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.*, Respondents, and DEMOCRATIC NATIONAL COMMITTEE and PENNSYLVANIA DEMOCRATIC PARTY, Proposed Intervenors-Respondents.	No. 447 MD 2022

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

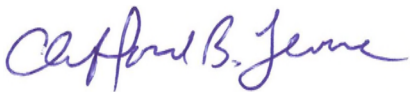
Finally, petitioners are wrong to assert (Memo. 32-33) that the preliminary injunction they seek satisfies the narrow-tailoring requirement. Petitioners seek an order prohibiting any county board in the Commonwealth from notifying voters about technical errors in their mail-in or absentee ballots. Such 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

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.

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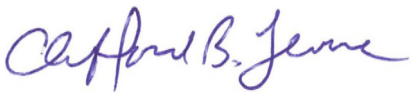
CERTIFICATE OF SERVICE

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.



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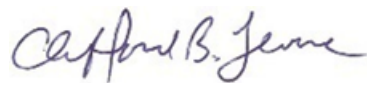

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