore ***not*** engaging in the conduct that the RNC claims is unlawful.

Consequently, even if this Court agrees with the RNC’s interpretation of *Boockvar*, the RNC still cannot satisfy the rigorous standard for a preliminary injunction as to the Respondent Counties. A contrary finding requires this Court to

issue an advisory opinion about hypothetical conduct on the part of the Respondent Counties, which violates a foundational principle of Pennsylvania law. Accordingly, this Court must, at minimum, affirm the Commonwealth Court's Order denying the Application as to the Respondent Counties.

## **COUNTERSTATEMENT OF SCOPE AND STANDARD OF REVIEW**

This Court exercise a highly deferential standard of review when considering a trial court's ruling on a request for a preliminary injunction. *See, e.g., Weeks v. DHS*, 222 A.3d 722, 727 (Pa. 2019). Under that standard, this Court reviews for an abuse of discretion and will affirm the denial of preliminary relief if the trial court had any apparently reasonable grounds. *See, e.g., Shenago Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 439 (Pa. 1982). Such grounds exist when the trial court properly found that any one of the prerequisites was not satisfied. *See, e.g., Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004). 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 an appellate court interfere with the decree. *See, e.g., Marcellus Shale Coal. v. DEP*, 185 A.3d 985, 996 (Pa. 2018).

## **COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW**

- I. Whether this Court should affirm the Commonwealth Court's Order denying the RNC's Application for Preliminary Injunction, where none of the Respondent Counties are engaging in the alleged unlawful conduct?

**Suggested answer: Yes.**

## COUNTERSTATEMENT OF THE CASE

Respondent Counties submit the foregoing Counterstatement of the Case primarily because the RNC’s “Statement of the Case” is riddled with argument, in violation of Rule 2117. Pa.R.A.P. 2117(b) (“The statement of the case shall not contain any argument.”).

On September 1, 2022, the RNC filed a Petition for Review against Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, Jessica Mathis, in her official capacity as Director of Pennsylvania Bureau of Elections, and the Boards of Elections for each of Pennsylvania’s 67 counties, including the Respondent Counties, alleging that “several Boards, without legal authority, have developed and implemented cure procedures for the 2022 general election and beyond” and raising claims of declaratory and injunctive relief. (C.R. (Pet’rs’ Pet. for Review ¶¶7, 86-103)).<sup>1</sup>

On September 7, 2022, 62 days away from the 2022 General Election, the RNC filed an Application for Preliminary Injunction, seeking to enjoin the County Boards of Elections from “developing or implementing cure procedures relating to a voter’s failure to comply with the signature and secrecy ballot requirements set forth in the Election Code and permanently enjoining the Respondent Boards from

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<sup>1</sup> Given the expedited nature of this appeal, Respondent Counties have cited to the Certified Record—or “C.R.”—instead of the Reproduced Record.



developing and implementing cure procedures and the Acting Secretary from taking any action inconsistent with that injunction.” (C.R. (Pet’rs’ Application for Prelim. Inj. ¶9)). Like the Petition, the RNC conceded in the Application that some—but not all—County Boards had adopted notice and cure procedures. (C.R. (Pet’rs’ Application for Prelim. Inj. ¶¶1, 7, 8)).

On September 16, 2022, 13 of the 15 Respondent Counties<sup>2</sup> filed their Answer in Opposition to the Application, denying that they implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond curing for ballots for which proof of identification has not been received or could not be verified. (C.R. (Joint Answer in Opposition to Application ¶¶1, 2, 6, 7, 8, 13, 15, 17)).

On September 20, 2022, the parties filed a Joint Stipulation of Facts. (C.R. (Joint Stipulation of Facts)). Per the Joint Stipulation:

- **Bedford County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Centre County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

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<sup>2</sup> Carbon County and Snyder County did not join in the Answer, because neither had retained the undersigned counsel or any other attorney to represent them in this matter at that time. However, like the other Respondent Counties, no cure procedures have been implemented by the Carbon County Board of Elections for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code. (C.R. (Br. in Opp’n to Pet’rs’ Application for Prelim. Inj., Ex. A)). The same is true for the Snyder County Board of Elections.

- **Columbia County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Dauphin County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Fayette County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Huntingdon County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

**Indiana County Board of Elections:** No cure procedures implemented for the 2022 General Election re regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

- **Jefferson County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Lawrence County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Northumberland County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Venango County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

- **York County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

(C.R. (Joint Stipulation of Facts, Ex. B)).

On September 22, 2022, the Commonwealth Court held a status conference, “which was essentially turned into a hearing without objection of the parties.” (Br. of Appellants, App. A). The Commonwealth Court issued an Order later that day, directing the parties to brief any remaining arguments pertaining to the criteria for a preliminary injunction, among other issues. (C.R. (9/22/22 Order)). On September 26, 2022, Respondent Counties filed a Brief in Opposition to Petitioners’ Application for Preliminary Injunction. (C.R. (Br. in Opp’n to Pet’rs’ Application for Prelim. Inj.)).

On September 29, 2022, the Commonwealth Court issued a Memorandum Opinion and Order, denying Petitioners’ Application for Preliminary Injunction. (Br. of Appellants, App. A). The Commonwealth Court began by addressing whether the RNC is likely to prevail on the merits. (*Id.* at 31-41). The Commonwealth Court rejected the RNC’s interpretation of *Boockvar*, reasoning that “the Supreme 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 such procedures. Those are separate and distinct issues.” (*Id.* at 41 (emphasis in original)).

The Commonwealth Court found that “it is not clear based on either the text of the Election Code, or the subsequent cases interpreting it, whether notice and cure procedures are permitted and/or prohibited by the Election Code.” (*Id.*). Therefore, and because it could not say for certain “whether the legislature intended to omit a notice and opportunity to cure procedure from the Election Code, or whether the lack thereof imbues the County Boards with authority under their discretionary rulemaking authority delegated to them by the General Assembly,” the Commonwealth Court held that the RNC failed to show a strong likelihood of success on the merits. (*Id.* at 40-41).

While the Commonwealth Court did not need to consider the other factors in light of this holding, it nonetheless proceeded to do so, finding that the RNC could not satisfy the remaining requirements for a preliminary injunction. (*Id.* at 42). The Commonwealth Court found that greater harm would result from the granting the sought-after injunction, it would not preserve the status quo, and it would adversely affect the public interest, writing:

Such sweeping relief against the 67 County Boards would clearly cause greater injury than refusing the injunction, precisely because it would seriously the harm public interest and orderly administration of elections, namely the 2022 General Election, which is already well underway. Enjoining the various County Boards’ procedures at this point in time would further deprive voters in counties who have been

privity 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. If this Court were to grant the injunctive relief Petitioners seek, the County Boards would then have to modify their practices and procedures in response to the injunction and would notably have to do so when absentee and mail-in voting is already underway. Simply put, Petitioners ignore the actual harms that will almost certainly occur if the injunction is granted, which all participating Respondents have laid out in their comprehensive filings in this matter.

(Br. of Appellants, App. A at 43-44).

The Commonwealth Court further held that the RNC did not show that the injunction is reasonably suited to abate the alleged offending activity because: (a) Petitioners have not alleged a clear violation of the Election Code or the law interpreting it; (b) not all 67 County Boards have notice and cure procedures; and (c) Petitioners have not sufficiently alleged what, if any, type of action the Acting Secretary might take in the event the injunction is granted. (*Id.* at 45). For similar reasons, the Commonwealth Court held that the RNC did not satisfy the immediate-and-irreparable harm prong. (*Id.* at 47-49).

On October 3, 2022, the RNC filed a Notice of Appeal. (C.R. (Notice of Appeal)). On October 4, 2022, this Court issued an Order, noting probable jurisdiction, directing the RNC to file its principal brief by October 5, 2022, and directing the Respondent Counties and other Appellees to file their respective principal brief by October 6, 2022. (10/4/22 Order).

## **SUMMARY OF ARGUMENT**

Notwithstanding the fact that the Commonwealth Court issued a 54-page Memorandum Opinion, this appeal is straightforward with respect to the Respondent Counties. This is because, since none of them have implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code, none of them are engaging in the supposedly unlawful conduct. As a result, the RNC cannot satisfy every one of the prerequisites for a preliminary injunction—regardless of whether this Court agrees with the RNC’s interpretation of *Boockvar*. Accordingly, this Court must, at minimum, affirm the Commonwealth Court’s Order with regard to the Respondent Counties.

## ARGUMENT

### **I. This Court Must, At Minimum, Affirm The Commonwealth Court's Order With Respect To The Respondent Counties**

A preliminary injunction is “somewhat like a judgment and execution before trial.” *Herman v. Dixon*, 141 A.2d 57, 577 (Pa. 1958). It is a “harsh remedy” that should only issue where “there is urgent necessity to avoid injury which cannot be compensated for by damages.” *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1282-83, 1286 (Pa. 1992) (citation and quotation marks omitted). In order to obtain preliminary injunctive relief, the party seeking the injunction must show that: (1) 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; (2) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (3) greater injury would result from refusing an injunction than from granting it and, concomitantly, that the issuance of an injunction will not substantially harm other interested parties in the proceedings; (4) the requested injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (5) the sought-after injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *See, e.g., Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

The burden of proof with respect to these six elements falls squarely upon the party seeking injunctive relief. *See, e.g., Warehime*, 860 A.2d at 47. “For a preliminary injunction to issue, ***every one of these prerequisites must be established.***” *Allegheny County. v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added).

When properly applying the foregoing standard, it is evident that the RNC is not entitled to a preliminary injunction as to the Respondent Counties, necessitating at least the partial affirmance of the Commonwealth Court’s Order.

**A. The Requested Injunction is Not Appropriate Because the RNC Cannot Show Irreparable Harm; the Alleged Harm is Speculative**

First and foremost, the requested injunction is not necessary to prevent immediate and irreparable harm vis-à-vis the Respondent Counties. *See, e.g., Summit Towne*, 828 A.2d at 1001. An injury is deemed irreparable if it cannot be adequately compensated by an award of monetary damages. *See, e.g., Cosner v. United Penn Bank*, 517 A.2d 1337, 1341 (Pa. Super. Ct. 1986). For harm to be irreparable, moreover, “it must be irreversible.” *Schulman v. Franklin & Marshall College*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988).

The plaintiff’s claimed irreparable harm “cannot be based solely on speculation and hypothesis.” *Greenmoor, Inc. v. Burchick Constr. Co.*, 908 A.2d 310, 314 (Pa. Super Ct. 2006); *see, e.g., Novak v. Commonwealth*, 523 A.2d 318,



320 (Pa. 1987) (rejecting speculative considerations as legally insufficient to support preliminary injunction); *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1387 (Pa. 1978) (plurality) (stating that “actual proof of irreparable harm” required for preliminary injunction, and concluding that injunction granted in that case was improper because record failed to indicate irreparable harm); *Credit Alliance Corp. v. Phila. Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973) (trial court properly denied preliminary injunction where no showing made of necessity to avoid immediate and irreparable harm); *Sameric Corp. of Mkt. St. v. Gross*, 295 A.2d 277, 279 (Pa. 1972) (rejecting speculative considerations offered in support of preliminary injunction). Instead, in order to meet this heavy burden of proof, the plaintiff “must present concrete evidence demonstrating actual proof of irreparable harm.” *City of Allentown v. Lehigh Cnty. Auth.*, 222 A.3d 1152, 1160 (Pa. Super. Ct. 2019) (citation and quotation marks omitted).

Here, no such evidence of imminent and irreparable harm exists as to the Respondent Counties. This is because—even assuming, *arguendo*, that the RNC is correct that *Boockvar* prohibits counties from implementing cure procedures—the Respondent Counties have not implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code. (C.R. (Joint Stipulation of Facts, Ex. B; Joint Answer in Opposition to Application ¶¶1, 2, 6, 7, 8, 13, 15, 17; Br. in Opp’n to Pet’rs’ Application for

Prelim. Inj., Ex A.)). Indeed, the RNC repeatedly concedes this fact in its principal brief. (*See, e.g.*, Br. of Appellants at 27 (explaining that “some, but not all County Boards,” have adopted “cure” procedures).<sup>3</sup> Consequently, any claimed harm on the part of the RNC with regard to the Respondent Counties is nothing more than “speculation and hypothesis.” *Greenmoor*, 908 A.2d at 314. On this basis alone, this Court should affirm the Commonwealth Court’s Order as to the Respondent Counties.

**B. The RNC is Not Likely to Prevail on the Merits, Because the Respondent Counties Have No Cure Procedures**

In Counts I and II, the RNC raises a claim of declaratory judgment, and each claim is based on the premise one or more Respondents implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by law. (C.R. ((Pet’rs’ Pet. for Review ¶¶87-96)).<sup>4</sup> However, with respect to the Respondent Counties, they have ***not*** implemented such procedures—a point which the RNC has admitted for at least 12 of the 15

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<sup>3</sup> (*See also* Br. of Appellants at 6 (admitting that the challenged cure procedures are not “even in force throughout the state”); *id.* at 15 (stating that only “some Boards allow voters to ‘cure’ noncompliant ballots”); *id.* at 18 (acknowledging that “other Boards do not allow for any notice and opportunity to cure non-compliant ballots”); *id.* at 28 (referencing the “unique and idiosyncratic cure procedures developed by some of the Boards”); *id.* at 45 (challenging the cure procedures implemented by “some of the Boards”)).

<sup>4</sup> In Count III, the RNC purports to assert claim for “INJUNCTION PROHIBITING BOARDS FROM DEVELOPING OR IMPLEMENTING CURE PROCEDURES.” (C.R. (Pet’rs’ Pet. for Review ¶¶97-103)). However, an injunction is a remedy, ***not*** a cause of action.

Respondent Counties. (C.R. ((Joint Stipulation of Facts, Ex. B)).<sup>5</sup> Thus, even if that the RNC’s reading of *Boockvar* is proper, the RNC is not likely to prevail on the merits with regard to the Respondent Counties. This is a separate basis to affirm the Commonwealth Court’s Order as to the Respondent Counties. *See, e.g., Summit Towne*, 828 A.2d at 1001.

**C. The Remaining Elements for a Preliminary Injunction are Similarly Lacking**

The remaining elements for a preliminary injunction are similarly lacking. Because the Respondent Counties are not engaging in the supposedly unlawful conduct, the blanket, statewide injunction sought by the RNC is unnecessary, overbroad, and not reasonably suited to abate the alleged offending activity, as correctly found by the Commonwealth Court. (Br. of Appellants, App. A at 45). The RNC’s contrary claim is groundless. (Br. of Appellants at 56 (arguing that “[t]he relief sought by the Petitioners is narrowly tailored”)).

Likewise, the sought-after injunction will not restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. To the contrary, the

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<sup>5</sup> In light of these stipulated facts, it is fair to wonder how the RNC and its counsel, in good faith, included the Respondent Counties as named respondents in this matter. *See* Pa.R.Civ.P. 1023.1 (“The signature of an attorney . . . constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney . . . certifies that, to the best of that person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances, . . . the factual allegations have evidentiary support.”); *see also* 42 Pa.C.S. §2503 (permitting an award of reasonable attorney’s fees “as a sanction against another participant for dilatory, obdurate or vexatious conducting during the pendency of a matter”).

injunction will alter the status quo at least with respect to the Respondent Counties, because they are not engaging in the conduct in question. In this same vein, the sought-after injunction will adversely affect the public interest, because it will create a dangerous precedent under which a party can obtain a preliminary injunction based on imaginary conduct. Finally, greater injury will result from granting the sought-after injunction than refusing it. Each one of these grounds is a separate and independent basis to affirm the Commonwealth Court's Order at least in part. *Allegheny Cnty.*, 544 A.2d at 1307.<sup>6</sup>

**D. A Contrary Finding Requires This Court to Issue an Advisory Opinion About Hypothetical Conduct on the Part of the Respondent Counties**

Were this Court to reverse the Commonwealth Court and issue the requested injunction, this Court would be issuing an advisory opinion as to the Respondent Counties because they are not engaging in the alleged unlawful conduct. *See, e.g., Stuckley v. Newtown Twp. Zoning Hearing Bd.*, 79 A.3d 510, 516 (Pa. 2013) (“An advisory opinion is one issued despite the lack of a justiciable case or controversy between the parties.”). Such an opinion violates a foundational principle of Pennsylvania law. *See, e.g., Pittsburgh Palisades Park, LLC v. Commonwealth*, 888

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<sup>6</sup> The RNC purports to incorporate by reference and “in their entirety” the Memorandum of Law in Support of its Application for Preliminary Injunction and Supplemental Memorandum of Law in Support of its Application. (Br. of Appellants at 26). Such incorporation, however, would result in the RNC's principal brief exceeding 14,000, in violation of Rule 2135. Pa.R.A.P. 2135(a)(1). Presumably, this is why the RNC neglected to file the Certificate of Compliance required by Rule 2135(d) with its principal brief.

A.2d 655, 659 (Pa. 2005) (“The courts in our Commonwealth do not render decisions in the abstract or offer purely advisory opinions.”). This Court should thus refrain from enjoining the Respondent Counties from engaging in non-existent conduct.

## CONCLUSION

For the foregoing reasons, this Court must, at minimum, affirm the Commonwealth Court's Order as to the Respondent Counties.

Respectfully submitted,

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and ZOMNIR, P.C.

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York County Boards of Elections*

Dated: October 6, 2022

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing BRIEF OF APPELEES BEDFORD COUNTY, CARBON COUNTY, CENTRE COUNTY, COLUMBIA COUNTY, DAUPHIN COUNTY, FAYETTE COUNTY, JEFFERSON COUNTY, HUNTINGDON COUNTY, INDIANA COUNTY, LAWRENCE COUNTY, LEBANON COUNTY, NORTHUMBERLAND COUNTY, SNYDER COUNTY, VENANGO COUNTY AND YORK COUNTY BOARDS OF ELECTIONS complies with the word-count limit set forth in Pa.R.A.P. 2135(a). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required by Pa.R.A.P. 2135(b) and (d)), contains 4,444 words.

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

Date: October 6, 2022

*/s/ Elizabeth A. Dupuis*

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Elizabeth A. Dupuis, Esquire