

ELECTION MATTER

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100 MAP 2022

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**No. 100 MAP 2022**

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

Petitioners/Appellants,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth; Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; and All 67 County Boards of Elections  
(See back of cover for list of County Respondents),

Respondents/Appellees.

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**BRIEF FOR APPELLEE CHESTER COUNTY BOARD OF ELECTIONS**

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Adams County Board of Elections; Allegheny County Board of Elections; Armstrong County Board of Elections; Beaver County Board of Elections; Bedford County Board of Elections; Berks County Board of Elections; Blair County Board of Elections; Bradford County Board of Elections; Bucks County Board of Elections; Butler County Board of Elections; Cambria County Board of Elections; Cameron County Board of Elections; Carbon County Board of Elections; Centre County Board of Elections; Chester County Board of Elections; Clarion County Board of Elections; Clearfield County Board of Elections; Clinton County Board of Elections; Columbia County Board of Elections; Crawford County Board of Elections; Cumberland County Board of Elections; Dauphin County Board of Elections; Delaware County Board of Elections; Elk County Board of Elections; Erie County Board of Elections; Fayette County Board of Elections; Forest County Board of Elections; Franklin County Board of Elections; Fulton County Board of Elections; Greene County Board of Elections; Huntingdon County Board of Elections; Indiana County Board of Elections; Jefferson County Board of Elections; Juniata County Board of Elections; Lackawanna County Board of Elections; Lancaster County Board of Elections; Lawrence County Board of Elections; Lebanon County Board of Elections; Lehigh County Board of Elections; Luzerne County Board of Elections; Lycoming County Board of Elections; McKean County Board of Elections; Mercer County Board of Elections; Mifflin County Board of Elections; Monroe County Board of Elections; Montgomery County Board of Elections; Montour County Board of Elections; Northampton County Board of Elections; Northumberland County Board of Elections; Perry County Board of Elections; Philadelphia County Board of Elections; Pike County Board of Elections; Potter County Board of Elections; Schuylkill County Board of Elections; Snyder County Board of Elections; Somerset County Board of Elections; Sullivan County Board of Elections; Susquehanna County Board of Elections; Tioga County Board of Elections; Union County Board of Elections; Venango County Board of Elections; Warren County Board of Elections; Washington County Board of Elections; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; and York County Board of Elections,

Respondents/Appellants.

Initially, Appellee Chester County Board of Elections (“Chester County”) disagrees with the Appellants’ legal interpretation of Pennsylvania election law and the Court’s holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Additionally, Appellants have not identified any specific activity that **Chester County** has undertaken, let alone any activity that violates the Election Code. Indeed, it appears that the Appellants did not perform any investigation into Chester County’s activities prior to filing its Petition for Review (Reproduced Record (“R”) Vol. 1 at 0006a–74a) and Application for Special Relief in the Form of a Preliminary Injunction (R. Vol. 1 at 0075a–162a) (“Application”). Moreover, Appellants have not identified any specific activity that Chester County has undertaken or has even contemplated undertaking to support the relief they seek. As the movant, it was Appellants’ burden to assert facts that demonstrate they have a clear right to relief against Chester County. Because the Appellants have not asserted any allegations directed to Chester County, they have failed to satisfy their burden, and the Court should affirm the holding from the Commonwealth Court’s September 29, 2022 Memorandum Opinion (R. Vol. 3 at 1089a–1143a) (“Opinion”).

## I. STATEMENT OF THE CASE

Relevant to this appeal, on or about September 7, 2022, Appellants filed the Application in the Commonwealth Court seeking a preliminary injunction to prohibit the 67 County Boards of Elections in Pennsylvania from developing and implementing cure procedures. (R. Vol. 1 at 0075a–162a). The Application included 17 paragraphs but failed to assert any direct conduct against Chester County nor allege that Chester County has developed, or plans to implement, cure procedures. *Id.*

On or about September 9, 2022, the Commonwealth Court issued an Order instructing any party that opposes the Application to file an opposition by September 16 at 12:00 noon, see ¶ 1, and directing the parties to file a joint stipulation of facts indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure absentee and/or mail-in ballots, see ¶ 4. R. Vol. 1 at 0163a–171a. Pursuant to the Order, Chester County filed its opposition (R. Vol. 1 at 0172a–186a)<sup>1</sup> and also submitted to the Appellants a statement regarding its pre-canvassing

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<sup>1</sup> The Opinion listed Chester County as one of “41 County Boards [that] failed to file answers to the Application for Preliminary Injunction and, thus, are considered by the Court to be unopposed to the relief sought therein.” See R. Vol. 3 at 1095a. This is not accurate because Chester County filed its opposition on September 16 at 10:20 AM—which was prior to the deadline—and the prothonotary’s office affixed the filing with a stamp indicating that it had been received and filed. See R. Vol 1. 0172a–186a. Accordingly, Chester County did oppose the Application.

procedures for non-compliant mail-in or absentee ballots (R. Vol. 2 at 0544a–546a).

On or about September 29, 2022, the Commonwealth Court issued the Opinion denying the Application because the Appellants failed to demonstrate that they were likely to succeed on the merits or that their right to relief is clear. The next day, September 30, the Appellants filed their Notice of Appeal.

## **II. LEGAL ARGUMENT**

### **A. Appellants Misstate the Court’s Holding in *Pa. Democratic Party*.**

The Appellants repeatedly argue that Pennsylvania law authorizes cure procedures in a narrow circumstance: specifically, ballots “for which proof of identification has not been received or could not be verified.” See e.g., Application ¶ 1 (citing 25 P.S. § 3146.8(h)) (R. Vol. 1 at 0076a). Appellants contend that “some Boards” have implemented their own cure procedures, which violates the “clear and unanimous holding of the Pennsylvania Supreme Court” that held that cure procedures “must come from the Legislature.” See e.g., Application ¶ 2 (citing *Pa. Democratic Party*, 238 A.3d at 374) and Memorandum at 15 (R. Vol. 1 at 0076a and 0129a). However, the holding in *Pa. Democratic Party* did not find that Pennsylvania’s election law prohibits a Board from providing an elector the

opportunity to cure mail-in and absentee ballots. It also did not limit sole authority to implement cure procedures to the Legislature.

In *Pa. Democratic Party*, the Pennsylvania Democratic Party and several elected officials and congressional candidates (collectively “PDP”) presented five issues for the Court to review, including their request for an injunction “requiring Boards that have knowledge of an incomplete or incorrectly filled out ballot and the elector’s contact information to contact the elector and provide them ‘the opportunity to cure the facial defect . . . .’” 238 A.3d at 353.<sup>2</sup> The PDP submitted that “when the Boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector’s contact information, the Boards should be required to notify the elector using the most expeditious means possible and provide the elector a chance to cure the facial defect.” *Id.* at 372.

The Court rejected their request finding that “the ***Boards are not required*** to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots.” *Id.* at 374 (emphasis added). It reasoned that PDP’s request for the judiciary to mandate a proposed statewide procedure

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<sup>2</sup> See also, *id.* at 372 (seeking to require “the Boards to contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them with an opportunity to cure those defects.”).

(i.e., requiring the Boards to contact an elector whose ballots are reviewed but contain a “minor” or “facial” defect—and for whom the Boards have contact information—to afford them an opportunity to cure the defect) lacked constitutional or statutory basis.<sup>3</sup> Instead, the Court held that, although elections must be “free and equal,” the task of effectuating a statewide mandate, including the contours of the procedure to implement, is a task best suited for the Legislature, not the judiciary. *Id.*

Accordingly, *Pa. Democratic Party* did not find, or even consider, whether a single Board, or even some Boards, can implement a cure procedure; rather, it involved a request that the **judiciary** issue a statewide mandate governing cure procedures only weeks before the November 2020 national election. It held that the **Boards are not required** to provide opportunity to cure incomplete or incorrect ballots and that the judiciary lacked the authority to order the Boards to implement PDP’s proposed statewide mandate. Indeed, it recommended that such a mandate is an issue for the Legislature to decide. Thus, the holding in *Pa. Democratic Party* did

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<sup>3</sup> In concurrence, Justice Wecht noted that accepting the PDP’s proposal would have created an “amorphous standard” rather than “judicially manageable criteria for distinguishing ‘minor’ defects from ‘major’ ones that could be adopted on a statewide basis.” *Id.* at 389 (J. Wecht, concurring).

not consider or decide the precise issue that the Appellants' have presented here, *i.e.*, whether a Board or some Boards can implement cure procedures.

**B. A Preliminary Injunction Cannot be Issued Against Chester County as Appellants Have Failed to Satisfy the Immediate and Irreparable Harm Requirement.**

The purpose of a preliminary injunction is to “put and keep matters in the position in which they were before the *improper conduct* of the defendant commenced.” *Chapman v. Avon Grove Sch. Dist.*, 841 A.2d 1098, 1101 (Pa. Commw. 2004) (emphasis added). A preliminary injunction is warranted when certain prerequisites are met, and, if the Appellants fail to establish any one of them, there is no need to address the other prerequisites. *See Singzon v. Dep't of Pub. Welfare*, 436 A.2d 125, 127–28 (Pa. 1981); *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1167–68 (Pa. 1977); *Ala. Binder & Chem. Corp. v. Pa. Indus. Chem. Corp.*, 189 A.2d 180, 184 (Pa. 1963). The first requirement that must be met is a showing that “an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.” *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc*, 828 A.2d 995, 1001 (Pa. 2003).

The Appellants argue that a “preliminary injunction is necessary to prevent immediate and irreparable harm to the uniform administration of



elections in Pennsylvania” and that “absent a preliminary injunction, **some Boards** will continue developing and implementing in secrecy disparate and unlawful cure procedures in all elections.” See Memorandum at 14 (emphasis added) (R. Vol. 1 at 0128a). Appellants assert that an unlawful action “per se constitutes immediate and irreparable harm” and insinuate that they can demonstrate irreparable harm merely through a finding that “illegal activity occurred.” *Id.* Accordingly, Appellants seek a preliminary injunction against all 67 Boards of Elections, including Chester County.

The initial flaw in Appellants’ argument is that they have not shown that it is “unlawful” for a Board or even “some Boards” to implement cure procedures. Appellants’ reliance on the holding from *Pa. Democratic Party* does not support their argument because, as described above, the Court did not hold that Boards of Elections are prohibited from implementing cure procedures. See *supra* § II.A. Furthermore, Pennsylvania’s election laws do not expressly prohibit a Board from instituting cure procedures. Indeed, as the Commonwealth Court noted, the Boards have “broad authority under Section 302(f) of the Election Code, 25 P.S. § 2642(f) to implement [notice and cure procedures] at their discretion to ensure that the electoral franchise is protected.” See Opinion at 9 (R. Vol. 1 at 1098a).

However, even assuming that a Board's decision to implement a cure procedure is considered unlawful, Appellants have failed to allege that Chester County has instituted a cure procedure, nor have they contended that Chester County's pre-canvassing procedures are unlawful.<sup>4</sup> Instead, the Appellants sought to enjoin *all* Counties regardless of whether they had any evidence that a specific County, such as Chester County, has done anything actionable. Because the Appellants did not assert allegations against Chester County, they have failed to demonstrate the necessity for the Court to act to prevent an immediate and irreparable harm.

Indeed, the Appellants rely on *Hempfield Sch. Dist. v. Election Bd. of Lancaster Cnty.*, 574 A.2d 1190 (Pa. 1990) to argue that "the continued implementation of such cure procedures by Boards constitutes a 'violation of

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<sup>4</sup> During the September 22, 2022 oral argument, in response to laches, the Commonwealth Court asked Appellants' counsel why her clients did not file their Petition earlier, and Appellants' counsel represented that they had been "in the process of trying to attempt to gather additional information with respect to [curing procedures] . . . [and] [w]e wanted to be thorough. We didn't want to be knee-jerk." (R. Vol. 2 at 0618a). However, there is no evidence in the record that Appellants, prior to initiating the lawsuit, performed any due diligence investigation into Chester County's procedures, or lack thereof. Instead, the Appellants' filed a lawsuit that included Chester County and sought to enjoin it from acting without any specific evidence or understanding of Chester County's policies or procedures. This forced Chester County to expend resources defending itself without any specific allegations directed against it. Appellants' lack of due diligence investigation prior to filing a lawsuit seeking to enjoin Chester County from actions Chester County is not undertaking and has no plans to undertake is problematic and it indicates that a petitioner can seek to enjoin a party without evidence or understanding of whether that party is acting, or if the supposed actions even harm the petitioner.

law’ which per se constitutes immediate and irreparable harm.” See Memorandum at 15 (R. Vol. 1 at 0129a). However, in *Hempfield*, it was clear that the Election Board of Lancaster County had acted—i.e., it decided to include a non-binding referendum question on the upcoming primary ballot—and the Hempfield School District sought to enjoin that action. *Hempfield Sch. Dist.* 574 A.2d at 1190–91. Here, the Appellants have not alleged that Chester County has decided to proceed with any action, yet the Appellants are requesting an injunction because “some Boards” may implement cure procedures. Because the Appellants have not asserted any specific allegations directed to Chester County, they have not met their burden for the issuance of a preliminary injunction against Chester County. Accordingly, the Court should deny the appeal and affirm the Commonwealth Court’s decision.

### III. CONCLUSIONS

For the reasons above, the Court should affirm the Commonwealth Court's decision.

Dated: October 6, 2022

Respectfully,

/s/ Colleen Frens

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## CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Dated: October 6, 2022

/s/ Colleen Frens

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## Rule 2135 Certificate of Compliance

I certify pursuant to Pa. R.A.P. 2135(d) that the foregoing Brief does not exceed 14,000 words, as determined using Microsoft Word for Office 365 software, and therefore complies with the word limit set forth in Pa. R.A.P. 2135(a)(1).

Dated: October 6, 2022

/s/ Colleen Frens

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