

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 447 MD 2022</p>
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**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS'  
APPLICATION FOR SPECIAL RELIEF IN THE FORM  
OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532**

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**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES .....iii

INTRODUCTION ..... 1

STATEMENT OF THE CASE.....2

LEGAL STANDARD..... 12

ARGUMENT ..... 14

    I.    A Preliminary Injunction Is Necessary to Prevent  
          Immediate and Irreparable Harm ..... 14

    II.   Greater Injury Would Result from Refusing Than  
          from Granting the Injunction..... 17

    III.  The Requested Injunction Seeks Only to Preserve  
          the Status Quo ..... 19

    IV.  Petitioners Are Likely to Prevail on the Merits ..... 21

        A.   Boards Are Prohibited from Developing and  
              Implementing Cure Procedures Not Expressly  
              Created by the General Assembly ..... 21

          1.   The Supreme Court Has Already Held  
              That the Decision to Provide a Cure  
              Procedure Rests with the Legislature ..... 21

          2.   The Legislature Has Not Enacted Any  
              Cure Procedure Since *Pa. Democratic*  
              Party Was Denied ..... 23

          3.   Boards Are Not Free to Create Their  
              Own Cure Procedures ..... 23

4.	Collateral Estoppel Precludes the Respondents from Relitigating the Issue.....	26
5.	The Acting Secretary Should Be Barred from Advocating for a Different Result Now.....	27
B.	Allowing the Boards to Implement Their Own Cure Procedures Absent Any Directive from the Election Code Would Violate the Federal Elections Clause.....	30
V.	The Requested Injunction Is Reasonably Suited to Abate the Offending Activity.....	32
VI.	The Requested Injunction Will Not Adversely Affect the Public Interest.....	33
	CONCLUSION .....	34

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## TABLE OF AUTHORITIES

### Cases

<i>Allegheny Anesthesiology Assoc. v. Allegheny Gen. Hosp.</i> , 826 A.2d 886 (Pa. Super. 2003) .....	19
<i>Ariz. State Legis. V. Ariz. Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015) ....	31
<i>Bausch v. Lehigh County Board of Elections, et al.</i> , No. 5:22-cv-02111 (E.D. Pa.).....	9
<i>Big Bass Lake Cmty. Ass’n v. Warren</i> , 950 A.2d 1137 (Pa. Commw. 2008).....	33
<i>Chipman v. Avon Grove Sch. Dist.</i> , 841 A.2d 1098 (Pa. Commw. 2004).....	12
<i>City of Philadelphia v. Commonwealth</i> , 837 A.2d 591 (Pa. Commw. 2003) .....	19
<i>Commonwealth ex. rel. Pappert v. Coy</i> , 860 A.2d 1201 (Pa. Commw. 2004).....	13
<i>Commonwealth v. Coward</i> , 414 A.2d 91 (Pa. 180).....	14, 18
<i>Crowe v. Sch. Dist. Of Pittsburgh</i> , 805 A.2d 691 (Pa. Commw. 2002).....	32
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020).....	7, 30
<i>Hatfield Twp. V. Lexon Ins. Co.</i> , 15 A.2d 547 (Pa. Commw. 2011).....	19
<i>Hempfield Sch. Dist. V. Election Bd. of Lancaster County</i> , 574 A.2d 1190 (Pa. Commw. 1990).....	14, 15, 18, 25
<i>In re Nov. 3, 2020 Gen. Election</i> , 240 A.3d 591 (Pa. 2020).....	7, 25, 30
<i>J.S. by &amp; ex rel. H.S. v. Bethlehem Area Sch. Dist.</i> , 794 A.2d 936 (Pa. Commw. 2002).....	26
<i>Kessler v. Broder</i> , 851 A.2d 944 (Pa. Super. 2004) .....	20
<i>Kuznik v. Westmoreland Cty. Bd. of Comm’rs</i> , 902 A.2d 476 (Pa. 2006).....	15, 25

<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018) .	3, 4, 22, 28
<i>Marazas v. Workers’ Comp. Appeal Bd. (Vitas Healthcare Corp.)</i> , 97 A.2d 854 (Pa. Commw. 2014) .....	28
<i>Mazzi v. Commonwealth</i> , 432 A.2d 985 (Pa. 1981) .....	20
<i>Milton Hershey School Trust</i> , 807 A.2d 324 (Pa. Commw. 2002).....	19
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020) .....	passim
<i>Pa. Pub. Utility Com. v. Israel</i> , 52 A.2d 317 (Pa. 1947) .....	14, 18
<i>PG Publ. Co. v. Aichele</i> , 902 F. Supp. 2d 724 (W.D. Pa. 2012) .....	25, 32
<i>Rue v. K-Mart Corp.</i> , 713 A.2d 82 (Pa. 1998).....	27
<i>Shenango Valley Osteopathic Hosp. v. Dep’t of Health</i> , 451 A.2d 434 (Pa. 1982) .....	13
<i>Smiley v. Holm</i> , 285 U.S. 355 (1982).....	21, 31
<i>Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.</i> , 828 A.2d 995 (Pa. 2003) .....	13
<i>Sunbeam Corp. v. Liberty Mut. Ins. Co.</i> , 791 A.2d 1189 (Pa. 2001) .....	28
<i>United States v. Berks County</i> , 250 F. Supp. 2d 525 (E.D. Pa. 2003).....	17
<i>United States Term Limits v. Thornton</i> , 514 U.S. 779 (1995).....	31
<i>Woods at Wayne Homeowners Ass’n v. Gambone Bros. Constr. Co.</i> , 893 A.2d 196 (Pa. Commw. 2006) .....	33
<b><u>Statutes</u></b>	
24 P.S. § 7-701.1 .....	15
25 P.S. § 2642 .....	6, 24, 32

25 P.S. § 3146.2a ..... 16

25 P.S. § 3146.6 ..... 3, 21

25 P.S. § 3146.8 ..... 3, 23

25 P.S. § 3150.12a ..... 16

25 P.S. § 3150.16 ..... 3, 21

**Rules**

Pa. R.A.P. 1532 ..... 12, 13

**Constitutional Provisions**

PA. CONST. art. I, § 5 ..... 3, 22

PA. CONST. art. VII, § 6 ..... 12, 15, 24, 25

U.S. CONST. art. I, § 4 ..... 21, 30

**Other Authorities**

House Bill 1300, Printer’s Number 1869, § 1308 ..... 5, 23

Lancaster County, *Frequently Asked Questions About Mail-In Ballots*,  
at <https://www.co.lancaster.pa.us/1351/FAQs-of-MAIL-IN-BALLOTS> ..... 11

Pennsylvania Dep’t of State, *Guidance Concerning Examination of  
Absentee and Mail-In Ballot Return Envelopes* (Sept. 11, 2020), at  
[www.dos.pa.gov/VotingElections/OtherServicesEvents/Docu-  
ments/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) ..... 6, 29

Pennsylvania Department of State, *Mail and Absentee Ballot*, at  
[https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.  
aspx](https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx) ..... 6, 10, 29

## INTRODUCTION

Less than two years ago, the Pennsylvania Supreme Court unanimously held that “the Election Code provides procedures for casting and counting a vote by mail” but does not provide for a notice and opportunity to cure procedure (“cure procedure”) for a voter who fails to comply with the signature and secrecy envelope requirements for voting by mail-in or absentee ballot. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). The Supreme Court expressly stated that “[t]o the extent that a voter is at risk of having his or her ballot rejected” due to failure to comply with the Election Code’s signature and secrecy ballot requirements for mail-in and absentee ballots, “the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Id.* The Supreme Court “express[ed] 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.” *Id.*

Last year, the Legislature passed a bill to implement a broader cure procedure, but Governor Wolf vetoed it. Thus, under the Election Code, Pennsylvania finds itself in the same position it was two years ago: without a cure procedure to address

a voter's failure to comply with the Election Code's signature and secrecy envelope requirements.

Nonetheless, several of the Respondent County Boards of Elections ("Boards") have begun or continue to implement cure procedures of their own making for signature and secrecy-envelope defects. This is unlawful. The Boards are not free to act as quasi-legislatures, to make policy decisions and fashion cure procedures of their own design that lack uniformity across the Commonwealth. Article VII, Section 6 of the Pennsylvania Constitution requires statewide uniformity for all laws regulating the holding of elections, and the Boards' implementation of cure procedures constitutes a plain violation of the Elections Clause of the U.S. Constitution.

Petitioners support and seek to uphold free and fair elections on behalf of all Pennsylvanians. Accordingly, they have brought this action to ensure that Respondents adhere to state law and the Supreme Court's holding for the upcoming general election and beyond.

### **STATEMENT OF THE CASE**

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; *Pa. Democratic Party*, 238 A.3d 345.

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 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 Pa. Democratic Party*, 238 A.3d 345. 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 require the Boards of Elections 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 are more 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 has acknowledged 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).

Boards are not free 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.

In a separate matter regarding election administration, the Secretary took that the position that the Election Code’s failure to specifically authorize Boards to take certain action precluded them from doing so. 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%](http://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes)

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This guidance was challenged in both state and federal court; in both cases, the guidance was upheld. In the federal district court action, the court observed 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). In the state court action, the Pennsylvania followed the same reasoning, 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.’” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020).

Nevertheless, publicly available information and investigation have revealed that 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* Email from Daniel D. Grieser, dated August 1, 2022, and a copy of the postcard used by Bucks County is attached to the Petition for Review 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* Montgomery County Right to Know Law Response, attached to the Petition for Review 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 agreed to begin implementing cure procedures in future elections. 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 **Exhibit “D”** attached to the Application (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 of Elections 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 Northampton County Board of Elections Stipulated Settlement Agreement, attached to the Petition for Review 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 Lehigh County Board of Elections Stipulated Settlement Agreement, attached to the Application as **Exhibit F**.

The Acting Secretary was a party in the *Bausch* 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 acknowledgment 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 **Exhibit G** (October 6, 2020 email from Jean C. Byers, p. 34) attached to the Petition for Review.

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 the defect depends entirely on where they reside. In other words, mail-in and absentee ballots

with identical defects are receiving unequal treatment based solely on the voter's residency. Even worse, the likelihood of the voter receiving notice of his or her non-compliant ballot depends not only on the voter's county of residence, but also whether that voter is registered with a political party, when the ballot is returned to the Board, and whether "time allows" for some Boards to provide such notice. Further, the permissible methods of cure vary even across those counties which do allow for curing. Indeed, it is unclear to what extent those Boards which allow for curing contact all voters who, under their cure procedures, would be permitted to cure their ballots.

The result 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.

### **LEGAL STANDARD**

The Court may order a preliminary injunction or special injunction "in the interest of justice and consistent with the usages and principles of law." Pa. R.A.P. 1532(a). The purpose of a preliminary injunction is to "put and keep matters in the position in which they were before the improper conduct of the defendant commenced." *Chipman v. Avon Grove Sch. Dist.*, 841 A.2d 1098, 1101 (Pa.

Commw. 2004). The standard for obtaining a preliminary injunction under Rule 1532(a) of the Pennsylvania Rules of Appellate Procedure are the same as that for obtaining a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *See Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982); *Commonwealth ex rel. Pappert v. Coy*, 860 A.2d 1201, 1204 (Pa. Commw. 2004). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See Pa. R.A.P. 1532(a)*.

A special injunction is warranted where: (1) it is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages, (2) greater injury would result from refusing than from granting the injunction and the issuance of an injunction will not substantively harm other interested parties in the proceedings, (3) the injunction would restore their status quo ante, (4) the movant is likely to succeed on the merits, (5) the requested injunction is reasonably suited to abate the offending activity, and (6) the injunction will not adversely affect the public interest. *See Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

All of these factors are satisfied here.

## ARGUMENT

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

A preliminary injunction is necessary to prevent immediate and irreparable harm to the uniform administration of elections in Pennsylvania. Absent a preliminary injunction, some Boards will continue developing and implementing in secrecy disparate and unlawful cure procedures in all elections, including the General Election scheduled to take place on November 8, 2022.

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. 1999). “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 *Pa. 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 and secrecy ballot 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 runs 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. Voters can request mail-in and absentee ballots as early as 50 days before the general election, 25 P.S. §§ 3146.2a, 3150.12a; thus, voters can vote as early as September 19, 2022. 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. The continued practice of some Boards to implement cure procedures—despite the Election Code’s failure to authorize one, the Pennsylvania Supreme Court’s confirmation that such procedures must come from the Legislature, and Governor Wolf’s veto of the Legislature’s effort to enact one—also would cause irreparable harm to the separation of powers and the rule of law.

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, (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 Pennsylvania Constitution, the Election Code, and the Pennsylvania Supreme Court's holding in *Pa. Democratic Party*.

## **II. Greater Injury Would Result from Refusing Than from Granting the Injunction.**

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 or secrecy ballot envelope

defects (in violation of the Election Code) while preventing others—especially those not registered with an 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. A violation of law cannot be considered a benefit to the public. *Coward*, 414 A.2d at 98 (citing *Israel*, 52 A.2d at 321).

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.

If the Boards are not enjoined from implementing cure procedures of their own making, the Voter Petitioners thus suffer the risk of having votes being treated unequally based on their county of residence; effectively, their validly-cast votes will be diluted by the counting of unlawfully “cured” ballots that failed to meet the Election Code’s minimal criteria. The Committee Petitioners will likewise be unable to properly educate their members regarding the exact rules applicable to mail-in and absentee ballot voters due to the fact that many of the Boards do not publicize whether they have implemented a cure procedure and if so, the particulars of same. In contrast, by granting the requested injunction, the Court will affirm the



Pennsylvania Supreme Court's prior holding in *Pa. Democratic Party* that the Boards cannot implement cure procedures that are not set forth in the Election Code and eliminate these harms to Petitioners.

### **III. 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 and secrecy ballot 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.

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.

#### **IV. Petitioners Are Likely to Prevail on the Merits.**

Petitioners are likely to prevail on the merits of the underlying claims in this case. The cure procedures implemented by Boards run afoul of both the Election Code and the Supreme Court's holding in *Pa. Democratic Party*. Moreover, the Boards' implementation of cure procedures not crafted by the Legislature violates the Elections Clause of the United States Constitution, as only the Legislature or Congress may prescribe the "manner" of holding federal elections. *See* U.S. CONST. art. I, § 4, cl. 1. Boards' implementation of cure procedures for mail-in and absentee ballots in federal elections infringes on the Legislature's exclusive authority in this domain. *See Smiley v. Holm*, 285 U.S. 355, 373 (1982).

##### **A. Boards Are Prohibited from Developing and Implementing Cure Procedures Not Expressly Created by the General Assembly.**

##### **1. The Supreme Court Has Already Held That the Decision to Provide a Cure Procedure Rests with the Legislature.**

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)).

The Supreme Court agreeing 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 ballot 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.*

**2. The Legislature Has Not Enacted Any Cure Procedure Since *Pa. Democratic Party* Was Decided.**

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 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 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.

**3. Boards Are Not Free to Create Their Own Cure Procedures.**

In addition to squarely holding that the Boards are not required to implement cure procedures, *Pa. Democratic Party* also forecloses any argument that the Boards

are permitted to implement their own cure procedures. After all, it observed that any such procedures would reflect policy choices reserved by law to the Legislature. Boards simply do not have the authority under Pennsylvania law to craft and implement their own 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. Section 2642 enumerates several duties the Boards must perform. *See id.* § 2642(a)–(p). Notably absent from the list is anything that might authorize the development and implementation of cure procedures.

In fact, § 2642 makes clear that the Boards lack the authority to implement their own cure procedures that necessarily vary across and even within counties. For example, Boards are required to “instruct election officers in their duties ... and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted.” *Id.* § 2642(g) (emphasis added); *see also* PA. CONST. art. VII, § 6 (requiring that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State”).

Further, the limited rulemaking authority granted to the Boards does not extend to cure procedures. Rather, Boards are authorized only “[t]o make and issue

such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” *Id.* § 2642(f); *accord 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.’”); *Hempfield Sch. Dist.*, 574 A.2d at 1191 (“It is *a priori* that a governmental body such as an election board has only those powers expressly granted to it by the legislature.”).

Cure procedures adopted by Boards are “inconsistent with law” because the Election Code spells out the limited availability of such procedures and does not authorize Boards to expand them. *See, e.g., Pa. Democratic Party*, 238 A.3d at 374. “It is a well established principle of statutory interpretation that [the courts] ‘may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.’” *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020). Especially where the Election Code contemplates a “unitary system of voting in Pennsylvania” in keeping with the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State,” Boards simply cannot be permitted to decide whether and how to implement their own cure procedures. *see Kuznik v. Westmoreland County Bd. of Comm’rs*, 902 A.2d 476, 492 (Pa. 2006); *see also* PA. CONST. art. VII, § 6.

The Election Code’s provision of cure procedures for some matters—namely, lack of proof of identification—but not for others, such as a voter’s failure to comply with signature and secrecy envelope requirements, cannot be assumed to be accidental. Nor can it be interpreted as giving the Boards the discretion to create their own cure procedures. Accordingly, the Boards’ development of such cure procedures is “inconsistent with law.”

#### **4. Collateral Estoppel Precludes the Respondents from Relitigating the Issue.**

The Supreme Court has already resolved the issues of whether the Election Code provides for cure procedures aside from providing missing proof of identification—it does not—and which governmental body is empowered to change that—the Legislature. Because the Respondents were parties or in privity with parties in *Pa. Democratic Party*, the issue cannot be relitigated.

“Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were actually litigated and necessary to a previous final judgment.” *J.S. by & ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 794 A.2d 936, 939 (Pa. Commw. 2002). Collateral estoppel applies where: (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4) the party against whom collateral estoppel is asserted had a full and fair



opportunity to litigate the issue in the prior action. *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998).

All four elements of collateral estoppel apply here. *First*, the absence of a cure procedure to address voters' failure to comply with signature and secrecy envelope requirements was squarely addressed by the Supreme Court. So too was the issue of who was authorized to change that: the Legislature. *See Pa. Democratic Party*, 238 A.3d 374. *Second*, the Supreme Court of Pennsylvania entered a final judgment on the merits in *Pa. Democratic Party*. *Third*, all 67 Beards were parties in *Pa. Democratic Party*, as was the Secretary of the Commonwealth, just as is the case here. *Fourth*, all parties unquestionably had a full and fair opportunity to litigate the issue in the prior action; all respondents entered appearances, were represented by counsel, and submitted briefing on the issue.

Because all four elements of collateral estoppel apply, the Respondents should be precluded from relitigating the issues raised in this application for preliminary injunction.

**5. The Acting Secretary Should Be Barred from Advocating for a Different Result Now.**

Judicial estoppel prohibits the Acting Secretary from taking a different position in this action. The Secretary previously taken the position that the Election Code does not provide for cure procedures to address voters' failure to comply with signature and secrecy envelope requirements, and in other contexts, has argued that

the that the Election Code's silence on a matter does not vest the Boards with discretion to take matters into their own hands.

“The purpose of judicial estoppel is to ensure the parties do not play ‘fast and loose’ with the facts in order to suit their interests in different actions before different tribunals.” *Marazas v. Workers’ Comp. Appeal Bd. (Vitas Healthcare Corp.)*, 97 A.3d 854, 859 (Pa. Commw. 2014). Unlike *res judicata* and collateral estoppel, “judicial estoppel does not require actual litigation to a final order.” *Id.* “In essence, the doctrine of judicial estoppel prohibits parties from switching legal positions to suit their own ends.” *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 791 A.2d 1189, 1192 (Pa. 2001).

Both in *Pa. Democratic Party* and afterwards, the Acting Secretary has taken the position that cure procedures for signature and secrecy envelope defects are not permitted. In *Pa. Democratic Party*, the Acting Secretary *opposed* the relief sought by the Pennsylvania Democratic Party, arguing that “so long as a voter follows the requisite voting procedures, he or she ‘will have equally effective power to select the representative of his or her choice.’” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809). Moreover, the Acting Secretary noted that “logistical policy decisions” implicated in a cure procedure are properly addressed by the Legislature. *Id.*

The Acting Secretary has remained consistent in her public pronouncements since *Pa. Democratic Party*. The “Frequently Asked Questions” page on the Secretary’s website provides in relevant part:

**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>.

The Secretary’s position on cure procedures is consistent with the position she has taken in other contexts. With regard to signature comparisons, the Secretary issued guidance in 2020 that remains in force today: “The 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 guidance was upheld in both state and federal court, with both courts noting that the Election Code’s failure to expressly provide for signature comparison for

absentee and mail-in ballots did not allow for either the Boards or the courts to craft procedures of their own. *See In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020) (“It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance.”); *accord Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 399 (W.D. Pa. 2020) (“nowhere does the plain language of the statute require signature comparison as part of the verification analysis of [absentee or mail-in] ballots.”).

The Secretary has consistently asserted that the Boards are not free to act absent express authorization under the Election Code. Accordingly, the Acting Secretary should be barred from taking a different position in this litigation.

**B. Allowing the Boards to Implement Their Own Cure Procedures Absent Any Directive from the Election Code Would Violate the Federal Elections Clause.**

The Elections Clause of the United States Constitution directs: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

U.S. CONST. art. I, § 4, cl. 1. The United States Supreme Court held that:

[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to **notices**, registration, supervision of voting, protection of voters, prevention of fraud and

corrupt practices, **counting of votes**, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

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

The Elections Clause plainly contemplates that only two entities are empowered to regulate the “manner” in which elections are conducted: the Legislature and Congress. The General Assembly has authorized only a limited cure procedure regarding proof of identification through the Election Code, and a recent bill passed by the Legislature to include broader cure procedures was vetoed by Governor Wolf. For its part, Congress has not created any cure procedure for Pennsylvania elections.

Moreover, there is nothing in the Election Code to suggest that the General Assembly has authorized Boards to develop and implement cure procedures of their

own. The powers granted to the Boards are limited. *See* 25 P.S. § 2642. Indeed, the Boards are required to inspect “the conduct of primaries and elections ... to the end that primaries and elections may be honestly, efficiently, and **uniformly** conducted.” *Id.* § 2642(g) (emphasis added). Accordingly, Boards are authorized only “[t]o make and issue such rules, regulations and instructions, **not inconsistent with law**, as they may deem necessary for the guidance of voting machine custodians, elections officers, and electors.” *Id.* (emphasis added); *see also PG Publ. Co. v. Aichele*, 902 F. Supp. 2d 724, 761 (W.D. Pa. 2012) (holding that § 2642(f) “extends only to the promulgation of rules that are ‘not inconsistent with law.’”).

The Pennsylvania Supreme Court has already clearly expressed what the law is with respect to cure procedures: the Election Code does not provide for any aside from proof of identification. Those Boards which have implemented their own cure procedures cannot be acting “consistent with law” and, to the extent such cure procedures differ from those implemented by other Boards (and from those Boards which have not implemented a cure procedure), have usurped the Legislature’s authority to regulate the “manner” of elections in Pennsylvania. Such conduct must be enjoined.

**V. 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 the Pennsylvania Supreme 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.

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

The Pennsylvania Supreme 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.

### CONCLUSION

The Court should grant the Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction and enter an order prohibiting the Respondent Boards from developing and implementing cure procedures and for the Acting Secretary to take no action inconsistent with such an order.

Respectfully submitted,

Dated: September 7, 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: September 7, 2022

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief contains fewer than the 14,000 words permitted under Pa. R.A.P. 2135(a), excluding the cover page, table of contents and table of authorities. This word count relies upon the word count of the word processing software used to prepare this brief.

**GALLAGHER GIANCOLA LLC**

Dated: September 7, 2022

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**PROOF OF SERVICE**

I do hereby certify that a true and correct copy of the **Memorandum of Law in Support of Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under PA. R.A.P. 1532** has been served on all parties and/or their counsel as listed below:

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Respectfully submitted,

Dated: September 7, 2022

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