IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 447 MD 2022

Republican National Committee, Republican Party of Pennsylvania, David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib,

Petitioners,

v.

Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth; Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; and All 67 County Boards of Elections (See back of cover for list of County Respondents),

Respondents.

PETITIONERS' OMNIBUS BRIEF IN OPPOSITION TO RESPONDENTS' PRELIMINARY OBJECTIONS

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Respondents/Appellants.

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INTRODUCTION

Although some Boards of Elections ("Boards") have renamed certain pre-canvass activities as "cure procedures," that does not give them license to conduct those activities earlier than Election Day, disclose any part of the "results" of that process before the polls close, or allow voters who have already cast a ballot to vote again provisionally. Such notice-and-cure procedures directly violate the Election Code, are "inconsistent with law," and must be enjoined or prohibited.

All parties acknowledge that the Election Code authorizes curing in only the limited instance of deficiencies regarding voter identification; the Election Code does not expressly authorize the notice-and-cure procedures at issue here. Instead, Boards to effectuate their unlawful curing procedures must act in excess of their defined authority. Boards cannot determine whether a cast ballot—i.e., any absentee or mail-in ballot they have received—complies with the signature, date, and secrecy envelope requirements unless they "inspect" it, an act Boards are not permitted to do until Election Day. 25 P.S. § 3146.8(g)(1.1). Boards, having violated the prohibition on inspection, also cannot notify voters of any defect in their ballot to facilitate a cure without "disclos[ing] the results of any portion of any pre-canvass meeting prior to the close of the polls." 25 P.S. § 3146.8(g)(1.1). And Boards, having violated both the prohibition on inspection and disclosure, cannot allow voters to "cure" a defective absentee or mail-in ballot by allowing them to vote provisionally

without causing the voter to perjure him or herself: a condition of voting provisionally is signing an affidavit that affirms that the provisional ballot "is the only ballot I cast in this election," a demonstrably false statement in the curing context. 25 P.S. § 3050(a.4)(2).

The Election Code is explicit that the only thing Boards are permitted to do with absentee and mail-in ballots before Election Day is to "safely keep the ballots in sealed or locked containers." 25 P.S. § 3146.8(a). By inspecting the ballots and notifying voters about discovered defects, Boards are vastly exceeding their authority.

Just two years ago, this Court held that the Free and Equal Elections Clause did not authorize the Court to mandate a notice and opportunity to cure procedure with respect to defects in absentee and mail-in ballots, even when the absence of such a procedure would leave a voter "at risk of having his or her ballot rejected." *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). But the Court did not stop there. Rather, it held that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.* While the Legislature subsequently attempted to answer the Court's call to create such a procedure, former Governor Wolf vetoed those efforts. Thus, even today, just as was the case in 2020 when *Pa. Democratic Party* was decided, the Election Code "does not provide for [a] 'notice and opportunity to cure' procedure." *Id*. It defies

logic to conclude that an individual Board has the authority to do that which the Pennsylvania Supreme Court acknowledged it could not: resolve the "open policy questions" necessarily attendant to the implementation and enforcement of notice and cure procedures. *Id.*

Lacking express statutory authorization to implement notice-and-cure procedures, Boards have instead defended this practice as an act of discretion. But the Boards' reliance on discretion fails because the Boards' discretion in this space is constrained where their rulemaking is "inconsistent with law." 25 P.S. § 2642(f). The Boards' notice-and-cure procedures are "inconsistent with law"—and, in fact, directly violate the Election Code—on several grounds: *First*, such practice is in irreconcilable tension with the Court's holding in *Pa. Democratic Party*. *Second*, the Supreme Court's prior decisions, including recent cases such as *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591 (Pa. 2020), demonstrate that the Boards' discretion is extraordinarily limited and does not extend to the sweeping notice-and-cure programs at issue here. *Third*, the Boards' notice-and-cure procedures are inconsistent with the Election Code's express requirements for the treatment of absentee and mail-in ballots, including those requirements governing the storing of such ballots before Election Day, the time to commence the canvassing of such ballots, and the ability of absentee and mail-in ballot voters to vote provisionally. *Fourth*, the disuniformity in election administration promoted by some Boards'

implementation of notice-and-cure procedures runs afoul of constitutional requirements that "[a]ll laws regulating the holding of elections by the citizens … **shall be uniform throughout the State**," PA. CONST. art. VII, § 6 (emphasis added), and that "[e]lections shall be free **and equal**." PA. CONST. art. I, § 5 (emphasis added); *see also* 25 P.S. § 2642(g) (requiring Boards to inspect "the conduct of primaries and elections … to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted").

FACTUAL AND PROCEDURAL BACKGROUND

At issue in this case is the authority of county Boards to develop and implement non-uniform procedures to allow voters to "cure" signature, date, and secrecy envelope defects in their absentee and mail-in ballots. The Election Code makes no provision for such notice-and-cure procedures and, in fact, such notice-and-cure procedures constitute pre-canvass activities that cannot commence until Election Day and cannot be disclosed to anyone until after the polls close. Petitioners have challenged these notice-and-cure procedures, which are not uniform or even in force throughout the state, because they support and seek to uphold free and fair elections on behalf of all Pennsylvanians. They have brought this action to ensure

that Respondents adhere to state law and the Supreme Court's holdings for the general election and beyond.

On September 1, 2022, the Petitioners filed a Petition for Review pursuant to this Court's original jurisdiction. The Petition for Review sought an Order declaring that the Boards are not authorized to adopt and or enact procedures for the curing of absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code's signature and secrecy envelope requirements.

On September 7, 2022, Petitioners filed an Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532 ("Application for Preliminary Injunction") and a memorandum of law in support. In the Application for Preliminary Injunction, Petitioners sought to enjoin the county boards of elections from developing or implementing notice-and-cure procedures to address voters' failures to comply with the Election Code's signature and secrecy envelope requirements for mail-in and absentee ballots.

On September 9, 2022, the Court scheduled a hearing on the Application for Preliminary Injunction on September 28, 2022, directing the filing of answers in opposition to the Application for Preliminary Injunction by September 16, 2022, and a joint stipulation of facts, indicating which Boards have implemented, or plan to implement, notice-and-cure procedures with respect to mail-in and absentee ballots, and scheduled a status conference to take place on September 22, 2022.

On September 20, 2022, Petitioners filed a joint stipulation of facts, signed by Petitioners and 42 county boards of elections. The joint stipulation of facts reveals that at least 15 Boards have implemented some form of a notice-and-cure procedure for absentee and mail-in ballots for a voter's failure to comply with signature or secrecy envelope requirements.

At the status conference on September 22, 2022, the Court held a hearing. Following the status conference and hearing, the Court entered an order canceling the September 28, 2022 hearing and directing the parties to file supplemental briefs. Petitioners and several Respondents filed supplemental briefs on September 26, 2022.

On September 29, 2022, the Court entered a memorandum opinion and order, denying the Petitioners' application for preliminary injunction. The following day, Petitioners appealed. On October 21, 2022, the Court's decision was affirmed as a result of the Pennsylvania Supreme Court being evenly divided.

On January 30, 2023, Petitioners filed an application for leave to file an amended petition for review. The Court granted the application, and scheduled deadlines for preliminary objections and briefing.

Under the Pennsylvania Election Code, voters casting an absentee or mail-in ballot are required to: (1) place their marked ballots in a sealed envelope ("secrecy envelope"), (2) place the secrecy envelope inside a second envelope, which is

marked with a "declaration of the elector" form, (3) "fill out" and "sign the declaration printed on such envelope," and (4) return the ballot by 8:00 p.m. on election day. 25 P.S. § 3146.6(a); § 3150.16(a). If a voter fails to comply with these requirements, the voter's absentee or mail-in ballot must be set aside and not counted. 25 P.S. § 3146.8; *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 378 (Pa. 2020). Once the voter mails or personally delivers the absentee or mail-in ballot to the county board of elections ("Board"), the ballot is cast. *See Pa. Democratic Party*, 238 A.3d at 371 n.26 (Pa. 2020); 25 P.S. § 3146.8(g)(7).

The Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them. "[U]pon receipt" of an absentee or mail-in ballot, the Board "shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the [Board]." 25 P.S. § 3146.8(a) (emphases added). Boards are not authorized to do anything else with the absentee and mail-in ballots until Election Day. Then, and only then, may Boards "pre-canvass" the absentee and mail-in ballots, a process which includes "the inspection … of all envelopes containing official absentee ballots or mail-in ballots." 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1). Even when such inspection of the envelopes containing absentee and mail-in ballots begins, "[n]o person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls." 25 P.S. § 3146.8(g)(1.1).

The General Assembly has addressed notice-and-cure procedures and has provided only a limited opportunity for voters to cure a non-compliant mail-in or absentee ballot. In particular, the Election Code allows curing in only one circumstance: "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." *See* 25 P.S. § 3146.8(h). This procedure provides that if proof of a voter's identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2). No other notice-and-cure procedure for absentee or mail-in ballots exists in the Election Code.[1]

Less than three years ago, the Pennsylvania Democratic Party sought an injunction to *require* Boards of Elections to contact voters whose mail-in or absentee ballots contained facial defects and to provide those voters with an opportunity to cure the same. *See Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Commw. Ct.). There, citing the Free and Equal Elections Clause, PA. CONST. art. I, § 5, and the Court's "broad authority to craft meaningful remedies," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018), the Pennsylvania Democratic Party argued that the Court should allow Boards to implement a "notice

[1] The Election Code also provides for in-person voters to "cure" deficiencies with non-matching signatures when voting in person after election day. *See* 25 P.S. § 3050(a.3)(2); *accord Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020) (comparing in-person voting which affords an opportunity to cure with main-in or absentee voting, which do not).

and opportunity to cure procedure" for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

The Acting Secretary *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that "so long as a voter follows the requisite voting procedures, he or she 'will have equally effective power to select the representative of his or her choice.'" *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Acting Secretary noted that "logistical policy decisions" implicated in a notice-and-cure procedure beyond that already set forth in statute are properly addressed by the Legislature, not the courts. *Id.*

The Supreme Court unanimously agreed with the Acting Secretary. It held that "[w]hile the Pennsylvania Constitution mandates that elections be 'free and equal,' it leaves the task of effectuating that mandate to the Legislature." *Id.* It further noted that "although the Election Code provides the procedures for casting and counting a vote by mail [ballot], it does not provide for the 'notice and opportunity to cure' procedure sought by the Petitioner." *Id.*

Importantly, the Supreme Court further agreed that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk [of a voter having his or her ballot rejected due to potentially curable errors] is one best suited for the Legislature." *Id.* It reasoned that the Legislature was best positioned to resolve the

"open policy questions" attendant with a notice and opportunity to cure procedure, including "what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots." *Id.*

After *Pa. Democratic Party* was decided, the Legislature considered and even passed legislation requiring a notice-and-cure procedure for non-compliant mail-in and absentee ballots. *See* House Bill 1300, Printer's Number 1869, § 1308(g)(2)(iv), (v) (2021). But former Governor Wolf vetoed that legislation. As a result, the Election Code remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a notice-and-cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

The Acting Secretary of the Commonwealth to this day continues to advise voters that Pennsylvania law does not provide notice-and-cure procedures for signature and secrecy envelope requirements for mail-in and absentee ballots. As stated in the Acting Secretary's "Frequently Asked Questions":

> **How do I know if my ballot was accepted or counted?**
> Under current Pennsylvania law, your mail-in ballot can't be opened until Election Day. Therefore, **if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election.** Still, as long as you followed all the instructions and mailed your completed, signed, dated, and sealed in the inner secrecy envelope, ballot by Election Day, you don't have to worry.

Pennsylvania Department of State, *Mail and Absentee Ballot*, *at* https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx (emphasis added). This position is consistent with the position the Acting Secretary took during *Pa. Democratic Party*, in which she argued against the imposition of notice-and-cure procedures, stating "so long as a voter follows the requisite voting procedures, he or she 'will have equally effective power to select the representative of his or her choice.'" *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 737, 809 (Pa. 2018)).

Since the commencement of this action, however, the Acting Secretary issued guidance in connection with the 2022 general election, directing Boards to "[e]xamine all mail-in ballots received to determine if the return envelopes for those ballots are signed and dated." *See* https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf. Despite characterizing this conduct as an "administrative determination," this is precisely the type of inspection included within the definition of "pre-canvass" under the Election Code, which cannot begin until 7:00 a.m. on Election Day. *See* 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1). Thus, the Acting Secretary has now directed Boards to directly violate the Election Code. Further, in the days before the 2022 general election, the Acting Secretary encouraged Boards "to contact voters whose ballots have been cancelled due to an

error on the outside envelope so that voters may have the opportunity to have their vote count." *See* https://www.media.pa.gov/pages/state-details.aspx?newsid=544. This is an express endorsement of notice-and-cure procedures and directly violates the Election Code's prohibition of disclosing results of the pre-canvass before the close of the polls. *See* 25 P.S. § 3146.8(g)(1.1).

As established by *Pa. Democratic Party* and the Acting Secretary's earlier guidance, Boards simply lack statutory authority to make up their own rules when it comes to the administration of elections or the creation and implementation of notice-and-cure procedures. Under the Election Code, the Boards "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. Although Section 2642 enumerates several duties the Boards must perform, *see id.* § 2642(a)–(p), notably absent from the list is anything that could authorize the development and implementation of their own bespoke notice-and-cure procedures that would necessarily differ from board to board, county to county.

The inability of Boards to act untethered to statutory authority of any kind is well established in law and in practice. Indeed, the Acting Secretary only recently took that exact position in another case concerning proper procedures for canvassing absentee and mail-in ballots—a position irreconcilable (and unreconciled) with her position here.

In advance of the 2020 general election, the Acting Secretary had issued guidance that "[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." *See* Pennsylvania Dep't of State, *Guidance Concerning Examination of Absentee and Mail*-In Ballot Return Envelopes (Sept. 11, 2020), available at www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

This prohibition was challenged in both state and federal court; in both cases, the prohibition was upheld. In the federal district court action, the court seemingly left open the question of whether signature comparison was permitted, but reasoned that "nowhere does the plain language of the statute *require* signature comparison as part of the verification analysis of [absentee or mail-in] ballots." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 399 (W.D. Pa. 2020) (emphasis added). In the state court action, this Court shut the door completely to signature comparison notwithstanding there was no explicit prohibition found in the election statutes: "In assessing a declaration's sufficiency, there is nothing in this language which *allows* or compels a county board to compare signatures." *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 608 (Pa. 2020) (emphasis added). The Pennsylvania Supreme Court followed the same path as Judge Ranjan, noting that "[i]t is a well

established principle of statutory interpretation that we 'may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.'" *Id.* at 611.

Notwithstanding all this, some Boards allow voters to "cure" noncompliant ballots, following protocols of their own non-uniform design, while many other Boards have followed the Election Code and refrained from implementing notice-and-cure procedures. The result of this county-by-county patchwork is that whether voters who cast a non-compliant mail-in ballot will be afforded an opportunity to cure a defective ballot depends entirely on where they reside. In other words, mail-in and absentee ballots with identical defects are receiving unequal treatment based solely on the voter's residency. Even worse, the likelihood of the voter receiving notice of his or her non-compliant ballot depends not only on the voter's county of residence, but also whether that voter is registered with a political party, when the ballot is returned to the Board, and whether "time allows" (which varies from Board to Board) for some Boards to provide such notice.

The evidence revealed in this litigation has only more starkly shown the multi-tiered nature of election administration in this Commonwealth. Because of haphazard and unlawful curing, there are the "haves" and the "have-nots" in this state: More than half the population resides in counties that have developed their own notice-and-cure procedures. This includes the four most populous counties,

which alone comprise more than one-third of Pennsylvania's population: Philadelphia, Allegheny, Montgomery, and Bucks Counties. These voters sometimes, depending on their membership in a political party and who happens to be processing their ballots, receive a mulligan if they fail to adhere to balloting requirements. Meanwhile, voters in the rest of the state have to vote, consistent with the Election Code, without the benefit of a second chance.

The result of all of this unauthorized and unlawful conduct is a lack of transparency, a lack of uniformity in the holding of elections, *see* PA. CONST. art. VII, § 6, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, the usurpation by some Boards of the Legislature's exclusive role to regulate the manner of elections, and an erosion of public trust and confidence in the integrity of Pennsylvania's elections. Moreover, refusing the injunction in this case does not protect the elective franchise. Rather, it undermines the public policy of this state by ensuring that some votes in this state count more than others. There is no reason in law or equity why voters who fail to follow clear instructions for marking and returning their ballot envelopes in some counties should have more rights than similarly situated voters in other counties. By artificially building this into the Election Code, Boards diminish the right of voters in non-curing counties (relative to voters in curing counties) "to elect a candidate of their choice" in statewide races, effectively disenfranchising a portion of the electorate.

Nine of the sixty-eight Respondents have filed preliminary objections to the Amended Petition for Review. For the reasons set forth below, these preliminary objections should be overruled.

STANDARD OF REVIEW

When resolving preliminary objections, the Court "must accept as true all well-pleaded factual averments in the petition for review." *Kaba v. Berrier*, 275 A.3d 85, 89 (Pa. Commw. 2022). The Court must also accept as true "all reasonable inferences deducible therefrom." *Minor v. Kraynak*, 155 A.3d 114, 121 (Pa. Commw. 2017). "A preliminary objection should be sustained only in cases when, based on the facts pleaded, it is clear and free from doubt that the facts pleaded are legally insufficient to establish a right to relief." *Id.*

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

Subject matter jurisdiction in this matter exists because the Acting Secretary is an indispensable party and because the Boards of Elections are part of the Pennsylvania commonwealth government.

The Acting Secretary is an indispensable party in this action. *See* 42 Pa. C.S. § 761 ("the Commonwealth Court shall have original jurisdiction of all civil actions or proceedings: (1) against the Commonwealth government, including any officer thereof, acting in his official capacity …"). A party is indispensable when his rights are so connected with the claims of the litigants that no decree can be made without

impairing those rights. *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. 2007). The Acting Secretary has issued guidance to the Boards and to the voting public regarding the mechanics of absentee and mail-in ballot voting, as well as whether a right to cure exists. Indeed, the Acting Secretary recently filed suit against three Boards in Commonwealth Court, espousing the same position Petitioners assert here: that the Election Code's silence on a matter does not vest Boards with discretion to take matters into their own hands. *See Chapman v. Berks County Board of Elections*, No. 355 MD 2022, 2022 WL 4100998, 2022 Pa. Commw. Unpub. LEXIS 390 (Pa. Commw. Aug. 19, 2022) (regarding whether Boards may exercise discretion whether to count absentee and mail-in ballots that are not dated by the voter).

On November 3, 2022, the Acting Secretary issued guidance to the Boards and to the voting public regarding the mechanics of absentee and mail-in ballot voting, as well as whether a right to cure exists. The guidance directs Boards to "[e]xamine all mail-in ballots received to determine if the return envelopes for those ballots are signed and dated." *See Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court's Order in* Ball v. Chapman*, issued November 1, 2022*, DOS.PA.GOV, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf (last visited Mar. 10, 2023). Despite

characterizing this conduct as an "administrative determination," this is precisely the type of inspection included within the definition of "pre-canvass" under the Election Code, which cannot begin until 7:00 a.m. on Election Day. *See* 25 P.S. §§ 2602(q.1), 3146.8(g)(1.1). Thus, the Acting Secretary is instructing Boards to directly violate the Election Code. Further, in the days before the 2022 general election, the Acting Secretary encouraged Boards "to contact voters whose ballots have been cancelled due to an error on the outside envelope so that voters may have the opportunity to have their vote count." *See* https://www.media.pa.gov/pages/state-details.aspx?newsid=544. This is an express endorsement of notice-and-cure procedures and directly violates the Election Code's prohibition of disclosing results of the pre-canvass before the close of the polls. *See* 25 P.S. § 3146.8(g)(1.1). Thus, this action not only challenges the conduct of some Boards that have implemented cure provisions, it also challenges actions taken by the Acting Secretary. Accordingly, the Acting Secretary is an indispensable party, and as such, this Court has original jurisdiction to hear this matter.

Further, the Respondent Boards are a component of the "Commonwealth government" under 42 Pa. C.S. § 761, and thus the Court has subject matter jurisdiction to hear this matter. Under the Judicial Code, "commonwealth government" is defined as:

> The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General

> Assembly and its officers and agencies, the Governor, and the departments, ***boards***, commissions, authorities and officers and agencies of the Commonwealth, but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.

42 Pa. C.S. § 102. In turn, a "local authority," which is excluded from the definition of "commonwealth government," is defined as "a municipal authority or other body corporate or politic created by one or more political subdivisions pursuant to statute." 1 Pa. C.S. § 1991. The difference between a "commonwealth government" and a "local authority" hinges on how the entity was created. Where local legislative bodies create the entity, it is a "local authority." *Phila. Parking Auth. v. AFSCME, Dist. Council 33, Local 1637*, 1845 A.2d 245, 248 (Pa. Commw. 2003).

The Boards constitute a commonwealth government and are not "local authorities" under these definitions. Boards are formed by statute, specifically, § 301(a) of the Election Code; they are not created by a political subdivision. *See* 25 P.S. § 2641(a); *see also In re Nomination Petition of Griffis*, 259 A.3d 542 (Pa. Commw. 2021) (citing § 2641(a)); *Cnty. of Fulton v. Sec'y of the Commonwealth*, 276 A.3d 846, 861 (Pa. Commw. 2021) ("Whether prevention [with the tampering of election equipment] is the responsibility of the Secretary or the county boards of elections, or both, is not clear. ***Both are government agencies created by the General Assembly*** with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania …. The county boards of elections are not bureaus within

the Department of State subject to management by the Secretary of the Commonwealth. They are a ***separate and standalone government agencies***.").

II. ALL PETITIONERS HAVE STANDING TO BRING THIS ACTION.

Both the Republican Committee Petitioners—the Republican National Committee ("RNC") and the Republican Party of Pennsylvania ("RPP")—and the Voter Petitioners have standing to bring this action and to secure an order from this Court prohibiting the implementation of notice-and-cure procedures.

A party has standing where it has "1) a substantial interest in the subject matter of the litigation; 2) [its] interest [is] direct; and 3) [its] interest [is] immediate and not a remote consequence of the action." *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999); *accord Ball*, 2022 Pa. LEXIS 1879, at *30 (quoting *Markham v. Wolf*, 136 A.3d 134, 136 (Pa. 2016)) ("To support standing, a plaintiff's interest in the outcome of a given suit must be 'substantial, direct, and immediate.'"). An organization may establish standing in its own right when it suffers a concrete injury to its own cognizable interest as a result of the complained-of conduct. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 308 (3d Cir. 2014). Notably, individual voters, who have "the right to vote and the right to have one's vote counted," readily satisfy this standard. *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994 (Pa. 2002). The Court has

jurisdiction to resolve any issue presented by at least one party with "standing to assert" it. *Friends of DeVito v. Wolf*, 227 A.3d 872, 893 n.12 (Pa. 2020).

A. The Republican Committees Have Standing.

In *Ball*, the Pennsylvania Supreme Court expressly held that the Republican Committees had standing in an action seeking a declaration that undated and incorrectly dated absentee and mail-in ballots cannot be included in the pre-canvass or canvass under the Election Code. The same holding is required here. As set forth more fully in the Petitioners' Brief Addressing the Pennsylvania Supreme Court's Decision in *Ball* filed on February 27 ("Petitioners' *Ball* Brief")—which is incorporated by reference herein as if set forth at length—the Republican Committees have standing to seek declaratory and injunctive relief barring notice-and-cure procedures on at least two grounds.

1. *Notice-and-Cure Procedures Violate the Republican Committees' Statutory Right to Have a Representative Attend All Pre-Canvass Meetings.*

The Republican Committees have standing to protect their statutory right to have "one representative . . . remain in the room in which the absentee ballots and mail-in ballots are" pre-canvassed and canvassed. 25 P.S. § 3146.8(g)(1.1)–(2). The Republican Committees have actively exercised this right in past elections and did so again in the 2022 general election. In particular, the Republican Committees devote substantial time and resources toward training watchers on the rules for

casting, canvassing, and counting ballots and "monitoring . . . the voting and vote counting process in Pennsylvania." Am. Pet. ¶¶ 30–31. Such activities include monitoring whether election officials canvass and count only ballots that are "lawful[]" under the Election Code. *Id.*

The Republican Committees' interest in having a representative in the room when the ballots are pre-canvassed is "substantial" because it "surpasses the interest of all citizens in procuring obedience to the law." *Ball v. Chapman*, 2022 Pa. LEXIS 1879, 2023 WL 2031284, at *30 (Pa. Feb. 8, 2023) (quoting *Commonwealth v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014)). This opportunity to "observe the mechanics of the canvassing process" and to "observe the Board conducting its activities as prescribed under the Election Code," *In re Canvassing Observation*, 241 A.3d 339, 350–51 (Pa. 2020), is not afforded to all citizens, but rather, only to candidates and political parties. *See* 25 P.S. § 3146.8(g)(1.1), (2). By conducting pre-canvassing activities before the Election Code authorizes them to do so, Boards that implement notice-and-cure procedures harm the Republican Committees by conducting in secret a process designed to be open and transparent.

Likewise, the harm caused to the Republican Committees by Boards that implement notice-and-cure procedures is "direct" and "immediate." The directness element is satisfied because the Republican Committees' harm is caused by Boards' implementation of notice-and-cure procedures; each envelope that the Boards

inspect before the pre-canvass outside of the presence of the Republican Committees' representatives deprives the Republican Committees of a statutory right under the Election Code. *See Ball v. Chapman*, 2022 Pa. LEXIS 1879, 2023 WL 2031284, at *30 (Pa. Feb. 8, 2023) (quoting *Commonwealth v. Donahue*, 98 A.3d 1223, 1229 (Pa. 2014)). Similarly, the harm "is neither remote nor speculative," *id.*; the Election Code expressly provides the Republican Committees with an opportunity to observe all aspects of the pre-canvass and canvass, but the curing Boards deliberately interfere with that right by conducting pre-canvass activities early and out of sight.

2. *The Law Governing Curing Is Unsettled, Causing A Waste of Petitioners' Resources.*

In addition to having standing to protect their statutory right to attend all pre-canvass activities, the Republican Committees also have standing as a result of their expenditure of resources toward education, training, and monitoring with respect to absentee and mail-in ballot voting.

As the Supreme Court held in *Ball*, where the law is unsettled, such expenditures can constitute the substantial interest necessary to confer standing, even though "an organization's expenditure of resources alone ordinarily does not confer standing." *Ball*, 2022 Pa. LEXIS 1879, at *31-32. The Acting Secretary's conflicting guidance reflects the confusion that exists regarding the extent to which notice-and-cure procedures are permissible under the Election Code. On the one

hand, the Acting Secretary has advised voters that "if there's a problem with your mail-in ballot, you won't have the opportunity to correct it before the election" while also directing Boards post-*Ball* to start the pre-canvass process early. *See* Am. Pet. ¶¶ 68, 122. But the Acting Secretary has also directed Boards to examine mail-in ballots before the pre-canvass is permitted to begin, *see* Am. Pet. ¶ 122, and has directed Boards to provide information to authorized representatives of political parties about voters whose absentee and mail-in ballots have been rejected so they can attempt to cure the same via provisional ballot. *See* Jonathan Marks email dated Nov. 2, 2020, attached as Ex. A. This, in turn, has led to confusion amongst the Boards regarding whether notice-and-cure procedures are permitted. *See, e.g.*, Am. Pet. ¶ 100.

The Acting Secretary's conflicting guidance and the Boards' resultant confusion harms the Republican Committees by rendering their training and monitoring activities less effective, wasting the considerable resources they have devoted to those activities, or requiring them to devote even more resources to them. The Republican Committees' monitoring activities and training can be effective only if the legal rules that govern the casting, counting, and canvassing of ballots are clear.

An order from this Court confirming that notice-and-cure procedures are "inconsistent with law," namely the Election Code and the Pennsylvania

Constitution, would redress that harm. The Republican Committees therefore have a "substantial," "immediate," and "direct" interest in securing an order from this Court prohibiting the implementation of notice-and-cure procedures. *See In re T.J.*, 739 A.2d at 481; *Havens Realty*, 455 U.S. at 378-79; *Blunt*, 767 F.3d at 308; *see also La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 306 (5th Cir. 2022) (holding that national and county political party committees had an interest of right to intervene in a case challenging regulation of poll watchers appointed by the committees).

The unsettled nature of the law regarding the permissibility of notice-and-cure procedures demands that the Republican Committees' expenditures to ensure that they and their voters understand the rules governing the election process provides a further basis to find standing under the Supreme Court's decision in *Ball*. The Republican Committees thus have standing to challenge the implementation of notice-and-cure procedures which are "inconsistent with law" under the Election Code and the Pennsylvania Constitution. *See Pa. Dem. Party*, 238 A.3d at 352.

B. The Voter Petitioners Have Standing.

The Voter Petitioners have standing. Unlike the individuals in *Ball*, the Voter Petitioners here have alleged sufficient facts from which to infer that their votes will be diluted as a result of the curing counties' unlawful activity. Further, the Voter Petitioners do not rely solely on the harm from vote dilution to establish their

standing. The curing Boards, with the approval of some guidance from the Acting Secretary, have impaired their right to participate in "free and *equal*," uniform elections, subjected them to an increased risk of being governed by illegally elected candidates, and frustrated their constitutional right to communicate with their preferred candidates by means of the ballot. Each of these is an independent direct, immediate, and non-speculative harm sufficient to confer standing.

1. *Curing Introduces Unconstitutional Disuniformity.*

Curing introduces a regional disuniformity into our elections that inflicts a constitutional harm on the Voter Petitioners that finds no analog in *Ball.* Pennsylvania's Constitution commands that "[a]ll laws regulating the holding of elections by the citizens … shall be uniform throughout the State." PA. CONST. art. VII, § 6; *accord Kuznik v. Westmoreland County Bd. of Comm'rs*, 902 A.2d 476, 492 (Pa. 2006) (noting that the Election Code contemplates a "unitary system of voting in Pennsylvania" in keeping with Article VII, § 6 of the Pennsylvania Constitution); *see also* PA. CONST. art. I, § 5 ("Elections shall be free **and equal**" (emphasis added)). The Boards' action to create different curing regimes throughout the state violates this mandate and harm the Voter Petitioners who are barred from the opportunity to cure their ballots based solely on where they happen to reside in the state.

The Supreme Court has long enforced requirements that Boards administer elections in an "equal" and "uniform" manner:

> All laws regulating the holding of elections … shall be uniform throughout the State." What is meant by the word "uniform" as here used? A law is general and uniform if all persons in the same circumstances are treated alike. Uniform operation means that the same law shall apply to all persons placed in the same circumstances. 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 provision.

Winston v. Moore, 91 A. 520, 524 (Pa. 1914); *see also Baker v. Carr*, 369 U.S. 186, 207–08 (1962) ("[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties"). In other words, "voters who allege facts showing disadvantage to themselves" have standing to bring suit to remedy that disadvantage, but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group. *Baker*, 369 U.S. at 206. The Voter Petitioners, most of whom reside in counties that do not offer curing, suffer harm to the extent their votes are not given the same opportunity to count as those whose votes can be cured in other counties.

Ball did not address any state action that inflicted an analogous disuniformity-based harm on the voter petitioners in that case. It did discuss how state and federal courts reached different outcomes as to whether to count undated absentee and mail-

in ballots. But unlike in this case, those cases did not result in the differential treatment of voters in different parts of the state. To the contrary, each decision announced a uniform, statewide approach to counting such ballots. As a result, under *Ball*'s reasoning, the harm to any voter from counting or not counting such ballots was no different from the harm inflicted on any other voter. That is not the case here. Different rules regarding curing disburse the benefits and burdens of voting unequally throughout the state, benefiting some voters, and harming others, like the Voter Petitioners.

Voter standing based on the harm inflicted upon them by the disuniform administration of elections is consistent with other precedents of the Pennsylvania Supreme Court, which has previously reached the merits of voter challenges to the manner in which elections are conducted. For example, in *Kuznik*, voters filed an action for declaratory judgment and injunctive relief against the Westmoreland Board and the Secretary, seeking to enjoin certain Boards from implementing a system of voting different from the system used in the rest of the state. 902 A.2d at 480–81. Notably, the voters did *not* rest their standing on an argument that the new voting system would dilute their vote or favor one party over another. *Id.* Instead, they argued that the disuniformity in voting systems alone presented a constitutional harm. *Id.* at 486, 489–92. The Supreme Court reached the merits without hesitation and held that the Election Code contemplated a "unitary system of voting," under

which laws "regulating the holding of elections … treat all persons in the same circumstances alike." *Id.* at 491–92. It held that Article VII, § 6 of the Pennsylvania Constitution requires "uniformity with respect to the laws that regulate elections in the Commonwealth" and "emphasizes that when a particular method of voting is used, it must be done 'at all elections or primaries.'" *Id.* (citing PA. CONST. art. VII, § 6). There was no question in *Kuznik* that the individual voters had standing to vindicate their right to participate in elections administered in a uniform manner.

So too here. Curing Boards violate Article VII, § 6—as well as 25 P.S. § 2642(g) (requiring primaries and elections to be "honestly, efficiently, and uniformly conducted")—by giving some voters a second opportunity to cast their vote, when non-curing Boards do not. Under the current scheme, neighbors can be subjected to different rules regarding whether they will have an opportunity to correct an invalid absentee or mail-in ballot:

> Take Sadsbury Township, Lancaster County, for example. Voters there were not allowed to fix errors on mail ballots such as missing dates ….
>
> But their neighbors just over the county line in West Sadsbury Township, Chester County, were allowed to cure their ballots ….

Carter Walker and Kate Huangpu, *Unequal election policies disenfranchised some Pennsylvania voters in 2022. Explore what each county did*, PENNSYLVANIA.VOTEBEAT.ORG, https://pennsylvania.votebeat.org/2023/2/21/23604816/pa-2022-election-drop-box-

mail-ballot-curing-scorecard?utm_source=Votebeat&utm_campaign=fe3d58466a-EMAIL_CAMPAIGN_2022_05_06_11_26_COPY_01&utm_medium=email&utm_term=0_d2e6ae1125-fe3d58466a-1297126817 (last visited Feb. 27, 2023).

The disparities created by some, but not all Boards implementing notice-and-cure procedures creates a two-tier system of voting in the Commonwealth premised entirely on voters' county of residence. The Boards' failure to adhere to the constitutional requirement of uniformity in elections constitutes a unique harm—not present in *Ball*—that causes the Voter Petitioners substantial, direct, and immediate harm. Accordingly, they have standing to bring this action.

2. *Curing Dilutes the Voter Petitioners' Votes.*

The Supreme Court's exclusive focus on *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970) and its analysis of the Voter Petitioners' standing demonstrates why the Voter Petitioners in this case have standing, even though the individuals in *Ball* did not.

In *Kauffman*, a group of voters sought to enjoin election officials from recognizing and counting absentee ballots cast by voters on vacation on election day on the ground that the Absentee Ballot Law which authorized such class of ballots was invalid under the federal and state constitutions. *Id.* at 238. The trial court dismissed the action for lack of standing; both the Commonwealth Court and the Pennsylvania Supreme Court affirmed. *Id.* at 237, 240. The Pennsylvania Supreme

Court observed that a fundamental assumption of the *Kauffman* appellants' theory of standing was that "those who obtain absentee ballots, by virtue of statutory provisions which they deem invalid, will vote for candidates … other than those for whom the appellants will vote and thus will cause a dilution of appellants' votes." *Id.* at 239–40. But the plaintiffs there failed to allege any facts for why such allegedly invalid absentee ballots would favor one candidate over another. They offered only speculation that the ballots would tilt in one direction as opposed to another. Accordingly, whether any harmful dilution might materialize was, on the basis of the pleadings, too speculative to support standing. *Id.* at 239. The Court did not rule out vote dilution as a theory of harm. It held only that the plaintiffs had not done enough to establish that any action actually threatened to dilute their votes.

In *Ball*, the Pennsylvania Supreme Court reasoned that *Kauffman*'s holding held equal force with respect to how the individuals had pled harm attributable to undated and incorrectly dated ballots. *Ball v. Chapman*, 2022 Pa. LEXIS 1879, 2023 WL 2031284, at *30. The Supreme Court concluded that the Petitioners had offered no evidence that undated or incorrectly dated absentee and mail-in ballots would be cast by voters favoring candidates other than those favored by the Petitioners. *Id.*[2]

[2] Petitioners note, however, the scant opportunity afforded for Petitioners to present such evidence. The Supreme Court provided Petitioners with less than 72 hours to file a brief, and the Supreme Court's order made no provision for the development or submission of a factual record.

But that is not the case here. Unlike the record in either *Kauffman* or *Ball*, the record here shows that curing is likely to dilute the votes of the Individual Petitioners. Already in this case, a Joint Stipulation of Facts was filed, indicating which Boards have implemented notice-and-cure procedures. *See* Joint Stipulation of Facts filed September 20, 2022. In the counties that have implemented notice-and-cure procedures, registered Democratic voters outnumber registered Republican voters by more than 1 million.[3] Meanwhile, in non-curing counties, registered Republicans outnumber registered Democrats. *Id.*

As discussed in further detail in Petitioners' *Ball* Brief, Democratic candidates have enjoyed a significant electoral advantage from absentee and mail-in voting since Act 77 became effective. *See* Petitioners' *Ball* Brief at 20–21. The Voter Petitioners, who are registered Republicans who support Republican candidates, thus suffer a particularized harm from illegal notice-and-cure procedures. Even if other *Republican* voters share the same harm of vote dilution, such "widespread" harm is not synonymous with "generalized" harm. *See William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 287 (Pa. 1975) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687–88

[3] *See Voting & Election Statistics: Voter registration statistics by county*, DOS.PA.GOV, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx (lasted visited Feb. 27, 2023) (comparing Republican and Democratic voter registrations for Adams, Allegheny, Beaver, Berks, Bucks, Lehigh, Luzerne, Lycoming, Montgomery, Northampton, Philadelphia, Tioga, and Union Counties).

(1973)). Voter Petitioners have introduced evidence to support the inference that differential notice-and-cure procedures favor other voters, while harming them and others like them. That is sufficient to establish standing, especially at this stage of the proceedings. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue").

3. *Voter Petitioners Have Standing Under the Free and Equal Elections Clause.*

The Free and Equal Elections Clause guarantees all Pennsylvania citizens the right to "have an equal opportunity to translate their votes into representation." PA. CONST. art. I, § 5. The dilution of the Voter Petitioners' voting power gives rise to their claim under the Free and Equal Elections Clause.

The Amended Petition for Review sets forth a claim for declaratory judgment that the disparate approaches taken by Boards with respect to notice-and-cure procedures violate the Free and Equal Elections Clause. *See* Am. Pet. Count II. "The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth's elections process, and it explicitly confers this guarantee." *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 812 (Pa. 2018)).

Indeed, the two-tiered system in which curing counties give their residents a second bite at the apple bares a strong similarity to a partisan gerrymander. The

Voter Petitioners and petitioners contesting a redistricting plan on partisan gerrymandering grounds both assert that they have unequal opportunities to elect representatives of their choice due to inequalities in the election process. *See League of Women Voters*, 178 A.3d at 765. Both the Voter Petitioners and the petitions in *League of Women Voters* can argue that the "the 'weight' of their votes has been substantially diluted." *Id.* Here, the Voter Petitioners' votes for Republican candidates are diluted by those Boards who have improperly adopted notice-and-cure procedures to permit primarily voters for Democratic candidates to fix ballots which otherwise should not count. In both redistricting cases and the instant matter, the complaint is the same: the unequal election framework throughout the Commonwealth has deprived some voters—including the Petitioners here—of "an equal opportunity to translate their votes into representation." *Working Families Party*, 209 A.3d at 279 (quoting *League of Women Voters*, 178 A.3d at 804).

4. *Voter Petitioners Have Standing Due to an Increased Risk of Harm.*

In *Ball*, the Supreme Court did not take the opportunity to consider the Voting Petitioners' standing under a theory of increased risk of harm. Here, the Voting Petitioners' diluted voting power resulting from cured absentee and mail-in ballots subjects them to an increased risk of harm that candidates other than those for whom Voter Petitioners will vote may win. This is true *regardless* of whether the cured ballots primarily support or harm the candidates they support. This is a form of

substantial, direct, and immediate harm that the Supreme Court had no opportunity to consider in *Ball*.

As noted above, since the advent of no-excuse mail-in ballot voting under Act 77, voting by mail has disproportionately favored Democratic candidates. Those candidates, then, are most likely to benefit from the use of illegal notice-and-cure protocols, as probabilistically, a cured ballot is also more likely to benefit a Democratic candidate. This tilting of the odds increases the likelihood of those Democratic candidates winning elections, harming the Voter Petitioners who support Republican candidates.

In addition, in races with more than two candidates, even a small number of improperly cured ballots for an opposing candidate could create a plurality vote that swings an election. Consider the following example, involving 3 candidates and 100 votes cast, 90 of which were valid and 10 of which are cured:

Candidate	Valid Votes	Cured Votes
A	24	5
B	32	4
C	34	1

If cured votes are permitted to be counted, Candidate B would win with 36 votes (out of 100 votes), but Candidate C would have won with 34 votes (out of 90 votes) absent curing. In neither case would Candidate A win, so under the Pennsylvania Supreme Court's analysis in *Ball*, voters for Candidate A should not have had standing. But that analysis is incomplete. Supporters of Candidate A also

have a right to be governed by Candidate C (whom they may prefer to Candidate B), rather than Candidate B, who won only with the counting of invalidly cured ballots. Despite their first choice among candidates losing regardless of whether cured votes are counted, supporters of Candidate A still suffer harm by the wrongful election of Candidate B instead of Candidate C.

The U.S. Supreme Court has held that the "risk of real harm" can satisfy the "concreteness" requirement for standing under federal law. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). The Third Circuit, in turn, has held that a violation of a procedural requirement in a statute "manifests concrete injury if the violation … presents a material risk of harm to the underlying concrete interest." *Kamal v. J. Crew Group, Inc.*, 918 F.3d 102 (3d Cir. 2019).

The closeness of elections in Pennsylvania, together with multi-candidate elections in which winners are determined by a plurality, increases the risk of harm resulting from the counting of ballots that were cured in violation of the Election Code.[4] Such races always bear the risk that the "wrong" candidate might be elected if such invalid votes are counted. Indeed, just in the past 3 years, multiple races were won and lost based on court decisions regarding undated ballots. *See, e.g.*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022) (court's decision whether to count undated ballots

[4] For examples of how notice-and-cure procedures are "inconsistent with law," specifically the Election Code, *see, e.g.*, Am. Pet. ¶ 134.

determined outcome of election); *Ziccarelli v. Allegheny County Bd. of Elections*, No. 2:20-cv-1831-NR, 2021 U.S. Dist. LEXSIS 5272, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021) (same). Of course, ballot secrecy makes it impossible to ever know whether this risk has materialized.[5] But the mere presence of the risk is the harm that gives rise to standing.

5. *Voter Petitioners' Speech Rights Are Harmed by Curing.*

The inclusion of invalid ballots in a count harms the Voter Petitioners' ability to communicate with candidates through the means of the ballot. *See Williams v. Rhodes*, 393 U.S. 23, 31–32 (1968). As the Supreme Court has held, the right to vote encompasses the associational right that voters and candidates have to associate by means of the ballot. *Id*. at 31 (discussing ballot access as vital to the associational rights of candidates and supporters). But that associational right is impaired if invalid votes are allowed to enter the mix. Critically, this speech-based harm exists even if invalid ballots *favor* the candidate supported by the Voter Petitioners. In that instance, every invalid ballot included in the count diminishes the weight of valid

[5] *See Ball v. Chapman*, 2022 Pa. LEXIS 1879, 2023 WL 2031284, at *30 ("There is no way of knowing whether undated and incorrectly dated absentee or mail-in ballots will be cast for Republicans, Democrats, or others." But the Court's repeated handling of redistricting cases on the merits demonstrates that absolute certainty regarding the votes cast in future elections is not necessary. Given the required secrecy attendant with each vote cast in an election, to say nothing of the impossibility of knowing with certainty how future elections will unfold, data reflecting past voting tendencies in the aggregate is sufficient both to establish standing and for the Court to address cases on the merits. *See, e.g.*, *League of Women Voters*, 178 A.3d at 767–81 (reviewing data of the composition of the congressional districts and expert testimony regarding projected future election results).

voters' ballots, not in the context of the electoral contest, but with respect to the power of those ballots to communicate a message to their preferred candidate. Invalid votes that favor the candidate supported by Voter Petitioners diminish the strength of the ballot-based associational bond that otherwise exists between voter and candidate. The Court in *Ball* had no occasion to consider harm to this associational harm.[6]

Accordingly, the Voter Petitioners have standing.

III. THE BOARDS LACK DISCRETION TO IMPLEMENT NOTICE-AND-CURE PROCEDURES.

Under the Election Code, the Boards enjoy only limited rulemaking authority, and such authority does not extend to the development of sweeping notice-and-cure procedures when this Court has observed that the Election Code itself does not provide for the same. Rather, Boards "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. Beyond specifically enumerated authorities, the Election Code allows Boards only "[t]o make and issue such rules, regulations and instructions, **not inconsistent with law**, as they may deem necessary for the

[6] The Philadelphia Board's suggestion that *Williams* is "wholly inapposite" misses the point. With respect to standing, the question is simply whether a party—here, the Voter Petitioners—have been harmed by the State's (or Board's) actions. Because the Supreme Court has held that voters have an associational right with their preferred candidates, *see Williams*, 393 U.S. at 32, that right is harmed when voters cannot speak with the same force to candidates because the state is diluting their voices. At a minimum, voters must have standing to ask the Court whether Boards are authorized to dilute their voice with differential curing policies.

guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f) (emphasis added); *see also PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) "extends only to the promulgation of rules that are 'not inconsistent with law.'"). The Boards lack the discretion to implement notice-and-cure procedures because they are, in fact, "inconsistent with law."

A. Notice-And-Cure Procedures Are "Inconsistent With Law" Because The Election Code Does Not Authorize Them.

The unique and idiosyncratic notice-and-cure procedures developed by some of the Boards are "inconsistent with law" because the Supreme Court has already thoughtfully reviewed the relevant statutes detailing canvassing and pre-canvassing of mail and absentee ballots and found that they do not provide for notice-and-cure procedures. The Election Code does not set forth a procedure by which Boards are permitted to provide voters with notice and an opportunity to cure their mail-in or absentee ballots that fail to comply with the signature and secrecy envelope requirements set forth in 25 Pa. C.S. §§ 3146.6(a) or 3150.16(a).

In *Pa. Democratic Party*, the petitioners sought an order requiring the Boards to contact voters whose mail-in or absentee ballots failed to comply the Election Code's requirements regarding signatures and secrecy envelopes. *Pa. Democratic Party*, 238 A.3d at 372. The Pennsylvania Democratic Party said this was required by the Free and Equal Elections Clause of the Pennsylvania Constitution, PA. CONST.

art. I, § 5, and could be implemented through the Court's "'broad authority to craft meaningful remedies' when necessary." *Id.* at 373 (quoting *League of Women Voters v. Commonwealth*, 178 A.3d at 737, 822 (Pa. 2018)).

The Supreme Court agreed with the Acting Secretary and soundly rejected the Pennsylvania Democratic Party's contentions. It noted what was obvious from a plain reading of the Election Code: the Election Code "does not provide for [a] 'notice and opportunity to cure' procedure" outside narrow circumstances relating to voters providing proof of identification. *Id.* at 374. It further held that to the extent a voter is at risk for having his or her ballot rejected due to a failure to comply with the Election Code's signature and secrecy envelope requirements, "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature." *Id.* This was so "particularly in light of the open policy questions attendant to that decision… which are best left to the legislative branch of Pennsylvania's government." *Id.* (policy questions included "what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots").

In other words, this Court could not *impose* an election administration requirement on the County Boards because it could not discern anywhere in the law any principles for resolving the open policy questions identified. If such principles

existed in the law, surely this Court would have discerned and applied them, rather than needlessly leaving voters exposed to the very serious risk of "having [their] ballot rejected due to minor errors." *Pa. Democratic Party*, 238 A.3d at 374. Those defending the County Boards must believe that they are better at discerning governing principles than this Court. They must also believe that it is acceptable for those principles to vary from county to county in a system constitutionally and statutorily obligated to strive for uniformity. And that when this Court said "legislature," it did not mean "legislature." Respondents have provided no reasons that could conceivably justify any of those views. The truth is, this Court could not discern the requisite principles for resolving the open policy questions because they simply are not set forth anywhere in our law—and that when this Court said "legislature," it meant it.

In the intervening two-plus years since *Pa. Democratic Party* was decided, no such legislative solution to the "open policy questions" has materialized, although not for lack of trying. In 2021, the Legislature considered and even passed legislation requiring a notice-and-cure procedure for non-compliant mail-in and absentee ballots. *See* House Bill 1300, Printer's Number 1869, § 1308(g)(2)(iv), (v) (2021).[7] But former Governor Wolf vetoed that legislation. As a result, the Election Code

[7] Additional legislation was proposed in November 2021, but also failed. *See* House Bill NO. 1800, Printer's Number 2431, § 1308 (2021).

remains as it existed in 2020 when *Pa. Democratic Party* was decided: without a legislatively proscribed notice-and-cure procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

Thus, post-*Pa. Democratic Party*, the Election Code provides a notice-and-cure procedure in only one circumstance: "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." *See* 25 P.S. § 3146.8(h). This procedure provides that if proof of a voter's identification is received and verified prior to the sixth day following the election, the Board shall canvass the absentee or mail-in ballot. *Id.* § 3146.8(h)(2). As was the case at the time *Pa. Democratic Party* was decided, no other notice-and-cure procedures exist in the Election Code.

B. The Election Code's Lack Of Notice-And-Cure Procedures For Signature, Date, And Secrecy Envelope Requirements Does Not Give Boards License To Create Them.

Boards do not have discretion to implement notice-and-cure procedures to address signature, date, and secrecy envelope requirements simply because the Election Code does not provide one. *See* § 2642(f). Indeed, the Legislature's enactment of a notice-and-cure procedure for voters who fail to provide proof of identification at the time they request their absentee or mail-in ballot serves as evidence that the Legislature intended for no other cures to be available.

1. Expressio Unius est Exclusio Alterius *Demonstrates That Notice-And-Cure Procedures Are "Inconsistent with Law."*

"One fundamental maxim of statutory construction, 'expres[s]io unius est exclusio alterius,' stands for the principle that the mention of one thing in a statute implies the exclusion of others not expressed." *Commonwealth v. Spotz*, 716 A.2d 580, 590 (Pa. 1998); *accord In re Little Beaver Twp. Sch. Dirs.' Election*, 30 A. 955 957 (Pa. 1895) ("In so far as the mode of voting is thus specifically prescribed by the act, all other modes are, by necessary implication, forbidden."); *see also In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004) ("under the principles of *expression unius est exclusio alterius*, the General Assembly's failure to describe an alternative to mailing or in-person delivery of absentee ballots implies that third-person delivery is forbidden.").

Because the Legislature established a notice-and-cure procedure for a certain defect—a voter's initial lack of proof of identity, *see* 25 P.S. § 3146.8(h)—it obviously had the ability to legislate additional notice-and-cure procedures. But it has not done so, and it is well aware that it has not done so. Under these circumstances, the Court "must listen 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).

2. *Section 2642(f) Gives Boards Only Limited Power to Engage in Rulemaking That the Legislature Authorizes.*

Rather than giving Boards unfettered power to regulate election administration, § 2642 merely allows Boards to engage in rulemaking in the small "gaps" the Legislature created in the Election Code.

The Supreme Court's decision in *In re Nov. 3, 2020 Gen. Election* is instructive. 240 A.3d 591 (Pa. 2020). There, the Court assumed King's Bench jurisdiction to consider "[w]hether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature variances." *Id.* at 595. The Court concluded that the Election Code, specifically 25 P.S. § 3146.8(g)(3), "does not impose a duty on county boards to compare signatures." *In re. Nov. 3, 2020 Gen. Election*, 240 A.3d at 609. Had the Court stopped there, Boards might have been permitted under § 2642(f), even though not required, to compare signatures. But the Court did not stop there. Rather, the Court held that "[i]t is a well established principle of statutory interpretation that we 'may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.'" *Id.* (quoting *Sivick v. State Ethics Comm'n*, 238 A.3d 1250 (Pa. 2020)). Under that principle, the Court held that "county boards of elections are ***prohibited*** from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of

third-party challenges based on signature analysis and comparisons." *Id.* at 611 (emphasis added).

In contrast, *In re Canvassing Observation* demonstrates the type of circumstances where the Boards do have interpretive discretion to promulgate their own rules. 241 A.3d 339 (Pa. 2020). At issue in *In re Canvassing Observation* was Boards' varied rules governing the how close authorized representatives could stand to Board workers conducting the canvass. Although the Election Code provided that authorized representatives could "remain in the room," the Legislature did not set forth specific distance requirements for those authorized representatives. The Court permitted to fill this gap in the statute, holding that "[i]t would be improper for this Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.* at 350. The Court "deem[ed] the absence of proximity parameters to reflect the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections" under § 2642(f). *Id.*

In this case, the Boards are effectively writing a new election code, not filling any statutory gap or making decisions deliberately left to them by the legislature. So the circumstances here much more closely match *In re Nov. 3, 2020 Gen. Election* than *In re Canvassing Observation*. Here, the Legislature enacted one cure procedure, to apply only in the limited circumstance of a voter initially failing to

provide proof of identification. The Court cannot "supply omissions" in the Election Code when the Legislature may have intentionally omitted providing notice-and-cure procedures under any other circumstances. The absence of notice-and-cure procedures for signature, date, and secrecy envelope defects in absentee or mail-in ballots is not a mere "gap" in the law like *In re Canvassing Observation*, where the Election Code provides that authorized representatives must be permitted "in the room" but fails to specify how close they may stand. Just as the Court held the Election Code did not allow county boards to exercise discretion to impose signature matching requirements, the same Election Code that does not provide for a notice-and-cure procedure cannot be interpreted as allowing Boards to develop and implement their own idiosyncratic curing procedures.

In fact, if section 302(f) authorizes these types of rules and regulations from County Boards, it calls into question the reasoning in several of the Supreme Court's recent precedents, most notably *Pa. Democratic Party*, which required the invalidation of votes for various reasons. There, not only did the Court hold that it could not impose cure proceedings on Boards, but it also professed itself powerless to save so-called naked ballots from invalidation.[8] But if section 302(f) is as broad

[8] *See Pa. Democratic Party*, 238 A.3d at 380 ("Thus, we find that our holding in *Appeal of Pierce* leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.… Accordingly, we hold that the secrecy provision language in Section 3150.16(a) is mandatory and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.").

as the Respondents suggest, the Supreme Court should not have been so categorical. Rather than merely disqualifying votes, the Supreme Court could have noted that Boards have the power to "re-qualify" votes resides with the Boards in addition to the General Assembly.

But the alternative, which is better supported by *Pa. Democratic Party* and *In re Nov. 3 Election*, as well as ordinary tools of statutory construction, is that the Election Code, including section 302(f), does not authorize curing of this type.

C. Board Implementation of Notice-and-Cure Procedures Is "Inconsistent With Law" Concerning Authorized Pre-Canvassing Activities And Provisional Ballot Voting.

Boards are not free to implement their own notice-and-cure procedures because such procedures are "inconsistent with law," i.e., the Election Code.

1. *The Election Code Expressly Mandates How Boards Must Handle Absentee and Mail-In Ballots.*

a. Boards must keep absentee and mail-in ballots in sealed and locked containers "upon receipt."

Boards cannot develop notice-and-cure procedures because the Election Code already spells out precisely what Boards must do upon receipt of absentee and mail-in ballots. Under the Election Code, Boards,

> **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 ballots as in sealed official mail-in allot 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**.

25 P.S. § 3146.8(a) (emphases added). Thus, it is "inconsistent with law" for Boards to do anything else with the absentee and mail-in ballots upon receipt. This includes inspecting the absentee and mail-in ballots, notifying voters of potential defects in their absentee or mail-in ballots, and allowing such voters to "cure" their defective ballots in some manner.

b. <u>The Election Code prescribes when pre-canvassing can begin.</u>

Boards cannot implement their own notice-and-cure procedures because they constitute pre-canvass activities, and the Election Code expressly limits when such activities may take place.

Under the Election Code, "pre-canvass" includes "the inspection … of all envelopes containing official absentee ballots or mail-in ballots." 25 P.S. § 2602(q.1). The Election Code also expressly defines when the pre-canvass may begin: "The county board of elections shall 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). In addition, Boards must provide "at least forty-eight hours' notice of a pre-canvass meeting," and must permit "[o]ne authorized representative of each candidate in an election and one representative from each political party" to "remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed." 25 P.S. § 3146.8(a)(1.1). This, of course, ensures transparency during the course of the

Boards' handling of the absentee and mail-in ballots. Boards' notice-and-cure procedures, while including aspects of the "inspection" required during the pre-canvass, are not only performed earlier than the pre-canvass is permitted to begin, but also do not necessarily include the same notice and observer requirements as are afforded during the pre-canvass.

Cure procedures are "inconsistent with law" because they necessarily entail "inspection" of the absentee and mail-in ballot envelopes before the pre-canvass is permitted to begin. Because "inspection" is not defined in the Election Code, the Court must construe it according to its ordinary usage. *See* 1 Pa. C.S. § 1903(a); *accord Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632, 636 n.6 (Pa. 2009) ("Absent a statutory definition, we construe statutory words according to their ordinary usage."). The ordinary usage of "inspection" is the "checking or testing of an individual against established standards." *See, e.g.*, *Inspection*, MERRIAM-WEBSTER'S DICTIONARY (online ed.), *available at* https://www.merriam-webster.com/dictionary/inspection (last visited Oct. 5, 2022). Cure inspections require "inspection" of absentee and mail-in ballots. To determine whether a voter complied with the signature and dating requirements of the Election Code, Boards must visually inspect the ballot envelopes. To determine whether voters included the secrecy envelope, some Boards have taken to weighing the ballot envelopes. Regardless of how Boards go about "checking or testing" individual ballot envelopes

against the established standards of the Election Code, they are unquestionably inspecting them. When Boards engage in these inspections prior to 7:00 a.m. on election day, they are pre-canvassing absentee and mail-in ballots before the Election Code allows them to do so.

Similarly, the Boards' notification to voters or others regarding defects in absentee or mail-in ballots is "inconsistent with law." "No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls." 25 P.S. § 3146.8(g)(1.1).[9] But that is precisely what Boards do when they contact voters or party representatives or publish notices on the internet regarding defective absentee or mail-in ballots. These notifications are disclosures of the "results" of a "portion" of a pre-canvass meeting, wherein the ballots were inspected and determined to be invalid and prohibited from being included in the vote total.

Accordingly, notice-and-cure procedures are "inconsistent with law" as established by the Election Code, and the implementation of the same constitutes an abuse of Board discretion under § 2642(f).

[9] This provision's reference to "the results of any portion of any pre-canvass meeting prior to the close of the polls" must be broader than the results of counting, computing and tallying of votes, since a pre-canvass "does not include the recording or publishing of the votes reflected on the ballots." 25 P.S. § 2602(q.1). Accordingly, the referenced "results" must be understood as the information produced by the pre-canvass "inspection" of absentee and mail-in ballots. *See* 25 P.S. § 3146.8(g)(1.1). In any event, that a ballot will not count due to a defect such as the lack of a signature, date, or secrecy envelope is a "result," which cannot be disclosed until the polls close. *Id.*

2. *Notice-And-Cure Procedures That Involve Provisional Voting Are "Inconsistent with Law" Because They Require Voters to Make Knowingly False Statements Under Penalty of Perjury.*

A cure commonly invoked by Boards when a voter's absentee or mail-in ballot is found to have a defect is to encourage or allow such voter to vote provisionally. But to do so, the voter is required to make a false statement while subject to the penalties for perjury.

Provisional voting is not open to just anyone. Rather, voters who both "receive and vote" via absentee or mail-in ballot "shall not be eligible to vote at a polling place on election day." 25 P.S. §§ 3146.6(b)(1); 3150.16(b)(1). To ensure such voters do not vote at the polling place, "[t]he district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place." 25 P.S. §§ 3146.6(b)(1); 3150.16(b)(1).[10]

Cure procedures that encourage or allow voters who cast an absentee or mail-in ballot that does not comply with the Election Code's signature, date, or secrecy envelope requirements to vote via provisional ballot suborn such voters to commit

[10] This restriction applies only to voters who both receive ***and*** vote via absentee or mail-in ballot. Those voters who requested an absentee or mail-in ballot but did not cast it may vote provisionally. 25 P.S. §§ 3146.6(b)(2); 3150.16(b)(2). Those voters who requested an absentee or mail-in ballot and spoil it at the polling place may vote at the polling place. 25 P.S. §§ 3146.6(b)(3); 3150.16(b)(3). Likewise, those voters whose absentee or mail-in ballot "is not timely received" by the Board may also vote via provisional ballot. 25 P.S. §§ 3146.3(e), 3150.3(e).

perjury. The Election Code requires every voter who casts a provisional ballot to sign an affidavit which states:

> I do solemnly swear or affirm that my name is _____, that my date of birth is _____, and at the time that I registered I resided at _____ in the municipality of _____ in _____ County of the Commonwealth of Pennsylvania **and that this is the only ballot that I cast in this election**.

25 P.S. § 3050(a.4)(2) (emphasis added).[11] Of course, every voter casting a provisional ballot who signs this affidavit makes a knowingly false, sworn statement: they are only voting provisionally ***because*** they cast another ballot in that election.[12]

Accordingly, any notice-and-cure procedure that encourages or allows voters to vote provisionally after casting a defective absentee or mail-in ballot is "inconsistent with law," specifically, the Election Code's express prohibition of such practice. Such notice-and-cure procedures are also "inconsistent with law" because they require voters to submit knowingly false statements in sworn affidavits.

[11] The Election Code does not define the term "cast." Nevertheless, this Court has plainly used the term as synonymous with submit or deliver a vote to the Board. *See, e.g.*, *Pa. Democratic Party*, 238 A.3d at 371 n.26 (Pa. 2020) ("We emphasize that voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters, including those utilizing drop boxes ….''). Whether a ballot is valid and able to be counted has no bearing on whether the vote was "cast." *See, e.g.*, 25 P.S. § 3146.8(g)(7) ("Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.").

[12] Allowing voters who already cast an absentee or mail-in ballot to also vote provisionally also introduces a risk that the voter will be permitted to vote twice. The Election Code does not provide for defective absentee and mail-in ballots to be spoiled.

Because these notice-and-cure procedures are "inconsistent with law," Boards lack the discretion to implement them under 25 P.S. § 2642.

D. The Disuniformity Permitted By Allowing Boards To Implement Their Own Notice-And-Cure Procedures Is "Inconsistent With Law."

Both the Pennsylvania Constitution and the Election Code require uniformity in election administration. Thus, allowing Boards to implement their own unique notice-and-cure procedures is not merely bad policy, it is "inconsistent with law" and with their own affirmative obligations under the Election Code. Accordingly, Boards lack the discretion to implement their own notice-and-cure procedures.

"All laws regulating the holding of elections by the citizens … shall be uniform throughout the State." PA. CONST. art. VII, § 6; *accord Kuznik v. Westmoreland County Bd. of Comm'rs*, 902 A.2d 476, 492 (Pa. 2006) (noting that the Election Code contemplates a "unitary system of voting in Pennsylvania" in keeping with Article VII, § 6 of the Pennsylvania Constitution); *see also* PA. CONST. art. I, § 5 ("Elections shall be free **and equal**" (emphasis added)). "Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation." *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018)). "The Free and Equal Elections Clause was specifically intended to equalize the power of voters in our

Commonwealth's elections process, and it explicitly confers this guarantee." *Id.* (quoting *League of Women Voters*, 178 A.3d at 812). Similarly, the Election Code, in turn, cements the requirement for uniformity in election administration. Under the Election Code, the Boards are required to inspect "the conduct of primaries and elections … to the end that primaries and elections may be honestly, efficiently, and ***uniformly*** conducted." 25 P.S. § 2642(g) (emphasis added).

The Supreme Court has long enforced requirements that Boards administer elections in an "equal" and "uniform" manner:

> "All laws regulating the holding of elections … shall be uniform throughout the State." What is meant by the word "uniform" as here used? A law is general and uniform if all persons in the same circumstances are treated alike. Uniform operation means that the same law shall apply to all persons placed in the same circumstances. 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 provision.

Winston v. Moore, 91 A. 520, 524 (Pa. 1914). "Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation." *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (quoting *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018)).

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honestly, efficiently, and ***uniformly*** conducted." 25 P.S. § 2642(g) (emphasis added).[13]

It is "inconsistent with law" to allow the Boards to administer elections in a manner that is distinctly non-uniform, resulting in a two-tier system. Some counties' adoption of notice-and cure procedures has resulted in a two-tier system, based upon voters' county of residence, in which some voters receive a second opportunity to ensure their vote will count—and in turn, "translate their votes into representation"—while others do not. All persons "placed in the same circumstances" will not have the same election law apply. Rather, voters in Philadelphia County will have the luxury of a "second bite at the apple" if their absentee or mail-in ballot failed to comply with signature, date, or secrecy envelope requirements, notwithstanding provisions of the Election Code discussed above that prohibit such voters getting a mulligan. A similar voter in Butler County, however, will not enjoy the same opportunities, and, in fact, will be subject to an entirely different set of rules. The unequal adoption and implementation of notice-and-cure

[13] The Philadelphia Board wrongly argues that if the disuniformity in the availability of notice-and-cure procedures violated Pennsylvania's constitution, "the solution would be to level up and require *all* counties to develop enfranchising procedures, not level down and prohibit them everywhere." Philadelphia Board Br. at 66. But the Pennsylvania Supreme Court has already made clear that "leveling up" is not permissible here. In *Pa. Democratic Party*, the Court acknowledged that the Election Code "does not provide for the 'notice and opportunity to cure' procedure sought by Petitioner." *Pa. Democratic Party*, 238 A.3d at 374. The Supreme Court thus declined to mandate such a "level up" solution, holding that such decision "is one best suited for the Legislature." *Id.*

procedures prevents all voters within the Commonwealth from having an "equal opportunity to translate their votes into representation." Specifically, some counties' adoption of notice-and-cure procedures results in a two-tier system, based upon voters' county of residence, in which some voters receive a second opportunity to ensure their vote will count—and in turn, "translate their votes into representation"—while others do not. Hence, as a result of this two-tier system, not all voters have equal power within the election process. Similarly, the discrepancies in the procedures used by those counties that have adopted notice-and-cure procedures has created further inequalities in opportunities for voters to translate their votes into representation, based upon when their ballots are received, and in the case of those counties who delegate the notification process to political parties, candidates, and/or special-interest groups, whether the voter supports the notifiers' favored candidates or party.

In refusing to mandate notice-and-cure procedures, the Supreme Court noted the "open policy questions" attendant with the decision to provide a cure procedure, "including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots." *Pa. Democratic Party*, 238 A.3d at 374. Allowing all 67 Boards to independently resolve the multitude of policy questions identified in *Pa. Democratic Party* would render it impossible to ensure that the

Commonwealth's elections are "uniformly conducted." Absent clarity from this Court and a permanent injunction against notice-and-cure procedures, disuniformity will reign, and elections will vary from county to county, even on important issues such as differential access to ballot-saving remedies.[14] This approach enshrines a two-tier paradigm where roughly half the voters of the Commonwealth enjoy residing in counties that have a notice-and-cure procedure and a safety net to ensure their absentee and mail-in ballots will count, while the other half of the population must resign themselves to being "have-nots." Accordingly, the Boards' notice-and-cure procedures are "inconsistent with law" and not within the Boards' discretion to implement. The Respondents' demurrers suggesting that such notice-and-cure procedures are permitted under the Boards' "discretion" must be overruled.

IV. ALLOWING BOARDS TO IMPLEMENT THEIR OWN NOTICE-AND-CURE PROCEDURES WOULD VIOLATE THE ELECTIONS CLAUSE.

The Elections Clause of the United States Constitution directs: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time

[14] Petitioners acknowledge that *some* disuniformity is unavoidable. For example, Boards may regulate proximity parameters when the Election Code only specifies that authorized representatives may "remain in the room," *see In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020); such "rooms" in the counties throughout the Commonwealth will necessarily be different sizes, and the Legislature's deliberate ambiguity about proximity gives the Boards license to determine what proximity makes sense. But § 2642(f) cannot be read to authorize Boards to make wholesale changes to the administration of elections, particularly on such significant matters as determining which votes will count. Such massive disuniformities are self-evidently inconsistent with law, namely § 2642(g).

by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. The United States Supreme Court held that:

> [i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to **notices**, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, **counting of votes**, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (Pa. 1932) (emphases added). "The Framers intended the Elections Clause to grant States authority to create procedural regulations." *United States Term Limits v. Thornton*, 514 U.S. 779 (1995). "Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people. So comprehended, the clause doubly empowers the people. They may control the State's lawmaking processes in the first instance … and they may seek Congress's correction of regulations prescribed by state legislatures." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015).

The Elections Clause plainly contemplates that only two entities are empowered to regulate the "manner" in which elections are conducted: the Legislature and Congress. The General Assembly has authorized only a limited notice-and-cure procedure regarding proof of identification through the Election Code, and a recent bill passed by the Legislature to include broader notice-and-cure

procedures was vetoed by Governor Wolf. For its part, Congress has not created any notice-and-cure procedure for Pennsylvania elections.

Moreover, there is nothing in the Election Code to suggest that the General Assembly has authorized Boards to develop and implement notice-and-cure procedures of their own. The powers granted to the Boards are limited. *See* 25 P.S. § 2642. Indeed, the Boards are required to inspect "the conduct of primaries and elections … to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted." *Id.* § 2642(g) (emphasis added). Accordingly, Boards are authorized only "[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." *Id.* (emphasis added); *see also PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) "extends only to the promulgation of rules that are 'not inconsistent with law.'").

In *Pa. Democratic Party*, the Pennsylvania Supreme Court clearly expressed what the law is with respect to notice-and-cure procedures: the Election Code does not provide for any aside from proof of identification. Indeed, the Court recognized that the Elections Clause restricted the power of entities other than the General Assembly to adopt notice-and-cure procedures. *See Pa. Democratic Party*, 238 A.3d at 366–67. Those Boards which have implemented their own notice-and-cure

procedures cannot be acting "consistent with law" and, to the extent such notice-and-cure procedures differ from those implemented by other Boards (and from those Boards which have not implemented a cure procedure), have usurped the Legislature's authority to regulate the "manner" of elections in Pennsylvania. Such conduct must be enjoined.

V. DEMURRERS TO THE REQUEST FOR INJUNCTIVE RELIEF ARE WITHOUT MERIT.

As set forth above, the notice-and-cure procedures implemented by some of the Boards are "inconsistent with law" and thus outside the Boards' discretion. But these unlawful notice-and-cure procedures also readily establish harm sufficient to support the issuance of a permanent injunction: in particular, unconstitutional disuniformity on material aspects of election administration and the counting of ballots, placing Pennsylvania voters in a two-tier system where some get the benefit of a second chance to have their absentee or mail-in ballot count, while others do not.

Unlawful action by a Board "per se constitutes immediate and irreparable harm." *Hempfield Sch. Dist. v. Election Bd. of Lancaster County*, 574 A.2d 1190, 1193 (Pa. Commw. 1990). "Where a statute proscribes certain activity, all that need be done is for the court to make a finding that the illegal activity occurred." *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980). A "violation of law" cannot be considered a benefit to the public. *Id.* (citing *Pennsylvania Pub. Utility Com. v.*

Israel, 52 A.2d 317, 321 (Pa. 1947)). "For one to continue such unlawful conduct constitutes irreparable injury." *Israel*, 52 A.2d at 321.

In *Hempfield School District*, a school board filed an action requesting that the county board of elections be enjoined from placing a non-binding referendum question on the primary ballot. The trial court dismissed the action, but this Court reversed, holding that the Board lacked the authority under the Election Code to place the referendum question on the ballot. This Court held "[i]t is *a priori* that a governmental body such as an election board has only those powers expressly granted to it by the legislature." *Hempfield Sch. Dist.*, 574 A.2d at 1191. It held that Act 34, 24 P.S. § 7-701.1 required the board of school directors, not the board of elections, to obtain the consent of the electorate by referendum or public hearing prior to the construction or leasing of a new school building. The Court thus found that the board of elections' placement of a non-binding referendum on the primary was an unlawful action that "per se constitute[d] immediate and irreparable harm." *Id.* at 1193.

Here, the Pennsylvania Supreme Court has already held that a notice-and-cure procedure to address signature, date, and secrecy envelope defects in mail-in and absentee ballots must come from the Legislature. *See Pa. Democratic Party*, 238 A.3d at 373. Thus, the continued implementation of such notice-and-cure procedures by Boards constitutes a "violation of law" which per se constitutes immediate and

irreparable harm. Moreover, the disparate approaches taken by the Boards run afoul of 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; *see also Kuznik v. Westmoreland County Bd. of Comm'rs*, 902 A.2d 476, 492 (Pa. 2006) ("[T]he Election Code, the Pennsylvania Constitution, and the testimony of experienced election officials contemplated a unitary system of voting in Pennsylvania ….").

There is no question that per se immediate and irreparable harm will occur without a permanent injunction. At least fifteen Boards implement notice-and-cure procedures in elections. They have, therefore, admitted they intend to engage in pre-canvass activities—inspecting mail-in and absentee ballots and disclosing the results of same via notification to voters whose ballots will not count—before the time designated in the Election Code. These notice-and-cure procedures are not authorized under the Election Code and many of these notice-and-cure procedures are not publicly disclosed and differ from one another, and quite possibly even within a single county. The Voter Petitioners thus suffer the risk of having votes being treated unequally, while the Republican Committee Petitioners are unable to properly educate their members regarding the rules applicable to mail-in and absentee ballots, especially when such notice-and-cure procedures directly violate Pennsylvania law.

Moreover, the holding of an election in a manner that violates applicable election laws constitutes irreparable harm to all Pennsylvania voters. *See United States v. Berks County*, 250 F. Supp. 2d 525, 540 (E.D. Pa. 2003) (collecting cases which held that the holding of an election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters). The Respondents fail to explain how a voter in a county that does not offer a notice-and-cure procedure could ever reverse the harm inherent in having a vote not count when a voter in a neighboring county in the exact same circumstance may get a mulligan. *Id.*

Because (1) the Pennsylvania Supreme Court has already held that all notice-and-cure procedures for defective mail-in and absentee ballots must come from the Legislature, (2) the Legislature's effort to create such a notice-and-cure procedure was vetoed by Governor Wolf, and (3) a violation of election law constitutes immediate and irreparable harm per se, and (4) no adequate damages remedy exists, a permanent injunction is necessary to prevent the immediate and irreparable harm caused by Boards failing to follow the Election Code and the Pennsylvania Supreme Court's holding in *Pa. Democratic Party*.

VI. THIS ACTION IS NOT BARRED BY THE DOCTRINE OF LACHES.

This Court has already ruled that in the context of the Petitioners' Application for Preliminary Injunction, the Respondents' invocation of the doctrine of laches was inapplicable. Such ruling should apply with even greater force here, as the

immediacy inherent in a request for preliminary injunctive relief is absent. On this basis alone, the Respondents' preliminary objections invoking the laches defense should be overruled.

"Laches is an equitable doctrine that 'bars relief when the complaining party is guilty of want of due diligence in failing to promptly institute [an] action to the prejudice of another.'" *Chapman v. Berks County Bd. of Elections*, 2022 Pa. Commw. Unpub. LEXIS 390, 2022 WL 4100998, at *27 (quoting *Sprague v. Casey*, 550 A.2d 184, 187 (Pa. 1988)). "To prevail on the assertion of laches, it must be established that there was an inexcusable delay arising from the petitioners' failure to exercise due diligence, and prejudice to the party asserting laches resulting from the delay." *Id.* "It is not enough to show delay arising from failure to exercise due diligence; for '[l]aches will not be imputed where no injury has resulted to the other party by reason of the delay.'" *Kehoe Gilroy*, 467 A.2d 1, 4 (Pa. Super. 1983) (quoting *Brodt v. Brown*, 172 A.2d 152, 154 (1961)).

Here, neither element of laches is present. As set forth in Petitioners' Application for Preliminary Injunction, which is incorporated by reference herein, the Petitioners timely commenced this suit after proposed legislation to implement notice-and-cure procedures failed and Boards responded to Petitioners' Right to Know Law requests.

Likewise, there is no undue prejudice: a "violation of law" cannot be considered a benefit to the public. *Commonwealth v. Coward*, 414 A.2d 91, 98 (Pa. 1980). Indeed, the only prejudice alleged by the Boards asserting this defense is their alleged expenditure of resources to implement the illegal notice-and-cure procedures. These expenditures would have been incurred the moment the Boards implemented such notice-and-cure procedures, independent of any alleged "delay" in the Petitioners commencing this action. Likewise, there is no prejudice to voters: just as people do not (or should not) engage in riskier behavior simply because they are insured, for example, Pennsylvania voters do not rely on curing when casting their ballots simply because they *might* live in a county that *might* allow that procedure.

Further, although "laches may be raised and determined by preliminary objection," such is permitted only when "laches clearly appears in the complaint." *Holiday Lounge, Inc. v. Shaler Enterprises Corp.*, 272 A.2d 175, 177 (Pa. 1971); *accord Ritter v. Theodore Pendergrass Teddy Bear Prods., Inc.*, 514 A.2d 930, 933–34 (Pa. Super. 1986) (quoting *Estate of Marushak*, 413 A.2d 649, 651 (1980) ("While the defense of laches may be raised by preliminary objections, laches should never be declared unless the existence thereof is clear on the face of the record."). As demonstrated below, laches are not applicable at all; certainly, nothing on the face of the Petition for Review gives rise to the application of laches.

The few Respondents who raised this defense certainly cannot meet their burden on the face of the pleadings. Both the Bucks Board and Montgomery Board refer to alleged expenditures they made, however, the Amended Petition is silent on these points, and even these Boards fail to provide any source to support their factual contentions. *See* Bucks Board Br. at 8; Montgomery Board Br. at 7. Respondents' invocation of the doctrine of laches simply does not apply here.

VII. NON-CURING BOARDS MUST ALSO REMAIN IN THIS ACTION.

Contrary to the argument raised by the Boards of Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntington, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties, non-curing Boards must remain in this action. *First*, per guidance issued by the Acting Secretary, *all* Boards are directed to prematurely engage in pre-canvass activities before Election Day. *Second*, as noted in the Amended Petition, "[t]he unequal adoption and implementation of notice-and-cure procedures prevents all voters within the Commonwealth from having an "equal opportunity to translate their votes into representation." Am. Pet. ¶ 147. *Third*, discovery is needed to determine the precise notice-and-cure procedures implemented by these counties. The Joint Stipulation of Facts filed by the parties on September 20, 2022, included only the following statement with respect to these Boards: "No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is

permitted by the Election Code." *See* Ex. B to Joint Stipulation of Facts. With no details regarding the particular notice-and-cure procedures implemented by these Boards—or if any notice-and-cure procedure has been implemented by these Boards—it is impossible for the Court to evaluate as a matter of law whether their notice-and-cure procedures are, in fact, "permitted by the Election Code." *Fourth*, as evidenced by the Acting Secretary's position in this action, non-curing Boards could adopt notice-and-cure procedures in the future. The constitutional imperative of equality in elections requires that all Boards be parties to this action.

VIII. IF PRELIMINARY OBJECTIONS ARE SUSTAINED, PETITIONERS SHOULD BE GRANTED LEAVE TO AMEND.

For the reasons set forth above, the Respondents' preliminary objections should be overruled. Nevertheless, to the extent the Respondents' preliminary objections are sustained, Petitioners should be granted leave to further amend the Petition for Review.

"Where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend." *Jones v. City of Philadelphia*, 893 A.2d 837, 846 (Pa. Commw. 2006) (quoting *Harley Davidson Motor Co. v. Hartman*, 442 A.2d 284, 286 (Pa. Super. 1982)). "The right to amend should not be withheld where there is some reasonable possibility that amendment can be accomplished successfully." *Otto v. Am. Mutual Ins. Co.*, 393 A.2d 450, 451 (1978). "If it is possible that the pleading can be cured by

amendment, a court 'must give the pleader an opportunity to file an amended complaint. This is not a matter of discretion with the court but rather a positive duty.'" *Jones*, 893 A.2d at 846 (quoting *Framlau Corp. v. County of Delaware*, 299 A.2d 335, 337 (1972)).

To the extent the Court determines to sustain some or all of the Respondents' preliminary objections, the Court should grant the Petitioners leave to file a second amended petition for review.

CONCLUSION

The preliminary objections to the Amended Petition for Review should be overruled.

Respectfully submitted,

Dated: March 10, 2023

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CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

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Dated: March 10, 2023

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