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**Motions for Admission Pro Hac Vice Forthcoming*
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

PROPOSED INTERVENOR-RESPONDENTS DSCC AND DCCC'S RESPONSE IN OPPOSITION TO PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

On September 7, 2022, less than two weeks before county boards of election start distributing mail-in and absentee ballots (collectively, "mail ballots") to Pennsylvania voters, several Republican party committees and Republican voters filed an Application with this Court for an emergency injunction to prohibit county boards from providing lawful, eligible voters an opportunity to avoid disenfranchisement by curing minor facial defects on their mail ballots before the close of the voting period. As their own filings demonstrate, the procedures that Petitioners challenge pre-date even the 2020 general election and were the subject of two lawsuits filed in 2020—in the first, which was decided by the Pennsylvania Supreme Court, the plaintiffs sought to mandate notice and cure procedures in all counties, *Pennsylvania Democratic Party v. Boockvar,* 238 A.3d 345, 372 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 209 L. Ed. 2d 164, 141 S. Ct. 732 (2021). In the second, which was decided by the U.S. Court of Appeals for the Third Circuit, the plaintiffs challenged the legality of any counties offering such procedures voluntarily, *Donald J. Trump for President, Inc, v. Secretary Commonwealth of Pa.*, 830 F. App'x 377 (3d. Cir. 2020) ("*DJT II*"). Neither court found cure procedures unlawful—in fact, the Third Circuit rejected an argument similar to the one Petitioners raise here. *Id.* at 384, 388.

Petitioners' Application, however, mischaracterizes the Pennsylvania Supreme Court ruling and ignores the Third Circuit entirely. In *Pennsylvania Democratic Party*, the Pennsylvania Supreme Court held that neither the Free and Equal Elections Clause nor the Election Code *required* county boards of elections to implement cure procedures. The Court did not address whether such procedures were lawful, but the Third Circuit did: in a lawsuit filed in 2020 by the campaign of former President Donald Trump, the Third Circuit found that "the Election Code says nothing about what should happen if a county notices these errors before election day." *DJT II*, 830 F. App'x at 384. The court further explained that although "[s]ome counties stay silent and do not count the ballots [while] others contact the voters and give them a chance to correct their errors," *id.*, "[a] violation of the Equal Protection Clause requires more than variation from county to county," *id.* at 388.

Petitioners then waited two years, with mail voting underway in a statewide election that will choose (among other offices) Pennsylvania's next U.S. Senator, to petition this Court to enjoin cure procedures statewide but fail to identify a single Election Code provision that precludes county boards from adopting such measures. Nor do Petitioners reconcile their proposed injunction with the legislature's express delegation of authority to county boards of elections to "instruct election officers in their duties" and "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections

officers and electors," *id.* 25 P.S. §§ 2642(f), 2642(g). And despite their misleading attempt to convert *Pennsylvania Democratic Party* into a definitive ruling on the legality of cure procedures, in moments of candor Petitioners themselves previously recognized that the Pennsylvania Supreme Court's ruling only determined "whether the Court could *require* the Boards to implement a notice and opportunity to cure . . . [and that] the answer of whether Boards were free to create their own policies" is supplied by Pennsylvania law, Pets.' Pet. for Rev. ("Pet.") ¶ 56 (emphasis in original), which expressly confers authority upon county boards to administer elections and implement the types of procedures that Petitioners challenge here. In sum, Petitioners point to no authority that supports their interpretation of the Election Code or their request for extraordinary relief.

Nor can Petitioners satisfy any of the remaining equitable factors which are prerequisites for a preliminary injunction. They identify no immediate irreparable harm, offering only speculation about county variations in cure procedures—which, by itself, causes no injury absent a deprivation of a constitutional right—and they ignore the disenfranchisement of Pennsylvania voters that would result from their requested relief. To make matters worse, Petitioners offer no explanation for their two-year delay in challenging county board procedures that were disclosed even before the 2020 general election. Their lack of diligence in pursuing injunctive relief until the eleventh-hour harms Respondents' and Proposed Intervenors' election

preparations, risks confusion, and thrusts all 67 county boards of election and the Secretary of State into a fire drill of Petitioners' own making—all while the mail voting process is already underway. Granting Petitioners' Application would cause immeasurable harm to voters, election officials, and others, while Petitioners will suffer no cognizable harm if the status quo is maintained. This Court therefore should reject Petitioners' request for a preliminary injunction.

BACKGROUND

The Pennsylvania Election Code confers broad authority upon county boards to administer elections. It provides that "[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act." 25 P.S. § 2641(a). "[C]ounty boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code]." *Id.* § 2642. In particular, the Election Code imposes a duty on boards to "inspect systematically and thoroughly the conduct of primaries and elections," *id.* § 2642(g), and empowers boards to "instruct election officers in their duties" and "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors," *id.* §§ 2642(f), (g). Consistent with this authority, county boards have adopted

procedures within their respective counties that differ from procedures in other counties. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 386 (W.D. Pa. 2020) ("*DJT I*"); *DJT II*, 830 F. App'x at 388 ("Pennsylvania's Election Code gives counties specific guidelines. To be sure, counties vary in implementing that guidance, but that is normal. Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.")

Prior to the 2020 elections, the Pennsylvania Democratic Party ("PDP") sought an injunction requiring all county boards to provide notice to electors whose mail ballots bore certain facial defects and an opportunity to cure such defects. *Pa. Democratic Party*, 238 A.3d at 372. Under the Election Code, a mail-in or absentee ballot (collectively, "mail ballot") must be enclosed and sealed in a secrecy envelope and placed into a second envelope, and the elector must complete and sign the form declaration printed on the second envelope and mail or drop off their ballot by 8:00 p.m. on election day. 25 P.S. § 3150.16(a).[1] Citing the Free and Equal Elections Clause of the Pennsylvania Constitution, PDP argued, among other claims, that "voters should not be disenfranchised by technical errors or incomplete ballots" and

[1] The Third Circuit recently held that not counting ballots for failing to comply with the dating provisions in 25 P.S. §§ 3146.6(a) and 3150.16(a) violates the Materiality Provision of the Civil Rights Act. *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022).

that procedures requiring "notice and opportunity to cure" would ensure that all electors have the opportunity to exercise their right to vote. *Pa. Democratic Party*, 238 A.3d at 372–73.

Although the Secretary of the Commonwealth sided with PDP in the other aspects of its suit, *id.* at 357–58, 365–66, 376, 382, and noted that it "may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them," the Secretary ultimately opposed PDP's request for an injunction *requiring* boards to implement such procedures due to the absence of any statutory or constitutional mandate. *Id.* at 373. The Pennsylvania Supreme Court agreed, concluding that boards were "not *required* to implement" cure procedures because neither the Pennsylvania Constitution nor the Election Code mandated such procedures. *Id.* at 374 (emphasis added). But at no point did the Court determine that county boards lacked authority to proactively implement cure procedures.

Consistent with the Supreme Court's narrow ruling, the Secretary of the Commonwealth encouraged—but did not require—county boards to provide notice and an opportunity to cure facially defective mail ballots ("cure procedures") in the 2020 general election. *DJT II*, 830 F. App'x at 384. In response, then-President Trump's campaign brought an unsuccessful challenge to select counties' notice and cure procedures in federal court, primarily arguing that allowing county boards discretion to implement cure procedures violated the U.S. Constitution's Equal

Protection Clause. *See generally id.* The district court dismissed the lawsuit. In affirming that dismissal, the U.S. Court of Appeals for the Third Circuit recognized that "[n]ot every voter can be expected to follow [the mail ballot] process perfectly" and that "the Election Code says nothing about what should happen if a county notices these errors before election day." *Id.* at 384. The Third Circuit further observed that "[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors," *id.*, but ultimately held that "[a] violation of the Equal Protection Clause requires more than variation from county to county," *id.* at 388. The Third Circuit's opinion issued on November 27, 2020.

Petitioners initiated these proceedings on September 1, 2022, nearly two years after these decisions by the Pennsylvania Supreme Court and Third Circuit Court of Appeals, after two statewide primary elections and the 2021 municipal election have been successfully conducted with counties free to employ cure procedures, and just weeks before mail ballots will be distributed for the 2022 general election. Petitioners seek (1) a declaration that boards are prohibited from developing and implementing cure procedures absent explicit authorization from the General Assembly; (2) a declaration that adopting cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution; and (3) an injunction prohibiting boards from developing

or implementing cure procedures. On September 7, 2022, Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction ("Application"), as well as a Memorandum of Law in support of the Application, which Proposed Intervenors oppose.

LEGAL STANDARD

Petitioners' Application should be denied because they cannot satisfy each of the "essential prerequisites" necessary to seek preliminary injunctive relief. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003) (internal quotations and citations omitted). To qualify for a preliminary injunction, Petitioners must establish that (1) they are likely to succeed on the merits; (2) an injunction is necessary to prevent immediate and irreparable harm; (3) greater injury will result from refusing than granting the injunction, while the injunction will not substantially harm other interested parties; (4) the preliminary injunction seeks to restore the status quo; (5) the injunction is reasonably suited to redress the purported offending activity; and (6) the injunction will not adversely affect the public interest. *Id.* As the Supreme Court has explained, "for a preliminary injunction to issue, *every one* of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others." *Cnty. of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added).

ARGUMENT

Petitioners fail to establish any of the essential prerequisites necessary to obtain preliminary injunctive relief. They are unlikely to succeed on the merits because "the Election Code says nothing about what should happen if a county notices" minor errors on mail ballots before election day. *DJT II*, 830 F. App'x at 384. At the same time, the Code confers broad authority on county boards to administer elections; absent an express limitation, that broad authority clearly confers the authority to implement procedures by which a voter whose ballot has been flagged for rejection due to a curable error can address that error and ensure that their ballot is counted. Even if Petitioners' legal arguments had any merit (which they do not), Petitioners suffer no cognizable injury when *other* Pennsylvania citizens are allowed to ensure their votes are counted. On the other hand, significant harm, including disenfranchisement, would result if Petitioners are permitted to force an alteration of the status quo, requiring county boards to discard ballots of lawful voters who have made minor errors unrelated to their eligibility to vote, without providing a cure opportunity. Petitioners' strategic decision to wait until shortly before a pivotal statewide election to bring this challenge—despite all material facts being evident two years ago—only exacerbates the harm that would result if the relief they request were granted.

I. Petitioners are not likely to succeed on the merits.

Petitioners' Application fails on the merits because it identifies no provision in the Election Code or elsewhere that prohibits a county board from providing voters with an opportunity to cure defective mail ballots, and it ignores the county boards' broad authority—conferred by the legislature under the Election Code—to administer elections and implement appropriate procedures, particularly in areas where the Election Code does not mandate any specific course of action. *See DJT II*, 830 F. App'x at 384 ("[T]he Election Code says nothing about what should happen if a county notices [defects on mail ballots] before election day.").

A. The Election Code permits county boards to implement notice-and-cure procedures.

The Election Code establishes a framework within which county boards bear significant responsibility for overseeing elections in their respective counties. *See* 25 P.S. § 2641(a) ("There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act."); *id.* § 2642 ("[C]ounty boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code]."). Determining the scope of the county boards' authority requires "listen[ing] attentively to what the statute says, but also to what it does not say." *In re Canvassing Observation*, 241

A.3d 339, 349 (Pa. 2020) (quoting *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017)). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Election Code that does not specify relevant parameters may "reflect the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections." *Id.* at 350.

Because the Election Code does not dictate what county boards should do when faced with a clearly deficient mail ballot, the broad authority vested by the General Assembly in county boards allows individual boards to determine whether voters in their counties should have an opportunity to resolve correctible errors that are detected before the voting deadline. To be sure, the Election Code does not *require* county boards to provide these notice and cure opportunities, *see Pa. Democratic Party*, 238 A.3d at 373, but neither does it *prohibit* them from implementing such procedures to protect the right to vote. In other words, the decision of whether to offer cure procedures rests within each board's discretion. *See DJT II*, 830 F. App'x at 384.

Having failed to identify a single provision that prohibits notice and cure procedures, Petitioners resort to drawing implausible inferences from the legislature's silence and suggest that no mail ballots can be cured absent express authorization. The problem with their theory is that the Election Code expressly empowers boards "[t]o make and issue such rules, regulations and instructions, not

inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f). The plain meaning of this conferral of authority is that boards have broad power to adopt procedures to promote the purpose of the Election Code: "freedom of choice, a fair election and an honest election return," *Pa. Democratic Party*, 238 A.3d at 356 (internal quotations and citations omitted), provided that the procedures they adopt are not otherwise inconsistent with law. The Petitioners' argument that the General Assembly has not expressly mandated boards to guarantee opportunities to cure defective mail ballots has it precisely backward.

Nor does the Election Code provision allowing mail voters a grace period to supply proof of identification help Petitioners' cause. While they suggest that "cure procedures for some matters—namely, lack of proof of identification—but not for others . . . cannot be assumed to be accidental," Memo in Supp of Pets.'s Appl. for Prelim. Inj. ("Memo") at 26 (Sept. 7, 2022), proof of identification for mail voters is best understood as an application requirement rather than a mail ballot defect. *See* 25 P.S. § 3150.12b(c). The General Assembly's decision to create a specified procedure for resolving mail *ballot application* deficiencies should not be read to foreclose boards from implementing procedures for addressing facially deficient *ballots*.

B. The Pennsylvania Supreme Court's ruling did not foreclose county boards from adopting cure procedures.

Petitioners next distort the Pennsylvania Supreme Court's ruling in *Pennsylvania Democratic Party*, 238 A.3d 345, suggesting that the Court not only resolved whether county boards have authority to impose cure procedures, but that collateral estoppel bars the parties from arguing otherwise. Memo at 26–27. Their mischaracterization of *Pennsylvania Democratic Party* contradicts even their own prior pleading in which Petitioners recognized that "[a]lthough *Pa. Democratic Party* answered the question of whether the Court could *require* the Boards to implement a notice and opportunity to cure . . . the answer of whether Boards were free to create their own such policies" is supplied by Pennsylvania law. Pet. ¶ 56 (emphasis in original). Petitioners' description of the case in their prior pleading in this respect at least was accurate: the Pennsylvania Supreme Court made clear that it concluded only "that the Boards are not *required* to implement a 'notice and opportunity to cure' procedure." *Pa. Democratic Party*, 238 A.3d at 374 (emphasis added). And a federal court interpreting that ruling reached the same conclusion, noting that "the [Pennsylvania Supreme Court] declined to explicitly answer whether such a policy is necessarily forbidden." *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 907 (M.D. Pa.), *aff'd sub nom. DJT II*, 830 F. App'x 377, *and appeal dismissed sub nom. Signed v. Pennsylvania*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021). The Court's refusal to "impos[e] the procedure

Petitioner s[ought] to require" says nothing about what boards may do on their own accord. *Pa. Democratic Party*, 238 A.3d at 374.

Just as the Supreme Court in *Pennsylvania Democratic Party* court refused to impose a requirement not promulgated by the legislature, this Court should refuse to impose a *prohibition* where the statute is silent. The Election Code allows boards to implement procedures "not inconsistent" with law, and Petitioners cannot demonstrate that providing eligible voters with the opportunity to have their votes counted violates the Election Code.

C. County boards' exercise of authority vested by the legislature does not violate the Elections Clause

Petitioners fail to draw any direct connection between the Elections Clause and the cure procedures at issue because a county board acting "within its authority" presents "no Elections Clause problem." *Wise v. Circosta*, 978 F.3d 93, 102 (4th Cir. 2020). "State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause." *Moore v. Circosta*, 494 F. Supp. 3d 289, 325 (M.D.N.C. 2020), *appeals dismissed sub nom. Wise v. Circosta*, No. 20-2104 (L), 2021 WL 1511943 (4th Cir. Jan. 8, 2021), *and Moore v. Circosta*, No. 20-2107, 2021 WL 1511941 (4th Cir. Jan. 11, 2021). And "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Ariz. State Legis. v. Ariz. Indep.*

Redistricting Comm'n, 576 U.S. 787, 816–17 (2015) (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999)).

The Pennsylvania General Assembly, in compliance with the Elections Clause, granted county boards "powers" and "duties" "within their respective counties" to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors." 25 P.S. § 2642(f). This delegation of authority includes the duty to "inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county" and the power to "instruct election officers in their duties." 25 P.S. § 2642(g). Under this framework county boards are authorized to develop and implement cure procedures "within their respective counties" so long as they are "not inconsistent with [the] law." 25 P.S. § 2642(f). And, as explained above, Petitioners fail to identify a single provision in the Election Code or elsewhere that constrains the broad authority vested in county boards when fashioning procedures for curing facially defective ballots.

II. Petitioners have not alleged any immediate or irreparable harm.

Petitioners cannot demonstrate "per se [] immediate and irreparable harm," Memo at 14, because, as explained, *supra* Section I, the county boards have not committed any clear violation of law. *Brewneer Realty Two, LLC v. Catherman*, 276 A.3d 267 (Pa. Super. Ct. 2022). But even if so, none of the purported injuries

Petitioners claim will result from allowing lawful, eligible voters to cure minor, facial defects on their ballots are cognizable or otherwise sufficient to support a cause of action, much less a preliminary injunction. For example, Petitioners contend that they "seek to uphold free and fair elections . . . [so] have brought this action to ensure that Respondents adhere to state law and the Supreme Court's holding," Memo at 2, but this is nothing more than a generalized "common interest [that] all citizens [have] in procuring obedience to the law." *Pittsburgh Palisades Park, LLC v Commonwealth*, 888 A.2d 655, 660 (Pa. 2005) (citing *In re Hickson*, 821 A.2d 1238 at 1243 (2003)). A desire to see that the law has been followed "is precisely the kind of undifferentiated, generalized grievance" that cannot give rise to a cognizable injury and is insufficient to warrant an injunction. *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

Nor is it enough for Petitioners to speculate that they "suffer the risk of having votes being treated unequally," Memo at 16, when they do not suggest that their mail ballots will be rejected, or that they will be denied an opportunity to cure defects—or even that they ever have voted (or plan to vote) by mail. *See, e.g.*, Pet. ¶¶ 20–36; *see also Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally insufficient to support preliminary injunction); *Sameric Corp. of Mkt. St. v. Goss*, 295 A.2d 277, 279 (Pa. 1972) (same); *Kiddo v. Am. Fed'n of State*, 239 A.3d 1141 (Pa. Cmwlth. 2020) (reversing trial court's grant

of preliminary judgment because plaintiffs' alleged harm was speculative). Such abstract claims of potential unequal treatment would not be sufficient to even invoke this Court's jurisdiction, let alone constitute irreparable harm.

Petitioners' mischaracterization of vote cancellation and dilution also fall short of a cognizable injury. Differences in election procedures such as these by county boards does not, by itself, injure anyone so long as the procedures do not discriminate against certain groups of voters or infringe on an individual's fundamental right to vote. *DJT I*, 493 F. Supp. 3d at 331, 383, 390, 391; *DJT II*, 830 F. App'x at 388. Nowhere in either their Petition for Review or Memorandum of Law do Petitioners argue that county boards allowing lawful, eligible voters to cure non-material defects discriminates against a group of voters or prevents a single voter from voting. Nor could they. By giving voters notice and an opportunity to cure non-material defects, county boards *increase* access to the franchise by allowing voters whose mail ballots would otherwise be thrown out the opportunity to have their votes counted. It is Petitioners' requested relief that would result in disenfranchisement.

Petitioners' theories of vote dilution are not only speculative, but also legally incorrect, having been rejected consistently by courts in Pennsylvania and around the country. *See, e.g.*, *DJT I*, 493 F. Supp. 3d 331, 342–43 (finding vote dilution claim to be "speculative" and not "certainly impending"); *Kauffman v. Osser*, 271

A.2d 236, 239 (Pa. 1970) (finding vote dilution claim was "too remote and too speculative" to afford standing); *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 802–04 (W.D. Tex. 2015) (holding complaints of "potential vote dilution are nothing but a generalized grievance" and that "[c]ertainly all citizens in general want to participate in an electoral system where only lawfully cast ballots count"); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 927 (D. Nev. 2020) (same); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1004 (D. Nev. 2020) (dismissing complaint challenging post-election day canvassing of mail ballots for lack of standing in part because the alleged vote dilution was impermissibly speculative); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (holding that "the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury"). Such impermissibly speculative harm does not warrant "the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotations and citations omitted).[2]

[2] Petitioners' attempt to manufacture a purported injury by invoking the Pennsylvania Constitution's requirement that "[a]ll laws regulating the holding of elections by the citizens … shall be uniform throughout the State" also fails. Memo at 15 (quoting PA. Const. art. VII, § 6; *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 492 (Pa. 2006)). "[T]o be uniform in the constitutional sense," such laws simply "must treat all persons in the same circumstances alike." *Kuznik*, 902 A.2d at 491 (quotation omitted). And "[a] law is general and uniform, not because it operates upon every person in the state, but because every person

Finally, Committee Petitioners' complaints about the lack of accessible information on cure procedures with which "to properly educate their members regarding the rules applicable to mail-in and absentee ballots," cannot be reconciled with the broad injunction they seek barring cure procedures statewide. Even assuming such an injury is immediate and irreparable, it can be entirely redressed by far less intrusive remedies like ensuring publication of cure procedures, or by simply requesting such information from county boards. *See infra* Section V.

III. Greater injury would result from granting than refusing the injunction.

Not only are Petitioners unable to "show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings," *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003), but they also fail to even acknowledge the injury that would follow to voters and other parties to this suit if Petitioners are successful in their effort to bar all notice and cure procedures, which would result in the disenfranchisement of entirely lawful voters for minor curable defects on their mail ballots. This is the greater injury threatened by this litigation, not the speculative and abstract injuries

brought within the relations provided for in the statute is within its provisions." *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914). Petitioners make no meaningful allegation that any county boards' procedures lack uniformity when applied to voters "within their respective counties." 25 P.S. § 2642(f).

that Petitioners claim, which courts have repeatedly held are not cognizable, *see infra* Section II.

An injunction would also "substantially harm other interested parties in the proceedings," *Summit Towne Ctr.*, 828 A.2d at 1001, including Respondents who have expended substantial time and resources administering Pennsylvania's vote-by-mail infrastructure and corresponding cure procedures, and Proposed Intervenors who have similarly expended resources promoting vote by mail in Pennsylvania and trained staff and volunteers, taking into account the existing mail ballot cure opportunities. If Petitioners are successful, Respondents and Proposed Intervenors will be forced—less than two months before a major statewide election—to devise and implement new procedures to educate voters and minimize ballot defects in the absence of cure procedures. *See id.* Therefore, "with regard to proportionate harm, . . . the balance of harms actually favor[s]" Respondents and Proposed Intervenors, "as [Petitioners'] speculative harm pale[s] in comparison" to forcing Respondents and Proposed Intervenors to hastily try and prevent voter disenfranchisement. *See id.* at 1002.

Worse yet, the last-minute nature of Petitioners' request for equitable relief exacerbates the potential harm to Respondents, Proposed Intervenors, voters, and Pennsylvania's election apparatus in general. Many Pennsylvania voters have already requested mail ballots. County boards will begin distributing these mail

ballots on September 19, 2022—50 days before the election, "or at such earlier time as the county board of elections determines may be appropriate," 25 P.S. § 3150.12a(b), and voters will begin returning their ballots soon after. If Petitioners' requested relief is granted, Respondents and Proposed Intervenors will be forced to scramble to implement new procedures to educate voters and combat voter error and mail ballot defects, along with the increased risk of disenfranchisement, all while the mail voting process is well underway.

Petitioners offer no explanation for their lack of diligence in bringing this action. Much of their legal arguments are grounded in events that occurred nearly two years ago, yet they strategically waited until the eleventh-hour before thrusting this suit upon all 67 counties in the Commonwealth and seeking a preliminary injunction on an expedited basis. *See* Pet. Exs. B, C, D, G (exhibits attached to Petitioners' own Petition for Review, including one public website, show county boards employing cure procedures since at least the 2020 election cycle). Indeed, Petitioners and their allies have been closely scrutinizing Pennsylvania's vote-by-mail process since the 2020 election cycle and have advanced numerous challenges to mail voting in Pennsylvania. *See, e.g., DJT II*, 830 F. App'x 377 (affirming dismissal); *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cnty. Nov. 5, 2020). Their inexcusable delay in bringing this claim

and the resulting prejudice to Respondents, Proposed Intervenors, and Pennsylvania voters outweighs the abstract and speculative harms Petitioners cite in support of their belated motion. And it underscores why the equitable, preliminary injunctive relief Petitioners seek is improper.

IV. The proposed preliminary injunction seeks to alter the status quo.

Petitioners acknowledge that "[t]he status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." Memo at 20 (quoting *Allegheny Anesthesiology Assocs. v. Allegheny Gen. Hosp.*, 826 A.2d 886, 894 (Pa. Super. 2003)). And they concede that the status quo preceding the pending controversy was established in 2020 by *Pennsylvania Democratic Party*, which held that "Boards are not *required* to implement a [cure procedure]," 238 A.3d at 374, but "declined to explicitly answer whether such a policy is necessarily forbidden." *Donald J. Trump for President*, 502 F. Supp. 3d at 907; *see also* Memo at 20; Pet. ¶ 56. Moreover, the Petition for Review confirms that some county boards have been giving voters notice and an opportunity to cure since at least 2020. Pet. ¶ 65. Indeed, more than half of the exhibits attached to the Petition—including a public website—*pre-date even the 2020* general election. *See* Pet. Exs. B, C, D, G. Petitioners' effort to enjoin boards' cure procedures would therefore undo the status quo that preliminary injunctions are meant to maintain.

V. The requested injunction is not reasonably suited to abate the activity of which Petitioners complain.

Even if the other prerequisites of an injunction were satisfied, and they are not, "the court must fashion a remedy reasonably suited to abate the harm." *Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co.*, 893 A.2d 196, 207 (Pa. Cmwlth. 2006). Petitioners' attempt to rewrite the status quo post-*Pennsylvania. Democratic Party* is a far cry from being narrowly tailored. *See Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Cmwlth. 2002) (any injunction "must be narrowly tailored to address the wrong plead and proven"). As demonstrated, *supra* Section II, Petitioners' alleged harm is, at best, speculative. And any harm to Petitioners caused by a lack of clarity as to the cure procedures in each county can be remedied by requiring boards to publish such information. Preventing votes from being counted for the sake of clarity is neither proportional nor reasonably suited to abate Petitioners' purported informational harm.

VI. The requested injunction will adversely affect the public interest.

Lastly, Petitioners fail to demonstrate that an injunction will benefit rather than harm the public interest. Courts considering whether to grant "the extraordinary remedy of injunction" pay special attention to the "public consequences" and, where a temporary injunction "will adversely affect a public interest," it should not be granted. *Weinberger*, 456 U.S. at 312 (internal quotations and citations omitted). Voting is a fundamental right. "[T]he Election Code should be liberally construed

so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice." *Pa. Democratic Party*, 238 A.3d at 356 (internal quotations omitted).

If Petitioners' relief is granted, voters who would otherwise be able to rid their ballots of minor defects and exercise their fundamental right to "elect a candidate of their choice" will be disenfranchised. *Pa. Democratic Party*, 238 A.3d at 356. The public interest is not served by preventing lawful residents from voting, especially when legitimate processes are, and have been, in place to allow more eligible citizens to vote while ensuring their ballots conform with state voting requirements. Moreover, granting a last-minute injunction barring ballot cure procedures and requiring county boards to disenfranchise voters whose ballots have minor, facial defects—all while mail voting is already underway and voters have ballots in hand—disserves the public interest. *See supra* Section III. Far from advancing the interests of justice, Pennsylvania courts have rejected such last-minute requests for extraordinary relief where Petitioners failed to exercise diligence in enforcing their purported rights and granting an injunction would reward their dilatory conduct at the expense of Pennsylvania voters. *Kelly*, 240 A.3d at 1256.

CONCLUSION

Petitioners fail to establish each of the prerequisites necessary to justify a preliminary injunction, thus their Application should be denied.

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Respectfully submitted,

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**Motions for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF COMPLIANCE

I, Adam C. Bonin, certify that Proposed Intervenors' DSCC and DCCC's Response in Opposition to Petitioners' Application for Preliminary Injunction contains fewer than 7,000 words as prescribed by Pa.R.A.P. 2135.

Submitted by:

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