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**Motions for Admission Pro Hac Vice Forthcoming
Attorneys for Proposed Intervenors DSCC and DCCC*

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); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020); *Kelly v. Pennsylvania*, No. 620 MD 2020 (Pa. Cmwlth. Nov. 20, 2020); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD-20-011654, 2020 WL 7012634 (Pa. C.C.P. Allegheny Cty. Nov. 12, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2011-00874 (Pa. C.C.P. Phila. Cty. Nov. 9, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cty. Nov. 5, 2020).

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.

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.

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.

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.

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

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.

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.*

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 correctable 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.

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.

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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Respectfully submitted,

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