IN THE SUPREME COURT OF PENNSYLVANIA

No. 100 MAP 2022

REPUBLICAN NATIONAL COMMITTEE, et al.,

Appellants,

v.

LEIGH M. CHAPMAN, et al.,

Appellees,

and

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Intervenors-Appellees.

BRIEF FOR INTERVENORS-APPELLEES THE DEMOCRATIC NATIONAL COMMITTEE AND PENNSYLVANIA DEMOCRATIC PARTY

Appeal from the Sept. 29, 2022 Opinion and Order of the Commonwealth Court, Docketed at No. 477 M.D. 2022

October 6, 2022

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INTRODUCTION

After waiting over two years since they became aware of the challenged conduct, appellants ask this Court to disrupt the county election boards' ongoing administration of the November 2022 elections. Appellants make this belated request while mail-in and absentee ballots are being distributed and cast, seeking a preliminary injunction that would deny indisputably qualified voters their fundamental right to vote because of mistakes that could easily be fixed before the deadline to vote lapses. And appellants seek this extraordinary relief without offering any sound justification for delaying so long in challenging the procedures at issue here, nor any explanation for why—after having sat on their claims through the administration of no fewer than four elections—emergency relief is suddenly required in the midst of this particular election.

For the reasons set forth below and explained more fully in the prior briefs of intervenor-appellees the Democratic National Committee (DNC) and Pennsylvania Democratic Party (PDP), briefs that are attached hereto as exhibits, the Commonwealth Court properly denied appellants' application for a preliminary injunction, correctly concluding that appellants were not likely to succeed on the merits of their claims and had not shown irreparable harm. (Indeed, appellants have failed to satisfy any—let alone all—of the factors required for preliminary-injunctive relief.) As to the merits, the General Assembly has vested county boards with

substantial authority over the administration of elections, and that authority includes the discretion to offer voters notice and an opportunity to cure easily correctable errors on their ballots. The inevitable county-by-county variation that arises from such delegation does not violate the Pennsylvania Constitution, the Election Code, or basic principles of fairness and equality for the reasons set forth below. And appellants' claims of harm, which shifted throughout the proceedings below, are plainly insufficient, resting largely on the notion that one voter is harmed if another qualified voter's ballot is counted.

The denial of a preliminary injunction should be affirmed.

ARGUMENT

A. Appellants Have Failed To Establish That They Are Likely To Succeed On The Merits

Appellants have not established a likelihood of success on the merits, either with respect to the arguments they presented below, which the Commonwealth Court properly rejected, or with respect to the arguments they raised for the first time in this Court, which are waived.

1. Arguments presented below

Appellants wrongly claim (Br. 27) that there is no statutory authority for county boards to adopt notice-and-cure procedures. As the Commonwealth Court explained (Op. 36-37), the General Assembly has explicitly given each board the power "[t]o make and issue such rules, regulations and instructions, not inconsistent

with law, as they may deem necessary for the guidance of … electors," 25 Pa. Stat. §2642(f). For the reasons explained in the DNC's and PDP's prior briefs, determining what notice-and-cure procedures to provide, if any, easily falls within that broad grant of express authority. See Proposed Intervenors-Respondents' Answer To Petitioners' Application For Special Relief (Ex. A) pp.12-17; DNC's and PDP's Supplemental Brief (Ex. B) pp.20-21.

Appellants respond (Br. 28-31) that procedures to provide notice and opportunity to cure minor errors are "inconsistent with law," and thus not within the General Assembly's power, because of this Court's holding in Pennsylvania Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020). As the DNC and PDP explained fully in their briefs in the Commonwealth Court (see Ex. A pp.19-22; Ex. B pp.21-26), and as the Commonwealth Court recognized (Op. 38-40), that is meritless. Pennsylvania Democratic Party rejected only a claim that voters are entitled to both notice of a mail-ballot defect and a post-election opportunity to address that defect. This Court held 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," because the Court discerned "no constitutional or statutory basis that would countenance imposing the procedure Petitioner seeks to require." 238 A.3d at 374 (emphases added). And, this Court elaborated, whether to mandate statewide notice and cure is a decision "best suited

for the Legislature." Id. at 374; see also id. at 373 ("Respondent [argues] that the Legislature, not this Court, is the entity best suited to address the procedure proposed by Petitioner," i.e., a statewide notice-and-cure mandate (emphasis added)). But the decision never addressed whether boards have discretion under section 2642(f)—a provision never cited in the decision—to provide, on a county-specific basis, notice to voters and an opportunity to cure before the close of voting on election day.

Appellants' argument (Br.31-35) that the expressio unius canon requires reading a limitation into the General Assembly's grant of authority to county boards is contrary to this Court's decision in In re Canvassing Observation, 241 A.3d 339 (Pa. 2020). The Court there explained that "the absence of" particular procedures for carrying out a rule in the Election Code "reflect[s] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code." See Ex. B pp.24-25. Just as this Court declined to override that discretion in Pennsylvania Democratic Party by mandating the adoption of such procedures, the Commonwealth Court correctly denied appellants' request to override that discretion through a preliminary injunction barring the continued use of such procedures in the ongoing election.[1]

[1] This Court likewise recognized county boards' discretion under the Election Code in Pennsylvania Democratic Party itself, holding that "the Election Code permits county boards of elections to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes." 238 A.3d at 361.

Appellants are wrong to say (Br. 34-35) that this case is more akin to In re November 3, 2020 General Election, 240 A.3d 591 (Pa. 2020). That case involved an unrelated question, namely, "[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 rested its decision that the boards lacked such authority on (1) "the plain and unambiguous language of the Election Code" regarding what county board could require before accepting mail or absentee ballots, (2) the fact that the General Assembly "has been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter's signature," and (3) the evolution of the Election Code itself, which had been amended to remove "explicit signature comparison requirements for canvassing certain absentee ballots" and "expand[] the allowances for voting by mail." Id. at 608-610. Here there is no "plain and unambiguous" language precluding the boards' discretion to implement notice-and-cure; indeed, appellants' argument rests (Br. 27-32) on inferring such a bar from the Election Code's silence on the question. Further, appellants seek to restrict rather than "expand" the allowances for voting by mail, violating the principle that "the Election Code should be liberally construed so as not to deprive … electors of their right to elect a candidate of their choice," Pennsylvania Democratic Party, 238 A.3d at 356; see

also Appeal of James, 105 A.2d 64, 65-66 (Pa. 1954) (courts must liberally construe the Election Code "in favor of the right to vote").

2. Arguments presented for the first time in this Court

For the first time on appeal, appellants argue (Br. 36-42) that county notice-and-cure procedures violate the Election Code's pre-canvass requirement that ballots are to be kept in sealed or locked containers upon receipt, and that cure procedures that involve provisional ballots are inconsistent with the law because they require voters to knowingly make false statements under penalty of perjury. Appellants did not brief these issues before the Commonwealth Court. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa. R.A.P. 302(a).

Indeed, this Court has repeatedly refused to entertain this type of circumvention of the judicial process. For example, in Stuski v. Lauer, 697 A.2d 235 (Pa. 1997), the appellant was held to have waived her constitutional challenge to a statute because she failed to raise the issue with the Commonwealth Court sitting in original jurisdiction, id. at 238-239. And in Trigg v. Children's Hospital of Pittsburgh of UPMC, 229 A.3d 260 (Pa. 2020), this Court similarly held that a litigant had waived an issue, explaining that "[r]equiring issues to be properly raised first in the [lower] court … promotes the orderly and efficient use of judicial

resources, ensures fundamental fairness to the parties, and accounts for the expense attendant to appellate litigation," id. at 269.

Appellants' petition did not claim that the notice-and-cure procedures amounted to unlawful pre-canvassing activity, and they cited the pre-canvassing provisions of the Election Code only in passing in the supplemental brief they submitted to the Commonwealth Court after the close of primary briefing. See Supplemental Memorandum of Law in Support of Petitioners' Application for a Preliminary Injunction 9-10, RNC v. Chapman, No 447 MD 2022 (Pa. Commw. Ct. Sept. 26, 2022). Accordingly, the issue was not properly raised before the Commonwealth Court, because as this Court has explained, "an appellant is prohibited from raising new issues in a reply brief [and] a reply brief cannot be a vehicle to argue issues raised but inadequately developed in appellant's original brief." Commonwealth v. Fahy, 737 A.2d 214, 219 n.8 (Pa. 1999) (citing Pa. R.A.P. 2113(a) and 16 Standard Pennsylvania Practice 2d §89.5); see also Commonwealth v. Basemore, 744 A.2d 717, 726-727 (Pa. 2000) ("A reply brief … is an inappropriate means for presenting a new and substantively different issue than that addressed in the original brief.").

The considerations supporting waiver are especially relevant here. This Court has already had occasion to consider the processes that county boards of election go through before they pre-canvass the ballots. In re Canvass of Absentee and Mail-In

Ballots of November 3, 2020, 241 A.3d 1058, 1065-1067 (Pa. 2020). In doing so, this Court noted that the boards must, upon receipt of the ballot, scan the ballot into the SURE system, stamp the date of receipt on the outer envelope, and conduct the inspection required by 25 Pennsylvania Statutes §3146.8(g)(3) to produce a "list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed." 241 A.3d at 1067. Any reconsideration of the pre-canvassing rules would require full briefing and argument, which appellants have prevented by failing to present the issue below.

B. Appellants Cannot Establish They Would Suffer Irreparable Harm Absent An Injunction

The Commonwealth Court correctly held (Op. 46-50) that appellants have not met their "heavy" burden to show that they would suffer irreparable harm without an injunction, Warehime v. Warehime, 860 A.2d 41, 47 (Pa. 2004). Appellants' three contrary arguments fail.

First, appellants argue (Br. 45-46) that because they have claimed that the boards' procedures are unlawful, they are "per se" irreparably harmed. That is not the law—likelihood of success and irreparable harm are distinct requirements for an injunction. See Ex. A pp.24-25. Moreover, this harm argument depends entirely (see RNC Br. 46-48) on appellants' erroneous argument, discussed above, that Pennsylvania Democratic Party already held that county boards' notice-and-cure

procedures were unlawful. As the Commonwealth Court held (Op. 47-48), that does not satisfy their burden.

Second, appellants suggest (Br. 47-48) that the harm is the differential treatment itself, i.e., that voters in some counties can cure and others cannot. But that is an equal-protection claim, and appellants waived any such claim by failing to raise it in their petition. As the Commonwealth Court explained (Op. 25), appellants "waived their uniformity and equal protection arguments based on their failure to plead them in the Petition for Review." See Ex. A pp.25-27; Ex. B pp.17-20. The absence of an equal-protection claim is no accident. Courts in Pennsylvania have repeatedly rejected such claims in this very context, recognizing that "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." Donald J. Trump for President, Inc. v. Boockvar, 502 F.Supp.3d 899, 919 (M.D. Pa. 2020) (subsequent history omitted). Hence, the Third Circuit has explained that "[c]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems," and that "[e]ven when boards of elections vary considerably in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection." Donald J. Trump for President, Inc. v. Secretary of Pennsylvania, 830 F.App'x 377, 388 (3d Cir. 2020). Appellants have cited no contrary authority, i.e., not one case holding that voters have an interest, much less a right, to have their votes "inflated" via the

disenfranchisement of other qualified registered citizens whose ballots are timely cast. Put simply, no one has a legitimate interest in the rejection of their fellow citizens' ballots because of minor fixable errors, so long as those errors are in fact fixed and a properly completed ballot submitted within the time for voting prescribed by state law. See Ex. A pp.25-27; Ex. B. p.19. Thus, as the Commonwealth Court held (Op. 25 & n.15), "even if [appellants] had brought an election uniformity or equal protection claim, it would plainly fail, just as the equal protection claim in [the Trump cases from 2020] failed."[2]

Third, to the extent that appellants argue (Br. 48) that voters in counties that do not offer notice-and-cure procedures would be harmed by their inability to cure any mistakes, that contention likewise fails. The injunction appellants seek—barring other counties from affording notice and cure—would do nothing to remedy this supposed harm, so it provides no basis for an injunction. See Ex. B pp.16-17.

Having shown no cognizable injury at all, appellants certainly cannot establish the irreparable harm that is required for a preliminary injunction.

[2] These points regarding equal protection likewise apply to appellants' argument (Br. 42-44) under the Pennsylvania Constitution's Free and Equal Elections Clause (article I, section 5): No claim under that clause appears in the petition, so it is waived, and in any event there is no authority for the proposition that county-level variation in notice-and-cure (or other election) procedures violates that clause.

C. Granting A Preliminary Injunction Would Cause Far Greater Harm Than Denying It

The Commonwealth Court also correctly determined (Op. 41-46) that appellants' requested injunction would inflict far "greater injury," Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003), than the (non-existent) harm that would result from refusing it. Even if it were a cognizable harm not to have one's vote inflated, as appellants claim (Br. 49-50), that harm would unquestionably be outweighed by the harm of outright preventing tens of thousands of people, from having their vote counted at all. See Ex. A pp.29-32; Ex. B pp.26-27. The disenfranchisement of qualified Pennsylvania voters that the injunction would cause is a severe and irreparable injury, as the right to vote "is the bed-rock of our free political system," Bergdoll v. Kane, 731 A.2d 1261, 1268-1269 (Pa. 1999). Not only would such disenfranchisement deny Pennsylvanians their "constitutionally protected right to vote and to have their votes counted," Reynolds v. Sims, 377 U.S. 533, 554 (1964), doing so in the midst of an election on the request of those who believe such disenfranchisement would politically advantage them would also undermine public confidence in our electoral system, see Ex. B p.26-27. Contrary to appellants' assertion (Br. 52), a qualified voter is disenfranchised whenever her vote is not counted, regardless of whether she has a "right" to protective procedures that would have increased the likelihood that her ballot was accepted. The notion (RNC Br. 52-53) that such disenfranchisement "would not

harm voters" because they do not rely, in advance, on the availability of a cure procedure is contrary to common sense and gives no weight whatsoever to voters' interest in having their votes actually count.

In addition, and as the Commonwealth Court recognized (Op. 44-45), appellants' requested injunction would significantly harm respondents. It would also harm the DNC and PDP (as well as the other intervenor-appellees, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee), which would be required to devote additional resources to educating voters—during a period when voting is already underway—about the absentee-ballot requirements, in order to minimize the chance of errors that, if the injunction were granted, could no longer be corrected so that people's votes could be counted. See Ex. A pp.31-32; Ex. B pp.12-14. Appellants' contrary argument (Br. 50-51) that respondents and intervenors could easily change their education and related efforts ignores that the election has already started and that any injunction at this point would result in extreme confusion and disenfranchisement. These harms necessarily outweigh appellants' interest in obtaining a political advantage by denying other admittedly qualified Pennsylvanians their ability to cast votes that will be counted.

D. An Injunction Would Disturb—Not Preserve—The Status Quo

As the Commonwealth Court explained (Op. 42-43), appellants are wrong to contend (Br. 53-56) that their requested injunction would restore the status quo, as is required to justify a preliminary injunction, County of Allegheny v. Commonwealth, 544 A.3d 1305, 1307 (Pa. 1988). Without any basis, appellants assert (Br. 56) that the relevant status quo is the "time when no such cure procedures existed." That is wrong. See Ex. A pp.27-29. Moreover, appellants' own petition establishes—and the joint stipulation of facts confirms—that there is no pre-cure state to revert to. The challenged procedures were in place for years before appellants filed this action. Indeed, from at least the time that Act 77, which authorized universal mail voting, went into effect, counties have employed procedures to notify voters and allow them to take measures to ensure their ballots were properly submitted prior to election day. See Ex. A pp.27-29; Ex. B pp.7-9. Appellants cannot overcome this fact by relying (Br. 55) on one statement on the secretary of state's website. In short, appellants' requested injunction would not only upset the status quo, but also do so in the midst of an ongoing election where the very mail and absentee votes at issue are already being cast, and where the very procedures being challenged are already being deployed. That would create precisely the type of disturbance that preliminary injunctions are intended to avoid.

E. The Requested Injunction Is Not Narrowly Tailored

Appellants are also wrong to assert (Br. 56-57) that the preliminary injunction they seek satisfies the narrow-tailoring requirement. Appellants ask for an order prohibiting any county board in the Commonwealth from notifying voters about technical errors in their mail-in or absentee ballots. That relief would guarantee that thousands or even tens of thousands of qualified Pennsylvania voters will lose their right to have their votes counted in the ongoing elections—disenfranchisement that could not be corrected even if this Court ultimately holds that the challenged procedures are lawful. Such permanent invalidation of affected ballots is not a reasonable form of interim relief to address the challenged conduct while this litigation proceeds. See Ex. A p.33.

F. Laches Bars Appellants' Claims Entirely, And Emergency Relief Especially

Even setting aside all of the foregoing bases for affirmance (any one of which is sufficient), appellants' request is independently barred by laches. That equitable doctrine protects election administrators and voters from exactly these kinds of attempts at last-minute disruption, and it precludes appellants from using the judiciary to impose the burdens and prejudice of emergency litigation that could have been avoided with the barest diligence.

Although the Commonwealth Court agreed that the appellants had failed to meet each of the traditional criteria that would support a preliminary injunction, it

disagreed with respondents' and intervenors' laches argument, crediting appellants' claim that they were "not aware of the cure procedures being challenged" until various right-to-know inquiries were launched in 2021 and litigation involving Lehigh County was settled this year. Op. 52. But appellants' claim does not involve, much less turn on, any information generated by those inquiries or litigation. Appellants have brought a facial challenge to county boards' authority to implement any notice-and-cure procedures, claiming that Pennsylvania Democratic Party (which was decided in 2020) and the Election Code preclude all such efforts. Appellants therefore needed to know only that one or more counties offered notice-and-cure procedures. And they knew or should have known that nearly two years before they sued—from public meetings, public guidance from the secretary of state, and numerous public lawsuits. Ex. B pp.7-10. Their delay in suing thus precludes their claims, and certainly their request for emergency injunctive relief in the midst of an ongoing election.

The Commonwealth Court also found (Op. 53) that respondents and intervenors had failed to establish prejudice from appellants' delay. Prejudice, however, may be "demonstrated by showing that the [party asserting laches] took actions or suffered consequences that it would not have, had the plaintiff promptly brought suit." Energy Intelligence Group, Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industries & Service Workers International

Union, 2013 WL 4648333, at *18 (W.D. Pa. Aug. 29, 2013). And had appellants filed this action soon after they learned (or should have learned) about notice-and-cure procedures being employed in the commonwealth, voters could have made different decisions regarding how to vote in the election now underway, county boards could have taken different steps to administer the now-in-progress election, and the DNC and PDP could have both taken additional measures to educate their voters and changed their approach to getting out the vote, given the disproportionate effect the relief sought would have on Democratic candidates. There is simply no basis in equity to reward appellants for delaying in bringing this suit and then rushing into court demanding emergency relief in the middle of an ongoing election when that relief would unquestionably result in qualified Pennsylvania voters losing their fundamental right to vote because of minor errors that could easily be fixed before election day. Ex. B pp.10-15.

CONCLUSION

The Commonwealth Court's denial of appellants' application for an emergency mid-election injunction should be affirmed.

October 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents. Clifford B Levine

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CERTIFICATE OF WORD COUNT

According to the word-count function of the word-processing system used to prepare this brief (Microsoft Word), the brief contains 3,673 words, exempting the portions not subject by rule to the word count.

Clifford B. Levine

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on October 6, 2022, by this Court's electronic filing system.

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EXHIBIT A

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania; JESSICA MATHIS, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries, *et al.*, No. 447 MD 2022

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE and PENNSYLVANIA DEMOCRATIC PARTY,

Proposed Intervenors-Respondents.

PROPOSED INTERVENORS-RESPONDENTS' ANSWER TO PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PENNSYLVANIA RULE OF APPELLATE PROCEDURE 1532

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I. INTRODUCTION

Mail-in and absentee voting in the November 2022 general election starts on September 19. Yet just a few days before that, petitioners ask this Court to stop County Boards of Elections from taking commonsense measures to notify voters of technical errors on returned ballots, errors that would otherwise lead to the invalidation of those ballots and hence the denial of one of the most fundamental of all rights. Boards have employed such measures with ballots cast by mail for *over two years* now, under their express statutory authority "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of … electors." 25 Pa. Stat. §2642(f). Nothing in the Election Code, the Pennsylvania or U.S. Constitution, or *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)—which held only that notice-and-cure procedures are not *required*—undermines that explicit legislative grant of power to local officials who are most familiar with the needs of the voters in their particular county. To the contrary, the statutory text amply supports county boards' authority to implement procedures that give voters notice about such technical mistakes and an opportunity to correct them so that their votes can be counted.

Petitioners' contrary view is that the lack of a statutory provision specifically using the words "notice" and "cure" (or synonyms) constitutes a prohibition on boards helping voters to avoid technical invalidations of their ballots. That view

conflicts with the Pennsylvania Supreme Court's holding that courts must liberally construe the Election Code "in favor of the right to vote," *Appeal of James*, 105 A.2d 64, 65-66 (Pa. 1954), and, to the extent possible, to "enfranchise and not to disenfranchise" the electorate. *In re Luzerne County Return Board*, 290 A.2d 108, 109 (Pa. 1972). In other words, "the Election Code should be liberally construed so as not to deprive … electors of their right to elect a candidate of their choice." *Pennsylvania Democratic Party*, 238 A.3d at 356. In addition to inverting these principles, petitioners' inexcusably last-minute effort to derail the orderly administration of the upcoming elections would upend settled practices across the commonwealth *after* voting has begun—all in service of precluding Pennsylvanians from exercising the franchise. There is no basis in law or equity for doing so. The application for a preliminary injunction should therefore be denied.

II. STATEMENT

A. The General Assembly's Delegation of Authority To County Boards Of Elections

Elections in this commonwealth are primarily administered at the county level. As the Pennsylvania Supreme Court has explained, "in 1937, the General Assembly enacted a county-based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process." *Pennsylvania Democratic Party*, 238 A.3d at 382-383. The decision to "'draw the

lines' at the county level [was] something entirely rational in fashioning a scheme for a state as large as Pennsylvania," *Republican Party of Pennsylvania v. Cortés*, 218 F.Supp.3d 396, 401 (E.D. Pa. 2016), because Pennsylvania's 67 counties are widely diverse in population as well as geography, demographics, and culture. The General Assembly has updated the Election Code repeatedly since 1937, without altering the county-based structure for election administration. *See, e.g.*, Act of Nov. 27, 2019, Pub. Law 673, No. 94; Act of Mar. 27, 2020, Pub. Law 41, No. 12.

The General Assembly has expressly conferred broad authority on county boards of elections, including "jurisdiction over the conduct of primaries and elections in such count[ies]," 25 Pa. Stat. §2641(a). In particular, section 302 of the Election Code provides that:

> The county boards of elections, within their respective counties, 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, 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.

25 Pa. Stat. §2642. As this Court has recently observed, this provision "imposes mandatory duties upon the county boards of elections as well as discretionary authority and powers, such as the power to promulgate regulations." *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 856 (Pa. Commw. 2022).

In exercise of their authority under section 2642, county boards develop the specific procedures and systems for carrying out elections, including selecting, equipping, and staffing polling locations. To take just one example, some boards have authorized the use of drop boxes to accept hand-delivered mail-in or absentee ballots. *See Pennsylvania Democratic Party*, 238 A.3d at 361. Petitioners allege that some boards have used their statutory authority to implement mechanisms for informing absentee voters about minor technical errors with their mail-in ballots and, in some cases, for allowing voters to fix those errors.

B. Mail-In Voting Since Act 77

In 2019, the General Assembly enacted Act 77, which extended the opportunity to use mail-in voting to all Pennsylvanians. Voting by mail requires voters to complete a number of steps. *See generally* 25 Pa. Stat. §§3150.1 *et seq.* After opening the envelope containing the ballot and filling out the ballot, a voter must place the ballot into a so-called privacy envelope, seal that envelope, and then place the sealed privacy envelope into a second envelope. *Id.* §3150.16. After sealing the latter, the voter must provide information on the outside of the second envelope, including a declaration. *Id.* Finally, the voter must return the envelopes and ballot to his or her county board, either by taking them to a Board-prescribed location or by stamping and mailing the outer envelope. *Id.*

Many Pennsylvania voters make minor errors in carrying out this multistep process. *See Pennsylvania Democratic Party*, 238 A.3d at 372. For example, ballots are often returned with an incomplete outer envelope—this could be an envelope not completed at all or could be one where the declaration is missing a date or a signature. *See id.* In all these instances, such minor errors can result in the qualified voter's ballot being excluded from the count. *See id.*

Petitioners allege that some counties have sought to minimize such disenfranchisement by adopting procedures to notify voters of faulty ballots so that voters can either correct any deficiencies or cancel their ballots and submit new compliant ones. (The Secretary of the Commonwealth encouraged county boards to do so in 2020. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 907 n.18 (M.D. Pa. 2020), *aff'd sub nom. Trump v. Secretary of Pennsylvania*, 830 F.App'x 377 (3d Cir. 2020)). For example, petitioners allege that in Bucks County, Montgomery County, and Philadelphia, officials will "send a postcard," "email[]," or otherwise alert a voter about certain problems with his or her mail-in ballot (such as a missing signature or date), and that some of these counties will also "send [a] list of voters with [such] problems to the parties" upon request. Pet. ¶¶66-70. Petitioners further allege that county boards in Northampton County and Leigh County have, as part of stipulated settlement agreements, agreed to employ voter-assistance procedures in upcoming elections. *Id.* ¶¶71-74.

Petitioners allege (Pet. ¶¶65-76) that county boards in Pennsylvania have used notice-and-cure procedures during the 2020 general election, and in elections held since that time.

C. Federal Courts Hold That Variations In Election Rules And Procedures Across County Boards Do Not Violate the Equal Protection Clause

After the November 2020 election, then-President Trump's campaign sued in federal court in Pennsylvania arguing that allowing county boards to implement notice-and-cure procedures violated the federal Equal Protection Clause. *See Donald J. Trump for President,* 502 F.Supp.3d at 910. The district court rejected that argument, explaining that a county board's decision to implement a notice-and-cure procedure does not burden any voter's right to vote but rather "lift[s] a burden on the right to vote." *Id.* at 919 (emphasis omitted). The court further reasoned that "it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920.

In affirming, the Third Circuit reiterated the district court's explanation that "[c]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Trump*, 830 F.App'x at 388. "Even when boards of elections 'vary … considerably' in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection." *Id.* (omission in original). The Third Circuit also recognized that

"[n]ot every voter can be expected to follow [the mail-in vote] process perfectly" and that "the Election Code says nothing about what would happen if a county notices these errors before election day." *Id.* at 384; *accord Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336, 355 (3d Cir. 2020) (rejecting a similar claim, on the ground that "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots 'were a true equal-protection problem, then it would transform every violation of state election law … into a potential federal equal-protection claim.," but "[t]hat is not how the Equal Protection Clause works"), *judgment vacated for mootness sub nom. Bognet v. Degraffenreid*, 141 S.Ct. 2508 (2021).

III. ARGUMENT

As this Court has repeatedly explained, a preliminary injunction is "'a harsh and extraordinary remedy.'" *Dusman v. Board of Directors of the Chambersburg Area School District*, 123 A.3d 354, 361 (Pa. Commw. 2015) (quoting *Commission of Seventy v. Albert*, 381 A.2d 188, 190 (Pa. Commw. 1977)). And because a preliminary injunction is "extraordinary," this Court has further explained, it "should be used with caution and only where the rights and equity of the petitioner are clear and free from doubt and the harm to be remedied is great and irreparable." *Green v. Wolf*, 176 A.3d 362, 365 n.5 (Pa. Commw. 2017). More specifically, for a court to issue a preliminary injunction, "every one of the[six] prerequisites must be

established." *County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988), *quoted in Summit Towne Center, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Those six prerequisites are:

- "that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages,"
- "that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings,"
- "that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct,"
- "that its right to relief is clear, and that the wrong is manifest, or, in other words, … that it is likely to prevail on the merits,"
- that the injunction "is reasonably suited to abate the offending activity," and
- "that a preliminary injunction will not adversely affect the public interest."

Id. Because all six requirements must be established, "if the petitioner fails to establish any one of the[se], there is no need to address the others." *County of Allegheny*, 544 A.2d at 1307, *quoted in Summit Towne Center*, 828 A.2d at 1001.

Applying these factors here leaves no doubt that petitioners are not entitled to a preliminary injunction to stop the county boards from providing notice and an opportunity to cure technical errors related to mail-in ballots, much less an injunction that would be issued *after* voting begins and that could prevent thousands of Pennsylvanians from having their votes counted.

As a threshold matter, petitioners are unlikely to succeed on the merits, for two overarching reasons. First, petitioners' claims are foreclosed by laches: As explained earlier, opponents of notice-and-cure procedures failed in 2020 to translate their purported concerns about such procedures into cognizable federal constitutional claims. They have now waited almost another two full years to assert in this case that those same concerns somehow constitute a violation of the Election Code or the state and federal constitutions. That inexcusable and prejudicial delay precludes the relief petitioners seek—and assuredly precludes the extraordinary equitable relief of an emergency injunction that would disrupt an election that is already underway. Second, county boards' efforts to help ensure that qualified voters' ballots are not discarded comply with the Election Code, the Pennsylvania Constitution, and the United States Constitution.

Petitioners cannot satisfy the other preliminary-injunction factors either. The requested injunction would upset the status quo, confuse county officials and voters alike, and risk unnecessarily and unjustifiably disenfranchising Pennsylvanians—none of which is within the public interest. And petitioners have little if any valid interest in ensuring that the ballots of qualified Pennsylvania voters are *not* counted because of technical errors that are easily remedied, and the injunction they seek is not narrowly tailored to address the challenged conduct during the pendency of this litigation.

A. Petitioners Are Not Likely To Succeed In Establishing That The County Boards' Procedures Are Unlawful

A preliminary injunction should be denied because plaintiffs have not shown that they are "likely to prevail on the merits" because their "right to relief is clear." *Summit Towne Center*, 828 A.2d at 1001. To begin with, laches bars petitioners' claims altogether—and, at a minimum, bars their request for a last-minute injunction to alter the conduct of the 2022 elections. And more fundamentally, county boards have express statutory authority to implement the kinds of notice procedures challenged in the petition. Nothing in *Pennsylvania Democratic Party* (or anything else in Pennsylvania or federal law) overrides that expressly conferred legislative authority.

1. Laches Bars Petitioners' Claims

"'[L]aches is an equitable doctrine that bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another.'" *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam) (quoting *Stilp v. Hafer*, 718 A.2d 290, 292 (1998)). That doctrine bars petitioners' claims (and certainly their much-belated request for an emergency injunction) because petitioners have inexcusably sought relief years after the complained-of conduct began. Indeed, petitioners were on notice of the disputed procedures at least two *years* ago, yet they did not file this action until two *weeks* before voting in the 2022 elections began.

As the petition itself describes, county boards have employed variations of the challenged procedures since before the November 2020 general election. For example, the petition discusses (¶66) a "'cure' protocol" allegedly implemented by Bucks County during the 2020 election cycle. It also alleges (¶¶67-70) that such procedures were used in Philadelphia and Montgomery Counties during the same timeframe. And petitioners' memorandum of law in support of the preliminary-injunction application states (at 16) that "Boards have implemented cure procedures in past elections." Such procedures were even the subject of litigation during and after the 2020 general election cycle. *See Pennsylvania Democratic Party*, 238 A.3d 345; *Donald Trump for President*, 502 F.Supp.3d at 907; *Bognet*, 980 F.3d at 352; *Ziccarelli v. Allegheny County Board of Elections*, 2021 WL 101683 (W.D. Pa. Jan 12, 2021). Despite having thus been on notice of the complained-of conduct for years, petitioners offer no justification for waiting to file this action until the eve of the 2022 general election. The delay is particularly inexcusable given that the statutory and constitutional provisions that form the basis of petitioners' challenge "were also readily available" well before September 2022, *Stilp*, 718 A.2d at 294.

Granting an injunction after such a lengthy and unjustified delay would prejudice respondents, intervenors, and the public, by injecting additional confusion into an already complex absentee and mail-in voting process, requiring county boards to change their procedures mid-election, and forcing intervenors and others

(perhaps including respondents) to spend time and money on additional voter-education efforts.

The Pennsylvania Supreme Court has applied laches to bar election-related claims even when the delay in suing was shorter than the delay here. In particular, in *Kelly v. Commonwealth*, the court dismissed challenges to Act 77 that were brought "more than one year after the enactment of Act 77," reasoning that "the June 2020 Primary Election and the November 2020 General Election" had already been held pursuant to such procedures. 240 A.3d at 1256-1257. Here, with two years having passed (and multiple elections having been held), it is all the more "beyond cavil that Petitioners failed to act with due diligence in presenting the instant claim." *Id.* at 1257. And even if laches did not bar petitioners' claims entirely, it would surely bar (and does bar) their emergency request for the extraordinary relief of a mid-election preliminary injunction. The application should be denied on that ground alone.

2. The Legislature Granted The County Boards Authority To Implement The Challenged Procedures

a. An independent reason why petitioners have not shown the requisite likelihood of success on the merits is that the General Assembly has given county boards authority to adopt the procedures petitioners challenge. As this Court has explained, boards have jurisdiction "over the conduct of primaries and elections in that county in accordance with the provisions of the Election Code." *Hempfield*

School District v. Election Board of Lancaster County, 574 A.2d 1190, 1191 (Pa. Commw. 1990); *see also* 25 Pa. Stat. §2641(a). To aid in the exercise of that jurisdiction, the General Assembly has given boards the authority "[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 Pa. Stat. §2642(f). This expansive language easily encompasses the notice-and-cure procedures that petitioners challenge, as such procedures "guid [e] … elections officers," *id.*

Indeed, since 2020, courts have held that various board actions that are not explicitly listed in section 2642 fell within the scope of the boards' delegated powers. For example, courts in this state have ruled that boards may—but are not required to—establish drop boxes to accept hand-delivered mail or absentee ballots, and that they also have discretion regarding how to allocate boxes around a county. *Pennsylvania Democratic Party*, 238 A.3d at 361; *Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 352, 382 (W.D. Pa. 2020). They have also ruled that boards have discretion to regulate how far authorized representatives must be from canvassing activities, *In re Canvassing Observation*, 241 A.3d 339, 349-350 (Pa. 2020), and that boards have discretion under section 2642(g) regarding how to inspect voting machines, *County of Fulton*, 276 A.3d at 860-862.

Petitioners nonetheless deny that the General Assembly's broad grant of this express authority to county boards supports the challenged procedures, asserting in their memorandum of law (at 6) that section 2642 does not include "anything that could authorize the development and implementation of … cure procedures." But as just explained, the broad language of section 2642(f) does precisely that. Indeed, petitioners do not argue otherwise. Their argument for why section 2642(f) does *not* confer the necessary authority (Memo. 25-26) is instead that cure procedures are "inconsistent with law," 25 Pa. Stat. §2642(f), because the Election Code *requires* the counting of mail-in or absentee ballots if the absence of adequate proof of identification for such ballots is cured "prior to the sixth calendar day following the election," *id.* §3146.8. Petitioners contend that this provision sub silentio precludes any other cure procedures. That simply does not follow. At most, the General Assembly's explicit *requirement* of one cure procedure could preclude the conclusion that other cure procedures are also *required*. But the legislative requirement of one cure procedure in no way constitutes a *prohibition* on other such procedures. By that logic, a state legislative *requirement* that cities and counties impose a speed limit no higher than 25 mph on roads with 1000 feet of an elementary school would constitute a *prohibition* on any city or county adopting that same speed limit for all roads within 1000 feet of a middle school (or a church, or any other category of building). That is obviously wrong—and in fact it demonstrates that

although petitioners charge respondents with adding language to statutes, it is actually petitioners who do so, asking the Court to impose limitations on express grants of broad authority that the General Assembly did not see fit to include. That is impermissible. *See, e.g.*, *In re November 3, 2020 General Election*, 240 A.3d 591, 611 (Pa. 2020); *Commonwealth v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016).

Relevant case law addressing similar statutory language illustrates the point. For example, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the U.S. Supreme Court concluded that federal statutory language providing that employees "shall" be permitted to use compensatory time off in a certain manner "is more properly read as a minimal guarantee" than "as setting forth the *exclusive* method by which compensatory time can be used." *Id.* at 583 (emphasis added); *accord New York Legal Assistance Group v. BIA*, 987 F.3d 207, 217-218 & n.19 (2d Cir. 2021); *Animal Legal Defense Fund v. United States Department of Agriculture*, 935 F.3d 858, 871 (9th Cir. 2019). The Pennsylvania Supreme Court adopted the same view in interpreting the state constitution in an election-related case, holding that "[i]n the cases specified[,] the constitution is mandatory.… In the cases not enumerated, but of the same kind, it is discretionary." *Commonwealth ex rel. McCormick v. Reeder*, 33 A. 67, 70 (Pa. 1895). Particularly given the legislature's broad conferral of

discretionary authority to county boards in section 2642(f), the same conclusion is warranted here.[1]

A further basis for rejecting petitioners' request to impose atextual limitations on the General Assembly's broad grant of authority in section 2642(f) is the Pennsylvania Supreme Court's consistent and longstanding solicitude for the fundamental right to vote. This solicitude rests partly on the Pennsylvania Constitution's Free and Equal Elections Clause, Pa. Const. art. I, §5, which the court has said "guards against the risk of unfairly rendering votes nugatory." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018). To minimize that risk, and to protect the right to vote more generally, the court has admonished other courts that although they "must strictly enforce all provisions to prevent fraud"—a concern not implicated here—the "overriding concern at all times must be to be flexible in order to favor the right to vote." *Appeal of Weiskerger*, 290 A.2d 108, 109 (Pa. 1972). Put more simply, the "goal must be to enfranchise and not

[1] ~~This line of authority also~~ defeats petitioners' argument (Memo. 23) that the post-Election Day "cure procedure" in section 3146.8(h)(2) limits county boards authority to implement voter-assistance procedures before Election Day. Section 3146.8(h)(2) is a ***mandatory*** requirement that all boards must follow when canvassing absentee and mail-in ballots. A mandatory ***post***-Election Day cure procedure for certain circumstances related to mail-in ballots does not mean boards may not implement ***other*** cure procedures, particularly ***before*** Election Day.

disenfranchise." *Id.* Petitioners' argument is directly counter to these foundational principles.[2]

Petitioners also contend (Memo. 24) that the challenged notice-and-cure procedures violate section 2642(g), which requires county boards to "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," because it leads to divergent procedures across the Commonwealth. But what section 2642(g) requires is uniformity ***within*** each county, not across counties. Indeed, by its terms section 2642 gives county boards authority over only those elections conducted "within their respective counties." Boards thus have no ability to ensure uniformity ***across*** counties—and hence the entire premise of section 2642(f)'s authorization of county-specific rules and instructions is that there will be variation across counties. This reading of section 2462(g)'s uniformity mandate is confirmed by the provision's reference to "the conduct of primaries and elections ***in the several election districts***

[2] Although petitioners cast themselves as defenders of "free and fair elections" (Memo. 2), they do not actually claim that the challenged procedures violate the Free and Fair Elections Clause. For good reason: As just noted in the text, the Pennsylvania Supreme Court has explained that the clause guards against unfair invalidation of ballots. That is precisely what the requested injunction—and petitioners' claims more generally—would do.

of the county" (emphasis added). Uniformity is thus required across the districts of each county, but not across counties.

Likewise infirm is petitioners' related argument that the challenged procedures violate article VII, section 6 of the Pennsylvania Constitution, which provides that "[a]ll laws regulating the holding of elections by the citizens … shall be uniform throughout the State." This provision by its terms applies to "laws," i.e., statutory enactments. It does not apply to the "rules, regulations and instructions" authorized by section 2642(f). Indeed, section 2642(f) reflects this distinction, providing (as discussed) that the authorized "rules, regulations and instructions" cannot be "inconsistent with *law*" (emphasis added), i.e., inconsistent with the General Assembly's statutory enactments. Petitioners cite no authority (and to intervenors' knowledge there is none) for the proposition that section 6's uniformity requirement forbids any inter-county variation whatsoever in the conduct of elections.

Finally, petitioners assert that the challenged procedures violate the Elections Clause of the U.S. Constitution, which authorizes state legislatures to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4. As an initial matter, "[b]ecause [petitioners] are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the

General Assembly's rights under the Elections … Clause[]." *Bognet*, 980 F.3d at 350; *see also Markham v. Wolf*, 136 A.3d 134, 141 (Pa. 2016) (applying Pennsylvania standing requirements in rejecting standing by state legislators). And even if any petitioner had such standing, the challenged procedures are (as explained) expressly authorized by state law, specifically section 2642(f). Petitioners offer no argument that if that is correct, there is any violation of the Elections Clause.

In short, even putting laches aside, petitioners have not shown that they will likely succeed on their claims, because the challenged procedures easily fall with the broad authority the General Assembly has given county boards in section 2642(f).

b. Petitioners insist, however (Memo. 21-22), that *Pennsylvania Democratic Party* establishes the illegality of the challenged notice-and-cure procedures. That is incorrect. The Pennsylvania Supreme Court in that case "addressed whether counties are ***required*** to adopt a notice-and-cure policy under the Election Code. Holding that they are not, the court declined to explicitly answer whether such a policy is necessarily *forbidden*." *Donald J. Trump for President*, 502 F.Supp.3d at 907. Indeed, the petition itself acknowledges this, stating (at ¶56) that "***Pa. Democratic Party*** answered the question of whether the Court could

require the Boards to implement a notice and opportunity to cure provision." That (correct) assertion shows why the case does not support petitioners' arguments here.[3]

None of the language petitioners quote from *Pennsylvania Democratic Party* supports a contrary conclusion. For example, petitioners quote (Memo. 22) the Court's statement that "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 Petitioner*." 238 A.3d at 374 (emphasis added). Again, the "procedure sought by Petitioner" in that case was a *mandatory* notice-and-cure procedure. In fact, it was a mandatory *post-election* procedure; the petitioner in that case argued "that when the Boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector's contact information, the Boards should be required to notify the elector using the most expeditious means possible *and provide the elector a chance to cure the facial defect up until the UOCAVA deadline of November 10, 2020*." *Pennsylvania Democratic Party*, 238 A.3d at 372 (emphasis added). The Pennsylvania Supreme Court's conclusion that the Election Code "does not provide" for such a mandatory post-election procedure provides no support for the notion that counties are *forbidden*

[3] The same point answers petitioners' reliance (e.g., Memo. 16, 23) on the recent veto of legislation that would have mandated notice-and-cure procedures. Again, the absence of a mandate is not a prohibition, certainly in light of the broad grant of authority that the General Assembly gave county boards in §2462(f) to adopt election-related rules, regulations, and procedures.

from adopting pre-election notice and cure procedures pursuant to their section 2642(f) authority.

Petitioners next point (Memo. 22) to the statement in *Pennsylvania Democratic Party* that "the decision to provide a 'notice and opportunity to cure' procedure to alleviate that risk is one best suited for the Legislature," 238 A.3d at 374. To begin with, the court (as explained) was discussing the mandatory notice-and-cure procedures that the petitioner in that case argued was required. No such mandatory procedure is at issue here. In any event, intervenors' position here is fully consistent with the broader notion that notice-and-cure procedures are best dealt with by the General Assembly. By expressly giving county boards broad authority to adopt election-related rules, regulations, and instructions (authority that, as explained, encompasses the adoption of notice-and-cure procedures), the General Assembly *did* decide how best to deal with this issue. That legislative judgment warrants judicial respect.

Finally, the fact that *Pennsylvania Democratic Party* addressed only whether notice-and-cure procedures are required means there is no merit to petitioners' assertion (Memo. 26-30) that respondents should be judicially or collaterally estopped from defending county boards' authority to inform voters of fixable technical problems. As petitioners acknowledge, "judicial estoppel prohibits parties from switching *legal* positions to suit their own ends." *Sunbeam Corp. v. Liberty*

Mutual Insurance Company, 781 A.2d 1189, 1192 (Pa. 2001) (emphasis added). Respondents have not switched "legal positions" from *Pennsylvania Democratic Party*, because that case, as explained, addressed whether there was a "statutory or constitutional basis for *requiring* the Boards to contact voters when faced with a defective ballot and afford them an opportunity to cure defects," 238 A.3d at 373 (emphasis added). Respondents' argument there that the answer was "no" is in no way inconsistent with county boards possessing *discretion* under section 2642(f) to offer qualified voters notice and an opportunity to cure. For the same reason, collateral estoppel does not apply either: Collateral estoppel applies only when the relevant issue in the prior proceeding is "identical" to the one in the current proceeding. *Gow v. Department of Education*, 763 A.2d 528, 532-533 (Pa. Commw. 2000). As explained, the issue in *Pennsylvania Democratic Party* is different from the issue here.

* * *

Petitioners cannot establish a likelihood of success on their claims. They waited far too long to sue, and in any event, the General Assembly's broad grant of authority to county boards to implement election-related rules, regulations, and instructions to election officials within their respective counties easily includes the authority to adopt notice-and-cure procedures. Nothing in state or federal law (constitutional, statutory, or otherwise) renders such discretionary procedures

illegal. The Court need go no further to deny petitioners' application for the extraordinary relief of a mid-election preliminary injunction that would be enormously disruptive and likely result in the denial of qualified Pennsylvania voters' right to have their ballots counted.

B. The Remaining Injunction Factors Are Not Satisfied

Even if petitioners could demonstrate a likelihood of success on their claims, they would still not be entitled to a preliminary injunction. Petitioners have failed to establish any legitimate interest in preventing qualified voters from having their votes counted, much less that they will suffer "great and irreparable" harm without that remedy. And the requested injunction would upset the status quo in the midst of an election, creating far more harm—in the form of voter disenfranchisement and significant confusion—than it could possibly prevent.

1. Petitioners Will Not Suffer Irreparable Harm Absent An Injunction

Petitioners have not established that, absent a preliminary injunction, they will suffer "immediate, irreparable harm," *Summit Towne Center*, 828 A.2d at 1001. The central "harm" petitioners assert (Memo. 14-16) is that some counties will continue to implement their notice-and-cure procedures (and perhaps that other counties may newly adopt such procedures). But even if notice-and-cure procedures were unlawful, petitioners would not be harmed by the mere fact of illegality. They must instead establish that they suffer actual injury in some personal and specific way.

For the same reasons, the asserted (yet unexplained) harms "to the separation of powers and the rule of law" would erase irreparable harm as a separate injunction requirement, collapsing it into the likelihood-of-success requirement. But "[i]rreparable harm must be established as a separate element, independent of any showing of likelihood of success." *King Pharmaceuticals, Inc. v. Sandoz, Inc.* 2010 WL 1957640, at *5 (D.N.J. May 17, 2010) (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)).

Contrary to petitioners' assertion, this Court's decision in *Hempfield School District v. Election Board of Lancaster County* does not establish that "[u]nlawful action by a County Board of Elections per se constitutes immediate and irreparable harm," Memo. 14 (quotation marks omitted)—much less that *any* "violation of law … per se constitutes immediate and irreparable harm," Memo. 15 (quotation marks omitted). *Hempfield* held only that the inclusion of a particular "non-binding" referendum on a ballot constituted irreparable harm. *See* 574 A.3d at 1193. That makes sense because the referendum's presence on the ballot and the outcome of the election could not be undone after it was held, and there were real-world consequences to petitioner. The Court's holding does not mean that *any* unauthorized action by an election board would meet that standard—and if it did mean that, then it would be inconsistent with Pennsylvania Supreme Court cases making clear that irreparable harm is a separate factor from likelihood of success

regarding the claimed illegality. The court has explained, for example, that "[a] preliminary injunction of any kind should not be granted unless both the right of the plaintiff is clear and immediate *and* irreparable injury would result were the preliminary injunction not granted." *McMullan v. Wohlgemuth*, 281 A.2d 836, 840 (1971) (emphasis added).

More fundamentally, there is no simply cognizable harm, to anyone, from allowing *more* validly cast ballots from qualified voters to be counted. Petitioners do not claim that the votes that would be counted because of the challenged procedures would be fraudulent or cast by ineligible voters. And courts have consistently rejected the notion that one voter is hurt because another qualified and registered voter is allowed to cast a lawful ballot. For example, in *Short v. Brown*, 893 F.3d 671 (9th Cir. 2018), the Ninth Circuit rejected an equal-protection challenge to a California law that gradually introduced universal mail voting, reasoning that the law did "not burden anyone's right to vote" but instead made "it easier for some voters to cast their ballots," *id.* at 677. Put simply, petitioners are wrong to assert (Memo. 18) that "validly-cast votes will be diluted by the counting of unlawfully 'cured' ballots." Any cured ballots will be counted only if they are ultimately submitted in accordance with all state-law requirements, and cast by qualified and registered voters. There is no authority for the proposition that one

person's vote is "diluted" because other ballots cast by qualified voters are counted, and that proposition should be soundly rejected.

Petitioners, however, assert that "the holding of an election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters." Memo. 17. But neither the case they cite in support of that assertion nor any of the cases it cited held that the irreparable-harm requirement was satisfied solely because of an alleged Voting Rights Act violation. They instead held that the irreparable-harm requirement was satisfied because individual voters' right to vote would be infringed. As one of the cases put it, "[t]he injury alleged here is ***denial of the right to vote***." *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1363 (M.D. Ala. 1986) (emphasis added). As explained, the procedures challenged here can inflict no such harm; helping qualified and registered voters submit their ballots properly so that those ballots can be counted does not deny or infringe anyone's right to vote, nor "dilute" the votes of others in any cognizable way.

Lastly, petitioners assert (Memo. 16) that they "suffer the risk of having votes being treated unequally," presumably because not all jurisdictions in Pennsylvania use notice-and-cure procedures. But nothing in Pennsylvania (or federal) law forbids any and all variation in how jurisdictions administer elections. Just as courts have held that it does not violate the law for residents of different counties to have to travel different distances to reach their polling place, or to wait different amounts

of time in line in order to vote in person (whether because of different staffing capabilities across counties or otherwise), or to use different voting machines, *see, e.g.*, *Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006), so courts have recognized that other types of variation across counties, including variation in the availability of notice and cure procedures, is not inherently unlawful. In 2020, for example, a federal court in Pennsylvania rejected an injunction much like the one sought here—an injunction invalidating votes cast in counties with notice-and-cure procedures for mail-in ballots—reasoning that although "states may not discriminatorily sanction procedures that are likely to burden some persons' right to vote more than others, they need not expand the right to vote in perfect uniformity," *Donald J. Trump for President*, 502 F.Supp.3d at 920. That reasoning applies fully here, and it confirms that no petitioner (or anyone else) will suffer any legally cognizable harm simply by allowing more votes from qualified, registered voters to be counted.

2. An Injunction Will Not Preserve The Status Quo

Petitioners are wrong to claim (Memo. 19-21) that the injunction they seek would preserve the status quo. As this Court has explained, the "status quo" is the "status that existed between the parties just before the conflict between them arose." *Hatfield Township v. Lexon Insurance Company*, 15 A.3d 547, 555-556 & n.6 (Pa. Commw. 2011). Here, the challenged procedures were in place for years before

petitioners filed their action. Petitioners are thus seeking to *change* the status quo, through an injunction that would halt extant notice-and-cure procedures (well after voting has begun, no less, *see supra* p.1). Judicial orders to change election procedures in the midst of voting not only upset the status quo, but also "can themselves result in voter confusion," *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

In denying that they seek to change the status quo, petitioners assert (Memo. 19) that an injunction "must not change the status that existed between the parties just before the conflict between them arose." That argument *undermines* petitioners' position, because as just explained, "the status that existed between the parties just before the conflict between them arose" was (according to petitioners themselves) that counties had already been using notice-and-cure procedures for years. Petitioners also state (Memo. 20) that the injunction they seek "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*." That argument improperly assumes that the Election Code and *Pennsylvania Democratic Party* affirmatively *forbid* notice-and-cure procedures. As explained, neither one does; the Election Code expressly grants county boards broad power to adopt election-related "rules, regulations and instructions," 25 Pa. Stat. §2642(f), and *Pennsylvania*

Democratic Party held only that state law does not *mandate* notice-and-cure procedures.

In any event, petitioners are wrong that the injunction they seek would impose the state of affairs that existed around the time that *Pennsylvania Democratic Party* was decided. As their own petition demonstrates, some counties already had procedures in place to notify voters and allow them to take measures to ensure their ballot was properly submitted in the weeks following that decision. Specifically, the petition cites (¶¶68-69) an October 2020 e-mail supposedly showing that before the last general election, "the Montgomery County Board of Elections [had] implemented its own protocol to contact voters and allow them to cure ballots." In short, petitioners have not remotely established that the relevant status quo is one in which no Pennsylvania county employed notice-and-cure procedures. The fact that petitioners in fact seek to change the status quo is yet another ground for rejecting their application.

3. An Injunction Will Harm Respondents, Intervenors, And The Public Interest

Petitioners' requested injunction is additionally improper because "greater injury would result from refusing an injunction than from granting it," *Summit Towne Center*, 828 A.2d at 1001. The indisputable key fact about this litigation is that petitioners seek to disenfranchise qualified registered Pennsylvania voters on the basis of easily correctible errors. But disenfranchisement is a severe and

irreparable injury, particularly because the right to vote "is the bed-rock of our free political system." *Bergdoll v. Kane*, 731 A.2d 1261, 1268-1269 (1999). For that reason, the Pennsylvania Supreme Court has recognized that "[t]he disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter." *Perles v. County Return Board Of Northumberland County*, 202 A.2d 538, 540 (1964). The failure to count votes cast by qualified and registered voters—votes that could easily be fixed to comply fully with Pennsylvania law—interferes with the Commonwealth's effectiveness as a democratic polity and undermines public faith in the electoral process. That is because citizens' ability both to vote *and* to have their votes counted "is of the essence of a democratic society," and any interference with those rights "strike[s] at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Disenfranchisement accordingly harms both the individual members of the public whose votes are not counted and the public interest more broadly.

An injunction here would thus create far greater harm than it would prevent. As discussed, *see supra* Part III.B.1, petitioners' asserted harms are simply the fact of allegedly illegal activity and the supposed—but non-cognizable—"dilution" of votes via the counting of votes from other qualified and registered voters. Petitioners' interest in denying their fellow Pennsylvanians an opportunity to have

their votes counted cannot overcome the public's fundamental interest in maximizing the counting of votes from qualified and registered voters.

Relatedly, the injunction is improper because "issuance … will … substantially harm other interested parties in the proceedings," *Summit Towne Center*, 828 A.2d at 1001. Petitioners do not address the harm that their requested injunction would impose on the respondent counties. As explained, those counties have already begun the absentee-ballot process for the November 2022 general election, with votes able to be cast starting on September 19. An injunction issued in the middle of that process would create significant confusion and disruption for county officials and voters. Nor do petitioners contend with the harm to the Democratic National Committee and the Pennsylvania Democratic Party, who would be required to devote additional resources to educating voters (during a period when voting is already underway) about the absentee-ballot requirements, in order to minimize the chance of errors that, if the injunction were granted, could no longer be corrected so that people's votes could be counted. The injunction would also surely result, as explained, in some Pennsylvanians' votes not being counted when they otherwise would have been. Some of those votes will unquestionably be cast by Democratic voters (i.e., intervenors' members) and some will unquestionably be cast for Democratic candidates. The injunction would thus harm intervenors by both

infringing their members' right to vote and diminishing their ability to help elect Democratic candidates.

In arguing about public interest, petitioners again conflate a separate injunction factor with their argument on the merits. In particular, they claim (Memo. 33) that the public will not be hurt by mid-election changes and disenfranchisement because "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." That is true but it does not support petitioners, because "the rule of law established by the General Assembly" is, as discussed, a broad grant of authority to county boards to promulgate election-related rules, regulations, and instructions. And it does not maintain "the separation of powers in Pennsylvania" for courts to insert themselves in the elections process (mid-election, no less) in order to block county boards from using that legislatively delegated power, as petitioners request.

Put simply, the public interest is served by counting the maximum number of votes properly cast by qualified registered Pennsylvanians, including those who inadvertently make technical but easily corrected errors. The public interest is not served by (and petitioners have no valid interest in) denying thousands of Pennsylvanians one of their most fundamental rights by barring the correction of such errors.

4. The Requested Injunction Is Not Narrowly Tailored

Finally, petitioners are wrong to assert (Memo. 32-33) that the preliminary injunction they seek satisfies the narrow-tailoring requirement. Petitioners seek an order prohibiting any county board in the Commonwealth from notifying voters about technical errors in their mail-in or absentee ballots. Such an injunction would guarantee that many Pennsylvanians—perhaps thousands or even tens of thousands—will lose their right to vote in the upcoming elections, even if this Court ultimately holds that the challenged procedures are lawful. Such *permanent* invalidation of affected ballots is not a reasonable form of interim relief to address the challenged conduct while this litigation proceeds. *See Three County Services, Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985) (a "preliminary injunction, if issued, should be no broader than is necessary for the petitioner's interim protection").

IV. CONCLUSION

The application for a preliminary injunction should be denied.

September 16, 2022

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CERTIFICATE OF COMPLIANCE

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

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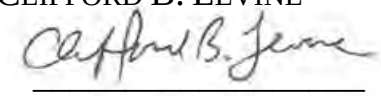
CLIFFORD B. LEVINE

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on September 16, 2022 by this Court's electronic filing system.

CLIFFORD B. LEVINE



CERTIFICATE OF LENGTH

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 7,404, as counted by Microsoft Word's word count tool.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, *et al.*,

Respondents,

No. 447 MD 2022

and

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Intervenors-Respondents.

THE DEMOCRATIC NATIONAL COMMITTEE'S AND PENNSYLVANIA DEMOCRATIC PARTY'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A PRELIMINARY INJUNCTION

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I. INTRODUCTION

After waiting over *two years* since they became aware of the challenged conduct, petitioners ask this Court to disrupt the county election boards' ongoing administration of the November 2022 elections. Petitioners make this belated request while mail-in and absentee ballots are being distributed and cast, seeking a preliminary injunction that would deny *qualified voters* their fundamental right to vote because of easily fixable mistakes. And petitioners seek this extraordinary relief even though they offer no sound justification for delaying so long in challenging the procedures at issue here, nor any explanation for why—after having sat on their claims through the administration of no fewer than four elections—emergency relief is suddenly required in the midst of this particular election.

Laches bars such gamesmanship. That doctrine protects election administrators and voters from exactly these kinds of attempts at last-minute disruption, and it precludes petitioners from using the judiciary to impose the burdens and prejudice of emergency litigation that could have been avoided with the barest diligence. For this reason alone, the Court should deny the requested injunctive relief and dismiss this case. But at a minimum, the Court should deny the application and allow this case to be decided with the benefit of full briefing and a complete evidentiary record developed on a non-expedited schedule.

Injunctive relief is also unavailable for other independent reasons, including petitioners' failure to show irreparable harm (or indeed any cognizable harm) and their separate failure to establish that they are like to succeed on their claims. As to the former (lack of harm), petitioners argued at last week's status conference that voters in counties that do not offer notice-and-cure procedures would be harmed by their inability to cure any mistakes. But the injunction petitioners seek—barring *other* counties from affording notice and cure—would do nothing to remedy this supposed harm, so it provides no basis for an injunction. And to the extent petitioners' response is that the harm is the differential treatment itself (i.e., that voters in some counties can cure and others cannot), that is an equal-protection claim. As respondents explained at the recent status conference, however, no such claim appears in the petition, so equal protection provides no basis for relief here.

The absence of an equal protection claim is no accident. Courts in Pennsylvania have repeatedly rejected such claims in this very context, recognizing that "[e]xpanding the right to vote for some residents of a state does not burden the rights of others." *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp.3d 899, 919 (M.D. Pa. 2020) (subsequent history omitted). Hence, the Third Circuit has explained, "[c]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems," and that "[e]ven when boards of elections vary considerably in how they decide to reject ballots, those local

differences in implementing statewide standards do not violate equal protection." *Donald J. Trump for President, Inc. v. Secretary of Pennsylvania*, 830 F.App'x 377, 388 (3d Cir. 2020). Petitioners have cited no contrary authority, i.e., not one case holding that voters have an interest, much less a right, to have their votes "inflated" via the disenfranchisement of other qualified registered citizens whose ballots are timely cast. Having shown no cognizable injury at all, petitioners certainly cannot establish the irreparable harm that is required for a preliminary injunction.[1]

As to likelihood of success, petitioners' claim is that there is no statutory authority for county boards to adopt notice-and-cure procedures. But the General Assembly has explicitly given each board the power "[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of … electors." 25 Pa. Stat. §2642(f). Determining what notice-and-cure procedures to provide, if any, easily falls within that broad grant of express authority. Petitioners' lone response is that any such procedures are "inconsistent with law," *id.*, because of the Pennsylvania Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). That is meritless. There, the court rejected a claim that voters are constitutionally entitled

[1] The points just made regarding equal protection likewise apply to any argument under on the Pennsylvania Constitution's Free and Equal Elections Clause (article I, §5): No claim under that clause appears in the petition, and there is no authority for the proposition that county-level variation in notice-and-cure (or other election) procedures violates that clause.

to both notice of a mail ballot defect and a post-election opportunity to address that defect. The court held 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," because the court discerned "no constitutional or statutory basis that would countenance *imposing* the procedure Petitioner seeks to require." *Id.* at 374 (emphases added). The court said nothing about whether boards have discretion under section 2642(f)—a provision never cited in the decision—to provide, on a county-specific basis, notice to voters and an opportunity to cure before the close of voting on election day. The court did state that whether to *mandate* statewide notice and cure is a decision "best suited for the Legislature." 238 A.3d at 374; *see also id.* at 373 ("Respondent [argues] that the Legislature, not this Court, is the entity best suited to address the procedure ***proposed by Petitioner***," i.e., a statewide notice-and-cure mandate (emphasis added)). To date, no such statewide legislative mandate has been adopted. But as explained, the General Assembly has given election boards broad discretion to adopt county-specific rules, regulations, and instructions regarding the administration of elections—"reflect[ing] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections," *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020). It is not for the courts to override that authority by proscribing any notice-and-cure procedures. Indeed, doing so would be directly contrary to *Pennsylvania*

Democratic Party's conclusion that whether to offer notice and cure is not for courts to resolve.

Finally, issuing the requested injunction would cause far greater harm than denying it. The injunction would disenfranchise qualified Pennsylvania voters, denying them their "constitutionally protected right to vote and to have their votes counted," *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). That, in turn, would likely undermine public confidence in our electoral system. By contrast, denying the injunction would (as explained) cause no cognizable harm to individual voters. And to the extent that the telling of widespread falsehoods about voter fraud and stolen elections in recent years may have undermined confidence in our electoral system already, that does nothing to warrant an injunction. Put simply, affirmative intentional efforts to attack our system of representative democracy (by misleading voters about its functioning) cannot provide any justification for weakening that system by excluding voters from the process. That is what the requested injunction would do. To the extent these attacks should be considered at all, the proper response for a court of equity is to fully *protect* individuals' right and ability to vote. That is what denying the injunction would do.[2]

[2] The DNC's and PDP's previously filed answer to petitioners' application for special relief (Sept. 16, 2022) provides additional reasons why petitioners fail to meet the six requirements of emergency injunctive relief. That filing is incorporated here by reference so as not to burden the Court with repetition.

Petitioners' application for an emergency mid-election injunction should be denied.

II. ARGUMENT

A. Laches Bars Petitioners' Claims Entirely, And Emergency Relief Especially

Laches bars petitioners' claims because petitioners did not "promptly institute" this action after they knew or should have known that county boards were employing the challenged procedures, *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (per curiam), and petitioners have offered no adequate explanation for their two-year delay. "Whether the complaining party acted with due diligence depends upon what that party might have known by use of information within its reach." *In re Estate of Leitham*, 726 A.2d 1116, 1119 (Pa. Commw. 1999). Here, all the information needed to bring this lawsuit was "within [petitioners'] reach" by October 2020 (at the latest). And granting the relief petitioners now seek—two years later, and in the middle of an election—would undermine the orderly administration of the ongoing election, disenfranchise and confuse voters, and harm the DNC's and PDP's members and candidates. This threshold defect bars petitioners' claims and means they cannot show the likelihood of success on the merits required for a preliminary injunction. No more is needed to deny petitioners' application.

1. Petitioners Have Been On Notice Of The Challenged Procedures For Years

Petitioners knew or should have known since at least October 2020 that counties in the commonwealth were giving their voters notice of defects in their mail-in or absentee ballots and a chance to cure those defects. The Bucks County Board, for example, "has been providing notice to electors in Bucks County regarding facially deficient problems with their outer ballot envelopes since 2020," and it has continued to "provid[e] this service to all of its voters" during the past five elections. Bucks County Answer ¶117. These procedures "have been publicly discussed and deliberated at public meetings since at least October 2020," that have been "routinely attended by members of the political parties." *Id.* ¶¶19, 120. Indeed, "[c]andidates and the political parties in Bucks County are well aware of" these longstanding procedures, because "the political parties, specifically the Bucks County Republican Committee, [were] present at a public Board of Elections meeting wherein the procedure of notice and cure was discussed and approved as far back as October 2020," and the parties have since repeatedly requested lists of voters who were notified of defective ballot envelopes. *Id.* ¶¶118-123.

The situation in Bucks County is not unique. Adams County has provided notice of defective absentee or mail-in ballots since at least *2010*. Factual Stip. ("SOF") at 2 (Sept. 20, 2022). Lycoming County has used notice-and-cure procedures since the enactment of Act 77 in 2019. *Id.* at 4. And Allegheny County

has done so since 2020. *Id.* at 2. So have Philadelphia, Lehigh, and Northampton counties. *Id.* at 4, 6, Ex. G. Beaver and Blair Counties, too, have previously provided notice and an opportunity to cure. *Id.* at 2-3. Whether petitioners actually knew about these widespread and longstanding practices years ago (at least some of them assuredly did), there is no question that they could have become aware of the practices with reasonable diligence, which is the relevant question, *see, e.g.*, *Taylor v. Coggins*, 90 A. 633, 635 (Pa. 1914), *cited in Kelly*, 240 A.3d at 1257 (Wecht, J., concurring); *Turns v. Dauphin County*, 273 A.3d 66, 76 (Pa. Commw. 2022).

The extensive litigation surrounding notice-and-cure procedures in 2020 eliminates any reasonable argument that petitioners neither knew nor could have learned about the notice-and-cure procedures they challenge years before they filed this action. As Judge Brann explained, during the 2020 elections, "[s]ome counties [in the commonwealth] chose to implement a notice-and-cure procedure while others did not." *Donald J. Trump for President*, 502 F.Supp.3d at 907. The Third Circuit made the same observation in affirming Judge Brann, explicating that although "[s]ome counties did not notify voters about" defective mail-in or absentee ballots, "[o]thers, including the counties named in this suit, decided to reach out to these voters to let them cure their mistakes." *Donald J. Trump for President*, 830 F.App'x at 384; *see also id.* at 390 (referring to "seven counties whose notice-and-cure procedures are challenged"). In November 2020, moreover, the secretary of state

"encourag[ed] counties to provide information to party and candidate representatives during the pre-canvass that identifies the voters whose ballots have been rejected' so those ballots could be cured." *Donald J. Trump for President*, 502 F.Supp.3d at 907. All of this was in the public record two years ago, and thus could have been discovered with reasonable diligence by any petitioners who were not actually aware of it.[3]

Petitioners' contrary arguments fail. Petitioners first assert (Reply 3) that their delay should be measured from Governor Wolf's June 2021 veto of a bill that would have mandated a notice-and-cure procedure statewide. But as shown by the Pennsylvania Supreme Court's unanimous decision in *Kelly v. Commonwealth*, the year-plus that petitioners waited to sue *after* the veto suffices to trigger laches. *See* 240 A.3d at 1257. (Petitioners' reply never cites *Kelly*, even though multiple oppositions to their application did so.) The argument that the delay should be measured from the veto would thus fail even if it were right. But it is not right. To begin with, it does nothing to excuse the delay in suing between October 2020 and June 2021, when the bill in question was introduced. Nor does the introduction of the bill provide any reason for delay. The inherent uncertainty of the legislative process (reflected in the fact that many bills that are introduced are never enacted)

[3] As reflected on the federal district court and Third Circuit online docket sheets, one of petitioners' counsel here, Thomas King, participated in the 2020 litigation just discussed in the text (both in the district court and on appeal).

means that the pendency of a bill does not justify waiting to challenge extant procedures. That is particularly true given that petitioners' challenges would not have been mooted had the bill become law, because some counties offer notice-and-cure procedures different than those that the bill would have mandated.

Petitioners also claim (Reply 4) that they were "not aware of the cure procedures being challenged" until various right-to-know inquiries were launched in 2021 and litigation involving Lehigh County was settled this year. But petitioners' claim does not involve, much less turn on, any information generated by those inquiries or litigation. They have brought a broad challenge to county boards' authority to implement *any* notice-and-cure procedures, claiming that *Pennsylvania Democratic Party* and the Election Code preclude *all* such efforts. All that petitioners therefore needed to know was that one or more counties offered notice-and-cure procedures. And as explained, petitioners knew or should have known *that* nearly two years before they sued—from public meetings, public guidance from the secretary of state, and numerous public lawsuits. Their delay in suing precludes their claims, and certainly their request for emergency injunctive relief in the midst of an ongoing election.

2. Petitioners' Delay Prejudices The Public, Respondents, And Intervenors

The emergency injunction petitioners seek would cause significant prejudice. "'Courts have recognized two chief forms of prejudice in the laches context—

evidentiary and expectations-based.'" *Energy Intelligence Group, Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industries & Service Workers International Union*, 2013 WL 4648333, at *18 (W.D. Pa. Aug. 29, 2013) (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001)). Petitioners' reply says nothing about the latter (addressing only the former), but expectations-based prejudice unquestionably exists here. Such prejudice "is demonstrated by showing that the [party asserting laches] took actions or suffered consequences that it would not have, had the plaintiff promptly brought suit." *Id.* Had petitioners filed this action soon after they learned (or should have learned) about notice-and-cure procedures being employed in the commonwealth, voters could have made different decisions regarding how to vote in the election now underway, county boards could have taken different steps to administer the now-in-progress election, and the DNC and PDP could have both taken additional measures to educate their voters and changed their approach to getting out the vote, given the disproportionate effect the relief sought would have on Democratic candidates.

Start with the prejudice to voters. For at least five elections—including the one now underway—voters in counties with notice-and-cure procedures have been able to rely on the opportunity to cure technical defects with mail-in or absentee ballots when deciding whether to vote in person or instead cast a mail-in or absentee ballot. And some voters in the current election cycle no doubt relied on the

availability of those procedures—or will have done so by the time any injunction could be issued and upheld on appeal—in choosing to vote by mail rather than waiting to vote in person. Changing the rules in the middle of the election would unfairly upset those legitimate reliance interests.

The county boards of elections will also be prejudiced if relief (and certainly a preliminary injunction) is granted. For years—and in the case of Adams County, more than a decade—boards have employed notice-and-cure procedures. Resources are spent to train staff on those procedures, to educate voters about them, and to conduct ballot-canvass procedures based on them. None of those (expectation-based) resources would have been spent in the last year or two had petitioners sued (and succeeded) promptly. And certainly a prompt challenge would have ensured that boards would not have to endure the prejudice of rushing to re-train and re-educate in the midst of an election—when the already face numerous other demands beyond what exists in the relative calm between elections, i.e., conducting elections under pandemic conditions as well as threats of disruption or even physical violence.

Finally, the DNC and PDP, as well as their members and candidates, will be particularly prejudiced by petitioners' delay in seeking relief. Had petitioners sued (and succeeded) a year or two ago, the DNC and PDP would have had ample time to educate voters about, and design get-out-the-vote strategies around, any injunction. The DNC and PDP could have, for example, devoted additional efforts

to training voters on how to avoid common mistakes when filling out mail-in and absentee ballots, and urged more voters to cast ballots in person. *See* Pellington Supp. Decl. ¶¶19-24 (describing PDP's existing voter education and get-out-the-vote efforts related to mail-in ballots). But now, after voters are already requesting and returning ballots, such efforts would be far more difficult, if not impossible. *Id.* ¶¶53-55 (Ex. A).[4]

The prejudice to intervenors is made even more acute by the significant and disproportionate effect an injunction would have on Democratic voters. Pellington Supp. Decl. ¶¶35-44, 48. To take just one example, Allegheny County estimates that approximately 1.5% to 1.6% of absentee and mail-in ballots in the elections held in 2021 and thus far in 2022 had missing dates or signatures that could have been remedied under the challenged procedures. *Id.* ¶47. Assuming a similar error rate statewide in the 2020 general election would mean that nearly 40,000 voters faced their ballots being discarded for such technical errors. *Id.* ¶49. Because a large majority of absentee or mail-in ballots were cast by registered Democrats in the last election cycle, an injunction prohibiting notice-and-cure procedures statewide could

[4] Even if laches did not bar petitioners' requested injunction, petitioners would be required to post a bond of at least $2 million as to the PDP and DNC alone. Under 231 Pennsylvania Code §1531, petitioners cannot be awarded a preliminary injunction unless they "file[] a bond … conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained." The requested injunction would injure DNC and PDP in the amount of, at least, $2 million. Pellington Supp. Decl. ¶54.

result in a swing in a statewide election of tens of thousands of votes. *Id.* That would be, in many elections, outcome determinative. *See, e.g.*, *id.* ¶¶50-52. It could well be dispositive in November. *See Ziccarelli v. Allegheny County Board of Elections*, 2021 WL 101683 (W.D. Pa. Jan. 12, 2021) (dispute over election in which ballots from which a date was omitted would decide the winner). That would be particularly true in local elections, where even a small number of invalidated ballots can alter the result. Pellington Suppl. Decl. ¶¶50-52. In sum, the DNC and PDP, along with its members, would suffer significant expectations-based prejudice from petitioners' delay in challenging the procedures they knew or should have known about years ago.

Finally, petitioners' delay in suing has also caused evidentiary prejudice, as the rushed process necessitated by petitioners' delay in seeking emergency relief deprives the Court—and respondents and intervenors—of the opportunity to develop an appropriate evidentiary record for this case. To take the most obvious example, petitioners bear the burden of establishing irreparable harm from the existence of notice-and-cure procedures in those counties that employ them. *See Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). But there has been no discovery in support of that essential element of their claim, and whatever witness testimony petitioners may offer (if any) by declaration will not—

because of the rush caused by petitioners' delay—have been tested through cross-examination before the Court rules on the application.

In addition, petitioners claim that mail and absentee voters in counties that provide notice-and-cure are somehow afforded preferential treatment. Discovery would illustrate a far different picture. Were full factual development permitted here, the Court would learn that, throughout the commonwealth, any time a voter interacts with an election official (by voting in-person on election day or casting an in-person mail ballot), receiving notice of an error with one's ballot or envelope affidavit and the opportunity to fix it is commonplace. What petitioners seek is denial of that commonplace courtesy to mail and absentee voters who (petitioners likely believe) are on balance less likely to support them.

* * *

While the foregoing demonstrates that laches bars petitioners' claims entirely, at an absolute minimum it precludes petitioners from running into this Court in the middle of an election and rushing the courts into issuing an "emergency" injunction that would confuse as well as disenfranchise voters and impose significant costs on election officials as well as the DNC and PDP. If petitioners wanted to prevent any use of notice-and-cure procedures in the 2022 elections, they needed to sue well before those elections started. The application should be denied and petitioners' claims adjudicated in the ordinary course.

B. Petitioners Cannot Establish That They Would Suffer Irreparable Harm Absent An Injunction

Petitioners' burden to show that they would suffer irreparable harm without an injunction is a "heavy" one, *Warehime v. Warehime*, 860 A.2d 41, 47 (Pa. 2004). Petitioners have not met it.

1. Petitioners Cannot Assert An Injury Based On The Inability Of Voters In Counties Without Notice-And-Cure Procedures To Cure Their Ballots

At the recent status conference in the case, petitioners suggested that voters in counties that lack notice-and-cure procedures are irreparably injured because they will not get a chance to correct any errors with their mail or absentee ballots. But any such harm flows from the choice that no-cure counties have made to deny their voters such an opportunity. It does not flow from any procedures in use in other counties; whether or not any such procedures exist, the voters in no-cure counties that petitioners point to would be in exactly the same situation they are now. Accordingly, the preliminary injunction would not prevent or redress the supposed harm petitioners assert. And that precludes issuance of the injunction, because as the Pennsylvania Supreme Court has explained, "a party seeking a preliminary injunction must show that an injunction is necessary *to prevent* immediate and irreparable harm." *Summit Towne Centre*, 828 A.2d at 1001 (emphasis added). Petitioners cannot make that required showing, because their requested injunction would do nothing to remedy the fact that voters in no-cure counties lack a notice-

and-cure opportunity. *See Donald J. Trump for President, Inc.*, 502 F.Supp.3d at 913-914.

2. Petitioners Cannot Assert An Equal-Protection Injury

Perhaps recognizing the point just made, petitioners offered at the recent status conference a slight variation on the argument just discussed, asserting that voters in no-cure counties are irreparably harmed because their opportunity to cure is *different* from that of voters in counties with notice-and-cure procedures. This argument fails for multiple reasons.

First, the argument is one of equal protection, yet petitioners omitted any equal-protection claim from their petition. *See* Pet. 25-29. They cannot claim an irreparable injury as a basis for relief that is unmoored from the claims in their petition. *See, e.g.*, *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994); *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir. 1997); *Memphis A. Phillip Randolph Institute v. Hargett*, 478 F.Supp.3d 699, 709 (M.D. Tenn. 2020).

Petitioners' failure to bring an equal-protection claim here was surely not just an oversight. Petitioners no doubt framed their challenged in terms of statutory authority because Pennsylvania counties' notice-and-cure procedures have already been challenged repeatedly under an equal-protection theory—and those challenges failed *every single time*. For example, in *Donald J. Trump for President v. Boockvar*, Republicans asserted that the same notice-and-cure procedures challenged here

violated equal protection, a claim Judge Brann rejected on the ground that "it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." 502 F.Supp.3d at 920. The Third Circuit affirmed that rejection, similarly holding that "[c]ounties may, consistent with equal protection, employ entirely different election procedures and voting systems," and that "[e]ven when boards of elections vary considerably in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection." *Donald J. Trump for President*, 830 F.App'x at 388. As explained in the DNC's and PDP's opposition (at 26-27), that holding is consistent with other courts' conclusion that variations across counties in the details of election administration do not violate equal protection. *See Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 389 (W.D. Pa. 2020) (collecting cases).

And even looking beyond equal protection, it is simply not a cognizable harm to one group of voters—much less an irreparable harm sufficient to warrant the extraordinary remedy of a preliminary injunction—that other qualified voters have a chance to fix technical mistakes on their ballots so that they too can participate in representative democracy. No one has a legitimate interest in the rejection of their fellow citizens' ballots because of minor fixable errors, so long as those errors are in fact fixed and a properly completed ballot submitted within the time for voting

prescribed by state law. Petitioners have not cited a single case holding or even suggesting that there is such an interest, and that interest should be firmly rejected.[5]

3. Petitioners Cannot Show Any Irreparable "Vote-Dilution" Injury

Yet another variation of the same argument that petitioners have thrown at the wall is that the irreparable harm is "vote dilution." According to petitioners, the votes of people in no-cure counties are "diluted" if the votes of other (equally qualified) voters are counted after being cured through notice-and-cure procedures. That is not a theory of "vote dilution"; it is one of vote *inflation*. Petitioners claim a right to have their vote receive additional weight via the rejection of other qualified voters' ballots that have fixable errors. There is no such entitlement; courts have so held in the cases cited in the prior subsection and in the DNC's and PDP's opposition. Not having one's vote inflated through disenfranchisement of one's fellow registered citizens is simply not a cognizable injury.

Under petitioners' theory, voters would suffer irreparable harm from things like county-specific voter outreach, registration drives, or get-out-the-vote campaigns—even counties providing their voters with detailed instructions on how

[5] As noted in the introduction, all the basic points just made regarding equal protection—including that no such claim is made in the petition—apply equally to the Free and Equal Elections Clause of the state constitution, which petitioners likewise invoked at the recent status conference despite their failure to include a claim under that clause in their petition.

to accurately complete and submit a ballot. All of these items make it likely that more valid votes will be cast and counted, and all of them result in the same lack of vote inflation that petitioners assert here. There is no colorable argument that these types of democracy-promoting activities inflict any legally cognizable harm, let alone irreparable harm. *See Jones v. Sorbu*, 2021 WL 365853, at *5 (E.D. Pa. Feb. 3, 2021) (when courts "consider the irreparable harm prong of the preliminary injunction test, the harm the party seeking the injunction expects to suffer must be legally cognizable harm"). Again, petitioners cite no authority that supports their argument.

C. The Pennsylvania Supreme Court's Decision In *Pennsylvania Democratic Party* Did Not Address—And Does Not Change—The Fact That The General Assembly Has Given County Boards Authority To Adopt Notice-And-Cure Procedures

It is firmly established that the General Assembly "may, where necessary, confer authority and discretion in connection with the execution of the law." *Chartiers Valley Joint Schools v. County Board of School Directors of Allegheny County*, 211 A.2d 487, 492 (Pa. 1965). The General Assembly has done so here, giving county boards broad authority "[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 Pa. Stat. §2642(f). As the DNC's and PDP's answer explained (at 12-19), this expansive

delegation encompasses the authority to determine whether and how to allow voters to correct minor mistakes made in completing their mail or absentee ballots.[6]

Petitioners only response to section 2642(f) is that county-created notice-and-cure procedures are "inconsistent with law" under that provision because *Pennsylvania Democratic Party* declined to *mandate* such procedures statewide. As the DNC's and PDP's opposition explained (at 19-22), that is incorrect. *Pennsylvania Democratic Party*'s refusal to read the Election Code as requiring every county board of elections to provide notice-and-cure procedures says nothing about whether county boards have delegated legislative authority to provide such procedures on a county-specific basis.

At the recent status conference, this Court suggested that the foregoing reading ignores portions of *Pennsylvania Democratic Party*. In particular, the Court appeared to indicate that some or all of the following language supports petitioners' reading of the case:

> [A]lthough 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 Petitioner. To the extent that

[6] The record here (abbreviated though it is) illustrates the varied ways that counties have exercised this authority. For example, Allegheny County provides *notice* and an opportunity to cure erroneous absentee and mail-in ballots; by contrast, Berks County provides no notice, but permits voters recognize a mistake *on their own* to cure the defect. *See* SOF 2-3. And in Lehigh County, election clerks who notice errors when a voter returns his or her ballot *in person* will inform the voter so that he or she may fix the error at the counter of the Voter Registration Office. *See* Lehigh County Answer ¶2.

> 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.

238 A.3d at 374. The DNC and PDP respectfully submit that none of this language supports a conclusion that the broad authority conferred on the boards in section 2642(f)—a provision that, as noted earlier, *Pennsylvania Democratic Party* never cited—excludes the authority to adopt county-specific notice-and-cure procedures.

The first sentence quoted says that "the Election Code … does not provide for the 'notice and opportunity to cure' procedure ***sought by Petitioner***." 238 A.3d at 374 (emphasis added). As discussed, the "procedure sought by Petitioner" was a mandatory statewide notice-and-cure procedure, which included a period of seven days ***after*** the election to cure any defects. ***See id.*** at 372 ("Petitioner seeks to require that the Boards contact qualified electors whose mail-in or absentee ballots contain minor facial defects … and provide them with an opportunity to cure those defects."); ***id.*** at 352-353 ("Petitioner … sought an injunction requiring Boards … to contact the elector and provide them the opportunity to cure the facial defect until" seven days after the election (quotation marks omitted)); ***accord Donald J. Trump for President***, 502 F.Supp.3d at 907. The court's conclusion that the Election Code

does not provide for a mandatory notice procedure or a post-election opportunity to cure has no bearing on whether the Election Code *does* allow each county to adopt notice and a pre-election opportunity to cure via its section 2642(f) authority.

The second sentence in the block quote above states that "the decision to provide a 'notice and opportunity to cure' procedure … is one best suited for the Legislature." 238 A.3d at 374. As discussed, the General Assembly has made that decision, by not mandating a statewide procedure (as *Pennsylvania Democratic Party* held) but instead giving each board the power to choose whether a county-specific procedure is appropriate for its county.

The last sentence in the block quote above refers to "the open policy questions attendant to th[e] decision" whether to provide notice and cure, "all of which are best left to the legislative branch of Pennsylvania's government." 238 A.3d at 374. Again, the "legislative branch" has spoken to those questions by not requiring notice and cure statewide, but delegating to each board the power to answer the "open policy questions" for its particular county.

Put simply, *Pennsylvania Democratic Party*'s conclusion that whether and how to provide notice-and-cure opportunities was an issue "best suited for the Legislature," 238 A.3d at 374, does not make the challenged procedures "inconsistent with law," §2642(f). As explained, those procedures were enacted pursuant to legislatively delegated authority. In other words, the General Assembly

has decided on this issue, choosing to allow individual boards to resolve whether to adopt notice-and-cure procedures (or other "rules, regulations and instructions") for their respective counties.

That conclusion is consistent with the Pennsylvania Supreme Court's holding two months later that "the absence of" particular procedures for carrying out a rule in the Election Code "reflect[s] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code." *In re Canvassing Observation*, 241 A.3d at 350. In that case, the court addressed a challenge to the proximity requirements for election observation set by counties, and it rejected the contention that the legislature's silence on that question meant counties could not set their own rules. The court explained that the "General Assembly, had it so desired, could have easily established such [specific procedures]; however it did not." *Id.* And, the Court continued, "[i]t would be improper for this Court to judicially rewrite the statute by imposing" a statewide approach "where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.* The same is true here. The General Assembly enacted rules regarding the requirements for mail-in and absentee ballots, but it did not adopt specific procedures for whether or how voters who make mistakes in complying with those requirements may be notified and permitted to fix the problem prior to the election. That decision not to adopt a state-wide approach

to that question "reflect[s] the … deliberate choice to leave such matters to … county boards." *Id.*

Petitioners argue, however, that this Court should ignore the legislature choice to delegate authority to the boards in section 2642(f) because last year both houses of the legislature approved a bill that—had it become law rather than being vetoed—would have mandated certain notice-and-cure procedures statewide. The Pennsylvania Supreme Court rejected much the same argument this year, explaining that refusing to give any weight to "a plan passed by the Legislature but vetoed by the Governor is not only logical, but also comports with this Commonwealth's constitutional precepts." *Carter v. Chapman*, 270 A.3d 444, 461 (Pa. 2022). In any event, for the same reason that *Pennsylvania Democratic Party* does not support petitioners, a legislative failed attempt to mandate statewide notice-and-cure says nothing about whether the legislature delegated authority to county boards to decide whether to do so by choice.[7]

In short, *Pennsylvania Democratic Party* held *nothing* about whether counties have discretionary authority to adopt notice-and-cure procedures—and the statement in that case that it is for the legislature and not the courts to decide how to handle

[7] As discussed earlier, the distinction between pre-election cure (at issue here) and post-election cure (at issue in *Pennsylvania Democratic Party*) is yet a further reason why that case does not limit county boards' authority to provide the challenged procedures.

notice and cure requires respect for the legislature's decision to delegate that determination to the county boards. If that delegation is to be altered, it must be done by the General Assembly, not the courts.

D. Granting A Preliminary Injunction Would Cause Far Greater Harm Than Denying It

A final independent reason to deny petitioners' application is that the requested injunction would inflict far "greater injury," *Summit Towne Centre*, 828 A.2d at 1001, than the (non-existent) harm that would result from refusing it. In particular, the disenfranchisement of qualified Pennsylvania voters that the injunction would cause is a severe and irreparable injury, as the right to vote "is the bed-rock of our free political system." *Bergdoll v. Kane*, 731 A.2d 1261, 1268-1269 (Pa. 1999). Even if it were a cognizable harm not to have one's vote *inflated*, as petitioners claim, that harm would unquestionably be outweighed by the harm of outright excluding people—tens of thousands of people, as explained in the attached declaration (¶49)—from having their vote counted *at all*.

Relatedly, granting an injunction would injure the public by undermining public faith in the electoral system. As explained, the mailing and casting of ballots for the 2022 general election has already begun. A court order that interfered with that ongoing process—by disenfranchising qualified voters and reducing the overall number of Commonwealth citizens who can participate in the democratic process, Pellington Supp. Decl. ¶¶16-18, 47, 49—would be deeply harmful, likely leading

voters to believe that the election is something to be won and lost in court, rather than the ballot box.

The fact that some segments of the public may have already lost faith in our electoral system—largely because of relentless untrue claims about rampant voter fraud and stolen elections—provides no reason to grant the request injunction. There is simply no equivalence between, on the one hand, efforts by county officials to *enhance* voter participation (and hence faith in our republican system of government) by increasing the number of ballots counted and, on the other hand, efforts to *suppress* voter participation (and hence disillusionment with our country's representative democracy) by falsely telling people that their votes do not matter because elections are rigged. The latter, which decidedly *undermines* the public interest, provides no basis whatsoever for enjoining the former, which decidedly *serves* that interest.

III. CONCLUSION

The application for a preliminary injunction should be denied.

September 26, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

CLIFFORD B. LEVINE

CERTIFICATE OF LENGTH

Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 6,538, as counted by Microsoft Word's word count tool.

Clifford B. Levine

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was served upon all counsel of record on September 26, 2022, by this Court's electronic filing system.

CLIFFORD B. LEVINE

EXHIBIT A

IN THE IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania; JESSICA MATHIS, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries, *et al.*,

No. 447 MD 2022

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE and PENNSYLVANIA DEMOCRATIC PARTY, *et al.*,

Intervenors-Respondents.

SUPPLEMENTAL DECLARATION OF COREY PELLINGTON

I, Corey Pellington, hereby declare and state upon personal knowledge as follows:

I. Professional Experience

1. I currently serve as the Executive Director of the Pennsylvania Democratic Party ("PDP"). I have held that position since June of 2022.

2. Before that, I was the Deputy Executive Director of the PDP, starting in December of 2015.

3. Additionally, I have been the Chief Operations Officer since April of 2018.

4. As Executive Director of the PDP, I work with PDP officers and oversee the administration of the State Democratic Committee and state party activities, including the endorsement of statewide candidates.

5. Additionally, I oversee the operation of the Coordinated Campaign, a program that links all Democratic candidates on the ballot and conducts political, digital, communications, and field activities for all Democratic candidates running that cycle. I manage the full financial apparatus of the PDP coming to bear on each election cycle.

6. I also supervise campaign expenditures to help county-level parties and candidates, including mail programs.

II. PDP Generally

7. The Democratic National Committee ("DNC") is the national umbrella organization for state parties. The PDP is the official state affiliate of DNC; what that means in practice is that nothing in our bylaws can contradict anything in the DNC bylaws (with the exception of primary endorsements in certain states). The PDP oversees 67 subsidiary county committees, whose bylaws in turn cannot contradict anything in the PDP bylaws.

8. The DNC has an interest in electing Democratic candidates and invests significant resources in state parties, including the PDP.

9. Among other things, the PDP communicates with voters concerning the timing of and how to participate in upcoming elections; encourages them to participate in the selection of the party's nominees; and encourages them to support the party's nominees during the general election.

10. The PDP represents the interests of Democratic voters in Pennsylvania by supporting candidates who share these voters' values. As of August 4, 2022, there were roughly three-and-a-half million registered Democrats throughout the Commonwealth.

11. The PDP also represents the interests of Democratic candidates by providing campaign resources, logistical support, and coordination with other candidates. The number of Democratic candidates varies by year and cycle.

12. In 2020, for example, the PDP represented the interests of Democratic nominees for President and Vice President; four Democratic candidates for statewide row offices; 18 Democratic congressional candidates; 25 Democratic State Senate candidates; and roughly 203 Democratic State House candidates.

13. In 2018, the PDP represented the interests of Democratic candidates for Governor and United States Senate; 18 Democratic congressional candidates; 25 Democratic candidates for State Senate; and roughly 203 Democratic State House candidates.

14. This year, the PDP represents the interests of Democratic nominees for Governor and Lieutenant Governor, United States Senate, 17 Democratic Congressional candidates, 25 Democratic candidates for State Senate, and roughly 203 Democratic State House candidates.

III. Increasing the Availability of Mail Voting Raises (And In Pennsylvania Has Raised) Voter Participation

15. The DNC and the PDP share the goal of universal voter participation. That means that we take steps to facilitate safe, secure, and convenient voting so that an any eligible voter may exercise their right to vote. In our experience, allowing any qualified voter to vote by mail increases participation.

16. Using two recent state-run Democratic primaries as examples—one prior to no-excuses mail-in voting under Act 77, and one after Act 77 took effect—illustrates the point: In 2019, before Act 77 took effect, the Democratic primary participation was approximately 835,000; in 2021, by contrast, in a primary with similar offices, the turnout was over 1.1 million, a 32% increase. I believe that Act 77 is one of the principal reasons for this increase in voter participation.

17. In the 2020 general election, roughly 2.6 million voters voted by mail. Of these voters, roughly 65% or 1.7 million were registered Democrats.

18. As of October 4, 2021, over 700,000 voters had requested to be placed on the "permanent" vote by mail application list for 2021, which allows them to receive a mail-in ballot automatically for both elections this year. Of these voters, roughly 72% or 500,000 are registered Democrats. According to the Department of State, nearly

1.4 million voters have exercised this option in 2020 and 2021 combined.

IV. PDP Encourages its Voters to Vote By Mail

19. Consistent with its goal to elect Democrats to public office, the PDP shifted its strategy around voting by mail gradually after Act 77's passage, in response to changes on the ground and the law's interpretation in the courts.

20. In particular, as a result of Act 77, the PDP invested vastly more resources than before in a robust set of programs, including digital outreach, communications, field, and get-out-the-vote ("GOTV") that both encourage our voters to vote by mail and support their efforts to do so.

21. These programs consume an enormous amount of time, money, and effort. For example, our digital and communications teams educated voters on (1) the availability of mail voting for all qualified voters and (2) how to vote by mail in accordance with the requirements of the law. These efforts are conducted by mail and online.

22. Our field efforts have similarly shifted to conducting substantial voter contact around voting by mail.

23. Finally, PDP's GOTV program has fundamentally changed. Before Act 77, we conducted that program only in the four days preceding an election. Now, we work the entire ***month*** before the election, from when voters first receive their mail-in ballots to the receipt deadline for ballots. This vast expansion in the scope of the GOTV program has required wholesale revisions in the allocation of our resources.

24. In short, the PDP has invested significant time and money encouraging its voters to utilize the vote-by-mail option.

25. If Pennsylvania courts were to impose additional burdens on voting by mail that are not imposed on in-person voting, that would negatively and disproportionately affect Democratic voters.

26. In addition, PDP has an interest in preserving the confidence and trust it has built with voters over the four full election cycles Act 77 has been in effect and increased mail-in voting has become available.

27. Specifically, there are many voters who did not vote until they realized the simplicity of voting by mail. The PDP put significant resources into educating and convincing these voters that mail-in voting was safe, secure, and effective through digital advertising, social media, media interviews, and online events. These voters would be put at increased risk of disenfranchisement should minor and correctible errors with their ballots become disqualifying.

V. A Ban on County Notice and Cure Procedures Would Disproportionally Harm Democratic Voters and Candidates

28. Since the enactment of Act 77, voters have had the opportunity to vote in person, by mail, or provisionally. When voters vote in person, they interact with election judges and representatives of the various county boards of election.

29. An in-person voter has the opportunity to ask questions of board representatives.

30. In the event the in-person voter makes an error on his or her ballot, that voter is allowed to spoil the ballot and obtain a new ballot.

31. Upon information and belief, many counties account for the number of spoiled ballots.

32. Further, if in-person voters have some confusion with the voting process, representatives of county boards of election typically communicate with that voter to assist the voter in casting a vote that will be counted.

33. The lawsuit brought by the Republican National Committee (RNC), the Republican Party of Pennsylvania (State GOP) and others seeks to impose limitations on notice and cure only for mail-in voters and not in-person voters.

34. In analyzing the impact of such a policy on implications for the DNC and PDP (including their shared goal of universal voter participation), I have reviewed information about recent elections contained on the official website of the Pennsylvania Secretary of the Commonwealth. My analysis is set forth below.

A. Review of Recent Elections

35. In the Presidential Election of 2020, Democrat Joseph R. Biden received a total of 3,458,299 votes, broken down as follows:[1]

    (a) In-person: 1,409,341

    (b) Mail-in: 1,995,691

    (c) Provisional: 53,168

36. Republican Donald J. Trump received a total of 3,377,674 votes, broken down as follows:

    (a) In-person: 2,731,230

    (b) Mail-in: 595,538

    (c) Provisional: 50,874

37. Of the total of 2,591,299 mail-in votes cast, approximately 77% were for Biden and 23% were for Trump.

38. In absolute terms, for the 2020 Presidential race, Democratic voters cast 1,400,153 more mail-in votes than Republicans. (1,995,691 – 595,538 = 1,400,153).

39. In the 2022 Primary Election for Governor, votes for the Democratic candidate broke down as follows:[2]

    (a) In-person: 694,912

    (b) Mail-in: 522,146

    (c) Provisional: 6,384

[1] Election data comes from the Department of State's official returns, accessible at https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G&IsActive=0

[2] https://www.electionreturns.pa.gov/Home/SummaryResults?ElectionID=94&ElectionType=P&IsActive=0

40. In the 2022 Primary Election for Governor, votes for the Republican candidates for Governor (in the aggregate) broke down as follows

(a) In-person: 1,200,905

(b) Mail-in: 144,725

(c) Provisional: 1,799

41. As a percentage of mail-in votes, 78% were cast in the Democratic Primary for Governor and 22% were cast in the Republican Primary for Governor.

42. In absolute terms, the number of mail-in voters for the Democratic candidate exceeded the number of mail-in voters for the Republican candidates in the 2022 Gubernatorial Primary Election by 377,421 votes (522,146 – 144,725 = 377,421).

43. My experience with the PDP makes me believe a blanket prohibition on curing minor defects with mail-in ballots would do damage to voter participation. It would create an additional barrier to using a method of voting that has become very popular with voters.

44. Additionally, as is evident from the election results cited above, any prohibition on notice and cure for mail-in votes will disproportionately disenfranchise Democratic voters.

B. Rejection Rate of Mail In Ballots

45. Upon information and belief, there have been a number of votes that have been rejected by county boards of election due to technical deficiencies, such as ballots submitted without a secrecy envelope or missing a name, date, or signature on the outer ballot declaration.

46. The notice-and-cure procedures implemented by many county boards of election reduce this number and provide an opportunity for qualified voters to be able to submit a vote that is counted.

47. While a statistical impact of the effect of any change in counties' notice-and-cure procedures may ultimately be a question for expert ~~analysis, in l~~ight of the expedited time frame for the current phase of this litigation, I have calculated the effect as follows, using the rates provided by the Allegheny County Board of Elections as a basis to

extrapolate statewide. There, the county noted the number of deficient ballots that were subject to the notice and cure process as equaling 1,541 in 2021 and 1,396 in 2022, or a total of 1.5% in 2021 and 1.6% in 2022. Notably, the naked ballots, i.e. those ballots without a secrecy ballot, are not included in this calculation, presumably because the lack of an interior ballot is not detected until Election Day. However, consideration of these ballots would increase the number of rejected ballots based on technical deficiencies and would increase the percentage of votes of qualified voters that were not counted.

C. Application of Rejection Ration to Recent Elections

48. Given the general rejection rate in Allegheny County and the disproportionately high number of mail-in votes cast for Democratic candidates, an absolute ban on a notice and cure program in every county would favor Republican voters and candidates.

49. In the Presidential race of 2020, a 1.5% reduction in mail in votes would have translated into a reduction in Joe Biden's numbers by 29,935 votes (1.5% x 1,995,691) and a reduction in Donald Trump's numbers by 8,933 (1.5% x 595,538) and thus a net reduction to the Democratic candidate of 21,002 votes (29,935 – 8,933). Given that Biden's margin of victory was 80,555, the net mail-in votes lost, without an opportunity to cure, would exceed 25% of the margin of victory.

50. In the 2021 Municipal Election, there was a statewide race for a position on the Pennsylvania Supreme Court. Republican candidate Kevin Brobson received 1,397,100 votes statewide, and Democratic candidate Maria McLaughlin received 1,372,182 votes, a difference of 24,918 votes.[3]

Corey Pellington

51. Also in the Municipal Election, there was a statewide race for a position on the Pennsylvania Commonwealth Court. Democratic candidate Lori Dumas received 1,297,253 votes and Republican candidate Drew Crompton received 1,274,899 votes, a difference of 22,354 votes.

[3] https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=84&ElectionType=G&IsActive=0

52. These margins are small, and even a 1.5% reduction in mail-in votes counted could significantly affect close statewide elections.

D. The Democratic Party Would Need to Respond to an Injunction with a Voter Education Effort

53. The DNC and the PDP would also have to invest resources in overcoming heightened voter confusion if voters in counties that previously had a system of notice and cure were barred from continuing to fix minor errors on their mail-in ballots.

54. Conservatively, a digital campaign carried out by the Party to educate voters in the final weeks of the Election would cost $2-3 million, subject to fundraising, if targeted to reach Democratic voters.

55. Additionally, the Party would also advertise on television in the affected counties and media markets to inform voters that there will be no opportunity to correct minor errors with their ballots, and to ensure voters get the information they need to ensure their votes are counted. That effort will cost substantially more than a purely digital effort.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 26, 2022