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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE; *et al.*, Petitioners, v. LEIGH M. CHAPMAN, *et al.*, Respondents, and DSCC, *et al.*, Intervenor-Respondents.	Case No. 447 MD 2022

BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF INTERVENOR-RESPONDENTS DSCC AND DCCC TO PETITIONERS' PETITION FOR REVIEW SEEKING DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

Pennsylvania voters have the right to vote by mail for any reason. A mail-in or absentee ballot (collectively, "mail ballot") must be sealed in a secrecy envelope and placed into a second envelope; the elector must then complete the form declaration printed on the outer envelope and mail or drop off their ballot by 8 p.m. on election day. Voters (especially elder voters) sometimes make mistakes when returning their ballots, such as forgetting to sign and date the declaration on the outer envelope or providing their birthdate instead of the date of voting. Consistent with the Commonwealth's longstanding policy of safeguarding the franchise, many county boards of elections inform voters if they have made such a mistake and provide voters with the opportunity to ensure that their votes will be counted.

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Petitioners ask this Court to prohibit county election officials from allowing eligible voters to remedy curable facial defects on their mail ballot envelopes, thereby forcing county boards to reject ballots submitted by qualified voters because of observable technical defects that could easily be corrected. The Court should reject Petitioners' attempt to disenfranchise eligible voters and instead should uphold the county boards of elections' authority under the Election Code to implement common-sense procedures to protect the right to vote.

The Petition for Review should be dismissed because Petitioners lack standing and their claims fail as a matter of law. Petitioners' purported desire for compliance with the Election Code, the Pennsylvania Constitution, and the U.S. Constitution constitute generalized grievances, which are insufficient to confer standing. Petitioners suffer no cognizable injury when county boards allow qualified voters to ensure their votes are counted. On the merits, there is no violation of any law. The Election Code does not prohibit counties from developing notice-and-cure procedures; rather, counties are lawfully granted the authority to do so by the General Assembly. There is no

basis for declaring such procedures unlawful or enjoining their implementation, and doing so would only harm voters.

BACKGROUND

In 2019, a Republican-led majority of the General Assembly enacted Act 77, a comprehensive revision of the Election Code that made it easier for Pennsylvanians to participate in their democracy. One of the most significant changes to the Election Code made by Act 77 was the expansion of access to the ballot through the institution of no-excuse mail-in voting. As part of Act 77, the Election Code affirmed preexisting statutory requirements for submitting and counting mail ballots but did not address what county boards should do when confronted with a ballot envelope with observable errors or omissions.

In 2020, the Pennsylvania Democratic Party sought an injunction that would have required all county boards to provide notice and an opportunity to cure to voters whose mail ballots bore certain facial defects. *Pa. 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). The Supreme Court of Pennsylvania concluded that boards were "not *required* to implement" cure procedures because neither the Pennsylvania Constitution nor the Election Code mandated them, *id.* at 374 (emphasis added), but it did not otherwise address county boards' authority to proactively implement cure procedures. Consistent with the Supreme Court's narrow ruling, the Secretary encouraged county boards to provide notice and an opportunity to cure facially defective mail ballots in the 2020 general election. Many boards did so.

After the 2020 elections revealed that Democrats relied on mail-in ballots at significantly higher rates than Republicans, then-President Trump's campaign brought (among other challenges) an unsuccessful challenge against notice-and-cure procedures in federal court,

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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. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020) ("*DJT II*").[1] The district court dismissed the lawsuit. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa.). In affirming that dismissal, the Third Circuit 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." *DJT II*, 830 F. App'x at 384. The Third Circuit 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.*, and held that this "variation from county to county" did not offend equal protection principles. *Id.* at 388.

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PROCEDURAL HISTORY

On September 1, 2022, Petitioners filed their Petition for Review, which seeks a declaration that county boards are prohibited from developing and implementing notice-and-cure procedures absent explicit authorization from the General Assembly (Count 1); a declaration that adopting notice-and-cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution (Count 2); and an injunction prohibiting county boards from developing or implementing notice-and-cure procedures (Count

[1] Petitioners and their supporters have turned to Pennsylvania courts in one lawsuit after another seeking to use the judiciary to undermine voting measures that Petitioners once supported. *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); *Ziccarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020); *Kelly v. Pennsylvania*, 620 MD 2020 (Pa. Cmwlth. Nov. 20, 2020); *Ziccarelli v. Allegheny Cnty. Bd. of Elections*, No. GD-20-011654, 2020 WL 7012634 (Pa. C.C.P. Allegheny Cty. Nov. 18, 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).

3). The Petition was opposed by the Secretary of the Commonwealth, numerous counties, and Intervenor-Respondents including DSCC and DCCC. DSCC and DCCC (and others) subsequently filed Preliminary Objections.[2]

On September 7, Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction under Pa.R.A.P. 1532, seeking to enjoin the challenged notice-and-cure procedures until resolution of this litigation. On September 29, 2022, the Court issued a Memorandum Opinion and Order denying Petitioners' Application for a Preliminary Injunction, concluding that Petitioners had "not proven that they are likely to succeed on the merits or that their right to relief is clear." Mem. Op. at 9. On September 30, Petitioners appealed the Court's decision to the Supreme Court of Pennsylvania, which, after expedited briefing, affirmed this Court's denial of Petitioners' Application for a Preliminary Injunction on October 21, 2022. *Republican Nat'l Comm. v. Chapman*, 284 A.3d 207 (Pa. 2022). Consistent with these rulings, many counties provided voters with notice and an opportunity to cure defective ballots during the 2022 general election.

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Between October 28 and November 16, 2022, Respondents filed additional pleadings with this Court in opposition to Petitioners' Petition for Review, and Petitioners filed responses, including to DSCC and DCCC's Preliminary Objections. On December 7, the Court issued an Order setting a schedule for briefing on Respondents' and Intervenor-Respondents' Preliminary Objections.

[2] Intervenor-Respondents DSCC and DCCC's Preliminary Objections are attached as Exhibit 1. DSCC and DCCC filed six Preliminary Objections. Five remain before this Court; Preliminary Objection 1, regarding laches, was previously resolved by this Court.

QUESTIONS PRESENTED

1. Should the Petition be dismissed for lack of standing, pursuant to Pa.R.Civ.P. 1028(a)(5), because Petitioners are not injured by the challenged notice-and-cure procedures or any alleged violation of the Elections Clause? (Preliminary Objections 2 and 3.)

2. Should Count II of the Petition be dismissed for lack of standing, pursuant to Pa.R.Civ.P. 1028(a)(5), because Petitioners lack standing to sue under the Elections Clause? (Preliminary Objection 3.)

3. Should the Petition be dismissed for failure to state a claim, pursuant to Pa.R.Civ.P. 1028(a)(4), because the challenged notice-and-cure procedures are consistent with law? (Preliminary Objections 4, 5, and 6.)

Intervenor-Respondents respectfully submit that each of the questions presented should be answered in the affirmative.

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STANDARD OF REVIEW

In reviewing preliminary objections in a case filed within this Court's original jurisdiction, the Court must "consider as true all well-pleaded facts which are material and relevant." *Pa. Tpk. Comm'n v. Hafer*, 597 A.2d 754, 756 (Pa. Cmwlth. 1991). But the Court may not accept legal conclusions, arguments, opinions, or unwarranted inferences. *Giffin v. Chronister*, 616 A.2d 1070, 1072 (Pa. Cmwlth. 1992). Petitioners cannot rely on factually unsupported conclusions, *Miketic v. Baron*, 675 A.2d 324, 331 (Pa. Super. 1996); *Pa. Pub. Util. Comm'n v. Zanella Transit, Inc.*, 417 A.2d 860, 861 (Pa. Cmwlth. 1980), and this Court may not supply facts that Petitioners have omitted from their pleading, *see Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451, 454 (Pa. 1964).

ARGUMENT

The Petition for Review fails at the outset because Petitioners suffer no cognizable injury when county boards of elections allow qualified voters to ensure that their votes are counted. Petitioners assert only generalized interests common to all voters; these interests are not sufficient to confer standing. Separately, the Petition also fails on the merits because the adoption of notice-and-cure procedures by county boards is fully consistent with the Election Code.

I. Petitioners lack standing (Preliminary Objections 2 and 3).

Petitioners lack standing to bring this suit because they are not injured by county boards' implementation of notice-and-cure procedures or any alleged violation of the Elections Clause. To demonstrate 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." *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 v. Pa. Liquor Control Bd.*, 432 A.2d 1375, 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). 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 lacks standing. *Soc'y Hill Civic Ass'n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 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*, 888 A.2d at 660 (citing to *In re Hickson*, 821

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A.2d 1238 at 1243); *see also Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) ("it is hornbook law that a person whose interest is common to that of the public generally . . . lacks standing to attack the validity" of state action).

Petitioners fail to identify any concrete and distinct harm they have suffered as a result of some county boards implementing notice-and-cure procedures. Instead, they rely on generalized interests such as the desire to have ballots counted accurately in accordance with the law—an interest shared by all citizens. *See In re Hickson*, 821 A.2d at 1243. Petitioners focus on differences in voting practices across counties, but courts have repeatedly held that county boards may "employ entirely different election procedures and voting systems within a single state" without imposing *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. *DJT II*, 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) ("*DJT I*"). Indeed, as this Brief will later argue, the General Assembly has structured the Election Code to confer such discretion upon the sixty-seven county boards.

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Petitioners do not argue that county boards discriminate against any group of voters or prevent any voter from voting when they allow voters to cure non-material defects. Nor could they. The county boards' notice-and-cure opportunities *prevent* disenfranchisement and help eligible Pennsylvanians vote. By contrast, Petitioners' requested relief would mean that fewer eligible voters would have their votes counted.[3]

[3] Any alleged injury to 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 Petitioners' purported informational harm.

Petitioners also lack standing to bring their challenge under the Elections Clause of the United States Constitution. The Elections Clause authorizes state legislatures and Congress to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. None of the Petitioners are members of the General Assembly (or any branch of government), nor are they authorized to sue on its behalf. And courts have repeatedly held that allegations that "the Elections Clause . . . has not been followed" involve "precisely the kind of undifferentiated, generalized grievance about the conduct of government that" does not present a cognizable case or controversy. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see also Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 350 (3d Cir. 2020), *cert. granted, judgment vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) ("Because Plaintiffs 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]."). The Court should reach the same conclusion under Pennsylvania law, which similarly holds that litigants lack standing to assert generalized grievances. *See Markham v. Wolf*, 136 A.3d 134, 143–45 (Pa. 2016).

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II. Petitioners' claims fail on the merits as a matter of law (Preliminary Objections 4, 5, and 6).

The Election Code gives county boards broad authority 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 requires boards to "inspect systematically and

thoroughly the conduct of primaries and elections," *id.* § 2642(g), and it 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 may adopt procedures within their respective counties that differ from procedures in other counties unless the Code dictates otherwise. *See, e.g.*, *DJT I*, 493 F. Supp. 3d at 386; *DJT II*, 830 F. App'x at 388. As this Court recognized in denying interim relief, "[t]he Election Code does not specifically prohibit County Boards from implementing notice and cure procedures" and "[t]he courts have held that any doubt about whether the Election Code authorizes County Boards to implement notice and cure procedures must be resolved in favor of preventing the inadvertent forfeiture of electors' right to vote." Mem. Op. at 9–10.

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a. Count I fails to state a claim because the Election Code does not proscribe counties' notice-and-cure procedures (Preliminary Objection 4).

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) (quoting *Discovery Charter Sch. v. Sch. Dist. of Phila.,* 166 A.3d 304, 321 (Pa. 2017)). Consistent with that principle, the Supreme Court of Pennsylvania 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. Although the Election Code does not *require* county boards to implement notice and cure procedures, *see. Boockvar*, 238 A.3d at 373, it does not prohibit them from doing so, either. 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 correctible errors. *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.").

The Supreme Court of Pennsylvania 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) ("This Court has held, we repeat, that the [Pennsylvania] Election Code must be *liberally* construed…") (emphasis in original). 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). 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." *Boockvar,* 238 A.3d at 356 (quotations and citations omitted).

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Petitioners have not identified any provision in the Election Code that prohibits county boards from providing notice and an opportunity to cure, and no such provision exists. Petitioners instead argue that no mail ballots can be cured absent express authorization, inferring from the General Assembly's silence that such authorization was deliberately withheld. But this argument has it backwards: because the General Assembly has not provided guidance on how county boards should address ballots with facial defects, the boards have the authority under the Election Code to implement appropriate procedures "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). Petitioners' arguments to the contrary are meritless.

First, Petitioners argue that the General Assembly allows a cure procedure for only one kind of defect—a voter's initial lack of proof of identity—and that the express allowance of cure in that instance implies that no other cure procedures are available. *See* Pet. ¶ 5. But the theory is strained at the outset because the General Assembly never defined a voter's ability to show proof of identity as a "cure"—it is only Petitioners who characterize it that way. Moreover, the *expressio unius* canon the argument relies on "does not apply 'unless it is fair to suppose that [the General Assembly] considered the unnamed possibility and meant to say no to it.'" *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 5537 U.S. 149, 168 (2003)). The canon thus "depends on identifying a series of two or more terms or things that should be understood to go hand in hand," at least one of which the General Assembly omitted from the statute. *Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). Here, however, there is no "established series" of cure procedures, only some of which the General Assembly addressed. *Id.* And the procedure Petitioners identify applies to an entirely different stage of the voting process from the cure processes at issue here: *voter application* defects rather than *ballot* defects. When the county board receives an application for a mail ballot, it must "determine the qualifications of the applicant by verifying the proof of identification." 25 P.S. § 3150.12b(a). If proof of identification cannot be verified upon *application*, the Code establishes specific requirements as to when and how the putative elector must confirm that they are in fact eligible to vote. *See id.* § 3146.8(h). But the Code is completely silent on what should be done when a county board receives a *ballot* that clearly cannot be counted. In the absence of a contrary command in the text,

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this Court should not presume that the General Assembly intended to prohibit county boards from allowing voters to correct errors with their mail ballots so that their votes may be counted.

Second, Petitioners claim that notice-and-cure procedures are unlawful "pre-canvassing" activities, *see generally* Pets.' Resp. to Prelim. Objs., but this argument does not square with the Election Code. The Election Code requires counties to "meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting." 25 P.S. § 3146.8(g)(1.1). But "pre-canvass" is defined as "the inspection *and opening* of all envelopes containing official absentee ballots or mail-in ballots." *Id.* § 2602(q.1) (emphasis added). No board is opening any ballot envelope as part of their cure procedure; therefore, no board is doing anything that meets the definition of "pre-canvass" before Election Day.

Third, Petitioners argue that the Election Code states that boards "shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections," *id.* § 3146.8(a), and that it is therefore inconsistent with law for boards to do anything else. But other provisions of the Election Code show that this provision cannot be read to literally require boards to blindly place all mail ballots in a locked container until the canvass begins. In particular, 25 P.S. § 3150.16(b)(1) provides that "[a]ny elector who receives *and votes* a mail-in ballot . . . shall not be eligible to vote at a polling place on election day" and that "[t]he district register at each polling place shall clearly identify" such electors. *Id.* § 3150.16(b)(1) (emphasis added). This mandate can only be accomplished if county boards review incoming mail ballots to identify electors who voted by mail prior to election day, before placing such ballots in sealed or locked containers as § 3146.8(a) requires. Boards can identify curable defects as part of that same initial review process. Similarly, 25 P.S. § 3146.8(g) directs boards to pre-canvass mail ballots before the canvass begins. Pre-canvassing requires access to the mail ballots and would be

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impossible if the ballots could not be accessed until the canvass itself. The provision cited by Petitioners is therefore properly read as a direction requiring boards to securely maintain ballots, including by locking them up when they are not being used—not to literally keep them in a container from the instant they are received until the moment the canvass begins.

Moreover, this provision applies only to *valid* mail ballots—those sealed in envelopes "as provided under" the relevant article of the Election Code:

> The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes *as provided under this article* and mail-in ballots as in sealed official mail-in ballot envelopes *as provided under Article XIII-D*, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.

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Id. § 3146.8(a) (emphasis added). The phrase "as provided under" limits this requirement to ballots that are (or appear to be) properly completed, because ballots with facial defects are not "official [] ballots in sealed official [] ballot envelopes as provided under" the Code. *Id.* At a minimum, the phrase is ambiguous. *See Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) (because "'provided' . . . is a conjunction meaning 'on the condition [of],'" the phrase "as provided under" "could reasonably mean [either] as defined by law" or, alternatively, "'contingent on' or 'subject to' law"). County boards therefore may adopt procedures for ballots that clearly do not comply with the Election Code (for example, because the declaration has omissions) and thus are not sealed "as provided under" the Election Code, rather than immediately locking away such ballots.

Fourth, Petitioners invoke 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. But the Supreme Court of Pennsylvania has long held that "[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) (citing *De Walt v. Bartley*, 24 A. 185, 187 (Pa. 1892)). And the Election Code makes clear that "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." 25 P.S. § 2642 (emphasis added). Pennsylvania law therefore contemplates a somewhat decentralized election system in which county boards—acting within the boundaries of the Code—will set procedures for their respective counties. *See Boockvar*, 238 A.3d at 385 ("[F]rom its inception, Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth."). That natural deviations occur as each county allocates its own resources in service to the unique needs of its voters is neither constitutionally nor statutorily wrong. As this Court noted in denying interim relief, "an election uniformity or equal protection claim . . . would plainly fail." Mem. Op. at 24 n.15.

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Thus, just as the Supreme Court of Pennsylvania refused to impose a requirement not promulgated by the General Assembly in *Boockvar*, this Court should refuse to impose a *prohibition* now where the statute is again 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.

b. Count II fails to state a claim because the Elections Clause does not deprive the General Assembly of the power to delegate authority to county boards of elections to develop and implement notice-and-cure procedures (Preliminary Objection 5).

Petitioners' request for a declaratory judgment that counties' notice-and-cure procedures violate the Elections Clause also fails. 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) ("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 ("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]."). The Elections Clause does not deprive the General Assembly of the power to delegate such authority to county boards. *See Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("The Elections Clause . . . affirmatively grants rights to state legislatures, and under Supreme Court precedent, to other entities to which a state may, consistent with the Constitution, delegate lawmaking authority."); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 816 (2015) ("it is characteristic of our federal system that States retain autonomy to establish their own governmental processes"). County boards of elections that develop procedures for allowing voters to cure or cancel mail-in ballots are therefore not regulating the "Manner of holding Elections" in violation of the Elections Clause. Instead, they are exercising the lawful discretion granted by the General Assembly to resolve issues not directly addressed by statute.

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c. Count III fails to state a claim because counties' notice-and-cure procedures are consistent with the Election Code, do not harm Petitioners (or anyone else), and enjoining such procedures would harm voters (Preliminary Objection 6).

No injunction should issue in this matter because notice-and-cure procedures adopted by county boards are fully consistent with the Election Code. As explained above, *supra* Section II(a), 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.

The balance of equities further counsels against injunctive relief. None of the procedures at issue allows an individual to vote who is not otherwise qualified, and there are no allegations of

fraud or other malfeasance. *See DJT II*, 830 F. App'x at 390–91 (noting that campaign did not allege, and there was no evidence of, fraud or other malfeasance that warranted granting injunctive relief). And "the public . . . has a great interest in safeguarding the right of every eligible, registered voter to make their voices heard in a national election." *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 360 (M.D. Pa. 2020). 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 is fully consistent with Pennsylvania's interest in protecting the franchise, and county boards have the flexibility to implement such procedures (or not) in accordance with local needs. *See supra* pp. 16–17. Enjoining the use of notice-and-cure provisions, in contrast, would strip county boards of the authority granted by the Election Code and would harm voters across the Commonwealth whose ballots would be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted.

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CONCLUSION

For the foregoing reasons, the Petition should be dismissed.

Dated: January 6, 2023

Respectfully submitted,

By: /s/ *Timothy J. Ford*

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EXHIBIT 1

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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' PRELIMINARY OBJECTIONS TO PETITIONERS' PETITION FOR REVIEW IN THE NATURE OF AN ACTION FOR A DECLARATORY JUDGMENT

Proposed Intervenor-Respondents, DSCC and DCCC, present the following preliminary objections to Petitioners' Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief. Pa.R.A.P. 1532(b).

INTRODUCTION

In 2019, a Republican-led majority of the General Assembly enacted Act 77, a comprehensive revision of the Election Code that made it easier for Pennsylvanians to participate in their democracy. One of the most significant changes to the Election Code made by Act 77 was the institution of no-excuse mail-in voting—which at the time was an uncontroversial expansion of access to the ballot. But after the 2020 elections revealed that Democrats relied on mail-in ballots at significantly higher rates than Republicans, Petitioners and their supporters have turned to Pennsylvania courts in one lawsuit after another seeking to use the judiciary to undermine voting measures that Petitioners once supported. *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); *Ziccarelli 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); *Ziccarelli 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).

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This latest challenge is a familiar one. Petitioners ask this Court to prohibit county election officials from allowing eligible voters to correct minor, curable facial 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.

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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 ballot") must be enclosed and sealed in a secrecy envelope and placed into a second 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).

[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).

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.

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.

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PRELIMINARY OBJECTION 1
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACHES)

7. DSCC and DCCC incorporate 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 strategically 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.

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10. In fact, this action is not the first time that high profile Republicans have 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. The documents attached to the Petition itself also reveal that county boards have been giving voters notice and an opportunity to cure for multiple election cycles. Pet. ¶ 65. Indeed, more than half of the Exhibits attached to their Petition—including a public website—pre-date even the 2020 general election. *See* Pet. Exs. B, C, D, G. 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.

12. *Second*, Proposed Intervenors and 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. DSCC and DCCC meanwhile have expended significant resources crafting electoral strategies that include encouraging vote by mail in Pennsylvania. Indeed, Democrats in Pennsylvania are disproportionately more likely than Republicans to cast mail-in and absentee ballots—in 2020, more than three out of every five mail ballots were cast by registered Democrats.[2] If Petitioners are successful, Intervenors will be forced to redirect limited resources from other programs to efforts aimed at educating voters about the requirements of the mail voting procedures to prevent minor errors or defects given the absence of an opportunity to cure, and developing new programs to mobilize in person voting and minimize potential disenfranchisement from rejected mail ballots.

13. Because Petitioners could have brought this action at any time over the last two years but instead decided to delay until shortly before the 2022 general election, the action should be dismissed with prejudice under the equitable doctrine of laches.

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[2] Holly Otterbein, *Democrats return nearly three times as many mail-in ballots as Republicans in Pennsylvania*, POLITICO (Nov. 3, 2020) (hereinafter "Otterbein"), available at https://www.politico.com/news/2020/11/03/democrats-more-mail-in-ballots-pennsylvania-433951.

PRELIMINARY OBJECTION 2
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(5)
LACK OF CAPACITY TO SUE (STANDING)

14. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

15. Even assuming that this action is not barred by laches, Petitioners nevertheless lack standing to bring this suit because they are not injured by any county's implementation of notice-and-cure procedures.

16. 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. Cmwlth. 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).

17. Beyond their generalized desire to have ballots counted accurately—an interest shared by virtually all citizens—Petitioners fail to identify any concrete and distinct harm they

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have suffered as a result of some county boards implementing notice-and-cure procedures. *In re Hickson*, 821 A.2d at 1243.

18. 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, the county boards' 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.

19. 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.

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PRELIMINARY OBJECTION 3
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
LACK OF CAPACITY TO SUE (STANDING)

20. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

21. 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, county boards are violating the U.S. Constitution by creating notice-and-cure procedures in Pennsylvania. *Id.*; *see also id.* ¶ 9.

22. Yet, at no point in their Petition do Petitioners state what concrete and distinct harm they suffered as a result of county boards, 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*.

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PRELIMINARY OBJECTION 4
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT I)

23. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

24. 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 correctible errors.

25. 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).

26. 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).

27. 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.

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28. 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.

29. Petitioners do not allege that any specific notice-and-cure procedure is inconsistent with the Election Code.

30. The identified procedures allegedly utilized by the Boards in Bucks, Montgomery, Philadelphia, Northampton, and Lehigh, for instance, 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.

31. Petitioners have not identified any provision in the Election Code that prevents a 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.

32. Nor have Petitioners identified any provision in the Election Code that prevents a 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.

33. Finally, Petitioners have not identified any provision in the Election Code that prevents a county board from allowing a voter whose mail ballot does not comply with the requirements of the Election Code to cast a provisional ballot.

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PRELIMINARY OBJECTION 5
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT II)

34. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

35. 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).

36. County boards of elections that develop procedures for allowing voters to cure or cancel mail-in ballots are not regulating the "Manner of holding Elections." Instead, they are

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)

37. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

38. No injunction should issue in this matter because notice-and-cure procedures adopted by county boards 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.

39. 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.

40. Enjoining the use of notice-and-cure provisions would harm voters 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.

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Dated: September 9, 2022

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