

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**No. 100 MAP 2022**

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Republican National Committee, National Republican Senatorial Committee,  
National Republican Congressional 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/Appellants,

v.

Leigh M. Chapman, in her 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/Appellees.

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**BRIEF FOR APPELLANT**

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Appeal from Commonwealth Court's Sept. 29, 2022 Order at No. 447 MD 2022

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Carbon County Board of Elections; Centre County Board of Elections;  
Chester County Board of Elections; Clarion County Board of Elections;  
Clearfield County Board of Elections; Clinton County Board of Elections;  
Columbia County Board of Elections; Crawford County Board of Elections;  
Cumberland County Board of Elections; Dauphin County Board of Elections;  
Delaware County Board of Elections; Elk County Board of Elections;  
Erie County Board of Elections; Fayette County Board of Elections;  
Forest County Board of Elections; Franklin County Board of Elections;  
Fulton County Board of Elections; Greene County Board of Elections;  
Huntingdon County Board of Elections; Indiana County Board of Elections;  
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Lehigh County Board of Elections; Luzerne County Board of Elections;  
Lycoming County Board of Elections; McKean County Board of Elections;  
Mercer County Board of Elections; Mifflin County Board of Elections;  
Monroe County Board of Elections; Montgomery County Board of Elections;  
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Northumberland County Board of Elections; Perry County Board of Elections;  
Philadelphia County Board of Elections; Pike County Board of Elections;  
Potter County Board of Elections; Schuylkill County Board of Elections;  
Snyder County Board of Elections; Somerset County Board of Elections;  
Sullivan County Board of Elections; Susquehanna County Board of Elections;  
Tioga County Board of Elections; Union County Board of Elections;  
Venango County Board of Elections; Warren County Board of Elections;  
Washington County Board of Elections; Wayne County Board of Elections;  
Westmoreland County Board of Elections; Wyoming County Board of Elections;  
and York County Board of Elections,

Respondents/Appellants.

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## STATEMENT OF JURISDICTION

Pursuant to Rule 1101(a)(1) of the Pennsylvania Rules of Appellate Procedure, an order of the Commonwealth Court entered in “any matter which was originally commenced in the Commonwealth Court and which does not constitute an appeal of the Commonwealth Court from another court, a district justice or another government unit” may be appealed as of right to the Supreme Court. Pa. R.A.P. 1101(a)(1). This action was commenced in the Commonwealth Court pursuant to its original jurisdiction. *See* 42 Pa. C.S. § 761(a)(1). Accordingly, the Supreme Court has exclusive jurisdiction over this matter. *See* 42 Pa. C.S. § 723(a).

The Memorandum Opinion and Order are immediately appealable because they deny an injunction. *See* Pa. R.A.P. 311(a)(4); *see also SEIU Healthcare Pennsylvania v. Com.*, 104 A.3d 495, 501 n.6 (Pa. 2014) (holding that “[t]he Commonwealth Court’s order denying SEIU’s preliminary injunction is appealable to this Court as of right pursuant to Pa. R.A.P. 311(a)(4) (providing that an appeal may generally be taken as of right from an order that grants or denies an injunction); *see also* 42 Pa. C.S. § 723(a) (providing that this Court shall have exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter originally commenced in that Court).”).

Further, the Court may exercise its discretion to take immediate jurisdiction of the case, as this Court is the “Supreme judicial power of the Commonwealth,” PA.

CONST. art. V, § 2(a), with the ability to “exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King’s Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722.” 42 Pa. C.S. § 502. That includes the “power of general superintendency over inferior tribunals even when no matter is pending.” *Bd. of Revisions of Taxes, City of Philadelphia v. City of Philadelphia*, 4 A.3d 610, 620 (Pa. 2010), and the power over any matter of public importance pending before any other court within the Commonwealth. *See* 42 Pa. C.S. § 526.

“King’s Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015). King’s Bench authority is appropriate when this Court deems that the “public interest” should not “suffer” the “deleterious effect ... caused by delays incident to ordinary processes of law.” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014).

**ORDER IN QUESTION**

AND NOW, this 29<sup>th</sup> day of September 2022, the Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532, filed by Petitioners, is DENIED.

*/s/ Ellen Ceisler*

\_\_\_\_\_  
ELLEN CEISLER, Judge

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## SCOPE OF REVIEW AND STANDARD OF REVIEW

“The scope of review in preliminary injunction matters is plenary.” *Id.* at 46 n.7. “Appellate courts review a trial court order refusing or granting a preliminary injunction for an abuse of discretion.” *Summit Towne Centre, Inc.*, 828 A.2d at 1000 (citing *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1286-1287 (Pa. 1992) and *Bloomington’s by Mail, Ltd. v. Dep’t of Revenue*, 518 A.2d 1203, 1204 (Pa. 1986)). “[T]he court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its discretion in a manner lacking reason.” *Kline v. Travelers Personal Security Ins. Co.*, 223 A.3d 677, 685 (Pa. Super. 2006); see also *In re Estate of Strasheimer*, 54 A.3d 359, 363 (Pa. Super. 2012) (“if in reaching a conclusion, the court overrides or misapplies the law, or the judgment exercised is shown by the record to be ... manifestly unreasonable or the product of partiality, prejudice, bias or ill will, discretion has been abused.”) (citing *In re Estate of Cella*, 12 A.3d 374, 378 (Pa. Super. 2010)).

## STATEMENT OF QUESTIONS INVOLVED

Whether the Commonwealth Court erred by denying the Petitioners' Application for Preliminary Injunction?

**ANSWER: Yes.**

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## STATEMENT OF THE CASE

At issue in this case is the authority of county boards of elections (“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 when the Election Code makes no provision for such cure procedures and when, in fact, the Boards’ cure procedures, if they implement them, 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 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, Petitioners, Republican National Committee, National Republican Senatorial Committee, National Republican Congressional 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”) filed a Petition for Review in the Commonwealth Court pursuant to its original jurisdiction. Petitioners’ Petition for Review seeks 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 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 Commonwealth Court scheduled a hearing on the Application for Preliminary Injunction to take place 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 opportunity to 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 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 Commonwealth Court decided to hold a hearing. Following the status conference and hearing, the Commonwealth 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 Honorable Ellen Ceister of the Commonwealth Court entered a memorandum opinion and order, from which Petitioners appeal.

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 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 cure procedure for absentee or mail-in ballots exists in the Election Code.

Just two years ago, the Pennsylvania Democratic Party sought an injunction to *require* Boards of Elections to contact electors whose mail-in or absentee ballots contained facial defects and to provide those electors 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 Boards to implement a “notice and opportunity to cure procedure” for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.

The Secretary of the Commonwealth *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 Secretary noted that “logistical policy decisions” implicated in a 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 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 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 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 cure

procedure for absentee or mail-in ballots that lack a required signature or secrecy envelope.

The Secretary of the Commonwealth to this day continues to advise voters that Pennsylvania law does not provide cure procedures for signature and secrecy envelope requirements for mail-in and absentee ballots. As stated in the 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 Secretary took during *Pa. Democratic Party*, in which she argued against the imposition of 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)).

As established by *Pa. Democratic Party* and the Secretary's existing 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 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 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 in practice. Indeed, the 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 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](http://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). This 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. For example, in 2020, during the course of an appeal regarding its response to a Right to Know Law request, the Bucks County Board of Elections admitted that it implemented the

following “cure” protocol which included sending postcards to voters with missing required information and allowing voters to sign and date their ballot envelope:

Generally speaking, we receive mail-in/absentee ballots during the election season, for those missing a signature or date, we allow them to be “cured.” BOE sends a postcard out to voters on ballots needing to be cured. Last year’s version is attached. We send those postcards out up to the day before the election. We also send our list of voters with problems to the parties if they request them. We update the list each day to allow the parties to contact them on election day if necessary. To cure ballots, voters travel to BOE and either sign or date their ballots and then resubmit them to the BOE. If a voter is unable to cure the problematic ballot, they can file a provisional ballot at their poll on election day. Any cured mailed-in/absentee ballots received at 8 PM on election day are not accepted.

*See R\_\_* (Email from Daniel D. Grieser, dated August 1, 2022, and a copy of the postcard used by Bucks County is attached as Exhibit “A”). Bucks County also contacted both political parties and forwarded the list of voters it had sent the postcard to in the event either party wished to reach out to the voters in order to assist them in curing their ballot.

Similarly, the Montgomery County Board of Elections implemented its own protocol to contact voters and allow for them to cure ballots in the 2020 General Election. Its protocol included emailing certain voters to alert them of the defect or defects with their absentee or mail-in ballot. Montgomery County Board of Elections workers also attempted to speak to such voters utilizing a script. The Montgomery County Board then afforded such voters the opportunities that included but were not limited to: coming to the Board of Elections’ office to “correct an incomplete

declaration;” canceling their absentee or mail-in ballot and replacing it in person; or canceling their absentee or mail-in ballot and replacing it by email using a form on the Montgomery County Board of Elections website. *See* R\_\_ (Montgomery County Right to Know Law Response, attached as Exhibit “B” (October 27, 2020 email from Sarah Batipps (pp. 24-25))).

Other counties have previously opined that curing is not permissible under the Election Code, but nevertheless have acceded to implement cure procedures in future elections in response to litigation pressure. For example, the Northampton County Board stated that its solicitor had opined that “we are prohibited from contacting voters: to cure defective ballots, such as those which are missing the secrecy envelope.” *See* R\_\_ (Exhibit “D” (October 6, 2020 Amy Cozze email, p. 35)). But in conjunction with a stipulated settlement agreement reached in *Bausch v. Lehigh County Board of Elections, et al.* in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 5:22-cv-02111, the Northampton County Board agreed that for future elections, it would:

- Include messaging to Northampton County voters emphasizing the importance of providing contact information including a notice on the Northampton County Voter Registration website;
- Provide notice to a voter who returns mail-in ballots and absentee ballots without a secrecy envelope (known as “Naked Ballots”); and
- Provide the names of all voters whose Naked Ballots are discovered prior to 8:00 p.m. on Election Day to the party and/or candidate

representative(s) who are on-site during pre-canvassing so that the party representative(s) can notify the voters.

See R\_\_ (Northampton County Board of Elections Stipulated Settlement Agreement, attached hereto as Exhibit “E.”) The Lehigh County Board entered into a similar agreement, which included additional obligations:

- Explore in good faith the acquisition of a ballot sorter that has the capability to either weigh return ballots or measure their thickness so that voters can be notified of possible Naked Ballots. If feasible, such a ballot sorter shall be purchased and in operation as soon as possible;
- Explore in good faith the legality of the Office notifying voters if, upon receipt of their ballot, the Office believes (without opening or tampering with the envelope or the ballot) that the voter may have submitted a Naked Ballot. If feasible, this practice shall be implemented in advance of the November 2022 General Election.

See R\_\_ (Lehigh County Board of Elections Stipulated Settlement Agreement, attached hereto as Exhibit “F.”)

The Acting Secretary was a party in the *Dondiego* litigation, and upon information and belief, was made aware of the Stipulated Settlement Agreements involving the Northampton and Lehigh Boards but has taken no action to stop the unauthorized cure procedures. The Stipulated Settlement Agreements involving the Northampton and Lehigh County Boards run afoul not only of Pennsylvania law, but even the Secretary’s simultaneous and currently published admonishment to voters that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election.” Pennsylvania Department of State, *Mail and*

*Absentee Ballot*, at <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx>.

Meanwhile, other Boards do not allow for any notice and opportunity to cure non-compliant ballots. Some Boards are transparent and explicit in their adherence to the Election Code, the Supreme Court's holding in *Pa. Democratic Party*, and the Secretary's guidance. For example, the Lancaster Board provides on its website, stating in relevant part:

Once a ballot has been recorded as received by the County, there is not a legal procedure for the County to return it to the voter or for the voter to alter it for any reason.

Lancaster County, *Frequently Asked Questions About Mail-in Ballots*, at <https://www.co.lancaster.pa.us/1351/FAQs-of-MAIL-IN-BALLOTS>.

Communications among the Directors of the Boards of Elections reveal that several other Boards have not provided any opportunity for voters to cure noncompliant absentee or mail-in ballots. For example, the Executive Director of the Franklin County Board of Elections noted in an email:

I know that voters are not entitled to notice and an opportunity cure minor defects resulting from failure to comply with statutory requirements for vote by mail but I am curious if any counties are planning on reaching out to voters by email, phone or mail whenever a defect is detected.

See R\_\_ (Exhibit "G" (October 6, 2020 email from Jean C. Byers, p. 34).

Many other Boards have followed the Election Code and refrained from implementing 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. These exact concerns about the unequal treatment of voters by county weighed heavily on this Court in *Pa. Democratic Party* and Judge Ranjan in *Donald J. Trump* for President when it declined to permit mail ballot signature comparison by the Boards. 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. Further, the permissible methods of cure also vary even across those counties which do allow for curing. Indeed, it is unclear to what extent those Boards which allow for curing even contact all voters who, under their cure procedures, would be permitted to cure their ballots, raising the specter of clerk-by-clerk discretion within a county as to who gets to cure and who does not.

The facts developed in this litigation have 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 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, as the Commonwealth Court believed, 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 careless voters in some counties should have more rights than careless voters in other counties. By building this into the Election Code, the Commonwealth Court diminishes the right electors in certain counties “to elect a candidate of their choice” in statewide races, effectively disenfranchising a portion of the electorate.

Petitioners seek review of the Commonwealth Court’s order denying Petitioners’ Application for Preliminary Injunction (“Application”), which sought to enjoin the cure procedures implemented by some Boards.

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## SUMMARY OF THE ARGUMENT

Although “a rose by any other name would smell as sweet,” renaming pre-canvass activity as a “cure procedure” does not permit it to be conducted earlier than Election Day, nor does it allow any part of the product of that process to be disclosed to any person before the polls close, nor does it allow voters who have already cast a ballot to vote again provisionally. The cure procedures which the Respondent Boards and the Secretary of the Commonwealth are not authorized by the Election Code and foreclosed by precedents of this Court.

For one, although the Election Code does authorize curing for deficiencies regarding voter identification, it does not expressly authorize the cure procedures at issue here. No party contends otherwise.

Further, Boards must act in excess of their defined authority in order to effectuate their unlawful curing procedures. 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 “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).

Against all this, the statute 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.

In addition, the Commonwealth Court’s denial of Petitioners’ Application must be reversed because it runs afoul of this Court’s recent precedents and permits material disuniformity in a significant aspect of election administration that the Legislature clearly never intended. 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, 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.*

Lacking express statutory authorization to implement cure procedures, Boards have instead defended this practice as an act of discretion. But the Boards’ reliance on discretion, and the Commonwealth Court’s agreement with same, fails because the Boards’ discretion in this space is constrained where their rulemaking is “inconsistent with law.” 25 P.S. § 2642(f). The Boards’ cure procedures are, however, “inconsistent with law” on several grounds: *First*, such practice is in irreconcilable tension with the Court’s holding in *Pa. Democratic Party*. *Second*, this 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 far more limited than the Commonwealth Court asserts. *Third*, the Boards’ 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 the

Commonwealth Court's decision 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.

Finally, the balance of the equities favors granting the preliminary injunction sought by the Petitioners. The requested injunction is consistent with the Secretary of the Commonwealth's existing election administration guidance; would return all Boards to the status quo of compliance with the Election Code's express provisions regarding the handling of absentee and mail-in ballots; and would promote constitutionally-mandated uniformity in election administration. Conversely, there is no showing of any harm that would result as a result of the injunction. The Boards would not suffer any harm because the injunction would alleviate Boards of the burdens attendant with implementing cure procedures. Even though this year's general election is already underway, at issue here is the handling of absentee and mail-in ballots, which should not even begin until Election Day, more than a month from now. Further, there is no evidence that any voter would suffer harm from the injunction, either; Respondents presented no evidence that any voter votes in reliance on the possibility of later having an opportunity to cure any defects. The injunction would not result in the invalidation of any counted vote. The elimination of cure procedures that this Court has previously held cannot be mandated and which

half of the Commonwealth does not utilize would not amount to “disenfranchisement.”

The Petitioners have satisfied all six essential prerequisites for the grant of a preliminary injunction. For the reasons set forth below, and for those reasons set forth in Petitioners’ Memorandum of Law in Support of its Application and Supplemental Memorandum of Law in Support of its Application filed with the Commonwealth Court, which are incorporated in their entirety by reference herein, the Boards should reverse the Commonwealth Court’s denial of the Petitioners’ Application, prohibit the Respondent Boards from developing and implementing cure procedures, and enjoin the Secretary from taking any action inconsistent with such an order.

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## ARGUMENT

### I. THE COMMONWEALTH COURT ERRED BY DENYING THE PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION.

#### A. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE BOARDS LACK DISCRETION TO IMPLEMENT UNIQUE CURE PROCEDURES.

Under the Election Code, the Boards enjoy only limited rulemaking authority, and such authority does not extend to the development of sweeping cure procedures when this Court has observed that the Election Code itself does not provide for 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 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 Commonwealth Court erred by denying the Application on the grounds that the non-uniform cure procedures authorized by some, but not all County Boards, are not in fact “inconsistent with law.”

**1. Cure Procedures Are “Inconsistent With Law” Because the Election Code Does Not Authorize Cure Procedures.**

The unique and idiosyncratic cure procedures developed by some of the Boards are “inconsistent with law” because this 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 cure procedures. The Election Code does not set forth a procedure by which Boards are permitted to provide electors 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).

Two years ago, the Pennsylvania Democratic Party tried to force the Secretary of the Commonwealth and all 67 Boards to require 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)).

This Court agreed with the 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, 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, all of which are best left to the legislative branch of Pennsylvania’s government.

*Id.*

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 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 cure procedure for non-compliant mail-in and absentee ballots. *See* House Bill 1300, Printer’s Number 1869, § 1308(g)(2)(iv), (v) (2021).<sup>1</sup> But 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 legislatively proscribed 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 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*

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<sup>1</sup> Additional legislation was proposed in November 2021, but also failed. *See* House Bill No. 1800, Printer’s Number 2431, § 1308 (2021).

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 cure procedure exists in the Election Code.

**2. The Election Code’s Lack Of Cure Procedures For Signature, Date, And Secrecy Envelope Requirements Does Not Give Boards License To Create Them.**

Boards do not have discretion to implement 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 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.

**a. Expressio Unius est Exclusio Alterius Demonstrates That 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 cure procedure for certain defects—a voter’s initial lack of proof of identity, *see* 25 P.S. § 3146.8(h)—it obviously had the ability to legislate additional cure procedures.<sup>2</sup> But it has not done so, and it is well aware that it has not do 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).

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

The Commonwealth Court erred in interpreting § 2642(f) far too broadly. Rather than giving Boards unfettered power to regulate election administration, this provision merely allows Boards to engage in rulemaking in the small “gaps” the Legislature created in the Election Code.

This Court’s decision in *In re Nov. 3, 2020 Gen. Election*—a case the Commonwealth Court did not address at all—is instructive. 240 A.3d 591 (Pa.

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<sup>2</sup> The Election Code also provides for in-person voters to cure deficiencies with non-matching signatures when voting in person. *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).

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 more closely match *In re Nov. 3, 2020 Gen. Election* than *In re Canvassing Observation*, the sole case the lower court relied upon for concluding counties had discretion to allow for curing procedures. 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 cure procedures under any other circumstances. The absence of 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 which does not provide for a cure procedure cannot be interpreted as allowing Boards to develop and implement their own idiosyncratic curing procedures.

In fact, if the Commonwealth Court is correct that section 302(f) authorizes these types of rules and regulations from County Boards, it calls into question the reasoning in several of this 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.<sup>3</sup> But if the Commonwealth Court’s holding is correct, the Court should not have been so categorical. Rather than merely disqualifying votes, this Court could have noted that County Boards have the power to “re-qualify” them resides in the County Boards – in addition to the General Assembly. If the Commonwealth Court is right, this Court must face the reality that its failure to insert just a few words into its opinion—its

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<sup>3</sup> 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.”).

failure to discern the law with the same accurate perception as the Commonwealth Court—means that it unnecessarily disenfranchised at least many thousands of voters in this state, if not more. The other alternative, which is better supported by both precedent, including *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.

**3. Board Implementation of Cure Procedures Is “Inconsistent With Law” Concerning Authorized Pre-Canvassing Activities And Provisional Ballot Voting.**

Boards are not free to develop and implement their own cure procedures because such procedures are “inconsistent with law” as established by express provisions of the Election Code.

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

**i. Boards must keep absentee and mail-in ballots in sealed and locked containers “upon receipt.”**

Boards cannot develop 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 ballot envelopes as provided under Article XIII-D, **shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.**

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.

ii. **The Election Code prescribes when pre-canvassing can begin.**

Boards cannot implement their own 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).

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).<sup>4</sup> 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, cure procedures are “inconsistent with law” as established by the Election Code, and the implementation of same constitutes an abuse of Board discretion under § 2642(f).<sup>5</sup>

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<sup>4</sup> 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 produce such results. 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 accordingly cannot be disclosed until the polls close. *Id.*

<sup>5</sup> The Election Code also requires Boards to provide “at least forty-eight hours’ notice of a pre-canvass meeting,” and Boards are required to 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’ 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. This is yet another aspect of cure procedures that renders them “inconsistent with law.”

**b. *Cure Procedures That Involve Provisional Voting Are “Inconsistent with Law” Because They Require Voters to Make Knowingly False Statements Under Penalty of Perjury.***

A common cure invoked by the 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 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).<sup>6</sup>

Cure procedures that encourage or allow voters who cast an absentee or mail-in ballot that do not comply with the Election Code’s signature, date, or secrecy

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<sup>6</sup> 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).

envelope requirements to vote via provisional ballot suborn such voters to commit 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).<sup>7</sup> 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.<sup>8</sup>

Accordingly, any 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 cure procedures are also “inconsistent with law” because they require voters to submit knowingly false statements in sworn affidavits. Because these cure

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<sup>7</sup> 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.”).

<sup>8</sup> 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.

procedures are “inconsistent with law,” Boards lack the discretion to implement them under 25 P.S. § 2642.

**4. The Disuniformity Permitted By Allowing Boards To Implement Their Own 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 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 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)).

The Court has long enforced these 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).

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 Commonwealth Court erred because in refusing to issue the preliminary injunction, it allows the Boards to administer elections in a manner that is distinctly non-uniform. 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.

In refusing to mandate cure procedures, this 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 a preliminary injunction, disuniformity will reign, and elections would vary from county to community, even on important issues such as differential access to ballot-saving remedies.<sup>9</sup> This approach enshrines a two-tier paradigm where roughly half the voters of the Commonwealth enjoy residing in counties that have a 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' cure procedures are "inconsistent with law" and not within the Boards' discretion to implement.

**B. PETITIONERS HAVE SATISFIED EACH OF THE OTHER ESSENTIAL PREREQUISITES FOR A PRELIMINARY INJUNCTION.**

As set forth in the memorandum and supplemental memorandum of law in support of their Application, Petitioners have satisfied each of the other essential prerequisites for the issuance of a preliminary injunction.

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<sup>9</sup> 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).

## 1. A Preliminary Injunction Is Necessary To Prevent Immediate And Irreparable Harm.

As set forth above, the cure procedures implemented by some of the Boards are “inconsistent with law” and thus outside the Boards’ discretion. But these unlawful cure procedures also readily establish harm sufficient to support the issuance of a preliminary 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 County Board of Elections “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 which “per se constitutes immediate and irreparable harm.” *Id.* at 1193.

Here, the Pennsylvania Supreme Court has already held that a 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 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 preliminary injunction. Fifteen Boards have confirmed they intend to implement cure procedures in the upcoming election. 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. Further, the Northampton and Lehigh County Boards agreed as recently as June 15, 2022 to begin implementing cure procedures for upcoming elections, including the 2022 general election. Other Boards have implemented cure procedures in past elections, and upon information and belief, plan to do so again for the upcoming general election.

None of these cure procedures are authorized under the Election Code and many of these 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 Committee Petitioners are unable to properly educate their members regarding the rules applicable to mail-in and absentee ballots, especially when such cure procedures directly violate Pennsylvania law.

The Commonwealth Court largely ignored these harms, focusing instead on claims that Petitioners did not raise. For example, the Commonwealth Court focused on federal court decisions involving Equal Protection claims—claims that Petitioners explicitly did not raise. *See Op.* at 24 n.15. And the Commonwealth Court simply glossed over the inherent harm caused by disuniform election administration procedures governing whether absentee or mail-in ballots with signature, date, or secrecy envelope defects will be given a second chance to count, merely holding that such lack of uniformity that the harm is irreversible. *Op.* at 49–50. But the Commonwealth Court does not explain how a voter in a county that does not offer a 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.*

Moreover, the holding of an election in a manner that violates applicable election laws constitutes irreparable harm to 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). Voters denied equal access to the electoral process cannot collect money damages after trial. *Id.*

Because (1) the Pennsylvania Supreme Court has already held that all cure procedures for defective mail-in and absentee ballots must come from the

Legislature, (2) the Legislature's effort to create such a 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 preliminary 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*.

**2. Greater Injury Would Result From Refusing Than From Granting The Injunction.**

If left unabated, some Boards will continue their unauthorized cure procedures, in direct violation of the Election Code. An injunction will prevent the disparate treatment of non-compliant mail-in and absentee ballots throughout the Commonwealth, while at the same time will eliminate uncertainty regarding how mail-in and absentee ballots will be counted. Absent an injunction, the Boards will collectively engage in a mishmash of cure procedures, allowing some voters to cure signature, date, or secrecy envelope defects (in violation of the Election Code) while preventing others—especially those not registered with a particular political party—from doing so. As noted above, the unlawful act by a Board constitutes per se immediate and irreparable harm. *See Hempfield Sch. Dist.*, 574 A.2d at 1191.

Further, without an injunction, Pennsylvania will effectively have two classes of voters: those who get a second chance to vote via absentee or mail-in ballot, and those that do not. This arrangement will inevitably undermine public confidence in

elections, as it becomes manifest that some votes count more than others, or, at least that some voters get heightened opportunities to have their vote counted than others.

On the other side, an injunction would cause the Respondents little, if any harm. The preliminary injunction would merely require Boards to *stop* implementing cure procedures. Such an injunction would actually *save* Boards money, as they would no longer be required to devote staff and resources their cure procedures would otherwise require. Additionally, while they comprise more than half of the state's registered voters, there are only 15 of 67 counties that will require any modifications to their processes, with one of them, Luzerne, already affirming they will suspend, without difficulty or burden, any curing until the disposition of this motion.

As to the Intervenor-Respondents, they have failed to demonstrate any harm would be suffered with respect to their education and outreach efforts.<sup>10</sup> This is not surprising as it is wholly implausible that they have educated or are educating even a single voter in this state that they need not carefully follow the instructions that come with their ballots because they might be able to cure certain defects at a later time. The prospect that they are telling voters not to worry about such compliance

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<sup>10</sup> Indeed, Intervenor-Respondents have not proffered any evidence regarding their education and outreach programs, so any argument regarding the impact of the injunction would be hypothetical. If, however, an injunction is granted, the Intervenor-Respondents' education and training efforts—like the Committee Petitioners—would be greatly simplified, as all Boards would be following a uniform set of rules already observed by a majority of the Boards.

is even less likely given that the even the availability of the opportunity to cure is unknown in some counties. In any event, the requested injunction, their training could be uniform and standardized statewide.

The Respondents and Intervenor-Respondents, along with the Commonwealth Court, have expressed an erroneous belief that the requested injunction will “disenfranchise” those voters who reside in counties which have a cure procedure. Op. at 43. This is wrong for multiple reasons.

*First*, the requested injunction would merely bring all counties into a uniform application of the Election Code, as contemplated by the Pennsylvania Constitution. Elections are “free and equal” for constitutional purposes when, *inter alia*, “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Pa. Democratic Party*, 238 A.3d at 372–73 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)). Indeed, in *Pa. Democratic Party*, the 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.’” *Id.* at 373 (quoting *League of Women Voters*, 178 A.3d at 809). In other words, voters who do not have access to a cure procedure are not disenfranchised. To conclude otherwise would be to concede that *PA Democratic*

*Party* disenfranchised half of this state—the half that lives in counties that do not allow for curing.

*Second*, the requested injunction would not cause “disenfranchisement” because no Pennsylvania voter has a right to a cure procedure. Certainly, the Election Code does not provide for one. And the Pennsylvania Supreme Court in *Pa. Democratic Party* was perfectly comfortable with the fact that a voter may be “at risk for having his or her ballot rejected due to minor errors made in contravention of [the Election Code’s] requirements” unless and until the Legislature provided a procedure to alleviate that risk. *Pa. Democratic Party*, 238 A.3d at 374. Respondents have also not proffered any evidence that voters are preemptively notified about the opportunity to cure nor, much less that voters implausibly rely on the ability to cure their mail ballots. It strains credulity to think that voters are casual about adhering to balloting procedures because they believe that an election official might pluck their ballot from the pile, notice the error, and notify them—and that they will only then take the time to conform their ballot to the law. That some version of this sequence of events may sometimes happen is not evidence that any voter relies upon it when voting. To the extent such reliance exists, it is not reliance that merits the equitable attention of this court.

*Third*, the requested injunction would not harm voters because there is no evidence voters rely on the cure procedures. There is no evidence of record that any

voter has voted or will vote carelessly in reliance on the possibility of later curing any defects in his or her ballot. Indeed, there is no evidence of record that voters are aware of the existence of or particulars surrounding any Boards' cure procedures.

Thus, the second prerequisite for a preliminary injunction is easily satisfied: the refusal to grant a preliminary injunction will result in further unlawful activity, which constitutes immediate and irreparable injury per se. As the continued unlawful activity cannot be considered a benefit to the public, the need for a preliminary injunction is manifest.

### **3. The Requested Injunction Seeks Only To Preserve The Status Quo.**

Petitioners' requested injunction seeks only to preserve the status quo as it existed prior to the wrongful (i.e., unauthorized) conduct. *See City of Philadelphia v. Commonwealth*, 837 A.2d 591, 604 (Pa. Commw. 2003) (granting preliminary injunctive relief and noting that "the public interest lies in favor of maintaining the status quo" pending resolution of the case's merits).

"Courts have defined the term 'status quo ante' as 'the last peaceable and lawful uncontested status preceding the underlying controversy.'" *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Commw. 2011) (quoting *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002)). "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." *Allegheny Anesthesiology Assocs.*



*v. Allegheny Gen. Hosp.*, 826 A.2d 886, 894 (Pa. Super. 2003). “Put another way, the grant of relief necessitates a change in status at the time a court grants injunctive relief, but the relief must not change the status that existed between the parties just before the conflict between them arose.” *Hatfield Twp.*, 15 A.3d at 556 n.6.

To the extent Pennsylvania courts distinguish between mandatory injunctions—which command the performance of some positive act to preserve the status quo—and prohibitory injunctions, which enjoin the doing of an act that will change the status quo—the Court generally engages in greater scrutiny of mandatory injunctions. See *Mazzie v. Commonwealth*, 432 A.2d 985, 988 (Pa. 1981); accord *Kessler v. Broder*, 851 A.2d 944, 947 (Pa. Super. 2004).

Here, Petitioners seek only a prohibitory injunction that would preserve the state of the law as set by the Election Code and as established by the Pennsylvania Supreme Court just two years ago in *Pa. Democratic Party*, with its explicit recognition that only the Legislature can authorize a cure procedure to address voters’ failure to comply with the Election Code’s signature, date, and secrecy envelope requirements. Boards have never been permitted to develop and implement their own cure procedures with respect to mail-in and absentee ballots that do not satisfy the Election Code’s signature and secrecy envelope requirements; all such cure procedures are unlawful under the Election Code.

The Commonwealth Court held that the requested injunction would disrupt the status quo because the general election is already underway. Op. at 10. But this misconstrues the nature of the relief requested. Petitioners do *not* seek to enjoin or alter the way voters vote. And this requested injunction does not seek to affect whether votes that have already been cast are counted. *Cf. Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020) (wherein the plaintiffs sought to prohibit certification of a general election that had already taken place).

In stark contrast, this action merely requests the Boards to not initiate cure procedures in the upcoming election that are not authorized under the Election Code, and, in fact, run directly counter to express provisions in the Election Code governing the handling of absentee and mail-in ballots. The requested injunction does not invalidate any vote, but instead aims only to put all absentee and mail-in ballot voters on equal footing, as required under the Pennsylvania Constitution. And the requested injunction would bring the Boards in compliance with the Secretary's guidance on this issue:

**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).

With respect to the Commonwealth Court's concern that this year's general election is already underway, at issue here is the handling of absentee and mail-in ballots, which should not even begin until Election Day, more than a month from now. Thus, the status quo ante in this matter is the time when no such cure procedures existed. Petitioners' application for preliminary injunction seeks to return to that status quo pending a final resolution of this litigation.

**4. The Requested Injunction Is Reasonably Suited To Abate The Offending Activity.**

The relief sought by the Petitioners is narrowly tailored. *See Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Commw. 2002) (any injunction "must be narrowly tailored to address the wrong plead and proven"); *Woods at Wayne Homeowners Ass'n v. Gambone Bros. Constr. Co.*, 893 A.2d 196, 207 (Pa. Commw. 2006) ("Even if the prerequisites of an injunction are satisfied, the court must fashion a remedy 'reasonably suited to abate the harm.'"); *Big Bass Lake Cmty. Ass'n v. Warren*, 950 A.2d 1137, 1145 (Pa. Commw. 2008) ("the court must narrowly tailor its remedy to abate the injury").

Petitioners seek only to enforce this Court's holding that the Election Code fails to provide a cure procedure for mail-in and absentee ballots and that only the

Legislature—not the Courts or any other entity, including the Boards—can enact one. Petitioners also only seek relief against those County Boards that are administering unlawful cure procedures, not against the many that are following the law. The request has no impact on many County Boards or the overwhelming majority of mail-in and absentee ballots which are properly cast.

The narrowness of the requested injunction stands in stark contrast to the relief sought in other election cases dealing with mail-in ballots. For example, in *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020), the petitioners filed a facial challenge to Act 77 nearly three weeks after the general election, seeking to invalidate millions of mail-in ballots that had already been cast. *Id.* at 1256. Similarly, in *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), the plaintiffs sought to prohibit certification of a general election that had already taken place. In stark contrast, this action merely requests the Boards to not initiate cure procedures in the upcoming election that are not authorized under the Election Code. The requested injunction does not invalidate any vote, but instead aims only to put all absentee and mail-in ballot voters on equal footing, as required under the Pennsylvania Constitution.

**5. The Requested Injunction Will Not Adversely Affect the Public Interest.**

This Court has already held that the “task of effectuating” the Pennsylvania Constitution’s mandate that elections be free and equal is the province of the

Legislature. *Pa. Democratic Party*, 238 A.3d at 374. Thus, the public interest is best served by a consistent application of the rule of law established by the General Assembly and the maintenance of the separation of powers in Pennsylvania. Conversely, the public interest is not served by allowing Boards to act as quasi-legislatures, resolving “the open policy questions” attendant with the development of cure procedures on their own, let alone cure procedures whose existence and particulars vary from county to county. *Id.* A ruling to the contrary would only further diminish Pennsylvania voters’ confidence in the election system as a result of the secretive and inconsistent application of election procedures across the state.<sup>11</sup>

## CONCLUSION

The Court should reverse the Commonwealth Court’s denial of the Petitioners’ Application, prohibit the Respondent Boards from developing and implementing cure procedures, and enjoin the Secretary from taking any action inconsistent with such an order.

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<sup>11</sup> Several Respondents raised the affirmative defense of laches as a bar to the issuance of a preliminary injunction. The Commonwealth Court, however, correctly held that laches was inapplicable here. *See Op.* at 50–54. For the reasons set forth in the Commonwealth Court’s memorandum opinion and in Petitioners’ supplemental memorandum of law in support of its Application, which is incorporated by reference herein, this affirmative defense has no bearing on the relief Petitioners seek.

Respectfully submitted,

Dated: October 5, 2022

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## RULE 2135 CERTIFICATE OF COMPLIANCE

I certify pursuant to Pa. R.A.P. 2135(d) that the foregoing Brief of Appellants does not exceed 14,000 words (excluding the supplementary matter outlined in Pa. R.A.P. 2135(b)), as determined using Microsoft Word for Office 365 software, and therefore complies with the word count limit set forth in Pa.R.A.P. 2135(a)(1).

Respectfully submitted,

Dated: October 5, 2022

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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.

**GALLAGHER GIANCOLA LLC**

Dated: October 5, 2022

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional 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; S. Michael :  
Streib, :

Petitioners :

v. :

No. 447 M.D. 2022

Leigh M. Chapman, in her 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; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
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Elections; Carbon County Board of :  
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Elections; Clearfield County Board of :  
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Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
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Board of Elections; Philadelphia County :  
Board of Elections; Pike County Board :  
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Elections; Venango County Board of :

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Elections; Warren County Board of :  
Elections; Wayne County Board of :  
Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE CEISLER

FILED: September 29, 2022

On September 1, 2022, the Republican National Committee (RNC), the National Republican Congressional Committee (NRCC), the National Republican Senatorial Committee (NRSC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners), and 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-Biancaneillo, and S. Michael Streib (collectively, Voter Petitioners)<sup>1</sup> (all collectively referred to as Petitioners), filed a Petition for Review Directed to this Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief (Petition for Review) against Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth (Acting Secretary), and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and

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<sup>1</sup> Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections, and who intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the upcoming General Election. (Pet. for Rev. ¶¶ 20-32.)

Notaries (collectively, Commonwealth Respondents), and the Commonwealth's 67 county boards of elections (County Boards).<sup>2</sup> Petitioners allege that several County Boards have taken it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code's (Election Code)<sup>3</sup> signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and our Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). (Pet. for Rev. ¶¶ 2-12.) On September 7, 2022, 62 days away from the 2022 General Election scheduled for November 8, 2022, Petitioners also filed an Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 (Application for Preliminary Injunction), along with a Memorandum of Law in Support thereof, asking this Court to preliminarily enjoin the County Boards from developing and implementing notice and opportunity to cure procedures, and the Acting Secretary from taking any action inconsistent with such order enjoining the County Boards. The Application for Preliminary Injunction is currently before the Court for disposition.

## **I. PROCEDURAL HISTORY**

Initially, the Court notes that, because Petitioners' claims, as set forth in the Petition for Review and Application for Preliminary Injunction bear directly on

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<sup>2</sup> The Court notes that only 66 of the Commonwealth's 67 county boards of elections (County Boards) are actually named in the caption in this matter. It appears that the Washington County Board of Elections was inadvertently omitted from the caption, as the allegations of the Petition for Review clearly refer to all 67 County Boards. Moreover, the Petition for Review and other filings were served on the Washington County Board of Elections. The Court will therefore consider the Washington County Board of Elections to be a Respondent in this matter notwithstanding its omission from the caption.

<sup>3</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

future elections, including the November 8, 2022 General Election, which is only **39 days** from the date of this filing, this Court made every effort to expeditiously conduct factfinding, obtain all of the parties' positions, and consider the applicable law in this case. The Court will therefore first explain the procedural history of this case in depth for purposes of transparency.

By Order dated September 9, 2022, the Court scheduled a hearing on the Application for Preliminary Injunction for Wednesday, September 28, 2022; directed the filing of answers in opposition to the Application for Preliminary Injunction by noon on Friday, September 16, 2022, and a joint stipulation of facts by noon on Monday, September 19, 2022, indicating which County Boards have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots; and scheduled a status conference for Thursday, September 22, 2022, for purposes of discussing, among other things, the logistics of the hearing. The Court's Order also provided, *inter alia*, that any party who failed to file an answer to the Application for Preliminary Injunction will be considered by the Court to be unopposed to the Application.

Also on September 9, 2022, two Applications for Leave to Intervene (Applications to Intervene) were filed by: (1) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and DCCC), and (2) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP) (collectively, Intervenors). In light of the Applications to Intervene and the status conference scheduled for September 22, 2022, the Court issued an Order on September 13, 2022, directing answers in opposition to the Applications to Intervene by noon on Monday, September 19, 2022; granting Intervenors (then-proposed intervenors) leave to participate in the

status conference subject to the Court's future disposition of their respective Applications to Intervene; and further directed the parties and Intervenors to be prepared to discuss the Applications to Intervene at the status conference. The Court's Order also provided, among other things, that any party who failed to file an answer to the Applications to Intervene will be considered by the Court to be unopposed to the Applications. Only Petitioners opposed the Applications to Intervene.

Pursuant to the Court's September 9, 2022 Order, Commonwealth Respondents filed an answer and a brief in opposition to the Application for Preliminary Injunction. Twenty-five County Boards<sup>4</sup> (25 County Boards) filed answers in opposition to the Application for Preliminary Injunction, generally all of which deny that injunctive relief is warranted in this case. The Washington County Board of Elections filed a letter, indicating it takes no position on the Application for Preliminary Injunction or the joint stipulation of facts ordered by the Court, and

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<sup>4</sup> These include: Berks County; Lehigh County; Allegheny County; Philadelphia County (also filed Memorandum of Law in Opposition); Montgomery County (also filed preliminary objections to the Petition for Review); Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Lebanon County, Northumberland County, Venango County, York County (filed Joint Answer); Northampton County; Bucks County; Monroe County; Adams County; Luzerne County; Delaware County; and Erie County.

The Court notes that Erie County filed an answer to the Application for Preliminary Injunction past the deadline for doing so, joining in Commonwealth Respondents' answer in opposition. In addition to filing an answer opposing the Application, Bucks County also filed an answer and new matter to the Petition for Review. Monroe County also filed a letter separate from its answer in opposition to the Application, indicating that it takes no position on the joint stipulation of facts ordered by the Court and that it will not be participating in the filing of the joint stipulation or in the status conference. Luzerne County also filed a Submission separate from its answer in opposition to the Application, explaining Luzerne County's notice and cure procedure and indicating that it takes no position on the other proposed stipulations submitted by the other parties. Erie, Bucks, Monroe, and Luzerne Counties are nevertheless included in the above list of County Boards that oppose the Application for Preliminary Injunction.

41 County Boards<sup>5</sup> failed to file answers to the Application for Preliminary Injunction and, thus, are considered by the Court to be unopposed to the relief sought therein. Intervenors filed separate answers in opposition to the Application for Preliminary Injunction setting forth their respective positions on why the relief sought by Petitioners should be denied.

By Order dated September 19, 2022, the Court granted Petitioners' request for an extension to 5:00 p.m. on Tuesday, September 20, 2022, for the filing of the joint stipulation of facts. In accordance with that extension Order, the parties filed a Joint Stipulation of Facts on September 20, 2022, which is signed by Petitioners and 42 County Boards<sup>6</sup> and includes 8 exhibits (Exhibits A through H). Exhibit A is the

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<sup>5</sup> These include: Armstrong County; Beaver County; Blair County; Bradford County; Butler County; Cambria County; Cameron County; Carbon County; Chester County; Clarion County; Clearfield County; Clinton County; Crawford County; Cumberland County; Elk County; Forest County; Franklin County; Fulton County; Greene County; Juniata County; Lackawanna County; Lancaster County; Lycoming County; McKean County; Mercer County; Mifflin County; Montour County; Perry County; Pike County; Potter County; Schuylkill County; Snyder County; Somerset County; Sullivan County; Susquehanna County; Tioga County; Warren County; Wayne County; Westmoreland County; Wyoming County; and Union County.

Perry County filed a no answer letter, indicating it would not be filing an answer to the Petition for Review in this matter. Union County filed a Submission, similar to Luzerne County's Submission, explaining Union County's notice and cure procedure and indicating that it takes no position on the other proposed stipulations submitted by the other parties. Lancaster County filed an answer to the Petition for Review, indicating that it does not have a notice and cure procedure. Perry, Union, and Lancaster Counties did not address their positions on the Application for Preliminary Injunction and are thus considered to be unopposed to the Application.

<sup>6</sup> These include: Adams County; Allegheny County; Beaver County; Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Northumberland County, Venango County, and York County; Berks County; Blair County; Bradford County; Bucks County; Butler County; Cameron County; Chester County; Clarion County, Susquehanna County, and Tioga County; Cumberland County; Delaware County; Erie County; Franklin County; Juniata County; Lehigh County; Luzerne County; Lycoming County; Montgomery County; Northampton County; Philadelphia County; Union County; Westmoreland County; Sullivan County and Wyoming County; Snyder County; and Somerset County.

letter Petitioners sent to all County Boards requesting information regarding, *inter alia*, whether they have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots. Exhibits B through H contain separate stipulations regarding the above information from 18 County Boards<sup>7</sup> that signed the Joint Stipulation of Facts. For the sake of brevity, the Court will not reproduce the Joint Stipulation of Facts in its entirety in this opinion. However, the Court notes the Joint Stipulation of Facts reveals that there are a number of County Boards that have implemented notice and opportunity to cure procedures, both before pre-canvassing begins and on Election Day, with respect to absentee and mail-in ballots that lack either a date or signature on the outer ballot envelope, or that lack a secrecy envelope. There are other County Boards that do not have any notice and opportunity to cure procedures.

The Court held the status conference on Thursday, September 22, 2022, via WebEx videoconferencing. For purposes of transparency and given the exigency of this matter in light of the looming General Election, the Court permitted the status conference to be livestreamed to the public and had a stenographer present for purposes of creating a record in the event any appeal is taken from this Court's final order. During the status conference, which was essentially turned into a hearing without objection of the parties, the Court first considered Intervenors' Applications to Intervene. There being no objection by any of the parties, including Petitioners who initially opposed the Applications, the Court granted the Applications to

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<sup>7</sup> These include: Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Northumberland County, Venango County, and York County (Exhibit B – also indicates Lebanon County's response not yet received); Westmoreland County (Exhibit C); Chester County (Exhibit D); Bucks County (Exhibit E); Luzerne County (Exhibit F); Philadelphia County (Exhibit G); and Union County (Exhibit H).



Intervene on the record, which was confirmed by subsequent order.<sup>8</sup> The Court then heard argument on laches as a potential bar to the relief sought in the Application for Preliminary Injunction and the six criteria for a preliminary injunction. Following argument, and observing that the issue in this case is really a legal one, the Court asked the parties if an evidentiary hearing was necessary. The parties ultimately agreed to dispense with the hearing on the Application for Preliminary Injunction that was scheduled for Wednesday, September 28, 2022, and for the Court to decide the Application on the papers, with the caveat that the Court permit additional briefing. Following the status conference, the Court issued an Order on September 22, 2022, granting intervention; directing the parties and Intervenors to file briefs and a joint stipulation of exhibits; cancelling the hearing; and indicating that the Application for Preliminary Injunction would be decided on the papers following the Court's receipt of the aforementioned filings, unless otherwise ordered.

The parties<sup>9</sup> have complied with the Court's September 22, 2022 Order by filing comprehensive briefs addressing their respective positions and the applicable

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<sup>8</sup> The Court's order also directed the Prothonotary to docket Intervenors' respective sets of preliminary objections to the Petition for Review. *See* Cmwlth. Ct. Order dated Sept. 22, 2022.

<sup>9</sup> The following parties filed briefs pursuant to this Court's September 22, 2022 Order: Northampton County; Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Northumberland County, Venango County, and York County (joint answer, in which Carbon County now joins); Allegheny County; Montgomery County; Intervenors DNC and PDP; Bucks County; Intervenors DSCC and DCCC; Luzerne County; Commonwealth Respondents; Petitioners; Philadelphia County; and Lehigh County. Delaware County joined in the brief filed by Allegheny County. Berks County filed a letter in response to the September 22, 2022 Order, indicating, among other things, that it takes no position on either laches as a potential bar to the relief sought herein or on the Application for Preliminary Injunction.

The Court also notes that the Lawyers Democracy Fund filed an *amicus curiae* brief in support of Petitioners' requested relief.

law, and a comprehensive Joint Stipulation of Exhibits, which includes, *inter alia*, the Joint Stipulation of Facts previously filed by the parties. At this juncture, the Court is satisfied that everyone in this case had a full and fair opportunity to be heard, that a sufficient record has been created given the time constraints, and that the proceedings were conducted with transparency.

Having considered the argument, pleadings, evidence, and law, the Court **DENIES** Petitioners' Application for Preliminary Injunction, as Petitioners did not meet their heavy burden of proving the following criteria:

1. **Petitioners' have not proven that they are likely to succeed on the merits or that their right to relief is clear.**

- A review of relevant and recent case law indicates that notice and opportunity to cure procedures implemented by County Boards have *generally* been accepted in order to fulfill the longstanding and overriding policy in this Commonwealth to protect the elective franchise. The courts have held that any doubt about whether the Election Code authorizes County Boards to implement notice and cure procedures must be resolved in favor of preventing the inadvertent forfeiture of electors' right to vote.
- The Election Code does not specifically prohibit County Boards from implementing notice and cure procedures. Rather, County Boards enjoy broad authority under Section 302(f) of the Election Code, 25 P.S. § 2642(f), to implement such procedures at their discretion to ensure that the electoral franchise is protected. While Section 302(f) of the Election Code requires that only procedures that comply with the

law are permitted, Petitioners themselves do not allege any fraud is taking place with respect to such procedures.

- In *Pennsylvania Democratic Party*, 238 A.3d 345, the Supreme Court specifically held that adoption of statewide notice and opportunity to cure procedures are within the province of the legislature and not the judiciary.

2. **The relief requested by Petitioners will disrupt the status quo and is not narrowly tailored to abate the offending activity.**

- Such sweeping relief against the 67 County Boards would clearly cause greater injury than refusing the injunction, precisely because it would seriously harm the public interest and orderly administration of the 2022 General Election, **which is already well underway**. Enjoining the various County Boards' procedures at this point in time would further deprive voters in counties who have been privy to such procedures for the past two years since the enactment of Act 77 the opportunities to have their votes counted, thus resulting in almost certain disenfranchisement of voters. If this Court were to grant the injunctive relief Petitioners seek, the County Boards would then have to modify their practices and procedures in response to the injunction **when absentee and mail-in voting is already underway**.

3. **Petitioners have not presented concrete or sufficient evidence that the injunction is necessary to prevent immediate and irreparable harm.**

- There is no violation of the Election Code which would constitute *per se* immediate and irreparable harm, and the cases cited by Petitioners to support this claim are inapposite. Importantly, as stated earlier,

Respondents also agree that there is no assertion, or evidence, of fraud by the County Boards in any county in Pennsylvania.

- Petitioners claims of immediate and irreparable harm are speculative in nature.

Having summarized the Court's findings and conclusions with respect to the denial of the Application for Preliminary Injunction above, the Court turns to averments of the Petition for Review, the Application for Preliminary Injunction, and the parties' arguments, and finally, explains its reasoning for denying the Application for Preliminary Injunction.

### **PETITION FOR REVIEW**

The Petition for Review in this matter sets forth Petitioners' concern that various County Boards have developed and implemented unauthorized notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Election Code's signature and ballot secrecy requirements. (Pet. for Rev. ¶¶ 7-8.) Petitioners claim these cure procedures are unauthorized, because the Election Code does not specifically provide for them, and our Supreme Court has already held in *Pennsylvania Democratic Party* that the decision to provide a notice and opportunity to cure procedure is one that is best suited for the legislature. (Pet. for Rev. ¶¶ 2-4, 43-47.) Petitioners point out that the Election Code provides only one cure procedure in a very limited circumstance with respect to those absentee or mail-in ballots for which proof of identification has not been received or could not be verified. (Pet. for Rev. ¶¶ 5-6, 48-51); *see also* Section 1308(h) of the Election

Code, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.8(h).<sup>10</sup> Petitioners claim that the Acting Secretary has also acknowledged the absence of any other cure procedures in the Election Code on the Department of State’s website. (Pet. for Rev. ¶ 55 (stating, in response to the frequently asked question, “How do I know if my ballot was accepted or counted?” that “if there’s a problem with your mail-in ballot, **you won’t have the opportunity to correct it before the election.**” (emphasis added)); *see also* Pa. Dep’t of State, Mail-in and Absentee Ballot, Frequently Asked Questions, *available at* <https://www.vote.pa.gov/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (last visited Sept. 27, 2022); Jt. Stip. of Exs., Pet’rs’ Ex. 11. Petitioners further point out that Governor Wolf recently vetoed the legislature’s attempt to implement a broad notice and cure procedure in the Election Code. *See* Pet. for Rev. ¶¶ 52-53; *see also* House Bill 1300 (vetoed by the Governor on June 30, 2021), *available at* <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PD>

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<sup>10</sup> Section 1308(h) provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately] . . . .

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

(last visited Sept. 27, 2022); Jt. Stip. of Exs., Pet’rs’ Ex. 9. Thus, according to Petitioners, the only cure procedure available that the County Boards may provide, as was the case in 2020, is that set forth in Section 1308(h) of the Election Code, (Pet. for Rev. ¶¶ 6, 54), and any attempt to adopt cure procedures at the county level constitutes a usurpation of the exclusive legislative authority of the General Assembly and a violation of the authority granted to the General Assembly to regulate the manner of federal elections under Article I, Section 4 of the United States Constitution, U.S. Const. art. I, § 4,<sup>11</sup> (Pet. for Rev. ¶¶ 8-9).

Petitioners further assert that the County Boards’ unlawful actions in adopting cure procedures have resulted and/or will result in “a lack of transparency, unequal treatment of otherwise identical ballots based upon the county in which the voter resides, and an erosion of public trust and confidence in the integrity of Pennsylvania’s elections at a vital moment in the Nation’s and the Commonwealth’s history.” (Pet. for Rev. ¶ 1.) Specifically, Petitioners contend that not all County Boards have publicly disclosed whether they have adopted cure procedures or the particulars of those procedures, resulting in confusion and a lack of transparency in election administration; and that those County Boards that have adopted cure procedures have not uniformly adopted **the same** procedures, resulting in a lack of statewide uniformity in both the existence and particulars of such cure procedures. (Pet. for Rev. ¶¶ 10-11, 83-85.) Petitioners thus request that this Court “restore transparency, fundamental fairness, and integrity to Pennsylvania’s elections by

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<sup>11</sup> The Elections Clause provides: “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 by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl.1.

upholding the plain text of the Election Code and the clear holding of the Pennsylvania Supreme Court and declaring that [the County Boards] may not adopt cure procedures other than as the General Assembly has expressly provided in the Election Code.” (Pet. for Rev. ¶ 12.)

Republican Committee Petitioners, specifically, assert that they have each made significant contributions and expenditures in support of Republican candidates for various federal, state, and local offices and in mobilizing and educating voters in Pennsylvania in past election cycles and again in 2022. (Pet. for Rev. ¶¶ 15-18.) According to Republican Committee Petitioners, such education includes devoting substantial time and resources toward monitoring the voting and vote counting processes in Pennsylvania and ensuring that such processes are lawfully conducted, and further ensuring that voters understand the rules governing the election process, including applicable dates, deadlines, and requirements for voting by mail or absentee. (Pet. for Rev. ¶¶ 15-18.) Republican Committee Petitioners further assert that their “efforts require a uniform application of the law and a clear and transparent understanding of mail voting requirements, including any allowances for notice and opportunity to cure procedures.” (Pet. for Rev. ¶¶ 15-18.) Republican Committee Petitioners thus contend that they each have “a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.” (Pet. for Rev. ¶¶ 15-18.) However, because the various approaches taken by the County Boards regarding notice and opportunity to cure procedures are not published and are also not readily known to Republican Committee Petitioners, or voters for that matter, Republican Committee Petitioners argue that their ability to educate voters in this regard is thwarted. (Pet. for Rev. ¶ 19.)

For their own part, Voter Petitioners assert that the implementation of cure procedures by some County Boards, absent any directive to do so under the Election Code, has interfered with Voter Petitioners' right to "equal elections." (Pet. for Rev. ¶ 33.) Further, "the unauthorized cure procedures implemented by some [of the County] Boards have had and will have the result of counting votes that should not have been counted due to the voter's failure to comply with signature and secrecy ballot requirements for mail-in and absentee ballots[,] which will result in Voter Petitioners' validly cast votes being "cancelled and diluted by the counting of ballots in violation of the Election Code." (Pet. for Rev. ¶ 34.)

Petitioners thus observe that this case involves essentially the same factual scenario that existed in 2020 when the *Pennsylvania Democratic Party* decision was issued, which they describe as "an election landscape where [County] Boards throughout the state operate under different rules, particularly with respect to whether to implement cure procedures, and if so, how." (Pet. for Rev. ¶ 35.) In light of the Supreme Court's holding and Governor Wolf's recent veto of the General Assembly's attempt to implement a uniform cure procedure, Petitioners claim they "seek the mirror-image form of relief: the Court should enjoin the [County] Boards from using any cure procedures that are not expressly set forth in the Election Code." (Pet. for Rev. ¶ 36.)

Petitioners readily acknowledge that Section 302 of the Election Code, 25 P.S. § 2642, imbues the County Boards with authority to exercise all powers granted to them, provides that the County Boards "shall perform all the duties imposed upon them by th[e Election Code,]" and lists several duties the County Boards must perform. (Pet. for Rev. ¶¶ 57-58.) Petitioners also concede the County Boards' authority in that section to, among other things, "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.” (Pet. for Rev. ¶ 63); Section 302(f) of the Election Code, 25 P.S. § 2642(f) (emphasis added). Petitioners claim, however, that absent from that section is any indication that the County Boards have authority to develop and implement notice and opportunity to cure procedures; as such, Petitioners assert, such cure procedures are “inconsistent with law,” i.e., the Election Code. (Pet. for Rev. ¶¶ 56, 59-62, 64.)

Petitioners further assert that publicly available information and investigation has revealed that some County Boards, including Bucks, Montgomery, Philadelphia, Northampton, and Lehigh Counties, have developed and intend to implement cure procedures, or have agreed to begin the process of implementing cure procedures in future elections. (Pet. for Rev. ¶¶ 65-76.) According to Petitioners, Northampton and Lehigh Counties, specifically, have each also entered into Stipulated Settlement Agreements in federal court that would permit them to, among other things, utilize certain cure procedures. (Pet. for Rev. ¶¶ 72-76.) Other counties have expressed, however, that they are not allowing any cure procedures, including, among others, Lancaster, Franklin, Mifflin, Wyoming, and Allegheny. (Pet. for Rev. ¶¶ 77-81.) Thus, Petitioners assert, whether voters will be permitted to fix their noncompliant absentee or mail-in ballots “depends entirely on the county in which they reside.” (Pet. for Rev. ¶ 82.) Stated otherwise, “ballots with identical defects are receiving unequal treatment based solely on the voter’s residency.” (Pet. for Rev. ¶¶ 82.)

Count I of the Petition for Review therefore requests a declaratory judgment that the County Boards are prohibited under Pennsylvania law from developing and implementing cure procedures not expressly created by the legislature. (Pet. for Rev. ¶¶ 86-92.) Count II requests a declaratory judgment that adoption of any cure

procedures for federal elections not expressly authorized by the General Assembly violates the Elections Clause of the United States Constitution, U.S. Const. art. I, § 4, cl. 1, in that it is the legislature, not the County Boards, that has authority to regulate the manner of holding federal elections. (Pet. for Rev. ¶¶ 93-96.) Count III requests a statewide injunction prohibiting the 67 County Boards from developing or implementing cure procedures and directing the Acting Secretary to take no action inconsistent with such injunction order. (Pet. for Rev. ¶¶ 97-103.)

## **II. APPLICATION FOR PRELIMINARY INJUNCTION**

Petitioners' Application for Preliminary Injunction seeks the same relief as that sought in the Petition for Review. In addition, Petitioners claim that they have satisfied each element for injunctive relief. They assert, first, that the County Boards' unlawful conduct in implementing, or continuing to implement, cure procedures per se constitutes immediate and irreparable harm. (Appl. for Prelim. Inj. ¶ 13; Memo. of Law in Support at 14.) Further, an injunction is needed to prevent immediate and irreparable harm in the form of Voter Petitioners' votes being treated unequally in violation of article VII, section 6 of the Pennsylvania Constitution, Pa. Const. art. VII, § 6,<sup>12</sup> and Republican Committee Petitioners not being able to properly educate their members regarding the rules applicable to absentee and mail-in ballots. (Appl. for Prelim. Inj. ¶ 13; Memo. of Law in Support at 14-15.) Petitioners contend that the Supreme Court has spoken when it ruled that notice and cure procedures must come from the General Assembly. (Memo. of Law in Support at 14.) Petitioners claim there is no question that per se immediate and irreparable harm will occur without an injunction, as ballots are expected to go out

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<sup>12</sup> It provides: "All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State," with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

as soon as September 19, 2022, and Northampton and Lehigh Counties have agreed as recently as June 2022 to begin implementing cure procedures for upcoming elections, none of which are authorized under the Election Code. (Memo. of Law in Support at 16.) Moreover, Petitioners claim that there is no adequate damages remedy for voters who are denied equal access to the electoral process. (Memo. of Law in Support at 17.)

Second, Petitioners assert that greater injury would result from refusing rather than granting the injunction, because the County Boards “will collectively engage in a mishmash of cure procedures, allowing some voters to cure signature or secrecy envelope defects for some Pennsylvania voters (in violation of the Election Code) while preventing others from doing so.” (Appl. for Prelim. Inj. ¶ 13; Memo. of Law in Support at 17.) Because the County Boards’ continued unlawful conduct cannot be considered a benefit to the public, Petitioners argue that the need for a preliminary injunction is clear. (Appl. for Prelim. Inj. ¶ 13; Memo. of Law in Support at 17-18.) Petitioners also repeat their claims regarding the harms to Republican Committee Petitioners and Voter Petitioners, respectively. Petitioners thus claim that by granting the injunction, the Court will reaffirm the *Pennsylvania Democratic Party* Court’s holding that the County Boards cannot implement cure procedures that are not set forth in the Election Code, thus eliminating the harms to Petitioners. (Memo. of Law in Support at 19.)

Third, Petitioners claim that the requested prohibitory injunction—i.e., one that enjoins the doing of an act that will change the status quo—seeks only to preserve the state of the law as set forth by the Election Code and as established by the Supreme Court’s decision in *Pennsylvania Democratic Party*, i.e., prior to the County Boards’ unlawful conduct in implementing notice and cure procedures.

(Appl. for Prelim. Inj. ¶ 14; Memo. of Law in Support at 19-20.) Petitioners further request “an explicit recognition that only the Legislature can authorize a cure procedure to address voters’ failure to comply with the Election Code’s signature and [ballot secrecy] requirements.” (Appl. for Prelim. Inj. ¶ 13; Memo. of Law in Support at 20.)

Fourth, Petitioners assert they are likely to prevail on the merits of their underlying claims in this matter because the notice and cure procedures implemented by some, but not all, County Boards are unlawful under both the Election Code and the Supreme Court’s holding in *Pennsylvania Democratic Party*, and they violate the Elections Clause of the United States Constitution because they infringe on the legislature’s exclusive authority to regulate the manner of holding federal elections. (Appl. for Prelim. Inj. ¶ 15; Memo. of Law in Support at 21-22.) Petitioners again highlight the Supreme Court’s prior holding that County Boards are not required to implement cure procedures, which they contend forecloses the notion that County Boards are permitted to implement their own notice and cure procedures, because such procedures would reflect policy decisions reserved for the legislature. (Memo. of Law in Support at 23-24.) Petitioners repeat their claim that Section 302 of the Election Code contains nothing authorizing County Boards to implement these procedures, and, moreover, that section requires that County Boards ensure that elections are honestly, efficiently, and **uniformly** conducted. (Memo. of Law in Support at 24 (quoting Section 302(g) of the Election Code, 25 P.S. § 2642(g)). Petitioners again highlight that these cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, “because the Election Code spells out the

limited availability of such procedures and does not authorize Boards to expand them.” (Memo. of Law in Support at 25.)<sup>13</sup>

Fifth, Petitioners contend the requested injunction is narrowly tailored and, thus, reasonably suited to abate the offending activity because it seeks only to enforce the Supreme Court’s prior holding in *Pennsylvania Democratic Party* that the Election Code does not provide any cure procedures for absentee and mail-in ballots and that only the legislature can enact such procedures. (Appl. for Prelim. Inj. ¶ 16; Memo. of Law in Support at 32-33.) Sixth, and finally, Petitioners argue that “the public interest is best served by a consistent application of the rule of law established by the General Assembly and the maintenance of the separation of powers in Pennsylvania. Conversely, the public interest is not served by allowing Boards to act as quasi-legislatures, resolving ‘the open policy questions’ attendant [to] the development of cure procedures on their own, let alone cure procedures whose existence and particulars vary from county to county.” (Appl. for Prelim. Inj. ¶ 17; Memo. of Law in Support at 33-34.) In this regard, Petitioners claim that any “ruling to the contrary would only further diminish Pennsylvania voters’ confidence in the election system as a result of the secretive and inconsistent application of election procedures across the state.” (Memo. of Law in Support at 34.) For these reasons, Petitioners assert they are entitled to injunctive relief.

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<sup>13</sup> Petitioners further contend that Respondents, who all were parties in the *Pennsylvania Democratic Party* case, are collaterally estopped from relitigating whether the Election Code provides for cure procedures aside from missing proof of identification. (Memo. of Law in Support at 26-27.) Moreover, the Acting Secretary should be barred, through judicial estoppel, from advocating for a different result in this case, when she previously took the position in *Pennsylvania Democratic Party* that the Election Code does not provide for cure procedures to address voters’ failure to comply with the signature and ballot secrecy requirements. (Memo. of Law in Support at 27-28.) Given the Court’s disposition on the Application for Preliminary Injunction, the Court will not address these issues further.

### **III. PARTIES' & INTERVENORS' ARGUMENTS**

Commonwealth Respondents, and various County Boards, oppose the relief sought in the Application for Preliminary Injunction and argue that Petitioners cannot establish a clear right to relief for various reasons. First, Commonwealth Respondents contend that this Court lacks subject matter jurisdiction over the matter because Commonwealth Respondents are not indispensable parties. (Cmwth. Resps.' Br. in Opp. at 10-15.) Commonwealth Respondents point out that Petitioners' challenges to the "varied exercise of discretionary power" are made in relation to the 67 County Boards, which are not considered "the Commonwealth government" for purposes of Section 761 of the Judicial Code, 42 Pa.C.S. § 761, but rather, are "local agencies." (Cmwth. Resps.' Br. in Opp. at 12.) According to Commonwealth Respondents, Petitioners are not challenging any decision or exercise of authority of the Acting Secretary, the Department of State, or otherwise, and nowhere do Petitioners allege any unlawful act committed by any Commonwealth official. (Cmwth. Resps.' Br. in Opp. at 13.) Moreover, the relief sought is an injunction against the County Boards, prohibiting them from developing and implementing cure procedures; as such, the participation of Commonwealth officials is not necessary for Petitioners to obtain the relief they seek. (Cmwth. Resps.' Br. in Opp. at 13-14.) Petitioners opine, in footnotes, that Petitioners must instead assert their claims separately against each County Board in the respective county court of common pleas. (Cmwth. Resps.' Br. in Opp. at 14-15, nn. 2-3.)

Commonwealth Respondents further argue that Petitioners lack standing, as they have not pled a cognizable injury. (Cmwth. Resps.' Br. in Opp. at 16-21.) Commonwealth Respondents contend specifically as to Voter Petitioners that courts have repeatedly rejected the "vote dilution" theory of standing, which has been held

to assert only a generalized grievance as opposed to any particularized injury. (Cmwlth. Resps.' Br. in Opp. at 17-18.) Moreover, Voter Petitioners have not been prevented from voting; they are not otherwise disadvantaged in terms of voting relative to other Pennsylvanians; and there is no indication the implementation of cure procedures by some County Boards has otherwise interfered with Petitioners' right to equal elections. (Cmwlth. Resps.' Br. in Opp. at 17-18.) According to Commonwealth Respondents, to the extent any Voter Petitioners live in counties with cure procedures, those procedures actually lift the burden on their right to vote; conversely, to the extent any Voter Petitioners live in counties without cure procedures, there is no injury. (Cmwlth. Resps.' Br. in Opp. at 18-19.)

To the extent Republican Committee Petitioners have alleged a cognizable injury with respect to their "thwarted" ability to educate voters about absentee and mail-in voting due to a lack of notice of County Boards' procedures, Commonwealth Respondents contend that they fail to prove the causal connection between the alleged injury and the County Boards' notice and cure procedures. (Cmwlth. Resps.' Br. in Opp. at 20-21.) Moreover, Republican Committee Petitioners have not alleged that the County Boards' notice and cure procedures put Republicans at a competitive disadvantage or otherwise impair their ability to win votes. (Cmwlth. Resps.' Br. in Opp. at 21.) Commonwealth Respondents further contend that Petitioners have failed to make out an Elections Clause claim, as "case law makes clear that individual voters, candidates, and political party organizations have no particularized interest in alleged violations of the Elections Clause[,]" and also have no interest in a state legislature's authority under the Election Code. (Cmwlth. Resps.' Br. in Opp. at 21-22 (citing various federal cases).) Rather, the only entity

who may assert such a claim is the General Assembly itself. (Cmwlth. Resps.’ Br. in Opp. at 22.)

Finally, Commonwealth Respondents argue that Petitioners’ claims simply fail as a matter of law, as they have not identified any provision of the Election Code prohibiting the County Boards from developing and implementing notice and cure procedures; the County Boards have rulemaking authority under Section 2642(f) of the Election Code delegated to them by the General Assembly; and, in *In Re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), our Supreme Court specifically recognized that the County Boards may fill gaps in the Election Code under such discretionary rulemaking authority. (Cmwlth. Resps.’ Br. in Opp. at 23-26.) Commonwealth Respondents also point to the statutory requirement that County Boards make lists of voters who have received and voted absentee and/or mail-in ballots, which requirement presupposes that County Boards will review absentee and mail-in ballots before pre-canvassing and canvassing begin and identify any deficiencies with those ballots. (Cmwlth. Resps.’ Br. in Opp. at 27 (citing Sections 1306(b)(1) and 1306-D(b)(1) of the Election Code,<sup>14</sup> 25 P.S. §§ 3146.6(b)(1) and 3150.16(b)(1)).) Commonwealth Respondents further observe that the other purported “cure procedure” identified by Petitioners in Section 1308(h) of the Election Code does not go “hand in hand” with the cure procedures implemented by certain County Boards, thus defeating Petitioners’ reliance on that section to support its case. (Cmwlth. Resps.’ Br. in Opp. at 29-30.) Commonwealth Respondents further contend that the Election Code must be read to enfranchise, not disenfranchise, voters (*id.* at 31-33); Petitioners distort the Supreme Court’s holding in *Pennsylvania Democratic Party*, and thus, collateral and judicial estoppel do not

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<sup>14</sup> Section 1306-D was added to the Election Code by Act 77.



apply (*id.* at 34-37); and Petitioners waived their uniformity and equal protection arguments based on their failure to plead them in the Petition for Review (*id.* at 37-40).<sup>15</sup>

With respect to the Application for Preliminary Injunction, Commonwealth Respondents assert that Petitioners cannot meet their burden on the preliminary injunction criteria. Specifically, they contend that the injunction would run counter to the public interest of enfranchising voters and would substantially harm voters by disenfranchising them. (Cmwth. Resps.’ Br. in Opp. at 40-42.) Moreover, according to Commonwealth Respondents, any order prohibiting notice and cure procedure for the upcoming General Election would likely result in the invalidation of ballots already cast, confuse and upset electors, and disrupt the ongoing administration of the election. (Cmwth. Resps.’ Br. in Opp. at 43.) Further, the injunction is “vastly overbroad.” (Cmwth. Resps.’ Br. in Opp. at 45-47.)

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<sup>15</sup> Federal courts have previously rejected the notion that variations in notice and opportunity to cure procedures from county to county violate equal protection principles. For example, in *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020) (*Trump II*), the United States District Court for the Middle District of Pennsylvania rejected such a claim made on behalf of the Trump Campaign, holding that it is consistent with equal protection principles for some but not all counties to implement notice and opportunity to cure procedures. The District Court stated: “[t]hat some counties may have chosen to implement the [Secretary’s] guidance [on notice and opportunity to cure procedures] (or not), or to implement it differently, does not constitute an equal[ ]protection violation. ‘[M]any courts [ ] have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.’ . . . Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.” *Trump II*, 502 F. Supp. 3d at 922-23 (quoting *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 389-90 (W.D. Pa. 2020) (*Trump I*)). The United States Court of Appeals for the Third Circuit affirmed the District Court’s decision in *Trump II*. See *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F. App’x 377, 388 (3d Cir. 2020) (*Trump III*). **Thus, even if Petitioners had brought an election uniformity or equal protection claim, it would plainly fail, just as the equal protection claim in *Trump I* and *Trump II* failed.**

Commonwealth Respondents finally contend that Petitioners must post a substantial bond to obtain the relief sought, pursuant to Pa.R.Civ.P. 1531(b). (Cmwlth. Resps.’ Br. in Opp. at 47-48.)

In their answers in opposition, mostly all of the 25 County Boards generally deny that Petitioners are entitled to the relief they seek in the Application for Preliminary Injunction and assert reasons therefor that are similar to those of Commonwealth Respondents. Generally speaking, these County Boards claim that Petitioners misunderstand and misstate the Supreme Court’s holding in *Pennsylvania Democratic Party*, which was not that County Boards are prohibited from implementing notice and cure procedures, but only that County Boards are not **required** to implement notice and cure procedures. To the contrary, County Boards enjoy broad authority under Section 2642(f) of the Election Code to implement such procedures at their discretion. Further, Petitioners cannot meet their burden of establishing the six essential prerequisites for the grant of a preliminary injunction because (1) they cannot show immediate and irreparable harm setting Petitioners apart from other voters in Pennsylvania and, further, with respect to the County Boards continuing any notice and cure procedures; (2) greater injury to voters would result from granting the injunction rather than refusing it; (3) the injunction would substantially disrupt the status quo by changing current procedures in various counties, some of which have been in place since 2020; (4) Petitioners have not shown a clear right to the relief they seek, as they have pointed to neither any provision of the Election Code, nor any case law, prohibiting the curing of minor defects on absentee and mail-in ballots; (5) the injunction is overbroad, as some County Boards have no cure procedures in place; (6) and the public interest will be severely harmed if the injunction is granted, as it will result in the

disenfranchisement of voters whose ballots will be set aside based on readily apparent and easily correctible defects, general confusion amongst voters, and County Boards having to expend additional funds to educate voters, as well as County Board staff, about new procedures on the eve of an election that is already underway.

Northampton County also generally opposes the relief sought by Petitioners for the above reasons but adds that Petitioners misrepresent the Stipulated Settlement Agreement to which it is a party, which provides only that it may provide notice to a voter who returns a ballot lacking a secrecy envelope in relation to its pre-canvass duties, which is compliant with the Election Code.

Lehigh County, which is a party to a separate Stipulated Settlement Agreement, explains that it has entered in the agreement to perform certain actions, including informing voters of the importance of providing contact information, notifying all voters whose naked ballots are discovered prior to 8:00 p.m. on Election Day, providing those names to the party or candidate representatives who are onsite, and pursuing other actions in good faith to allow Lehigh County officials to identify naked ballots prior to pre-canvassing by virtue of the weight and/or thickness of the envelope and possibly utilizing a secrecy envelope of a strong color so it is more readily identifiable compared to other absentee or mail-in ballot materials that are provided to voters.

Monroe County additionally asserts, in relevant part, that Petitioners have not stated with specificity what is and is not considered a “cure” procedure. Adams County adds, similar to Commonwealth Respondents, that Section 1308(h) is not actually a “cure” concerning ballot defects but rather addresses the identity of the voter, and further highlights that it is impossible to know what the General Assembly

might consider a “cure procedure” without that term being statutorily defined or appearing elsewhere in the Election Code.

Philadelphia County, Delaware County, and Intervenors DNC and PDP assert that Petitioners’ claims are foreclosed by laches, as they waited nearly two years to assert the same claims that were rejected in 2020 and have not offered any justification for waiting to file this action when they knew or should have known that County Boards had these notice and cure procedures. Like Commonwealth Respondents, Philadelphia County also vehemently argues that Petitioners, i.e., party organizations and individual voters from counties that do not include Philadelphia, lack standing to pursue their claims and, on that basis, cannot show a probability of success on the merits. (Phila. Cnty. Memo. of Law in Opp. to Pet’rs’ Appl. for Prelim. Inj. at 6-7.) The Philadelphia Board claims that Petitioners have failed to show they have an interest surpassing that of every other citizen in having ballots counted properly and in having County Boards obey the law. (*Id.* at 6.) Further, citing a federal district court decision in *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020), the Philadelphia Board asserts that “[p]arty organizations cannot show any particularized injury given that it is pure speculation at this time what parties’ candidates any cured ballots will favor.” (*Id.* at 6.)

Philadelphia County and Intervenors further assert that Petitioners cannot satisfy the other preliminary injunction factors, as the requested injunction would upset the status quo, confuse county officials and voters alike regarding an already complex system of absentee and mail-in voting, and risk unnecessarily and unjustifiably disenfranchising Pennsylvanians, which is not in the public interest. Moreover, Petitioners have not asserted any irreparable harm, and the injunction is

not narrowly tailored to address the challenged conduct during the pendency of this litigation.

Petitioners rejoin that their claims are not barred by the doctrine of laches, as asserted by Philadelphia County, Delaware County, and Intervenors. Petitioners inform that it was not until after the Governor vetoed House Bill 1300 in June of 2021 that Petitioner RNC began seeking information about County Boards' various ballot curing procedures under the Right-to-Know Law (RTKL).<sup>16</sup> Further, the most recent settlement agreement addressing cure procedures did not occur until June of 2022. Petitioners thus contend that Respondents have alleged only vague and speculative harms that may occur if a preliminary injunction is granted; however, even if the County Boards would experience some harm in the form of incurring costs to adjust their practices and train staff, such harm is not the type of prejudice that the laches defense is intended to prevent. Petitioners also contend that this Court does have subject matter jurisdiction over this matter and dispute Commonwealth Respondents' assertion that the County Boards are not included as part of the "Commonwealth government" under 42 Pa.C.S. § 761. Petitioners submit that this Court also has exclusive original jurisdiction over election matters under 42 Pa.C.S. § 764. Petitioners argue that the County Boards are creatures of statute, i.e., the Election Code, and, thus, are government agencies. For these reasons, Petitioners assert that this Court has original jurisdiction over this matter. Petitioners finally assert that all of the named Respondents are indispensable parties in this matter.

#### **IV. DISCUSSION**

As extensively set forth above, Petitioners seek an order from this Court, preliminarily enjoining the County Boards from developing and implementing

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<sup>16</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Election Code's signature and ballot secrecy requirements, as well as enjoining the Acting Secretary from taking any action inconsistent with such order enjoining the County Boards, and Respondents generally deny that injunctive relief is warranted in this case. Commonwealth Respondents, some County Boards, and one set of Intervenor also assert several arguments as to why the Application for Preliminary Injunction should be denied and the Petition for Review dismissed, including challenges based on laches, lack of subject matter jurisdiction, and lack of standing. Because the Court heard argument on the parties' positions regarding laches at the status conference/hearing, the Court will address that issue herein. However, because the Court does not find laches to be a bar to Petitioners' action, the Court will first address the Application for Preliminary Injunction, followed by an analysis of why laches does not apply in this case.

### **Application for Preliminary Injunction**

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Dec. of Zoning Hearing Bd. of Little Britain Twp.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties' dispute can be fully resolved. *Id.* The party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages;
- (2) greater injury would result from refusing the injunction than from granting it,

and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and[] (6) the preliminary injunction will not adversely affect the public interest.

*SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014) (citing, *inter alia*, *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)). “Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if **each** [factor] has been fully and completely established.” *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original). However, “if the petitioner[s] fail[] to establish any one of them, there is no need to address the others.” *Lee Pub’n, Inc. v. Dickinson Sch. of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (emphasis in original) (quoting *City of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988)).

Before addressing each of the preliminary injunction criteria, this Court notes that “[t]he longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020) (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). Further, any doubt about whether the Election Code authorizes County Boards to implement notice and cure procedures must be resolved in favor of preventing inadvertent forfeiture of electors’ right to vote. In interpreting the Election Code, the Court applies “interpretive principles” of statutory construction specific to “election matters.” *Pa. Democratic Party*, 238 A.3d at 360. “[T]he overarching principle guiding the interpretation of the Election Code is that it should be liberally construed

so as not to deprive electors of the right to elect a candidate of their choice.” *Chapman v. Berks Cnty. Bd. of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022), 2022 WL 4100998, at \*13 (Cohn Jubelirer, P.J.) (single-Judge op.) (citing *Pa. Democratic Party*, 238 A.3d at 356); accord *In re Major*, 248 A.3d 445, 450 (Pa. 2021), *reargument denied* (Apr. 12, 2021). The “goal must be to enfranchise and not to disenfranchise the electorate,” *Pa. Democratic Party*, 238 A.3d at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)), in accordance with the “longstanding and overriding policy in this Commonwealth to protect the elective franchise,” *id.* (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)).

With the above principles in mind, the Court turns to the Application for Preliminary Injunction before it.

### **Success on the Merits**

Because it is dispositive, the Court will first address whether Petitioners are likely to prevail on the merits of their claims. At the status conference/hearing in this matter, all parties agreed that a hearing was not necessary in this case because the issue is purely a legal one requiring both statutory construction and interpretation of relevant case law. The Petition for Review essentially asks this Court to decide whether County Boards are prohibited under Pennsylvania law from developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Election Code’s signature and ballot secrecy requirements. The Court will thus begin with the relevant sections of the Election Code pertaining to those requirements.

Section 1306(a) of the Election Code, 25 P.S. § 3146.6(a), explains the process for voting by absentee ballot as follows:



(a) Except as provided in paragraphs (2) and (3), at any time after receiving an official absentee ballot, but on or before eight o'clock P.M. the day of the primary or election, **the elector shall, in secret, proceed to mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot."** This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(Emphasis added.) Section 1306-D(a) of the Election Code, added by Act 77, 25 P.S. § 3150.16(a), explains the same process for voting by mail-in ballot:

(a) General rule.--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector **shall, in secret, proceed to mark the ballot . . . and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed "Official Election Ballot."** This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

(Emphasis added.) In summary, after absentee and mail-in voters mark their respective ballots, they must secure them in a secrecy envelope, and then place that envelope into the return envelope on which is printed the declaration of the elector, which the elector must "fill out, date and sign." Electors can then either send the return envelope to their County Boards by mail, postage prepaid, or deliver it in person to their County Boards. Notably, neither Section 1306 nor Section 1306-D,

governing voting by absentee and mail-in ballots, provides any language regarding the consequence for failing to comply with either the “fill out, date<sup>17</sup> and sign” requirement as to the declaration or the secrecy envelope requirement.

Section 1308(a) of the Election Code governs what happens when County Boards receive voted absentee and mail-in ballots:

(a) **The county boards of election**, upon receipt of official absentee ballots in sealed official absentee ballot envelopes as provided under this article and mail-in ballots as in sealed official mail-in ballot envelopes as provided under Article XIII-D, **shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.** An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a) (emphasis added). Thus, upon receipt of voted ballots, County Boards must safely keep and secure the ballots until they are to be canvassed.

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<sup>17</sup> Although the date requirement does not appear to be at issue in this case, the Court notes that in *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election (Appeal of: Donald J. Trump for President, Inc.)*, 241 A.3d 1058, 1061-62 (Pa. 2020), a plurality of our Supreme Court held that Election Code does not require County Boards to disqualify absentee or mail-in ballots submitted by qualified electors who signed the declaration on their ballots’ outer envelopes but did not handwrite their name, address, and/or date in voter declaration on outer envelope, where no fraud or irregularity has been alleged. *See also McCormick v. Chapman* (Pa. Cmwlth., No. 286 M.D. 2022, filed June 2, 2022) (in granting motion for special injunction, Court concluded a substantial question was raised as to whether voters are being disenfranchised based on a date requirement that is immaterial to a voter’s qualification in violation of Section 10101(a)(2)(B) of the Civil Rights Act and/or without a compelling reason in violation of state law), and *Chapman v. Berks Cnty. Bd. of Election* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022) (in granting summary relief, Court held the lack of a handwritten date on the declaration on the return envelope of a timely received absentee or mail-in ballot does not support excluding those ballots from the three county boards’ certified results under both Pennsylvania law and Section 10101(a)(2)(B) of the Civil Rights Act).

The County Boards may begin pre-canvassing ballots no earlier than 7:00 a.m. on Election Day per Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1). Section 1308(g)(1.1) further provides that “[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.”

Following the pre-canvass, County Boards are required to “canvass,” or count, the votes reflected in the absentee and mail-in ballots that are received no later than 8:00 p.m. on Election Day. Section 1308(g)(2) of the Election Code, 25 P.S. § 3146.8(g)(2); Section 102 of the Election Code, 25 P.S. § 2602 (defining “canvass”). Each County Board is to examine the declaration of the absentee and mail-in ballots, which includes comparing the information thereon with the information the county board has in its files, verifying the proof of identification and the right to vote of the elector, and determining whether the elector’s declaration is sufficient. 25 P.S. § 3146.8(g)(3). Where no challenge to the absentee or mail-in ballot has been made, and the elector is not deceased, “[a]ll absentee ballots . . . and all mail-in ballots . . . that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(d), (g)(4). However, “[i]f any of the envelopes on which are printed, stamped or endorsed the words “Official Election Ballot” [(i.e., the secrecy envelope)] contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” 25 P.S. § 3146.8(g)(4)(ii).

In support of their argument that they have a likelihood of success on the merits, Petitioners cite Section 1308(h), which they claim provides the only “cure”

procedure in the Election Code relating to the proof of identification required when applying for and obtaining absentee and mail-in ballots:<sup>18</sup>

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<sup>18</sup> In order to vote by absentee or mail-in ballot, electors

must submit applications to county boards of elections, and in connection therewith must provide the address at which they are registered to vote. They must also sign a declaration affirming, among other things, that they are “eligible to vote by mail-in [or absentee] ballot at the forthcoming primary or election,” and that “all of the information” supplied in the mail-in or absentee ballot application is “true and correct.” 25 P.S. §§ 3150.12, 3146.2. Upon receipt of the application, the county board of elections must confirm the elector’s qualifications and verify that the elector’s address on the application matches the elector’s registration. Upon the county board of elections’ approval of the application, the elector is provided with a ballot, an inner “secrecy envelope” into which the ballot is to be placed, and an outer envelope into which the secrecy envelope is to be placed and returned to the board.

*See In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election (Appeal of: Donald J. Trump for President, Inc.),* 241 A.3d 1058, 1067 (Pa. 2020). Where, however, an absentee ballot is not approved by the County Board, Section 1302.2(d) of the Election Code, added by the Act of August 13, 1963, P.L. 707, 25 P.S. § 3146.2b(d), provides a type of cure procedure for applications for absentee ballots/proof of identification:

(d) In the event that any application for an official absentee ballot is not approved by the county board of elections, the elector shall be notified immediately to that effect with a statement by the county board of the reasons for the disapproval. For those applicants whose proof of identification was not provided with the application or could not be verified by the board, the board shall send notice to the elector with the absentee ballot requiring the elector to provide proof of identification with the absentee ballot or the ballot will not be counted.

*See also* Section 1305 of the Election Code, added by the Act of March 6, 1951, P.L. 3, 25 P.S. § 3146.5, which states that, “For those applicants whose proof of identification was not provided with the application or could not be verified by the board, the board shall send the notice required under section 1302.2(d) with the absentee ballot.”

For mail-in ballots, Section 1302.2-D(c) of the Election Code, added by Act 77, 25 P.S. § 3150.12b(c), provides as follows:

(c) Notice.--In the event that an application for an official mail-in ballot is not approved by the county board of elections, the elector shall be notified immediately

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately] . . . .

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h). Thus, those electors applying to vote by absentee or mail-in ballot have until six days following Election Day to verify their proof of identification, and, pursuant to subsection (h)(3), their failure to do so will result in their ballot not being counted.

Also pertinent to this dispute is Section 302 of the Election Code, 25 P.S. § 2642, which enumerates the powers and duties of County Boards, in relevant part, as follows:

The county boards of elections, within their respective counties, shall exercise, **in the manner provided by this act**, all powers granted to

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with a statement by the county board of the reasons for the disapproval. For applicants whose proof of identification was not provided with the application or could not be verified by the board, the board shall send notice to the elector with the mail-in ballot requiring the elector to provide proof of identification with the mail-in ballot or the ballot will not be counted.

*See also* Section 1305-D of the Election Code, 25 P.S. § 3150.15, which states that, “For applicants whose proof of identification was not provided with the application or could not be verified by the board, the board shall send the notice required under section 1302.2-D(c) with the mail-in ballot.”

them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

....

(f) To 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.

(Emphasis added.)

The case law interpreting these sections of the Election Code has been less than clear over recent years. As many of the Respondents, and even Petitioners, in this case point out, in *Pennsylvania Democratic Party*, the Supreme Court considered the specific question of whether County Boards were required to contact qualified electors whose absentee and mail-in ballots contained minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail and provide them with an opportunity to cure those defects. *Pa. Democratic Party*, 238 A.3d at 372. In considering that question and ultimately concluding that the petitioner in that case, i.e., PDF, was not entitled to the relief it sought as to that question, the Supreme Court stated as follows, which we quote in full for accuracy:

Upon review, we conclude that the Boards are not required to implement a “notice and opportunity to cure” procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, [the petitioner] has cited no constitutional or statutory basis that would countenance imposing the procedure [the petitioner] seeks to require (*i.e.*, having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including “minor” or “facial” defects—and for whom the Boards have contact information—and then afford those individual the opportunity to cure defects until the . . . deadline [for uniform and overseas ballots].”

**While the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature.** *Winston*, 91 A. at 522. As noted herein, although the

Election Code provides the procedures for casting and counting a vote by mail, **it does not provide for the “notice and opportunity to cure” procedure sought by [p]etitioner.** To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, **we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature.** We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government. Thus, for the reasons stated, the [p]etitioner is not entitled to the relief it seeks in Count III of its petition.

*Pa. Democratic Party*, 238 A.3d at 374 (emphasis added).

As the above-quoted text indicates, the *Pennsylvania Democratic Party* Court held that the decision of whether to provide a notice and cure procedure is one best suited for the legislature in light of the policy considerations attendant to that decision. However, this Court does not read that decision, and specifically, the above text, to stand for the much broader proposition asserted by Petitioners that County Boards are necessarily prohibited from developing and implementing notice and opportunity to cure procedures. Notably, the Supreme Court did not explicitly decide whether County Boards’ implementation of notice and opportunity to cure procedures were **forbidden** under the Election Code, but only whether the Election Code **required** County Boards to implement such procedures. Those are separate and distinct issues. **Therefore, the Court disagrees with Petitioners’ argument that *Pennsylvania Democratic Party* was the final word on this subject.**

The *Pennsylvania Democratic Party* Court also considered whether the Election Code required that absentee or mail-in ballots, which are otherwise without error, be invalidated based solely on voters’ failure to place such ballots in the

secrecy envelope (labeled “Official Election Ballot”). The Court ultimately concluded that the legislature intended for the secrecy envelope provision of 25 P.S. § 3150.16(a) to be mandatory, stating: “We respectfully reject the contentions of [the petitioner] and the Secretary that because the General Assembly did not delineate a remedy narrowly linked to the mail-in elector’s failure to utilize a secrecy envelope, the language of the Election Code is directory, and an elector’s violation of the command inconsequential.” *Pa. Democratic Party*, 238 A.3d at 378. The Court further noted “the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.” *Id.* at 380. In *In Re: Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election (Appeal of: Donald J. Trump for President, Inc.)*, 241 A.3d 1058, 1061-62 (Pa. 2020), a plurality of the Supreme Court reaffirmed its holding in *Pennsylvania Democratic Party* that the secrecy ballot requirement was mandatory, noting it implicated a “weighty interest,” i.e., secrecy in voting protected by article VII, section 4 of the Pennsylvania Constitution, but distinguished that case from the dispute before it, which involved what it found to be “minor irregularities.” *In re Canvass*, 241 A.3d at 1071-73. There is no question these cases stand for the proposition that the secrecy envelope requirement is mandatory.

The Supreme Court’s holding in *Pennsylvania Democratic Party*, and later in *In re Canvass*, specifically with respect to the mandatory nature of the ballot secrecy requirement, leads this Court to conclude that any procedure developed and implemented to cure such deficiency **may be** contrary to the Supreme Court’s observations that (1) the Election Code contains no notice and cure procedures for defective absentee or mail-in ballots, and (2) the implementation of any such cure procedures is one best suited for the legislature in light of the policy decisions



attendant thereto. However, notably absent from the Supreme Court’s discussions in both those cases is whether County Boards’ are prohibited from offering a notice and opportunity to cure procedure to remedy such mandatory defect. Also absent from those cases, as well as the parties’ filings in this case, is any discussion of whether the signature requirement with respect to absentee or mail-in ballots is a mandatory requirement of the Election Code, or merely directory, and whether such defect may be remedied prior to 8:00 p.m. on Election Day.

With respect to Section 302(f) of the Election Code, upon which Respondents rely for the proposition that the County Boards do in fact have authority to develop and implement notice and cure procedures at their discretion, our Supreme Court has held that the absence of any provisions in the Election Code relating to proximity parameters for representatives viewing the pre-canvassing meeting reflected “the legislature’s deliberate choice to leave such matters to the informed discretion of [County Boards], who are empowered by Section 2642(f) of the Election Code ‘[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers.’” *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020). As the Supreme Court further stated in that case, “[t]he General Assembly, had it so desired, could have easily established such [proximity] parameters; however, it did not. It 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.” *See Sivick v. State Ethics Commission*, — Pa. —, 238 A.3d 1250, —, 2020 WL 5823822, at \*10 (2020) (“It is axiomatic that we may not add statutory language where we find the extant language somehow lacking.”) Here, in light of *In re Canvassing Observation*, this Court cannot say for certain whether

the legislature intended to omit a notice and opportunity to cure procedure from the Election Code, or whether the lack thereof imbues the County Boards with authority under their discretionary rulemaking authority delegated to them by the General Assembly in Section 302(f).

Because it is not clear based on either the text of the Election Code, or the subsequent cases interpreting it, whether notice and cure procedures are permitted and/or prohibited by the Election Code, the Court concludes that Petitioners have failed to show a strong likelihood of success at this early stage of the litigation.

**Greater Injury by Refusing the Injunction; Maintaining the Status Quo;**  
**Injunction Reasonably Suited to Abate Offending Activity; Public Interest**

Although the Court technically need not continue further in light of its conclusion that Petitioners have not established a likelihood of success on the merits in this case, the Court will address the other prongs of the preliminary injunction test for the sake of completeness.

As stated earlier, in order to grant a preliminary injunction, Petitioners must also prove each of the following:

(2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings;

(3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;

.....

(5) the injunction is reasonably suited to abate the offending activity; and[]

(6) the preliminary injunction will not adversely affect the public interest.

*SEIU Healthcare Pa.*, 104 A.3d at 582. Because these four prongs are closely interrelated and involve similar issues and analysis, they will be addressed together.

The injunction requested by Petitioners does not satisfy these four prongs or effectively address the concerns raised by the parties to this action. Specifically, greater harm will clearly result from granting the injunction, rather than denying it; granting the injunction will not maintain the status quo; the injunction is not reasonably suited to abate the offending conduct; and the injunction will adversely affect the public interest.

Petitioners argue that greater harm will result if the injunction is denied, rather than if the injunction is granted, because it will prevent the disparate treatment of noncompliant mail-in and absentee ballots throughout the Commonwealth and eliminate uncertainty regarding how mail-in and absentee ballots will be counted. Further, absent the injunction, the County Boards “will collectively engage in a[n unlawful] mishmash of cure procedures.” (Pet’rs’ Suppl. Memo. of Law at 14.) Petitioners also contend that the burden imposed on the County Boards is “*de minimis*” because all that is required is for them to **stop** implementing cure procedures, which would save the County Boards money; the requested injunction would merely bring all County Boards into a uniform application of the Election Code; the injunction would not cause “disenfranchisement” as alleged by Respondents, because no Pennsylvania voter has a right to notice and an opportunity to cure their ballot; and without an injunction, voter confidence will be harmed due to the disparate procedures employed by various County Boards. (Pet’rs’ Suppl. Memo. of Law at 15-18 (emphasis in original).) Petitioners further submit that the injunction only seeks to preserve the status quo, which it claims is the time when no such cure procedures existed; the injunction is narrowly tailored because it seeks

only to enforce the Supreme Court's decision in *Pennsylvania Democratic Party* that the Election Code fails to provide a cure procedure and only the legislature can enact one; and, finally, the injunction will not adversely affect the public interest, which is best served by consistent application of the rule of law established by the General Assembly and the maintenance of the separation of powers in Pennsylvania. (Pet'rs' Suppl. Memo. of Law at 18-19, 33-35.)

Petitioners' arguments as to greater harm in refusing the injunction, preserving the status quo, and adverse effect on the public interest all hinge on their belief that the notice and cure procedures used by various County Boards are "unlawful." However, as will be discussed below in the context of immediate and irreparable harm, Petitioners have failed to establish a clear violation of the Election Code or the law interpreting the Election Code, such that the County Boards' continuing implementation of these procedures cannot, therefore, be considered "unlawful" at this point in the litigation such that it needs to be enjoined.

Such sweeping relief against the 67 County Boards would clearly cause greater injury than refusing the injunction, precisely because it would seriously harm the public interest and orderly administration of elections, namely the 2022 General Election, which is already well underway. Enjoining the various County Boards' procedures at this point in time would further deprive voters in counties who have been privy to such procedures for the past two years since the enactment of Act 77 the opportunities to have their votes counted, thus resulting in almost certain disenfranchisement of voters. If this Court were to grant the injunctive relief Petitioners seek, the County Boards would then have to modify their practices and procedures in response to the injunction **and would notably have to do so when absentee and mail-in voting is already underway.** Simply put, Petitioners ignore

the actual harms that will almost certainly occur if the injunction is granted, which all participating Respondents have laid out in their comprehensive filings in this matter.

As it further relates to the greater harm inquiry, the status quo,<sup>19</sup> and an adverse effect on the public interest, the Court quotes the following passage from Commonwealth Respondents' Brief in Opposition to Petitioners' Application for Preliminary Injunction:

Beyond disenfranchising electors directly, entering an injunction now will [] cause confusion and uncertainty, altering election administration procedures in many counties. As the Petition for Review reflects, [County Boards] with notice-and-cure procedures have, at least in some cases, had them in past years, *see* Pet.[] ¶¶ 65-70, and communicated them to the public. *See, e.g., id.* ¶¶ 66-67, 70; *see also* Angela Coulombis and Jamie Martines, *Republicans Seek to Sideline Pa. Mail Ballots that Voters Were Allowed to Fix*, Spotlight PA (November 3, 2020), <https://www.spotlightpa.org/news/2020/11/pennsylvania-mail-ballots-republican-legal-challenge-naked-ballots-fixed-cured/>.

Further, by the time the Court hears argument on Petitioners' [Application for Preliminary Injunction] on September 28, mail-in and absentee voting pursuant to Act 77 will likely already be well underway. Counties are statutorily authorized to begin processing mail-in ballot applications and mailing ballots to electors on the permanent mail-in voting list on September 19. *See* 25 P.S. § 3150.12a (application processing may begin 50 days before Election Day); 25 P.S. § 3150.15 (mailing of ballots). Ballot mailings will speed up in the last two weeks of September. By the end of September, counties will likely have mailed out tens of thousands of ballots; in many places, voters will be streaming to election offices to request mail-in ballots in person, fill them out, and hand them in.

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<sup>19</sup> The status quo for a preliminary injunction is “the last peaceable and lawful uncontested status preceding the underlying controversy.” *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Cmwlth. 2011) (quoting *In re Milton Hershey Sch. Tr.*, 807 A.2d 324, 333 (Pa. Cmwlth. 2002)). One purpose of a preliminary injunction is to keep the parties in the same positions they had when the case began in order to preserve the Court's ability to decide the issues before it.

Accordingly, an order prohibiting notice-and-cure procedures in the November 2022 election would likely invalidate ballots already cast, confuse and upset electors, and disrupt the ongoing administration of the election. In that way, this case is like *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam). There, the petitioners filed a suit asking that mail-in votes already cast in the 2020 general election be disqualified, **387 days and two elections** after the Governor signed Act 77 into law. Here, Petitioners filed suit on September 1, 2022, 667 days after the 2020 election, the latest date by which Petitioners knew about [County Boards'] notice-and-cure procedures. *See* Pet. ¶¶ 66-67 (discussing 2020 notice-and-cure procedures about which political parties were notified).

Consequently, . . . , fundamental principles of equity would preclude this Court from granting the relief Petitioners seek prior to the November 2022 general election. *See* . . . *McLinko v. Degraffenreid* [Pa. Cwmlth., No. 244 M.D. 2021, order dated Sept. 24, 2021] [] (“prospective relief, as requested by petitioners, is not available for the November 2021 election because it is already underway”); *see also Kuznik v. Westmoreland Cnty. Bd. of Com[m]’rs*, 902 A.2d 476, 489 (Pa. 2006) (injunctive relief is unavailable where greater injury would result from granting the injunction than from denying it).

(Cmwlth. Resps.’ Br. in Opp. at 42-44 (emphasis in original).) This Court agrees.

Petitioners have also not shown that the injunction is reasonably suited to abate the offending activity. Petitioners seek a statewide injunction enjoining all 67 County Boards from developing and implementing “unlawful” notice and opportunity to cure procedures, as well as the Acting Secretary from taking any action inconsistent with such injunction. **Again, Petitioners have not alleged a clear violation of the Election Code or the law interpreting it.** Further, not all 67 County Boards have notice and opportunity to cure procedures. *See* Jt. Stip. of Exs., Jt. Stip. of Facts at 2-6 & Exs. B-D. Moreover, Petitioners have not sufficiently alleged what, if any, type of action the Acting Secretary might take in the event this Court granted the requested relief in this case. Accordingly, this Court concludes

that Petitioners failed to meet their burden as to these four prongs of the preliminary injunction test.

### **Immediate & Irreparable Harm**

The Court will now address the remaining prong of the preliminary injunction criteria: that the party seeking a preliminary injunction must establish that “the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages.” To meet this burden, Petitioners must present “concrete evidence” demonstrating “actual proof of irreparable harm.” *Greenmoor, Inc. v. Burchick Constr. Co., Inc.*, 908 A.2d 310, 314 (Pa. Super. 2006). A claim of irreparable harm cannot be based on speculation and hypothesis, and for purposes of a preliminary injunction, the harm must be irreversible before it is deemed irreparable. *Id.* at 314; *see also Kiddo v. Am. Fed’n of State*, 239 A.3d 1141 (Pa. Cmwlth. 2020) (not reported), 2020 WL 4431793 (stating that “the alleged harm or consequences must not be speculative in nature and [that] ‘speculative considerations . . . cannot form the basis for issuing [a preliminary injunction]’”).

Petitioners argue that the preliminary injunction is necessary to prevent immediate and irreparable harm to the uniform and equal administration of elections in Pennsylvania and that, absent a preliminary injunction, some County Boards will continue developing and implementing in secrecy disparate and unlawful cure procedures in all elections, including in the upcoming 2022 General Election. In support of their argument that there would be immediate and irreparable harm if the injunction is not granted, Petitioners cite *Hempfield School District v. Election Board of Lancaster County*, 574 A.2d 1190, 1191 (Pa. Cmwlth.), *appeal denied*, 581 A.2d 575 (Pa. 1990). In doing so, Petitioners allege that this case stands for the proposition that unlawful action by a County Board “per se constitutes immediate

and irreparable harm.” (Appl. for Prelim. Inj. ¶ 13, Memo. of Law in Support at 14; Pet’rs’ Suppl. Memo. of Law at 11.) However, this case is not on point.

In *Hempfield*, the county board of elections (election board) planned to include on the local May 1990 primary election ballot a nonbinding referendum asking voters if they supported the school board’s plan to construct a new high school. *Hempfield*, 574 A.2d at 1190-91. The school board petitioned a trial court for an injunction enjoining the election board from placing the referendum on the ballot, arguing that the election board had no legal authority to place the referendum on a ballot on its own initiative. The trial court denied injunctive relief, and the school district appealed. *Id.* at 1191. On appeal, the election board argued that the school district was not entitled to injunctive relief because the referendum would not subject the school board to “**great** and irreparable harm.” *Id.* at 1193 (emphasis added). Noting that the Election Code gave the school board, not the election board, “the option as to the means for obtaining public review of the construction or leasing of a new school building . . . [,]” this Court disagreed with the election board and reversed the trial court, holding that “unlawful action by the [e]lection [b]oard per se constitutes immediate and irreparable harm.” *Id.* at 1193.

Here, Petitioners have not proven that there is a clear violation of the Election Code or the law interpreting the Election Code, such that it per se constitutes immediate and irreparable harm. First, Petitioners argue that notice and opportunity to cure procedures are not authorized under the Election Code, but they have not cited to any Election Code provision that **prohibits** County Boards from developing and implementing such notice and opportunity to cure procedures. Second, Petitioners’ strained reliance on the Supreme Court’s decision in *Pennsylvania Democratic Party* for the proposition that the Court has already spoken on the



subject and held that a cure procedure to address signature and secrecy ballot defects in absentee and mail-in ballots must come from the legislature, such that the continued implementation of such cure procedures by County Boards constitutes a “violation of law” that *per se* constitutes immediate and irreparable harm, is also unavailing.

As mentioned above, *Pennsylvania Democratic Party* considered, *inter alia*, the specific question of whether County Boards were **required** to contact qualified electors whose absentee and mail-in ballots contained minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail and provide them with an opportunity to cure those defects. *Pa. Democratic Party*, 238 A.3d at 372. In considering that question and ultimately concluding that the petitioner in that case, i.e., PDP, was not entitled to the relief it sought as to that question, the Supreme Court determined that the Election Code does not provide for the notice and cure procedure the petitioner requested in that case. In so deciding, the Court recognized that while voters may be at risk of having their ballots rejected based on minor defects in contravention of the Election Code’s requirements, it agreed that the decision to provide such a procedure was one best suited for the legislature. Thus, while this Court agrees with Petitioners that *Pennsylvania Democratic Party* held that implementation of any notice and cure procedure is best suited for the legislature, this Court does not read that decision to stand for the much broader proposition asserted by Petitioners that County Boards are necessarily prohibited from developing and implementing notice and opportunity to cure procedures and, consequently, that any violation of such holding constitutes *per se* immediate and irreparable harm. As discussed above in the context of whether Petitioners are likely to succeed on the merits of their claims, the question of whether

County Boards are **forbidden** from allowing electors to cure deficient absentee or mail-in ballots is separate and distinct from the issue of whether counties are **required** to adopt notice and opportunity to cure procedures under the Election Code. Accordingly, the Court concludes that Petitioners have failed to establish that the County Boards are clearly violating this case law interpreting the Election Code, such that it constitutes per se immediate and irreparable harm.

To the extent Petitioners allege that, without an injunction, the continuing implementation of such notice and cure procedures will harm Voter Petitioners because they will suffer the risk of having their votes being treated unequally, and thus diluted, and Republican Committee Petitioners because they will be unable to properly educate their members regarding the rules applicable to absentee and mail-in voting, the Court disagrees that these things constitute immediate and irreparable harm. In support of their claim of harm in these regards, Petitioners point to the nearly 15 County Boards identified in the Joint Stipulation of Facts in this matter and the lack of uniformity in cure procedures amongst those counties. *See generally* Jt. Stip. of Exs., Jt. Stip. of Facts at 2-3 (Beaver County); Ex. G (Philadelphia County); Jt. Stip. of Exs., Allegheny-2 and Allegheny-3; Pet'rs' Ex. 7 (Lehigh County Settlement). Petitioners also rely on the declarations of four named Voter Petitioners, all of whom allege that their respective County Boards do not have notice and opportunity to cure procedures; as such, if there is a mistake on their ballots, they will not have an opportunity to correct them and their votes will not count. *See* Jt. Stip. of Exs., Pet'rs' Exs. 17-20 (Declarations of Ross M. Farber (Pet-17), Vallerie Siciliano-Biancaniello (Pet-18), S. Michael Streib (Pet-19), and Jesse D. Daniel (Pet-20)). While it appears true from the Joint Stipulation of Facts that some County Boards are implementing different cure procedures, the Court does not

believe such lack of uniformity constitutes “concrete evidence” demonstrating “**actual proof** of irreparable harm” that is irreversible. Moreover, with respect to Voter Petitioners, such matters are, at best, **speculative** considerations, which cannot form the basis for issuing the extraordinary relief sought. *See Kiddo*, at \*11 (stating that “claims that something may happen in the future if the injunctive relief is denied is speculative and insufficient to support the grant of a preliminary injunction”). As such, Petitioners have not met their burden of proving immediate and irreparable harm for purposes of the preliminary injunction.

### **Laches**

Respondents and Intervenors essentially allege that the Application for Preliminary Injunction should be denied, and the Petition for Review dismissed, because Petitioners waited too long to file this action, which has prejudiced voters who reasonably rely on notice and opportunity to cure procedures when casting their absentee or mail-in ballots. In support of their argument, Respondents and Intervenors rely primarily on *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020). Petitioners respond that *Kelly* is distinguishable from this matter, and that laches does not apply here because they have neither unduly delayed instituting this action due to a lack of due diligence, nor has there been any prejudice to any Respondents or Intervenors. Petitioners cite various exhibits in the Joint Stipulation of Exhibits as support for their contentions.

The Court first addresses Respondents’ and Intervenors’ reliance on *Kelly*. The *Kelly* action was commenced several weeks after the 2020 General Election and set forth a facial challenge to the constitutionality of Act 77. The petitioners in that case “sought to invalidate the ballots of millions of Pennsylvania voters who utilized the mail-in voting procedures established by Act 77 and count only those ballots that

[the petitioners] deem to be ‘legal votes.’” *Kelly*, 240 A.3d at 1256. The petitioners further sought “injunctive relief prohibiting the certification of the results of the General Election held on November 3, 2020.” *Id.* Notably, in addition to advocating the “proposition that the court disenfranchise al 6.9 million Pennsylvanians’ who voted in the General Election[,]” the petitioners also requested that the court “direct[ ] the General Assembly to choose Pennsylvania’s electors.” *Id.* The Supreme Court ultimately dismissed the petition for review on the basis of laches, holding that the petitioners failed to act with due diligence in commencing their facial challenge nearly a year after the enactment of Act 77 and on the eve of the County Boards’ certification of the results of the election when the results were “becoming seemingly apparent.” *Id.* at 1256-57. The Supreme Court also noted the substantial prejudice in the form of disenfranchisement of voters who had already voted in both the primary and general elections that year that would arise from the failure to institute a timely facial challenge. *Id.*

The Court agrees with Petitioners that *Kelly* is distinguishable from the instant matter. The petitioners in *Kelly* filed their challenge to Act 77 nearly 3 weeks **after** the 2020 General Election and a year after the enactment of Act 77, whereas Petitioners here filed this action on September 1, 2022, nearly two months **prior to** the upcoming General Election. That absentee and mail-in voting has already begun in relation to the 2022 General Election does not mean that laches is a complete bar to Petitioners’ action as a whole, which also seeks a declaration regarding the lawfulness of notice and opportunity to cure procedures in future elections. The Court therefore holds that *Kelly* is not controlling in this case and will instead consider whether laches applies under the applicable standards.

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.” *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 Petitioners’ failure to exercise due diligence, and prejudice to the party asserting laches resulting from the delay. *Id.*; *Meier v. Maleski*, 648 A.2d 595, 603 (Pa. Cmwlth. 1994). “[T]he question of laches is factual and is determined by examining the circumstances of each case.” *Sprague*, 550 A.2d at 187.

After reviewing the evidence offered and the circumstances of this case, the Court concludes that Respondents and Intervenors have not established that laches is a bar to Petitioners’ claims. Based on the evidence presented in this case, the delay was not inexcusable or for want of due diligence. Petitioners explained in their filings, as well as at the status conference/hearing in this matter, that following the Supreme Court’s decision in *Pennsylvania Democratic Party*, and the failed legislative attempt to enact such procedures in accordance with that decision (i.e., House Bill 1300), Petitioner RNC began seeking information about County Boards’ various ballot curing procedures under the RTKL but was met with numerous extensions and delays. *See* Jt. Stip. of Exs., Pet’rs’ Exs. 9 (House Bill 1300); 10 (Governor Wolf’s Letter dated June 30, 2021, indicating he was withholding his signature); 16 (Declaration of Brian M. Adrian, explaining, *inter alia*, that RTKL requests served on Philadelphia County in October 2021 and March 2022, and on Bucks County in October 2021, and that responses not received from either County Board until August 2022). Petitioners further explained that the earliest indication they had that some County Boards planned to utilize cure procedures for the upcoming 2022 General Election came to light in the wake of the Stipulated

Settlement Agreements entered into by Northampton and Lehigh Counties in the federal case in *Dondiego v. Lehigh County Board of Elections*, No. 5:22-cv-02111 (E.D. Pa. 2022), on June 15, 2022. See Jt. Stip. of Exs., Pet'rs' Exs. 6 (Northampton County Settlement dated June 15, 2022) & 7 (Lehigh County Settlement dated June 15, 2022). Petitioners, RNC and RPP of which were intervenors in the federal action, have also produced a June 15, 2022 letter from one of their counsel addressed to the federal court Judge in that case, placing Northampton and Lehigh Counties on notice that the Settlement Agreements reached were illegal. Jt. Stip. of Exs., Pet'rs' Ex. 21 (June 15, 2022 letter from Thomas W. King to Judge Schmehl in *Dondiego* case). Petitioners further highlight, as they did at the status conference/hearing, that the Acting Secretary did not sign the Settlement Agreements, purportedly because her doing so would have been contrary to the guidance she has on the Department of State's website stating that absentee and mail-in ballots will not be counted if they fail to comply with the Election Code's outer envelope declaration and ballot secrecy requirements. Jt. Stip. of Exs., Pet'rs Ex. 11 (print-out of Acting Secretary's Guidance on Department of State's website). The Court finds Petitioners' explanation and evidence in this regard credible and that its decision to actively seek out information from County Boards regarding what they were doing with respect to ballot curing following the legislature's failed attempt to enact the same, rather than immediately file a lawsuit, reflects that Petitioners acted with due diligence and provides an excuse for any delay in filing the Petition for Review.

The Court is also not convinced that Respondents and Intervenors established that they were prejudiced in any way by the delay in filing the Petition for Review. The party asserting laches "must establish prejudice from some changed condition of the parties which occurs during the period of, and in reliance on, the delay."

*Meier*, 648 A.2d at 604-05 (citing *Sprague*, 550 A.2d at 188) (emphasis omitted). Such prejudice has been found where “records have become lost or unavailable, witnesses die or cannot be located, and where the party asserting laches has changed its position in anticipation that a party will not pursue a particular claim.” *Id.* The evidence in this case does not establish that Philadelphia County, Delaware County, or Intervenor DNC and PDP changed their positions based on the delay in filing the Petition for Review. While the County Boards and Intervenor DNC and PDP claim that, if Petitioners prevail, voters, the County Boards, and DNC and PDP will be prejudiced because voters will no longer be able to rely on longstanding notice and cure procedures in their respective counties, County Boards that have employed these procedures will have to, among other things, retrain their staff, and DNC and PDP will have to reeducate voters on mail voting – this is not prejudice, but rather “this would be a natural consequence of a legal determination that” such notice and cure procedures violate the law. *Chapman v. Berks Cnty. Bd. of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed Aug. 19, 2022), slip op. at 22 (Cohn Jubelirer, P.J.) (single-Judge op.), 2022 WL 4100998. Thus, under the circumstances in this case, the Court cannot say that laches applies here.

Accordingly, for all of the foregoing reasons, Petitioners’ Application for Preliminary Injunction is **DENIED**.



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ELLEN CEISLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :  
National Republican Senatorial :  
Committee; National Republican :  
Congressional 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; S. Michael :  
Streib, :

Petitioners :

v. :

No. 447 M.D. 2022

Leigh M. Chapman, in her 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; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :



Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
Elections; Elk County Board of :  
Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
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Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
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Board of Elections; Perry County :  
Board of Elections; Philadelphia County :  
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Elections; Warren County Board of :

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Elections; Wayne County Board of :  
Elections; Westmoreland County Board :  
of Elections; Wyoming County Board of:  
Elections; and York County Board of :  
Elections, :  
Respondents :

**ORDER**

AND NOW, this 29<sup>th</sup> day of September, 2022, the Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532, filed by Petitioners, is DENIED.



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ELLEN CEISLER, Judge

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