HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Robert A. Wiygul (I.D. No. 310760)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

PENNSYLVANIA DEPARTMENT OF STATE
Kathleen M. Kotula (I.D. No. 86321)
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

OFFICE OF ATTORNEY GENERAL
Jacob B. Boyer (I.D. No. 324396)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

TUCKER LAW GROUP, LLC
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

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-elector plaintiffs. *See id.* at 918-23.

First, regarding the individual-elector 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).

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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 standin*g, 502 F. Supp. 3d at 909. For the same reasons, as well as those set forth in the previous sub-sections, *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 I*") (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 instruuctions 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 Couloumbis 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.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 16, 2022 By: */s/ Robert A. Wiygul*
Robert A. Wiygul (I.D. No. 310760)
John Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

OFFICE OF ATTORNEY GENERAL

Jacob B. Boyer (I.D. No. 324396)
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-2717

PENNSYLVANIA DEPARTMENT
OF STATE

Kathleen M. Kotula (I.D. No. 86321)
306 North Office Bldg.
401 North Street
Harrisburg, PA 17120-0500
(717) 783-1657

TUCKER LAW GROUP, LLC
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents Leigh M. Chapman and Jessica Mathis

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