

IN THE SUPREME COURT OF PENNSYLVANIA

No. 100 MAP 2022

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

Petitioners/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.

REPRODUCED RECORD – VOLUME 1

Appeal from Commonwealth Court’s Sept. 29, 2022 Order at No. 447 MD 2022

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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.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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; S.
MICHAEL STREIB,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official
capacity as Acting Secretary of the
Commonwealth; JESSICA MATHIS,
in her official capacity as Director of
the Pennsylvania Bureau of Election
Services and Notaries; 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

No. _____ MD 2022

**PETITION FOR REVIEW
DIRECTED TO COURT'S
ORIGINAL JURISDICTION
SEEKING DECLARATORY AND
INJUNCTIVE RELIEF**

Filed on behalf of Petitioners

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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; WAYNE
COUNTY BOARD OF ELECTIONS;
WESTMORELAND COUNTY

BOARD OF ELECTIONS;
WYOMING COUNTY BOARD OF
ELECTIONS; and YORK COUNTY
BOARD OF ELECTIONS,

Respondents.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, *et al.*,

No. _____ MD 2022

Petitioners,

v.

LEIGH M. CHAPMAN, in her official
capacity as Acting Secretary of the
Commonwealth, *et al.*,

Respondents.

NOTICE TO PLEAD

To Respondents:

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: September 1, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Russell D. Giancola

Gallagher Giancola LLC

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p style="text-align: center;">Respondents.</p>	<p>No. _____ MD 2022</p>
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**PETITION FOR REVIEW
DIRECTED TO COURT’S ORIGINAL JURISDICTION
SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Petitioners support and seek to uphold free and fair elections on behalf of all Pennsylvanians. For that reason, Petitioners bring this suit to ensure that the upcoming 2022 general election and future elections are conducted in accordance with the rules that the General Assembly has prescribed by law. Unfortunately, several County Boards of Elections (“Boards”), acting on their own initiative, are departing from those rules in a crucial area of election administration. The result is a lack of transparency, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, and an erosion of public trust and confidence in the integrity of Pennsylvania’s elections at a vital moment in the Nation’s and the Commonwealth’s history.

2. In 2020, the Pennsylvania Supreme Court unanimously held that “the Election Code provides procedures for casting and counting a vote by mail” but does not provide for a notice and opportunity to cure procedure (“cure procedure”) for a voter who fails to comply with the requirements for voting by mail or absentee. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020).

3. The Supreme Court further stated that “[t]o the extent that a voter is at risk of having his or her ballot rejected” due to failure to comply with the Election Code’s signature and secrecy ballot requirements for mail-in and absentee ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.*

4. The Supreme Court “express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.” *Id.*

5. The Legislature has addressed the issue of when Boards may provide notice and an opportunity to cure a non-compliant mail-in or absentee ballot. The Election Code currently provides a cure procedure in only a limited circumstance: “[f]or those absentee ballots or mail-in ballots for which proof of identification has

not been received or could not be verified.” 25 P.S. § 3146.8(h). And even in that circumstance, the voter may cure only the lack of proof of identification and not any other defect. *See id.*

6. Earlier this year, the Legislature passed a bill to implement a broad cure procedure, but Governor Wolf vetoed it. Accordingly, lack of verification of identification remains the only circumstance under which Boards are authorized to provide a cure opportunity.

7. Despite the Election Code’s plain text and the Supreme Court’s clear holding, and the veto by the Governor of the bill enacted by the Legislature to implement a cure procedure, several Boards, without legal authority, have developed and implemented cure procedures for the 2022 general election and beyond.

8. These Boards’ development and implementation of cure procedures exceed the Boards’ authority under state law and the Election Code. These Boards have, in effect, usurped the exclusive legislative authority of the General Assembly in contravention of the Pennsylvania Supreme Court’s holding.

9. Moreover, these Boards’ actions purport to regulate the “manner” in which federal elections are conducted, in violation of the General Assembly’s plenary delegated authority to “prescribe” the “Manner” of such elections under the Elections Clause of Article 1, Section 4 of the United States Constitution.

10. The untenable consequences of these Boards' usurpation of the General Assembly's legislative and federal constitutional authority are difficult to overstate. For one thing, the Boards that have adopted cure procedures have not all disclosed that fact—let alone the particulars of those procedures—to the public, creating confusion and a lack of transparency in election administration.

11. The selective and varying adoption of cure procedures by some Boards has created an unequal playing field. Depending on the county in which voters reside, some receive notice and an opportunity to cure a ballot defect while others receive no such notice of or opportunity to cure an identical ballot defect. Moreover, the Boards that have adopted cure procedures on their own initiative have not uniformly adopted the *same* procedure. The result is a lack of statewide uniformity in both the existence and—where they do exist—the particulars of cure procedures.

12. The Court should restore transparency, fundamental fairness, and integrity to Pennsylvania's elections by upholding the plain text of the Election Code and the clear holding of the Pennsylvania Supreme Court and declaring that county boards of elections may not adopt cure procedures other than as the General Assembly has expressly provided in the Election Code.

JURISDICTION AND VENUE

13. This Court has original jurisdiction over this Petition for Review under 42 Pa. C.S. § 761(a)(1) because this matter is asserted against Commonwealth officials in their official capacities.

14. Petitioners bring this action pursuant to the Declaratory Judgments Act, which empowers this Court “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” 42 Pa. C.S. § 7541(a). The Declaratory Judgments Act permits “[a]ny person ... whose rights, status, or other legal relations are affected by a statute” to “have determined any question of construction or validity arising under the ... statute” and to “obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa. C.S. § 7533.

PARTIES

A. Republican Committees

15. The Republican National Committee (the “RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to

educate, mobilize, assist, and turnout voters. The RNC made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The RNC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The RNC has a substantial and particularized interest in ensuring that Pennsylvania administers free and fair elections.

16. The National Republican Congressional Committee (the “NRCC”) is the national congressional committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRCC’s mission is to elect Republican candidates to the U.S. House of Representatives from across the United States, including from Pennsylvania’s eighteen congressional districts. The NRCC works to accomplish its mission in Pennsylvania by, among other things, providing direct and indirect financial contributions and support to candidates and other Republican Party

organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRCC made significant contributions and expenditures in support of Republican House candidates and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The NRCC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The NRCC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

17. The National Republican Senatorial Committee (the “NRSC”) is the national senatorial committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRSC’s mission is to elect Republican candidates to the U.S. Senate from across the United States, including Pennsylvania. The NRSC works to accomplish its mission in Pennsylvania by, among other things, providing direct and

indirect financial contributions and support to candidates and other Republican Party organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRSC made significant contributions and expenditures in support of Republican Senate candidates and in mobilizing and educating voters in Pennsylvania in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. The NRSC makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. The NRSC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

18. Petitioner Republican Party of Pennsylvania (“RPP”) is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). RPP, on behalf of

itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works on an ongoing basis to accomplish this purpose by, among other things, devoting substantial resources toward turning out voters in Pennsylvania and informing them of the legal requirements as adopted by the Legislature for voting. RPP has made significant contributions and expenditures in support of Republican statewide, district, and local candidates in past election cycles and is doing so again in 2022. These efforts include devoting substantial time and resources toward monitoring of the voting and vote counting process in Pennsylvania and to ensure it is conducted lawfully. RPP makes expenditures to ensure it and its voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting by mail or absentee. These efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures. RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

19. The various approaches taken by the counties regarding cure procedures are not routinely published and thus not readily known to the RPP, RNC, NRSC, or NRCC or even voters themselves. Thus, the ability of the RPP, RNC, NRSC, and the NRCC to educate voters regarding the cure procedures is thwarted.

B. Voter Petitioners

20. Petitioner David Ball resides in Washington County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

21. Petitioner James D. Bee resides in Cambria County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

22. Petitioner Debra A. Biro resides in Northampton County, Pennsylvania is a registered Pennsylvania elector who consistently votes in each election.

23. Petitioner Jesse D. Daniel resides in Indiana County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

24. Petitioner Gwendolyn Mae DeLuca resides in Beaver County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

25. Petitioner Ross M. Farber resides in Westmoreland County, Pennsylvania, and is a registered Pennsylvania elector who consistently votes in each election.

26. Petitioner Connor R. Gallagher resides in Allegheny County, Pennsylvania, and is a registered Pennsylvania elector who consistently votes in each election.

27. Petitioner Lynn Marie Kalcevic resides in Beaver County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

28. Petitioner Linda S. Kozlovich resides in Fayette County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

29. Petitioner William P. Kozlovich resides in Fayette County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

30. Petitioner Vallerie Siciliano-Biancaniello resides in Delaware County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

31. Petitioner S. Michael Streib resides in Butler County, Pennsylvania and is a registered Pennsylvania elector who consistently votes in each election.

32. Each of the Voter Petitioners regularly votes in both primary and general elections and intends to vote for candidates in all races on their respective ballots in the upcoming general election, including but not limited to the races for United States Senate, United States House of Representatives, Pennsylvania Senate and Pennsylvania House of Representatives.

33. The implementation of cure procedures by some Boards absent any directive to do so under the Election Code has interfered with Voter Petitioners' right to "equal elections."

34. Moreover, the unauthorized cure procedures implemented by some Boards have had and will have the result of counting votes that should not have been counted due to the voter's failure to comply with signature and secrecy ballot requirements for mail-in and absentee ballots. As a result, the votes validly cast by Voter Petitioners have been and will be canceled out and diluted by the counting of ballots in violation of the Election Code.

35. Petitioners thus find themselves in the same factual setting as existed in 2020 when *Pa. Democratic Party* was filed: an election landscape where Boards throughout the state operate under different rules, particularly with respect to whether to implement cure procedures, and if so, how.

36. Insofar as the Pennsylvania Supreme Court made clear in *Pa. Democratic Party* that the solution to this lack of uniformity could not be resolved by the Court mandating a cure procedure for all counties to follow, and because Governor Wolf vetoed the General Assembly's attempt to implement a uniform cure procedure, Petitioners thus seek the mirror-image form of relief: the Court should enjoin the Boards from using any cure procedures that are not expressly set forth in the Election Code.

C. Respondents

37. Respondent Leigh M. Chapman is the Acting Secretary of the Commonwealth and is sued in her official capacity only. In that capacity, Acting Secretary Chapman must “receive from county boards of elections the returns of primaries and elections,” “canvass and compute the votes cast for candidates,” proclaim the results of such primaries and elections,” and “issue certificates of election to the successful candidates at such elections.” *See* 25 P.S. § 2621(f); *see also* 25 P.S. § 3159.

38. Respondent Jessica Mathis is the Director for the Bureau of Election Services and Notaries and is sued in her official capacity only. In that capacity, Director Mathis oversees the Election Services and Voter Registration divisions of the Pennsylvania Department of State. The Bureau of Election Services and Notaries is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. *See* <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx>.

39. Each of the 67 County Boards of Elections in Pennsylvania are also named as Respondents. Boards of Elections “have jurisdiction over the conduct of primaries and elections in such count[ies].” *Id.* at § 2641(a). The Boards of Elections’ powers are set forth under the Election Code. *See* 25 P.S. § 2642.

FACTUAL ALLEGATIONS

A. Act 77 Requirements for Absentee and Mail-In Ballots.

40. The expanded use of mail-in voting authorized under Act 77 has amply revealed a lack of statewide standards for the canvassing and counting of mail-in ballots.

41. Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope (“secrecy envelope”), (2) place the secrecy envelope inside a second envelope, which is marked with a “declaration of the elector” form, (3) “fill out” and “sign the declaration printed on such envelope,” and (4) return the ballot by 8:00 p.m. on election day. 25 P.S. § 3146.6(a); § 3150.16(a).

42. If a voter fails to comply with these requirements, the voter’s absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8; *Pa. Democratic Party*, 238 A.3d 345.

B. Providing Any Cure Procedure for Non-Compliant Ballots Is the Exclusive Province of The General Assembly.

43. Just two years ago, the Pennsylvania Democratic Party sought an injunction to *require* Boards of Election to contact electors whose mail-in or absentee ballots contained facial defects and to provide those electors with an opportunity to cure the same. *See Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Commw. Ct.).

44. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Court’s “broad authority to craft meaningful remedies,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Court should require the Boards of Elections to implement a “notice and opportunity to cure procedure” for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

45. In that case, the Secretary of the Commonwealth *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that “so long as a voter follows the requisite voting procedures, he or she ‘will have equally effective power to select the representative of his or her choice.’” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Secretary noted that logistical policy decisions implicated in a cure procedure are more properly addressed by the Legislature, not the Courts. *Id.*

46. The Supreme Court unanimously agreed. It held that “[w]hile the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature.” *Id.* It further noted that “although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the ‘notice and opportunity to cure’ procedure sought by the Petitioner.” *Id.*

47. Importantly, the Supreme Court further agreed that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk [of a voter having his or her ballot rejected due to minor errors] is one best suited for the Legislature.” *Id.* It reasoned that the Legislature was best positioned to resolve the “open policy questions” attendant with a notice and opportunity to cure procedure, including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.*

C. The Election Code Provides Only a Limited Notice and Opportunity to Cure, and Governor Wolf Recently Vetoed an Expansion of Ballot Curing.

48. The General Assembly has addressed cure procedures and has provided only a limited opportunity for voters to cure a non-compliant mail-in or absentee ballot.

49. In particular, the Election Code currently provides a cure procedure in only one circumstance: “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” *See* 25 P.S. § 3146.8(h).

50. This procedure provides that if proof of a voter’s identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2).

51. No other cure procedure exists in the Election Code.

52. After *Pa. Democratic Party* was decided, the Legislature considered and even passed legislation requiring a cure procedure for non-compliant mail-in and absentee ballots. See House Bill 1300, Printer's Number 1869, § 1308(g)(2)(iv), (v) (2021).

53. Governor Wolf vetoed House Bill 1300.

54. As a result, the Election Code remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

55. The Secretary of the Commonwealth has acknowledged this fact, providing in its answer to "Frequently Asked Questions":

How do I know if my ballot was accepted or counted?

Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, **if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election.** Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Pennsylvania Department of State, *Mail and Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>

(emphasis added).

D. Boards Are Not Free to Create Their Own Cure Procedures.

56. Although *Pa. Democratic Party* answered the question of whether the Court could *require* the Boards to implement a notice and opportunity to cure provision, the answer of whether Boards were free to create their own such policies is equally clear under Pennsylvania law.

57. Under the Election Code, the Boards “shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act.” 25 P.S. § 2642.

58. Section 2642 enumerates several duties the Boards must perform. *See id.* § 2642(a)–(p).

59. Notably absent from the list is the development and implementation of cure procedures.

60. In fact, § 2642 makes clear that the Boards lack the authority to implement their own cure procedures.

61. For example, Boards are required to “instruct election officers in their duties ... and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted.” *Id.* § 2642(g) (emphasis added).

62. Further, the limited rulemaking authority granted to the Boards does not extend to cure procedures.

63. Rather, Boards are authorized only “[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.” *Id.* § 2642(f); *accord PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) “extends only to the promulgation of rules that are ‘not inconsistent with law.’”).

64. Cure procedures adopted by Boards are “inconsistent with law” because the Election Code spells out the limited availability of such procedures and does not authorize Boards to expand them. *See, e.g., Pa. Democratic Party*, 238 A.3d at 374.

E. Nevertheless, Some Boards Provide Notice and Opportunities to Cure Defective Absentee or Mail-In Ballots.

65. Publicly available information and investigation have revealed that some Boards allow voters to “cure” noncompliant ballots, following protocols of their own design.

66. For example, in 2020, during the course of an appeal regarding its response to a Right to Know Law request, the Bucks County Board of Elections admitted that it implemented the following “cure” protocol which included sending postcards to the voters and allowing voters to sign and date their ballot envelope:

Generally speaking, we receive mail-in/absentee ballots during the election season, for those missing a signature or date, we allow them to be “cured.” BOE sends a postcard out to voters on ballots needing to be cured. Last year’s version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received at 8 PM on election day are not accepted.

See Email from Daniel D. Grieser, dated August 1, 2022, and a copy of the postcard used by Bucks County is attached as **Exhibit A**.

67. Bucks County also contacted both political parties and forwarded the list of voters it had sent the postcard to in the event either party wished to reach out to the voters in order to assist them in curing their ballot.

68. Similarly, the Montgomery County Board of Elections implemented its own protocol to contact voters and allow for them to cure ballots in the 2020 General Election.

69. Its protocol included emailing certain voters to alert them of the defect or defects in their absentee or mail-in ballot. Montgomery County Board of Elections workers also attempted to speak to such voters utilizing a script. The Montgomery County Board of Elections then afforded such voters the opportunities that included but were not limited to: coming to the Board of Elections’ office to “correct an incomplete declaration;” canceling their absentee or mail-in ballot and replacing it

in person; or canceling their absentee or mail-in ballot and replacing it by email using a form on the Montgomery County Board of Elections website. *See* Montgomery County Right to Know Law Response, attached as **Exhibit B** (October 27, 2020 email from Sarah Batipps (pp. 24-25).

70. Upon information and belief, the Philadelphia Board has implemented its own cure procedure, which includes providing information that voters' mail-in or absentee ballot will not count because it was returned without a signature on the declaration envelope or because the Philadelphia Board determined the ballot lacks a secrecy envelope without opening the declaration envelope. Voters whose ballots would be canceled for these defects were instructed that they could vote by provisional ballot or request a replacement ballot at a satellite election office. *See* Office of Philadelphia City Commissioners, *Cancelled Ballot Notification Information*, at https://www.philadelphiavotes.com/en/home/item/1873-cancelled_ballot_notification_info (as of November 1, 2020), a copy of which is attached as **Exhibit C**.

71. Still other counties have previously opined that curing is not permissible under the Election Code, but nevertheless have agreed to begin implementing cure procedures in future elections.

72. For example, the solicitor for the Northampton County Board of Elections stated that Northampton's solicitor had opined that "we are prohibited

from contacting voters: to cure defective ballots, such as those which are missing the secrecy envelope.” See **Exhibit D** (October 6, 2020 Amy Cozze email, p. 35).

73. But in conjunction with a stipulated settlement agreement reached in *Bausch v. Lehigh County Board of Elections, et al.* in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 5:22-cv-02111, the Northampton County Board of Elections agreed that for future elections, it would:

- Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;
- Provide notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as “Naked Ballots”); and
- Provide the names of all voters whose Naked Ballots are discovered prior to 8:00 p.m. on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters.

See Northampton County Board of Elections Stipulated Settlement Agreement, attached hereto as **Exhibit E**.

74. The Lehigh County Board of Elections entered into a similar agreement, which included additional obligations:

- Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;

- Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election.

See Lehigh County Board of Elections Stipulated Settlement Agreement, attached hereto as **Exhibit F**.

75. The Acting Secretary was a party in the *Bausch* litigation, and upon information and belief, was made aware of the Stipulated Settlement Agreements involving the Northampton and Lehigh Boards, but has taken no action to stop the unauthorized cure procedures.

76. The Stipulated Settlement Agreements involving the Northampton and Lehigh County Boards run afoul not only of Pennsylvania law, but also the Secretary's acknowledgment that "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election." Pennsylvania Department of State, *Mail and Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>. The Secretary was a party in the *Bausch* action in which the Stipulated Settlement Agreements were reached, but was not a party to the Stipulated Settlement Agreements.

77. Meanwhile, other Boards do not allow for any notice and opportunity to cure non-compliant ballots.

78. Some Boards are transparent and explicit in their adherence to the Election Code and the Supreme Court's holding in *Pa. Democratic Party*. For example, the Lancaster Board provides on its website, stating in relevant part:

Once a ballot has been recorded as received by the County, there is not a legal procedure for the County to return it to the voter or for the voter to alter it for any reason.

Lancaster County, *Frequently Asked Questions About Mail-in Ballots*, at <https://www.co.lancaster.pa.us/1351/FAQs-of-MAIL-IN-BALLOTS>.

79. Moreover, communications among the Directors of the Boards of Elections reveal that several other Boards have not provided any opportunity for voters to cure non-compliant absentee or mail-in ballots.

80. For example, the Executive Director of the Franklin County Board of Elections noted in an email:

I know that voters are not entitled to notice and an opportunity cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected.

See **Exhibit G** (October 6, 2020 email from Jean C. Byers, p. 34).

81. Other Boards have not implemented cure protocols, including the Mifflin County Board of Elections, the Wyoming County Board of Elections, and the Allegheny County Board of Elections.

82. Thus, whether voters who cast a non-compliant mail-in ballot will be afforded an opportunity to cure the defect depends entirely on the county in which they reside. In other words, mail-in and absentee ballots with identical defects are receiving unequal treatment based solely on the voter's residency.

83. Moreover, the likelihood of the voter receiving notice of his or her non-compliant ballot depends not only on the voter's county of residence, but also whether that voter is registered with a political party, when the ballot is returned to the Board, and whether "time allows" for some Boards to provide such notice.

84. Further, the permissible methods of cure vary even across those counties which afford voters the opportunity to cure.

85. The result is a lack of transparency, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, and an erosion of public trust and confidence in the integrity of Pennsylvania's elections.

COUNT I

DECLARATORY JUDGMENT THAT UNDER PENNSYLVANIA LAW, THE BOARDS ARE PROHIBITED FROM DEVELOPING AND IMPLEMENTING CURE PROCEDURES NOT EXPRESSLY CREATED BY THE GENERAL ASSEMBLY

86. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

87. The Election Code does not set forth a procedure by which Boards are permitted to provide electors with notice and an opportunity to cure their mail-in or absentee ballots that fail to comply with 25 Pa. C.S. §§ 3146.6(a) or 3150.16(a).

88. The Pennsylvania Supreme Court agrees, having already made clear that the Election Code “does not provide for [a] ‘notice and opportunity to cure’ procedure” outside narrow circumstances and that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate the risk [of minor errors causing a ballot to be rejected] is one best suited for the Legislature.” *Pa. Democratic Party*, 238 A.3d at 374.

89. Since *Pa. Democratic Party*, the Legislature has not enacted any law allowing for a cure procedure.

90. The Boards have only limited rulemaking authority under the Election Code.

91. To the extent certain counties have developed and implemented cure procedures, such are “inconsistent with law,” and are thus void *ab initio*. See *Bank of New York Mellon v. Johnson*, 121 A.3d 1056, 1060 (Pa. Super. 2015) (“When a prothonotary enters judgment without authority, that judgment is *void ab initio*.”).

92. The decision of some Boards to develop and implement their own cure procedures without authorization under the Election Code is unlawful.

WHEREFORE, Petitioners respectfully request this Honorable Court declare that the development and implementation of cure procedures by Boards violates Pennsylvania law and is prohibited.

COUNT II

DECLARATORY JUDGMENT THAT ADOPTION OF ANY CURE PROCEDURES FOR FEDERAL ELECTIONS NOT EXPRESSLY AUTHORIZED BY THE GENERAL ASSEMBLY VIOLATES THE ELECTIONS CLAUSE OF THE UNITED STATES CONSTITUTION

93. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

94. The Elections Clause of the United States Constitution directs: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

95. Whether, and under what circumstances, to provide voters notice and an opportunity to cure non-compliant mail-in and absentee ballots cast in federal elections are issues of the “Manner” in which such elections are conducted and, thus, are entrusted to the Legislature’s exclusive authority. *See id.*; *see also, e.g., Smiley v. Holm*, 285 U.S. 355, 373 (1982).

96. Accordingly, neither Boards nor any other organ or instrumentality of the State government may regulate that question. *See* U.S. CONST. art. I, § 4, cl. 1; *Smiley*, 285 U.S. at 373.

WHEREFORE, Petitioners respectfully request this Honorable Court declare that any adoption or implementation of cure procedures for federal elections other than those expressly authorized by the General Assembly violates the Elections Clause of the United States Constitution.

COUNT III

INJUNCTION PROHIBITING BOARDS FROM DEVELOPING OR IMPLEMENTING CURE PROCEDURES

97. Petitioners incorporate by reference all preceding paragraphs of this Petition as if fully set forth herein.

98. Because the development and implementation by some Boards of cure procedures is inconsistent with Pennsylvania law, and because the Court lacks the power to require Boards to implement a cure procedure, the practice must be enjoined statewide.

99. A party seeking a permanent injunction must establish three elements: “(1) a clear right to relief; (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) that a greater injury will result from refusing the injunction.” *Mazin v. Bureau of Professionals Occupational Affairs*, 950 A.2d 382, 389 (Pa. Commw. 2008).

100. Petitioners have a clear right to relief: the Election Code provides a cure procedure only with respect to proof of identity, not for defects under 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a). Moreover, the varied approaches taken by the Boards in deciding whether to implement a cure procedure, and if so, the particulars of same, unquestionably prevents voters in Pennsylvania from voting on equal terms.

101. The varied procedures (or absence of same) have materially affected the manner Pennsylvania voters are able to exercise their right to vote by absentee or mail-in ballot.

102. Violations which affect voting rights cannot be compensated by damages. *See Kuznik v. Westmoreland Cty. Bd. of Com'rs*, 902 A.2d 476 (Pa. 2006).

103. The balancing of harms favors granting injunctive relief, as the alternative is to allow the usurpation by some Boards of the exclusive legislative power held by the General Assembly to persist.

WHEREFORE, Petitioners respectfully request this Honorable Court issue a permanent injunction prohibiting the Boards from developing and implementing cure procedures and for the Acting Secretary to take no action inconsistent with such permanent injunction.

Respectfully submitted,

Dated: September 1, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
PA I.D. #37950
Russell D. Giancola
PA. I.D. #200058
GALLAGHER GIANCOLA LLC
436 Seventh Avenue, 31st Floor
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Thomas W. King, III
Thomas E. Breth
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128 W. Cunningham St.
Butler, PA 16001
Phone: (724) 283.2200
tking@dmkcg.com
tbreth@dmkcg.com

Counsel for Petitioners

EXHIBIT A

From: [Grieser, Daniel D.](#)
To: [Brian Adrian](#)
Cc: [Jennifer Pepmeyer](#); [Dayoub, Ashley](#); [Kathleen Gallagher](#)
Subject: RE: Bucks County filings
Date: Monday, August 1, 2022 11:47:35 AM
Attachments: [image001.png](#)
[Curing Postcard Side 1.docx](#)
[Curing Postcard Side 2 - 2021.doc](#)
[RNC responsive emails.pdf](#)

Brian, we are still working through the emails. Unfortunately, my computer crashed halfway through, so I had to start over.

Below is a summary of our "curing process"

Generally speaking, we receive mail in/absentee ballots during the election season, for those missing a signature or date, we allow them to be "cured." BOE sends a postcard out to voters on ballots needing to be cured. Last year's version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received after 8 PM on election day are not accepted.

I have also attached the only emails we have that regard "curing."

The remaining emails I am reviewing are DOS guidance regarding the election in general and our BOE's response, if any. There is several hundred to go through. If you are only concerned about curing, these emails are not particularly helpful. Please clarify if there is something specific you are looking for. If it is easier, I am free for a phone call as well – Dan.

County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901



County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901



County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901



County of Bucks
Board of Elections
55 East Court St
Doylestown PA 18901



**NOTICE: YOU FAILED TO SIGN AND/OR DATE
YOUR MAILED BALLOT.**

**PLEASE CONTACT THE BUCKS COUNTY BOARD OF
ELECTIONS OFFICE AS SOON AS POSSIBLE TO
REMEDY THIS. BALLOTS MUST BE CURED BY 8:00
PM ON ELECTION DAY IN ORDER TO COUNT. IF
YOU ARE UNABLE TO CORRECT THIS YOU MAY
VOTE BY PROVISIONAL BALLOT AT YOUR POLLING
PLACE.**

**CALL 215-348-6154 FOR MORE INFORMATION
OFFICE HOURS ARE 8:00-5:00, M-F.**

**NOTICE: YOU FAILED TO SIGN AND/OR DATE
YOUR MAILED BALLOT.**

**PLEASE CONTACT THE BUCKS COUNTY BOARD OF
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PLACE.**

**CALL 215-348-6154 FOR MORE INFORMATION
OFFICE HOURS ARE 8:00-5:00, M-F.**

EXHIBIT B

From: [Benitz, Caroline](#)
To: [Batipps, Sarah](#); [Piening, Sarah](#); [Dean, Francis](#)
Subject: Re: Montgomery County Voter Services
Date: Wednesday, October 28, 2020 9:21:50 AM

Unfortunately I'm not aware of any to refer them to you. Frank or Sarah, do you know a better answer to this question?

From: Batipps, Sarah <SBatipps@montcopa.org>
Sent: Wednesday, October 28, 2020 9:12 AM
To: Benitz, Caroline <cbenitz@montcopa.org>; Piening, Sarah <SPiening2@montcopa.org>
Subject: RE: Montgomery County Voter Services

Right, I have that understanding, the issue is that the person is physically disabled and cannot appear in person to cure the ballot or to cast a provisional vote.

I know that it is not the county issue that the person did not complete the ballot correctly, but are there any community resources/agencies that we could refer them too as far as assistance in getting to the polls?

From: Benitz, Caroline <cbenitz@montcopa.org>
Sent: Wednesday, October 28, 2020 9:09 AM
To: Batipps, Sarah <SBatipps@montcopa.org>; Piening, Sarah <SPiening2@montcopa.org>
Subject: Re: Montgomery County Voter Services

Hi Sarah,
The option would be us mailing them the form, but at this point we all know it wouldn't arrive in time for them to return and get a new ballot sent to them. Please also tell voters they can vote provisionally on election day.

From: Batipps, Sarah <SBatipps@montcopa.org>
Sent: Tuesday, October 27, 2020 5:58 PM
To: Piening, Sarah <SPiening2@montcopa.org>; Benitz, Caroline <cbenitz@montcopa.org>
Subject: FW: Montgomery County Voter Services

Good Evening Ladies

I am reaching out to you as I don't have any other direct contacts in Voters. I am coordinating the call backs to voters who submitted a ballots with errors in an attempt to cure the problem. I am working with Tom Bonner on this, and he sends me the spreadsheet and has provided scripted response to the various issues.

However, we have had a few voters who cannot cure their ballot with the options that we have been directed to provide them:

- Physically coming to HSC to correct an incomplete declaration
- completing a cancellation and replace in person, or
- cancellation and replace by email using the form on voter services website.

Are there any alternatives for those without electronic means of communication and who are disabled and cannot appear in person to cure their ballot?

One Voter in particular has been calling quite distressed about how to proceed, can you help us?

Ballot # 110832073 [REDACTED]

Thank you,

Sarah Batipps

Sarah Batipps, MSS

Performance and Planning Specialist
Office of Performance and Planning
Department of Health and Human Services
Office: 610-278-3013
Cell: 610-724-8926



Confidentiality Notice: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, forwarding, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

From: Applegate, Christina <CApplegate@montcopa.org>

Sent: Tuesday, October 27, 2020 5:48 PM

To: Batipps, Sarah <SBatipps@montcopa.org>

Subject: RE: Montgomery County Voter Services

Can we have someone from voter services call [REDACTED] with another option? I spoke with her last night and she was very upset because she cannot come to Norristown nor does she have email. She called me several times today crying.

EXHIBIT C



Presidential General Election

11/3/2020
Polls open 7am-8pm.

1 DAYS
20 HRS 45 MINS

Election Calendar

11/ 3/2020
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots

11/ 3/2020
GENERAL ELECTION

11/ 3/2020
24-Hour Reporting - Daily Reporting Ends

11/ 4/2020
First day to REGISTER after November election

11/10/2020
Last day for County Boards of Elections to receive voted military and overseas absentee ballots

11/23/2020
Thirty Day Post-Election - Cycle 6 Reporting Period Closes

Read more

Cancelled Ballot Notification Information

Share on Facebook | Print

Voters who have received a notification that their ballot was cancelled may fall into one of the following three categories:

- ✓ CANC – NO SIGNATURE - Voter's ballot was returned without a signature on the declaration envelope
- ✓ CANC – VOTE CANCELLED - Voter's ballot was determined to lack a secrecy envelope without opening the declaration envelope
- ✓ CANC - UNDELIVERABLE - Voter's ballot was returned by the USPS to the County Board of Elections

Voters whose ballots have been cancelled can vote by provisional ballot on Election Day; alternatively they may request a replacement ballot at a satellite election office through 8:00 PM on Election Day.

Información sobre el Aviso de Boleta Cancelada

Los votantes que hayan recibido un aviso de que su boleta fue cancelada pueden integrar una de las tres categorías siguientes:

- ✓ CANCELACIÓN-FALTA DE FIRMA: la boleta del votante se envió sin una firma en el sobre de declaración.
- ✓ CANCELACIÓN-VOTO CANCELADO: se determinó, sin abrir el sobre de declaración, que la boleta del votante no contenía el sobre secreto.
- ✓ CANCELACIÓN-IMPOSIBILIDAD DE ENTREGA: USPS devolvió la boleta del votante a la Junta Electoral del Condado.

Los votantes cuyas boletas hayan sido canceladas pueden votar mediante una boleta provisional el Día de la Elección; alternatively, pueden solicitar una boleta electoral de reemplazo en una oficina electoral satélite hasta las 8:00 p. m. del Día de la Elección.

Tweet

EXHIBIT D

From: [Powell, Pamela via PA County Election Directors](#)
To: [PA County Election Directors](#)
Subject: [PA County Election Directors] RE: [EXTERNAL]Naked Ballots & No Signature on Declaration Envelope
Date: Tuesday, October 6, 2020 4:29:33 PM

I thought DOS stated something somewhere that we weren't supposed to contact voters regarding the mail-ins/absentees? Anyone else vaguely remembering this?

Kind Regards,

Pam

*Pamela Powell
Director of Elections & Voter Registration
Mifflin County
20 North Wayne Street
Lewistown, PA 17044
(717) 248-6571 ext. 5444*

Notice: This confidential message/attachment contains information for a specific individual(s) and purpose. Any inappropriate use, distribution, or copying is prohibited. If received in error, please notify the sender and immediately delete the message. The Mifflin County Department of Elections and Voter Registration cannot provide legal, tax, or accounting advice. All candidates for public office should solicit advice from a licensed professional in the appropriate field in advance of statutory deadlines and before filing documents with this office. Filers are responsible for ensuring the correctness and completeness of all documents; the Mifflin County Department of Elections and Voter Registration is not responsible for errors and omissions.

From: Amy Cozze via PA County Election Directors
<paelectiondirectors+acozze_at_northamptoncounty.org@gaggle.email>
Sent: Tuesday, October 6, 2020 1:22 PM
To: 'PA County Election Directors' <paelectiondirectors@gaggle.email>
Subject: [PA County Election Directors] RE: [EXTERNAL]Naked Ballots & No Signature on Declaration Envelope

EXTERNAL EMAIL: Please use caution when opening attachments and links.

Has anyone attempted to rectify ballots returned that obviously don't have the secrecy envelope included? You can see the timing marks through the return envelope. Our solicitor is of the opinion that we are prohibited from contacting voters to cure this situation – but that being said I have several hundred ballots here that are “naked” and the number is growing....

From: Clearfield County Election Office via PA County Election Directors
<paelectiondirectors+elections_at_clearfieldco.org@gaggle.email>
Sent: Tuesday, October 6, 2020 12:57 PM
To: PA County Election Directors <paelectiondirectors@gaggle.email>

EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUTHANN BAUSCH, MARCIA DAY
DONDIEGO, JUDITH REED, RHODA
EMEFA AMEDEKU, DANIEL
STROHLER, SHARON STROHLER,
BERNARD BOAKYE BOATENG,
LORI RIEKER and LISA DANNER,

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF
ELECTIONS, NORTHAMPTON
COUNTY BOARD OF ELECTIONS
and LEIGH M. CHAPMAN,
in her capacity as Secretary of the
Commonwealth of Pennsylvania

Defendants.

JURY TRIAL DEMANDED

Civ. No. 5:22-cv-02111

**STIPULATED AGREEMENT BETWEEN AND AMONG PLAINTIFFS, RUTHANN
BAUSCH, MARCIA DAY DONDIEGO, JUDITH REED, DANIEL STROHLER,
SHARON STROHLER, BERNARD BOAKYE BOATENG AND LORI REIKER, AND
DEFENDANT, NORTHAMPTON COUNTY BOARD OF ELECTIONS**

AND NOW, come the Plaintiffs, Ruthann Bausch, Marcia Day Dondiego, Judith Reed Daniel Strohler, Sharon Strohler, Bernard Boakye Boateng, and Lori Reiker (“Northampton Plaintiffs”), by and through their attorneys Mobilio Wood, and the Defendant, Northampton County Board of Elections, by and through its attorney Richard Eugene Santee, and hereby submit the instant Stipulated Agreement and aver as follows:

1. Plaintiffs Ruthann Bausch, Marcia Day Dondiego, and Judith Reed are among a group of 23 Democratic Northampton County voters in State Senate District 14 whose timely-submitted mail-in ballots for the May 17, 2022, election will not count because they were not placed in a “secrecy envelope” before being sent to the Election Boards.

2. Plaintiffs Daniel Strohler, Sharon Strohler, Bernard Boakye Boateng, and Lori Reiker, are among a group of 25 Democratic Northampton County voters in State Senate District 14 whose timely-mailed ballots for the May 17, 2022, election will not count because said ballots were mailed to, but not received by the Northampton County Election Office on or before May 17, 2022, at 8:00 p.m.

3. On May 31, 2022, the Northampton Plaintiffs filed a Complaint in the Eastern District of Pennsylvania alleging that the aforementioned impediments to the counting of their votes was unlawful.

4. The Northampton County Board of Elections disputes Northampton Plaintiffs’ assertions with respect to the application of the law referenced in Plaintiffs’ Complaint.

5. Although the parties disagree on the application of the law in this matter, the parties agree that voting is a fundamental right which all parties strive to safeguard.

6. In furtherance of that objective, and as a full and final resolution of the aforementioned matter, the parties agree as follows:

a. Plaintiffs will immediately seek the dismissal, with prejudice, of the instant litigation.

b. Defendant, Northampton County Board of Elections, will, from this date forward:

- a. Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;

7. The parties also agree that is in the best interests of the Northampton County Board of Elections and Northampton County voters to provide the opportunity of notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as “Naked Ballots”).

8. In furtherance of that objective, the Northampton County Board of Elections shall do the following:

- a. During the pre-canvass which begins on or after 7 a.m. on Election Day, the County shall provide the names of all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters; and
- b. Explore changing the color of the secrecy envelope to something more conspicuous than white, so that the secrecy envelope stands out to the voter and is easily discernable from other materials provided to them with their mail-in ballot.

Date: 6/15/22

Matthew Mobilio

Matthew Mobilio, Esquire
Attorney for Plaintiff

Date: 6/15/22

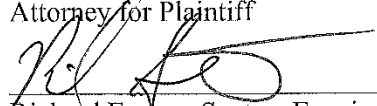

Richard Eugene Santee, Esquire
Assistant Solicitor, Office of the Solicitor
Attorney for Northampton County
Board of Elections

EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUTHANN BAUSCH, MARCIA DAY
DONDIEGO, JUDITH REED, RHODA
EMEFA AMEDEKU, DANIEL
STROHLER, SHARON STROHLER,
BERNARD BOAKYE BOATENG,
LORI RIEKER and LISA DANNER,

Plaintiffs,

v.

LEHIGH COUNTY BOARD OF
ELECTIONS, NORTHAMPTON
COUNTY BOARD OF ELECTIONS
and LEIGH M. CHAPMAN,
in her capacity as Secretary of the
Commonwealth of Pennsylvania

Defendants.

JURY TRIAL DEMANDED

Civ. No. 5:22-cv-02111

**STIPULATED AGREEMENT BETWEEN AND AMONG PLAINTIFFS, RHODA
EMEFA AMEDEKU AND LISA DANNER, AND DEFENDANT, LEHIGH COUNTY
BOARD OF ELECTIONS**

AND NOW, come the Plaintiffs, Rhoda Emefa Amedeku and Lisa Danner (“Lehigh Plaintiffs”), by and through their attorneys Mobilio Wood, and the Defendant, Lehigh County Board of Elections, by and through its attorneys Sarah Murray and Lucas Repka, and hereby submit the instant Stipulated Agreement and aver as follows:

1. Plaintiff Rhoda Emefa Amedeku is among a group of 94 Democratic Lehigh County voters in State Senate District 14 whose timely-submitted mail-in ballots for the May 17,

2022, election will not count because it was not placed in a “secrecy envelope” before being sent to the Election Board.

2. Plaintiff Lisa Danner is among a group of 118 Democratic Lehigh County voters in State Senate District 14 whose mailed ballots for the May 17, 2022, election will not count because said ballots were mailed to the Lehigh County Election Office on or before May 17, 2022, but were not received by the Lehigh County Election Office on or before May 17, 2022, at 8:00 p.m.

3. On May 31, 2022, the Lehigh Plaintiffs filed a Complaint in the Eastern District of Pennsylvania alleging that the aforementioned impediments to the counting of their votes was unlawful.

4. Although the parties disagree on the application of the law aforesaid, the parties agree that a more robust voter education system should be established to ensure that Lehigh County voters have every opportunity to have their votes counted.

5. In furtherance of that objective, and as a full and final resolution of the aforementioned matter, the parties agree as follows:

a. Plaintiffs will immediately seek the dismissal, with prejudice, of the instant litigation.

b. Defendant, Lehigh County Board of Elections, will, from this date

forward:

a. Include an insert with all outgoing mail-in ballot applications and absentee ballot applications (including permanent voter mailings) emphasizing the importance of providing contact information on the ballot application; and

- b. Include messaging on the Lehigh County Voter Registration website emphasizing the importance of providing contact information on the ballot application.

6. The parties also agree that is in the best interests of the Lehigh County Board of Elections and Lehigh County voters to provide notice to a voter who returns a mail-in ballot or an absentee ballot without a secrecy envelope (known as “Naked Ballots”).

7. In furtherance of that objective, the Lehigh County Voter Registration Office shall do the following:

- a. During the pre-canvass, which begins on or after 7:00 am on Election Day, the Office shall notify all voters whose Naked Ballots are discovered prior to 8:00 pm on Election Day and/or provide the names of such voters to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the voters can be notified;
- b. Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;
- c. Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election; and

- d. Explore in good faith changing the color of the secrecy envelope to something more conspicuous than white, so that the secrecy envelope stands out to the voter and is easily discernable from other materials provided to them with their mail-in or absentee ballot.

Date: June 15, 2022

By: 
Matthew Mobilio, Esquire
Attorney for Plaintiffs

Date: June 15, 2022

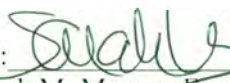
By: 
Sarah M. Murray, Esquire
Deputy County Solicitor
Attorney for Defendant Lehigh
County Board of Elections

EXHIBIT G

From: [Jean Byers via PA County Election Directors](#)
To: [PA County Election Directors](#)
Subject: [PA County Election Directors] Naked Ballots & No Signature on Declaration Envelope
Date: Tuesday, October 6, 2020 12:30:59 PM

I know that voters are not entitled to notice and an opportunity to cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected. Thanks!

Jean C. Byers
Deputy Chief Clerk & Open Records Officer
Phone: (717) 261-3810
Fax: (717) 267-3438

Sent via the paelectiondirectors@gaggle.email email group by
jcbyers@franklincountypa.gov - [reply to sender](#)

[My Settings](#) | [Unsubscribe](#)

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: _____



Angela Alleman, Executive Director
Republican Party of Pennsylvania

VERIFICATION


I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 

Philip Valenziano
RNC Regional Political Director

VERIFICATION

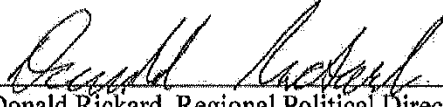
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By: 

Stu Sandler, Political Director
National Republican Senatorial Committee


VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Donald Rickard, Regional Political Director
National Republican Congressional Committee

VERIFICATION

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By: 
Debra A. Biro

VERIFICATION

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By: _____

Connor R. Gallagher

VERIFICATION

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By: David M Ball
David Ball

VERIFICATION


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By: Gwendolyn Mae Deluea
Gwendolyn Mae Deluea

VERIFICATION

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By: _____


James D. Bee

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Jesse D. Daniel


VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: Linda S. Kozlovich
Linda S. Kozlovich

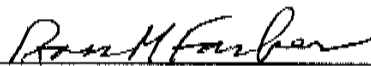
VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By:  _____
Lynn Marie Kalcevic

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Ross M. Farber

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: _____

S. Michael Streib

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 

Valerie Siciliano-Biancaniello

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: _____

William P. Kozlovich

**CERTIFICATION OF COMPLIANCE
WITH CASE RECORDS PUBLIC ACCESS POLICY**

I, Kathleen A. Gallagher, 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: September 1, 2022

GALLAGHER GIANCOLA LLC

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Counsel for Petitioner

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 447 MD 2022</p>
--	------------------------

**PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM
OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532**

Petitioners, by counsel, hereby move pursuant to Rule 1532 of the Pennsylvania Rules of Appellate Procedure for special relief in the form of a preliminary injunction enjoining Respondent County Boards of Elections (“Boards”) from implementing procedures to notify voters that their mail-in or absentee ballots fail to comply with the Election Code’s signature and secrecy ballot requirements and giving such voters an opportunity to “cure” noncompliant ballots (“cure procedures”), except where expressly authorized under the Election Code, until resolution of this litigation. In support of their application, Petitioners hereby incorporate the Petition for Review filed in this action on September 1, 2022, as well as the memorandum of law filed in support of this Application. Petitioners further state the following:

BACKGROUND

1. As set forth more fully in the Petition for review filed on September 1, 2022, the General Assembly has authorized cure procedures in only a narrow circumstance: specifically, “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” 25 P.S. § 3146.8(h). In that circumstance, the voter may cure only the lack of proof of identification, not any other defect. *Id.* Nonetheless, some Boards have, on their own initiative, implemented cure procedures of their own design in a broad range of circumstances not authorized by the General Assembly, including but not limited to voters’ failure to adhere to the Election Code’s requirement to place such ballots in a secrecy envelope and filling out and signing the “declaration of the elector” form on the outer envelope.

2. These Boards’ actions violate the clear and unanimous holding of the Pennsylvania Supreme Court just two years ago that “the Election Code provides procedures for casting and counting a vote by mail” but does not provide for cure procedures for voters who fail to comply with the requirements for voting by mail or absentee. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020).

3. The Pennsylvania Supreme Court expressly held that “[t]o the extent that a voter is at risk of having his or her ballot rejected” due to failure to comply with the Election Code’s signature and secrecy ballot requirements for mail-in and

absentee ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.*

4. The Supreme Court “express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.” *Id.*

5. The Legislature did, in fact, pass a bill to implement a broad cure procedure, but Governor Wolf vetoed it.

6. Those Boards which have implemented cure procedures not provided in the Election Code have exceeded their statutory authority and have usurped the exclusive legislative power of the General Assembly.

7. The selective and varying adoption of cure procedures by some Boards has also created an unequal playing field. Depending on the county in which voters reside, some receive notice and an opportunity to cure a ballot defect while others receive no such notice of or opportunity to cure an identical ballot defect. Moreover, the Boards that have adopted cure procedures on their own initiative have not uniformly adopted the *same* procedure. The result is a lack of statewide uniformity in both the existence and—where they do exist—the particulars of cure procedures.

8. The Court should enjoin the unauthorized cure procedures implemented by those Boards which have elected to do so not only because the current arrangement treats voters residing in different counties unequally, but also because the lack of transparency by some Boards regarding the use of cure procedures has created uncertainty regarding which Boards have implemented cure procedures and, for those Boards that have done so, the particulars of those procedures.

INJUNCTIVE RELIEF

9. In this action, Petitioners request that this Court enter an order declaring that Boards are prohibited 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 developing and implementing cure procedures and the Acting Secretary from taking any action inconsistent with that injunction.

10. Pursuant to Pa. R.A.P. 1532(a), the Court may order special relief, including a preliminary or special injunction "in the interest of justice and consistent with the usages and principles of law." The standard for obtaining a preliminary injunction under this rule is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 439 (Pa. 1982); *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. 2004). Preliminary injunctive

relief may be granted at any time following the filing of a Petition for Review. *See* Pa. R.A.P. 1532(a).

11. A special injunction is warranted where: (1) it is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages, (2) greater injury would result from refusing than from granting the injunction and the issuance of an injunction will not substantively harm other interested parties in the proceedings, (3) the injunction would restore their status quo ante, (4) the movant is likely to succeed on the merits, (5) the requested injunction is reasonably suited to abate the offending activity, and (6) the injunction will not adversely affect the public interest. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

12. All of these factors are satisfied here.

13. ***First***, an injunction is needed to prevent immediate and irreparable harm. Absent a preliminary injunction, some of the Boards will continue developing and implementing cure procedures in all elections, including the General Election scheduled to take place on November 8, 2022. Indeed, as referenced in the Petition for Review, the Northampton and Lehigh County Boards agreed as recently as June 15, 2022 to begin implementing cure procedures for upcoming elections. Upon information and belief, other Boards intend to implement cure procedures for the upcoming General Election. None of these cure procedures are authorized under the

Election Code and many of these cure procedures are not publicly disclosed and differ from one another. Unlawful action by a Board “per se constitutes immediate and irreparable harm.” *Hempfield Sch. Dist. v. Election Bd. of Lancaster County*, 574 A.2d 1190, 1193 (Pa. Commw. 1990). The Voter Petitioners thus suffer the risk of having votes being treated unequally, in violation of Article VII, Section 6 of the Pennsylvania Constitution, while the Committee Petitioners are unable to properly educate their members regarding the rules applicable to mail-in and absentee ballots. The continued practice of some Boards to implement cure procedures—despite the Election Code’s failure to authorize one, the Pennsylvania Supreme Court’s confirmation that such procedures must come from the Legislature, and Governor Wolf’s veto of the Legislature’s effort to enact one—also would cause irreparable harm to the separation of powers and the rule of law.

Second, greater injury would result from refusing than from granting the injunction. Absent an injunction, the Boards will collectively engage in a mishmash of cure procedures, allowing some voters to cure signature or secrecy envelope defects for some Pennsylvania voters (in violation of the Election Code) while preventing others from doing so. A violation of law cannot be considered a benefit to the public. *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980). The Committee Petitioners will likewise be unable to properly educate their members regarding the exact rules applicable to mail-in and absentee ballot voters. In contrast,

by granting the requested injunction, the Court will affirm the Pennsylvania Supreme Court's prior holding in *Pa. Democratic Party* that the Boards cannot implement cure procedures that are not set forth in the Election Code and maintain compliance with the Pennsylvania Constitution. See PA. CONST. art. VII, § 6 (requiring that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State”).

14. **Third**, Petitioners' requested injunction seeks only to preserve the status quo. See *City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. 2003) (granting preliminary injunctive relief and noting that “the public interest lies in favor of maintaining the status quo” pending resolution of the case's merits). Here, Petitioners merely seek to preserve the state of the law established by the Pennsylvania Supreme Court just two years ago in *Pa. Democratic Party*: with an explicit recognition that only the Legislature can authorize a cure procedure to address voters' failure to comply with the Election Code's signature and secrecy ballot requirements.

15. **Fourth**, Petitioners are likely to prevail on the merits of the underlying claims in this case. As set forth more fully in the brief accompanying this application, the cure procedures implemented by some, but not all, of the Boards run afoul of both the Election Code and the Supreme Court's holding in *Pa. Democratic Party*. Too, the Boards' implementation of cure procedures not crafted by the Legislature

violates the Elections Clause of the United States Constitution; only Congress and the Legislature may prescribe the “manner” of holding federal elections. *See* U.S. CONST. art. I, § 4, cl. 1. Boards’ implementation of cure procedures for mail-in and absentee ballots in federal elections infringes on the Legislature’s exclusive authority. *See Smiley v. Holm*, 285 U.S. 355, 373 (1982).

16. ***Fifth***, the requested injunction is reasonably suited to abate the offending activity. The relief sought by the Petitioners is narrowly tailored. Petitioners seek only to enforce the Pennsylvania Supreme Court’s holding that the Election Code fails to provide a cure procedure for mail-in and absentee ballots and that only the Legislature—not the Courts or any other entity, including the Boards—can enact one. The request has no impact on the overwhelming majority of mail-in and absentee ballots which are properly cast.

17. ***Sixth***, the requested injunction will not adversely affect the public interest. The Pennsylvania Supreme Court has already held that the “task of effectuating” the Pennsylvania Constitution’s mandate that elections be free and equal is the province of the Legislature. *Pa. Democratic Party*, 238 A.3d at 374. The public interest is best served by a consistent application of the rule of law and the maintenance of the separation of powers. Conversely, the public interest is not served by allowing Boards to act as quasi-Legislatures, resolving “the open policy questions” attendant with the development of cure procedures on their own. *Id.* A

ruling to the contrary would only further diminish Pennsylvania voters' confidence in the election system as a result of the secretive and inconsistent application of election procedures across the state.

WHEREFORE, for the above reasons and those set forth in the Petition for Review and the accompanying memorandum of law in support, Petitioners respectfully request that this Honorable Court grant their Application for Special Relief in the Nature of a Preliminary Injunction and enter an order prohibiting the Respondent Boards from developing and implementing cure procedures and for the Acting Secretary to take no action inconsistent with such an order.

Respectfully submitted,


Dated: September 7, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher (PA #37950)
Russell D. Giancola (PA #200058)
GALLAGHER GIANCOLA LLC
436 Seventh Avenue, 31st Floor
Pittsburgh, PA 15219
Phone: (412) 717-1900
kag@glawfirm.com
rdg@glawfirm.com

Thomas W. King, III (PA #21580)
Thomas E. Breth (PA #66350)
DILLON, McCANDLESS, KING,
COULTER & GRAHAM, LLP
128 W. Cunningham St.
Butler, PA 16001
Phone: (724) 283.2200
tking@dmkcg.com
tbreth@dmkcg.com
Counsel for Petitioners

VERIFICATION


I hereby aver that the statements of fact contained in the attached **Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 

Angela Alleman, Executive Director
Republican Party of Pennsylvania

VERIFICATION

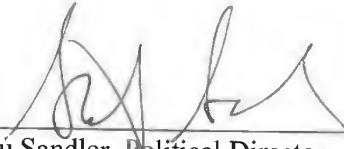
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By:  _____
Philip Valenziano, Regional Political Director
Republican National Committee

VERIFICATION

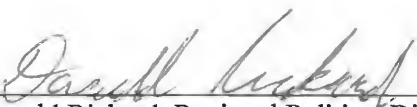
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By: _____


Stu Sandler, Political Director
National Republican Senatorial Committee

VERIFICATION

I hereby aver that the statements of fact contained in the attached **Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532** are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

By: 
Donald Rickard, Regional Political Director
National Republican Congressional Committee

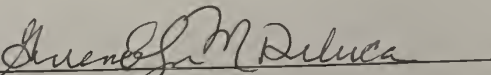
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By: David M Ball
David Ball

VERIFICATION

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By: 
Gwendolyn Mae Deluca

VERIFICATION

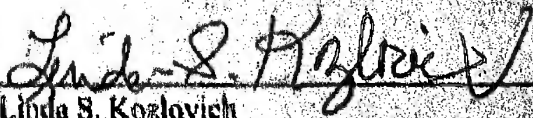
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By: _____

Jesse D. Daniel

VERIFICATION

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By: 
Linda S. Kozlovich

VERIFICATION

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By: Ross M. Farber
Ross M. Farber

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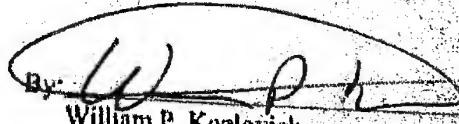
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By: 

Vallerie Siciliano-Biancaniello

VERIFICATION

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By: 
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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.

GALLAGHER GIANCOLA LLC

Dated: September 7, 2022

/s/ Kathleen A. Gallagher

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PROOF OF SERVICE

I do hereby certify that a true and correct copy of the **Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under PA. R.A.P.**

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i> , Petitioners, v. LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i> , Respondents.	No. 447 MD 2022
--	-----------------

**ORDER GRANTING PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION
UNDER PA. R.A.P. 1532**

Upon consideration of Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532, and finding that good cause exists for the same, it is hereby ORDERED that said Application is GRANTED.

The Respondent Boards of Elections shall not develop or implement cure procedures to address voters' failures to comply with the Election Code's signature and secrecy ballot requirements for mail-in and absentee ballots. The Acting Secretary is ordered to take no action inconsistent with this Court's Order.

BY THE COURT:

_____, J.

Received 9/7/2022 9:30:48 PM Commonwealth Court of Pennsylvania

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447 MD 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 447 MD 2022</p>
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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS'
APPLICATION FOR SPECIAL RELIEF IN THE FORM
OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532**

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INTRODUCTION

Less than two years ago, the Pennsylvania Supreme Court unanimously held that “the Election Code provides procedures for casting and counting a vote by mail” but does not provide for a notice and opportunity to cure procedure (“cure procedure”) for a voter who fails to comply with the signature and secrecy envelope requirements for voting by mail-in or absentee ballot. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). The Supreme Court expressly stated that “[t]o the extent that a voter is at risk of having his or her ballot rejected” due to failure to comply with the Election Code’s signature and secrecy ballot requirements for mail-in and absentee ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.* The Supreme Court “express[ed] this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.” *Id.*

Last year, the Legislature passed a bill to implement a broader cure procedure, but Governor Wolf vetoed it. Thus, under the Election Code, Pennsylvania finds itself in the same position it was two years ago: without a cure procedure to address

a voter's failure to comply with the Election Code's signature and secrecy envelope requirements.

Nonetheless, several of the Respondent County Boards of Elections ("Boards") have begun or continue to implement cure procedures of their own making for signature and secrecy-envelope defects. This is unlawful. The Boards are not free to act as quasi-legislatures, to make policy decisions and fashion cure procedures of their own design that lack uniformity across the Commonwealth. Article VII, Section 6 of the Pennsylvania Constitution requires statewide uniformity for all laws regulating the holding of elections, and the Boards' implementation of cure procedures constitutes a plain violation of the Elections Clause of the U.S. Constitution.

Petitioners support and seek to uphold free and fair elections on behalf of all Pennsylvanians. Accordingly, they have brought this action to ensure that Respondents adhere to state law and the Supreme Court's holding for the upcoming general election and beyond.

STATEMENT OF THE CASE

Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope ("secrecy envelope"), (2) place the secrecy envelope inside a second envelope, which is marked with a "declaration of the elector" form, (3) "fill out" and "sign the

declaration printed on such envelope,” and (4) return the ballot by 8:00 p.m. on election day. 25 P.S. § 3146.6(a); § 3150.16(a). If a voter fails to comply with these requirements, the voter’s absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8; *Pa. Democratic Party*, 238 A.3d 345.

The General Assembly has addressed cure procedures and has provided only a limited opportunity for voters to cure a non-compliant mail-in or absentee ballot. In particular, the Election Code allows curing in only one circumstance: “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” *See* 25 P.S. § 3146.8(h). This procedure provides that if proof of a voter’s identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2). No other cure procedure exists in the Election Code.

Just two years ago, the Pennsylvania Democratic Party sought an injunction to *require* Boards of Elections to contact electors whose mail-in or absentee ballots contained facial defects and to provide those electors with an opportunity to cure the same. *See Pa. Democratic Party*, 238 A.3d 345. There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Court’s “broad authority to craft meaningful remedies,” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Court should require the Boards of Elections to implement a “notice and opportunity to cure

procedure” for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

The Secretary of the Commonwealth *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that “so long as a voter follows the requisite voting procedures, he or she ‘will have equally effective power to select the representative of his or her choice.’” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Secretary noted that “logistical policy decisions” implicated in a cure procedure are more properly addressed by the Legislature, not the courts. *Id.*

The Supreme Court unanimously agreed with the Secretary. It held that “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Id.* It further noted that “although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the ‘notice and opportunity to cure’ procedure sought by the Petitioner.” *Id.*

Importantly, the Supreme Court further agreed that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk [of a voter having his or her ballot rejected due to potentially curable errors] is one best suited for the Legislature.” *Id.* It reasoned that the Legislature was best positioned to resolve the “open policy questions” attendant with a notice and opportunity to cure procedure,

including “what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.*

After *Pa. Democratic Party* was decided, the Legislature considered and even passed legislation requiring a cure procedure for non-compliant mail-in and absentee ballots. *See* House Bill 1300, Printer’s Number 1869, § 1308(g)(2)(iv), (v) (2021). But Governor Wolf vetoed that legislation. As a result, the Election Code remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

The Secretary of the Commonwealth has acknowledged that Pennsylvania law does not provide cure procedures for signature and secrecy envelope requirements for mail-in and absentee ballots. As stated in the Secretary’s “Frequently Asked Questions”:

How do I know if my ballot was accepted or counted?

Under current Pennsylvania law, your mail-in ballot can’t be opened until Election Day. Therefore, **if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election.** Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don’t have to worry.

Pennsylvania Department of State, *Mail and Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>

(emphasis added).

Boards are not free to make up their own rules when it comes to the administration of elections or the creation and implementation of cure procedures. Under the Election Code, the Boards “shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act.” 25 P.S. § 2642. Although Section 2642 enumerates several duties the Boards must perform, *see id.* § 2642(a)–(p), notably absent from the list is anything that could authorize the development and implementation of their own bespoke cure procedures that would necessarily differ from board to board.

In a separate matter regarding election administration, the Secretary took that the position that the Election Code’s failure to specifically authorize Boards to take certain action precluded them from doing so. In advance of the 2020 general election, the Secretary had issued guidance that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *See* Pennsylvania Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (Sept. 11, 2020), available at [www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%](http://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes)

[20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf](#).

This guidance was challenged in both state and federal court; in both cases, the guidance was upheld. In the federal district court action, the court observed that “nowhere does the plain language of the statute require signature comparison as part of the verification analysis of [absentee or mail-in] ballots.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 399 (W.D. Pa. 2020). In the state court action, the Pennsylvania followed the same reasoning, noting that “[i]t is a well established principle of statutory interpretation that we ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020).

Nevertheless, publicly available information and investigation have revealed that some Boards allow voters to “cure” noncompliant ballots, following protocols of their own non-uniform design. For example, in 2020, during the course of an appeal regarding its response to a Right to Know Law request, the Bucks County Board of Elections admitted that it implemented the following “cure” protocol which included sending postcards to voters with missing required information and allowing voters to sign and date their ballot envelope:

Generally speaking, we receive mail-in/absentee ballots during the election season, for those missing a signature or date, we allow them to be “cured.” BOE sends a postcard out to voters on ballots needing to be cured. Last year’s version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day

to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received at 8 PM on election day are not accepted.

See Email from Daniel D. Grieser, dated August 1, 2022, and a copy of the postcard used by Bucks County is attached to the Petition for Review as **Exhibit A**. Bucks County also contacted both political parties and forwarded the list of voters it had sent the postcard to in the event either party wished to reach out to the voters in order to assist them in curing their ballot.

Similarly, the Montgomery County Board of Elections implemented its own protocol to contact voters and allow for them to cure ballots in the 2020 General Election. Its protocol included emailing certain voters to alert them of the defect or defects with their absentee or mail-in ballot. Montgomery County Board of Elections workers also attempted to speak to such voters utilizing a script. The Montgomery County Board then afforded such voters the opportunities that included but were not limited to: coming to the Board of Elections' office to "correct an incomplete declaration"; canceling their absentee or mail-in ballot and replacing it in person; or canceling their absentee or mail-in ballot and replacing it by email using a form on the Montgomery County Board of Elections website. *See* Montgomery County Right to Know Law Response, attached to the Petition for Review as **Exhibit B** (October 27, 2020 email from Sarah Batipps (pp. 24-25)).

Other counties have previously opined that curing is not permissible under the Election Code, but nevertheless have agreed to begin implementing cure procedures in future elections. For example, the Northampton County Board stated that its solicitor had opined that “we are prohibited from contacting voters: to cure defective ballots, such as those which are missing the secrecy envelope.” *See Exhibit “D”* attached to the Application (October 6, 2020 Amy Cozze email, p. 35). But in conjunction with a stipulated settlement agreement reached in *Bausch v. Lehigh County Board of Elections, et al.* in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 5:22-cv-02111, the Northampton County Board of Elections agreed that for future elections, it would:

- Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;
- Provide notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as “Naked Ballots”); and
- Provide the names of all voters whose Naked Ballots are discovered prior to 8:00 p.m. on Election Day to the party and/or candidate representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters.

See Northampton County Board of Elections Stipulated Settlement Agreement, attached to the Petition for Review as **Exhibit E**. The Lehigh County Board entered into a similar agreement, which included additional obligations:

- Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;
- Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election.

See Lehigh County Board of Elections Stipulated Settlement Agreement, attached to the Application as **Exhibit F**.

The Acting Secretary was a party in the *Bausch* litigation, and upon information and belief, was made aware of the Stipulated Settlement Agreements involving the Northampton and Lehigh Boards, but has taken no action to stop the unauthorized cure procedures. The Stipulated Settlement Agreements involving the Northampton and Lehigh County Boards run afoul not only of Pennsylvania law, but even the Secretary's simultaneous acknowledgment that "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election."

Pennsylvania Department of State, *Mail and Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>.

Meanwhile, other Boards do not allow for any notice and opportunity to cure non-compliant ballots. Some Boards are transparent and explicit in their adherence to the Election Code, the Supreme Court's holding in *Pa. Democratic Party*, and the

Secretary's guidance. For example, the Lancaster Board provides on its website, stating in relevant part:

Once a ballot has been recorded as received by the County, there is not a legal procedure for the County to return it to the voter or for the voter to alter it for any reason.

Lancaster County, *Frequently Asked Questions About Mail-in Ballots*, at <https://www.co.lancaster.pa.us/1351/FAQs-of-MAIL-IN-BALLOTS>.

Communications among the Directors of the Boards of Elections reveal that several other Boards have not provided any opportunity for voters to cure noncompliant absentee or mail-in ballots. For example, the Executive Director of the Franklin County Board of Elections noted in an email:

I know that voters are not entitled to notice and an opportunity cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected.

See **Exhibit G** (October 6, 2020 email from Jean C. Byers, p. 34) attached to the Petition for Review.

Many other Boards have followed the Election Code and refrained from implementing cure procedures.

The result of this county-by-county patchwork is that whether voters who cast a non-compliant mail-in ballot will be afforded an opportunity to cure the defect depends entirely on where they reside. In other words, mail-in and absentee ballots

with identical defects are receiving unequal treatment based solely on the voter's residency. Even worse, the likelihood of the voter receiving notice of his or her non-compliant ballot depends not only on the voter's county of residence, but also whether that voter is registered with a political party, when the ballot is returned to the Board, and whether "time allows" for some Boards to provide such notice. Further, the permissible methods of cure vary even across those counties which do allow for curing. Indeed, it is unclear to what extent those Boards which allow for curing contact all voters who, under their cure procedures, would be permitted to cure their ballots.

The result is a lack of transparency, a lack of uniformity in the holding of elections, *see* PA. CONST. art. VII, § 6, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, the usurpation by some Boards of the Legislature's exclusive role to regulate the manner of elections, and an erosion of public trust and confidence in the integrity of Pennsylvania's elections.

LEGAL STANDARD

The Court may order a preliminary injunction or special injunction "in the interest of justice and consistent with the usages and principles of law." Pa. R.A.P. 1532(a). 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." *Chipman v. Avon Grove Sch. Dist.*, 841 A.2d 1098, 1101 (Pa.

Commw. 2004). The standard for obtaining a preliminary injunction under Rule 1532(a) of the Pennsylvania Rules of Appellate Procedure are the same as that for obtaining a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *See Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982); *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. 2004). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See Pa. R.A.P. 1532(a)*.

A special injunction is warranted where: (1) it is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages, (2) greater injury would result from refusing than from granting the injunction and the issuance of an injunction will not substantively harm other interested parties in the proceedings, (3) the injunction would restore their status quo ante, (4) the movant is likely to succeed on the merits, (5) the requested injunction is reasonably suited to abate the offending activity, and (6) the injunction will not adversely affect the public interest. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

All of these factors are satisfied here.

ARGUMENT

I. A Preliminary Injunction Is Necessary To Prevent Immediate And Irreparable Harm.

A preliminary injunction is necessary to prevent immediate and irreparable harm to the uniform administration of elections in Pennsylvania. Absent a preliminary injunction, some Boards will continue developing and implementing in secrecy disparate and unlawful cure procedures in all elections, including the General Election scheduled to take place on November 8, 2022.

Unlawful action by a County Board of Elections “per se constitutes immediate and irreparable harm.” *Hempfield Sch. Dist. v. Election Bd. of Lancaster County*, 574 A.2d 1190, 1193 (Pa. Commw. 1990). “Where a statute proscribes certain activity, all that need be done is for the court to make a finding that the illegal activity occurred.” *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980). A “violation of law” cannot be considered a benefit to the public. *Id.* (citing *Pa. Pub. Utility Com. v. Israel*, 52 A.2d 317, 321 (Pa. 1947)). “For one to continue such unlawful conduct constitutes irreparable injury.” *Israel*, 52 A.2d at 321.

In *Hempfield School District*, a school board filed an action requesting that the county board of elections be enjoined from placing a non-binding referendum question on the primary ballot. The trial court dismissed the action, but this Court reversed, holding that the Board lacked the authority under the Election Code to place the referendum question on the ballot. This Court held “[i]t is *a priori* that a

governmental body such as an election board has only those powers expressly granted to it by the legislature.” *Hempfield Sch. Dist.*, 574 A.2d at 1191. It held that Act 34, 24 P.S. § 7-701.1 required the board of school directors, not the board of elections, to obtain the consent of the electorate by referendum or public hearing prior to the construction or leasing of a new school building. The Court thus found that the board of elections’ placement of a non-binding referendum on the primary was an unlawful action which “per se constitutes immediate and irreparable harm.” *Id.* at 1193.

Here, the Pennsylvania Supreme Court has already held that a cure procedure to address signature and secrecy ballot defects in mail-in and absentee ballots must come from the Legislature. *See Pa. Democratic Party*, 238 A.3d at 373. Thus, the continued implementation of such cure procedures by Boards constitutes a “violation of law” which per se constitutes immediate and irreparable harm. Moreover, the disparate approaches taken by the Boards runs afoul of the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State.” PA. CONST. art. VII, § 6; *see also Kuznik v. Westmoreland County Bd. of Comm’rs*, 902 A.2d 476, 492 (Pa. 2006) (“[T]he Election Code, the Pennsylvania Constitution, and the testimony of experienced election officials contemplated a unitary system of voting in Pennsylvania”).

There is no question that per se immediate and irreparable harm will occur without a preliminary injunction. Voters can request mail-in and absentee ballots as early as 50 days before the general election, 25 P.S. §§ 3146.2a, 3150.12a; thus, voters can vote as early as September 19, 2022. Further, the Northampton and Lehigh County Boards agreed as recently as June 15, 2022 to begin implementing cure procedures for upcoming elections, including the 2022 general election. Other Boards have implemented cure procedures in past elections, and upon information and belief, plan to do so again for the upcoming general election.

None of these cure procedures are authorized under the Election Code and many of these cure procedures are not publicly disclosed and differ from one another, and quite possibly even within a single county. The Voter Petitioners thus suffer the risk of having votes being treated unequally, while the Committee Petitioners are unable to properly educate their members regarding the rules applicable to mail-in and absentee ballots. The continued practice of some Boards to implement cure procedures—despite the Election Code’s failure to authorize one, the Pennsylvania Supreme Court’s confirmation that such procedures must come from the Legislature, and Governor Wolf’s veto of the Legislature’s effort to enact one—also would cause irreparable harm to the separation of powers and the rule of law.

Moreover, the holding of an election in a manner that violates applicable election laws constitutes irreparable harm to voters. *See United States v. Berks County*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (collecting cases which held that the holding of an election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters). Voters denied equal access to the electoral process cannot collect money damages after trial. *Id.*

Because (1) the Pennsylvania Supreme Court has already held that all cure procedures for defective mail-in and absentee ballots must come from the Legislature, (2) the Legislature's effort to create such a cure procedure was vetoed by Governor Wolf, (3) a violation of election law constitutes immediate and irreparable harm per se, and (4) no adequate damages remedy exists, a preliminary injunction is necessary to prevent the immediate and irreparable harm caused by Boards failing to follow the Pennsylvania Constitution, the Election Code, and the Pennsylvania Supreme Court's holding in *Pa. Democratic Party*.

II. Greater Injury Would Result from Refusing Than from Granting the Injunction.

An injunction will prevent the disparate treatment of non-compliant mail-in and absentee ballots throughout the Commonwealth, while at the same time will eliminate uncertainty regarding how mail-in and absentee ballots will be counted. Absent an injunction, the Boards will collectively engage in a mishmash of cure procedures, allowing some voters to cure signature or secrecy ballot envelope

defects (in violation of the Election Code) while preventing others—especially those not registered with an particular political party—from doing so.

As noted above, the unlawful act by a Board constitutes per se immediate and irreparable harm. *See Hempfield Sch. Dist.*, 574 A.2d at 1191. A violation of law cannot be considered a benefit to the public. *Coward*, 414 A.2d at 98 (citing *Israel*, 52 A.2d at 321).

Thus, the second prerequisite for a preliminary injunction is easily satisfied: the refusal to grant a preliminary injunction will result in further unlawful activity, which constitutes immediate and irreparable injury per se. As the continued unlawful activity cannot be considered a benefit to the public, the need for a preliminary injunction is manifest.

If the Boards are not enjoined from implementing cure procedures of their own making, the Voter Petitioners thus suffer the risk of having votes being treated unequally based on their county of residence; effectively, their validly-cast votes will be diluted by the counting of unlawfully “cured” ballots that failed to meet the Election Code’s minimal criteria. The Committee Petitioners will likewise be unable to properly educate their members regarding the exact rules applicable to mail-in and absentee ballot voters due to the fact that many of the Boards do not publicize whether they have implemented a cure procedure and if so, the particulars of same. In contrast, by granting the requested injunction, the Court will affirm the

Pennsylvania Supreme Court's prior holding in *Pa. Democratic Party* that the Boards cannot implement cure procedures that are not set forth in the Election Code and eliminate these harms to Petitioners.

III. The Requested Injunction Seeks Only to Preserve the Status Quo.

Petitioners' requested injunction seeks only to preserve the status quo as it existed prior to the wrongful (i.e., unauthorized) conduct. *See City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. 2003) (granting preliminary injunctive relief and noting that "the public interest lies in favor of maintaining the status quo" pending resolution of the case's merits).

"Courts have defined the term 'status quo ante' as 'the last peaceable and lawful uncontested status preceding the underlying controversy.'" *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Commw. 2011) (quoting *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002)). "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." *Allegheny Anesthesiology Assocs. v. Allegheny Gen. Hosp.*, 826 A.2d 886, 894 (Pa. Super. 2003). "Put another way, the grant of relief necessitates a change in status at the time a court grants injunctive relief, but the relief must not change the status that existed between the parties just before the conflict between them arose." *Hatfield Twp.*, 15 A.3d at 556 n.6.

To the extent Pennsylvania courts distinguish between mandatory injunctions—which command the performance of some positive act to preserve the status quo—and prohibitory injunctions, which enjoin the doing of an act that will change the status quo—the Court generally engages in greater scrutiny of mandatory injunctions. *See Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981); *accord Kessler v. Broder*, 851 A.2d 944, 947 (Pa. Super. 2004).

Here, Petitioners seek only a prohibitory injunction that would preserve the state of the law as set by the Election Code and as established by the Pennsylvania Supreme Court just two years ago in *Pa. Democratic Party*, with its explicit recognition that only the Legislature can authorize a cure procedure to address voters’ failure to comply with the Election Code’s signature and secrecy ballot requirements. Boards have never been permitted to develop and implement their own cure procedures with respect to mail-in and absentee ballots that do not satisfy the Election Code’s signature and secrecy envelope requirements; all such cure procedures are unlawful under the Election Code.

Thus, the status quo ante in this matter is the time when no such cure procedures existed. Petitioners’ application for preliminary injunction seeks to return to that status quo pending a final resolution of this litigation.

IV. Petitioners Are Likely to Prevail on the Merits.

Petitioners are likely to prevail on the merits of the underlying claims in this case. The cure procedures implemented by Boards run afoul of both the Election Code and the Supreme Court’s holding in *Pa. Democratic Party*. Moreover, the Boards’ implementation of cure procedures not crafted by the Legislature violates the Elections Clause of the United States Constitution, as only the Legislature or Congress may prescribe the “manner” of holding federal elections. *See* U.S. CONST. art. I, § 4, cl. 1. Boards’ implementation of cure procedures for mail-in and absentee ballots in federal elections infringes on the Legislature’s exclusive authority in this domain. *See Smiley v. Holm*, 285 U.S. 355, 373 (1982).

A. Boards Are Prohibited from Developing and Implementing Cure Procedures Not Expressly Created by the General Assembly.

1. The Supreme Court Has Already Held That the Decision to Provide a Cure Procedure Rests with the Legislature.

The Election Code does not set forth a procedure by which Boards are permitted to provide electors with notice and an opportunity to cure their mail-in or absentee ballots that fail to comply with the signature and secrecy envelope requirements set forth in 25 Pa. C.S. §§ 3146.6(a) or 3150.16(a).

Two years ago, the Pennsylvania Democratic Party tried to force the Secretary of the Commonwealth and all 67 Boards to require the Boards to contact voters whose mail-in or absentee ballots failed to comply the Election Code’s requirements

regarding signatures and secrecy envelopes. *Pa. Democratic Party*, 238 A.3d at 372. The Pennsylvania Democratic Party said this was required by the Free and Equal Elections Clause of the Pennsylvania Constitution, PA. CONST. art. I, § 5, and could be implemented through the Court’s “broad authority to craft meaningful remedies’ when necessary.” *Id.* at 373 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d at 737, 822 (Pa. 2018)).

The Supreme Court agreeing with the Secretary and soundly rejected the Pennsylvania Democratic Party’s contentions. It noted what was obvious from a plain reading of the Election Code: the Election Code “does not provide for [a] ‘notice and opportunity to cure’ procedure” outside narrow circumstances relating to voters providing proof of identification. *Id.* at 374. It further held that to the extent a voter is at risk for having his or her ballot rejected due to a failure to comply with the Election Code’s signature and secrecy ballot requirements, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.* This was so

particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.

Id.

2. The Legislature Has Not Enacted Any Cure Procedure Since *Pa. Democratic Party* Was Decided.

After *Pa. Democratic Party* was decided, the Legislature considered and even passed legislation requiring a cure procedure for non-compliant mail-in and absentee ballots. See House Bill 1300, Printer's Number 1869, § 1308(g)(2)(iv), (v) (2021). But Governor Wolf vetoed that legislation. As a result, the Election Code remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a legislatively proscribed cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

Thus, post-*Pa. Democratic Party*, the Election Code provides a cure procedure in only one circumstance: “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” See 25 P.S. § 3146.8(h). This procedure provides that if proof of a voter’s identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2). As was the case at the time *Pa. Democratic Party* was decided, no other cure procedure exists in the Election Code.

3. Boards Are Not Free to Create Their Own Cure Procedures.

In addition to squarely holding that the Boards are not required to implement cure procedures, *Pa. Democratic Party* also forecloses any argument that the Boards

are permitted to implement their own cure procedures. After all, it observed that any such procedures would reflect policy choices reserved by law to the Legislature. Boards simply do not have the authority under Pennsylvania law to craft and implement their own cure procedures.

Under the Election Code, the Boards “shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act.” 25 P.S. § 2642. Section 2642 enumerates several duties the Boards must perform. *See id.* § 2642(a)–(p). Notably absent from the list is anything that might authorize the development and implementation of cure procedures.

In fact, § 2642 makes clear that the Boards lack the authority to implement their own cure procedures that necessarily vary across and even within counties. For example, Boards are required to “instruct election officers in their duties ... and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted.” *Id.* § 2642(g) (emphasis added); *see also* PA. CONST. art. VII, § 6 (requiring that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State”).

Further, the limited rulemaking authority granted to the Boards does not extend to cure procedures. Rather, Boards are authorized only “[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.” *Id.* § 2642(f); *accord PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) “extends only to the promulgation of rules that are ‘not inconsistent with law.’”); *Hempfield Sch. Dist.*, 574 A.2d at 1191 (“It is *a priori* that a governmental body such as an election board has only those powers expressly granted to it by the legislature.”).

Cure procedures adopted by Boards are “inconsistent with law” because the Election Code spells out the limited availability of such procedures and does not authorize Boards to expand them. *See, e.g., Pa. Democratic Party*, 238 A.3d at 374. “It is a well established principle of statutory interpretation that [the courts] ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020). Especially where the Election Code contemplates a “unitary system of voting in Pennsylvania” in keeping with the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State,” Boards simply cannot be permitted to decide whether and how to implement their own cure procedures. *see Kuznik v. Westmoreland County Bd. of Comm’rs*, 902 A.2d 476, 492 (Pa. 2006); *see also* PA. CONST. art. VII, § 6.

The Election Code’s provision of cure procedures for some matters—namely, lack of proof of identification—but not for others, such as a voter’s failure to comply with signature and secrecy envelope requirements, cannot be assumed to be accidental. Nor can it be interpreted as giving the Boards the discretion to create their own cure procedures. Accordingly, the Boards’ development of such cure procedures is “inconsistent with law.”

4. Collateral Estoppel Precludes the Respondents from Relitigating the Issue.

The Supreme Court has already resolved the issues of whether the Election Code provides for cure procedures aside from providing missing proof of identification—it does not—and which governmental body is empowered to change that—the Legislature. Because the Respondents were parties or in privity with parties in *Pa. Democratic Party*, the issue cannot be relitigated.

“Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were actually litigated and necessary to a previous final judgment.” *J.S. by & ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 794 A.2d 936, 939 (Pa. Commw. 2002). Collateral estoppel applies where: (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4) the party against whom collateral estoppel is asserted had a full and fair

opportunity to litigate the issue in the prior action. *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998).

All four elements of collateral estoppel apply here. *First*, the absence of a cure procedure to address voters' failure to comply with signature and secrecy envelope requirements was squarely addressed by the Supreme Court. So too was the issue of who was authorized to change that: the Legislature. *See Pa. Democratic Party*, 238 A.3d 374. *Second*, the Supreme Court of Pennsylvania entered a final judgment on the merits in *Pa. Democratic Party*. *Third*, all 67 Boards were parties in *Pa. Democratic Party*, as was the Secretary of the Commonwealth, just as is the case here. *Fourth*, all parties unquestionably had a full and fair opportunity to litigate the issue in the prior action; all respondents entered appearances, were represented by counsel, and submitted briefing on the issue.

Because all four elements of collateral estoppel apply, the Respondents should be precluded from relitigating the issues raised in this application for preliminary injunction.

5. The Acting Secretary Should Be Barred from Advocating for a Different Result Now.

Judicial estoppel prohibits the Acting Secretary from taking a different position in this action. The Secretary previously taken the position that the Election Code does not provide for cure procedures to address voters' failure to comply with signature and secrecy envelope requirements, and in other contexts, has argued that

the that the Election Code's silence on a matter does not vest the Boards with discretion to take matters into their own hands.

“The purpose of judicial estoppel is to ensure the parties do not play ‘fast and loose’ with the facts in order to suit their interests in different actions before different tribunals.” *Marazas v. Workers’ Comp. Appeal Bd. (Vitas Healthcare Corp.)*, 97 A.3d 854, 859 (Pa. Commw. 2014). Unlike *res judicata* and collateral estoppel, “judicial estoppel does not require actual litigation to a final order.” *Id.* “In essence, the doctrine of judicial estoppel prohibits parties from switching legal positions to suit their own ends.” *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 791 A.2d 1189, 1192 (Pa. 2001).

Both in *Pa. Democratic Party* and afterwards, the Acting Secretary has taken the position that cure procedures for signature and secrecy envelope defects are not permitted. In *Pa. Democratic Party*, the Acting Secretary *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that “so long as a voter follows the requisite voting procedures, he or she ‘will have equally effective power to select the representative of his or her choice.’” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Acting Secretary noted that “logistical policy decisions” implicated in a cure procedure are properly addressed by the Legislature. *Id.*

The Acting Secretary has remained consistent in her public pronouncements since *Pa. Democratic Party*. The “Frequently Asked Questions” page on the Secretary’s website provides in relevant part:

How do I know if my ballot was accepted or counted?

Under current Pennsylvania law, your mail-in ballot can’t be opened until Election Day. Therefore, **if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election.** Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don’t have to worry.

Pennsylvania Department of State, *Mail and Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>.

The Secretary’s position on cure procedures is consistent with the position she has taken in other contexts. With regard to signature comparisons, the Secretary issued guidance in 2020 that remains in force today: “The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” See Pennsylvania Dep’t of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes* (Sept. 11, 2020), available at www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

This guidance was upheld in both state and federal court, with both courts noting that the Election Code’s failure to expressly provide for signature comparison for

absentee and mail-in ballots did not allow for either the Boards or the courts to craft procedures of their own. *See In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020) (“It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance.”); *accord Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 399 (W.D. Pa. 2020) (“nowhere does the plain language of the statute require signature comparison as part of the verification analysis of [absentee or mail-in] ballots.”).

The Secretary has consistently asserted that the Boards are not free to act absent express authorization under the Election Code. Accordingly, the Acting Secretary should be barred from taking a different position in this litigation.

B. Allowing the Boards to Implement Their Own Cure Procedures Absent Any Directive from the Election Code Would Violate the Federal Elections Clause.

The Elections Clause of the United States Constitution directs: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

U.S. CONST. art. I, § 4, cl. 1. The United States Supreme Court held that:

[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to **notices**, registration, supervision of voting, protection of voters, prevention of fraud and

corrupt practices, **counting of votes**, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (Pa. 1932) (emphases added). “The Framers intended the Elections Clause to grant States authority to create procedural regulations.” *United States Term Limits v. Thornton*, 514 U.S. 779 (1995). “Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. So comprehended, the clause doubly empowers the people. They may control the State’s lawmaking processes in the first instance ... and they may seek Congress’s correction of regulations prescribed by state legislatures.” *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015).

The Elections Clause plainly contemplates that only two entities are empowered to regulate the “manner” in which elections are conducted: the Legislature and Congress. The General Assembly has authorized only a limited cure procedure regarding proof of identification through the Election Code, and a recent bill passed by the Legislature to include broader cure procedures was vetoed by Governor Wolf. For its part, Congress has not created any cure procedure for Pennsylvania elections.

Moreover, there is nothing in the Election Code to suggest that the General Assembly has authorized Boards to develop and implement cure procedures of their

own. The powers granted to the Boards are limited. *See* 25 P.S. § 2642. Indeed, the Boards are required to inspect “the conduct of primaries and elections ... to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted.” *Id.* § 2642(g) (emphasis added). Accordingly, Boards are authorized only “[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.” *Id.* (emphasis added); *see also PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) “extends only to the promulgation of rules that are ‘not inconsistent with law.’”).

The Pennsylvania Supreme Court has already clearly expressed what the law is with respect to cure procedures: the Election Code does not provide for any aside from proof of identification. Those Boards which have implemented their own cure procedures cannot be acting “consistent with law” and, to the extent such cure procedures differ from those implemented by other Boards (and from those Boards which have not implemented a cure procedure), have usurped the Legislature’s authority to regulate the “manner” of elections in Pennsylvania. Such conduct must be enjoined.

V. The Requested Injunction Is Reasonably Suited to Abate the Offending Activity.

The relief sought by the Petitioners is narrowly tailored. *See Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Commw. 2002) (any injunction “must

be narrowly tailored to address the wrong plead and proven”); *Woods at Wayne Homeowners Ass’n v. Gambone Bros. Constr. Co.*, 893 A.2d 196, 207 (Pa. Commw. 2006) (“Even if the prerequisites of an injunction are satisfied, the court must fashion a remedy ‘reasonably suited to abate the harm.’”); *Big Bass Lake Cmty. Ass’n v. Warren*, 950 A.2d 1137, 1145 (Pa. Commw. 2008) (“the court must narrowly tailor its remedy to abate the injury”).

Petitioners seek only to enforce the Pennsylvania Supreme Court’s holding that the Election Code fails to provide a cure procedure for mail-in and absentee ballots and that only the Legislature—not the Courts or any other entity, including the Boards—can enact one. Petitioners also only seek relief against those County Boards that are administering unlawful cure procedures, not against the many that are following the law. The request has no impact on many County Boards or the overwhelming majority of mail-in and absentee ballots which are properly cast.

VI. The Requested Injunction Will Not Adversely Affect the Public Interest.

The Pennsylvania Supreme Court has already held that the “task of effectuating” the Pennsylvania Constitution’s mandate that elections be free and equal is the province of the Legislature. *Pa. Democratic Party*, 238 A.3d at 374. Thus, the public interest is best served by a consistent application of the rule of law established by the General Assembly and the maintenance of the separation of powers in Pennsylvania. Conversely, the public interest is not served by allowing

Boards to act as quasi-legislatures, resolving “the open policy questions” attendant with the development of cure procedures on their own, let alone cure procedures whose existence and particulars vary from county to county. *Id.* A ruling to the contrary would only further diminish Pennsylvania voters’ confidence in the election system as a result of the secretive and inconsistent application of election procedures across the state.

CONCLUSION

The Court should grant the Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction and enter an order prohibiting the Respondent Boards from developing and implementing cure procedures and for the Acting Secretary to take no action inconsistent with such an order.

Respectfully submitted,

Dated: September 7, 2022

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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.

GALLAGHER GIANCOLA LLC

Dated: September 7, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

Russell D. Giancola

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains fewer than the 14,000 words permitted under Pa. R.A.P. 2135(a), excluding the cover page, table of contents and table of authorities. This word count relies upon the word count of the word processing software used to prepare this brief.

GALLAGHER GIANCOLA LLC

Dated: September 7, 2022

/s/ Kathleen A. Gallagher

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PROOF OF SERVICE

I do hereby certify that a true and correct copy of the **Memorandum of Law in Support of Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under PA. R.A.P. 1532** has been served on all parties and/or their counsel as listed below:

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Respectfully submitted,

Dated: September 7, 2022

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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; S. Michael :
Streib, :

Petitioners :

v. :

No. 447 M.D. 2022

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; 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 :
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Elections; Cumberland County Board :
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of Elections; Indiana County Board of :
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Board of Elections; Perry County :
Board of Elections; Philadelphia County :
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Elections; Union County Board of :
Elections; Venango County Board of :
Elections; Warren 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 :

PER CURIAM

ORDER

NOW, September 9, 2022, upon consideration of Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction under Pa.R.A.P. 1532 (Application for Preliminary Injunction), and the Memorandum of Law in Support of the Application for Preliminary Injunction, it is hereby ORDERED as follows:

1. Hearing on Petitioners’ Application for Preliminary Injunction is scheduled for Wednesday, September 28, 2022, at 10:00 a.m., in Courtroom 3001, Pennsylvania Judicial Center, Third Floor, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, and will continue daily thereafter until concluded.
2. Petitioners are directed to secure the services of a court stenographer for the hearing.
3. Any party who opposes the pending Application for Preliminary Injunction shall file and serve an answer in opposition thereto **no later than 12:00 noon on Friday, September 16, 2022**. Any party who fails to file an answer by 12:00 noon on Friday, September 16, 2022, will be considered by the Court to be unopposed to the Application for Preliminary Injunction.
4. The parties shall file a joint stipulation of facts **no later than 12:00 noon on Monday, September 19, 2022**, indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots.

5. A status conference is scheduled for Thursday, September 22, 2022, at 10:00 a.m., via WebEx videoconferencing, for the purpose of discussing the hearing, including the anticipated number of witnesses and exhibits, estimated duration of the hearing, and logistics.

6. Each party shall email the name, email address, and mobile telephone number of all counsel who intend to participate in the status conference to the following email address: CommCourtRemote@pacourts.us by **no later than 4:00 p.m. on Monday, September 19, 2022**. The Court will provide counsel with the information for connecting to the WebEx conference.

7. To facilitate participation, various WebEx applications are available for download at pacourts.webex.com. Please see the Protocol for WebEx Video Proceedings attached to this Order. The parties are directed to connect to the WebEx video conference 15 minutes before the starting time. In the event of technical difficulties, please contact the Court's IT staff at 717-255-1626.



Protocol for WebEx Video Proceedings

Protocol BEFORE the conference:

The Court shall provide counsel with the information for connecting to the video conference. This invitation will be sent by email.

It is the responsibility of counsel to provide the connection information to their clients.

It is the responsibility of all parties to provide the Court with their contact information. An email address will be required to join the video.

All participants must appear by video connection unless otherwise authorized by the Court.

Email invitations will be promptly sent to participants. If a participant has not received the email invitation from the Court, please check your SPAM or Junk folder before contacting the Court.

All parties must connect to the argument or call into the video system at least 15 minutes before the scheduled start time.

Minimum Technology requirements:

All attorneys and pro se parties appearing before the Court must have one of the following:

- A computer with a functioning web camera, microphone and speakers;

- A video conferencing system that supports Session Initiation Protocol (SIP) calling;

- A tablet device that supports Cisco WebEx with a functioning forward facing camera, microphone and speakers; or

- An alternative device used to connect to Cisco WebEx in the past.

If you experience audio issues with your computer/tablet audio, the Court recommends that you have our system call you by using the option listed in 0 below.

The Court's IT Department will endeavor to contact counsel in advance of the argument to test their connection to the WebEx platform.

Ground Rules and Video Conferencing Etiquette:

When not speaking, please mute your microphone. This helps prevent background noise.

Earbuds or headphones are preferable to avoid feedback.

Be aware of your behavior. Because you are on a video conference, people can see what you are doing at all times and *WebEx video conferences are recorded*. Further, others may view the proceedings via public livestream web link that will be provided to the parties and posted to the Court's website in advance of the proceeding.

If connecting from a laptop, plug in the laptop wall power.

Follow all instructions in the video conference invitation and note important supplemental information, such as a backup phone number in case you are disconnected.

Please be respectful; speak slowly and only one at a time.

Try not to speak over other parties. There is a slight delay when using video technology.

Technical Support

If you have any questions or need technical assistance, contact 717-255-1626.

1. Invitation from the Court:

Prior to your scheduled argument, you will receive an email from the Court with connection instructions. Please make sure to monitor your SPAM or Junk folder so that you receive the message. It should come from @pacourts.us. Here is the information from a sample invitation.

Commonwealth Court Legal Systems invites you to join this Webex meeting.

Meeting number (access code): 613 778 564 ③
Meeting password: Cy54FR39aBE

Wednesday, March 25, 2020
8:00 am | (UTC-04:00) Eastern Time (US & Canada) | 10 mins

Join meeting ①

Join by phone

Tap to call in from a mobile device (attendees only)

1-855-244-8681 Call-in toll-free number (US/Canada) ②

1-650-479-3207 Call-in toll number (US/Canada)

[Toll-free calling restrictions](#)

Join from a video system or application

Dial **613778564@pacourts.webex.com** ④

You can also dial 173.243.2.68 and enter your meeting number.

Join using Microsoft Lync or Microsoft Skype for Business

Dial **613778564.pacourts@lync.webex.com** ⑤

In the invitation, there are multiple connection options:

WebEx: Click on the Green *Join Meeting* button. ①

Phone: Dial either of the numbers listed under *Join by phone*. ②

When prompted, enter the Meeting number (access code) listed near the top of the invitation. ③

Use the SIP dial in connection number provided for non-WebEx devices such as video conferencing systems. ④

Microsoft Lync/Skype for Business connection information is also provided. ⑤

Controls while connected to WebEx:

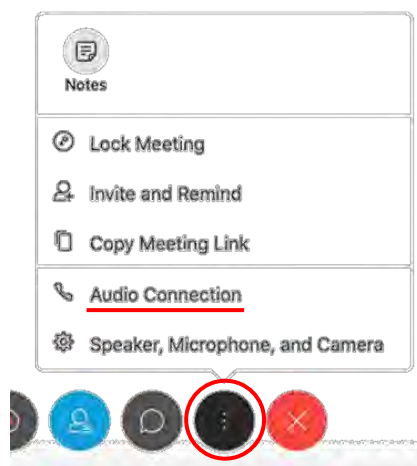
Once connected to a meeting, if you move your mouse, the below control panel should appear. These are the normal controls, but some of them may be disabled which means they will not appear. The icons will be the same.



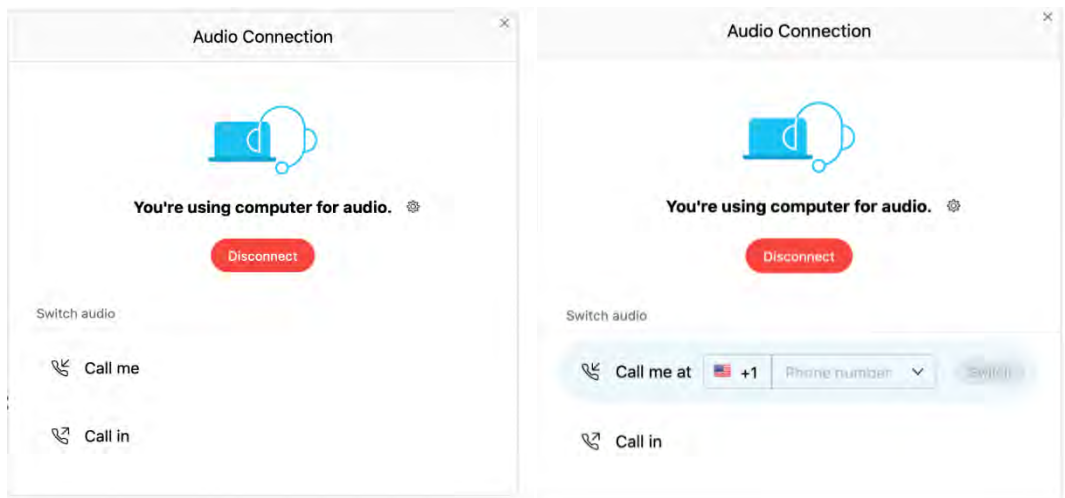
From left to right, the controls are:

- Mute/unmute microphone
- Turn on/off camera
- Share your desktop
- Recording control (Only available to the Court)
- Open/Close the participant list
- Chat windows
- Options – has more controls available
- End Meeting

Under the More Options button (7 above, the 3 dots icon). If you are having audio difficulties with your computer audio, you can have the system call you. Click on the 3 dots icon and then choose Audio Connection.



Click on the option “Call Me”. Enter the phone number that the system should call and press the switch button. When the call comes in, you will be prompted to press “1” to connect.



At the end of your call, press the red X to be disconnected.

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Republican National Committee, <i>et al.</i> ,	:	In the Commonwealth Court of
	:	Pennsylvania
Petitioners,	:	
	:	Case No. 447 MD 2022
v.	:	
	:	
Leigh M. Chapman, <i>et al.</i> ,	:	
	:	
Respondents.	:	

CHESTER COUNTY BOARD OF ELECTIONS' RESPONSE TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Chester County Board of Elections ("County") hereby submits its response to the Petitioners' Application for Special Relief in the Form of a Preliminary Injunction ("Application"). The County notes that the Petitioners have failed to proffer any specific factual allegations directed to the County, and instead, have asserted allegations against certain County Board of Elections (*e.g.*, Northampton and Lehigh County Boards) and have asserted vague averments directed to other unidentified County Boards of Elections. Essentially, the Petitioners seek a preliminary injunction against the County, but have not identified any specific activity that the County has undertaken, or even contemplated undertaking, to support the relief they seek. Because the Petitioners failed

to aver specific allegations directed to the County, a preliminary injunction would be premature and would amount to the Court issuing an advisory action counseling the County regarding actions or conduct that Petitioners have not alleged the County has implemented or is even considering implementing. Accordingly, the Petitioners have failed to present a cause of action or an actual controversy with the County and their Application should be dismissed against the County.

COUNTY’S RESPONSE TO APPLICATION

1. Admitted in part and denied in part. It is admitted only that Petitioners have accurately quoted a portion of 25 P.S. § 3146.8(h). However, to the extent this averment asserts an opinion regarding Pennsylvania election law, rules, and election administration procedure, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits or prohibits a Board’s decision to provide a cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that “**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” and suggested that the legislature, not the court, is best suited to implement a statewide “notice and opportunity to cure” procedure. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (emphasis added). Moreover, this averment is denied to the extent it vaguely references conduct attributable to unidentified “Boards” and/or other Respondents rather than asserting specific allegations against the County. Indeed, after a reasonable investigation, the County is without knowledge or information sufficient to

form a belief as to the truth of the averment concerning the actions of “some Boards” and denies the allegation.

2. Denied. Petitioners have failed to accurately quote a portion of the opinion in *Pa. Democratic Party*, 238 A.3d at 374. In addition, to the extent this averment asserts an opinion regarding the outcome or holding of *Pa. Democratic Party*, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits or prohibits a Board’s decision to provide a cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that “**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” and suggested that the legislature, not the court, is best suited to implement a statewide “notice and opportunity to cure” procedure. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). Moreover, this averment is denied to the extent it vaguely references conduct attributable to unidentified “Boards” and/or other Respondents rather than asserting specific allegations against the County. Indeed, after a reasonable investigation, the County is without knowledge or information sufficient to form a belief as to the truth of the averment concerning the actions of unidentified “Boards” and denies the allegation.

3. Denied. Petitioners have failed to accurately quote a portion of the opinion in *Pa. Democratic Party*, 238 A.3d at 374. In addition, to the extent this averment asserts an opinion regarding the outcome or holding of *Pa. Democratic Party*, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits

or prohibits a Board's decision to provide a cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that "**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" and suggested that the legislature, not the court, is best suited to implement a statewide "notice and opportunity to cure" procedure. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added).

4. Admitted that Petitioners have accurately quoted a portion of the opinion in *Pa. Democratic Party*, 238 A.3d at 374.

5. Denied. After a reasonable investigation the County is without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph concerning an unidentified "bill" and denies the allegation. Furthermore, to the extent this averment asserts an opinion regarding the contents of an unidentified "bill," the County denies the averment as a legal conclusion to which no responsive pleading is required. In addition, this averment is denied to the extent it vaguely references conduct attributable to non-parties "Legislature" and "Governor Wolf," rather than asserting specific allegations against the County.

6. Denied. After a reasonable investigation the County is without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph concerning unidentified "Boards" and denies the allegation. Furthermore, to the extent this averment asserts an opinion regarding Pennsylvania election law, rules, and election administration procedure, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits or prohibits a Board's decision to provide a

cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that “**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” and suggested that the legislature, not the court, is best suited to implement a statewide “notice and opportunity to cure” procedure. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). In addition, this averment is denied to the extent it vaguely references conduct attributable to unidentified "Boards" and/or other Respondents rather than asserting specific allegations against the County.

7. Denied. After a reasonable investigation the County is without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph and denies the allegation. Furthermore, to the extent this averment asserts an opinion regarding Pennsylvania election law, rules, and election administration procedure, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits or prohibits a Board’s decision to provide a cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that “**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” and suggested that the legislature, not the court, is best suited to implement a statewide “notice and opportunity to cure” procedure. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). In addition, this averment is denied to the extent it vaguely references conduct attributable to unidentified "Boards" and/or other Respondents rather than asserting specific allegations against the County.

8. Denied. After a reasonable investigation the County is without knowledge or information sufficient to form a belief as to the truth of the averment in this paragraph and denies the allegation. Furthermore, to the extent this averment asserts an opinion regarding Pennsylvania election law, rules, and election administration procedure, the County denies the averment as a legal conclusion to which no responsive pleading is required. If a response is required, the County denies that Pennsylvania election law expressly permits or prohibits a Board's decision to provide a cure procedure for mail-in or absentee ballots. Indeed, the Pennsylvania Supreme Court only held that "**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" and suggested that the legislature, not the court, is best suited to implement a statewide "notice and opportunity to cure" procedure. *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). In addition, this averment is denied to the extent it vaguely references conduct attributable to unidentified "Boards" and/or other Respondents rather than asserting specific allegations against the County.

9. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

10. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

11. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

12. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

13. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

14. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

15. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

16. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

17. This averment asserts a legal conclusion to which no responsive pleading is required and is denied. In addition, the County incorporates its accompanying memorandum of law as if fully set forth herein.

WHEREFORE, for the above reasons and those set forth in the accompanying memorandum of law, the County requests that the Court deny the Application because it

fails to assert any direct conduct against the County or to identify an activity that the County has undertaken, or contemplated undertaking, that would adversely affect the Petitioners.

Dated: September 16, 2022

Respectfully,



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Attorneys for Chester County Board of Elections

Republican National Committee, <i>et al.</i> ,	: In the Commonwealth Court of
	: Pennsylvania
Petitioners,	:
	: Case No. 447 MD 2022
v.	:
	:
Leigh M. Chapman, <i>et al.</i> ,	:
	:
Respondents.	:

CHESTER COUNTY BOARD OF ELECTIONS' MEMORANDUM OF LAW IN SUPPORT OF ITS RESPONSE TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Chester County Board of Elections ("County") hereby submits its Memorandum of Law in response to the Petitioners' Application for Special Relief in the Form of a Preliminary Injunction ("Application"). Initially, the County disagrees with the Petitioners' legal interpretation of Pennsylvania election law and the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). Additionally, Petitioners have not identified any specific activity that **the County** has undertaken, let alone any activity that violates the Election Code. Moreover, Petitioners have not identified any specific activity that the County has or even contemplated undertaking to support the relief they seek. As the movant, it is Petitioners' burden to

assert facts that demonstrate they have a clear right to relief against the County. Because the Petitioners have not asserted any allegations directed to the County, they have failed to satisfy their burden, and the Court should deny the Application.

I. STATEMENT OF THE CASE

On or about September 1, 2022, Petitioners filed a Petition for Review (“Petition”) seeking declaratory and injunctive relief against Respondents Leigh M. Chapman (Acting Secretary of the Commonwealth), Jessica Mathis (Director for the Bureau of Election Services and Notaries), and each of the 67 County Boards of Elections in Pennsylvania. The Petition includes 103 paragraphs. No paragraph directly references the County. No paragraph avers that the County has implemented, or plans to implement, procedures to cure non-compliant mail-in or absentee ballots.

On or about September 7, 2022, Petitioners filed an Application seeking a preliminary injunction against the Respondents to prohibit the 67 County Boards of Elections from developing and implementing cure procedures. The Application includes 17 paragraphs and, like the Petition, fails to directly reference the County or allege that the County has developed, or plans to implement, cure procedures.

II. LEGAL ARGUMENT

A. Petitioners Misstate the Pennsylvania Supreme Court’s Holding in *Pa. Democratic Party*.

The Petitioners 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)). Petitioners 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. 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 particular, the Pennsylvania Democratic Party and several elected officials and congressional candidates (collectively “PDP”) presented five issues for the Pennsylvania Supreme 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’” *Pa. Democratic Party*, 238 A.3d at 353.¹ 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 Pennsylvania Supreme 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). It reasoned that PDP’s proposed statewide procedure that they sought for the judiciary to mandate (i.e., requiring the Boards to contact an elector whose ballots are reviewed but contain a “minor” or “facial” defect—

¹ 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.”).

and for whom the Boards have contact information—to afford them an opportunity to cure the defect) lacked constitutional or statutory basis.² Indeed, 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 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 not consider or decide the precise issue that the Petitioners’ have presented here, *i.e.*, whether a Board or some Boards can implement cure procedures.

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

As Petitioners assert, 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 Petitioners fail to establish any one of them, there is no need to

² 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).

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 Petitioners 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). Petitioners 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, Petitioners seek a preliminary injunction against all 67 Boards of Elections, including the County.

The initial flaw in Petitioners argument is that they have not shown that it is “unlawful” for a Board or even “some Boards” to implement cure procedures. Indeed, Petitioners’ reliance on the holding from *Pa. Democratic Party* does not support their argument because, as described above, the Pennsylvania Supreme 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.

However, even assuming that a Board’s decision to implement a cure procedure is considered unlawful, Petitioners have failed to allege that the County has instituted a cure procedure, or even considered it. Simply put, the Petitioners have not alleged any specific action by the County, and thus, have failed to demonstrate the necessity for the Court to act to prevent an immediate and irreparable harm.

Indeed, the Petitioners 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 law’ which per se constitutes immediate and irreparable harm.” See Memorandum at 15. 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 Petitioners have not alleged that the County has decided to proceed with any action, yet the Petitioners are requesting an injunction because “some Boards” may implement cure procedures. Because the Petitioners have not asserted any specific allegations directed to the County, they have not met their burden for the issuance of a preliminary injunction against the County. Accordingly, the Court should dismiss the Application seeking to enjoin the County.

III. CONCLUSIONS

For the reasons above, the Court should deny the Application with respect to the County.

Dated: September 16, 2022

Respectfully,



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth of
Pennsylvania, et al.,

Respondents.

No. 447 MD 2022

**COMMONWEALTH RESPONDENTS' ANSWER TO
PETITIONERS' APPLICATION
FOR SPECIAL RELIEF IN THE FORM OF
A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532**

Respondents, Leigh M. Chapman, in her official capacity as Acting

Secretary of the Commonwealth of Pennsylvania and Jessica Mathis, in her official

capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, the “Commonwealth Respondents”), hereby present this Answer to Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.C.P. 1532 (the “Application”). In support of their Answer, Commonwealth Respondents incorporate their concurrently filed Brief in Opposition to Petitioners’ Application and state as follows:

BACKGROUND

1. Denied. To the extent the allegations of this paragraph characterize Petitioners’ filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, Commonwealth Respondents specifically deny that Petitioners are entitled to any of the relief they request.

2. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required.

3. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. Further, to the extent the allegations of this paragraph characterize the Pennsylvania Supreme Court’s opinion in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), that opinion is in writing and speaks of itself, and any characterization thereof is denied.

4. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. Further, to the extent the allegations of this paragraph characterize the Pennsylvania Supreme Court’s opinion in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), that opinion is in writing and speaks of itself, and any characterization thereof is denied.

5. Denied as vague, as the Application fails to identify with specificity the legislation to which it refers. Further, to the extent the allegations of this paragraph characterize a particular legislative bill, that bill is in writing and speaks for itself, and any characterization thereof is denied.

6. Denied. To the extent the allegations of this paragraph characterize Petitioners’ filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, Commonwealth Respondents specifically deny that Petitioners are entitled to any of the relief they request.

7. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further response, Respondents deny Petitioners’ characterization of county ballot cure procedures and demand strict proof thereof, if material. Among other issues, Petitioners’ use of the terms “notice and opportunity to cure” and “ballot defect” is vague and ambiguous.

8. Denied. To the extent the allegations of this paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. To the extent this paragraph alleges that Petitioners are "uncertain[]" about the "use of cure procedures" by "some Boards," Commonwealth Respondents lack knowledge or information sufficient to form a belief about the truth or falsity of these allegations, and they are therefore denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, Commonwealth Respondents specifically deny that Petitioners are entitled to any of the relief they request.

INJUNCTIVE RELIEF

9. Denied. To the extent the allegations of this paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, Commonwealth Respondents specifically deny that Petitioners are entitled to any of the relief they request.

10. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required.

11. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required.

12. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required.

13. Denied. To the extent the allegations of this paragraph predict future conduct and/or decisions by county boards of elections, Commonwealth Respondents lack knowledge or information sufficient to form a belief about the truth or falsity of those allegations, and they are therefore denied. To the extent the allegations of this paragraph purport to characterize an agreement entered into by the Northampton and Lehigh County Boards of Elections, that agreement is in writing and speaks for itself, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that the injunction sought by Petitioners is needed to prevent immediate and irreparable harm, or that greater injury would result from refusing rather than granting the injunction. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including Petitioners’ failure to show immediate and irreparable harm and the fact that granting the requested injunction would cause far greater harm than refusing it—as detailed in Commonwealth Respondents’ Brief in Opposition to Petitioners’ Application.

14. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. In addition, to the extent the allegations of this

paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. By way of further answer, it is specifically denied that Petitioners' requested injunction seeks only to preserve the status quo. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including that the requested injunction would fail to properly preserve the status quo—as detailed in Commonwealth Respondents' Brief in Opposition to Petitioners' Application.

15. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that Petitioners are likely to prevail on the merits of the underlying claims in this case. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including their failure to show a likelihood of success on the underlying merits of their claims—as detailed in Commonwealth Respondents' Brief in Opposition to Petitioners' Application.

16. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that Petitioners' injunction is appropriately tailored or narrow. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including because the relief they seek is grossly overbroad—as detailed in Commonwealth Respondents' Brief in Opposition to Petitioners' Application.

17. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that the requested injunction will not adversely affect the public interest. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including because the requested injunction would adversely affect the public interest and likely disenfranchise qualified electors—as detailed in Commonwealth Respondents’ Brief in Opposition to Petitioners’ Application.

WHEREFORE, Commonwealth Respondents respectfully request that this Honorable Court dismiss or deny Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.C.P. 1532.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 16, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I 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.

Dated: September 16, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 447 MD 2022

**REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
REPUBLICAN PARTY OF PENNSYLVANIA,
DAVID BALL,
JAMES D. BEE,
DEBRA A. BIRO,
JESSE D. DANIEL,
GWENDOLYN MAE DELUCA,
ROSS M. FARBER,
CONNOR R. GALLAGHER,
LYNN MARIE KALCEVIC,
LINDA S. KOZLOVICH,
WILLIAM P. KOZLOVICH,
VALLERIE SICILIANO-BIANCANIELLO,
S. MICHAEL STREIB,**

Petitioners,

v.

**LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the
Commonwealth of Pennsylvania,
JESSICA MATHIS, in her official capacity as Director of the Pennsylvania
Bureau of Election Services and Notaries,
*et al.,***

Respondents.

**ANSWER ON BEHALF OF BERKS COUNTY BOARD OF ELECTIONS
TO PETITIONERS' PETITION FOR REVIEW AND PETITION FOR
PRELIMINARY INJUNCTION**

Dated: September 16, 2022

*/s/ Cody L. Kauffman, Esq.*_____

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*For The Berks County Board of
Elections*

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POSITION STATEMENT OF
THE BERKS COUNTY BOARD OF ELECTIONS

Background

On September 1, 2022, and September 7, 2022, Petitioners filed a Petition for Review seeking Declaratory and Injunctive Relief and an Application for Special Relief in the Form of a Preliminary Injunction, respectively. Ultimately, Petitioners are seeking an injunction that prohibits County Boards of Elections from developing and implementing cure procedures for absentee and mail-in ballots that are initially submitted by the voters with errors that may preclude them from being counted. Petitioners assert that the law is clear on this issue and that it is unlawful for Counties to develop and implement absentee/mail-in ballot curing procedures.

Like other areas of Pennsylvania Election Law, the law surrounding mail-in/absentee ballot curing is not clear, as evidenced by the varied approaches to curing taken by Counties throughout the Commonwealth. These inconsistencies are the inevitable byproduct of 67 Counties having to use their best judgment to create or consider procedures that are not clear in the law. Moreover, the lack of clarity exposes Counties to increasing litigation during a time of heightened election scrutiny. In accordance with this Honorable Court's Order dated September 9, 2022, the Berks County Board of Elections files this position statement in support of Berks County's approach to ballot curing and in support of further clarity on the issue.

Relevant Law

Pennsylvania recognizes the “longstanding and overriding policy . . . to protect the elective franchise.” Petition of Cioppa, 626 A.2d 146, 148 (Pa. 1993). Election laws must be strictly construed to prevent fraud, but “ordinarily will be construed liberally in favor of the right to vote.” Appeal of James, 105 A.2d 64, 65 (Pa. 1954). It is axiomatic that the “purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.” In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985); See also In Re Mayor of Altoona, Blair County, 196 A.2d 371, 374 (Pa. 1964) (“The very purpose of election laws is to secure freedom of choice . . . to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.”).

Regarding absentee/mail-in ballot curing, Petitioners correctly state that the Election Code allows for ballot curing “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” See 25 P.S. § 3146.8(h). The Election Code does not otherwise expressly prohibit ballot curing in situations other than § 3146.8(h). The Pennsylvania Supreme Court concluded that County Boards “are not required to implement a ‘notice and opportunity to cure’ procedure.” Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345, 374 (Pa. 2020). However, this holding by the Pennsylvania Supreme Court

pertained the seeking of an injunction *requiring* County Boards to implement a Notice and Cure procedure. See id., at 353. The opinion does not specifically address whether County Boards are prohibited from implementing ballot curing procedures. Rather, the Court opined that further guidance on the issue was best left to the Legislature. Id., at 374.

Argument

To date, the County Boards of Elections throughout Pennsylvania have not received further clarity since Pennsylvania Democratic Party v. Boockvar was decided. Instead, as outlined within Petitioners’ filings, the Boards have developed varying curing procedures and prohibitions, based upon their respective interpretations of the law. Berks County does not proactively contact voters regarding irregularities within their mail-in/absentee ballots for the purpose of providing voters the opportunity to cure. As such, Berks County does not have a “notice and opportunity to cure” procedure. However, if a voter contacts the County about a potential deficiency within their mail-in/absentee ballot, that voter will generally be allowed the opportunity to cure prior to 8:00 pm on Election Day. Berks County believes this approach best balances enfranchisement, fairness, and consistency under the current state of the law.

A pertinent factor for Berks County not having a “Notice and Cure” procedure was the potential for disparate treatment between those voters who timely returned

their mail-in/absentee ballots closer to, or on, election day and those voters who timely returned their ballots earlier. In other words, voters who returned their ballots closer to, or on, election day would likely not be provided the same opportunity to cure as similarly-situated voters who returned their ballots earlier, because a curing notice would not be able to be sent to the former group of voters in time. This potential for disparate treatment risks an equal opportunity for all voters to cure and is the main reason why Berks County has not implemented a notice and cure procedure.

Nonetheless, Berks County values the principles of enfranchisement and equal opportunity, which is why Berks County will generally allow voters an opportunity to cure if they contact the County regarding an issue with their absentee/mail-in ballot. This approach is consistent with election law's goal of enfranchisement, as it gives voters who become aware of an issue within their mail-in/absentee ballot the opportunity to cure the defect. See In re Luzerne County Return Bd., 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise”).

The approach also ensures an equal chance and opportunity for voters to exercise their right to vote throughout Berks County regardless of whether they vote by absentee/mail or in person at the precincts. See In re General Election of 1985, 531 A.2d 836, 839 (Pa. Commw. 1985) (an equal opportunity for all eligible electors to participate in the election process is a key purpose of election law). Specifically, allowing voters who contact the County the opportunity to cure a minor irregularity

with their absentee/mail-in ballot prior to it being counted is consistent with a voter's right at a precinct to correct their ballot prior to it being counted. See, e.g., 52 U.S.C. § 21081(a)(1)(A)(ii) (each voting system shall “provide the voter with the opportunity . . . to change the ballot or correct any error before the ballot is cast and counted); 25 P.S. § 3007(h). In short, Berks County believes that our approach to curing best balances the principles of enfranchisement, fairness, and consistency for voters.

Conclusion

Berks County's approach to ballot curing falls between those jurisdictions who have implemented notice and cure procedures and those jurisdictions who do not provide curing opportunities to voters. To that end, pursuant to Paragraph 3 of this Honorable Court's September 9, 2022, Order, Berks County would oppose the Application for Preliminary Injunction to the extent that the requested relief seeks to prohibit Berks County's current practice of providing an opportunity to cure to voters who contact us. Since Berks County does not have a “Notice and Cure” procedure, the County does not take a position on the Application for Preliminary Injunction as it pertains to Notice and Cure procedures. However, the County welcomes further clarity from the Court on this issue.

Respectfully Submitted,

Dated: September 16, 2022

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CERTIFICATE OF COMPLIANCE

I 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.

Dated: September 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing position statement have been served upon the parties/counsel of record via electronic mail or the Court's Electronic Filing System.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting
Secretary of the Commonwealth of Pennsylvania; JESSICA
MATHIS, in her official capacity as Director of the
Pennsylvania Bureau of Election Services and Notaries, *et al.*,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE and
PENNSYLVANIA DEMOCRATIC PARTY,

Proposed Intervenors-Respondents.

No. 447 MD 2022

**PROPOSED INTERVENORS-RESPONDENTS' ANSWER
TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF
IN THE FORM OF A PRELIMINARY INJUNCTION UNDER
PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1532**

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I. INTRODUCTION

Mail-in and absentee voting in the November 2022 general election starts on September 19. Yet just a few days before that, petitioners ask this Court to stop County Boards of Elections from taking commonsense measures to notify voters of technical errors on returned ballots, errors that would otherwise lead to the invalidation of those ballots and hence the denial of one of the most fundamental of all rights. Boards have employed such measures with ballots cast by mail for *over two years* now, under their express statutory authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... electors.” 25 Pa. Stat. §2642(f). Nothing in the Election Code, the Pennsylvania or U.S. Constitution, or *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)—which held only that notice-and-cure procedures are not *required*—undermines that explicit legislative grant of power to local officials who are most familiar with the needs of the voters in their particular county. To the contrary, the statutory text amply supports county boards’ authority to implement procedures that give voters notice about such technical mistakes and an opportunity to correct them so that their votes can be counted.

Petitioners’ contrary view is that the lack of a statutory provision specifically using the words “notice” and “cure” (or synonyms) constitutes a prohibition on boards helping voters to avoid technical invalidations of their ballots. That view

conflicts with the Pennsylvania Supreme Court’s holding that courts must liberally construe the Election Code “in favor of the right to vote,” *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954), and, to the extent possible, to “enfranchise and not to disenfranchise” the electorate. *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). In other words, “the Election Code should be liberally construed so as not to deprive ... electors of their right to elect a candidate of their choice.” *Pennsylvania Democratic Party*, 238 A.3d at 356. In addition to inverting these principles, petitioners’ inexcusably last-minute effort to derail the orderly administration of the upcoming elections would upend settled practices across the commonwealth *after* voting has begun—all in service of precluding Pennsylvanians from exercising the franchise. There is no basis in law or equity for doing so. The application for a preliminary injunction should therefore be denied.

II. STATEMENT

A. The General Assembly’s Delegation of Authority To County Boards Of Elections

Elections in this commonwealth are primarily administered at the county level. As the Pennsylvania Supreme Court has explained, “in 1937, the General Assembly enacted a county-based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process.” *Pennsylvania Democratic Party*, 238 A.3d at 382-383. The decision to “draw the

lines’ at the county level [was] something entirely rational in fashioning a scheme for a state as large as Pennsylvania,” *Republican Party of Pennsylvania v. Cortés*, 218 F.Supp.3d 396, 401 (E.D. Pa. 2016), because Pennsylvania’s 67 counties are widely diverse in population as well as geography, demographics, and culture. The General Assembly has updated the Election Code repeatedly since 1937, without altering the county-based structure for election administration. *See, e.g.*, Act of Nov. 27, 2019, Pub. Law 673, No. 94; Act of Mar. 27, 2020, Pub. Law 41, No. 12.

The General Assembly has expressly conferred broad authority on county boards of elections, including “jurisdiction over the conduct of primaries and elections in such count[ies],” 25 Pa. Stat. §2641(a). In particular, section 302 of the Election Code provides that:

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following: ...

(f) 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 Pa. Stat. §2642. As this Court has recently observed, this provision “imposes mandatory duties upon the county boards of elections as well as discretionary authority and powers, such as the power to promulgate regulations.” *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 856 (Pa. Commw. 2022).

In exercise of their authority under section 2642, county boards develop the specific procedures and systems for carrying out elections, including selecting, equipping, and staffing polling locations. To take just one example, some boards have authorized the use of drop boxes to accept hand-delivered mail-in or absentee ballots. *See Pennsylvania Democratic Party*, 238 A.3d at 361. Petitioners allege that some boards have used their statutory authority to implement mechanisms for informing absentee voters about minor technical errors with their mail-in ballots and, in some cases, for allowing voters to fix those errors.

B. Mail-In Voting Since Act 77

In 2019, the General Assembly enacted Act 77, which extended the opportunity to use mail-in voting to all Pennsylvanians. Voting by mail requires voters to complete a number of steps. *See generally* 25 Pa. Stat. §§3150.1 *et seq.* After opening the envelope containing the ballot and filling out the ballot, a voter must place the ballot into a so-called privacy envelope, seal that envelope, and then place the sealed privacy envelope into a second envelope. *Id.* §3150.16. After sealing the latter, the voter must provide information on the outside of the second envelope, including a declaration. *Id.* Finally, the voter must return the envelopes and ballot to his or her county board, either by taking them to a Board-prescribed location or by stamping and mailing the outer envelope. *Id.*

Many Pennsylvania voters make minor errors in carrying out this multistep process. *See Pennsylvania Democratic Party*, 238 A.3d at 372. For example, ballots are often returned with an incomplete outer envelope—this could be an envelope not completed at all or could be one where the declaration is missing a date or a signature. *See id.* In all these instances, such minor errors can result in the qualified voter’s ballot being excluded from the count. *See id.*

Petitioners allege that some counties have sought to minimize such disenfranchisement by adopting procedures to notify voters of faulty ballots so that voters can either correct any deficiencies or cancel their ballots and submit new compliant ones. (The Secretary of the Commonwealth encouraged county boards to do so in 2020. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 907 n.18 (M.D. Pa. 2020), *aff’d sub nom. Trump v. Secretary of Pennsylvania*, 830 F.App’x 377 (3d Cir. 2020)). For example, petitioners allege that in Bucks County, Montgomery County, and Philadelphia, officials will “send a postcard,” “email[],” or otherwise alert a voter about certain problems with his or her mail-in ballot (such as a missing signature or date), and that some of these counties will also “send [a] list of voters with [such] problems to the parties” upon request. Pet. ¶¶66-70. Petitioners further allege that county boards in Northampton County and Leigh County have, as part of stipulated settlement agreements, agreed to employ voter-assistance procedures in upcoming elections. *Id.* ¶¶71-74.

Petitioners allege (Pet. ¶¶65-76) that county boards in Pennsylvania have used notice-and-cure procedures during the 2020 general election, and in elections held since that time.

C. Federal Courts Hold That Variations In Election Rules And Procedures Across County Boards Do Not Violate the Equal Protection Clause

After the November 2020 election, then-President Trump’s campaign sued in federal court in Pennsylvania arguing that allowing county boards to implement notice-and-cure procedures violated the federal Equal Protection Clause. *See Donald J. Trump for President*, 502 F.Supp.3d at 910. The district court rejected that argument, explaining that a county board’s decision to implement a notice-and-cure procedure does not burden any voter’s right to vote but rather “lift[s] a burden on the right to vote.” *Id.* at 919 (emphasis omitted). The court further reasoned 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.

In affirming, the Third Circuit reiterated the district court’s explanation that “[c]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.” *Trump*, 830 F.App’x at 388. “Even when boards of elections ‘vary ... considerably’ in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection.” *Id.* (omission in original). The Third Circuit also recognized that

“[n]ot every voter can be expected to follow [the mail-in vote] process perfectly” and that “the Election Code says nothing about what would happen if a county notices these errors before election day.” *Id.* at 384; *accord Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336, 355 (3d Cir. 2020) (rejecting a similar claim, on the ground that “if dilution of lawfully cast ballots by the ‘unlawful’ counting of invalidly cast ballots ‘were a true equal-protection problem, then it would transform every violation of state election law ... into a potential federal equal-protection claim.,” but “[t]hat is not how the Equal Protection Clause works”), *judgment vacated for mootness sub nom. Bognet v. Degraffenreid*, 141 S.Ct. 2508 (2021).

III. ARGUMENT

As this Court has repeatedly explained, a preliminary injunction is “‘a harsh and extraordinary remedy.’” *Dusman v. Board of Directors of the Chambersburg Area School District*, 123 A.3d 354, 361 (Pa. Commw. 2015) (quoting *Commission of Seventy v. Albert*, 381 A.2d 188, 190 (Pa. Commw. 1977)). And because a preliminary injunction is “extraordinary,” this Court has further explained, it “should be used with caution and only where the rights and equity of the petitioner are clear and free from doubt and the harm to be remedied is great and irreparable.” *Green v. Wolf*, 176 A.3d 362, 365 n.5 (Pa. Commw. 2017). More specifically, for a court to issue a preliminary injunction, “every one of the[six] prerequisites must be

established.” *County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988), *quoted in Summit Towne Center, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Those six prerequisites are:

- “that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages,”
- “that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings,”
- “that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct,”
- “that its right to relief is clear, and that the wrong is manifest, or, in other words, ... that it is likely to prevail on the merits,”
- that the injunction “is reasonably suited to abate the offending activity,” and
- “that a preliminary injunction will not adversely affect the public interest.”

Id. Because all six requirements must be established, “if the petitioner fails to establish any one of the[se], there is no need to address the others.” *County of Allegheny*, 544 A.2d at 1307, *quoted in Summit Towne Center*, 828 A.2d at 1001.

Applying these factors here leaves no doubt that petitioners are not entitled to a preliminary injunction to stop the county boards from providing notice and an opportunity to cure technical errors related to mail-in ballots, much less an injunction that would be issued *after* voting begins and that could prevent thousands of Pennsylvanians from having their votes counted.

As a threshold matter, petitioners are unlikely to succeed on the merits, for two overarching reasons. First, petitioners' claims are foreclosed by laches: As explained earlier, opponents of notice-and-cure procedures failed in 2020 to translate their purported concerns about such procedures into cognizable federal constitutional claims. They have now waited almost another two full years to assert in this case that those same concerns somehow constitute a violation of the Election Code or the state and federal constitutions. That inexcusable and prejudicial delay precludes the relief petitioners seek—and assuredly precludes the extraordinary equitable relief of an emergency injunction that would disrupt an election that is already underway. Second, county boards' efforts to help ensure that qualified voters' ballots are not discarded comply with the Election Code, the Pennsylvania Constitution, and the United States Constitution.

Petitioners cannot satisfy the other preliminary-injunction factors either. The requested injunction would upset the status quo, confuse county officials and voters alike, and risk unnecessarily and unjustifiably disenfranchising Pennsylvanians—none of which is within the public interest. And petitioners have little if any valid interest in ensuring that the ballots of qualified Pennsylvania voters are *not* counted because of technical errors that are easily remedied, and the injunction they seek is not narrowly tailored to address the challenged conduct during the pendency of this litigation.

A. Petitioners Are Not Likely To Succeed In Establishing That The County Boards' Procedures Are Unlawful

A preliminary injunction should be denied because plaintiffs have not shown that they are “likely to prevail on the merits” because their “right to relief is clear.” *Summit Towne Center*, 828 A.2d at 1001. To begin with, laches bars petitioners’ claims altogether—and, at a minimum, bars their request for a last-minute injunction to alter the conduct of the 2022 elections. And more fundamentally, county boards have express statutory authority to implement the kinds of notice procedures challenged in the petition. Nothing in *Pennsylvania Democratic Party* (or anything else in Pennsylvania or federal law) overrides that expressly conferred legislative authority.

1. Laches Bars Petitioners’ Claims

“[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another.” *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam) (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (1998)). That doctrine bars petitioners’ claims (and certainly their much-belated request for an emergency injunction) because petitioners have inexcusably sought relief years after the complained-of conduct began. Indeed, petitioners were on notice of the disputed procedures at least two *years* ago, yet they did not file this action until two *weeks* before voting in the 2022 elections began.

As the petition itself describes, county boards have employed variations of the challenged procedures since before the November 2020 general election. For example, the petition discusses (§66) a “‘cure’ protocol” allegedly implemented by Bucks County during the 2020 election cycle. It also alleges (§§67-70) that such procedures were used in Philadelphia and Montgomery Counties during the same timeframe. And petitioners’ memorandum of law in support of the preliminary-injunction application states (at 16) that “Boards have implemented cure procedures in past elections.” Such procedures were even the subject of litigation during and after the 2020 general election cycle. *See Pennsylvania Democratic Party*, 238 A.3d 345; *Donald Trump for President*, 502 F.Supp.3d at 907; *Bognet*, 980 F.3d at 352; *Zicarelli v. Allegheny County Board of Elections*, 2021 WL 101683 (W.D. Pa. Jan 12, 2021). Despite having thus been on notice of the complained-of conduct for years, petitioners offer no justification for waiting to file this action until the eve of the 2022 general election. The delay is particularly inexcusable given that the statutory and constitutional provisions that form the basis of petitioners’ challenge “were also readily available” well before September 2022, *Stilp*, 718 A.2d at 294.

Granting an injunction after such a lengthy and unjustified delay would prejudice respondents, intervenors, and the public, by injecting additional confusion into an already complex absentee and mail-in voting process, requiring county boards to change their procedures mid-election, and forcing intervenors and others

(perhaps including respondents) to spend time and money on additional voter-education efforts.

The Pennsylvania Supreme Court has applied laches to bar election-related claims even when the delay in suing was shorter than the delay here. In particular, in *Kelly v. Commonwealth*, the court dismissed challenges to Act 77 that were brought “more than one year after the enactment of Act 77,” reasoning that “the June 2020 Primary Election and the November 2020 General Election” had already been held pursuant to such procedures. 240 A.3d at 1256-1257. Here, with two years having passed (and multiple elections having been held), it is all the more “beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim.” *Id.* at 1257. And even if laches did not bar petitioners’ claims entirely, it would surely bar (and does bar) their emergency request for the extraordinary relief of a mid-election preliminary injunction. The application should be denied on that ground alone.

2. *The Legislature Granted The County Boards Authority To Implement The Challenged Procedures*

a. An independent reason why petitioners have not shown the requisite likelihood of success on the merits is that the General Assembly has given county boards authority to adopt the procedures petitioners challenge. As this Court has explained, boards have jurisdiction “over the conduct of primaries and elections in that county in accordance with the provisions of the Election Code.” *Hempfield*

School District v. Election Board of Lancaster County, 574 A.2d 1190, 1191 (Pa. Commw. 1990); *see also* 25 Pa. Stat. §2641(a). To aid in the exercise of that jurisdiction, the General Assembly has given boards the authority “[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 Pa. Stat. §2642(f). This expansive language easily encompasses the notice-and-cure procedures that petitioners challenge, as such procedures “guid[e] ... elections officers,” *id.*

Indeed, since 2020, courts have held that various board actions that are not explicitly listed in section 2642 fell within the scope of the boards’ delegated powers. For example, courts in this state have ruled that boards may—but are not required to—establish drop boxes to accept hand-delivered mail or absentee ballots, and that they also have discretion regarding how to allocate boxes around a county. *Pennsylvania Democratic Party*, 238 A.3d at 361; *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 352, 382 (W.D. Pa. 2020). They have also ruled that boards have discretion to regulate how far authorized representatives must be from canvassing activities, *In re Canvassing Observation*, 241 A.3d 339, 349-350 (Pa. 2020), and that boards have discretion under section 2642(g) regarding how to inspect voting machines, *County of Fulton*, 276 A.3d at 860-862.

Petitioners nonetheless deny that the General Assembly’s broad grant of this express authority to county boards supports the challenged procedures, asserting in their memorandum of law (at 6) that section 2642 does not include “anything that could authorize the development and implementation of ... cure procedures.” But as just explained, the broad language of section 2642(f) does precisely that. Indeed, petitioners do not argue otherwise. Their argument for why section 2642(f) does *not* confer the necessary authority (Memo. 25-26) is instead that cure procedures are “inconsistent with law,” 25 Pa. Stat. §2642(f), because the Election Code *requires* the counting of mail-in or absentee ballots if the absence of adequate proof of identification for such ballots is cured “prior to the sixth calendar day following the election,” *id.* §3146.8. Petitioners contend that this provision sub silentio precludes any other cure procedures. That simply does not follow. At most, the General Assembly’s explicit *requirement* of one cure procedure could preclude the conclusion that other cure procedures are also *required*. But the legislative requirement of one cure procedure in no way constitutes a *prohibition* on other such procedures. By that logic, a state legislative *requirement* that cities and counties impose a speed limit no higher than 25 mph on roads with 1000 feet of an elementary school would constitute a *prohibition* on any city or county adopting that same speed limit for all roads within 1000 feet of a middle school (or a church, or any other category of building). That is obviously wrong—and in fact it demonstrates that

although petitioners charge respondents with adding language to statutes, it is actually petitioners who do so, asking the Court to impose limitations on express grants of broad authority that the General Assembly did not see fit to include. That is impermissible. *See, e.g., In re November 3, 2020 General Election*, 240 A.3d 591, 611 (Pa. 2020); *Commonwealth v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016).

Relevant case law addressing similar statutory language illustrates the point. For example, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the U.S. Supreme Court concluded that federal statutory language providing that employees “shall” be permitted to use compensatory time off in a certain manner “is more properly read as a minimal guarantee” than “as setting forth the *exclusive* method by which compensatory time can be used,” *id.* at 583 (emphasis added); *accord New York Legal Assistance Group v. BIA*, 987 F.3d 207, 217-218 & n.19 (2d Cir. 2021); *Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858, 871 (9th Cir. 2019). The Pennsylvania Supreme Court adopted the same view in interpreting the state constitution in an election-related case, holding that “[i]n the cases specified[,] the constitution is mandatory.... In the cases not enumerated, but of the same kind, it is discretionary.” *Commonwealth ex rel. McCormick v. Reeder*, 33 A. 67, 70 (Pa. 1895). Particularly given the legislature’s broad conferral of

discretionary authority to county boards in section 2642(f), the same conclusion is warranted here.¹

A further basis for rejecting petitioners' request to impose atextual limitations on the General Assembly's broad grant of authority in section 2642(f) is the Pennsylvania Supreme Court's consistent and longstanding solicitude for the fundamental right to vote. This solicitude rests partly on the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, §5, which the court has said "guards against the risk of unfairly rendering votes nugatory." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018). To minimize that risk, and to protect the right to vote more generally, the court has admonished other courts that although they "must strictly enforce all provisions to prevent fraud"—a concern not implicated here—the "overriding concern at all times must be to be flexible in order to favor the right to vote." *Appeal of Weiskerger*, 290 A.2d 108, 109 (Pa. 1972). Put more simply, the "goal must be to enfranchise and not

¹ This line of authority also defeats petitioners' argument (Memo. 23) that the post-Election Day "cure procedure" in section 3146.8(h)(2) limits county boards authority to implement voter-assistance procedures before Election Day. Section 3146.8(h)(2) is a *mandatory* requirement that all boards must follow when canvassing absentee and mail-in ballots. A mandatory *post*-Election Day cure procedure for certain circumstances related to mail-in ballots does not mean boards may not implement *other* cure procedures, particularly *before* Election Day.

disenfranchise.” *Id.* Petitioners’ argument is directly counter to these foundational principles.²

Petitioners also contend (Memo. 24) that the challenged notice-and-cure procedures violate section 2642(g), which requires county boards to “to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted,” because it leads to divergent procedures across the Commonwealth. But what section 2642(g) requires is uniformity *within* each county, not across counties. Indeed, by its terms section 2642 gives county boards authority over only those elections conducted “within their respective counties.” Boards thus have no ability to ensure uniformity *across* counties—and hence the entire premise of section 2642(f)’s authorization of county-specific rules and instructions is that there will be variation across counties. This reading of section 2642(g)’s uniformity mandate is confirmed by the provision’s reference to “the conduct of primaries and elections *in the several election districts*

² Although petitioners cast themselves as defenders of “free and fair elections” (Memo. 2), they do not actually claim that the challenged procedures violate the Free and Fair Elections Clause. For good reason: As just noted in the text, the Pennsylvania Supreme Court has explained that the clause guards against unfair invalidation of ballots. That is precisely what the requested injunction—and petitioners’ claims more generally—would do.

of the county” (emphasis added). Uniformity is thus required across the districts of each county, but not across counties.

Likewise infirm is petitioners’ related argument that the challenged procedures violate article VII, section 6 of the Pennsylvania Constitution, which provides that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State.” This provision by its terms applies to “laws,” i.e., statutory enactments. It does not apply to the “rules, regulations and instructions” authorized by section 2642(f). Indeed, section 2642(f) reflects this distinction, providing (as discussed) that the authorized “rules, regulations and instructions” cannot be “inconsistent with *law*” (emphasis added), i.e., inconsistent with the General Assembly’s statutory enactments. Petitioners cite no authority (and to intervenors’ knowledge there is none) for the proposition that section 6’s uniformity requirement forbids any inter-county variation whatsoever in the conduct of elections.

Finally, petitioners assert that the challenged procedures violate the Elections Clause of the U.S. Constitution, which authorizes state legislatures to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, §4. As an initial matter, “[b]ecause [petitioners] are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the

General Assembly's rights under the Elections ... Clause[]." *Bognet*, 980 F.3d at 350; *see also Markham v. Wolf*, 136 A.3d 134, 141 (Pa. 2016) (applying Pennsylvania standing requirements in rejecting standing by state legislators). And even if any petitioner had such standing, the challenged procedures are (as explained) expressly authorized by state law, specifically section 2642(f). Petitioners offer no argument that if that is correct, there is any violation of the Elections Clause.

In short, even putting laches aside, petitioners have not shown that they will likely succeed on their claims, because the challenged procedures easily fall with the broad authority the General Assembly has given county boards in section 2642(f).

b. Petitioners insist, however (Memo. 21-22), that *Pennsylvania Democratic Party* establishes the illegality of the challenged notice-and-cure procedures. That is incorrect. The Pennsylvania Supreme Court in that case "addressed whether counties are *required* to adopt a notice-and-cure policy under the Election Code. Holding that they are not, the court declined to explicitly answer whether such a policy is necessarily *forbidden*." *Donald J. Trump for President*, 502 F.Supp.3d at 907. Indeed, the petition itself acknowledges this, stating (at ¶56) that "*Pa. Democratic Party* answered the question of whether the Court could

require the Boards to implement a notice and opportunity to cure provision.” That (correct) assertion shows why the case does not support petitioners’ arguments here.³

None of the language petitioners quote from *Pennsylvania Democratic Party* supports a contrary conclusion. For example, petitioners quote (Memo. 22) the Court’s statement that “although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the ‘notice and opportunity to cure’ procedure *sought by Petitioner.*” 238 A.3d at 374 (emphasis added). Again, the “procedure sought by Petitioner” in that case was a *mandatory* notice-and-cure procedure. In fact, it was a mandatory *post-election* procedure; the petitioner in that case argued “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 up until the UOCAVA deadline of November 10, 2020.*” *Pennsylvania Democratic Party*, 238 A.3d at 372 (emphasis added). The Pennsylvania Supreme Court’s conclusion that the Election Code “does not provide” for such a mandatory post-election procedure provides no support for the notion that counties are *forbidden*

³ The same point answers petitioners’ reliance (e.g., Memo. 16, 23) on the recent veto of legislation that would have mandated notice-and-cure procedures. Again, the absence of a mandate is not a prohibition, certainly in light of the broad grant of authority that the General Assembly gave county boards in §2462(f) to adopt election-related rules, regulations, and procedures.

from adopting pre-election notice and cure procedures pursuant to their section 2642(f) authority.

Petitioners next point (Memo. 22) to the statement in *Pennsylvania Democratic Party* that “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature,” 238 A.3d at 374. To begin with, the court (as explained) was discussing the mandatory notice-and-cure procedures that the petitioner in that case argued was required. No such mandatory procedure is at issue here. In any event, intervenors’ position here is fully consistent with the broader notion that notice-and-cure procedures are best dealt with by the General Assembly. By expressly giving county boards broad authority to adopt election-related rules, regulations, and instructions (authority that, as explained, encompasses the adoption of notice-and-cure procedures), the General Assembly *did* decide how best to deal with this issue. That legislative judgment warrants judicial respect.

Finally, the fact that *Pennsylvania Democratic Party* addressed only whether notice-and-cure procedures are required means there is no merit to petitioners’ assertion (Memo. 26-30) that respondents should be judicially or collaterally estopped from defending county boards’ authority to inform voters of fixable technical problems. As petitioners acknowledge, “judicial estoppel prohibits parties from switching *legal* positions to suit their own ends.” *Sunbeam Corp. v. Liberty*

Mutual Insurance Company, 781 A.2d 1189, 1192 (Pa. 2001) (emphasis added). Respondents have not switched “legal positions” from *Pennsylvania Democratic Party*, because that case, as explained, addressed whether there was a “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,” 238 A.3d at 373 (emphasis added). Respondents’ argument there that the answer was “no” is in no way inconsistent with county boards possessing *discretion* under section 2642(f) to offer qualified voters notice and an opportunity to cure. For the same reason, collateral estoppel does not apply either: Collateral estoppel applies only when the relevant issue in the prior proceeding is “identical” to the one in the current proceeding. *Gow v. Department of Education*, 763 A.2d 528, 532-533 (Pa. Commw. 2000). As explained, the issue in *Pennsylvania Democratic Party* is different from the issue here.

* * *

Petitioners cannot establish a likelihood of success on their claims. They waited far too long to sue, and in any event, the General Assembly’s broad grant of authority to county boards to implement election-related rules, regulations, and instructions to election officials within their respective counties easily includes the authority to adopt notice-and-cure procedures. Nothing in state or federal law (constitutional, statutory, or otherwise) renders such discretionary procedures

illegal. The Court need go no further to deny petitioners' application for the extraordinary relief of a mid-election preliminary injunction that would be enormously disruptive and likely result in the denial of qualified Pennsylvania voters' right to have their ballots counted.

B. The Remaining Injunction Factors Are Not Satisfied

Even if petitioners could demonstrate a likelihood of success on their claims, they would still not be entitled to a preliminary injunction. Petitioners have failed to establish any legitimate interest in preventing qualified voters from having their votes counted, much less that they will suffer “great and irreparable” harm without that remedy. And the requested injunction would upset the status quo in the midst of an election, creating far more harm—in the form of voter disenfranchisement and significant confusion—than it could possibly prevent.

1. Petitioners Will Not Suffer Irreparable Harm Absent An Injunction

Petitioners have not established that, absent a preliminary injunction, they will suffer “immediate, irreparable harm,” *Summit Towne Center*, 828 A.2d at 1001. The central “harm” petitioners assert (Memo. 14-16) is that some counties will continue to implement their notice-and-cure procedures (and perhaps that other counties may newly adopt such procedures). But even if notice-and-cure procedures were unlawful, petitioners would not be harmed by the mere fact of illegality. They must instead establish that they suffer actual injury in some personal and specific way.

For the same reasons, the asserted (yet unexplained) harms “to the separation of powers and the rule of law” would erase irreparable harm as a separate injunction requirement, collapsing it into the likelihood-of-success requirement. But “[i]rreparable harm must be established as a separate element, independent of any showing of likelihood of success.” *King Pharmaceuticals, Inc. v. Sandoz, Inc.* 2010 WL 1957640, at *5 (D.N.J. May 17, 2010) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)).

Contrary to petitioners’ assertion, this Court’s decision in *Hempfield School District v. Election Board of Lancaster County* does not establish that “[u]nlawful action by a County Board of Elections per se constitutes immediate and irreparable harm,” Memo. 14 (quotation marks omitted)—much less that *any* “violation of law ... per se constitutes immediate and irreparable harm,” Memo. 15 (quotation marks omitted). *Hempfield* held only that the inclusion of a particular “non-binding” referendum on a ballot constituted irreparable harm. *See* 574 A.3d at 1193. That makes sense because the referendum’s presence on the ballot and the outcome of the election could not be undone after it was held, and there were real-world consequences to petitioner. The Court’s holding does not mean that *any* unauthorized action by an election board would meet that standard—and if it did mean that, then it would be inconsistent with Pennsylvania Supreme Court cases making clear that irreparable harm is a separate factor from likelihood of success

regarding the claimed illegality. The court has explained, for example, that “[a] preliminary injunction of any kind should not be granted unless both the right of the plaintiff is clear and immediate *and* irreparable injury would result were the preliminary injunction not granted.” *McMullan v. Wohlgemuth*, 281 A.2d 836, 840 (1971) (emphasis added).

More fundamentally, there is no simply cognizable harm, to anyone, from allowing *more* validly cast ballots from qualified voters to be counted. Petitioners do not claim that the votes that would be counted because of the challenged procedures would be fraudulent or cast by ineligible voters. And courts have consistently rejected the notion that one voter is hurt because another qualified and registered voter is allowed to cast a lawful ballot. For example, in *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018), the Ninth Circuit rejected an equal-protection challenge to a California law that gradually introduced universal mail voting, reasoning that the law did “not burden anyone’s right to vote” but instead made “it easier for some voters to cast their ballots,” *id.* at 677. Put simply, petitioners are wrong to assert (Memo. 18) that “validly-cast votes will be diluted by the counting of unlawfully ‘cured’ ballots.” Any cured ballots will be counted only if they are ultimately submitted in accordance with all state-law requirements, and cast by qualified and registered voters. There is no authority for the proposition that one

person's vote is "diluted" because other ballots cast by qualified voters are counted, and that proposition should be soundly rejected.

Petitioners, however, assert that "the holding of an election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters." Memo. 17. But neither the case they cite in support of that assertion nor any of the cases it cited held that the irreparable-harm requirement was satisfied solely because of an alleged Voting Rights Act violation. They instead held that the irreparable-harm requirement was satisfied because individual voters' right to vote would be infringed. As one of the cases put it, "[t]he injury alleged here is *denial of the right to vote.*" *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1363 (M.D. Ala. 1986) (emphasis added). As explained, the procedures challenged here can inflict no such harm; helping qualified and registered voters submit their ballots properly so that those ballots can be counted does not deny or infringe anyone's right to vote, nor "dilute" the votes of others in any cognizable way.

Lastly, petitioners assert (Memo. 16) that they "suffer the risk of having votes being treated unequally," presumably because not all jurisdictions in Pennsylvania use notice-and-cure procedures. But nothing in Pennsylvania (or federal) law forbids any and all variation in how jurisdictions administer elections. Just as courts have held that it does not violate the law for residents of different counties to have to travel different distances to reach their polling place, or to wait different amounts

of time in line in order to vote in person (whether because of different staffing capabilities across counties or otherwise), or to use different voting machines, *see, e.g., Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006), so courts have recognized that other types of variation across counties, including variation in the availability of notice and cure procedures, is not inherently unlawful. In 2020, for example, a federal court in Pennsylvania rejected an injunction much like the one sought here—an injunction invalidating votes cast in counties with notice-and-cure procedures for mail-in ballots—reasoning that although “states may not discriminatorily sanction procedures that are likely to burden some persons’ right to vote more than others, they need not expand the right to vote in perfect uniformity,” *Donald J. Trump for President*, 502 F.Supp.3d at 920. That reasoning applies fully here, and it confirms that no petitioner (or anyone else) will suffer any legally cognizable harm simply by allowing more votes from qualified, registered voters to be counted.

2. *An Injunction Will Not Preserve The Status Quo*

Petitioners are wrong to claim (Memo. 19-21) that the injunction they seek would preserve the status quo. As this Court has explained, the “status quo” is the “status that existed between the parties just before the conflict between them arose.” *Hatfield Township v. Lexon Insurance Company*, 15 A.3d 547, 555-556 & n.6 (Pa. Commw. 2011). Here, the challenged procedures were in place for years before

petitioners filed their action. Petitioners are thus seeking to *change* the status quo, through an injunction that would halt extant notice-and-cure procedures (well after voting has begun, no less, *see supra* p.1). Judicial orders to change election procedures in the midst of voting not only upset the status quo, but also “can themselves result in voter confusion,” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

In denying that they seek to change the status quo, petitioners assert (Memo. 19) that an injunction “must not change the status that existed between the parties just before the conflict between them arose.” That argument *undermines* petitioners’ position, because as just explained, “the status that existed between the parties just before the conflict between them arose” was (according to petitioners themselves) that counties had already been using notice-and-cure procedures for years. Petitioners also state (Memo. 20) that the injunction they seek “would preserve the state of the law as set by the Election Code and as established by the Pennsylvania Supreme Court just two years ago in *Pa. Democratic Party*.” That argument improperly assumes that the Election Code and *Pennsylvania Democratic Party* affirmatively *forbid* notice-and-cure procedures. As explained, neither one does; the Election Code expressly grants county boards broad power to adopt election-related “rules, regulations and instructions,” 25 Pa. Stat. §2642(f), and *Pennsylvania*

Democratic Party held only that state law does not *mandate* notice-and-cure procedures.

In any event, petitioners are wrong that the injunction they seek would impose the state of affairs that existed around the time that *Pennsylvania Democratic Party* was decided. As their own petition demonstrates, some counties already had procedures in place to notify voters and allow them to take measures to ensure their ballot was properly submitted in the weeks following that decision. Specifically, the petition cites (¶¶68-69) an October 2020 e-mail supposedly showing that before the last general election, “the Montgomery County Board of Elections [had] implemented its own protocol to contact voters and allow them to cure ballots.” In short, petitioners have not remotely established that the relevant status quo is one in which no Pennsylvania county employed notice-and-cure procedures. The fact that petitioners in fact seek to change the status quo is yet another ground for rejecting their application.

3. *An Injunction Will Harm Respondents, Intervenors, And The Public Interest*

Petitioners’ requested injunction is additionally improper because “greater injury would result from refusing an injunction than from granting it,” *Summit Towne Center*, 828 A.2d at 1001. The indisputable key fact about this litigation is that petitioners seek to disenfranchise qualified registered Pennsylvania voters on the basis of easily correctible errors. But disenfranchisement is a severe and

irreparable injury, particularly because the right to vote “is the bed-rock of our free political system.” *Bergdoll v. Kane*, 731 A.2d 1261, 1268-1269 (1999). For that reason, the Pennsylvania Supreme Court has recognized that “[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.” *Perles v. County Return Board Of Northumberland County*, 202 A.2d 538, 540 (1964). The failure to count votes cast by qualified and registered voters—votes that could easily be fixed to comply fully with Pennsylvania law—interferes with the Commonwealth’s effectiveness as a democratic polity and undermines public faith in the electoral process. That is because citizens’ ability both to vote *and* to have their votes counted “is of the essence of a democratic society,” and any interference with those rights “strike[s] at the heart of representative government.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Disenfranchisement accordingly harms both the individual members of the public whose votes are not counted and the public interest more broadly.

An injunction here would thus create far greater harm than it would prevent. As discussed, *see supra* Part III.B.1, petitioners’ asserted harms are simply the fact of allegedly illegal activity and the supposed—but non-cognizable—“dilution” of votes via the counting of votes from other qualified and registered voters. Petitioners’ interest in denying their fellow Pennsylvanians an opportunity to have

their votes counted cannot overcome the public's fundamental interest in maximizing the counting of votes from qualified and registered voters.

Relatedly, the injunction is improper because “issuance ... will ... substantially harm other interested parties in the proceedings,” *Summit Towne Center*, 828 A.2d at 1001. Petitioners do not address the harm that their requested injunction would impose on the respondent counties. As explained, those counties have already begun the absentee-ballot process for the November 2022 general election, with votes able to be cast starting on September 19. An injunction issued in the middle of that process would create significant confusion and disruption for county officials and voters. Nor do petitioners contend with the harm to the Democratic National Committee and the Pennsylvania Democratic Party, who would be required to devote additional resources to educating voters (during a period when voting is already underway) about the absentee-ballot requirements, in order to minimize the chance of errors that, if the injunction were granted, could no longer be corrected so that people's votes could be counted. The injunction would also surely result, as explained, in some Pennsylvanians' votes not being counted when they otherwise would have been. Some of those votes will unquestionably be cast by Democratic voters (i.e., intervenors' members) and some will unquestionably be cast for Democratic candidates. The injunction would thus harm intervenors by both

infringing their members' right to vote and diminishing their ability to help elect Democratic candidates.

In arguing about public interest, petitioners again conflate a separate injunction factor with their argument on the merits. In particular, they claim (Memo. 33) that the public will not be hurt by mid-election changes and disenfranchisement because "the public interest is best served by a consistent application of the rule of law established by the General Assembly and the maintenance of the separation of powers in Pennsylvania." That is true but it does not support petitioners, because "the rule of law established by the General Assembly" is, as discussed, a broad grant of authority to county boards to promulgate election-related rules, regulations, and instructions. And it does not maintain "the separation of powers in Pennsylvania" for courts to insert themselves in the elections process (mid-election, no less) in order to block county boards from using that legislatively delegated power, as petitioners request.

Put simply, the public interest is served by counting the maximum number of votes properly cast by qualified registered Pennsylvanians, including those who inadvertently make technical but easily corrected errors. The public interest is not served by (and petitioners have no valid interest in) denying thousands of Pennsylvanians one of their most fundamental rights by barring the correction of such errors.

4. *The Requested Injunction Is Not Narrowly Tailored*

Finally, petitioners are wrong to assert (Memo. 32-33) that the preliminary injunction they seek satisfies the narrow-tailoring requirement. Petitioners seek an order prohibiting any county board in the Commonwealth from notifying voters about technical errors in their mail-in or absentee ballots. Such an injunction would guarantee that many Pennsylvanians—perhaps thousands or even tens of thousands—will lose their right to vote in the upcoming elections, even if this Court ultimately holds that the challenged procedures are lawful. Such *permanent* invalidation of affected ballots is not a reasonable form of interim relief to address the challenged conduct while this litigation proceeds. *See Three County Services, Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985) (a “preliminary injunction, if issued, should be no broader than is necessary for the petitioner's interim protection”).

IV. CONCLUSION

The application for a preliminary injunction should be denied.

September 16, 2022

Respectfully submitted,

Seth P. Waxman*

Christopher E. Babbitt*

Daniel S. Volchok*

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CERTIFICATE OF COMPLIANCE

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.



CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

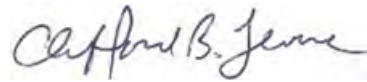
A true and correct copy of the foregoing document was served upon all counsel of record on September 16, 2022 by this Court's electronic filing system.



CLIFFORD B. LEVINE

CERTIFICATE OF LENGTH

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 7,404, as counted by Microsoft Word's word count tool.



Clifford B. Levine

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE, et al.,	:	
	:	
Petitioners	:	
	:	
	:	
v.	:	No. 447 MD 2022
	:	
	:	
LEIGH M. CHAPMAN, in her capacity as	:	
Acting Secretary of the Commonwealth of	:	
Pennsylvania, <i>et al.</i> ,	:	
	:	
Respondents	:	

ANSWER OF RESPONDENT LEHIGH COUNTY BOARD OF ELECTIONS IN OPPOSITION TO PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

In accordance with this Court’s Order of September 9, 2022, the Lehigh County Board of Elections (Lehigh) hereby files this Answer in Opposition to the Application for Special Relief in the form of a Preliminary Injunction filed by Petitioners. Petitioners have requested that the sixty-seven (67) County Boards of Election be “enjoined from implementing procedures to notify voters that their mail-in or absentee ballots fail to comply with the Election Code's signature and secrecy ballot requirements and giving such voters an opportunity to "cure" noncompliant ballots ("cure procedures"), except where expressly authorized under the Election Code, until resolution of this litigation.”

Lehigh joins in the Answer filed by Respondents Chapman, Mathis and Chester County, and by way of additional Answer includes the following:

1. Lehigh has been assisting voters who personally drop off their absentee ballots for many years, and provides the same assistance to voters who choose to use mail-in ballots.
2. Many voters now utilize the same day process to apply for and cast their mail-in or absentee ballots, bringing those ballots in person to the counter of the Voter Registration Office in Lehigh. If the clerk who receives these ballots notices that the outer envelope is incomplete and the voter is still present, the clerk informs the voter of the issue and permits the voter to cure the issue. Under the proposed injunction, the clerk would be required to stay silent, not provide what would be considered reasonable customer service, and disenfranchise the voter.
3. The request for injunction is overly broad and the injunction as presented could act to restrict the ability of Lehigh to answer questions addressed to it by voters wishing to know their options if they are notified that their ballot has been cancelled.
4. As an example of the foregoing, if a ballot is returned with no secrecy envelope, also known as a “naked ballot”, Boards of Election must cancel the ballot. This currently happens only on primary or election day, when pre-canvassing begins. When the outer envelope of the ballot is opened, and the ballot is determined to be naked, the ballot is cancelled and the

cancellation is entered into the state system, at which point the Department of State sends a notice of the cancellation to the voter who submitted the naked ballot.¹ This generally results in the voter calling the Voter Registration office in Lehigh. Lehigh's practice historically and anticipated for the 2022 general election is to inform the voter that they may go to their polling place and cast a provisional ballot.² It is unclear whether the requested injunction would permit Lehigh to inform voters of their option to cast a provisional ballot when their original ballot has been cancelled.

5. Should Lehigh gain the capability to ascertain that a ballot does not include the secrecy envelope prior to the start of pre-canvassing, giving either the voter or interested political parties advance notice of the potential cancellation would allow the voter to learn that they would need to make arrangements to go to their polling place to cast a provisional ballot.³ Lehigh has agreed to look at the legality of doing so as part of its Stipulated Agreement cited in the Petition. This is a commonsense solution which has

¹ For those voters who have provided an email address as part of their application for the absentee or mail-in ballot.

² To call this a "cure" for the issue seems a misnomer, because a proper cure would involve permitting the voter to replace the noncompliant ballot.

³ As cited in the Petition for Review, Lehigh has entered into a Stipulated Agreement to resolve a federal lawsuit filed at 22-CV-02111, in which Lehigh has agreed to certain actions which include informing voters of the importance of providing contact information, see <https://www.lehighcounty.org/Departments/Voter-Registration/Absentee-Mail-In-Ballot>, notifying all voters whose naked ballots are discovered prior to 8:00 P.M. on Election Day and providing those names to the party or candidate representatives who are on-site. Lehigh has also agreed to pursue in good faith other actions which would allow Lehigh to identify naked ballots prior to pre-canvass, by virtue of the weight and/or thickness of the envelope and possibly utilizing a secrecy envelope of a strong color which would be more discernable from other materials provided to the voter with the absentee and mail-in ballot materials.

as its goal the preservation of the voter's ability to participate in the electoral process.

6. Lehigh has had many incidents of a husband and wife signing the other's outside ballot envelope. Rather than disenfranchise both voters, they are notified and given the opportunity to sign the correct envelope.
7. In all of these scenarios Lehigh has determined to provide the voter with the opportunity to preserve their right to cast a ballot for their chosen candidates. This has led to a side benefit of increasing voter understanding of the processes followed by Lehigh and increasing voter appreciation for the integrity of the system.
8. Under Pennsylvania election law, it is a well settled principle that every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it. In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election, 241 A.3d 1058, 1071 (Pa. 2020), cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021), citing Appeal of Norwood, 382 Pa. 547, 116 A.2d 552, 554– 55 (1955).
9. "The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made; it is not to subvert, but to maintain the existing status until the merits of the controversy

can be fully heard and determined.” Appeal of Little Britain Township, 651 A.2d 606, 610 (Pa. Cmwlth. 1994). “A preliminary injunction [does not] serve as a judgment on the merits since by definition it is a temporary remedy granted until that time when the [parties’] dispute can be completely resolved.” Id.

10. The grant of the requested preliminary injunction would alter the status quo, and put mail-in and absentee voters at risk of having their ballots voided for reasons which are easily cured.
11. A party seeking a preliminary injunction bears a heavy burden of proof. The applicant for a preliminary injunction must show that (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interests. SEIU Healthcare Pennsylvania v.

Commonwealth, 104 A.3d 495, 502 (Pa. 2014); see also Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). “Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is granted only when each [factor] has been fully and completely established.” Pennsylvania AFL-CIO by George v. Commonwealth, 683 A.2d 691, 694 (Pa. Cmwlth. 1996).

12. Petitioners have not met the burden of proof for a preliminary injunction, for the reasons set forth below.
13. Petitioners have not identified any real immediate and irreparable harm from permitting county Boards of Election to notify mail-in and absentee voters of deficiencies in their ballots. The fact that counties may handle these situations in different ways does not create an impermissible lack of uniformity. Counties have been using different styles of voting machines for many years and may have different options as part of their vote casting in the polling place. For example, some machines notify voters if they under or over vote. Some do not. We see no handwringing over this difference.
14. Granting the preliminary injunction will cause great harm in the form of disenfranchising many Commonwealth voters, who could otherwise have their votes counted if they are able to cure their ballot envelope deficiencies or are informed that they may cast a provisional ballot if their ballot is

cancelled for lack of a secrecy envelope. There is no remedy for the loss of a vote.

15. The preliminary injunction would not restore the parties to the status quo, which one could argue is the status immediately prior to the effective date of Act 77, which introduced mail-in ballots. Lehigh has always assisted absentee voters with their ballot issues, and to treat mail-in ballots differently makes no sense.

16. Petitioners have not established a clear right to relief and are not likely to prevail on the merits of their claim. There is no prohibition in the Election Code which prevents Boards of Elections from assisting voters with their ballots. If Lehigh can assist a voter in person at the counter with ballot issues, it should be able to do so for ballots which are not delivered in person.⁴

17. The proposed injunction would be overbroad and could act to chill the speech of election workers in Lehigh who work diligently to assist all voters.

18. The preliminary injunction would definitely harm the public interest, which is to facilitate voting by all those who wish to participate in the electoral system.

⁴ Especially for disabled voters who cannot deliver their ballots in person.

For all the foregoing reasons, Lehigh respectfully requests that this Honorable Court deny Petitioners' request for a preliminary injunction.

Respectfully submitted,

/s/Catharine M. Roseberry, Esq.

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Counsel for the Lehigh County Board
of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL :
COMMITTEE, et al., :
Petitioners :
v. : No. 447 MD 2022
LEIGH M. CHAPMAN, in her capacity as :
Acting Secretary of the Commonwealth of :
Pennsylvania, *et al.*, :
Respondents :

CERTIFICATE OF COMPLIANCE

I, Catharine M. Roseberry, 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.

Respectfully submitted,

Date: September 16, 2022

/s/Catharine M. Roseberry, Esq.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE, et al.,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 447 MD 2022
	:	
LEIGH M. CHAPMAN, in her capacity as	:	
Acting Secretary of the Commonwealth of	:	
Pennsylvania, <i>et al.</i> ,	:	
	:	
Respondents	:	

ORDER

AND NOW, THIS DAY OF , 2022, upon consideration of Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction and the Answers in Opposition thereto, **IT IS HEREBY ORDERED THAT** the Application is Denied.

BY THE COURT:

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL)	
COMMITTEE et al.,)	
Petitioners,)	ELECTION MATTER
v.)	
)	
LEIGH M. CHAPMAN, in her capacity)	No. 447 MD 2022
as Acting Secretary of the)	
Commonwealth of Pennsylvania et al.,)	
)	
Respondents.)	

**ANSWER TO APPLICATION FOR SPECIAL RELIEF SEEKING
PRELIMINARY INJUNCTION UNDER P.A.R.A.P. 1532**

Now comes Respondent, Allegheny County Board of Elections (Allegheny), by and through George M. Janocsko, Allegheny County Solicitor, Allan J. Opsitnick, Assistant County Solicitor, and Lisa G. Michel, Assistant County Solicitor, and files the following Answer to Petitioners' Application for Special Relief Seeking a Preliminary Injunction, averring as follows:

1. Paragraph 1 states a conclusion of law to which no response is required. To the extent that any facts are averred, after reasonable investigation, Allegheny has insufficient knowledge or information in order to form a belief as to the truth of the averments contained in these paragraphs regarding other county boards of election. By way of further response, Allegheny has, for the past several elections, returned absentee and mail-in ballots (mail-in ballots) to voters where the outer envelope and the declaration thereon has not been properly completed.
2. Paragraph 2 states a conclusion of law to which no response is required. County, however, avers that the Petitioners' summary of *Pa. Democratic Party v. Boockvar*, 238 A.2d 345,

374 (Pa. 2020) misstates the Supreme Court’s holding. In *Pa. Democratic Party*, the petitioner was demanding that the 67 county boards of election institute and implement a cure process. The Supreme Court held that it would not compel the county boards to take on this task, especially at the late date of the petition when ballots were being printed and transmitted to voters. Moreover, the Court in *Pa. Democratic Party* did not indicate that county boards were prohibited from implementing a cure process for mail in ballots.

3. Paragraph 3 states a conclusion of law to which no response is required. The Supreme Court’s opinion speaks for itself. By way of further response, as set forth above, the Court did not indicate that county boards are prohibited from permitting voters to cure defects, prior to the final return date of a mail-in ballot.
4. Paragraph 4 states a conclusion of law to which no response is required. The Supreme Court’s opinion speaks for itself. By way of further response, as set forth above, the Court did not indicate that county boards are prohibited from permitting voters to cure defects, prior to the final return date of a mail-in ballot.
5. Respondent specifically denies the averment of this paragraph as stated. The Petitioners did not reference the specific legislation. As such, all the respondents are left to guess as to which legislation and its content. To the extent the Petitioners may be referring to House Bill 1300 in June 2021, it is noteworthy that ballot “cure” provisions were only one component of that voluminous legislation.
6. Paragraph 6 states a conclusion of law to which no response is required. To the extent that a response is required, the Respondent specifically denies the averment believing it to be erroneous.

7. Paragraph 7 states a conclusion of law and argument to which no response is required. Allegheny denies the premise asserted in the averments in Paragraph 7 that any county board's adoption of a policy or practice to notify voters of a technical defect and provide a limited opportunity to cure has been prohibited by the Supreme Court of Pennsylvania or any other court of competent jurisdiction.
8. Paragraph 8 states a conclusion of law and argument to which no response is required.
9. Paragraph 9 states argument to which no response is required. To the extent a response is necessary, Allegheny opposes the issuance of any injunctive relief.
10. Paragraph 10 states a conclusion of law to which no response is required.
11. Paragraph 11 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny avers that injunctive relief is necessary or required.
12. Paragraph 12 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny specifically denies that the elements for a preliminary injunction have been established as a matter of law.
13. Paragraph 13 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny incorporates its responses to the above paragraphs as though set forth at length as its response to the averments in Paragraph 13.
14. Paragraph 14 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny incorporates its responses to the above paragraphs as though set forth at length as its response to the averments in Paragraph 14.
15. Paragraph 14 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny incorporates its responses to the above paragraphs as though set forth at length as its response to the averments in Paragraph 14. By way of

additional response, Allegheny asserts that the Petitioners misstate the precise legal issue and holding in *Pa. Democratic Party*.

16. Paragraph 15 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny incorporates its responses to the above paragraphs as though set forth at length as its response to the averments in Paragraph 16.

17. Paragraph 17 states a conclusion of law to which no response is required. To the extent a response is necessary, Allegheny incorporates its responses to the above paragraphs as though set forth at length as its response to the averments in Paragraph 17. Additionally, Allegheny avers that the public interest will be adversely affected, particularly the cohort of those citizens who vote by absentee ballot due to physical limitation that impede their mobility and access to the polling sites and who will be disenfranchised by not having a reasonable opportunity to correct a technical defect.

WHEREFORE, for the above reasons and those to be set forth more fully in the response to the Petition for Review by all Respondents, including without limitation, the other responding county board of elections, the Respondent Allegheny County Board of Elections respectfully requests this Honorable Court to deny the Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,
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Allan J. Opsitnick

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(412) 391-3299

Attorneys for Respondent Allegheny County
Board of Elections

CERTIFICATE OF COMPLIANCE

I 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.

Submitted by: Allan J. Opsitnick

Signature: /s/ Allan J. Opsitnick

Name: Allan J. Opsitnick

Attorney #: 28126

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving true and correct copies of the foregoing **ANSWER TO APPLICATION FOR SPECIAL RELIEF SEEKING PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532** upon the persons and in the manner indicated below, which satisfies the requirements of Pa. R. A. P. 121:

Service by eService as Addressed as Follows:

To all active counsel of record listed as participants on Commonwealth Court docket in this matter.

Date: September 16, 2022

/s/ Allan J. Opsitnick
Allan J. Opsitnick
Assistant County Solicitor
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Attorney for Respondent - Allegheny
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Attorneys for Respondent Philadelphia County Board of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, <i>et al.</i> ,	:	
Petitioners,	:	
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, <i>et al.</i> ,	:	
Respondents.	:	

**RESPONDENT PHILADELPHIA COUNTY BOARD OF ELECTIONS’
ANSWER TO PETITIONERS’ APPLICATION FOR
PRELIMINARY INJUNCTION**

The Court should deny the Application because Petitioners’ Application is inexcusably late and fails the traditional, multi-prong test for preliminary injunction. Petitioners’ claims do not have a likelihood of success on the merits as Petitioners lack standing to challenge procedures for as-yet uncast ballots and their claims that Respondent Philadelphia County Board of Elections (“Philadelphia”)

lacks authority to issue replacement absentee and mail-in ballots are circular and unsupported. Nor can Petitioners show immediate irreparable harm setting them apart from other voters in the state, let alone harm that would justify disenfranchising eligible voters. Petitioners' requested injunction would also alter the status quo by changing current procedure, would enjoin practices far broader than the claimed injuries, and would disrupt a fast-approaching election.

Petitioner's eleventh-hour request to have this Court limit the ability of county boards of elections to ensure that registered voters can fully exercise their franchise is manifestly against the public interest. For all these reasons and as explained more fully in the accompanying memorandum of law, no injunction is warranted.

In opposition to the Application, Philadelphia states the following:

1. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

2. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

3. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

4. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

5. The allegations in this Paragraph are conclusions of law to which no response is required and refer to written documents which speak for themselves. To the extent a response is required, the characterizations and allegations are denied.

6. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

7. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

8. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

INJUNCTIVE RELIEF

9. Denied except that it is admitted that Petitioners purport to proceed as stated.

10. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

11. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

12. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

13. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

14. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

15. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

16. The allegations in this Paragraph are conclusions of law to which no response is required. To the extent a response is required, the allegations are denied.

WHEREFORE, for all of the foregoing reasons and those set forth in the Memorandum of Law in Opposition, Philadelphia has shown cause why this Court should not issue a preliminary injunction and respectfully requests that the Court deny the Application.

Respectfully submitted,

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

DATE: September 16, 2022

/s/ Ryan B. Smith
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Because Petitioners' Application is inexcusably late and fails the traditional, multi-prong test for preliminary injunction, the Court should deny the Application. Petitioners' claims do not have a likelihood of success on the merits as Petitioners lack standing to challenge procedures for as-yet uncast ballots and their claims that Philadelphia lacks authority to issue replacement absentee and mail-in ballots are circular and unsupported. Nor can Petitioners show immediate irreparable harm setting them apart from other voters in the state, let alone harm that would justify disenfranchising eligible voters. Petitioners' requested injunction would also alter the status quo by changing current procedure, seeks to enjoin practices far broader than the claimed injuries, and would disrupt a fast approaching election. Petitioner's eleventh-hour request that this Court limit the ability of county boards of elections to ensure that registered voters can fully exercise their franchise is manifestly against the public interest. For all these reasons and as explained more fully below, no injunction is warranted.

I. MATTER BEFORE THE COURT

Philadelphia requests the Court deny Petitioners' Application for a Preliminary Injunction.

II. RESTATEMENT OF QUESTIONS INVOLVED

Question 1: Should this Court deny as barred by laches Petitioners’

Application to enjoin Philadelphia’s provision of replacement ballots to voters whose ballots have technical defects?

Suggested Answer: Yes

Question 2: Should this Court deny Petitioners’ Application because

Petitioners have not, and cannot, satisfy the stringent requirements of the multi-prong test for a preliminary injunction?

Suggested Answer: Yes

III. PROCEDURAL BACKGROUND

Petitioners filed their Petition for Review in this Court on September 1, 2022. On September 7, 2022, Petitioners filed the instant application for a preliminary injunction. On September 9, 2022, this Court set a schedule for briefing and argument.

IV. ARGUMENT

Petitioners’ Application for preliminary injunction seeks the same sweeping relief—the disenfranchisement of voters with minor defects to their otherwise valid ballots—that the federal courts denied other challengers two years ago. This Application, filed on the eve of the 2022 General Election, comes too late and the Court should summarily deny it. Nor can Petitioners satisfy **any** of the necessary prerequisites for entitlement to a preliminary injunction, let alone all of them. For

those reasons, too, this Court should deny Petitioners' Application for a Preliminary Injunction.

A. As a Threshold Matter, the Court Should Summarily Deny Petitioners' Application Because They Have Inexcusably Delayed Seeking Injunctive Relief.

Courts have denied preliminary injunctions based on laches or similar concepts where a movant's failure to act has prejudiced the targeted party. As long ago as *Becker v. Lebanon & M. Ry. Co.*, 41 A. 612 (Pa. 1898), the Supreme Court approved the application of laches where a plaintiff had promptly brought an action against a railway company to prevent the construction of its railway on a road abutting onto his property, but then made no motion for a preliminary injunction until the road had been built.

In this case, Petitioners have waited nearly two years, until the eve of an election, to challenge publicly announced practices of providing replacement ballots to voters whose ballots have technical defects. Nothing stopped Petitioners from challenging this practice in 2020, in 2021, or even for the 2022 primary earlier this year. They could have sought the instant relief well in advance of this election, when Philadelphia and other counties would have had time to adjust their practices, retrain their staff, and educate voters for future elections based on the court's final ruling. Instead, Petitioners waited until that time had passed, and then sought immediate preliminary relief. This Court should not reward Petitioners'

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

B. Petitioners Cannot Meet the Stringent, Well-Defined Requirements to Obtain a Preliminary Injunction.

To obtain the requested preliminary injunction, Petitioners must establish every one of the following prerequisites:

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

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

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

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

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

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

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

As demonstrated below, Petitioners cannot satisfy any, much less all, of the six necessary factors, and the requested injunction must therefore be denied.

1. Petitioners Cannot Demonstrate a Clear Right to Relief and a Probability of Success on the Merits.

a. Petitioners Have No Standing to Challenge Philadelphia's Practice

Petitioners, party organizations, and individual voters from other counties are unlikely to succeed because they lack standing to challenge Philadelphia's replacement ballot practice.

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

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

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

Petitioners have failed to show they have any interest surpassing the interest of every other citizen in having ballots counted properly and boards of elections obey the law. Party organizations cannot show any particularized injury given that it is pure speculation at this time what parties' candidates any cured ballots will favor. *Cf. Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331,

380 (W.D. Pa. 2020) (“There is nothing in the record to establish that potential voter fraud and dilution will impact Republicans more than Democrats.”). Nor can individuals claim any particularized injury surpassing others when, even if the alleged dilution occurs, it would affect all other voters equally. *Id.* at 390 (emphasis added). Plaintiffs’ claimed vote dilution harm is brought in advance of the election on a theory that there is a potential risk of allegedly improper votes being counted. Just as the District Court found in 2020, this fails to establish concrete injury. *Id.* at 380. Moreover, Petitioners are not Philadelphia voters who will be affected by Philadelphia’s practice.

Because they lack standing to pursue their claims, Petitioners have not shown a probability of success on the merits.

b. *Petitioners Have Not Shown Philadelphia’s Practices Are Clearly Unlawful*

Petitioners’ merits arguments cannot withstand the slightest scrutiny let alone show a clear right to relief. First, they claim that the Supreme Court’s *Pennsylvania Democratic Party v. Boockvar* opinion, in refusing to *require* notice-and-cure, actually prohibits it entirely, and that Respondents are estopped from arguing otherwise. And second, they suggest county boards cannot choose to provide for notice-and-cure under their regulatory authority because it is not explicitly detailed as a power or duty of county boards and may vary in policy or practice between counties. None of these claims have merit.

In *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court held that the Election Code does not *require* county boards to provide a notice and an opportunity for voters to cure their defective ballots, in part because that policy decision was best suited for the legislature, not the Court. 238 A.3d 345, 374 (Pa. 2020). But Petitioners misconstrue the Pennsylvania Supreme Court’s reasoning as a definitive ruling on whether providing the opportunity to cure—and by extension delegation of such authority to county boards—is *permitted* under the election code. The language in *Pennsylvania Democratic Party* does not support either reading, and Petitioners’ failure to quote any language actually stating their alleged holding proves the point. *See* Pet’rs Br. at 21-22. Further, Petitioners offer no legal basis for the incredible proposition that a decision holding that the Election Code does not affirmatively require a specific procedure means that the Code prohibits such a procedure. And because the decision does not bar boards from voluntarily adopting cure procedures, estoppel does not apply either.

Petitioners’ arguments that the county boards lack authority fare no better. Petitioners acknowledge that the legislature has granted boards powers, including rulemaking authority, but suggest the lack of explicit mention of notice-and-cure forecloses it. Pet’rs Br. at 24 (quoting 25 P.S. § 2642). But Section 2642 is a broad grant of power allowing boards to regulate elections not inconsistent with the

Code; it does not spell out every detail of every action a board may take. If it did, rulemaking authority would be unnecessary. And the very rulemaking section Petitioners cite empowers boards to instruct local election officials and voters. *See id.* at 24-25 (quoting 25 P.S. § 2642(f)). What’s more, other Code provisions allow eligible voters to request a ballot and vote by mail. *See generally* 25 P.S. 3146.1 *et seq.* Boards are required to mail absentee and mail-in ballots to qualified electors when they receive acceptable applications. *See* 25 P.S. 3146.5(a)-(b)(1); *id.* § 3150.15. And more recently, the General Assembly has permitted qualified electors to request and receive their absentee or mail-in ballot in person from the county board. *See* 25 P.S. 3146.5(b)(2). “If a voter presents the voter’s application within the county board of elections’ office in accordance with this section, a county board of elections may not deny the voter’s request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application.” *Id.*

Philadelphia’s procedures have always been consistent with these dictates, even as alleged by Petitioners. Petitioners allege that Philadelphia permits qualified electors to request replacement absentee and mail-in ballot packages when the Board has not received a valid ballot from that elector. *See* Pet. For Review ¶ 70; *id.* Ex. C. Though Petitioners characterize this as a “cure procedure,” their own exhibit shows that this is a misnomer. Among other reasons, replacement ballot

packages may be issued because the original ballot was returned by the postal service as “UNDELIVERABLE.” *Id.* Ex. C. Nor does the Election Code prohibit the issuance of replacement ballot packages where, for instance, all or part of the ballot package is misdelivered and never reaches the voter, or where the voter has made an error in the process of marking their ballot. In those cases, the voter does not “cure” an invalid ballot; instead, they submit a replacement ballot. Petitioners’ argument that Philadelphia practice is (a) “inconsistent with law” because the Election Code allegedly does not authorize it and (b) that it is unauthorized because it is inconsistent with law, is simply circular reasoning that has no grounding in the statutory texts. Indeed, county boards’ rulemaking authority “not inconsistent with law, as they may deem necessary for the guidance of . . . electors” directly contemplates rulemaking where the Election Code does not explicitly provide for a necessary procedure; such delegation would be pointless otherwise. 26 P.S. § 2642(f).

Petitioners’ *expressio unis* and uniformity arguments also collapse when scrutinized. Petitioners claim the Code’s provision allowing voters to corroborate their application with proof of identification after voting forecloses notice-and-cure of ballots themselves, and that the Code’s requirement that elections be “uniformly conducted” bars notice-and-cure procedures merely because the minutiae of the procedures may vary between counties. Petitioners suggest that because the Code

requires county boards to allow voters to cure identification issues, it implicitly *prohibits* curing defective ballots, including Philadelphia's issuance of replacement ballots to voters who return invalid ballots. But Petitioners provide no authority for implying a prohibition on a voluntary practice relating to ballots from the involuntary requirement of a different practice relating to applications. For instance, county boards are required to accept absentee ballots at their main offices, but that requirement does not prohibit them from establishing and accepting such ballots at optional drop boxes. *Pa. Democratic Party*, 238 A.3d at 361. And the Court's recognition of drop boxes also defeats Petitioners' uniformity claim. It is undisputed that counties may, but are not required, to establish drop boxes for voters to return their ballots, without any suggestion that doing so violates the requirement of uniformity in elections. *See id.* So too here, where the laws governing the election are uniform and ballots are measured against the same standard, county variations in how those ballots are lawfully distributed and initially processed do not offend Pennsylvania's voting laws.

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

c. *Petitioners Have Not Shown a Violation of the Federal Elections Clause*

Petitioners have also failed to show a likelihood of success and clear right to relief on their federal Elections Clause claim. Petitioners’ theory—recently used to challenge interpretations by state courts, *see, e.g., Moore v. Harper*, 142 S. Ct. 2901 (2022)—essentially rehashes their lack-of-authority and uniformity claims, and should be rejected for the same reasons. *See* Pet’rs Br. at 31-32. Because Philadelphia’s practice is authorized—and certainly not prohibited—by the Election Code enacted by the General Assembly, there is no violation of the Elections Clause.

2. *“Notice” and “Cure” of Invalid Ballots by Eligible Voters Is Not An Immediate and Irreparable Harm and An Injunction Would Impose Greater Injury on Disenfranchised Voters than Petitioners*

Two of the most important factors for the Court to consider before granting preliminary injunctive relief are whether the injunction is necessary to prevent “immediate” and “irreparable” harm to the movant, *Summit Town Centre, Inc.*, 828 A.2d at 1001, and whether that harm is greater than the harm the injunction would impose on others and the public, *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1385 (Pa. 1978). But Petitioners have not shown any actual immediate and irreparable harm, and instead rely on a theory of *per se* irreparable harm duplicative of their defective merits arguments; as a result, the harm from granting

an injunction on disenfranchised voters would far outweigh the nominal harm from Petitioners' claimed statutory violation.

Petitioners' base their argument on language suggesting that unlawful action or conduct always constitutes irreparable harm where "a statute proscribes" that activity. Pet'rs Br. at 14 (quoting *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980)). But as discussed above, no statute "proscribes" Philadelphia's replacement ballot practice, and for Petitioners' thinly argued statutory allegations to satisfy the irreparable harm prong, at the absolute minimum, they would have to "clearly establish" the violation by showing that there was no dispute as to the underlying facts of who—if anyone—is harmed, when, and how. *Cappiello v. Duca*, 672 A.2d 1373, 1377-78 (Pa. Super. Ct. 1996); cf. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 508-09 (Pa. 2014) ("It is undisputed that the Executive Branch proposes to close more than one-third of the existing sixty Centers and to furlough twenty-six nurse consulting positions. Even absent factual findings by the Commonwealth Court regarding the pros and cons of the Executive Branch's proposal, it is clear that such action will reduce the number of Centers and the level of public health services in direct contravention of the plain language of Section 1403(c)(1)."). Having failed to do so, *see supra* Part IV.B.1.b., Petitioners have failed to show the necessary irreparable harm.

Further, Petitioners’ proposed preliminary injunction would inflict far greater harm on voters and the public than Petitioners’ claimed injuries. Petitioners seek to stop county boards from allowing voters who are admittedly qualified to cast an absentee or mail-in ballot, and who have timely done so, from having their votes counted because of technical defects detected before the close of polls on Election Day. Put simply, Petitioners seek to disenfranchise qualified voters by invalidating their entire ballots, to avoid allegedly “diluting” Petitioners’ ballots. Pet. ¶ 34. Not only that, Petitioners seek to do so now, on a preliminary basis, before this Court has finally determined the merits of the issues. But if Petitioners’ injunction is granted now and the Court later comes to a different final conclusion, those voters will still have been disenfranchised because they were deprived of the opportunity to cure their technically deficient ballots. Compared with that truly irreparable harm, Petitioners bare claim of an implicit statutory violation is far outweighed and no injunction is appropriate.

3. *An Injunction Would Disrupt the Status Quo*

Petitioners also claim that their proposed injunction would not change the status quo, but their recitation of recent elections practices shows just the opposite. As Petitioners acknowledge, county boards have been providing what Petitioners call notice-and-cure for multiple elections dating back to 2020. *See, e.g.*, Pet. ¶¶ 66-70. These Petitioners did not object to those practices then, rendering them the

“last peaceable and lawful uncontested” status. *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Commw. 2011). Petitioners seek to change that status quo by prohibiting the continued use of those previously uncontested procedures, which have been publicized to voters and in some cases contractually mandated and submitted to courts. *See, e.g.*, Pet., Exs. C, E, F. To adopt Petitioners’ conception of the status quo by retroactively invalidating heretofore unchallenged practice would effectively eliminate this prong of the test by turning every injunction into a preservation of the “status quo.” As a result, the Court must deny Petitioners’ requested injunction.

4. *Petitioners Requested Injunction Is Not Reasonably Tailored*

While Petitioners’ claimed harm is the violation of law and dilution of votes from the counting of cured ballots, Pet’rs Br. at 17, their proposed injunction is far broader. Petitioners’ requested relief goes far beyond addressing the actual counting of allegedly problematic ballots. Petitioners seek to have this Court enjoin the county boards from providing even notice to voters or developing potential procedures. Yet Petitioners have not alleged how the development of procedures or notice to voters of invalidity will harm Petitioners. Because the requested injunction is not reasonably suited to abate the alleged harm, and because it would impose far greater harm on disenfranchised voters, it should be denied entirely.

5. *A Disruptive, Disenfranchising Injunction Is Against the Public Interest*

The public interest also favors denying Petitioners' request injunction.

Election Day is less than two months away and voters will be receiving mail-in and absentee ballots imminently. Forcing county boards with established procedures to alter those procedures and expend resources educating voters about new, potentially temporary rules will disrupt preparation for the election and cause voter confusion. The public interest in an orderly election favors the denial of late-breaking requests for temporary injunctive relief.

V. **CONCLUSION**

Petitioners have failed to timely bring their Application and failed to meet their burden of establishing the requirements for obtaining a preliminary injunction. Accordingly, for all the reasons set forth herein, Petitioners' Application must be denied.

Respectfully submitted,

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

DATE: September 16, 2022

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE, et al.,	:	
	:	
	:	
Petitioners	:	
v.	:	No. 447 MD 2022
	:	
LEIGH M. CHAPMAN, et al.,	:	
	:	
Respondents	:	
	:	

ANSWER OF RESPONDENT MONTGOMERY COUNTY BOARD OF ELECTIONS TO PETITIONERS’ APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Montgomery County Board of Elections (“Respondent”), through its undersigned counsel, hereby answers the Application for Special Relief of Petitioners (“Petitioners”). In support of this answer, Respondent states as follows:

BACKGROUND

1. Admitted in part; denied in part. Respondent admits that it has had a long standing policy of allowing voters to correct minor errors to their absentee and/or mail-in ballots. With respect to the policies and procedures of County Boards of Elections other than Montgomery County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. The remaining averments of this

paragraph are denied as conclusions or statements of law to which no response is required. By way of further answer, the section of the Election Code referenced in this paragraph addresses ballot applications and not ballots returned by electors.

2. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, Petitioners' representation of the Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) is inaccurate. The Supreme Court stated that the [Election] 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. The Court did not rule that Election Boards were prohibited from allowing electors to correct minor defects identified by Election Boards.

3. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, Petitioners' representation of the Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) is inaccurate. The Supreme Court stated that the establishment of a procedure requiring Election Boards to provide "notice and opportunity to cure" to electors should be addressed by the legislature.

4. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

5. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, the bill referenced in this paragraph contained several provisions that sought to disenfranchise voters and therefore, was not a genuine attempt to establish a requirement that all Election Boards must allow electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

6. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, nothing in the Election Code or case law prohibits an Election Board from allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots. To the contrary, county boards of elections are responsible for overseeing elections in their respective counties and empowered to “make and issue ... instructions to voters,” including contacting voters when deemed necessary. *See* 25 P.S. § 2641(a), § 2642(f), (i).

7. Admitted in part; denied in part. Respondent admits that it has had a long standing policy of allowing voters to correct minor errors to their absentee and/or mail-in ballots. This policy was developed at the discretion of the Election Board granted by the Legislature to resolve issues not directly addressed by statute. Specifically, the General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their respective

counties. *See* 25 P.S. § 2641(a). With respect to the policies and procedures of County Boards of Elections other than Montgomery County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. The remaining averments of this paragraph are denied as conclusions or statements of law to which no response is required.

8. Denied. It is specifically denied that Respondent lacks transparency with respect to its use of a notice and cure process. To the contrary, Respondent has been transparent about its use of a notice and cure process that is fully consistent with the Election Code. The remaining averments of this paragraph are denied as conclusions or statements of law to which no response is required.

INJUNCTIVE RELIEF

9. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

10. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

11. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

12. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

13. Denied. With respect to the policies and procedures of County Boards of Elections other than Montgomery County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. The remaining averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, Petitioners' representation of the Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) is inaccurate. The Court did not rule that Election Boards were prohibited from allowing electors to correct minor defects identified by Election Boards. Accordingly, Petitioners have failed to demonstrate immediate and irreparable harm if Respondent continues its long standing policy of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

14. Denied. It is specifically denied that the granting of the requested injunction will "preserve the status quo." To the contrary, Respondent has had a long standing procedure of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots and this procedure is consistent with legislative intent that the Election Code be liberally construed so as not to deprive voters of their right to elect a candidate of their choice.

15. Denied. It is specifically denied the Petitioners are likely to prevail in this action when the relief requested is inconsistent with prior case law and contrary to the purpose of the Election Code in protecting electors' right to vote. The remaining averments of this paragraph are conclusions or statements of law to which no response is required. By way of further response, Petitioners' representation of the Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) is inaccurate.

16. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required. By way of further answer, the requested injunction is based on the Petitioners' misinterpretation of *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) and seeks to disenfranchise voters in Montgomery County.

17. Denied. It is specifically denied that the granting of the requested injunction will not adversely affect public interest. To the contrary, enjoining the use of notice-and-cure provisions would harm voters in Montgomery County and across the Commonwealth whose ballots will be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted. The remaining averments of this paragraph are conclusions or statements of law to which no response is required.

WHEREFORE, Respondent Montgomery County Board of Elections respectfully requests that this Court deny Petitioners' Application for Special Relief in the Form of a Preliminary Injunction.

Respectfully submitted,
MONTGOMERY COUNTY SOLICITOR'S OFFICE

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610-278-3033

Counsel for Montgomery County Board of Elections

Dated: September 16, 2022

CERTIFICATE OF COMPLIANCE

I 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.

/s/ Maureen E. Calder
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610-278-3033

Counsel for Montgomery County
Board of Elections

Dated: September 16, 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, <i>et al.</i> ,	:	
Petitioners	:	
	:	
vs.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of the	:	
Commonwealth, <i>et al.</i> ,	:	
Respondents.	:	

RESPONDENT NORTHAMPTON COUNTY BOARD OF ELECTIONS’ ANSWER TO APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA R.A.P 1532

Respondent Northampton County Board of Elections files this Answer to the Petition for special relief and requests that this Court deny the Application.

BACKGROUND

1. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

2. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

3. This is a legal conclusion to which no response is required. To the extent an answer is required, Petitioners' characterization of the Pennsylvania Supreme Court decision is denied as the decision is a document which speaks for itself.

4. This is a legal conclusion to which no response is required. To the extent an answer is required, Petitioners' characterization of the Pennsylvania Supreme Court decision is denied as the decision is a document which speaks for itself.

5. After reasonable investigation, Respondent is without sufficient information to form a belief as to the truth of the matter asserted. Strict proof herein is demanded at time of trial. Moreover, proposed bills are not laws.

6. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

7. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

8. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

INJUNCTIVE RELIEF

9. This is a legal conclusion to which no response is required. To the extent an answer is required, denied.

10. This is a legal conclusion to which no response is required. To the extent an answer is required, denied.

11. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

12. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

13. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. By way of further response, Petitioners' mischaracterized the nature of the settlement agreement applicable to Respondent Northampton County Board of Elections in their Petition. The settlement agreement indicated that the parties agree it is in the best interests of voters "to provide the opportunity of notice to a voter who returns a mail-in ballot or absentee ballot without a secrecy envelope (known as "Naked Ballots")." There is nothing in the settlement

agreement which indicates that the Northampton County Board of Elections would provide notice to a voter who returns mail-in ballots or absentee ballots lacking a secrecy envelope (“Naked Ballot”) prior to Election Day. The Northampton County Board of Elections agreed during the pre-canvass to create a list of names of voters whose ballots are set aside because they are lacking a secrecy envelope and offer that list of names to parties and candidates who are on-site during the pre-canvass. This does not violate the Election Code as the Northampton County Board of Elections is permitted to open and determine whether a ballot lacks a secrecy envelope beginning at 7:00 a.m. on Election Day during the pre-canvass. The Northampton County Board of Elections is compliant with the Election Code as the disclosure of the names of voters whose ballots were set aside does not constitute the disclosure of “results.” If a voter casts a provisional ballot after receiving notice that the voter’s ballot was set aside on Election Day during the pre-canvass, the Election Code permits a challenge to be made to the provisional ballot. As a result, Petitioner fails to establish the element of immediate an irreparable harm as this matter is not ripe and a process to challenge a provisional ballot is set forth in the Election Code with respect to the process applicable to Respondent Northampton County Board of Elections in the settlement agreement referenced by Petitioners.

With respect to ballots which lack a date or signature, voters who contacted the Election Office have been offered the opportunity to correct the issue prior to Election Day. In the 2021 Municipal Election and 2022 Primary Election, a letter from the Election Office were sent to voters if a mail-in ballot or absentee ballot was returned

without a date or signature. The affected voter would have an opportunity to correct the issue prior to Election Day.

“The purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.”

In re Gen. Election-1985, 531 A.2d 836, 839 (Pa. Cmwlth. 1987) (citing In re Mayor, City of Altoona, Blair County, 196 A.2d 371 (Pa. 1964)). This process provides an equal opportunity for all eligible electors to participate in the election process and favors the enfranchisement of voters over the disenfranchisement of voters due to minor issues with a ballot.

14. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

15. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

16. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction. By way of further response, Respondent Northampton County Board of Elections incorporates by reference the answers of all other Respondents which support denial of the Application.

WHEREFORE, Respondent Northampton County Board of Elections respectfully requests that this Court deny the Application for Special Relief in the Nature of a Preliminary Injunction.

Dated: 09/16/2022

Respectfully submitted,
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:
COMMITTEE,	:
<i>et. al.</i> ,	: No. 447 MD 2022
	:
Petitioners,	:
	:
v.	:
	:
LEIGH M. CHAPMAN, <i>et al.</i> ,	:
	:
Respondents.	:

ORDER

AND NOW, this _____ day of _____, 2022, having considered Petitioners’ Application for Preliminary Injunction and all answers submitted in opposition thereto, and in consideration of all evidence presented at the hearing held on Wednesday September 28, 2022, at 10:00 p.m., it is hereby ORDERED, ADJUDGED and DECREED that Petitioners’ Application for Preliminary Injunction is DENIED.

BY THE COURT:

_____ J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL :
COMMITTEE, :
et. al., : No. 447 MD 2022
:
Petitioners, :
:
v. :
:
LEIGH M. CHAPMAN, *et al.*, :
:
Respondents. :

JOINT ANSWER OF RESPONDENTS BEDFORD COUNTY, CENTRE COUNTY, COLUMBIA COUNTY, DAUPHIN COUNTY, FAYETTE COUNTY, JEFFERSON COUNTY, HUNTINGDON COUNTY, INDIANA COUNTY, LAWRENCE COUNTY, LEBANON COUNTY, NORTHUMBERLAND COUNTY, VENANGO COUNTY AND YORK COUNTY BOARDS OF ELECTIONS IN OPPOSITION TO PETITIONERS’ APPLICATION FOR PRELIMINARY INJUNCTION

Respondents Bedford County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Jefferson County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections and York County Board of Elections, (collectively “Respondent Counties”) by and through their undersigned counsel, Babst, Calland, Clements & Zomnir, P.C., file this Answer in Opposition to Petitioners’ Application for Preliminary Injunction.

INTRODUCTION

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 v. Warehime*, 860 A.2d 41, 47 (Pa. 2004). “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).

Here, Petitioners cannot satisfy the rigorous standard for injunctive relief with respect to the Respondent Counties because Respondent Counties have not implemented cure procedures for the general 2022 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. Therefore, the blanket, statewide injunction sought by Petitioners based on hypothetical conduct is improper and must be denied.

RESPONSE

1. Admitted in part; denied in part. It is admitted that Petitioners filed a Petition for Review on or about September 1, 2022. The allegations contained in Paragraph 1 of the Application reference a written document that speaks for itself, and Petitioners’ characterizations thereof are specifically denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or

information to form a belief as to the truth of the allegations contained in Paragraph

1. The remaining allegations contained in Paragraph 1 are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

2. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 2 of the Application. The remaining allegations contained in Paragraph 2 are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

3. Denied. The allegations contained in Paragraph 3 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

4. Denied. The allegations contained in Paragraph 4 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

5. Admitted in part; denied in part. It is admitted upon information and belief that the General Assembly passed House Bill 1300, Printers No. 1869, (“HB 1300”) on June 25, 2021, and Governor Wolf vetoed the bill on June 30, 2021. The

remaining allegations contained in Paragraph 5 of the Application reference a written document that speaks for itself, and Petitioners' characterizations thereof are specifically denied.

6. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 6 of the Application. The remaining allegations contained in Paragraph 6 are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

7. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 7 of the Application. The remaining allegations contained in Paragraph 7 are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

8. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 8 of the Application. The remaining allegations contained in Paragraph 8 are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

9. Denied. The allegations contained in Paragraph 9 of the Application reference the Petition, a written document that speaks for itself, and Petitioners' characterizations thereof are specifically denied. To the extent the allegations in Paragraph 9 and the Petition contain legal conclusions, no response to the same are required, and therefore, are deemed specifically denied.

10. Denied. The allegations contained in Paragraph 10 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

11. Denied. The allegations contained in Paragraph 11 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied.

12. Denied. The allegations contained in Paragraph 12 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

13. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 13 of the Application. The remaining allegations contained in Paragraph 13 are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

14. Denied. The allegations contained in Paragraph 14 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

15. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 15 of the Application. The remaining allegations contained in Paragraph 15 are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

16. Denied. The allegations contained in Paragraph 16 of the Application are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

17. Denied. It is specifically denied that Respondent Counties have implemented cure procedures for the general 2022 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. After reasonable investigation, Respondent Counties are without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 17 of the Application. The remaining allegations contained in Paragraph 17 are legal conclusions to which no response is required, and therefore, are deemed specifically denied. By way of further response, Respondent Counties incorporate by reference the “Introduction” section above.

WHEREFORE, Respondents Bedford County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Jefferson County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections and York County Board of Elections respectfully request that this Honorable Court deny Petitioners' Application for Preliminary Injunction and enter the form of Order submitted herewith.

Respectfully submitted,

BABST, CALLAND, CLEMENTS
and ZOMNIR, P.C.

/s/ Elizabeth A. Dupuis

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County, Dauphin County, Fayette*

*County, Jefferson County, Huntingdon
County, Indiana County, Lawrence
County, Lebanon County,
Northumberland County, Venango
County and York County Boards of
Elections*

Dated: September 16, 2022

VERIFICATION

I, Debra K. Brown, Election Director, Bedford County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.



Name

Chief Clerk/Director of Elections

Title

Bedford

County

9-16-2022
Date

VERIFICATION

I, Beth Lechman, Election Director, Centre County verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.



Beth Lechman, Election Director

9/14/22
Date

Centre _____
County

VERIFICATION

I, Matthew Repasky, Election Director, Columbia County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Matthew Repasky
Name

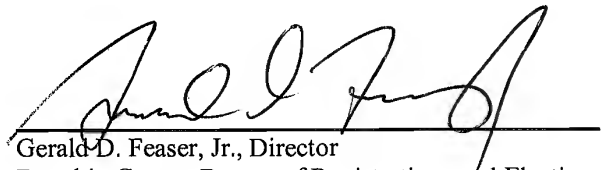
Elections Director
Title

Columbia County
County

9-16-2022
Date

VERIFICATION

I, Gerald D. Feaser, Jr., Election Director, Dauphin County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.


Gerald D. Feaser, Jr., Director
Dauphin County Bureau of Registrations and Elections

Date: September 15, 2022

VERIFICATION

I, Marybeth Kuznik, Election Director, Fayette County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.



Name

Director of Elections and Voter Registration
Title

Fayette
County

September 16, 2022
Date

VERIFICATION

I, Heather Feilman Election Director, Huntingdon County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Heather Feilman
Name

Chief Clerk / Election Director
Title

Huntingdon County
County

9/15/22
Date

VERIFICATION

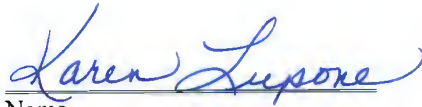
I, Robin Mangai, Election Director, Indiana County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Robin Mangai
Name
Chief Clerk
Title
Indiana
County

9-16-22
Date

VERIFICATION

I, Karen Lupone, Election Director, Jefferson County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.



Name

Chief Clerk/Director of Elections

Title

Jefferson

County

09/15/2022
Date

VERIFICATION

I, TIM GERMANI, Election Director, LAWRENCE County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

TIM GERMANI
Name

ELECTION DIRECTOR
Title

LAWRENCE
County

9/15/2022
Date

VERIFICATION

I, Lindsay Phillips, Election Director, Northumberland County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Lindsay Phillips
Name

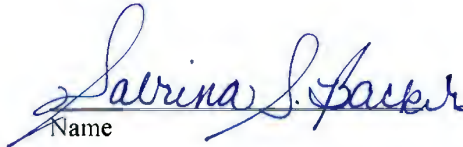
Chief Registrar
Title

Northumberland
County

9/16/2022
Date

VERIFICATION

I, Sabrina S Backer, Election Director, Venango County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.


Name

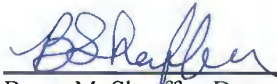
Director of Elections
Title

Venango
County

9/16/2022
Date

VERIFICATION

I, Bryan M. Sheaffer, Deputy Director for Elections and Voter Registration for York County, verify that the information contained in the foregoing Answer to Petitioners' Application for Preliminary Injunction is true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.



Bryan M. Sheaffer, Deputy Director of Elections and
Voter Registration County of York

9/15/22

Date

CERTIFICATE OF COMPLIANCE

I 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: September 16, 2022

/s/ Elizabeth A. Dupuis

Elizabeth A. Dupuis, Esquire

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Newtown, PA 18940
Attorneys for Bucks County Board of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et. al.	:	
	:	
Petitioners,	:	
	:	
v.	:	Docket No. 447 MD 2022
	:	
LEIGH M. CHAPMAN, in her official capacity	:	
as Acting Secretary of the Commonwealth of	:	
Pennsylvania, et al.,	:	
	:	
Respondents.	:	

ANSWER OF BUCKS COUNTY BOARD OF ELECTIONS TO APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Bucks County Board of Elections submits this Answer to the Application for Special Relief in the Form of a Preliminary Injunction.

1. Denied. To the extent the allegations of this paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, it is denied that the Bucks County Board of

Elections is departing from the directives of the Election Code. By way of further answer, the Bucks County Board of Elections faithfully follows the directives of the Election Code and the Courts in administering elections.

2. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Petitioners misconstrue the holding of the Pennsylvania Supreme Court's decision in *Pa. Democratic Party v. Boockvar*. The Court did not hold that cure procedures were prohibited or unlawful; rather the Court held that Board of Elections could not be compelled to implement a notice and cure procedure. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (“Upon review, we conclude that the Board 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.”).

3. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Petitioners misconstrue the Pennsylvania Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). The Pennsylvania Supreme Court stated that the establishment of a procedure *requiring* Election Boards to provide “notice and opportunity to cure” to electors should be addressed by the legislature.

4. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

5. Denied as vague, as the Application fails to identify with specificity the legislation to which it refers. Further, to the extent the allegations of this paragraph characterize a particular legislative bill, that bill is in writing and speaks for itself, and any characterization thereof is denied.

6. Admitted in part; denied in part. Admitted that Respondent has and is implementing notice and cure procedures but denied that Respondent is not acting within the scope of its legal authority by implementing notice and cure procedures. This long-standing policy was developed at the discretion of the Election Board granted by the Legislature to resolve issues not directly addressed by statute. Specifically, the General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a).

7. Admitted in part; denied in part. Admitted that Respondent has and is implementing notice and cure procedures but denied that Respondent is not acting within the scope of its legal authority by implementing notice and cure procedures. This long-standing policy was developed at the discretion of the Election Board granted by the Legislature to resolve issues not directly addressed by statute. Specifically, the General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a).

8. Denied. With respect to the policies and procedures of County Boards of Elections other than Bucks County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Respondent has disclosed and discussed its notice and cure procedures in public meetings of the Bucks County Board of Elections, and the use of notice and cure procedures is fully transparent. By way of further answer, Petitioners have failed to demonstrate immediate and irreparable harm if Respondent continues its long-standing policy of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

9. Denied. To the extent the allegations of this paragraph characterize Petitioners' filings, those filings are in writing and speak for themselves, and any characterization thereof is denied. The remaining allegations of this paragraph set forth conclusions of law to which no response is required. By way of further response, Respondent specifically denies that Petitioner are entitled to any of the relief they request.

10. Denied. The allegations in this paragraph are conclusions or statements of law to which no response is required.

11. Denied. The allegations in this paragraph are conclusions or statements of law to which no response is required.

12. Denied. The allegations in this paragraph are conclusions or statements of law to which no response is required.

13. With respect to the policies and procedures of County Boards of Elections other than Bucks County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Respondent has disclosed and discussed its notice and cure procedures in public meetings of the Bucks County Board of Elections, and the use of notice and cure procedures is fully transparent. By way of further answer, Petitioners have failed to demonstrate immediate and irreparable harm if Respondent continues its long-standing policy of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

14. Denied. It is specifically denied that the granting of the requested injunction will "preserve the status quo." To the contrary, Respondent has had a long-standing procedure of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots and this procedure is consistent with legislative intent that the Election Code be liberally construed

so as not to deprive voters of their right to elect a candidate of their choice. By way of further answer, the requested injunction seeks to disenfranchise voters in Bucks County.

15. Denied. The allegations in this paragraph are conclusions or statements of law to which no response is required. By way of further response, it is specifically denied the Petitioners are likely to prevail when the relief requested is inconsistent with prior case law and contrary to the purpose of the Election Code in protecting electors' right to vote.

16. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that Petitioners' injunction is appropriately tailored or narrow. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including because the relief they seek is grossly overbroad. By way of further answer, the requested injunction seeks to disenfranchise voters in Bucks County.

17. Denied. The allegations in this paragraph set forth conclusions of law to which no response is required. By way of further answer, it is specifically denied that the requested injunction will not adversely affect the public interest. Indeed, Petitioners are not entitled to preliminary injunctive relief for multiple independent reasons—including because the requested injunction would adversely affect the public interest and likely disenfranchise qualified electors in Bucks County.

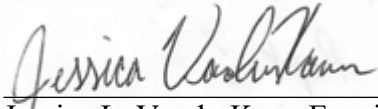
WHEREFORE, Respondent Bucks County Board of Elections respectfully requests this Court to deny Petitioner's Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,

Date: September 16, 2022

/s/ Amy M. Fitzpatrick, Esquire
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Attorney I.D. No. 324672
Daniel Grieser, Esquire
Attorney I.D. No. 325445

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*Attorneys for Respondent,
Bucks County Board of Elections*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et. al. :

Petitioners, :

v. :

Docket No. 447 MD 2022

LEIGH M. CHAPMAN, in her official capacity
as Acting Secretary of the Commonwealth of
Pennsylvania, et al., :

Respondents. :

ORDER

AND NOW, this ____ day of _____, 2022, upon consideration of the Application for Special Relief, and the responses thereto, the Application for a Preliminary Injunction is hereby DENIED and DISMISSED.

_____ J.

VERIFICATION

I, THOMAS FREITAG, state that I am the Director of Elections for Respondent, Bucks County Board of Elections and am authorized to make this verification on its behalf. I verify that the averments of fact made in the Response of the Board of Elections of Bucks County to the Application for Special Relief in the Form of a Preliminary Injunction under PA. R.A.P 1532 are true and correct to the best of my knowledge, information and belief. I understand that the statements are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.


THOMAS FREITAG

Dated: September 16, 2022

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Counsel for Respondents Leigh M. Chapman and Jessica Mathis

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth of
Pennsylvania, et al.,

Respondents.

No. 447 MD 2022

**COMMONWEALTH RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM
OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532**

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I. INTRODUCTION

“The longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.”¹ Petitioners’ lawsuit—and their present application for a preliminary injunction—seeks to stand that policy on its head. Petitioners ask this Court to disenfranchise qualified Pennsylvania electors who made technical errors when initially submitting their mail-in or absentee ballots—for example, neglecting to sign the declaration on the outer ballot-return envelope—and want to take steps to 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 ballots must be discarded: Because their *initial* submission was deficient, these citizens have irrevocably forfeited the right to vote.

Petitioners’ position is as broad as it is punitive. Under their view of the law, if an elector returns a mail-in ballot in person, and has neglected to sign the envelope, a board of elections employee cannot flag the omission and allow the elector to add the missing signature. Likewise, an elector who realizes her own mistake would not be allowed to ask for the ballot back to add the missing signature. The moment she handed the unsigned envelope to the employee across the counter, the elector was disenfranchised.

¹ *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

To protect the votes of their citizens, certain county boards of elections have worked to identify absentee and mail-in ballot submissions with technical defects—such as missing signatures and ballots not enclosed in inner secrecy envelopes—and provide electors with an opportunity to cast their vote by submitting a compliant ballot before the polls close. As the exhibits to Petitioners’ own Petition show, such “notice-and-cure” procedures have been in place since before the November 2020 election. And this lawsuit is hardly the first to challenge such procedures. Arguments identical to those raised in the Petition were litigated in multiple state and federal courts during the 2020 election cycle.

The Petition paints a grossly distorted portrait of that history. According to Petitioners, the Pennsylvania Supreme Court settled this issue on September 17, 2020, in *Pennsylvania Democratic Party v. Boockvar*. On the contrary, that decision held merely that Pennsylvania law does not *require* county boards to implement notice-and-cure procedures; our High Court did not hold that Pennsylvania law forbids such procedures.

Indeed, Petitioners’ arguments were raised—and squarely rejected—in the challenge to Pennsylvania’s November 2020 presidential election results brought by the campaign of then-incumbent President Donald J. Trump (the “Trump Campaign”) and certain individual electors. The plaintiffs sought to throw out millions of Pennsylvanians’ ballots, based in substantial part on their allegation

that some but not all counties had adopted some form of notice-and-cure procedures, in purported violation of the Pennsylvania Election Code, the U.S. Constitution's Elections Clause, and the plaintiffs' equal protection rights. The Secretary of the Commonwealth opposed the plaintiffs' claims, and the federal district court dismissed them with prejudice. The U.S. Court of Appeals for the Third Circuit swiftly affirmed.

Unsurprisingly, then, counties have continued to implement notice-and-cure procedures in the nearly two years since. What *is* surprising is the timing of Petitioners' lawsuit. Although they could have filed it at any point during at least the last two years, they inexcusably waited until two months before the November 2022 election, on the eve of when voters will begin returning absentee and mail-in ballots. Compounding the potential damage, Petitioners now demand an immediate "preliminary" injunction that is tantamount to a summary award of relief on the merits. They want the Court to immediately ban *all* notice-and-cure procedures used or planned in any of Pennsylvania's 67 counties, an order that would inevitably have the effect of disenfranchising electors who might otherwise have had their vote counted. Petitioners' lack of diligence should not be the Court's (or Respondents') emergency.

Putting aside its timing, Petitioners' application must be denied. It satisfies none of the essential prerequisites for preliminary injunctive relief. For multiple

reasons, Petitioners cannot establish a clear right to relief. First, this Court lacks subject matter jurisdiction over this case. Second, Petitioners lack standing to assert their claims. And third, those claims fail as a matter of law: Nothing in the Election Code prohibits county boards from exercising their statutory authority to notify electors of technical errors in their initial ballot submission and provide them with an opportunity to cast a fully compliant, timely ballot.

Even if Petitioners could show a likelihood of success, the injunction they seek would still have to be denied. It would not preserve the status quo pending a final adjudication, but rather immediately change the status quo by effectively granting Petitioners all the relief they seek—at the likely cost of disenfranchising significant numbers of Pennsylvania voters. Such an injunction would be inappropriately tailored and violate basic principles of equity.

II. BACKGROUND

A. Notice-and-Cure Procedures Are Not New

“Notice and cure” is not some recent novelty of Pennsylvania election administration. Since even before Pennsylvania permitted no excuse mail-in voting, certain county boards of elections have provided electors with notice of deficient ballot (including absentee) 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*

Hr’g 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 Petition for Review actually underscores this point, showing that the boards of elections in Bucks, Montgomery, and Philadelphia counties have utilized various notice-and-cure procedures since at least 2020. Petition for Review (“Pet.”), ¶¶ 65-70. Other county boards reportedly have likewise used notice-and-cure procedures. *See, e.g., Republicans Seek to Sideline Pa. Mail Ballots that Voters Were Allowed to Fix*, Spotlight PA (Nov. 3, 2020), <https://www.spotlightpa.org/news/2020/11/pennsylvania-mail-ballots-republican-legal-challenge-naked-ballots-fixed-cured/> (describing York, Erie and Luzerne County boards of elections’ notice-and-cure procedures in 2020). 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 varied. *See, e.g.,* Pet. ¶¶ 66-70, 73.

B. Petitioners Misconstrue the Precedent Addressing Notice-and-Cure Procedures

Notice-and-cure procedures were thrust into the spotlight as a result of litigation around the 2020 General Election. Those lawsuits generally fall into two categories: (1) a single case seeking to *require* that all county boards implement

notice-and-cure procedures, and (2) challenges to particular notice-and-cure procedures adopted in particular counties.

1. Notice-and-Cure Procedures Are Not Mandatory

Before the 2020 General Election, the Pennsylvania Democratic Party 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 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021). The petitioner 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.” *Id.* at 373 (emphasis added).

The Secretary of the Commonwealth opposed the petitioner’s request for an order requiring all county boards to implement notice-and-cure procedures. *See id.* The Secretary argued 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).

Our Supreme Court agreed. It “conclude[d] 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). “Put simply, as argued by the parties in opposition to the requested relief,

Petitioner ... cited no constitutional or statutory basis that would countenance *imposing* the procedure Petitioner seeks to require,” *i.e.*, mandatory notice and cure. *Id.* (emphasis added).

2. Variations in County Practices Regarding Notice-and-Cure Procedures Do Not Violate the Principle of Equal Protection

In the wake of the 2020 presidential election, the Trump Campaign and individual electors sought to prohibit the former Acting Secretary of the Commonwealth from certifying the results of the 2020 General Election in Pennsylvania. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 913-914 (M.D. Pa.), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020) (“*Trump II*”). Among other arguments, the plaintiffs first asserted that “it is unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy,” *id.* at 910, and, after realizing that “such a broad claim [wa]s foreclosed” under Third Circuit precedent, *id.*, plaintiffs then claimed that the Commonwealth’s “lack of a uniform prohibition against notice-and-cure is unconstitutional.” *Id.*

In addressing the plaintiffs’ notice-and-cure argument, the court first provided an overview of the legal landscape, emphasizing that nothing in Pennsylvania law prohibits counties from implementing notice-and-cure procedures: “Nowhere in the Election Code is any reference to ‘curing’ ballots, or

the related practice of ‘notice-and-cure.’” *Id.* at 907. “Recently, the Supreme Court of Pennsylvania in *Democratic Party of Pennsylvania v. Boockvar* addressed whether counties are *required* to adopt a notice-and-cure policy under the Election Code. Holding that they are not, the court declined to explicitly answer whether such a policy is necessarily *forbidden*.” *Id.* (footnote omitted).

After concluding that plaintiffs lacked standing to sue, *see id.* at 914, 916, the court turned to the merits of the plaintiffs’ notice-and-cure-related Equal Protection claim. The court determined the complaint failed to state a claim as to both the Trump Campaign and the individual-electors plaintiffs. *See id.* at 918-23.

First, regarding the individual-electors plaintiffs, the court 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. “No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to

allow counties to expand the right to vote if they so choose, [the] Individual Plaintiffs fail to state an equal-protection claim.” *Id.*

Second, the Court also dismissed the Trump Campaign’s Equal Protection claim. *Id.* at 922. 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).

III. PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

“[T]he proponent of a preliminary injunction faces a heavy burden of persuasion.” *Singzon v. Com., Dep’t of Pub. Welfare*, 436 A.2d 125, 127 (Pa. 1981).

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

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

Third, the party must show that a preliminary injunction will properly restore the parties to their status as it

existed immediately prior to the alleged wrongful conduct.

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

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

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

Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). “For a preliminary injunction to issue, every one of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.” *Allegheny Cnty. v. Com.*, 544 A.2d 1305, 1307 (Pa. 1988). Because Petitioners can establish none of these “essential prerequisites,” their application must be denied. *See Reed v. Harrisburg City Council*, 927 A.2d 698, 702-03 (Pa. Commw Ct. 2007).

A. Petitioners Cannot Establish “a Clear Right to Relief”

1. This Court Lacks Subject Matter Jurisdiction Because No Commonwealth Official Is an Indispensable Party

As a threshold matter, Petitioners’ lawsuit cannot proceed in this Court—and the Court cannot grant any preliminary injunctive relief—because the Court lacks subject matter jurisdiction.

“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)).

By contrast, “where the [respondent] entity operates [only] within a single county ... and is governed in large part by that county ... , the entity must be characterized as a local agency and sued in the trial courts [*i.e.*, courts of common pleas]” rather than this Court. *Blount v. Phila. Parking Auth.*, 965 A.2d 226, 232 (Pa. 2009) (quoting *James J. Gory Mech. Contracting, Inc. v. Phila. Housing Auth.*, 855 A.2d 669, 678 (Pa. 2004)).

It is well settled that “[t]he mere naming ... of the Commonwealth or its officers in an action does not conclusively establish this court’s jurisdiction, and the joinder of such parties when they are only tangentially involved is improper.” *City of Lebanon v. Commonwealth*, 912 A.2d 338, 341 (Pa. Commw. Ct. 2006) (quoting *Pa. Sch. Bds. Ass’n v. Commonwealth Ass’n of Sch. Administrators, Teamsters Local 502*, 696 A.2d 859, 867 (Pa. Commw. Ct. 1997)). Indeed, “for this Court to have original jurisdiction over a suit against the Commonwealth and other parties, *the Commonwealth party must be an indispensable party.*” *Rachel*

Carson Trails Conservancy, Inc. v. Dep't of Conservation & Nat. Res., 201 A.3d 273, 281 (Pa. Commw. Ct. 2018) (emphasis added).

Petitioners bear the burden of showing that the Commonwealth or its officers are indispensable parties, *City of Lebanon*, 912 A.2d at 341, and where they fail to carry that burden, this Court is “divested of jurisdiction,” *Rachel Carson Trails*, 201 A.3d at 281.

Petitioners cannot carry their burden here. Their suit challenges counties’ varied exercise of a discretionary power. Consistent with the nature of that challenge, Petitioners have brought suit against each of Pennsylvania’s 67 county boards of elections. These boards of elections are not “the Commonwealth government” for purposes of 42 Pa.C.S. § 761. *See In re Voter Referendum Petition Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009) (explaining that a county board of election is “a local agency”); *see also* 25 P.S. § 2641(a) (county board of elections “shall consist of the county commissioners of such county ex officio”).

Despite the fact that they challenge discretionary, county-level practices, Petitioners also named two Pennsylvania Department of State officials (the Acting Secretary of the Commonwealth and the Director of the Pennsylvania Bureau of Election Services and Notaries, collectively the “Department of State Respondents”) as additional respondents. But the Petition for Review makes

unmistakably clear that Petitioners are not challenging any decision or exercise of authority by the Department of State Respondents. Rather, what Petitioners challenge—and seek to enjoin—are various notice-and-cure procedures implemented by particular county boards of elections. This is apparent from the first paragraph of the Petition, which summarizes Petitioners’ grievance:

“Unfortunately, several County Boards of Elections . . . , *acting on their own initiative*, are [allegedly] departing from [purported statutory] rules in a crucial area of election administration.” Pet. ¶ 1 (emphasis added). The rest of the Petition sounds the same unchanging note. *See, e.g., id.* ¶ 7 (“[S]everal Boards, without legal authority, have developed and implemented cure procedures for the 2022 general election and beyond.”); *id.* ¶ 8 (“These Boards have, in effect, usurped the exclusive legislative authority of the General Assembly”); *id.* ¶ 19 (alleging that Petitioners have been injured by “[t]he various approaches taken by the counties regarding cure procedures”); *id.* ¶ 33 (alleging injury purportedly caused by “[t]he implementation of cure procedures by some Boards”); *id.* ¶ 92 (identifying the allegedly unlawful act at issue as “[t]he decision of some Boards to develop and implement their own cure procedures”). By contrast, nowhere do Petitioners allege that any Commonwealth official has committed any unlawful act.

The remedy sought by Petitioners confirms this Court’s lack of jurisdiction. Consistent with their description of the allegedly unlawful acts at issue, Petitioners

ask for a judicial “declar[ation] that county boards of elections may not adopt cure procedures other than as the General Assembly,” in Petitioners’ view, “expressly provided in the Election Code.” *Id.* ¶ 12. They also seek “a permanent injunction prohibiting the Boards from developing and implementing cure procedures.” *Id.* at p. 29. The participation of Commonwealth officials is not necessary for Petitioners to obtain effective relief in the event they prevail in this litigation.²

In sum, this case, as framed by the Petition for Review itself, is about whether certain county boards of elections have validly exercised their discretionary authority in implementing a variety of different procedures that Petitioners group under the label “notice and cure.” Brought before the election, this lawsuit does not seek to enjoin or direct the certification of any election results. It does not challenge any action by the Department of State Respondents.

² 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., Woodruff v. Phila. Cnty. Bd. of Elections*, No. 201002188 (C.P. Phila. Cnty.); *see also Barnette v. Lawrence*, No. 20-cv-05477 (E.D. Pa.). Those proceedings not only recognized and respected the statutory limits on this 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*, 965 A.2d at 232 (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”).

And it does not seek any particular relief from those Respondents. As a result, the Department of State Respondents are not indispensable parties.

Attempting to disguise this fact, Petitioners tack on a throwaway request for an order directing the Secretary “to take no action inconsistent” with the injunction Petitioners seek against the county boards. Pet. at p. 29. But this vague, generalized plea for relief—which Petitioners could, of course, have made against *any* person—serves only to give up Petitioners’ game; they are attempting to bootstrap a case against certain local agencies into this Court’s original jurisdiction. The attempt fails. This Court lacks jurisdiction to proceed. *See City of Lebanon*, 912 A.2d at 341; *Rachel Carson*, 201 A.3d at 281.³

³ As a result, Petitioners must assert their claims, if at all, separately against each county board in the court of 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 brought.”). Notably, Pa.R.C.P. 1006(c)(1), which provides that “an action to enforce a joint or joint and several liability against two or more defendants, except actions in which the Commonwealth is a party defendant, may be brought against all defendants in any county in which the venue may be laid against any one of the defendants,” is inapplicable by its own terms here; this is *not* a tort action alleging a “joint or joint and several liability.” *See Sehl v. Neff*, 26 A.3d 1130, 1132-34 (Pa. Super. Ct. 2011) (where defendant driver and defendant insurer were not jointly or jointly and severally liable, claim against driver could not be asserted in county in which venue could be individually laid against insurer only). In any event, “[b]ecause Rule 2103(b) is a particular provision, it would prevail over the more general Rule 1006(c).” *Twp. of Whitpain v. Goldenberg*, 569 A.2d 1002, 1004 (Pa. Commw. Ct. 1990).

As discussed above, this manner of proceeding—that is, separate suits against each county based on its own particular procedures—is not only dictated

2. Petitioners Lack Standing to Sue

Putting aside the want of subject matter jurisdiction, Petitioners lack standing to assert their claims. “In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). A litigant therefore must have a “substantial, direct, and immediate interest in the matter.” *Id.*

First, “[t]o have a substantial interest, the concern in the outcome of the challenge must surpass ‘the common interest of all citizens in procuring obedience to the law.’” *Id.* (quoting *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003)). Thus, “there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 282 (Pa. 1975). Second, to satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Markham*, 136 A.3d at 140 (internal quotation marks omitted). Third and finally, “the concern is immediate if that causal connection is not remote or speculative.” *Id.* (internal quotation marks omitted).

by the rules of procedure; it is consistent with how such claims were generally brought during the 2020 election cycle and ensures that an adequate factual record will be developed regarding—and sufficient judicial attention can be devoted to an examination of—the *particular* procedures and practices at issue. *See supra* note 2.

To plead standing, “a party must plead facts which establish a direct, immediate and substantial injury.” *Open PA Schools v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 129666, at *6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (citing *Pa. Chiropractic Fed’n v. Foster*, 583 A.2d 844, 851 (Pa. Commw. Ct. 1990)). “If a petition contains only ‘general averments’ or allegations that ‘lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,’ standing will not be found.” *Id.* (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep’t of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)). “Moreover, the harm asserted must be actual; an allegation of only a potential harm does not give rise to standing to bring a lawsuit.” *Id.*

The Petition here fails to satisfy this test. Petitioners comprise two different groups: “Voter Petitioners,” whose alleged interest is based on their status as registered, consistent voters, *see* Pet. ¶¶ 20-34, and certain “Republican Committees” (specifically, the RNC, NRSC, NRCC, and RPP), whose alleged interest derives from their work in supporting the election of Republican candidates, *see id.* ¶¶ 15-19. Neither group pleads a cognizable injury conferring standing to challenge counties’ notice-and-cure procedures.

(a) The Voter Petitioners Lack Standing

The Petition alleges that the Voter Petitioners are injured because their “validly cast” votes will supposedly be “canceled out and diluted by the counting

of ballots” submitted pursuant to the challenged notice-and-cure procedures. Pet.

¶ 34. But courts—in Pennsylvania and elsewhere—have repeatedly and consistently rejected this “vote dilution” theory of standing, recognizing that it asserts only a generalized grievance and fails to identify any particularized injury. *See, e.g., Kauffman v. Osser*, 271 A.2d 236, 240 (Pa. 1970) (plaintiff voters challenging statutes allowing certain categories of electors to vote absentee lacked standing; “the interest which [the plaintiffs] claim[ed] [was] nowise peculiar to them but rather [was] an interest common to that of all other qualified electors”); *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) (citing cases), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (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); *Martel v. Condos*, 487 F. Supp. 3d 247, 251-54 (D. Vt. 2020). Because “[n]othing is preventing [the Voter Petitioners] from voting, and their votes are not otherwise disadvantaged relative to those of the entire population of Pennsylvania,” their status as voters does not confer standing to challenge allegedly unlawful election procedures. *Toth v. Chapman*, No. 22-208, 2022 WL 821175, at *7 (M.D. Pa. Mar. 16, 2022) (three-judge court) (“[T]he mere fact that an individual has a right to vote does not confer standing to challenge any and all voting laws and procedures”).

Nor can Voter Petitioners 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.’” Pet. ¶ 33. To establish standing, Petitioners must show that the challenged notice-and-cure procedures inflict a particularized injury on them. This they cannot do. To the extent Voter Petitioners reside in counties with notice-and-cure procedures, the procedures they challenge “have in fact *lifted* a burden on the[ir] right to vote,” by ensuring that they will not irretrievably forfeit the ability to vote as a result of a technical defect (for example, a mistakenly omitted signature on the outer ballot-return envelope) in their initial mail-in or absentee ballot submission. *Trump II*, 502 F. Supp. 3d at 919. And to the extent Voter Petitioners reside in counties that do not provide for notice and cure of technical ballot-submission defects, the divergence in county procedures inflicts no injury. “Expanding the right to vote for some residents of a state does not burden the rights of others.” *Id.*

To be sure, voters who live in counties that do *not* offer notice and cure, and had their votes disqualified as a result, would likely have standing to seek relief. *See id.* at 912 (“[T]he denial of a person’s right to vote is typically always sufficiently concrete and particularized to establish a cognizable injury.”). But Voter Petitioners here deny that their ballots will ever be disqualified as the result

of the lack of notice-and-cure procedures, *see* Pet. ¶ 34, and they seek relief against counties that *do* offer such procedures. Their claims fail for lack of standing.

(b) The Republican Committee Petitioners Lack Standing

The Republican Committee Petitioners likewise fail to plead any basis for standing. The closest they come to alleging any injury is the Petition’s assertion that “[t]he various approaches taken by the counties regarding cure procedure are not routinely published and thus not readily known,” thereby allegedly “thwart[ing]” the Republican Committees’ “ability ... to educate voters regarding the cure procedures.” Pet. ¶ 19. But even assuming *arguendo* that such an allegation identifies a cognizable injury, it fails to satisfy the causation element of standing. As the Petition itself makes clear, the alleged injury is not caused by certain counties’ implementation of notice-and-cure procedures; it is caused by an alleged *lack of notice* about which counties offer those procedures and what those procedures are. But Petitioners do not seek an order requiring counties to publicize that information in certain ways; they seek an order enjoining the use of notice-and-cure procedures altogether. Because the injury Republican Committee Petitioners allege is not “directly” or “immediately” connected to the actions they challenge, the Petition fails to establish standing. *See Wm. Penn Parking Garage*, 346 A.2d at 282 (“the person claiming to be aggrieved must show causation of the harm to his interest *by the matter of which he complains*” (emphasis added)).

Republican Committee Petitioners’ alleged interest in electing Republican candidates is likewise insufficient to confer standing. Petitioners do not contend that notice-and-cure procedures put Republicans at a competitive disadvantage or otherwise impair their ability to win votes. They claim they are injured only because such procedures are allegedly prohibited by the Election Code. *See* Pet. ¶¶ 15-18. Such a claim does nothing more than restate a generalized interest in adherence to the law. *Wm. Penn Parking Garage*, 346 A.2d at 282; *see also Bognet*, 980 F.3d at 351-52 (candidate lacked standing to challenge election rule where he failed to plead any non-speculative facts showing how the rules “would lead to a *less* competitive race” or would cause a higher proportion of ballots to “be cast for [the candidate’s] opponent,” or that the number of allegedly invalid ballots would “change the outcome of the election to the [candidate’s] detriment”).

**(c) Petitioners Cannot Assert the General
Assembly’s Authority Under the Elections
Clause**

As shown above, the Petition fails to identify *any* injury conferring standing to assert either a violation of the Pennsylvania Election Code or a violation of the Elections Clause of the U.S. Constitution. That alone is dispositive. Notably, however, Petitioners’ Elections Clause claim—which alleges that county boards’ use of notice-and-cure procedures “usurp[s] the exclusive legislative authority of the General Assembly” to regulate elections, Pet. ¶¶ 8-9; *see also id.* ¶¶ 93-96—

must be dismissed for yet another reason. *See generally Fumo v. City of Phila.*, 972 A.2d 487, 502 n.7 (Pa. 2009) (agreeing that standing is appropriately analyzed “on a claim-by-claim basis”). The case law makes clear that individual voters, candidates, and political party organizations have no particularized interest in alleged violations of the Elections Clause. As a three-judge court held in the recent *Toth* case, U.S. Supreme Court precedent shows that individual voters and other private persons lack standing to “seek[] to compel state officials to follow what those citizens perceive to be the demands of the Elections Clause.” 2022 WL 821175, at *7 (explaining that *Lance v. Coffman*, 549 U.S. 437 (2007), which held that plaintiff voters lacked standing to assert an Elections Clause claim, is “directly on point”); *accord Bognet*, 980 F.3d at 349 (“[P]rivate plaintiffs lack standing to sue for alleged injuries attributable to a state government’s violations of the Elections Clause.”).

The Republican Committee Petitioners lack standing to assert Elections Clause claims for the same reason; they have no particularized interest in a state legislature’s authority under the Election Code. *See id.* (discussing *Lance*, 549 U.S. at 436-37); *see also id.* at *9-12 (holding that Congressional candidates lacked standing to bring a claim alleging violation of the Elections Clause). Indeed, the case law stands for the proposition that the only party with standing to assert the Elections Clause claim pled by Petitioners is the General Assembly itself. *See, e.g.,*

Corman v. Torres, 287 F. Supp. 3d 558, 573-74 (M.D. Pa. 2018) (three-judge court) (holding that two Pennsylvania state senators and eight members of Pennsylvania’s congressional delegation lacked standing to assert Elections Clause violations; the alleged Elections Clause claims “belong, if they belong to anyone, only to the Pennsylvania General Assembly”); *Bognet*, 980 F.3d at 349-50 (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).

Given this precedent, it is no surprise that, in the November 2020 litigation brought by the Trump Campaign and others, *the exact Elections Clause claim that Petitioners seek to reassert here was dismissed for lack of standing*, 502 F. Supp. 3d at 909. For the same reasons, as well as those set forth in the previous subsections, *see supra* Section III.A.2(a)-(b), Petitioners’ Elections Clause claim must meet the same fate.

3. Petitioners’ Claims Fail as a Matter of Law

Petitioners’ claims also fail on the merits. None of Petitioners’ submissions identify any provision of the Election Code prohibiting county boards of elections from notifying voters of, and providing them with an opportunity to correct, defective absentee and mail-in ballot submissions, for the simple reason that there is none. Instead, the Election Code demonstrates that county boards of elections

have authority to implement notice-and-cure procedures.⁴ And both the Pennsylvania and U.S. Constitutions sanction 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” that the General Assembly has specifically delegated to them. *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Commw. Ct.), *aff'd*, 938 A.2d 401 (Pa. 2007). Specifically, the Election Code “empowers the 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.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 352 (W.D. Pa. 2020) (“*Trump P*”) (quoting 25 P.S. § 2642(f)). Pursuant to this power, the Pennsylvania Supreme Court has made clear that where there are gaps

⁴ Count Two 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 One. That is, if the Election Code does not prohibit county boards from allowing electors to cure defective absentee and mail-in ballot submissions, then, *ipso facto*, there is no violation of the Elections Clause. Finally, the third and last count of the Petition for Review is not actually a claim at all but merely a request for injunctive relief. *See Boyer v. Clearfield Cnty. Indus. Dev. Auth.*, No. 19-152, 2021 WL 2402005, at *17 (W.D. Pa. June 11, 2021) (“an injunction is a remedy rather than a cause of action”).

in the Election Code’s prescription of the manner in which the county boards are to administer elections, the boards themselves may fill those gaps using their rulemaking authority. See *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).

Although county boards’ powers under 25 P.S. § 2642(f) have limits, those limits do not prohibit notice-and-cure procedures. First, any county rule or instructions must be “necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f). Here, it is self-evident that procedures concerning notice-and-cure are for the “guidance of ... elections officers and electors.” Petitioners do not contend otherwise.

Second, county boards’ rules and instructions must not be “inconsistent with law.” *Id.* That limitation is also inapplicable here. Indeed, the Election Code makes no “reference to ‘curing’ ballots, or the related practice of ‘notice and cure,’” including no reference to prohibiting notice-and-cure procedures. *Trump II*, 502 F. Supp. 3d at 907. Because the Election Code does not prohibit notice and cure, county boards of elections may exercise their extensive authority to implement such procedures so long as they are “not inconsistent with” any other specific law.

Recent Pennsylvania Supreme Court precedent confirms that counties may implement notice-and-cure procedures pursuant to the authority delegated to them

in the Election Code. In *In re Canvassing Observation*, the Supreme Court reviewed the lawfulness of the canvass watching procedures implemented by the Philadelphia County Board of Elections pursuant to its rulemaking power. 241 A.3d at 346-51. In particular, the Court assessed whether the Philadelphia Board violated the Election Code by enacting rules that did not permit canvass watchers to come within a certain distance of canvassing operations. *See id.* 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.* In accordance with *In re Canvassing Observation*, the county boards are permitted to adopt procedures governing cure procedures, in the exercise of their discretionary authority.

Apart from county boards’ statutorily delegated rulemaking power, counties have a statutory obligation under the Election Code to prepare before Election Day a list of “electors who have [1] received and [2] voted” absentee or mail-in ballots. 25 P.S. § 3146.6(b)(1); § 3150.16(b)(1). The Election Code therefore presupposes that the county boards of elections will review absentee and mail-in ballots upon receiving them, before pre-canvassing and canvassing. During that process, the

county boards may also identify deficiencies that, if left unresolved, would prevent the ballot from being canvassed. Thus, the decision of some county boards that provide electors with notice of and an opportunity to cure those deficiencies is an unsurprising outgrowth of their statutory duties.

Although Petitioners conclusorily assert that notice-and-cure procedures are, in all instances, “inconsistent with law,” Memo. at 25, they identify no law that such procedures actually contradict. Instead, 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*. Memo. at 23 (citing 25 P.S. § 3146.8(h)).

As the United States Supreme Court has “held repeatedly, the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it 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. Peabody Coal* demonstrates that Petitioners’ *expressio unius* argument is wrong for at least two reasons.

First, the process described in 25 P.S. § 3146.8(h), authorizing electors to provide, *after Election Day*, missing identification that was required for ballot applications,⁵ does not “go hand in hand” with the cure procedures Petitioners are seeking to enjoin, which address the curing, *before polls close on Election Day*, of initially deficient *ballot submissions*. Such notice-and-cure procedures do not modify the Election Code’s general requirement that mail-in and absentee ballots must, to be eligible for canvassing, be “received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. § 3146.8(g)(1)(ii). However, for applications for such ballots to be approved, they must be received at least a week before Election Day. 25 P.S. §§ 3146.2a(a), 3510.12a(a). And other related provisions specify that, in reviewing mail-in and absentee ballot applications, the county board “shall determine the qualifications of [the] application by,” among other things, “verifying the [applicant’s] proof of identification.” 25 P.S. §§ 3146.2b(c), 3150.12b(a). The

⁵ 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).

provision on which Petitioners rely nonetheless allows county boards to canvass absentee and mail-in ballots so long as “proof of identification is received and verified *prior to the sixth calendar day following the election.*” *Id.* § 3146.8(h)(2), This exception to the general timeline, which *requires* county boards to accept, up to six days after Election Day, proof of identification in support of ballot *applications*, plainly does not “go hand in hand” with procedures, adopted at the discretion of individual boards, that would permit electors to make fully compliant ballot submissions, *before 8 p.m. on Election Day*, in place of initially deficient ones. For this reason alone, Petitioners’ *expressio unius* argument fails.

Second, 25 P.S. § 3146.8(h)—the provision that Petitioners describe as providing a procedure for “curing” elector-identification information missing from ballot applications—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 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.

The *expressio unius* canon is inapplicable here. Petitioners' prohibition by implication argument is meritless.

(b) The Election Code Must Be Read to Enfranchise Electors

Further, 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. "[T]he overarching principle guiding the interpretation of the Election Code is that it should be liberally construed so as not to deprive electors of the right to elect a candidate of their choice." *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *13 (Pa. Commw. Ct. Aug. 19, 2022) (Cohn Jubelirer, P.J.) (citing *Pa. Democratic Party*, 238 A.3d at 356); accord *In re Major*, 248 A.3d 445, 450 (Pa. 2021), *reargument denied* (Apr. 12, 2021). The "goal must be to enfranchise and not to disenfranchise the electorate," *Pa. Democratic Party*, 238 A.3d 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.” *Berks*, 2022 WL 4100998, at *13. 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.

Id. (quoting *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.

To demonstrate how fundamentally Petitioners’ reading of the Election Code would violate these principles, one need only consider the following example. 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). According to Petitioners’ proposed rule, if, before Election Day, an elector personally delivers her mail-in ballot with an unsigned declaration to a county board of elections, 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.

Respectfully, that simply makes no sense. Notably, 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 Distort *Pennsylvania Democratic Party v. Boockvar*'s Holding

With principles of statutory interpretation against them, Petitioners attempt to re-write the Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*. There, the Court addressed whether the Election Code and Free and Equal Elections Clause of the Pennsylvania Constitution “*require* that the Boards 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.” 238 A.3d at 372 (emphasis added); *see also id.* at 374 (refusing to “impos[e] the procedure Petitioner seeks to require,” *i.e.*, requiring notice-and-cure procedures in all counties).

This case presents a fundamentally different question. Whether counties are *forbidden* to allow electors to cure deficient ballot submissions is separate and apart from the issue of whether counties are *required* to do so. Indeed, since the Supreme Court decided *Pennsylvania Democratic Party*, courts have emphasized that the Supreme Court did not go further and address what county boards are permitted to do: “Recently, the Supreme Court of Pennsylvania in *Democratic Party of Pennsylvania v. Boockvar* addressed whether counties are required to adopt a notice-and-cure policy under the Election Code. Holding that they are not,

the court declined to explicitly answer whether such a policy is necessarily *forbidden.*” *Trump II*, 502 F. Supp. 3d at 907.

Petitioners ignore this distinction entirely. Petitioners primarily rely on the *Pennsylvania Democratic Party* Court’s observation that:

[The Election Code] does not provide for the “notice and opportunity to cure” procedure sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature.

Pa. Democratic Party, 238 A.3d at 374; *see also* Memo. at 1, 4, 15, 22, 25.

Petitioners suggest this language means that notice-and-cure procedures are forbidden because the Election Code is silent on the topic and the legislature has not, to date, *required* county boards to implement notice-and-cure procedures. But this disregards that, in another part of the Election Code, the General Assembly has “delegate[d] extensive powers and authority to county election boards, including rulemaking authority to guide voting machine custodians, elections officers and electors.”⁶ *Nutter*, 921 A.2d at 60 (citing 25 P.S. § 2642(f)). Because the General

⁶ In remarking that notice-and-cure procedures are “best suited for the Legislature,” the Supreme Court was not drawing a contrast between the General Assembly and boards of elections; it was distinguishing between “the Legislature” and *the Judiciary*. *See Pa. Democratic Party*, 238 A.3d at 373 (noting Respondents’ argument “that the Legislature, *not this Court*, is the entity best suited to address the procedure proposed by Petitioner” (emphasis added)).

Assembly has delegated quasi-legislative authority to the county boards, boards may implement notice-and-cure procedures at their discretion. *See supra* Section III.A.3.(a). “Rules have force of law when issued pursuant to a grant of legislative power to make law through rules.” *Com. v. DePasquale*, 501 A.2d 626, 628 (Pa. 1985); *accord Elkin v. Com., Dep’t of Pub. Welfare*, 419 A.2d 202, 205 (Pa. Commw. Ct. 1980). Thus, even if the question of notice-and-cure procedures is one “best suited for the Legislature,” the county boards act with the imprimatur of the General Assembly when they exercise their delegated legislative authority pursuant to 25 P.S. § 2642(f).

Petitioners compound their incorrect interpretation of *Pennsylvania Democratic Party* by arguing that it somehow precludes Respondents from arguing the county boards of election have the discretion to implement procedures regarding notice and cure. Petitioners’ argument fails the first prong of the collateral-estoppel test: whether “the issue decided in the prior case is identical to the one presented in the latter case.” *Office of Disciplinary Counsel v. Duffield*, 644 A.2d 1186, 1189 (Pa. 1994). As shown above, the issues in *Pennsylvania Democratic Party* and here are distinct, and so collateral estoppel does not apply.

The doctrine of judicial estoppel is similarly inapplicable. According to Petitioners, because the Department of State respondents in *Pennsylvania Democratic Party* opposed *requiring* county boards to provide notice-and-cure

procedures, the Department of State Respondents here cannot argue that county boards are *permitted* to implement such procedures. *See* Memo. at 28. Once again, Petitioners fundamentally misapprehend the doctrine they invoke. “[T]o meet the requirements of judicial estoppel it must be shown that: 1) a party has assumed an inconsistent position in the present litigation from what it did in a prior litigation, and 2) that party successfully maintained the assumed position in the prior litigation.” *In re Pittsburgh Citizen Police Rev. Bd.*, 36 A.3d 631, 638 (Pa. Commw. Ct. 2011). The Department of State Respondents’ positions in this case and *Pennsylvania Democratic Party* are entirely compatible; there is nothing inconsistent between arguing that something is not required and arguing that it is not prohibited.⁷

(d) Petitioners’ Uniformity and Equal Protection Arguments Are Waived and Meritless

In addition to misreading the Election Code and attempting to rewrite *Pennsylvania Democratic Party*, Petitioners’ application for preliminary injunction appears to rely heavily on a constitutional argument unpled in the Petition, namely, that permitting counties to implement notice-and-cure procedures violates Article VII, § 6 of the Pennsylvania Constitution and Equal Protection principles. *See*

⁷ Petitioners also argue that the Department of State Respondents are judicially estopped from taking a position contrary to Petitioners’ reading of certain public statements posted on the Department of State’s website. *See* Memo. at 29. Petitioners misconstrue and overread the statements at issue. In any event, as noted above, judicial estoppel only applies to inconsistencies in a party’s positions taken in *litigation*. *See Pittsburgh Citizen Police Rev. Bd.*, 36 A.3d at 638.

Memo. at 12, 15, 16-17, 18, 24, 25. As a threshold issue, Petitioners “cannot set forth a claim not asserted in their complaint.” *Lewicki v. Washington Cnty.*, No. 2371 C.D. 2013, 2014 WL 10316922, at *7 (Pa. Commw. Ct. Dec. 4, 2014).

Beyond the fact that the Petition does not assert any claim sounding in Equal Protection or arising under the Pennsylvania Constitution, Petitioners are wrong to contend that county boards are constitutionally required to implement identical procedures for administering elections.

Petitioners’ argument misconstrues the uniformity requirement in Article VII, § 6. As the Supreme Court said in construing the same language in what was then 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 and not others. Here, Petitioners have not submitted any evidence that some counties implementing 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). Indeed, no such evidence exists. 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).

Likewise, 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 II*, 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*, 830 F. App’x 377, 388 (3d Cir. 2020) (“*Trump III*”) (affirming *Trump II*).

In *Trump II*, 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.” *Id.* “[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 *Trump I*, 493 F. Supp. 3d 331, 389-90 (W.D. Pa. 2020)). Thus, even if Petitioners had brought an election uniformity or Equal Protection claim, it would plainly fail, just as the Equal Protection claim in *Trump I* and *Trump II* failed.

B. The Equities Require Denying the Injunction

Not only have Petitioners failed to show a clear right to relief, but they also cannot establish any of the other essential prerequisites of a preliminary injunction. These failures independently require denial of their application. *See Summit Town Centre*, 828 A.2d at 1001 (enumerating prerequisites).

1. The Injunction Sought by Petitioners Is Diametrically Opposed to the Public Interest and Would Substantially Harm Electors

The Court cannot grant the requested injunction because “[a] preliminary injunction cannot run counter to the public interest.” *Com. ex rel. Corbett v. Snyder*, 977 A.2d 28, 49 (Pa. Commw. Ct. 2009). It is “the well-established public policy of [Pennsylvania] to favor enfranchisement.” *Com., State Ethics Comm’n v. Baldwin*, 445 A.2d 1208, 1211 (Pa. 1982); *see supra* Section III.A.3.(b). Granting Petitioners’ request, “disenfranchising [electors] and depriving [them] of votes,” is “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) (Cohn Jubelirer, P.J.); *accord Oliviero v. Diven*, 908 A.2d 933, 941 (Pa. Commw. Ct.

2006) (“Granting the Petitioners’ injunctive relief and invalidating the primary results would harm the electoral process, invalidate the will of the electorate and, as a result, greatly harm public interest.”). But denying the application for injunction 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 counties boards’ notice-and-cure procedures. *See Trump III*, 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.

2. Greater Injury Would Result from Granting the Injunction Than Denying It

For much the same reason, the balance of injuries requires denying the requested injunction. As shown above, granting Petitioners' injunction would have the effect of disenfranchising electors, as it would mean that qualified electors who cast deficient absentee or mail-in ballots will necessarily have their votes thrown out. The Court has made clear that disenfranchising qualified electors is a substantial injury for the purposes of this factor. *Berks*, 2022 WL 4100998, at *29.

Beyond disenfranchising electors directly, entering an injunction now will also cause confusion and uncertainty, altering election administration procedures in many counties. As the Petition for Review reflects, county boards with notice-and-cure procedures have, at least in some cases, had them in past years, *see* Pet., ¶¶ 65-70, and communicated them to the public. *See, e.g., id.* ¶¶ 66-67, 70; *see also* Angela Coulombis and Jamie Martines, *Republicans Seek to Sideline Pa. Mail Ballots that Voters Were Allowed to Fix*, Spotlight PA (November 3, 2020), <https://www.spotlightpa.org/news/2020/11/pennsylvania-mail-ballots-republican-legal-challenge-naked-ballots-fixed-cured/>.

Further, by the time the Court hears argument on Petitioners' application for preliminary injunction on September 28, mail-in and absentee voting pursuant to Act 77 will likely already be well underway. Counties are statutorily authorized to begin processing mail-in ballot applications and mailing ballots to electors on the

permanent mail-in voting list on September 19. *See* 25 P.S. § 3150.12a (application processing may begin 50 days before Election Day); 25 P.S. § 3150.15 (mailing of ballots). Ballot mailings will speed up in the last two weeks of September. By the end of September, counties will likely have mailed out tens of thousands of ballots; in many places, voters will be streaming to election offices to request mail-in ballots in person, fill them out, and hand them in.

Accordingly, an order prohibiting notice-and-cure procedures in the November 2022 election would likely invalidate ballots already cast, confuse and upset electors, and disrupt the ongoing administration of the election. In that way, this case is like *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (*per curiam*). There, the petitioners filed a suit asking that mail-in votes already cast in the 2020 general election be disqualified, *387 days and two elections* after the Governor signed Act 77 into law. Here, Petitioners filed suit on September 1, 2022, *667 days* after the 2020 election, the latest date by which Petitioners knew about county boards' notice-and-cure procedures. *See* Pet. ¶¶ 66-67 (discussing 2020 notice-and-cure procedures about which political parties were notified).

Consequently, 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 dated September 24, 2021, *McLinko v. Degraffenreid*, No. 244 M.D. 2021 (Pa.

Commw. Ct.) (“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).

Petitioners do not allege any injury that outweighs the disenfranchisement that their requested injunction would produce. Petitioners primarily point to their assertion that notice-and-cure procedures are unlawful and therefore constitute *per se* irreparable harm. Memo. 17-18. This collapses two distinct, equally essential prerequisites to issuing a preliminary injunction: (1) an injunction must be “necessary to prevent immediate and irreparable *harm* that cannot be adequately compensated by damages,” and (2), “greater *injury* [must] result from refusing an injunction than from granting it.” *Summit Towne Centre*, 828 A.2d at 1001 (emphasis added). The question whether Petitioners may suffer *any* irreparable harm is therefore distinct from whether any harm or injury they may suffer absent an injunction is *greater* than the injury to others caused by granting an injunction. Petitioners satisfy neither element of the *Summit Town Centre* test.

Petitioners identify at most two concrete injuries they claim will result absent an injunction. First, they assert that allowing counties to implement notice-and-cure procedures will cause “validly-cast votes [to] be diluted by the counting

of unlawfully ‘cured’ ballots.” Memo. at 18. As discussed above, however, courts across the country have resoundingly rejected such “vote dilution as injury” arguments. *See supra* Section III.A.2.(a). Put differently, this alleged “dilution” harm is not even a cognizable injury, let alone an irreparable one.

Second, Petitioners contend that, without an injunction, the Republican Committee Petitioners will be “unable to properly educate their members regarding the exact rules applicable to mail-in and absentee ballot electors due to the fact that many of the Boards do not publicize whether they have implemented a cure procedure and if so, the particulars of same.” Memo. at 18. As a threshold issue, the Petition undercuts this claim of injury, as it lists 15 county boards’ policies regarding notice-and-cure procedures, *see* Pet., ¶¶ 65-81, and shows that interested parties can find out a county board’s policy either by submitting a Right to Know Law request, *id.* ¶¶ 66, 69, looking on the county’s website, *id.* ¶ 70, or emailing the county, *id.* ¶ 80. Thus, Petitioners could avoid this injury themselves. Further, even if this claim of uncertainty alleged a viable injury, Petitioners’ requested injunction is a vastly overbroad remedy. Rather than prohibiting all notice-and-cure procedures, the Court could simply direct the county boards to publicize their procedures.

In any event, neither of these alleged injuries, even if they existed, could possibly outweigh the injury to qualified electors whose votes will not be counted

in the upcoming election if this Court issues the requested injunction. For this independent reason, no preliminary injunction should issue.

3. The Injunction Sought by Petitioners Is Not Narrowly Tailored

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). A “preliminary injunction concludes no rights and is a final adjudication of nothing.” *Philadelphia Fire Fighters’ Union, Loc. 22, Int’l Ass’n of Fire Fighters, AFL-CIO v. City of Philadelphia*, 901 A.2d 560, 565 (Pa. Commw. Ct. 2006) (internal quotation marks omitted). Yet here, given the closeness to Election Day, November 8, 2022, which is less than two months away, 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 technical deficiencies will be disenfranchised, even though the Court may ultimately conclude notice-and-cure procedures are permissible.

Put differently, even if Petitioners could demonstrate a clear right to relief and satisfy every other element—as they cannot—they would still not be entitled to the injunction they seek. Even then, the requirement of narrow tailoring would allow, at most, an injunction directing counties to segregate or otherwise track

ballots cast subject to notice-and-cure procedures, pending a full and final adjudication of their validity. *See, e.g.*, Order Dated November 6, 2020, *Hamm v. Boockvar*, No. 600 M.D. 2020 (Pa. Commw. Ct.).

C. If the Court Enters an Injunction, Petitioners Must Post a Substantial Bond to Obtain the Relief Sought

If the Court grants Petitioners’ application, the Court must require Petitioners to post a substantial bond. For a preliminary injunction to issue, the Pennsylvania Rules of Civil Procedure require the posting of a bond or cash by the Petitioners in an amount to be established by the Court:

[A] preliminary or special injunction shall be granted only if ... the plaintiff files a bond in an amount fixed and with security approved by the court ... conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees.

Pa. R. Civ. P. 1531(b).

The bond requirement “is mandatory and an appellate court must invalidate a preliminary injunction if a bond is not filed by the plaintiff.” *Berger By & Through Berger v. W. Jefferson Hill Sch. Dist.*, 669 A.2d 1084, 1086 (Pa. Commw. Ct. 1995). The bond amount must “cover damages that are reasonably foreseeable.” *Greene Cnty. Citizens United by Cumpston v. Greene Cnty. Solid Waste Auth.*, 636 A.2d 1278, 1281 (Pa. Commw. Ct. 1994). “To determine the proper amount of bond, courts should balance the equities involved.... [I]n seeking

to balance the equities might consider such factors as the inability of a plaintiff ‘to provide sufficient security where damages could be great.’” *Id.*

Petitioners ask the Court to issue an Order that, less than two months before Election Day, would bar county boards of elections from taking any steps whatsoever to allow electors to correct deficient mail-in or absentee ballot submissions. Should Respondents ultimately prevail on the merits and the Court withdraw the injunction before the election, counties would have to invest significant resources to, in an extremely compressed period of time, attempt to notify affected voters and provide them with an opportunity to salvage their vote. The Court must require a significant bond to offset all of these costs. Inevitably, some voters who would have had their votes counted in the absence of the injunction will end up disenfranchised. As to them, no amount of bond would be sufficient; the harm would be irreparable. And if the injunction were not withdrawn before Election Day, all such voters would be disenfranchised. This only underscores the point above: Even if Petitioners could show a clear likelihood of success on the merits—as they cannot—the “preliminary” relief Petitioners seek would contravene all principles of equity.

IV. CONCLUSION

Petitioners' application for a preliminary injunction should be denied.

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I 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.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, *et al.*,

Respondents.

Case No. 447 MD 2022

**PROPOSED INTERVENOR-RESPONDENTS DSCC AND DCCC'S
RESPONSE IN OPPOSITION TO PETITIONERS' APPLICATION FOR
PRELIMINARY INJUNCTION**

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INTRODUCTION

On September 7, 2022, less than two weeks before county boards of election start distributing mail-in and absentee ballots (collectively, “mail ballots”) to Pennsylvania voters, several Republican party committees and Republican voters filed an Application with this Court for an emergency injunction to prohibit county boards from providing lawful, eligible voters an opportunity to avoid disenfranchisement by curing minor facial defects on their mail ballots before the close of the voting period. As their own filings demonstrate, the procedures that Petitioners challenge pre-date even the 2020 general election and were the subject of two lawsuits filed in 2020—in the first, which was decided by the Pennsylvania Supreme Court, the plaintiffs sought to mandate notice and cure procedures in all counties, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 209 L. Ed. 2d 164, 141 S. Ct. 732 (2021). In the second, which was decided by the U.S. Court of Appeals for the Third Circuit, the plaintiffs challenged the legality of any counties offering such procedures voluntarily, *Donald J. Trump for President, Inc. v. Secretary Commonwealth of Pa.*, 830 F. App’x 377 (3d. Cir. 2020) (“*DJT II*”). Neither court found cure procedures unlawful—in fact, the Third Circuit rejected an argument similar to the one Petitioners raise here. *Id.* at 384, 388.

Petitioners' Application, however, mischaracterizes the Pennsylvania Supreme Court ruling and ignores the Third Circuit entirely. In *Pennsylvania Democratic Party*, the Pennsylvania Supreme Court held that neither the Free and Equal Elections Clause nor the Election Code *required* county boards of elections to implement cure procedures. The Court did not address whether such procedures were lawful, but the Third Circuit did: in a lawsuit filed in 2020 by the campaign of former President Donald Trump, the Third Circuit found that “the Election Code says nothing about what should happen if a county notices these errors before election day.” *DJT II*, 830 F. App'x at 384. The court further explained that although “[s]ome counties stay silent and do not count the ballots [while] others contact the voters and give them a chance to correct their errors,” *id.*, “[a] violation of the Equal Protection Clause requires more than variation from county to county,” *id.* at 388.

Petitioners then waited two years, with mail voting underway in a statewide election that will choose (among other offices) Pennsylvania's next U.S. Senator, to petition this Court to enjoin cure procedures statewide but fail to identify a single Election Code provision that precludes county boards from adopting such measures. Nor do Petitioners reconcile their proposed injunction with the legislature's express delegation of authority to county boards of elections to “instruct election officers in their duties” and “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections

officers and electors,” *id.* 25 P.S. §§ 2642(f), 2642(g). And despite their misleading attempt to convert *Pennsylvania Democratic Party* into a definitive ruling on the legality of cure procedures, in moments of candor Petitioners themselves previously recognized that the Pennsylvania Supreme Court’s ruling only determined “whether the Court could *require* the Boards to implement a notice and opportunity to cure . . . [and that] the answer of whether Boards were free to create their own policies” is supplied by Pennsylvania law, *Pets.’ Pet. for Rev.* (“Pet.”) ¶ 56 (emphasis in original), which expressly confers authority upon county boards to administer elections and implement the types of procedures that Petitioners challenge here. In sum, Petitioners point to no authority that supports their interpretation of the Election Code or their request for extraordinary relief.

Nor can Petitioners satisfy any of the remaining equitable factors which are prerequisites for a preliminary injunction. They identify no immediate irreparable harm, offering only speculation about county variations in cure procedures—which, by itself, causes no injury absent a deprivation of a constitutional right—and they ignore the disenfranchisement of Pennsylvania voters that would result from their requested relief. To make matters worse, Petitioners offer no explanation for their two-year delay in challenging county board procedures that were disclosed even before the 2020 general election. Their lack of diligence in pursuing injunctive relief until the eleventh-hour harms Respondents’ and Proposed Intervenors’ election

preparations, risks confusion, and thrusts all 67 county boards of election and the Secretary of State into a fire drill of Petitioners' own making—all while the mail voting process is already underway. Granting Petitioners' Application would cause immeasurable harm to voters, election officials, and others, while Petitioners will suffer no cognizable harm if the status quo is maintained. This Court therefore should reject Petitioners' request for a preliminary injunction.

BACKGROUND

The Pennsylvania Election Code confers broad authority upon county boards to administer elections. It provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a). “[C]ounty boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code].” *Id.* § 2642. In particular, the Election Code imposes a duty on boards to “inspect systematically and thoroughly the conduct of primaries and elections,” *id.* § 2642(g), and empowers boards to “instruct election officers in their duties” and “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors,” *id.* §§ 2642(f), (g). Consistent with this authority, county boards have adopted

procedures within their respective counties that differ from procedures in other counties. *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 386 (W.D. Pa. 2020) (“*DJT I*”); *DJT II*, 830 F. App’x at 388 (“Pennsylvania’s Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.”)

Prior to the 2020 elections, the Pennsylvania Democratic Party (“PDP”) sought an injunction requiring all county boards to provide notice to electors whose mail ballots bore certain facial defects and an opportunity to cure such defects. *Pa. Democratic Party*, 238 A.3d at 372. Under the Election Code, a mail-in or absentee ballot (collectively, “mail ballot”) must be enclosed and sealed in a secrecy envelope and placed into a second envelope, and the elector must complete and sign the form declaration printed on the second envelope and mail or drop off their ballot by 8:00 p.m. on election day. 25 P.S. § 3150.16(a).¹ Citing the Free and Equal Elections Clause of the Pennsylvania Constitution, PDP argued, among other claims, that “voters should not be disenfranchised by technical errors or incomplete ballots” and

¹ The Third Circuit recently held that not counting ballots for failing to comply with the dating provisions in 25 P.S. §§ 3146.6(a) and 3150.16(a) violates the Materiality Provision of the Civil Rights Act. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022).

that procedures requiring “notice and opportunity to cure” would ensure that all electors have the opportunity to exercise their right to vote. *Pa. Democratic Party*, 238 A.3d at 372–73.

Although the Secretary of the Commonwealth sided with PDP in the other aspects of its suit, *id.* at 357–58, 365–66, 376, 382, and noted that it “may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them,” the Secretary ultimately opposed PDP’s request for an injunction *requiring* boards to implement such procedures due to the absence of any statutory or constitutional mandate. *Id.* at 373. The Pennsylvania Supreme Court agreed, concluding that boards were “not *required* to implement” cure procedures because neither the Pennsylvania Constitution nor the Election Code mandated such procedures. *Id.* at 374 (emphasis added). But at no point did the Court determine that county boards lacked authority to proactively implement cure procedures.

Consistent with the Supreme Court’s narrow ruling, the Secretary of the Commonwealth encouraged—but did not require—county boards to provide notice and an opportunity to cure facially defective mail ballots (“cure procedures”) in the 2020 general election. *DJT II*, 830 F. App’x at 384. In response, then-President Trump’s campaign brought an unsuccessful challenge to select counties’ notice and cure procedures in federal court, primarily arguing that allowing county boards discretion to implement cure procedures violated the U.S. Constitution’s Equal

Protection Clause. *See generally id.* The district court dismissed the lawsuit. In affirming that dismissal, the U.S. Court of Appeals for the Third Circuit recognized that “[n]ot every voter can be expected to follow [the mail ballot] process perfectly” and that “the Election Code says nothing about what should happen if a county notices these errors before election day.” *Id.* at 384. The Third Circuit further observed that “[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors,” *id.*, but ultimately held that “[a] violation of the Equal Protection Clause requires more than variation from county to county,” *id.* at 388. The Third Circuit’s opinion issued on November 27, 2020.

Petitioners initiated these proceedings on September 1, 2022, nearly two years after these decisions by the Pennsylvania Supreme Court and Third Circuit Court of Appeals, after two statewide primary elections and the 2021 municipal election have been successfully conducted with counties free to employ cure procedures, and just weeks before mail ballots will be distributed for the 2022 general election. Petitioners seek (1) a declaration that boards are prohibited from developing and implementing cure procedures absent explicit authorization from the General Assembly; (2) a declaration that adopting cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution; and (3) an injunction prohibiting boards from developing

or implementing cure procedures. On September 7, 2022, Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction (“Application”), as well as a Memorandum of Law in support of the Application, which Proposed Intervenors oppose.

LEGAL STANDARD

Petitioners’ Application should be denied because they cannot satisfy each of the “essential prerequisites” necessary to seek preliminary injunctive relief. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003) (internal quotations and citations omitted). To qualify for a preliminary injunction, Petitioners must establish that (1) they are likely to succeed on the merits; (2) an injunction is necessary to prevent immediate and irreparable harm; (3) greater injury will result from refusing than granting the injunction, while the injunction will not substantially harm other interested parties; (4) the preliminary injunction seeks to restore the status quo; (5) the injunction is reasonably suited to redress the purported offending activity; and (6) the injunction will not adversely affect the public interest. *Id.* As the Supreme Court has explained, “for a preliminary injunction to issue, *every one* of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.” *Cnty. of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added).

ARGUMENT

Petitioners fail to establish any of the essential prerequisites necessary to obtain preliminary injunctive relief. They are unlikely to succeed on the merits because “the Election Code says nothing about what should happen if a county notices” minor errors on mail ballots before election day. *DJT II*, 830 F. App’x at 384. At the same time, the Code confers broad authority on county boards to administer elections; absent an express limitation, that broad authority clearly confers the authority to implement procedures by which a voter whose ballot has been flagged for rejection due to a curable error can address that error and ensure that their ballot is counted. Even if Petitioners’ legal arguments had any merit (which they do not), Petitioners suffer no cognizable injury when *other* Pennsylvania citizens are allowed to ensure their votes are counted. On the other hand, significant harm, including disenfranchisement, would result if Petitioners are permitted to force an alteration of the status quo, requiring county boards to discard ballots of lawful voters who have made minor errors unrelated to their eligibility to vote, without providing a cure opportunity. Petitioners’ strategic decision to wait until shortly before a pivotal statewide election to bring this challenge—despite all material facts being evident two years ago—only exacerbates the harm that would result if the relief they request were granted.

I. Petitioners are not likely to succeed on the merits.

Petitioners' Application fails on the merits because it identifies no provision in the Election Code or elsewhere that prohibits a county board from providing voters with an opportunity to cure defective mail ballots, and it ignores the county boards' broad authority—conferred by the legislature under the Election Code—to administer elections and implement appropriate procedures, particularly in areas where the Election Code does not mandate any specific course of action. *See DJT II*, 830 F. App'x at 384 (“[T]he Election Code says nothing about what should happen if a county notices [defects on mail ballots] before election day.”).

A. The Election Code permits county boards to implement notice-and-cure procedures.

The Election Code establishes a framework within which county boards bear significant responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a) (“There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.”); *id.* § 2642 (“[C]ounty boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code].”). Determining the scope of the county boards' authority requires “listen[ing] attentively to what the statute says, but also to what it does not say.” *In re Canvassing Observation*, 241

A.3d 339, 349 (Pa. 2020) (quoting *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017)). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Election Code that does not specify relevant parameters may “reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections.” *Id.* at 350.

Because the Election Code does not dictate what county boards should do when faced with a clearly deficient mail ballot, the broad authority vested by the General Assembly in county boards allows individual boards to determine whether voters in their counties should have an opportunity to resolve correctible errors that are detected before the voting deadline. To be sure, the Election Code does not *require* county boards to provide these notice and cure opportunities, *see Pa. Democratic Party*, 238 A.3d at 373, but neither does it *prohibit* them from implementing such procedures to protect the right to vote. In other words, the decision of whether to offer cure procedures rests within each board’s discretion. *See DJT II*, 830 F. App’x at 384.

Having failed to identify a single provision that prohibits notice and cure procedures, Petitioners resort to drawing implausible inferences from the legislature’s silence and suggest that no mail ballots can be cured absent express authorization. The problem with their theory is that the Election Code expressly empowers boards “[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). The plain meaning of this conferral of authority is that boards have broad power to adopt procedures to promote the purpose of the Election Code: “freedom of choice, a fair election and an honest election return,” *Pa. Democratic Party*, 238 A.3d at 356 (internal quotations and citations omitted), provided that the procedures they adopt are not otherwise inconsistent with law. The Petitioners’ argument that the General Assembly has not expressly mandated boards to guarantee opportunities to cure defective mail ballots has it precisely backward.

Nor does the Election Code provision allowing mail voters a grace period to supply proof of identification help Petitioners’ cause. While they suggest that “cure procedures for some matters—namely, lack of proof of identification—but not for others . . . cannot be assumed to be accidental,” Memo in Supp of Pets.’s Appl. for Prelim. Inj. (“Memo”) at 26 (Sept. 7, 2022), proof of identification for mail voters is best understood as an application requirement rather than a mail ballot defect. *See* 25 P.S. § 3150.12b(c). The General Assembly’s decision to create a specified procedure for resolving mail *ballot application* deficiencies should not be read to foreclose boards from implementing procedures for addressing facially deficient *ballots*.

B. The Pennsylvania Supreme Court’s ruling did not foreclose county boards from adopting cure procedures.

Petitioners next distort the Pennsylvania Supreme Court’s ruling in *Pennsylvania Democratic Party*, 238 A.3d 345, suggesting that the Court not only resolved whether county boards have authority to impose cure procedures, but that collateral estoppel bars the parties from arguing otherwise. Memo at 26–27. Their mischaracterization of *Pennsylvania Democratic Party* contradicts even their own prior pleading in which Petitioners recognized that “[a]lthough *Pa. Democratic Party* answered the question of whether the Court could *require* the Boards to implement a notice and opportunity to cure . . . the answer of whether Boards were free to create their own such policies” is supplied by Pennsylvania law. Pet. ¶ 56 (emphasis in original). Petitioners’ description of the case in their prior pleading in this respect at least was accurate: the Pennsylvania Supreme Court made clear that it concluded only “that the Boards are not *required* to implement a ‘notice and opportunity to cure’ procedure.” *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). And a federal court interpreting that ruling reached the same conclusion, noting that “the [Pennsylvania Supreme Court] declined to explicitly answer whether such a policy is necessarily forbidden.” *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 907 (M.D. Pa.), *aff’d sub nom. DJT II*, 830 F. App’x 377, and *appeal dismissed sub nom. Signed v. Pennsylvania*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021). The Court’s refusal to “impos[e] the procedure

Petitioner s[ought] to require” says nothing about what boards may do on their own accord. *Pa. Democratic Party*, 238 A.3d at 374.

Just as the Supreme Court in *Pennsylvania Democratic Party* court refused to impose a requirement not promulgated by the legislature, this Court should refuse to impose a *prohibition* where the statute is silent. The Election Code allows boards to implement procedures “not inconsistent” with law, and Petitioners cannot demonstrate that providing eligible voters with the opportunity to have their votes counted violates the Election Code.

C. County boards’ exercise of authority vested by the legislature does not violate the Elections Clause

Petitioners fail to draw any direct connection between the Elections Clause and the cure procedures at issue because a county board acting “within its authority” presents “no Elections Clause problem.” *Wise v. Circosta*, 978 F.3d 93, 102 (4th Cir. 2020). “State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause.” *Moore v. Circosta*, 494 F. Supp. 3d 289, 325 (M.D.N.C. 2020), *appeals dismissed sub nom. Wise v. Circosta*, No. 20-2104 (L), 2021 WL 1511943 (4th Cir. Jan. 8, 2021), *and Moore v. Circosta*, No. 20-2107, 2021 WL 1511941 (4th Cir. Jan. 11, 2021). And “it is characteristic of our federal system that States retain autonomy to establish their own governmental processes.” *Ariz. State Legis. v. Ariz. Indep.*

Redistricting Comm’n, 576 U.S. 787, 816–17 (2015) (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999)).

The Pennsylvania General Assembly, in compliance with the Elections Clause, granted county boards “powers” and “duties” “within their respective counties” to “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors.” 25 P.S. § 2642(f). This delegation of authority includes the duty to “inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county” and the power to “instruct election officers in their duties.” 25 P.S. § 2642(g). Under this framework county boards are authorized to develop and implement cure procedures “within their respective counties” so long as they are “not inconsistent with [the] law.” 25 P.S. § 2642(f). And, as explained above, Petitioners fail to identify a single provision in the Election Code or elsewhere that constrains the broad authority vested in county boards when fashioning procedures for curing facially defective ballots.

II. Petitioners have not alleged any immediate or irreparable harm.

Petitioners cannot demonstrate “per se [] immediate and irreparable harm,” Memo at 14, because, as explained, *supra* Section I, the county boards have not committed any clear violation of law. *Brewneer Realty Two, LLC v. Catherman*, 276 A.3d 267 (Pa. Super. Ct. 2022). But even if so, none of the purported injuries

Petitioners claim will result from allowing lawful, eligible voters to cure minor, facial defects on their ballots are cognizable or otherwise sufficient to support a cause of action, much less a preliminary injunction. For example, Petitioners contend that they “seek to uphold free and fair elections . . . [so] have brought this action to ensure that Respondents adhere to state law and the Supreme Court’s holding,” Memo at 2, but this is nothing more than a generalized “common interest [that] all citizens [have] in procuring obedience to the law.” *Pittsburgh Palisades Park, LLC v Commonwealth*, 888 A.2d 655, 660 (Pa. 2005) (citing *In re Hickson*, 821 A.2d 1238 at 1243 (2003)). A desire to see that the law has been followed “is precisely the kind of undifferentiated, generalized grievance” that cannot give rise to a cognizable injury and is insufficient to warrant an injunction. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

Nor is it enough for Petitioners to speculate that they “suffer the risk of having votes being treated unequally,” Memo at 16, when they do not suggest that their mail ballots will be rejected, or that they will be denied an opportunity to cure defects—or even that they ever have voted (or plan to vote) by mail. *See, e.g.*, Pet. ¶¶ 20–36; *see also Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally insufficient to support preliminary injunction); *Sameric Corp. of Mkt. St. v. Goss*, 295 A.2d 277, 279 (Pa. 1972) (same); *Kiddo v. Am. Fed'n of State*, 239 A.3d 1141 (Pa. Cmwlth. 2020) (reversing trial court’s grant

of preliminary judgment because plaintiffs' alleged harm was speculative). Such abstract claims of potential unequal treatment would not be sufficient to even invoke this Court's jurisdiction, let alone constitute irreparable harm.

Petitioners' mischaracterization of vote cancellation and dilution also fall short of a cognizable injury. Differences in election procedures such as these by county boards does not, by itself, injure anyone so long as the procedures do not discriminate against certain groups of voters or infringe on an individual's fundamental right to vote. *DJT I*, 493 F. Supp. 3d at 331, 383, 390, 391; *DJT II*, 830 F. App'x at 388. Nowhere in either their Petition for Review or Memorandum of Law do Petitioners argue that county boards allowing lawful, eligible voters to cure non-material defects discriminates against a group of voters or prevents a single voter from voting. Nor could they. By giving voters notice and an opportunity to cure non-material defects, county boards *increase* access to the franchise by allowing voters whose mail ballots would otherwise be thrown out the opportunity to have their votes counted. It is Petitioners' requested relief that would result in disenfranchisement.

Petitioners' theories of vote dilution are not only speculative, but also legally incorrect, having been rejected consistently by courts in Pennsylvania and around the country. *See, e.g., DJT I*, 493 F. Supp. 3d 331, 342–43 (finding vote dilution claim to be “speculative” and not “certainly impending”); *Kauffman v. Osser*, 271

A.2d 236, 239 (Pa. 1970) (finding vote dilution claim was “too remote and too speculative” to afford standing); *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 802–04 (W.D. Tex. 2015) (holding complaints of “potential vote dilution are nothing but a generalized grievance” and that “[c]ertainly all citizens in general want to participate in an electoral system where only lawfully cast ballots count”); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 927 (D. Nev. 2020) (same); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1004 (D. Nev. 2020) (dismissing complaint challenging post-election day canvassing of mail ballots for lack of standing in part because the alleged vote dilution was impermissibly speculative); *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (holding that “the notion that a single person’s vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury”). Such impermissibly speculative harm does not warrant “the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotations and citations omitted).²

² Petitioners’ attempt to manufacture a purported injury by invoking the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State” also fails. Memo at 15 (quoting PA. Const. art. VII, § 6; *Kuznik v. Westmoreland Cnty. Bd. of Comm’rs*, 902 A.2d 476, 492 (Pa. 2006)). “[T]o be uniform in the constitutional sense,” such laws simply “must treat all persons in the same circumstances alike.” *Kuznik*, 902 A.2d at 491 (quotation omitted). And “[a] law is general and uniform, not because it operates upon every person in the state, but because every person

Finally, Committee Petitioners' complaints about the lack of accessible information on cure procedures with which "to properly educate their members regarding the rules applicable to mail-in and absentee ballots," cannot be reconciled with the broad injunction they seek barring cure procedures statewide. Even assuming such an injury is immediate and irreparable, it can be entirely redressed by far less intrusive remedies like ensuring publication of cure procedures, or by simply requesting such information from county boards. *See infra* Section V.

III. Greater injury would result from granting than refusing the injunction.

Not only are Petitioners unable to "show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings," *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003), but they also fail to even acknowledge the injury that would follow to voters and other parties to this suit if Petitioners are successful in their effort to bar all notice and cure procedures, which would result in the disenfranchisement of entirely lawful voters for minor curable defects on their mail ballots. This is the greater injury threatened by this litigation, not the speculative and abstract injuries

brought within the relations provided for in the statute is within its provisions." *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914). Petitioners make no meaningful allegation that any county boards' procedures lack uniformity when applied to voters "within their respective counties." 25 P.S. § 2642(f).

that Petitioners claim, which courts have repeatedly held are not cognizable, *see infra* Section II.

An injunction would also “substantially harm other interested parties in the proceedings,” *Summit Towne Ctr.*, 828 A.2d at 1001, including Respondents who have expended substantial time and resources administering Pennsylvania’s vote-by-mail infrastructure and corresponding cure procedures, and Proposed Intervenors who have similarly expended resources promoting vote by mail in Pennsylvania and trained staff and volunteers, taking into account the existing mail ballot cure opportunities. If Petitioners are successful, Respondents and Proposed Intervenors will be forced—less than two months before a major statewide election—to devise and implement new procedures to educate voters and minimize ballot defects in the absence of cure procedures. *See id.* Therefore, “with regard to proportionate harm, . . . the balance of harms actually favor[s]” Respondents and Proposed Intervenors, “as [Petitioners’] speculative harm pale[s] in comparison” to forcing Respondents and Proposed Intervenors to hastily try and prevent voter disenfranchisement. *See id.* at 1002.

Worse yet, the last-minute nature of Petitioners’ request for equitable relief exacerbates the potential harm to Respondents, Proposed Intervenors, voters, and Pennsylvania’s election apparatus in general. Many Pennsylvania voters have already requested mail ballots. County boards will begin distributing these mail

ballots on September 19, 2022—50 days before the election, “or at such earlier time as the county board of elections determines may be appropriate,” 25 P.S. § 3150.12a(b), and voters will begin returning their ballots soon after. If Petitioners’ requested relief is granted, Respondents and Proposed Intervenors will be forced to scramble to implement new procedures to educate voters and combat voter error and mail ballot defects, along with the increased risk of disenfranchisement, all while the mail voting process is well underway.

Petitioners offer no explanation for their lack of diligence in bringing this action. Much of their legal arguments are grounded in events that occurred nearly two years ago, yet they strategically waited until the eleventh-hour before thrusting this suit upon all 67 counties in the Commonwealth and seeking a preliminary injunction on an expedited basis. *See* Pet. Exs. B, C, D, G (exhibits attached to Petitioners’ own Petition for Review, including one public website, show county boards employing cure procedures since at least the 2020 election cycle). Indeed, Petitioners and their allies have been closely scrutinizing Pennsylvania’s vote-by-mail process since the 2020 election cycle and have advanced numerous challenges to mail voting in Pennsylvania. *See, e.g., DJT II*, 830 F. App’x 377 (affirming dismissal); *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cnty. Nov. 5, 2020). Their inexcusable delay in bringing this claim

and the resulting prejudice to Respondents, Proposed Intervenors, and Pennsylvania voters outweighs the abstract and speculative harms Petitioners cite in support of their belated motion. And it underscores why the equitable, preliminary injunctive relief Petitioners seek is improper.

IV. The proposed preliminary injunction seeks to alter the status quo.

Petitioners acknowledge that “[t]he status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy.” Memo at 20 (quoting *Allegheny Anesthesiology Assocs. v. Allegheny Gen. Hosp.*, 826 A.2d 886, 894 (Pa. Super. 2003)). And they concede that the status quo preceding the pending controversy was established in 2020 by *Pennsylvania Democratic Party*, which held that “Boards are not *required* to implement a [cure procedure],” 238 A.3d at 374, but “declined to explicitly answer whether such a policy is necessarily forbidden.” *Donald J. Trump for President*, 502 F. Supp. 3d at 907; *see also* Memo at 20; Pet. ¶ 56. Moreover, the Petition for Review confirms that some county boards have been giving voters notice and an opportunity to cure since at least 2020. Pet. ¶ 65. Indeed, more than half of the exhibits attached to the Petition—including a public website—*pre-date even the 2020* general election. *See* Pet. Exs. B, C, D, G. Petitioners’ effort to enjoin boards’ cure procedures would therefore undo the status quo that preliminary injunctions are meant to maintain.

V. The requested injunction is not reasonably suited to abate the activity of which Petitioners complain.

Even if the other prerequisites of an injunction were satisfied, and they are not, “the court must fashion a remedy reasonably suited to abate the harm.” *Woods at Wayne Homeowners Ass’n v. Gambone Bros. Constr. Co.*, 893 A.2d 196, 207 (Pa. Cmwlth. 2006). Petitioners’ attempt to rewrite the status quo post-*Pennsylvania Democratic Party* is a far cry from being narrowly tailored. See *Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (any injunction “must be narrowly tailored to address the wrong plead and proven”). As demonstrated, *supra* Section II, Petitioners’ alleged harm is, at best, speculative. And any harm to Petitioners caused by a lack of clarity as to the cure procedures in each county can be remedied by requiring boards to publish such information. Preventing votes from being counted for the sake of clarity is neither proportional nor reasonably suited to abate Petitioners’ purported informational harm.

VI. The requested injunction will adversely affect the public interest.

Lastly, Petitioners fail to demonstrate that an injunction will benefit rather than harm the public interest. Courts considering whether to grant “the extraordinary remedy of injunction” pay special attention to the “public consequences” and, where a temporary injunction “will adversely affect a public interest,” it should not be granted. *Weinberger*, 456 U.S. at 312 (internal quotations and citations omitted). Voting is a fundamental right. “[T]he Election Code should be liberally construed

so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice.” *Pa. Democratic Party*, 238 A.3d at 356 (internal quotations omitted).

If Petitioners’ relief is granted, voters who would otherwise be able to rid their ballots of minor defects and exercise their fundamental right to “elect a candidate of their choice” will be disenfranchised. *Pa. Democratic Party*, 238 A.3d at 356. The public interest is not served by preventing lawful residents from voting, especially when legitimate processes are, and have been, in place to allow more eligible citizens to vote while ensuring their ballots conform with state voting requirements. Moreover, granting a last-minute injunction barring ballot cure procedures and requiring county boards to disenfranchise voters whose ballots have minor, facial defects—all while mail voting is already underway and voters have ballots in hand—disserves the public interest. *See supra* Section III. Far from advancing the interests of justice, Pennsylvania courts have rejected such last-minute requests for extraordinary relief where Petitioners failed to exercise diligence in enforcing their purported rights and granting an injunction would reward their dilatory conduct at the expense of Pennsylvania voters. *Kelly*, 240 A.3d at 1256.

CONCLUSION

Petitioners fail to establish each of the prerequisites necessary to justify a preliminary injunction, thus their Application should be denied.

Dated: September 16, 2022.

Respectfully submitted,

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DSCC and DCCC*

**Motions for Admission Pro Hac Vice
Forthcoming*

CERTIFICATE OF COMPLIANCE

I, Adam C. Bonin, certify that Proposed Intervenors' DSCC and DCCC's Response in Opposition to Petitioners' Application for Preliminary Injunction contains fewer than 7,000 words as prescribed by Pa.R.A.P. 2135.

Submitted by:



Adam C. Bonin, Esq. (Atty ID 80929)

voting—which at the time was an uncontroversial expansion of access to the ballot. In the months leading up to the 2020 General Election and in the years that have followed, Petitioners and their supporters have turned to Pennsylvania courts in multiple law suits challenging the voting measures enacted as a part of Act 77. *See, e.g., Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 22, 2022); *McLinko v. Degraffenreid*, 244 MD 2021 (Pa. Cmwlth. July 26, 2021); *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377 (3d Cir. 2020); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020); *Kelly v. Pennsylvania*, No. 620 MD 2020 (Pa. Cmwlth. Nov. 20, 2020); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD-20-011654, 2020 WL 7012634 (Pa. C.C.P. Allegheny Cty. Nov. 12, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2011-00874 (Pa. C.C.P. Phila. Cty. Nov. 9, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cty. Nov. 5, 2020).

In this latest challenge, Petitioners ask this Court to prohibit the Montgomery County Board of Elections, along with other county boards from allowing eligible voters to correct minor, curable defects on their mail ballot envelopes—in other words, to force them to reject all such otherwise-qualified

ballots—a request the Third Circuit denied when advanced by the Trump campaign in the 2020 election cycle. *Donald J. Trump for President, Inc.*, 830 F. App’x 377. Petitioners’ latest attempt to discard mail ballots on even the smallest of technicalities should be similarly rejected. Not only is it unsupported by any provision of the Election Code, but it also invites the Court to adopt an interpretive gloss that would deny qualified voters the franchise, ignoring the “overarching principle” guiding this Court’s analysis: that “the Election Code is to be liberally construed so as not to deprive voters of their right to elect a candidate of their choice.” *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9, *14 (Pa. Cmwlth. June 2, 2022).¹ The Court should reject Petitioners’ attempt to disenfranchise eligible voters and uphold the county boards of elections’ express authority under the Election Code to implement common-sense procedures to protect the right to vote.

BACKGROUND

1. Under Pennsylvania law, a qualified elector may vote by mail for any reason. 25 P.S. § 3150.11.
2. To be counted, a mail-in or absentee ballot (collectively, “mail

¹ This Court’s Internal Operating Procedures allows the citation of “a single-Judge opinion . . . for its persuasive value.” 210 Pa. Code § 69.414(b).

ballot”) must be enclosed and sealed in a secrecy envelope and placed into a second outer envelope. The elector must then complete and sign the form declaration printed on the outer envelope and mail or drop off their ballot by 8 p.m. on election day. 25 P.S. § 3150.16(a).

3. During the 2020 general election, the Secretary of the Commonwealth encouraged—but did not require—county boards to provide notice and an opportunity to cure facially defective ballots.

4. Then-President Trump’s campaign brought an unsuccessful challenge in federal court, primarily arguing that allowing county boards discretion to implement cure procedures violated the United States Constitution’s Equal Protection Clause. *Donald J. Trump for President, Inc.*, 830 F. App’x 377.

5. The district court dismissed the lawsuit. In affirming that dismissal, the United States Court of Appeals recognized that “[n]ot every voter can be expected to follow [the mail-in vote] process perfectly” and that “the Election Code says nothing about what should happen if a county notices these errors before election day.” *Id.* at 384. The Third Circuit further observed that “[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.” *Id.* The Third Circuit’s opinion issued on November 27, 2020.

6. Petitioners initiated these proceedings nearly two years later, after two statewide primary elections and the 2021 municipal election. Their belated Petition for Review seeks: (1) a declaration that boards are prohibited from developing and implementing cure procedures absent explicit authorization from the General Assembly; (2) a declaration that adopting cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution; and (3) an injunction prohibiting boards from developing or implementing cure procedures.

PRELIMINARY OBJECTION 1
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACHES)

7. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

8. Petitioners' claims are barred by laches, an equitable doctrine that forecloses relief where (1) petitioners fail to exercise due diligence in bringing the action leading to a delay, and (2) the delay prejudices the opposing party. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020); *see also Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). Both factors are met here.

9. *First*, Petitioners have, or easily could have, known for at least

two years that some county boards of elections provide voters with notice and an opportunity to cure mail ballot defects, yet they waited until *two months* before the general election to bring this suit. Indeed, Petitioners (as well as their candidates and supporters) have been closely scrutinizing and challenging the vote-by-mail process in Pennsylvania courts since the 2020 election cycle.

10. In fact, this action is not the first time that a third party representing Republican Party interests has sought to obtain a judgment prohibiting Pennsylvania election officials from notifying voters of, and allowing them to cure, non-material ballot defects. In 2020, the campaign of former President Donald Trump filed suit in federal court challenging the Secretary's authorization of notice-and- cure procedures for defective mail-in ballots. *Donald J. Trump for President, Inc.*, 830 F. App'x 377 (affirming dismissal). While the campaign's suit involved federal rather than state law claims, it challenged the actions of counties that "decided to reach out to [] voters to let them cure" ballots lacking secrecy envelopes. *Id.* at 384.

11. Additionally, as it pertains to Montgomery County specifically, Kathy Barnette, a then candidate for the 4th Congressional District, filed a Complaint for Declaratory and Injunctive Relief in federal court on November 3, 2020, seeking without success to have the Montgomery County Board of

Elections enjoined from implementing notice and cure procedures.²

12. The documents attached to the Petition itself also reveal that Respondents have been giving voters notice and an opportunity to cure for multiple election cycles. Pet. ¶ 65 Petitioners’ “complete failure to act with due diligence,” *Kelly*, 240 A.3d at 1256, and their decision to wait until mere months before an election to bring a claim they were well aware of for years, forecloses their last-minute request for disruptive relief.

13. *Second*, Respondents have been prejudiced by Petitioners’ delay. “Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act.” *Stilp*, 718 A.2d at 294. Since 2020, Respondents have expended substantial resources and efforts to administer Pennsylvania’s vote-by-mail infrastructure, including the notice and cure procedures in place. Respondents have placed considerable resources into the development and implementation of a notice and cure procedure to allow for the correction of defects.

14. Because Petitioners could have brought this action at any time over the last two years but instead decided to delay until shortly before the

² Petitioner voluntarily dismissed this action on November 11, 2020 via a Notice of Dismissal filed by counsel, Thomas E. Breth.

2022 general election, the action should be dismissed with prejudice under the equitable doctrine of laches.

PRELIMINARY OBJECTION 2
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(5)
LACK OF CAPACITY TO SUE (STANDING)

15. Respondents incorporate the foregoing paragraphs as if set forth fully herein.

16. Even assuming, for the sake of argument only, that this action is not barred by laches, Petitioners nevertheless lack standing to bring this suit because they are not injured by Montgomery County’s implementation of notice- and-cure procedures.

17. To have standing, petitioners must show that they have been “aggrieved,” meaning that they have a “substantial, direct and immediate interest in the outcome of the litigation.” *See In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). A substantial interest is one that is distinct from and exceeds “the common interest of all citizens in procuring obedience to the law;” a direct interest is one where the challenged conduct caused petitioner’s harm; and an immediate interest is one where the harm alleged is concrete, not speculative. *Id.* (quoting *Indep. State Store Union*, 432 A.2d 1375 at 1379–80 (Pa. 1981)); *see also Ams. for Fair Treatment, Inc. v. Phila. Fed’n of Tchrs.*, 150 A.3d 528, 533 (Pa. Cmwlt. 2016). The cornerstone of standing in

Pennsylvania is therefore that the party “must be negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). If a party is not adversely affected by what it challenges, it cannot be aggrieved and therefore “has no standing.” *Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (2007). “In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park, LLC*, 888 A.2d at 660 (citing to *In re Hickons*, 821 A.2d 1238 at 1243).

18. Petitioners fail to identify any concrete and distinct harm they have suffered as a result of Respondent implementing notice-and-cure procedures. *In re Hickson*, 821 A.2d at 1243.

19. Petitioners’ allegations instead center on a mischaracterization of vote cancellation and dilution. That county boards may “employ entirely different election procedures and voting systems within a single state” does not, by itself, impose any injury so long as those procedures do not discriminate against certain groups of voters or infringe on an individual’s fundamental right to vote. *Donald J. Trump for President, Inc.*, 830 F. App’x at 388; *see also Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 383 (W.D. Pa. 2020). Here, Respondent’s notice and cure procedures

do not lead to voter disenfranchisement. Quite the opposite—voters that would otherwise be prevented from casting an effective mail ballot will now have an opportunity to ensure their ballots are counted. Meanwhile, Petitioners’ requested relief would result in *more* disenfranchisement, not less.

20. Finally, any injury to the Petitioners caused by a lack of clarity as to the notice-and- cure procedures in each county can be redressed by ensuring access to such information. Preventing votes from being counted for the sake of clarity is neither proportional nor reasonably related to the Petitioners purported informational harm.

PRELIMINARY OBJECTION 3
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
LACK OF CAPACITY TO SUE (STANDING)

21. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

22. Petitioners additionally lack standing to bring a challenge under the Elections Clause of the United States Constitution. The Elections Clause gives authority over the “Times, Places and Manner of holding Elections for Senators and Representatives” to the state legislatures U.S. Const. Art. I, § 4, cl. 1. Petitioners argue that “neither Boards nor any other organ or instrumentality of the State government may regulate” the manner in which elections are run, including by creating notice-and-cure procedures. Pet. ¶¶

95, 96. Therefore, Petitioners contend, Montgomery County and other county boards are violating the U.S. Constitution by creating notice-and-cure procedures in Pennsylvania. *Id.*; *see also id.* ¶ 9.

23. Yet, at no point in their Petition do Petitioners state what concrete and distinct harm they suffered as a result of Respondent, not the General Assembly, implementing notice-and- cure policies. *In re Hickson*, 821 A.2d at 1243. None of the Petitioners are members of the General Assembly (or any government branch for that matter), nor are they authorized to sue on its behalf. Any hypothetical harm Petitioners suffer is limited to the same “common interest of all citizens” in ensuring that the mandates of the U.S. Constitution are being followed, which is insufficient to establish standing. *Id.*

PRELIMINARY OBJECTION 4
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT I)

24. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

25. While the Election Code may not require county boards to implement notice and cure procedures, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 373 (Pa. 2020), it does not prohibit county boards from providing voters whose mail ballots are defective with the opportunity to vindicate their right to vote. The broad authority vested by the General

Assembly in county boards instead allows individual boards to determine whether to take additional measures to ensure that voters in their counties can remedy correctable errors.

26. The Pennsylvania Supreme Court has consistently held that “the Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice.” *Boockvar*, 238 A.3d at 356; *see also Perles v. Hoffman*, 213 A.2d 781,784 (Pa. 1965) (“The Court has held, we repeat, that the [Pennsylvania] Election Code must be *liberally* construed...”)(emphasis in original).

27. The General Assembly determined that “county boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code], which shall include ... [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), and “[t]o investigate election frauds, irregularities and violations of [the Election Code],” *id.* § 2642(i).

28. Determining the scope of the county boards’ authority to promulgate rules, regulations, and instructions requires “listen[ing]

attentively to what the statute says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Elections Code that does not specify relevant parameters may “reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections.” *Id.* at 350.

29. Petitioners’ argument that the General Assembly’s decision not to impose a cure procedure means that no county board may adopt such a procedure fails. While county boards may not adopt any such procedures that are “inconsistent with law,” where the law is silent, the board may adopt procedures to promote the purpose of the Election Code: “freedom of choice, a fair election and an honest election return.” *Boockvar*, 238 A.3d 345 at 356.

30. Petitioners do not allege that any specific notice-and-cure procedure is inconsistent with the Election Code.

31. The identified procedures allegedly utilized by the Montgomery County Board of Elections include various combinations of: (1) notifying the voter that there are problems with their ballot; (2) allowing voters to cure and resubmit their ballots; (3) allowing voters to cancel and replace their ballots; (4) notifying voters that their ballots have been cancelled by the board; and (5) allowing voters to cast a provisional ballot.

32. Petitioners have not identified any provision in the Election Code that prevents Montgomery County or any county board from contacting a voter to inform them of problems with their ballot. To the contrary, boards are empowered to “make and issue ... instructions to voters,” 25 P.S. § 2642(f), (i); these powers necessarily must include the power to contact voters when deemed necessary.

33. Nor have Petitioners identified any provision in the Election Code that prevents Montgomery County or any county board from canceling a mail ballot, or from allowing a voter to cancel a mail ballot that does not comply with the requirements of the Election Code.

34. Finally, Petitioners have not identified any provision in the Election Code that prevents Montgomery County or any county board from allowing a voter whose mail ballot does not comply with the requirements of the Election Code to cast a provisional ballot.

PRELIMINARY OBJECTION 5
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT II

35. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

36. The General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their

respective counties. *See* 25 P.S. § 2641(a).

37. Montgomery County’s development of procedures for allowing voters to cure or cancel mail-in ballots is not regulating the “Manner of holding Elections.” Instead, the Board exercising discretion granted by the Legislature to resolve issues not directly addressed by statute. The Elections Clause does not deprive the Legislature of the power to delegate such authority to county boards.

PRELIMINARY OBJECTION 6
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT III)

38. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

39. No injunction should issue in this matter because notice-and-cure procedures adopted by the Montgomery County Board of Elections are fully consistent with the Election Code. The law does not prohibit a county board from taking action to prevent disenfranchisement when it receives a mail ballot that cannot be counted due to observable defects. Instead, it permits county boards to develop procedures to contact affected voters and provide them with the opportunity to have their votes counted.

40. Notifying voters that their ballots are not compliant with the Election Code and will not be counted, and providing voters with the

opportunity to vindicate their right to vote, does not cause any cognizable harm to Petitioners—or anyone else—that warrants an injunction.

41. Enjoining the use of notice-and-cure provisions would harm voters in Montgomery County and across the Commonwealth whose ballots will be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted.

Respectfully submitted,
MONTGOMERY COUNTY
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Elections

Dated: September 16, 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, et al.	:	
Petitioners,	:	ANSWER OPPOSING APPLICATION
	:	FOR SPECIAL RELIEF
v.	:	
	:	
LEIGH M. CHAPMAN, et al.	:	
	:	
Respondents.	:	

**ANSWER OF ADAMS COUNTY BOARD OF ELECTIONS OPPOSING
PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A
PRELIMINARY INJUNCTION UNDER P.A.R.A.P. 1532**

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REPUBLICAN NATIONAL	:	No. 447 MD 2022
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	:	
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**ANSWER OF ADAMS COUNTY BOARD OF ELECTIONS OPPOSING
PETITIONERS’ APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A
PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532**

I. INTRODUCTION

Petitioners raise a very similar issue to one that has been litigated once before, namely, whether non-uniform “notice and cure” procedures amongst the 67 counties harm voters. See *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp. 3d 899 (M.D. Pa. 2020) (holding that counties implementing a notice-and-cure procedure did not violate Equal Protection and in fact *enhanced* the right to vote). This time around, however, Petitioners are also asserting that the General Assembly has somehow affirmatively denied counties the ability to notify voters of defective ballots.

Petitioners are also repackaging their notice-and-cure uniformity argument to convince this Court that there is “immediate and irreparable harm” to voters for purposes of issuing a preliminary injunction ahead of a contentious midterm election. See Memorandum of Law in Support of Petitioners’ Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 (“Petitioners’ Memorandum”), Argument, Section I. Curiously, despite using uniformity as a basis for its preliminary injunction request, Petitioners make no reference to the relevant District Court’s holding that non-uniform notice-and-cure procedures do not

create harm, but rather enhance the right to vote in those counties that apply them. See generally, Petitioners' Memorandum; see also, *Donald J. Trump*, 502 F.Supp.3d at 919-20. Rather, Petitioners solely focus on the Pennsylvania Supreme Court's determination that the Election Code does not *mandate* that counties adopt notice-and-cure procedures and twists the Court's holding to argue that the lack of a mandate equates to an affirmative denial of that power. See Petitioners' Memorandum (citing *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)). Of course, it should be noted that in the same case relied upon by Petitioners, our Supreme Court determined that "the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." *Pennsylvania Democratic Party*, 238 A.3d at 356.

Because Respondent Adams County Board of Elections does not believe that voter rights should be the victim of what amounts to a spat between political parties and branches of government, it feels compelled to oppose the request of Petitioners.

II. STANDARD OF REVIEW

A preliminary injunction, which as a "harsh and extraordinary remedy," should only be granted if and when each of the following criteria has been fully and completely established by the petitioner: (1) the preliminary injunction must be necessary to prevent immediate and irreparable harm, (2) greater injury would result from the denial of the preliminary injunction than from the granting of it, (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct, (4) the petitioner is likely to prevail on the merits, (5) the injunction is reasonably suited to abate the offending activity, and (6) the public interest

will not be harmed if the injunction is granted. *Berwick Township v. O'Brien*, 148 A.3d 872, 890 (Pa.Cmwlth. 2016).

III. ARGUMENT

a. **Permitting voters to correct defective ballots does not constitute immediate and irreparable harm to voters.**

Petitioners do not convincingly point to any harm to voters, much less immediate and irreparable harm, caused by notice or cure. Petitioners rely solely on a theory of *per se* harm caused by some violation of the law by the counties. See Petitioners' Memorandum, pg. 14-17. In support of their theory, Petitioners point to Section 2642 ("Powers and duties of county boards") of the Election Code and hastily declare that none of the enumerated powers therein "authorize the development and implementation of their own bespoke cure procedures...". Memorandum of Law, pg. 6. Upon declaring this, Petitioners jump to the next conclusion that "cure procedures" must be illegal and therefore constitute *per se* harm. Memorandum of Law, pg. 14 (citing *Hempfield Sch. Dist. v. Election Bd. Of Lancaster County*, 574 A.2d 1190 (Pa.Cmwlth. 1990)). Petitioners overlook the relevant statute.

The General Assembly provided county boards of elections with the power "[t]o make and issue such rules, regulations and instructions, not inconsistent with the law, as they may deem necessary for the guidance of ... electors." 25 P.S. 2642(f). Providing "guidance" and "instructions" to electors is an essential and fundamental aspect of the job of the boards of elections. *Id.* Part of the guidance is informing voters how to cast a proper ballot. When

inevitable errors are made by voters at the ballot box or via mail, boards are granted the express authority by the General Assembly to provide instruction and guidance to those voters.

Of course, subsection (f) requires that any instructions and guidance may not be “inconsistent with the law.” 25 P.S. 2642(f). Petitioners’ apparent argument for such inconsistency with the law can be boiled down to this misguided proposition: that because the General Assembly outlined a single “cure procedure” for absentee/mail-in voters whose IDs could not be verified initially, see 25 P.S. 3146.8(h), the legislature therefore intended to outlaw all other “cure procedures.” See Petitioners’ Memorandum, pg. 6. There are two problems with this argument. First and foremost, the “cure” outlined in Section 3156.8(h) does not actually concern a ballot defect. Rather, it addresses the identity of the voter. 25 P.S. 3146.8(h). The Election Code only mentions ballot defects in the context of whether a ballot may be counted, and *not* how ballot defects may be remedied ahead of Election Day. To the extent that Petitioners’ now urge this Court to write such a prohibition against notification and opportunity to correct such errors, Respondent asks this Court to reject that invitation as “it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.” *Shafter Electric & Construction v. Mantia*, 96 A.3d 989, 994 (Pa. 2014).

The second problem with Petitioners’ claim is that it is impossible to determine what words or actions might be considered a “cure procedure” by the General Assembly because the terms “cure” and “cure procedures” are not statutorily defined, nor do they appear anywhere in the Code. Petitioners themselves make no attempt to define the terms, only loosely referring to efforts to remedy “signature and secrecy-envelope defects.” Petitioners’ Memorandum, pg. 2. Petitioners loose definition is neither helpful to this Court or to the 67 counties. Is merely notifying the voter of the defect enough to constitute a “cure procedure?” Or does it require

notification *and* some affirmative act to induce the voter to submit a valid ballot? Do “cure procedures” include directing voters to submit a provisional ballot separate from a defective ballot? Or does it only include changes to the original defective ballot? What about voiding a defective ballot and providing the voter with a new one at their request? How about a court-ordered ballot replacement? None of these questions are answered by Petitioners, yet they allege that they know some unlawful act has been committed by the boards. Is this a case of Justice Stewart’s “I’ll know it when I see it?” See *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Petitioners are not alone, however. Our own Supreme Court did not define the term (which would have been far more problematic if it had either required boards to adopt “notice and opportunity to cure” policies or expressly disallowed it). See *Pennsylvania Democratic Party*, 238 A.3d at 372. As we throw around the term “notice and cure procedure” in the courts and in the legislature, or some variation thereof, we must remember that prohibiting an amorphous concept will likely impede the franchise of Pennsylvania voters. If no precise definition is offered by Petitioners, this Court cannot reasonably determine harm and certainly cannot fashion a narrowly-tailored equitable remedy to address any such harm.

To the extent that Petitioners argue that the lack of uniformity in cure procedures among the counties will harm voters, at least one court has addressed that very issue to Petitioners’ detriment. About a month after our Supreme Court determined that notice and cure procedures were not required to be implemented, the Trump campaign sued in federal court, arguing that the lack of uniformity of notice and cure procedures among Pennsylvania counties violated Equal Protection and harmed voters. In essence, the Trump campaign argued that if not every county could offer notice and the opportunity to cure small defects, then no county should,

just as Petitioners do here. The Middle District Court flatly rejected the Trump campaign's argument, holding that expanding the right to vote through notice-and-cure does not burden non-county residents:

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. And Plaintiffs' claim cannot stand to the extent that it complains that "the state is not imposing a restriction on someone else's right to vote." Accordingly, Defendant Counties' use of the notice-and-cure procedure (as well as Secretary Boockvar's authorization of this procedure) will be upheld unless it has no rational basis.

Individual Plaintiffs' claims fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots. Though states may not discriminatorily sanction procedures that are likely to burden some persons' right to vote more than others, they need not expand the right to vote in perfect uniformity. All Plaintiffs have alleged is that Secretary Boockvar allowed counties to choose whether or not they wished to use the notice-and-cure procedure. No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose, Individual Plaintiffs fail to state an equal-protection claim.

Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 919–20 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020), and *appeal dismissed sub nom. Signed v. PA*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021). In other words, contrary to the suggestion that the notice-and-cure practice was somehow harmful to voters and violated equal protection, the court determined that the practice actually *enhanced* the right to vote in those counties. That decision was affirmed on appeal by the 3rd Circuit Court of Appeals.

It makes little sense that counties that choose to enhance the right to vote should be required to reduce the protection of rights for its citizens so as to achieve parity with the counties where citizens enjoy lesser protections. In fact, the exact opposite of that theory is in the best interest of the electorate.

In sum, Petitioners make an insufficient case for harm. Notice and cure procedures do not cause *per se* harm, as that power is expressly granted to counties by the General Assembly, see 25 P.S. 2642(f), nor does the non-uniform application of such procedures among the counties cause harm to the voters. *Donald J. Trump for President, Inc.* 502 F.Supp. 3d at 919-20. In their quest for a victim, Petitioners only stumble upon an “enhanced” right to vote.

b. Greater injury would result for the *granting* of the preliminary injunction.

Petitioners largely rely on the same two arguments used in support of the “immediate and irreparable harm” criterion to attempt to satisfy this “greater injury” criterion, namely, (1) that the boards are somehow contravening some implied intention of the legislature by curing ballots, and (2) that the lack of uniformity will harm voters in counties that don’t adopt curing procedures. Those arguments are adequately addressed in the previous section, but it should be stated that greater injury to voters would occur if this Court were to *grant* Petitioners’ request for a preliminary injunction for a number of reasons. First, a preliminary injunction would necessarily lessen the protection of voting rights in those counties that adopt notice and cure procedures. Second, because of the lack of a legal definition of the term “notice and cure,” county boards would not be able to apply the mandates of an injunction with any degree of certainty or uniformity. Third, assuming that mere notice, instruction, and guidance likely falls under the broad definition of “curing procedures,” a preliminary injunction would both usurp an enumerated statutory power of the boards of elections under Section 2642(f) and may even act as a prior restraint on speech that is protected by the First Amendment. See *Nebraska Press*

Association v. Stuart, 427 U.S. 539 (1976) (prior restraints on speech are presumptively unconstitutional). For those reasons, this Court should not grant Petitioners' request.

c. An injunction would upset the status quo, which allows counties the discretion to notify voters of ballot errors.

Notifying voters of errors on their mail-in ballots is the status quo for many counties, as outlined in Petitioners' own Application. As explained in a prior section, the county has the express authority by the legislature to advise and guide voters. 25 P.S. 2642(f). This power existed long before Act 77, and continued to be applied upon the advent of no-excuse mail-in ballots in Pennsylvania. An injunction, which would effectively impose a gag order on election officials to speak with constituents, would disrupt the status quo, usurp the power of the counties delegated to them by the legislature, and could not be narrowly tailored enough to only prohibit non-protected speech of election officials.

d. Petitioner is not likely to prevail on the merits.

So far, no state or federal court has ruled that counties are forbidden from notifying voters of defective ballots. As noted above, our Supreme Court determined that county boards are not required to adopt notice and cure procedures, but did not go so far as to prohibit them. *Pennsylvania Democratic Party*, 238 A.3d 345. The federal district court, affirmed by the 3rd Circuit, rejected the primary claims underlying Petitioners' request for special relief here, namely, that lack of uniformity of cure procedures in any way harms voters. *Donald J. Trump for President, Inc.*, 502 F. Supp. 3d at 919–20. Rather, the federal court opined that such procedures, even applied inconsistently actually enhanced the right to vote. *Id.* Therefore, such claims related to uniformity are unlikely to prevail here.

With regard to the separation of powers arguments, Petitioners assert that counties, as arms of the executive branch, are infringing on the powers of the legislative branch, thus violating the separation of powers doctrine. The separation of powers doctrine stands for the proposition “that the executive, legislative, and judicial branches of government are equal and none should exercise powers exclusively committed to another branch.” *Jefferson Cty. Court Appointed Emp. Ass’n v. Pa. Labor Relations Bd.*, 985 A.2d 697, 703 (Pa. 2009). Indeed, the counties could possibly violate the separation of powers doctrine if they exercised power not granted to them by the Legislature. However, as explained in prior sections, the General Assembly expressly granted county boards of elections with the power “[t]o make and issue such rules, regulations and instructions, not inconsistent with the law, as they may deem necessary for the guidance of ... electors.” 25 P.S. 2642(f). Petitioners cite no “inconsistency” in the exercise of those powers with the Election Code except for an unsupported belief that a single provision related to voter identification, 25 P.S. 3146.8(h), somehow precludes boards from notifying voters of ballots defects. Adopting Petitioners’ reasoning would result in county boards being unable to exercise their basic powers enumerated under Section 2642(f). See 1 Pa.C.S. 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”).

e. An injunction is not an appropriate means for curing whatever ails Petitioners.

Simply put, an injunction prohibiting some ill-defined and amorphous mishmash of speech and actions would be impossible to tailor narrowly. Even if “cure procedures” were well-defined and relief could be narrowly-tailored, it is wholly inappropriate to lessen the protections of voter rights to either (1) achieve parity with the lesser protections of other counties, or (2) to

vindicate the powers of one branch of government. And, as mentioned above, an injunction affecting communication to voters may even chill constitutionally-protected speech of election officials and staff (not to mention voter protections). Therefore, injunctive relief is wholly inappropriate and would create more harm than good.

f. The public interest will be substantially harmed by the imposition of a preliminary injunction pending while mail-in ballots are being returned.

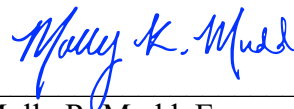
Petitioners' request for a preliminary injunction will have the effect of disenfranchising certain Pennsylvania voters under the guise of "uniformity" and "separation of powers." It is repugnant to our constitutional system that any political party would seek to weaponize the courts to lessen the protection of rights of Pennsylvania voters. To be clear, it is *not* the counties that are preventing the General Assembly from exercising its power to pass uniform "notice and cure" provisions related to mail-in ballots. It is the General Assembly's own inability to pass a bill palatable to the Governor for signature. As we all know, the General Assembly has a constitutional mechanism to bypass the Governor's veto, but it has yet to exercise it. This Court should reject the attempt of the Petitioners' to bypass that constitutional mechanism at the expense of voter rights protections.

IV. CONCLUSION

This Court should deny Petitioners' request for a preliminary injunction to decrease the protections of voter rights in some counties to achieve parity with lesser-accorded rights in other counties, or for the resolution of some baseless power struggle between two branches of

government. The only potential harm in granting such a request is to the voter. Lessening voter protections for naked political gain is antithetical to our state and federal constitutions and must be rejected.

Respectfully submitted,



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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; S. Michael
Streib,

Petitioners

NO. 447 M.D. 2022

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; 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; Wayne County Board of Elections; Westmoreland County Board of Elections; Wyoming County Board of Elections; and York County Board of Elections,

Respondents.

ANSWER IN OPPOSITION TO APPLICATION FOR PRELIMINARY INJUNCTION

And now comes Respondent Monroe County Board of Elections and Answers in Opposition to Petitioners Application for Injunctive Relief as follows:

1. This allegation is specifically denied based on the claimed inaccuracy of the characterization that the act of the General Assembly has the effect of limiting “cure procedures to those enumerated in 25 P.S. 3146. 8 (h) and without further specificity in the Petitioners’ Application as to what a “cure procedure” is or what qualifies as such the allegation is further specifically denied.

2. It is specifically denied that any alleged actions of “some Boards”, without further specificity of what Boards and what specific conduct, violate any holding of the Pennsylvania Supreme Court.

3. The characterization of the Supreme Court’s holding is specifically denied.

4. No answer required.
5. Due to lack of specificity as to what was “passed” by the Legislature, this allegation is specifically denied.
6. This is a conclusion of law, and without further specificity as to what “cure procedures” (whatever that term may mean) any Board may have purportedly implemented, the allegation is specifically denied.
7. Without further specificity as to what “cure procedures” “some Boards” may have passed the serial allegations of this paragraph are specifically denied.
8. This allegation is specifically denied as this Court should not enjoin any procedures that any Board may have adopted until further hearing as to what is a “cure procedure” and what is not and until it determines what any Board may or may not have adopted that is a so-called “cure procedure” and whether such procedure is or is not permitted.
9. It is admitted what the Petitioners are asking for in the nature of relief.
10. Admitted.
11. Admitted.
12. It is specifically denied that the factors have been satisfied.
13. The Respondent is without knowledge as to what other Boards of Election may or may not have implemented and whether the same are “cure

procedures” or if any such action which Petitioners characterize as such are or are not authorized by statutory law or caselaw. Therefore, the first paragraph of this averment is specifically denied. So too is there a specific denial of the second paragraph as the denial of the first paragraph denies immediate and irreparable harm. Absent that there is no injury and therefore there is no injury which would be a greater or less injury resulting from a refusal to grant an injunction.

14. This allegation is specifically denied as the Respondent does not acknowledge what Petitioners assert is the state of the law.

15. Based on the foregoing denials the Respondent specifically denies that the Petitioners are likely to prevail on the merits.

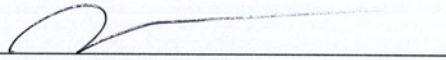
16. Based on the foregoing denials the Respondent specifically denies that any injunction is merited and that, as a result, it would not abate any offending activity.


17. This averment is specifically denied since an injunction is not warranted and any unwarranted injunction would adversely affect the public interest.

WHEREFORE, based on the above denials the Monroe County Board of Elections request this Honorable Court to deny the Application for Preliminary Injunction.

Dated: 9-16-22

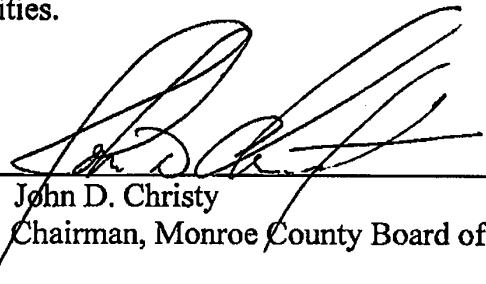
Respectfully submitted,

By: 
James V. Fareri, Esq.
Attorney I.D. No.: 34402
Counsel for Respondent
712 Monroe Street
Stroudsburg, PA 18360
(570) 421-9090

/s/ 
John B. Dunn
Monroe County Solicitor
Commissioners' Office
Administration Building
Quaker Alley
Stroudsburg, Pa. 18360
johndunnjbd@gmail.com
Counsel for Monroe County
Board of Elections

VERIFICATION

I hereby aver that to the extent any statement of facts are contained in the Respondent's Answer are true and correct to the best of my knowledge and belief and are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.

By: 
John D. Christy
Chairman, Monroe County Board of Elections

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.

NEWMAN, WILLIAMS, MISHKIN,
CORVELEYN, WOLFE & FARERI,
P.C.

Date: 9-16-22

By: 

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jfareri@newmanwilliams.com

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, <i>et al.</i> ,	:	
Petitioners	:	
	:	
vs.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of the	:	
Commonwealth, <i>et al.</i> ,	:	
Respondents.	:	

**RESPONDENT NORTHAMPTON COUNTY BOARD OF ELECTIONS' ANSWER
TO APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY
INJUNCTION UNDER PA R.A.P 1532**

Respondent Northampton County Board of Elections files this Answer to the
Petition for special relief and requests that this Court deny the Application.

BACKGROUND

1. This is a legal conclusion to which no response is required. To the extent
an answer is required, denied. Respondent Northampton County Board of Elections at
all times relevant have administered fair, free and accurate elections in accordance with
applicable law.

8. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Respondent Northampton County Board of Elections at all times relevant have administered fair, free and accurate elections in accordance with applicable law.

INJUNCTIVE RELIEF

9. This is a legal conclusion to which no response is required. To the extent an answer is required, denied.

10. This is a legal conclusion to which no response is required. To the extent an answer is required, denied.

11. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

12. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

13. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. By way of further response, Petitioners' mischaracterized the nature of the settlement agreement applicable to Respondent Northampton County Board of Elections in their Petition. The settlement agreement indicated that the parties agree it is in the best interests of voters "to provide the opportunity of notice to a voter who returns a mail-in ballot or absentee ballot without a secrecy envelope (known as "Naked Ballots")." There is nothing in the settlement

without a date or signature. The affected voter would have an opportunity to correct the issue prior to Election Day.

“The purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.”

In re Gen. Election-1985, 531 A.2d 836, 839 (Pa. Cmwlth. 1987) (citing In re Mayor, City of Altoona, Blair County, 196 A.2d 371 (Pa. 1964)). This process provides an equal opportunity for all eligible electors to participate in the election process and favors the enfranchisement of voters over the disenfranchisement of voters due to minor issues with a ballot.

14. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

15. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction.

16. This is a legal conclusion to which no response is required. To the extent an answer is required, denied. Petitioners fail to establish all of the factors required entitling them to a preliminary injunction. By way of further response, Respondent Northampton County Board of Elections incorporates by reference the answers of all other Respondents which support denial of the Application.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	447 MD 2022
	:	
Leigh M. Chapman, in her official capacity	:	
as Acting Secretary of the Commonwealth	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

**ANSWER OF RESPONDENT LUZERNE COUNTY BOARD OF
ELECTIONS TO PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION
and
APPLICATION TO SUBMIT SAME *NUNC PRO TUNC***

Respondent Luzerne County Board of Elections ("Board") submits the following to the Court:

Application to submit answer to Petitioners' Application *nunc pro tunc*:

1. Per its Order of September 9, 2022, this Court directed "[a]ny party" who opposed the subject Application for Preliminary Injunction to file and serve same "no later than 12:00 noon on Friday, September 16, 2022," (which is today), with failure to do so to be considered lack of opposition to the Application.
2. Undersigned was retained by the Board late this morning and entered his appearance moments before the above-noted deadline.

3. With this late entry, undersigned was unaware of the deadline until he reviewed the documents in question upon his access to the docket after entry of appearance.

4. As the Board opposes the requested relief to the extent indicated below, any delay in response to the Court's deadline was not undertaken in bad faith.

5. Given the significance of the matters at issue and the position of the Board, as noted below, its opposition should be considered.

WHEREFORE, the Board prays this Honorable Court to grant it permission to submit the Answer to Petitioners' Application *nunc pro tunc*.

Answer to Petitioners' Application for Special Relief:

Background

1. Denied as stated. To the extent this allegation contains legal conclusions, no answer is necessary. To the extent this allegation mischaracterizes any "notice and cure" procedure implemented by the Board, it is denied.

2. To the extent this allegation contains legal conclusions, no answer is necessary.

3. Denied as stated. To the extent this allegation contains legal conclusions, no answer is necessary. To the extent this allegation mischaracterizes the law, it is denied.

4. To the extent this allegation contains legal conclusions, no answer is necessary.

5. Denied as stated. To the extent this allegation mischaracterizes the legislative process regarding the issue at hand, it is denied.

6. Denied as stated. To the extent this allegation contains legal conclusions, no answer is necessary. To the extent this allegation mischaracterizes any "notice and cure" procedure implemented by the Board, it is denied.

7. Denied as stated. To the extent this allegation contains legal conclusions, no answer is necessary. To the extent this allegation mischaracterizes any "notice and cure" procedure implemented by the Board, it is denied.

8. Denied as stated. To the extent this allegation contains legal conclusions, no answer is necessary. To the extent this allegation mischaracterizes any "notice and cure" procedure implemented by the Board, it is denied.

Injunctive Relief

9. Petitioners' Application at issue herein is a written request which speaks for itself.

10. Admitted.

11. Admitted.

12. Denied as stated. This allegation is denied to the extent it characterizes facts neither alleged nor proven.

13. Denied as stated. To the extent this allegations contains legal conclusions, no answer is necessary. To the extent this allegation contains facts unknown to the Board, same is denied as stated.

14. Denied as stated. To the extent this allegations contains legal conclusions, no answer is necessary. To the extent this allegation contains facts unknown to the Board, same is denied as stated.

15. Denied as stated. To the extent this allegations contains legal conclusions, no answer is necessary. To the extent this allegation contains facts unknown to the Board, same is denied as stated.

16. Denied as stated. To the extent this allegations contains legal conclusions, no answer is necessary. To the extent this allegation contains facts unknown to the Board, same is denied as stated.

17. Denied as stated. To the extent this allegations contains legal conclusions, no answer is necessary. To the extent this allegation contains facts unknown to the Board, same is denied as stated.

WHEREFORE the Luzerne County Board of Elections, in the context noted herein, opposes the Petitioners' Application for Injunctive Relief

Respectfully submitted,

SELINGO GUAGLIARDO LLC

/s/ Joseph M. Cosgrove

Attorney I.D. 37130

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Kingston, PA 18704

570-287-2400

jcosgrove@getyourselfagoodlawyer.com

CERTIFICATE OF COMPLIANCE

I 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.

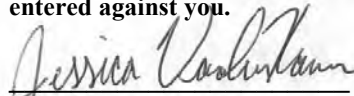
Respectfully submitted,

/s/Joseph M. Cosgrove
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BUCKS COUNTY LAW DEPARTMENT
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First Assistant County Solicitor
Attorney I.D. No. 324672
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Attorney I.D. No. 325455
55 East Court Street, Fifth Floor
Doylestown, PA 18901

NOTICE TO PLEAD

Petitioners: You are hereby notified to file a written response to the enclosed New Matter within thirty (30) days from service hereof or a judgment may be entered against you.


Jessica L. VanderKam, Esquire

STUCKERT AND YATES
Jessica L. VanderKam, Esquire
County I.D. No. 208337
2 North State Street
Newtown, PA 18940
Attorneys for Bucks County Board of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et. al.	:	
	:	
Petitioners,	:	
v.	:	
	:	Docket No. 447 MD 2022
LEIGH M. CHAPMAN, in her official capacity	:	
as Acting Secretary of the Commonwealth of	:	
Pennsylvania, et al.,	:	
	:	
Respondents.	:	

ANSWER AND NEW MATTER OF BUCKS COUNTY BOARD OF ELECTIONS TO PETITION FOR REVIEW SEEKING DECLARATORY AND INJUNCTIVE RELIEF

Respondent Bucks County Board of Elections submits this Answer and New Matter to the Petition for Declaratory and Injunctive Relief.

1. Denied. It is denied that the Bucks County Board of Elections is departing from the directives of the Election Code. By way of further answer, the Bucks County Board of Elections faithfully follows the directives of the Election Code and the Courts in administering elections.

2. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Petitioners misconstrue the holding of the Pennsylvania Supreme Court’s decision in *Pa. Democratic Party v. Boockvar*. The Court did not hold that cure procedures were prohibited or unlawful; rather the Court held that Board of Elections could not be compelled to implement a notice and cure procedure. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020)(“Upon review, we conclude that the Board 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.”).

3. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Petitioners misconstrue the Pennsylvania Supreme Court’s holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). The Pennsylvania Supreme Court stated that the establishment of a procedure *requiring* Election Boards to provide “notice and opportunity to cure” to electors should be addressed by the legislature.

4. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

5. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, the bill referenced in this paragraph contained several provisions that sought to disenfranchise voters and, therefore, was not a genuine attempt to establish a requirement that all Election Boards must allow electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

6. Denied as vague, as the Petitioner fails to identify with specificity the legislation to which it refers. Further, to the extent the allegations of this paragraph characterize a particular

legislative bill, that bill is in writing and speaks for itself, and any characterization thereof is denied. To the extent that Petitioner is referring to House Bill 1300, same was a 150-page bill which included, among other things, limitations on the use of drop boxes, voter identification requirements, and signature verification requirements, and was in essence a voter suppression effort. Further, nothing in the Election Code or case law prohibits an Election Board from allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

7. Admitted in part; denied in part. Admitted that Respondent has and is implementing notice and cure procedures but denied that Respondent is not acting within the scope of its legal authority by implementing notice and cure procedures. This long-standing policy was developed at the discretion of the Election Board granted by the Legislature to resolve issues not directly addressed by statute. Specifically, the General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a).

8. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

9. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

10. Denied. Respondent has disclosed and discussed its notice and cure procedures in public meetings of the Bucks County Board of Elections. Further, Respondent notifies any voters that have submitted problematic ballot outer envelopes and provides instructions to them to cure the outer envelope defect before Election Day.

11. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

12. Denied. With respect to the policies and procedures of County Boards of Elections other than Bucks County Board of Elections, Respondent is without knowledge or information sufficient to form a belief as the truth of the averment, and therefore the averment is denied. The remaining averments of this paragraph are conclusions or statements of law to which no response is required. By way of further answer, Petitioners have failed to demonstrate immediate and irreparable harm if Respondent continues its long-standing policy of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots.

13. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, Petitioners' representation of the Supreme Court's holding in *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) is inaccurate. The Court did not rule that Election Boards were prohibited from allowing electors to correct minor defects identified by Election Boards.

14. Denied. It is specifically denied that the granting of the requested injunction will "preserve the status quo." To the contrary, Respondent has had a long-standing procedure of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots and this procedure is consistent with legislative intent that the Election Code be liberally construed so as not to deprive voters of their right to elect a candidate of their choice.

15. Respondent admits the first sentence of this paragraph. The remaining sentences are conclusions of law to which no response is required and are therefore denied. It is specifically denied the Petitioners are likely to prevail when the relief requested is inconsistent with prior case law and contrary to the purpose of the Election Code in protecting electors' right to vote.

16. Respondent admits the first sentence of this paragraph. The remaining sentences are conclusions of law to which no response is required and are therefore denied. By way of further

answer, the requested injunction seeks to adversely affect the public interest and disenfranchise qualified voters in Bucks County.

17. Respondent admits the first sentence of this paragraph. The remaining sentences are conclusions of law to which no response is required and are therefore denied. It is specifically denied that the granting of the requested injunction will not adversely affect public interest. To the contrary, enjoining the use of notice-and-cure provisions would harm voters in Bucks County and across the Commonwealth whose ballots will be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted. The remaining averments of this paragraph are conclusions or statements of law to which no response is required.

18. Respondent admits the first sentence of this paragraph. The remaining sentences are conclusions of law to which no response is required and are therefore denied.

19. Denied as it pertains to Respondent. By way of further answer, Respondent cannot determine what is readily known. Respondent's notice and cure procedures have been publicly discussed and deliberated at public meetings since at least October 2020. These public meetings are routinely attended by members of the political parties. The remaining sentence is a conclusion of law to which no response is required and are therefore denied.

20. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

21. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

22. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

23. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

24. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

25. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

26. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

27. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

28. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

29. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

30. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

31. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

32. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

33. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, assisting voters to prevent the unnecessary

disenfranchisement of qualified electors does not interfere with any voter's right to an "equal election."

34. Admitted in part; denied in part. Admitted that the notice and cure procedures by Respondent could result in an elector successfully casting a ballot. The balance of this paragraph sets forth conclusions of law to which no response is required and is therefore denied.

35. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

36. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

37. Admitted.

38. Admitted.

39. Admitted. By way of further response, the county Board of Elections have numerous other duties and obligations as set forth and granted through the Election Code.

40. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

41. Admitted.

42. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

43. Admitted.

44. Denied as stated.

45. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

46. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

47. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

48. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

49. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

50. Admitted as it relates to the language of the statute; denied as it relates to the characterization of same.

51. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

52. To the extent the allegations of this paragraph characterize a particular legislative bill, that bill is in writing and speaks for itself, and any characterization thereof is denied. By way of further response, House Bill 1300 was a 150-page bill which included, among other things, limitations on the use of drop boxes, voter identification requirements, and signature verification requirements.

53. Admitted.

54. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

55. Denied as stated. Upon information and belief, the guidance cited was not intended to assert the Secretary of the Commonwealth's position on Respondent's ability to assist voters to

prevent disenfranchisement. By way of further response, this specific “FAQ” relates to limits on pre-canvassing rather than notice and cure procedures.

56. This paragraph sets forth conclusions of law to which no response is required and is therefore denied. By way of further response, this paragraph reveals that Petitioner is aware the Pennsylvania Supreme Court did not prohibit notice and cure procedures; rather the Court held that the Boards of Election could not be compelled to implement notice and cure procedures.

57. Admitted.

58. Admitted.

59. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

60. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

61. Admitted. By way of further response, Respondent does ensure that its notice and cure procedures are honestly, efficiently, and uniformly conducted in the County of Bucks, as required by the Election Code.

62. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

63. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

64. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

65. Admitted in part; denied in part. Respondent can only respond as to Respondent’s notice and cure procedures and does admit that it has implemented notice and cure procedures.

66. Admitted. A true and correct copy of the current postcard utilized by Respondent is attached as Exhibit A.

67. Denied as stated. It is only admitted that Respondent provided a list of voters it had sent the postcards to at the request of the political parties.

68. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

69. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

70. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

71. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

72. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

73. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

74. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

75. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

76. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

77. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

78. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

79. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

80. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

81. After reasonable investigation Respondent is without the knowledge or information sufficient to form a belief as to the truth of this averment.

82. This paragraph further sets forth conclusions of law to which no response is required and is therefore denied.

83. Admitted to the extent Respondent utilizes notice and cure procedures as time allows. Denied that notice and cure procedures are dependent upon party registration.

84. Denied.

85. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

86. No response necessary.

87. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

88. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

89. Admitted upon information and belief.

90. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

91. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

92. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

93. No response necessary.

94. Admitted.

95. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

96. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

97. No response necessary.

98. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

99. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

100. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

101. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

102. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

103. This paragraph sets forth conclusions of law to which no response is required and is therefore denied.

NEW MATTER

104. Respondent refers to and incorporates its response to the preceding paragraphs.

105. The General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a).

106. As noted by our Courts, “[i]n Pennsylvania, each county runs its own elections. 25 P.S. § 2641(a). Counties choose and staff polling places. § 2642(b), (d). They buy their own ballot boxes and voting booths and machines. § 2642(c). They even count the votes and post the results. § 2642(k), (l). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. § 2642(f). And they are charged with ensuring that elections are honestly, efficiently, and uniformly conducted. § 2642(g).” *Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, 830 Fed. Appx. 377, 382 (3rd Cir. 2020)(*quoting* 25 P.S. §2642(g)).

107. The Pennsylvania Election Code authorizes Respondent, and other county boards of election, to make such rules and regulations for the conduct of elections as they deem necessary for the guidance of the voters, as long as those rules and regulations are not inconsistent with the law. *See* 25 P.S. §2642(f).

108. Nothing in the Pennsylvania Election Code prohibits Respondent from providing notice to the electors that there is some facially deficient problem with the declaration on the outer envelope containing their ballot.

109. Respondent’s development of procedures for allowing voters to cure mail-in ballots is not regulating the “Manner of holding Elections” as Petitioners suggest. Instead, the Board is

exercising discretion granted by the Legislature to resolve issues not directly addressed by statute. The Elections Clause does not deprive the Legislature of the power to delegate such authority to county boards, which it has done.

110. Determining the scope of the county boards' authority to promulgate rules, regulations, and instructions requires "listen[ing] attentively to what the statute says, but also to what it does not say." *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Elections Code that does not specify relevant parameters may "reflect the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections." *Id.* at 350.

111. Petitioners' argument that the General Assembly has prohibited county boards of election from developing a notice-and-cure procedure fails. While county boards may not adopt any such procedures that are "inconsistent with law," where the law is silent, the board may adopt procedures to promote the purpose of the Election Code: "freedom of choice, a fair election and an honest election return." *Boockvar*, 238 A.3d 345 at 356.

112. Petitioners do not allege that notice-and-cure procedure is inconsistent with the Election Code.

113. Petitioners have not identified any provision in the Election Code that prevents Bucks County Board of Elections or any county board from contacting a voter to inform them of problems with their ballot. To the contrary, boards are empowered to "make and issue ... instructions to voters," 25 P.S. § 2642(f), (i); these powers necessarily must include the power to contact voters when deemed necessary.

114. No injunction should issue in this matter because notice-and-cure procedures adopted by the Bucks County Board of Elections are fully consistent with the Election Code. The

law does not prohibit a county board from taking action to prevent disenfranchisement when it receives a mail ballot that cannot be counted due to observable defects. Instead, it permits county boards to develop procedures to contact affected voters and provide them with the opportunity to have their votes counted.

115. Notifying voters that their ballots are not compliant with the Election Code and will not be counted and providing voters with the opportunity to ensure their vote will be counted, does not cause any cognizable harm to Petitioners—or anyone else—that warrants an injunction.

116. Further, Petitioner’s Petition seeking injunctive relief and declaratory judgment is barred by the doctrine of laches, as they have had more than ample time to bring such a lawsuit prior to the eve of mail-in and absentee ballots being mailed out for General Election 2022 and returned to the county boards of election.

117. Petitioner’s Petition seeking injunctive relief and declaratory judgment is further barred by the doctrine of laches since Respondent has been providing notice to electors in Bucks County regarding facially deficient problems with their outer ballot envelopes since 2020 and has been providing this service to all of its voters for five (5) elections so far: Primary and General Election in 2020; Primary and General Election in 2021; and Primary Election in 2022.

118. Candidates and the political parties in Bucks County are well aware of the notice and cure procedure in Bucks County, as same has been discussed in public meetings of the Board of Elections.

119. In fact, the political parties, specifically the Bucks County Republican Committee, was present at a public Board of Elections meeting wherein the procedure of notice and cure was discussed and approved as far back as October 2020 and have been aware of the procedure for the past five election cycles.

120. At the public meeting of the Bucks County Board of Elections on Oct 22, 2020, the Board discussed their procedures for notice and cure of facially defective outer envelopes containing ballots and voted to use this notice and cure practice and procedure for the benefit of all Bucks County voters.

121. The Board further discussed providing a listing of any voters who received notice of their facially defective ballot envelope and voted to provide this information to the political parties upon their request of same.

122. A representative of the Bucks County Republican Committee asked questions about how the lists would be distributed to the parties and was informed of those procedures.

123. Subsequently, and since General Election 2020, both political parties have requested said lists and continue to be provided said lists by Bucks County Board of Elections.

124. Petitioner's Petition seeking injunctive relief and declaratory judgment is further barred by the doctrine of res judicata, as they issues have already been litigated.

125. In 2020, then-President Trump's campaign brought an unsuccessful challenge in federal court, primarily arguing that allowing county boards discretion to implement cure procedures violated the United States Constitution's Equal Protection Clause. *See Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020).

126. The Court dismissed the lawsuit, noting: "[n]ot every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the

ballots; others contact the voters and give them a chance to correct their errors.” *Donald J. Trump for President, Inc. v. Sec’y Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020).

127. Further, the courts have already opined that “county-to-county variations do not show discrimination. Counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. Even when boards of elections vary . . . considerably in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635-36 (6th Cir. 2016); see also *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems). *Id.* at 388, citing *Donald J. Trump for President, Inc.*, 2020 U.S. Dist. LEXIS 188390, 2020 WL 5997680, at *44 (collecting cases).

128. Additionally, as it pertains to Bucks County specifically, Donald J. Trump, then-candidate, filed a Petition on Election Day, 2020, in the Bucks County Court of Common Pleas, Docket No. 2020-05627, raising complaints about the notice and cure procedures in Bucks County. Said Complaint was denied and dismissed; was not appealed; and is a final order. *Donald J. Trump for President, Inc. v. Bucks County Board of Elections*, 2020-05627 (Bucks C.C.P. 2020).

129. Further, Petitioners lack standing to bring this lawsuit against the Bucks County Board of Elections as it is a generalized grievance that is insufficient to confer standing.

130. Petitioners have no substantial, direct or immediate interest in the outcome of the litigation.

131. A substantial interest is one that is distinct from and exceeds “the common interest of all citizens in procuring obedience to the law;” a direct interest is one where the challenged conduct caused petitioner’s harm; and an immediate interest is one where the harm alleged is

concrete, not speculative. See *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003) (quoting *Indep. State Store Union*, 432 A.2d 1375 at 1379–80 (Pa. 1981)); see also *Ams. for Fair Treatment, Inc. v. Phila. Fed’n of Tchrs.*, 150 A.3d 528, 533 (Pa. Cmwlth. 2016).

132. The cornerstone of standing in Pennsylvania is therefore that the party “must be negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). If a party is not adversely affected by what it challenges, it cannot be aggrieved and therefore “has no standing.” *Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (2007). “In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park, LLC*, 888 A.2d at 660 (citing to *In re Hickson*, 821 A.2d 1238 at 1243).

133. Petitioners fail to identify any concrete and distinct harm they have suffered as a result of the Bucks County Board of Elections implementation of notice-and-cure procedures.

134. Any hypothetical harm Petitioners suffer is limited to the same common interest of all citizens in ensuring that the mandates of the U.S. Constitution are being followed, which is insufficient to establish standing. See *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

135. Petitioners’ allegations instead center on a mischaracterization of vote cancellation and dilution. That county boards may “employ entirely different election procedures and voting systems within a single state” does not, by itself, impose any injury so long as those procedures do not discriminate against certain groups of voters or infringe on an individual’s fundamental right to vote. See *Donald J. Trump for President, Inc.*, 830 F. App’x at 388; see also *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 383 (W.D. Pa. 2020).

136. Respondent’s notice and cure procedures do not lead to voter disenfranchisement.

Quite the opposite—voters that would otherwise be prevented from casting an effective mail ballot will now have an opportunity to ensure their ballots are counted. Meanwhile, Petitioners’ requested relief would result in *more* disenfranchisement, not less.

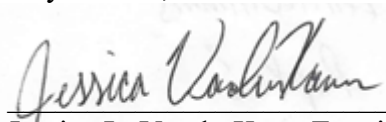
137. Enjoining the use of notice-and-cure provisions would harm voters in Bucks County and across the Commonwealth whose ballots will be cast aside due to readily apparent and easily correctible errors on the outer envelope, which are detected before any ballots are canvassed or counted.

WHEREFORE, Respondent Bucks County Board of Elections respectfully requests this Court to deny Petitioner’s Petition for Declaratory and Injunctive Relief.

Respectfully submitted,

Date: September 19, 2022

/s/ Amy M. Fitzpatrick, Esquire
First Assistant County Solicitor
Attorney I.D. No. 324672
Daniel Grieser, Esquire
Attorney I.D. No. 325445
BUCKS COUNTY LAW DEPARTMENT
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2 North State Street
Newtown, PA 18940

*Attorneys for Respondent,
Bucks County Board of Elections*

VERIFICATION

I, THOMAS FREITAG, state that I am the Director of Elections for Respondent, Bucks County Board of Elections and am authorized to make this verification on its behalf. I verify that the averments of fact made in the Response of the Board of Elections of Bucks County to the Petition for Declaratory and Injunctive Relief are true and correct to the best of my knowledge, information and belief. I understand that the statements are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.


THOMAS FREITAG

Dated: September 16, 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et. al. :

Petitioners, :

v. :

Docket No. 447 MD 2022

LEIGH M. CHAPMAN, in her official capacity
as Acting Secretary of the Commonwealth of
Pennsylvania, et al., :

Respondents. :

ORDER

AND NOW, this ____ day of _____, 2022, upon consideration of the
Petition for Declaratory and Injunctive Relief, and the responses thereto, the Petition for
Declaratory and Injunctive Relief is hereby DENIED and DISMISSED.

J.

EXHIBIT “A”

**NOTICE: YOU FAILED TO SIGN
AND/OR DATE YOUR MAILED
BALLOT.**

- Please contact The Bucks County Board Of Elections Office as soon as possible to remedy this.

- For your vote to count, your ballots must be cured by 8:00 PM on Tuesday, May 17, 2022 (Election Day).

Call 215-348-6154 or email Elections@BucksCounty.org for more information.

Our office hours are 8:00 AM to 5:00 PM,
Monday-Friday.

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**County of Bucks
Board of Elections
55 East Court St.
Doylestown PA 18901**



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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et al.

v.

CHAPMAN, et al.

CASE NO: 447 MD 2022

ANSWER OF RESPONDENT DELAWARE COUNTY BOARD OF ELECTIONS TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Delaware County Board of Elections ("Board") Answer to Petitioners' Application for Special Relief in the Form of a Preliminary Injunction ("Application"):

BACKGROUND

1. Denied. This Paragraph contains conclusions of law to which no response is required and they are therefore denied. By way of further response, the boards of elections in Pennsylvania, including the Board, are delegated authority to issue rules, regulations, and instructions to elections officers that are not inconsistent with law. See 25 P.S. § 2642(g).

2. Denied. This Paragraph contains conclusions of law to which no response is required. By way of further response, the Board denies that *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) prohibits boards from implementing procedures consistent with their statutory authority.

3. Denied. This Paragraph contains conclusions of law to which no response is required.

4. Denied. This Paragraph contains conclusions of law to which no response is required.

5. Admitted.

6. Denied. Further, this Paragraph contains conclusions of law to which no response is required. By way of further response, the boards of elections in Pennsylvania, including the Board, are delegated authority to issue rules, regulations, and instructions to elections officers that are not inconsistent with law. *See* 25 P.S. §§ 2642(f), (g). Petitioners cite no authority to justify a blanket ban on notice and cure procedures. *See Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (“...ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.”).

7. Denied as stated. Strict proof is demanded.

8. Denied as stated. Strict proof is demanded. Further, this Paragraph contains conclusions of law to which no response is required.

INJUNCTIVE RELIEF

9. This Paragraph purports to describe the action at bar and, as such, no response is required. To the extent this Paragraph contains assertions of fact, they are denied as stated.

10. Denied. This Paragraph contains conclusions of law to which no response is required.

11. Denied. This Paragraph contains conclusions of law to which no response is required. By way of further response, Petitioners are unable to meet the high bar required for imposition of a preliminary injunction. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners’ evidence dates to the 2020 Election, crippling their argument that they will suffer immediate and irreparable harm if an injunction is not granted. *Id.* Petitioners’ action is also barred by the doctrine of laches due to their

knowledge of the underlying facts since at least the 2020 Election and their failure to act diligently until nearly a month before the 2022 General Election. Moreover, Petitioners are unlikely to succeed on the merits because applicable precedent, including *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) and *Winston v. Moore*, 244 Pa. 447, 454, 91 A. 520 (Pa. 1914), does not support Petitioners' position.

12. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein.

13. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein.

14. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein.

15. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein. By way of further response, the Legislature has exercised its constitutional authority to prescribe the manner of elections by delegating certain powers to the Boards. *See* U.S. CONST. art. I, § 4, cl. 1; *see also* 25 P.S. §§ 2642(f), (g).

16. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein. By way of further response, Petitioners' requested relief is not narrowly tailored. Petitioners request relief that invades the province of the Legislature and the boards of elections and has no support in the law.

17. The Board incorporates by reference its response to Paragraph 11 as though fully set forth herein. By way of further response, the relief requested by Petitioners violates state and federal law and will disenfranchise Pennsylvania voters.

Dated: September 19, 2022

Respectfully submitted,

/s/ J. Manly Parks

J. Manly Parks (74647)

Nicholas M. Centrella, Jr. (326127)

30 South 17th Street

Philadelphia, PA 19103

Tel.: (215) 979-1000

JMParks@duanemorris.com

NMCentrella@duanemorris.com

**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.

GALLAGHER GIANCOLA LLC

Dated: October 5, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola

Counsel for Petitioners