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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

INTERVENOR-RESPONDENTS DSCC AND DCCC'S SURREPLY IN OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

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INTRODUCTION

Petitioners' challenge to procedures that county boards have employed for more than two years comes far too late, and this Court should find it barred by laches. Their theory of the case and requested injunction is undeveloped, challenging the amorphous concept of ballot "curing" without ever defining precisely what they mean by the term or what specific acts they seek to enjoin. And by thrusting this fire drill upon the Court and election officials around the Commonwealth, demanding that new standards for administering absentee and mail-in voting (collectively, "mail voting") be adopted across all 67 counties—*while voting is already underway*—they ask this Court to affirmatively act to inject chaos and confusion into the electoral process, further undermining public confidence in elections. The injury that would follow from granting Petitioners the relief they request would be severe and irreparable, not least of all because it would *disenfranchise* thousands of eligible voters for nothing more than minor, easily correctible mistakes on their mail ballots—mistakes that most larger Pennsylvania counties have long allowed voters to correct in order to ensure that their ballots are counted.

Petitioners bear a heavy burden to satisfy all prerequisites to justify the issuance of the extraordinary relief of a preliminary injunction, and they fail to do so. They do not demonstrate a clear right to relief because they cannot point to a single authority that precludes county boards from adopting cure procedures; their

strategic delay in bringing this lawsuit prejudices the parties, election workers, and voters; their requested relief seeks to alter the status quo in the middle of the voting process by enjoining procedures that have been in place for over two years; and greater injury—the disenfranchisement of lawful voters, which undermines public confidence in the election process—will result if Petitioners prevail. For all of these reasons, Petitioners application should be denied.

ARGUMENT

I. Laches bars Petitioners' proposed preliminary injunction.

A. Petitioners could have brought this action years ago.

Petitioners cannot pretend that this action was brought in a timely manner because all relevant facts were publicly available more than two years ago. Petitioners implausibly assert that they "were not aware of the cure procedures being challenged until quite recently." Reply at 4. But that excuse—even if true (and it almost certainly is not)—misses the point. When considering whether a claim is barred by laches, "[t]he correct inquiry . . . is to focus not upon what the plaintiff knows, *but what he might have known*, by the use of the means of information within his reach, with the vigilance the law requires of him." *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (emphasis added).

Petitioners should have known no later than November 2020 that some (but not all) counties allow voters the opportunity to cure a defective mail ballot. On

November 9, 2020, the Trump campaign sued then-Secretary of the Commonwealth Kathy Boockvar and seven county boards of elections in federal court over these very procedures. The suit alleged that the counties unlawfully "provided their mail-in voters with the opportunity to cure mail-in and absentee ballot deficiencies," Verified Compl. for Declaratory and Injunctive Relief ¶ 6, *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078-MWB, 2020 WL 6562045 (M.D. Pa. Nov. 9, 2020). The campaign's argument was rejected by the district court on November 21, 2020, in a decision affirmed by the Third Circuit six days later. *See generally Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377 (3d Cir. 2020) ("*DJT II*"), *appeal dismissed sub nom. Signed v. PA*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021).

This Court need not indulge the fiction—peddled by Petitioners—that the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania were totally unaware of the procedures challenged by the Trump campaign in November 2020. But even if, somehow, these Petitioners did not *actually know* of the Trump campaign's lawsuit, they certainly *could have found out* at some point before they finally initiated this action in September 2022. *See Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998) (applying laches and finding plaintiffs had

access to facts supporting their claim based on legislative procedures that were available to the public).

Indeed, even Petitioners acknowledge that they face "the same factual setting as existed in 2020" and that "the Election Code remains as it existed in 2020." Pet. for Review ¶ 35; Mem. of Law in Supp. of Pets.' App. ("Memo") at 23. This suit could have been brought at any time between then and now. Under the circumstances, "[t]he want of due diligence demonstrated in this matter is unmistakable." *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021).

B. Petitioners' strategic delay prejudices the parties and the public.

Respondents and Intervenors have previously described the ways in which they are prejudiced by Petitioners' decision to wait until shortly before the election to bring this action, including that granting the relief Petitioners request would force Respondents and Intervenors to expend significant resources implementing new procedures while voting already is underway. *See, e.g.*, DSCC and DCCC's Resp. in Opp'n to Pets.' App. for Prelim. Inj., at 21. This Court also should consider the severe prejudice to the public that would be caused by granting Petitioners' requested relief, particularly at this late stage

As this Court recognized during the proceedings held on September 22, concerns exist regarding the integrity of the electoral process. But it is *Petitioners'*

late-filed challenge, and not variation among county practices, that undermines public confidence. The General Assembly has long decided that Pennsylvania's elections are primarily administered by 67 county boards of elections, rather than a central agency, and county-by-county variance is both inevitable and proper. *See* 25 P.S. §§ 2641(a), 2642; *DJT II*, 830 F. App'x at 388. As Judge Brann wrote in *Boockvar*, "[i]t is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose" via notice and cure procedures, and the proper remedy for some counties' refusals to empower their voters to correct minor outer ballot envelope errors is assuredly *not* to cancel the votes of Pennsylvanians in other counties. 502 F. Supp. 3d at 920; *see also Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (recognizing the "longstanding and overriding policy in this Commonwealth to protect the elective franchise") (citations omitted). Indeed, the Pennsylvania Supreme Court has reiterated that "[o]ur goal must be to enfranchise and not to disenfranchise [the electorate]." *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972).[1]

Petitioners' strategic delay in bringing this challenge, however, unnecessarily creates chaos and confusion. This Court (and, inevitably, the Pennsylvania Supreme

[1] This matter does not involve fraud in any way, and Petitioners do not so allege. Even if they did, it is well-settled that "although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote." *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (internal quotation marks omitted).

Court) is being asked to make decisions that could result in significant changes to election processes on an artificially compressed timeline in which briefs and opinions must be thrown together in days rather than considered over the course of weeks or months. Already, every county board of elections in the Commonwealth is diverting resources that could be spent preparing for an orderly election into litigating this action. And the relief Petitioners seek would result in votes being discarded that otherwise would be cured and counted. In some situations, last-minute election litigation may be necessary to vindicate the right to vote; this is not one them. Nor can there be any question that a political party strategically waiting until shortly before an election to launch a suit aimed at making voting more difficult is the type of gamesmanship that severely undermines public confidence in elections.

Compounding the appearance of gamesmanship, the RNC has consistently argued that changing election administration rules close to an election is improper—at least when the changes would make it easier for eligible voters to cast ballots and have them counted. *See, e.g.*, *In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, ECF No. 194 at 9–10 (N.D. Ga. June 24, 2022) (RNC argued that a "motion for a preliminary injunction must be denied because it ask[ed the] Court to interfere with Georgia's elections laws shortly before voting" began which would have created "confusion and hardship" for voters and "[a]t the least, confused voters and groups would inundate state and local officials with inquiries and calls"); *League of*

Women Voters of Florida v. Florida Secretary of State, 2022 WL 4078870, at *8–9 (11th Cir. 2022) (RNC argued that "late judicial tinkering with election laws causes well-known harms to political parties") (internal quotations omitted). Yet now that changing the status quo in Pennsylvania would result in votes being *thrown out*, the RNC argues that a preliminary injunction at this late stage is appropriate. Their position runs exactly counter to the governing principle in Pennsylvania that the franchise should be protected and is but another reason why allowing this last-minute litigation to proceed would undermine public confidence.

II. Petitioners cannot meet the standard required to issue preliminary relief.

As this Court has noted, Petitioners must establish *every one* of the six preliminary injunction factors; if there is one factor that they cannot establish, "there is no need to address the others." *Cnty. Of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988). For the reasons discussed in previous briefs, Petitioners have not established *any* of the six factors. While the Court expressed that some of the factors present potentially challenging factual or legal questions, that is all the more reason to deny a request for extraordinary injunctive relief altering voting rules while mail voting is underway. *See, e.g., Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *28 (N.D. Ga. Apr. 18, 2022) (denying preliminary injunction sought shortly before primary election "[g]iven the preliminary stage of the proceedings, the difficulty of the legal questions posed, and Plaintiff's failure to . . .

establish[] a likelihood of success on the merits"); *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) ("where there are novel or complex issues of law or fact that have not been resolved a preliminary injunction should be denied"). Moreover, at least four of the six relevant factors *clearly* weigh against granting the requested injunction, obviating the need for this Court to consider the others.

A. A preliminary injunction is not necessary to prevent immediate and irreparable harm.

Petitioners cannot establish that they are harmed in any cognizable way by the possibility of eligible voters in some counties being allowed to cure their ballots. At the September 22 status conference, counsel for Petitioners repeatedly argued that the harm necessitating an injunction is that county-to-county differences in cure procedures violate Pennsylvania's Free and Equal Elections clause and result in "residence-based" disparities and vote dilution. But the Petition claims only that cure procedures should be enjoined for violating the Election Code and the Elections Clause of the U.S. Constitution. *See* Pet. ¶¶ 86–103; *Ioannidis v. Wolf*, 260 A.3d 1091, 2021 WL 2834611 at *3 n.5 (Pa. Cmwlth. 2020); *Pa. Med. Providers Ass'n v. Foster*, 613 A.2d 51, 53 n.3 (Pa. Cmwlth 1992).[2] Any claims or purported injuries

[2] Indeed, the Petition only mentions Pennsylvania's Free and Equal Elections clause *once* while summarizing the Supreme Court's holding in *Pennsylvania Democratic Party*, Pet. ¶ 46, and only mentions dilution *once* in asserting that cure procedures

resulting from the variation in county procedures across the Commonwealth are not properly before the Court; and even if they were, Petitioners' arguments lack merit.

As the Court noted during the September 22 proceedings, county boards have broad discretion to administer elections "within their respective counties," 25 P. S. § 2642. As a result, election procedures have always differed from one county to another because "[e]ach county has its own voting system."[3] Boards have, for example, discretion to "select and equip their own polling places," 25 P. S. § 2642(b), select and maintain voting machines, 25 P. S. § 2642(c), conduct their own trainings of election officers, 25 P. S. § 2642(g), canvas and certify ballots, 25 P. S. § 2642(k), and "make and issue [their own] rules, regulations, and instructions, not inconsistent with law," 25 P. S. § 2642(f). These differences have existed election after election, allowing county boards to meet the unique needs of their population without undermining the integrity or public perception of voting across the state, and courts routinely have rejected the argument that this creates a constitutional problem. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 342–43 ("*DJT I*") (W.D. Pa. Oct. 10, 2020); *see also Hendon v. N.C. State Bd. Of*

violate the Code, Pet. ¶ 34. While the Petition vaguely complains of "unequal treatment," *e.g.*, Pet. ¶¶ 82–85, it makes no claim on that basis and never even mentions "disparities" or "Equal Protection."

[3] Pa. Dep't of State, *Voting in PA*, DOS Voting & Election Information, https://www.vote.pa.gov/Voting-in-PA/Pages/default.aspx (last accessed Sep. 26, 2022).

Elections, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his [or her] vote may vary throughout the state.").

A holding that differences in election administration across counties create a cognizable harm would not only run afoul of existing caselaw and upend Pennsylvania's longstanding county-based election administration status quo, it would cast undue suspicion over the way elections are administered nationwide. The Court should reject Petitioners' attempts to circumvent longstanding precedent based on a purported injury that has been rejected time and again by courts around the country. *See, e.g.*, *DJT II*, 830 F. App'x at 388 ("Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law."); *Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) ("Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.") (cleaned up); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) ("Under [appellants'] theory, unless California foists a new system on all fifty-eight counties at once, it creates 'unconstitutional vote-dilution' in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court's controlling

precedent, or our case law suggests that we can micromanage a state's election process to this degree.").

B. Issuance of a preliminary injunction would substantially harm other interested parties.

Every eligible voter who returns a mail ballot to a county board with an evident error that the county currently allows voters to cure will be harmed by a preliminary injunction. Under current procedures, these voters would have the opportunity to cure their ballot so that their vote may be cast and counted. If a preliminary injunction is granted, they will not have that opportunity and their votes will not count. "It is . . . a well-settled principle of Pennsylvania election law that '[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it." *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1071 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021). Here, that principle strongly counsels against entering a preliminary injunction that could functionally disenfranchise a significant number of Pennsylvania voters.

C. A preliminary injunction would not restore the status quo ante.

Petitioners acknowledge that when "the grant of relief necessitates a change in status at the time a court grants injunctive relief . . . the relief must not change the status that existed between the parties just before the conflict between them arose." Mem. at 19 (quoting *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 556 n.6 (Pa.

Cmwlth. 2011)). The operative question therefore is what status existed "just before" this action. The facts are clear: for at least two years before this action was filed (and through at least five elections), the status quo has been that some county boards allow voters the opportunity to cure mail ballots. Petitioners argue that the status quo ante is that which existed before any board adopted a cure procedure. Mem. at 20. If Petitioners wished to maintain that status quo, they should have brought this action two years ago. *See supra* Part I.

D. The requested preliminary injunction is not reasonably suited to abating the allegedly offending activity.

While Petitioners make vague references to county boards providing voters with notice and cure opportunities, they do not explain what specific practices they challenge, which specific counties they allege are engaging in wrongdoing, or even what the scope of "notice" and "cure" is. Instead, Petitioners sued *every* county board just weeks before mail voting began and, relying only on non-specific examples of potential cure procedures in just five counties, ask this Court to prohibit all county boards "from developing and implementing cure procedures." Pet. at 29; Memo at 34. But without clarity on what "cure procedures" are, this Court cannot craft a meaningful preliminary injunction. For example, it is unclear whether Petitioners' requested injunction would prevent a board of elections worker from reviewing a voter's ballot envelope—even if that voter expressly so requests—to confirm whether the voter has properly completed the ballot declaration. Would saying "You

still need to sign that" constitute forbidden notice and cure? That is part of the reason why both laches and the public interest counsel against granting such relief at the eleventh hour on an expedited schedule that prevents careful exploration of these questions.

The ambiguity regarding which cure procedures Petitioners seek to enjoin is exacerbated by the lack of clarity regarding which counties employ cure procedures and the specifics of those that do. Although the County Respondents' Joint Stipulation of Facts provided valuable insights on these questions, it omitted information regarding over a third of Pennsylvania's counties, so the full scope of the proposed injunction is unknown.[4]

As Petitioner's repeatedly emphasize, *e.g.*, Pet. ¶ 47; Pets.' App. for Prelim. Inj. ¶ 17; Memo at 22, the Pennsylvania Supreme Court's rationale for refusing to *require* a notice and cure procedure throughout the Commonwealth included "the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and

[4] The Joint Stipulation does not provide information about Armstrong, Cambria, Carbon, Clearfield, Clinton, Crawford, Elk, Forest, Fulton, Greene, Lackawanna, Lancaster, McKean, Mercer, Mifflin, Monroe, Montour, Perry, Pike, Potter, Schuylkill, Warren, Washington, or Wayne Counties. Although the Joint Stipulation indicates that only 12 of Pennsylvania's 67 counties intend to employ cure procedures in 2022 (Adams, Allegheny, Bucks, Erie, Lehigh, Lycoming, Luzerne, Montgomery, Northampton, Philadelphia, Tioga, and Union), they include many of the most populous counties in the Commonwealth.

how the procedure would impact the confidentiality and counting of ballots." *Pa. Democratic Party v. Bookvar*, 238 A.3d 345, 374 (Pa. 2020). But what Petitioners fail to acknowledge is that the counties that employ cure procedures have addressed these questions in conformance with the particular needs of their county, as authorized by the Election Code. 25 P.S. § 2642(f). Any injunction will alter this status quo and force these counties to chaotically revise their thoughtfully developed procedures while in the middle of administering absentee and mail-in voting.

CONCLUSION

This action is barred by laches because Petitioners failed to exercise due diligence in bringing their claims. Furthermore, issuing a preliminary injunction while mail voting is well underway would force the Court to answer complicated questions without the benefit of time or discovery and create more harm than preserving the status quo. The Application for Preliminary Injunction should be denied.

Dated: September 26, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Claire Blewitt Ghormoz, certify that Intervenors DSCC and DCCC's Surreply in Opposition to Petitioners' Application for Preliminary Injunction contains 3,603 words as prescribed by Pa.R.A.P. 2135.

Submitted by:

Attorney for Intervenor-Respondents

DSCC and DCCC

Signature:

/s/ Claire Blewitt Ghormoz

Attorney No.:

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 26, 2022 */s/ Claire Blewitt Ghormoz*
Claire Blewitt Ghormoz