

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

BLACK POLITICAL EMPOWERMENT  
PROJECT, POWER INTERFAITH,  
MAKE THE ROAD PENNSYLVANIA,  
ONEPA ACTIVISTS UNITED, NEW  
PA PROJECT EDUCATION FUND,  
CASA SAN JOSÉ, PITTSBURGH  
UNITED, LEAGUE OF WOMEN  
VOTERS OF PENNSYLVANIA, AND  
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents.

Case No. 283 MD 2024  
Original Jurisdiction

**APPLICATION FOR LEAVE TO INTERVENE**

Proposed Intervenor-Respondents the Republican National Committee (“RNC”) and the Republican Party of Pennsylvania (“RPP”) (collectively, “Republican Intervenors”), by and through undersigned counsel, respectfully submit the following Application for Leave to Intervene as Respondents in this original jurisdiction matter under Pennsylvania Rules of Appellate Procedure 106, 123, and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, and aver the following in support thereof:

## PRELIMINARY STATEMENT

The Republican Intervenors support and seek to uphold free and fair elections for all Pennsylvanians and for all voters across the country.

Petitioners' suit is the latest iteration of a longstanding quest to invalidate the Pennsylvania General Assembly's date requirement for absentee and mail-in ballots. The Republican Intervenors, on behalf of themselves, their voters, and their candidates, led the successful defense of the legality of the date requirement in several of these cases. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022); *Pa. State Conf. of NAACP Branches v. Sec'y of Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024).

Petitioners now ask the Court to undercut decisions by both the Pennsylvania Supreme Court and the Third Circuit Court of Appeals adopting the Republican Intervenors' position and upholding the date requirement. In 2022, the Pennsylvania Supreme Court upheld the date requirement as mandatory under state law. *See Ball*, 289 A.3d 1; *Ball*, 284 A.3d 1189. Earlier this year, the Third Circuit rejected a challenge to the date requirement brought under the Materiality Provision of the Civil Rights Act of 1964. *See Pa. State Conf. of NAACP Branches*, 97 F.4th 120.

Those decisions eliminated two key grounds on which plaintiffs—including some of the Petitioners here—have sought to invalidate the date requirement. In particular, four Petitioners in this action—Black Political Empowerment Project,

Make The Road Pennsylvania, League of Women Voters of Pennsylvania, and Common Cause Pennsylvania—participated as *amici* in *Ball*. Those four Petitioners are also federal-court plaintiffs whose Materiality Provision claim the Third Circuit recently rejected and who continue to pursue federal constitutional challenges to the date requirement. *See* Am. Compl., ECF No. 121, *NAACP v. Schmidt*, No. 22 CV 339 (W.D. Pa. filed Nov. 4, 2022) *and* Compl., ECF No. 1, *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022).

Rather than raise their claims under the Pennsylvania Constitution in their pending federal cases, Petitioners now file yet another lawsuit raising them in this Court. Petitioners thus are attempting to circumvent the prior decisions upholding the date requirement won by the RNC and the RPP. The RNC and the RPP have an obvious interest, and right, to intervene in this case to prevent such circumvention and to preserve those decisions in their favor.

More generally, political parties such as the RNC and the RPP have a recognized interest in securing election of their supported candidates, in asserting and protecting the rights of their members in upcoming elections, and in protecting their own agendas and resources from such changes to election laws. In addition, the RNC and the RPP have made significant investments in support of Republican candidates up and down the ballot and in connection with voter mobilization and education efforts in Pennsylvania for the past many election cycles, and continue to

do so again in 2024. They thus have a substantial and particularized interest in defending this action to preserve the structure of the competitive environment in which their supported voters and candidates participate and seek to win elections, and to ensure that Pennsylvania carries out free and fair elections.

Indeed, in recent years, non-enforcement of the date requirement has changed the outcome of elections to the detriment of the Republican Intervenors, their voters, and their candidates. In 2022, court rulings invalidating the date requirement flipped the outcome of a Lehigh County Court of Common Pleas election and resulted in Republican David Ritter losing the election. *See* Cert. Pet. at 7-12, *Ritter v. Migliori*, No. 22-30 (U.S. July 7, 2022).<sup>1</sup> In 2023, the federal district court ruling invalidating the date requirement that the Third Circuit reversed on appeal nonetheless resulted in Montgomery County election officials flipping the outcome of a Towamencin Township Board of Supervisors Election and declaring Republican Richard Marino—who received the highest number of votes under the rules in effect on Election Day—the loser to a Democratic challenger. *See* North Penn Now, “Towamencin candidates address latest ruling on 2023 race” (Apr. 17, 2024).<sup>2</sup>

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<sup>1</sup> [https://www.supremecourt.gov/DocketPDF/22/22-30/22951/20220707140738344\\_Ritter%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/22/22-30/22951/20220707140738344_Ritter%20Petition.pdf).

<sup>2</sup> *See* <https://northpennnow.com/news/2024/apr/17/towamencin-candidates-ruling-2023-race/>.

No other party to this action represents the Republican Intervenors' interests. Petitioners, who seek invalidation of the date requirement, obviously do not represent those interests. Neither do Respondents: all three Respondents opposed the Republican Intervenors' position in prior litigation and asked the Pennsylvania Supreme Court and the Third Circuit to invalidate the date requirement. *See* Resp't Allegheny Cnty. Bd. of Elections Br. and Resp't Phila. Cnty. Bd. of Elections Br., *Ball v. Chapman*, No. 102 MM 2022 (Pa. filed Oct. 16, 2022); Defs.-Appellee Resp. Br., *NAACP v. Schmidt*, No. 23-3166 (3d Cir. filed Dec. 7, 2023). If Respondents again decline to defend the date requirement in this case, there will be no party before the Court to defend it absent intervention by the Republican Intervenors.

Further, Respondents, as Commonwealth and county officials, do not share the Republican Intervenors' objectives with regard to promoting and securing the election of Republican candidates.

For all of these reasons, and as explained more fully below, this timely application for intervention should be granted. The RNC and the RPP respectfully request that the Court grant their application to intervene as Respondents, and permit them to file of record the Preliminary Objections attached hereto.

## **I. BACKGROUND**

### **A. The Republican Intervenors.**

1. The RNC is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party's business at the national level, including development and promotion of the Party's national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters.

2. The RPP is a major political party, 25 P.S. § 2831(a), and the "State committee" for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered "State Committee" of the Republican Party as defined by 52 U.S.C. § 30101(15). The RPP on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

3. The RNC and the RPP each have made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in past election cycles and are doing so again in 2024. These efforts include devoting substantial time and resources towards monitoring the voting and vote counting processes in

Pennsylvania and ensuring those processes are conducted lawfully. The RNC and the RPP make expenditures to ensure they and their voters understand the rules governing the elections process, including applicable dates, deadlines, and requirements for voting absentee or by mail. These efforts require a uniform application of the law and a clear and transparent understanding of absentee and mail-in voting requirements, including the date requirement.

4. The Republican Intervenors have a substantial and particularized interest in ensuring that Pennsylvania administers free and fair elections.

**B. Procedural History.**

5. On May 28, 2024, Petitioners filed their Petition for Review addressed to the Commonwealth Court of Pennsylvania's original jurisdiction against Al Schmidt, in his official capacity as the Secretary of the Commonwealth, and the Philadelphia and Allegheny County Boards of Elections. Pet. ¶ 1.

6. This suit is the latest salvo in a long line of attempts to persuade the courts to undo the General Assembly's date requirement for absentee and mail-in ballots. *See McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112 (Pa. Commw. Ct. June 2, 2022); *In re Election in Region 4 for Downingtown Sch. Bd. Precinct Uwchlan 1*, 272 A.3d 993 (Pa. Commw. 2022) (unpublished); *Ritter v. Lehigh Cnty Bd. of Elections*, 272 A.3d 989 (Pa. Commw. 2022)

(unpublished); *NAACP v. Schmidt*, No. 22 CV 339 (W.D. Pa. filed Nov. 4, 2022); *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022).

7. On November 1, 2022, the Pennsylvania Supreme Court ruled in a case brought by the Republican Intervenors and voters that the date requirement is lawful and mandatory under state law. *See Ball*, 289 A.3d 1; *Ball*, 284 A.3d 1189. The court ordered county boards of elections “to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes.” 284 A.3d at 1192.

8. The Pennsylvania Supreme Court’s November 2022 order aligned with the view of three Justices of the U.S. Supreme Court. In addressing an application for a stay following Pennsylvania’s 2022 primary election, three Justices concluded that the notion that the date requirement violates the federal Materiality Provision is “very likely wrong.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Mem.) (Alito, J., dissenting from the denial of the application for stay). No other Justices addressed the merits in the stay posture of that litigation.

9. Earlier this year, the Third Circuit endorsed the view espoused in the *Ritter* dissent. Siding with the Republican Intervenors, the Third Circuit reversed the district court’s grant of summary judgment and held that the date requirement



does not violate the Materiality Provision. *See Pa. State Conf. of NAACP Branches*, 97 F.4th 120. The Third Circuit has denied the petition for rehearing.

10. Nonetheless, Petitioners—four of whom participated in both *Ball* and the ongoing federal-court litigation—now seek to circumvent those decisions by arguing that the date requirement violates the Pennsylvania Constitution. *See* Pet. ¶¶ 81–91. In particular, Petitioners purport to plead two counts challenging the date requirement as a violation of Pennsylvania’s Free and Equal Elections Clause, Pa. Const. art. I, § 5. *Id.* Petitioners ask the Court to invalidate the General Assembly’s duly enacted date requirement and to preliminarily and permanently enjoin further enforcement of the requirement. Pet. Prayer for Relief ¶¶ a-c.

11. This case is still in its infancy. As of the filing of this Application for Leave to Intervene, no Respondent has yet responded to the Petition. The Court has set a status conference for June 10, 2024, to discuss the schedule for proceeding in this case.

## II. THE GOVERNING INTERVENTION STANDARD

12. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa. R.A.P. 1531(b).

13. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw.

Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

14. The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 to 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

15. Pennsylvania Rule of Civil Procedure 2327(4) is permissive and provides in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules if . . . *the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327(4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at \*5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

16. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not

discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

17. Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

18. The Court should grant the Republican Intervenors’ application to intervene because the Court’s determination of this action may affect the Republican Intervenors’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Republican Intervenors’ participation will aid the Court.

### **III. BASIS FOR THE REPUBLICAN INTERVENORS’ INTERVENTION**

#### **A. The Republican Intervenors have substantial interests in this action.**

19. The Republican Intervenors, on behalf of their voters, supported candidates, and own institutional interests, have a substantial and particularized interest in preserving the date requirement challenged in this action, which was enacted to ensure the structure and integrity of Pennsylvania’s elections.

20. The Republican Intervenors have led the defense of the date requirement in prior cases, including *Ball* and *Pennsylvania State Conference of the NAACP*, and have an obvious interest in protecting the decisions upholding the date requirement in those cases. Petitioners' suit directly implicates that interest because it seeks to circumvent those decisions and secure a new judicial decision that the date requirement is invalid and unenforceable. *See* Pet. Prayer for Relief ¶¶ a-b.

21. More generally, there can be no question that the Republican Intervenors have an obvious interest in the continued enforcement of Pennsylvania's laws governing absentee and mail-in ballots as those laws are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Intervenors invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018). Courts around the country routinely recognize that political parties have an interest in defending against suits seeking judicial changes to election

laws and procedures.<sup>3</sup> Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures

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<sup>3</sup> See, e.g., *Pa. State Conf. of the NAACP v. Chapman*, No. 1:22-cv-00339-SPB (W.D. Pa. Jan. 6, 2023) (granting intervention of right to the RNC, National Republican Congressional Committee, and the Republican Party of Pennsylvania); *La Union Del Pueblo Entero v. Abbott*, 29 F.4th 299 (5th Cir. 2022) (granting intervention of right to county party committees, Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee); *United States v. Georgia*, No. 1:21-cv-2575 (N.D. Ga. July 12, 2021) (granting intervention to the RNC, NRSC, and Georgia Republican Party); *Concerned Black Clergy of Metro. Atlanta, Inc. v. Raffensperger*, No. 1:21-cv-1728 (N.D. Ga. June 21, 2021) (granting intervention to the RNC, NRSC, NRCC, and Georgia Republican Party); *Coalition for Good Governance v. Raffensperger*, No. 1:21-cv-02070 (N.D. Ga. June 21, 2021) (same); *New Georgia Project v. Raffensperger*, No. 1:21-cv-1229, 2021 WL 2450647 (N.D. Ga. June 4, 2021) (same); *Ga. State Conf. of the NAACP v. Raffensperger*, No. 1:21-cv-1259 (N.D. Ga. June 4, 2021) (same); *Sixth Dist. of the African Methodist Episcopal Church v. Kemp*, No. 1:21-cv-1284 (N.D. Ga. June 4, 2021) (same); *Asian Ams. Advancing Justice-Atlanta v. Raffensperger*, No. 1:21-cv-1333 (N.D. Ga. June 4, 2021) (same); *VoteAmerica v. Raffensperger*, No. 1:21-cv-1390 (N.D. Ga. June 4, 2021) (same); *Wood v. Raffensperger*, No. 1:20-cv-5155 (N.D. Ga. Dec. 22, 2020) (granting intervention to the DSCC and Democratic Party of Georgia); *Alliance for Retired American’s v. Dunlap*, No. CV-20-95 (Me. Super. Ct. Aug. 21, 2020) (granting intervention to the RNC, NRSC, and Republican Party of Maine); *Mi Familia Vota v. Hobbs*, Doc. 25, No. 2:20-cv-1903 (D. Ariz. June 26, 2020) (granting intervention to the RNC and NRSC); *Ariz. Democratic Party v. Hobbs*, Doc. 60, No. 2:20-cv-1143-DLR (D. Ariz. June 26, 2020) (granting intervention to the RNC and Arizona Republican Party); *Swenson v. Bostelmann*, Doc. 38, No. 20-cv-459-wmc (W.D. Wis. June 23, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Edwards v. Vos*, Doc. 27, No. 20-cv-340-wmc (W.D. Wis. June 23, 2020) (same); *League of Women Voters of Minn. Ed. Fund v. Simon*, Doc. 52, No. 20-cv-1205 ECT/TNL (D. Minn. June 23, 2020) (granting intervention to the RNC and Republican Party of Minnesota); *Issa v. Newsom*, 2020 WL 3074351, at \*4 (E.D. Cal. June 10, 2020) (granting intervention to the DCCC and Democratic Party of California); *Nielsen v. DeSantis*, Doc. 101, No. 4:20-cv-236-RH (N.D. Fla. May 28, 2020) (granting intervention to the RNC, NRCC, and Republican Party of Florida); *Priorities USA v. Nessel*, 2020 WL 2615504, at \*5 (E.D. Mich. May 22, 2020)

could affect candidates running as Republicans and voters who [are] members of the . . . Republican Party.” See *Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at \*2 (S.D. Ohio Aug. 26, 2005).

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(granting intervention to the RNC and Republican Party of Michigan); *Thomas v. Andino*, 2020 WL 2306615, at \*4 (D.S.C. May 8, 2020) (granting intervention to the South Carolina Republican Party); *Corona v. Cegavske*, Order Granting Mot. to Intervene, No. CV 20-OC-644-1B (Nev. 1st Jud. Dist. Ct. Apr. 30, 2020) (granting intervention to the RNC and Nevada Republican Party); *League of Women Voters of Va. v. Va. State Bd. of Elections*, Doc. 57, No. 6:20-cv-24-NKM (W.D. Va. Apr. 29, 2020) (granting intervention to the Republican Party of Virginia); *Paher v. Cegavske*, 2020 WL 2042365, at \*2 (D. Nev. Apr. 28, 2020) (granting intervention to four Democratic Party entities); *Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1505640, at \*5 (W.D. Wis. Mar. 28, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Gear v. Knudson*, Doc. 58, No. 3:20-cv-278 (W.D. Wis. Mar. 31, 2020) (same); *Lewis v. Knudson*, Doc. 63, No. 3:20-cv-284 (W.D. Wis. Mar. 31, 2020) (same); see also *Democratic Exec. Cmte. of Fla. v. Detzner*, No. 4:18-cv-520-MW-MJE (N.D. Fla. Nov. 9, 2018) (granting intervention to the NRSC); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at \*2 (D. Colo. Sept. 15, 2014) (granting intervention to the Colorado Democratic Party); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012) (granting intervention to the Republican Party of Michigan); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, \*1 (N.D. Ill. Nov. 22, 2011) (granting intervention to the Illinois Republican Party); *Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001) (acknowledging that the district court granted a motion by the Florida Democratic Party to intervene); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991) (acknowledging that the district court permitted Republican Party officials and the Republican State Committee of Pennsylvania to intervene and granting intervention to the Pennsylvania Democratic State Committee on appeal); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991) (granting intervention to a political party organized under the Illinois Election code); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980) (acknowledging that the district court granted the DNC’s motion to intervene).

22. This interest is not a hypothetical one. The courts' failure to enforce the date requirement in *Migliori v. Cohen* actually changed the outcome of an election in which a Republican candidate prevailed. *See supra* n.2. Similarly, in 2023, the Montgomery County Board of Elections' decision to count misdated ballots flipped the election against Republican incumbent, Richard Marino. *See supra* n.3. Such an outcome is possible in the 2024 election cycle, and the Republican Intervenors' interest in preventing it is obvious.

23. If Petitioners' action succeeds, the orderly administration of Pennsylvania's elections will be upended shortly before a critical general election.

24. Invalidating the date requirement would not only undercut the prior court rulings in the Republican Intervenors' favor and the democratically enacted laws that protect voters and candidates (including the Republican Intervenors and their members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), but also change the "structur[e] of [the] competitive environment" in Pennsylvania's elections and "fundamentally alter the environment in which [the Republican Intervenors] defend their concrete interests (e.g. their interest in . . . winning [elections])," *Shays v. Fed. Elec. Comm'n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

25. Such changes also risk confusing voters and undermine confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) ("Court

orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). The Republican Intervenors will be forced to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation in the election as a result of such a change.

26. Such interference with Pennsylvania’s election scheme—and with the Republican Intervenors’ electoral activities—would impair the Republican Intervenors’ interests on behalf of their candidates, their members, and themselves, and thus warrants intervention.

**B. There is no basis to refuse the Republican Intervenors’ application for intervention.**

27. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner’s claim or defense “is not in subordination to and in recognition of the propriety of the action”; (2) the petitioner’s interest is already adequately represented; or (3) “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”



28. None of these factors applies to the Republican Intervenors.<sup>4</sup>

29. First, the Republican Intervenors' defense in this action is in subordination to and in recognition of the action's propriety.

30. Second, no existing party adequately represents the Republican Intervenors' particularized interests. *See* Pa. R.C.P. No. 2329(2). That Petitioners do not represent the Republican Intervenors' interests is clear, since they seek invalidation of the date requirement the Republican Intervenors seek to uphold. Moreover, four Petitioners here opposed the Republican Intervenors' position as *amici* in *Ball* and as plaintiffs in the ongoing federal-court challenges to the date requirement. *See supra* p. 5.

31. Respondents also do not represent the Republican Intervenors' interests in this case. As noted, all three Respondents have taken positions opposed to the positions taken by the Republican Intervenors and have sought invalidation of the date requirement in prior litigation, including *Ball* and the federal-court litigation. *See supra* pp. 2-3. If Respondents again decline to defend the date requirement in this case, there will be no party before the Court to defend it absent intervention by the Republican Intervenors.

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<sup>4</sup> As explained above, the Court retains discretion to allow the Republican Intervenors to intervene even if it concludes that an exception under Rule 2329 applies. Pa. R.C.P. 2329; 7 Goodrich Amram 2d § 2329:7.

32. Moreover, Respondents, as Commonwealth and county officials, do not represent the private interests of the Republican Intervenors at stake in this litigation, which are fundamentally different from, and far narrower than, the broad public interests represented by Respondents. Indeed, “the government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 321 (D.C. Cir. 2015) (“[W]e look skeptically on government entities serving as adequate advocates for private parties.” (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003))).

33. Whereas the Republican Intervenors have particularized interests in securing election of Republicans and in maintaining the competitive electoral environment adopted through the Election Code, Respondents have no interest in the election of particular candidates. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government’s representation of the general public interest did not adequately represent the intervenor’s narrower private interests, despite the similarity in their goals). Instead, in acting on behalf of all Pennsylvania citizens and the Commonwealth, Respondents must consider “a range of interests likely to diverge from those of the intervenors.” *Meek v. Metro. Dade*

*Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). Indeed, “[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor.” *Utah Ass’n of Ctys.*, 255 F.3d at 1256. These considerations may include “the expense of defending the current [laws] out of [state] coffers,” *Clark v. Putnam Cty.*, 168 F.3d 458, 461–62 (11th Cir. 1999), “the social and political divisiveness of the election issue,” *Meek*, 985 F.2d at 1478, “their own desires to remain politically popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). Given that Respondents may take these other interests into account, their interests may diverge with the Republican Intervenors’ interests throughout this litigation.

34. Third, the Republican Intervenors have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. The Petition was filed only ten days ago. Intervention by the RNC and the RPP will not cause any undue delay, embarrassment, or prejudice to any party, but it will aid the Court in resolving the important legal and factual questions before it.

#### **IV. CONCLUSION**

35. For the reasons set forth above, the Republican Intervenors have a clear right to intervene in this case challenging an important state law governing the administration of Pennsylvania’s elections.

36. Pursuant to Pennsylvania Rule of Civil Procedure 2328, the Republican Intervenors attach a copy of the pleading, in the form of Preliminary Objections (attached as Exhibit A), they will file in the action if permitted to intervene.

**WHEREFORE**, for the foregoing reasons, the Republican National Committee and the Republican Party of Pennsylvania respectfully request that this Honorable Court GRANT this Application for Leave to Intervene, and DIRECT the Commonwealth Court Prothonotary to enter the names of the Republican National Committee and the Republican Party of Pennsylvania on the docket in this matter as Intervenor-Respondents, and DOCKET the Intervenor-Respondents' Preliminary Objections, attached as Exhibit A.

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Dated: June 7, 2024

Respectfully submitted,

*/s/ Kathleen A. Gallagher*

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# EXHIBIT A

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

BLACK POLITICAL EMPOWERMENT  
PROJECT, POWER INTERFAITH,  
MAKE THE ROAD PENNSYLVANIA,  
ONEPA ACTIVISTS UNITED, NEW  
PA PROJECT EDUCATION FUND,  
CASA SAN JOSÉ, PITTSBURGH  
UNITED, LEAGUE OF WOMEN  
VOTERS OF PENNSYLVANIA, AND  
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL  
COMMITTEE AND REPUBLICAN  
PARTY OF PENNSYLVANIA,  
Intervenors.

Case No. 283 MD 2024  
Original Jurisdiction

**NOTICE TO PLEAD**

To Petitioners:

You are hereby notified to file a written response to the enclosed preliminary objections within thirty (30) days from service hereof or a judgment may be entered against you.

Dated: June 7, 2024

THE GALLAGHER FIRM

By: /s/ Kathleen A. Gallagher  
Kathleen A. Gallagher  
Counsel for Intervenors

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**INTERVENORS' PRELIMINARY OBJECTIONS**

Petitioners' suit is the latest iteration in an ongoing quest to invalidate Pennsylvania's longstanding date requirement for absentee and mail-in ballots that the General Assembly reaffirmed in the bipartisan Act 77, 25 P.S. § 3150.16. In the years since enactment of universal mail-in voting in Pennsylvania, the Republican Intervenors, on behalf of themselves, their voters, and their candidates,

have led the successful defense of the legality of the date requirement in several of these cases. *See Ball v. Chapman*, 289 A.3d 1 (Pa. 2023); *Ball v. Chapman*, 284 A.3d 1189 (Pa. 2022); *Pa. State Conf. of NAACP Branches v. Sec’y Commonwealth of Pa.*, 97 F.4th 120 (3d Cir. 2024).

Petitioners now ask this Court to undercut decisions by both the Pennsylvania Supreme Court and the Third Circuit Court of Appeals adopting the Republican Intervenors’ position and upholding the date requirement. In 2022, the Pennsylvania Supreme Court held that the date requirement is mandatory under Pennsylvania law. *See Ball*, 289 A.3d 1; *Ball*, 284 A.3d 1189. The Pennsylvania Supreme Court reached that holding even though it had before it arguments that the date requirement violates the Free and Equal Elections Clause and serves no meaningful purpose—precisely the arguments Petitioners now advance. *See* 289 A.3d at 14-16 & n.77. And earlier this year, the Third Circuit rejected a challenge to the date requirement brought under the Materiality Provision of the Civil Rights Act of 1964 because the date requirement does not violate “the right to vote.” *Pa. State Conf. of NAACP Branches*, 97 F.4th at 133-35.

Those decisions eliminated two key grounds on which plaintiffs—including some of Petitioners here—have sought to invalidate the date requirement, as well as necessary premises of Petitioners’ claims in this suit. Four Petitioners in this action—Black Political Empowerment Project, Make The Road Pennsylvania,

League of Women Voters of Pennsylvania, and Common Cause Pennsylvania— participated as *amici* in *Ball*. Those four Petitioners are also federal-court plaintiffs whose Materiality Provision claim was recently rejected by the Third Circuit and who continue to pursue federal constitutional challenges to the date requirement. *See* Am. Compl., ECF No. 121, *Pa. State Conf. of NAACP v. Chapman*, No. 22 CV 339 (W.D. Pa. filed Nov. 4, 2022) *and* Compl., ECF No. 1, *Eakin v. Adams Cnty. Bd. of Elections*, No. 22 CV 340 (W.D. Pa. filed Nov. 7, 2022). But rather than raise their new claim under the Pennsylvania Constitution in their pending federal proceeding, Petitioners have filed yet another lawsuit to raise it in this Court, in an obvious attempt to circumvent the prior rulings upholding the date requirement.

In particular, despite the clarity and binding force of the Pennsylvania Supreme Court’s decision in *Ball* and the Third Circuit’s decision in *Pennsylvania State Conference of the NAACP*, Petitioners now seek a pre-enforcement declaratory judgment that would prohibit only the county boards of elections of Pennsylvania’s two most populous counties<sup>1</sup> from enforcing the date requirement. No other county boards of election are sued.<sup>2</sup> Petitioners also seek to enjoin the

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<sup>1</sup> According to census.gov, the population of Philadelphia County and Allegheny County as of July 1, 2023 were 1,550,542 and 1,224,825, respectively, making them Pennsylvania’s two most populous counties.

<sup>2</sup> Although the Petition makes reference to voters from Montgomery, York, Bucks, Chester, Berks, and Dauphin Counties, the boards of election of those counties are not sued and, therefore, no order entered by the Court would, on its face, apply to those counties.

Secretary of the Commonwealth (the “Secretary”) based solely on his non-binding “Guidance” advising the county boards of elections on the plain terms of the Election Code and the holdings in *Ball* and *Pennsylvania State Conference of the NAACP* as to the date requirement.

Petitioners’ cherry-picking of these three Respondents is no accident. In prior cases—including *Ball* and *Pennsylvania State Conference of the NAACP*—all three Respondents declined to defend the date requirement and asked courts to invalidate it. *See* Resp’t Allegheny Cnty. Bd. of Elections Br. and Resp’t Phila. Cnty. Bd. of Elections Br., *Ball v. Chapman*, No. 102 MM 2022 (Pa. filed Oct. 16, 2022); Defs.-Appellee Resp. Br., *NAACP v. Sec’y Commonwealth of Pa.*, No. 23-3166 (3d Cir. filed Dec. 7, 2023). That is why the Republican Intervenors have had to lead the successful defense of the date requirement in those cases. Moreover, given that Philadelphia County and Allegheny County are the Commonwealth’s two most populous counties, Petitioners’ suit would result in a significant number of ballots that the General Assembly has declared invalid nonetheless being counted, which could alter the result of elections for local, statewide, or national office.

Petitioners’ latest attack on the date requirement fails as a matter of law for the multiple reasons set forth below: (1) Petitioners lack standing, (2) the Petition fails to state any redressable claims against the Secretary, (3) the Secretary is not a

proper or indispensable party and, therefore, the Court lacks subject matter jurisdiction, (4) with the Secretary not a proper party, the county boards of election must be sued in their home counties, (5) assuming the Court has subject matter jurisdiction, Petitioners failed to join as indispensable parties the other 65 counties in the Commonwealth, and (6) the binding precedent of the Pennsylvania Supreme Court requires dismissal of the Petition on the merits.

## I. INTRODUCTION

1. Petitioners have named the Secretary of the Commonwealth and two county boards of election (Philadelphia and Allegheny, collectively, “the Boards”) as Respondents. Petitioners seek declaratory and injunctive relief based on the Boards’ decision not to count absentee and mail-in ballots that fail to comply with the date requirement set forth in 25 P.S. §§ 3146.6(a) and 3150.16(a).

2. Petitioners’ claims against the Secretary are based solely on his issuance of non-binding, non-enforceable Guidance about court decisions, including Pennsylvania Supreme Court’s decision in *Ball*, that have upheld the date requirement. *See* Pet. ¶ 42.

3. Petitioners’ suit is the latest iteration of a longstanding quest to invalidate the Pennsylvania General Assembly’s date requirement for absentee and mail-in ballots, stemming back to 2020.

4. Petitioners bring their current claims solely under the Free and Equal Election Clause of the Pennsylvania Constitution (Pa. Const. Art, 1, §5) and contend that the date requirement is “meaningless.” *See, e.g.*, Pet. ¶¶ 81-91.

5. Petitioners ask the Court to undercut (and essentially overrule) decisions by both the Pennsylvania Supreme Court and the Third Circuit upholding the date requirement.

6. The date requirement has been repeatedly challenged and yet still remains the settled law in Pennsylvania.

7. **Procedurally**, Petitioners’ claims fail as a matter of law because (i) Petitioners lack standing, (ii) the Secretary cannot be sued for issuing non-binding “Guidance” and, therefore, no redressable claim exists as to the Secretary, (iii) the Court lacks subject matter jurisdiction since the Secretary is not a proper or indispensable party to this matter, (iv) the Boards must be sued in their respective home counties given the lack of a claim against the Secretary, and (v) in the alternative, if the Court has subject matter jurisdiction, Petitioners failed to join indispensable parties, namely the boards of election of the other 65 Pennsylvania counties.

8. As discussed in greater detail in Section III(A) below, Petitioners lack standing. Petitioners’ sole theory of standing is that while each of them is engaged in educating voters as to the requirements for casting absentee and mail-in ballots,

the enforcement of the mandatory date requirement will somehow cause them to expend *additional* resources in the education of voters to comply with that requirement. This theory fails for several reasons. For one thing, an organization generally cannot “base standing on the diversion of resources from one program to another,” *Ball*, 289 A.3d at 19 n.103, but that is all Petitioners allege here. For another, Petitioners lack standing to mount this pre-enforcement challenge because they challenge “an existing interpretation of settled law.” *Id.* at 19. And if those defects were not enough, Petitioners and their constituents can choose to comply with the date requirement and have their ballots counted; in other words, they are not “confronted with a choice between complying with the law or forfeiting their claimed rights.” *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 490 (Pa. 2021).

9. As discussed in greater detail in Sections III(B) and III(C), the Secretary has been sued strictly because of his Guidance regarding treatment of absentee and mail-in ballots that do not comply with the date requirement in 25 P.S. §§ 3146.6(a) and 3150.16(a), which Guidance is consistent with the binding precedent of the Pennsylvania Supreme Court. *See* Pet. ¶ 42.

10. As this Court has previously held, a guidance from the Secretary is not legally binding—thus, (i) Petitioners have no redressable claim against the Secretary and (ii) he is not a proper or indispensable party, depriving the Court of original

subject matter jurisdiction. *See Republican Nat'l Comm. v. Schmidt*, No. 447 M.D. 2022 slip op. at 13-14, 18-22 (Pa. Commw. Ct. Mar. 23, 2023) (attached as **Exhibit A**).

11. Correspondingly, as discussed in greater detail in Section III(D), the Court lacks subject matter jurisdiction over the claims against the Boards, and those claims must be brought in each Board's respective home county. *See id.* at 25-28.

12. Finally, from a procedural standpoint, as discussed in Section III(E), Petitioners—assuming *arguendo* that the Court has subject matter jurisdiction—have failed to join indispensable parties, namely the other 65 county boards of election.

13. **Substantively**, as discussed in Section III(F), Petitioners' claims fail as a matter of law. Arguments that the date requirement violates the Free and Equal Elections Clause and serves no meaningful purpose were previously raised with the Pennsylvania Supreme Court in *Ball*. *See* 289 A.3d at 14-16 & n.77. The Pennsylvania Supreme Court rejected those arguments in upholding the date requirement. *See, e.g., id.*

14. Plaintiffs' claims also rest on a misconstruction of the Free and Equal Elections Clause.

15. In particular, the Supreme Court's decision in *Ball* followed its prior decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020)



(“*Pa. Dems.*”), where it rejected arguments that the Election Code’s secrecy envelope requirement for absentee and mail-in ballots (25 P.S. § 3150.16(a)) and its failure to mandate “notice and cure” procedures for such ballots violate the Free and Equal Elections Clause. 238 A.3d at 376-380 (secrecy envelope), 372-74 (rejecting request for the establishment of mandatory “notice and cure” procedures: “While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.”).

16. As discussed in detail in Section III(F), as a matter of law, these binding Supreme Court holdings, the reasoning behind them, and the law that they rely on are fatal to Petitioners’ claims. Simply, and contrary to the relief requested in the Petition, the Free and Equal Elections Clause is not a panacea to remedy every voter complaint with the Election Code. *E.g.*, *Winston v. Moore*, 91 A. 520 (Pa. 1914); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803-13 (Pa. 2018) (discussing history of the Free and Equal Elections Clause).<sup>3</sup>

17. The Petition should be dismissed as a matter of law for each of these procedural and substantive failures.

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<sup>3</sup> Petitioners Black Political Empowerment Project, Common Cause Pennsylvania, Make the Road Pennsylvania, and League of Women Voters of Pennsylvania filed an amicus brief in *Ball*. Accordingly, if this case advances past the preliminary objection stage and/or as part of the Court’s assessing Petitioners’ request for a preliminary injunction, the defense of collateral estoppel and similar doctrines would appear to bar the claims asserted in the Petition or prevent a finding of a likelihood of success on the merits as to the request for a preliminary injunction.

## II. STANDARD OF REVIEW

18. A party may assert preliminary objections based upon the “lack of jurisdiction over the subject matter of the action,” “legal insufficiency of [the] pleading (demurrer)” and “lack of capacity to sue.” Pa. R.C.P. No. 1028(a)(1), (4), (5); *see* Pa. R.A.P. 106 (noting that matters before this Court in its original jurisdiction generally comport with the Rules of Civil Procedure).

19. Subject matter jurisdiction is a pure question of law. *Seitel Data, Ltd. v. Ctr. Twp.*, 92 A.3d 851, 859 (Pa. Commw. Ct. 2014) (“[w]henever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.”) (internal quotation marks omitted).

20. The Court should dismiss an action under Rule 1028(a)(4) where, accepting all well-pleaded facts and reasonable inferences arising from those facts as true, the law will not permit recovery. *E.g., Kull v. Guisse*, 81 A.3d 148, 154 n.3 (Pa. Commw. Ct. 2013).

21. Moreover, the Court need not accept unwarranted inferences, conclusions of law, argumentative allegations, or opinions offered in a petition. *Id.*

22. When resolving preliminary objections in the nature of a demurrer, the Court must resolve the issues on the basis of the pleadings but may also consider matters of public record, such as court dockets in other proceedings. *d'Happart v. First Commonwealth Bank*, 282 A.3d 704, 713-15 (Pa. Super. Ct. 2022).

23. When there are no pertinent contested factual averments, the Court may address standing under Rule 1028(a)(4) and/or (a)(5). *See Petty v. Hosp. Serv. Ass'n of Ne. Pa.*, 967 A.2d 439, 444 (Pa. Commw. Ct. 2009).

### **III. PRELIMINARY OBJECTIONS**

#### **A. FIRST PRELIMINARY OBJECTION PURSUANT TO PA. R.C.P. 1028(A)(5): PETITIONERS LACK STANDING.**

24. The Republican Intervenors incorporate the foregoing paragraphs as if fully set forth herein.

25. The Petition asks the Court to exercise its equitable powers to issue a pre-enforcement declaration under the Declaratory Judgment Act that would deem the date requirement improper and unenforceable in two counties. Essentially, the Petition asks that the date requirements be stricken from the law in those two counties. Not only does Petitioners' request run afoul of binding precedent from the Supreme Court, including *Ball*, but Petitioners lack standing to bring such a pre-enforcement claim.

#### **a. Applicable Legal Standards as to Standing.**

##### **i. General Standing Law.**

26. The Pennsylvania Rules of Civil Procedure allow a party to file preliminary objections to any pleading filed by a petitioner who lacks the capacity to sue. *See Pa. R.C.P. No. 1028(a)(5)*.

27. “In Pennsylvania, a party to litigation must establish as a threshold matter that he or she has standing to bring an action.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016) (citing cases). Because “[s]tanding is a justiciability concern . . . a court must resolve justiciability concerns as a threshold matter before addressing the merits of the case.” *Firearm Owners*, 261 A.3d at 481.

28. The cornerstone of standing in Pennsylvania is that the party “must be negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005).

29. To have standing, petitioners must show that they have been “aggrieved,” meaning that they have a “substantial, direct and immediate interest in the outcome of the litigation.” *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003); *see also, Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 2007) (if a party is not adversely affected by what it challenges, it cannot be aggrieved and therefore “has no standing”).

30. A substantial interest is one that is distinct from and exceeds “the common interest of all citizens in procuring obedience to the law;” a direct interest is one where the challenged conduct caused petitioner’s harm; and an immediate interest is one where the harm alleged is concrete, not speculative. *In re Hickson*, 821 A.2d at 1243 (quoting *Indep. State Store Union v. Pa. Liquor Control Bd.*, 432 A.2d 1375, 1379–80 (Pa. 1981)); *Markham*, 136 A.3d at 140 (“To have a substantial

interest, the concern in the outcome of the challenge must surpass “the common interest of all citizens in procuring obedience to the law.””) (quoting *In re Hickson*, 821 A.2d at 1243); accord *Ball*, 289 A.3d at 19; see also *Ams. for Fair Treatment, Inc. v. Phila. Fed’n of Tchrs.*, 150 A.3d 528, 533 (Pa. Commw. Ct. 2016).

31. To satisfy the criterion of directness, a litigant must “demonstrat[e] that the matter caused harm to the party’s interest.” *Markham*, 136 A.3d at 140 (internal quotation marks omitted); see also *Ball*, 289 A.3d at 19. (“An interest . . . is immediate when the causal connection with the alleged harm is neither remote nor speculative.”) (internal quotation marks omitted).

32. “If a petition contains only ‘general averments’ or allegations that ‘lack the necessary factual depth to support a conclusion that the [petitioner] is an aggrieved party,’ standing will not be found.” *Open PA Schs. v. Dep’t of Educ.*, No. 504 M.D. 2020, 2021 WL 1296666, at \*6 (Pa. Commw. Ct. Jan. 14, 2021) (en banc) (quoting *Pa. State Lodge, Fraternal Ord. of Police v. Dep’t of Conservation & Nat. Res.*, 909 A.2d 413, 417 (Pa. Commw. Ct. 2006)).

33. “In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park, LLC*, 888 A.2d at 660 (citing *In re Hickson*, 821 A.2d at 1243). It is “hornbook law that a person whose interest is common to

that of the public generally, in contradistinction to an interest peculiar to himself, lacks standing.” *Kauffman v. Osser*, 271 A.2d 236, 239 (Pa. 1970).

**ii. Standing Law in the Context of a Prospective, Pre-Enforcement Request for Declaratory Relief.**

34. Under associational standing doctrine, an association or group may have standing to assert a claim because of the “substantial and direct” impact of a law on its members who face “immediate or threatened injury.” *See generally Firearm Owners*, 261 A.3d at 483-84.

35. Under organizational standing doctrine, an organization may establish standing by showing that it suffers a legally cognizable harm from the challenged practice. However, “an organization’s expenditure of resources alone ordinarily does not confer standing,” and an organization cannot “base standing on the diversion of resources from one program to another.” *Ball*, 289 A.3d at 19 & n.103 (citing *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998)).

36. “Pre-enforcement review is an equitable principle driven by the need to avoid imposing **impossible** choices upon plaintiffs.” *Firearm Owners*, 261 A.3d at 495 (Wecht, J, concurring) (emphasis added). Accordingly, a pre-enforcement Declaratory Judgment is not the appropriate method for an association to challenge “an existing interpretation of settled law, or [] to compel the Commonwealth to act

in a way that aligns with [the association’s] mission or its investment of resources.”  
*Ball*, 289 A.3d at 19.

37. Typically, a party has standing to assert a pre-enforcement challenge to a law only if the “petitioners must choose between relinquishing their rights to comply with [the] law or willfully violating the law.” *Firearm Owners*, 261 A.3d at 489. Said another way, standing exists where petitioners “are confronted with a choice between complying with the law or forfeiting their claimed rights.” *Id.* at 490; *accord id.* 493-95 (Wecht, J, concurring).

38. Thus, because “[s]tatutes, regulations, and ordinances require citizens to conform their behavior to the requirements of the law[,]” standing does not exist to bring a pre-enforcement challenge if petitioners “[m]erely [] lack the desire to conform, or simply [] find the requirements of the law distasteful. . . . Discomfort with legal requirements, without more, does not confer standing.” *Id.* at 495 (Wecht, J. concurring).

**b. The Petition Must Be Dismissed Because Petitioners Lack Standing.**

39. Petitioners have not been aggrieved in a manner giving rise to standing because they fail to identify any concrete and distinct harm they have suffered as a result of Respondents following clear Pennsylvania law. In other words, the Boards’ statutory compliance with the date requirement in no way inflicts a particularized injury upon Petitioners.

40. Each Petitioner advances the same argument for how they have been “harmed”: that they will have to expend resources to educate voters on the issue of properly dating mail-in and absentee ballots, and that such resources could be spent elsewhere.

41. In particular:

- a. Petitioner Black Political Empowerment Project (“B-PEP”) alleges that its mission is to “ensure that the Pittsburgh African-American community votes in every election,” by “promoting voting rights and get-out-the vote efforts.” Pet. ¶ 8. The sole basis offered to support B-PEP’s standing is that the Allegheny Board’s observance of Pennsylvania law will obligate B-PEP “to continue diverting resources in this and future elections from its other voter education and mobilization efforts.” *Id.* ¶ 10(a)-(e).
- b. Petitioner POWER Interfaith (“POWER”) alleges that it is “committed to civic engagement and organizing communities so that the voices of all faiths, races and income levels are counted and have a say in government.” *Id.* ¶ 11. Again, POWER’s sole alleged injury here is that it will have to “continue diverting resources” as a result of the Philadelphia Board adhering to the Pennsylvania Election Code. *Id.* ¶ 13(a)-(d).
- c. Petitioner Make the Road Pennsylvania (“Make the Road PA”) purportedly “builds the power of the working class in Latino and other communities to achieve dignity and justice through organizing, policy innovation, and education services.” *Id.* ¶ 14. Make the Road PA, like B-PEP and POWER, asserts repeatedly that the sole harm that it will incur as a result of the Philadelphia Board’s adherence to the law is that it will “continue diverting resources in this and future elections from its other voter education and mobilization efforts.” *Id.* ¶ 17(a)-(e).
- d. Petitioner OnePA Activists United (“OnePA”) “fights for racial, economic and environmental justice.” *Id.* ¶ 18. OnePA’s sole alleged injury, as with its fellow Petitioners, is that as a result of



the Boards' adherence to the law, OnePA will "continue diverting resources in this and future elections from its other voter education and mobilization efforts." *Id.* ¶ 20(a)-(e).

- e. Petitioner New PA Project Education Fund ("NPPEF") is "dedicated to centering underrepresented and underserved communities to embrace their power." *Id.* ¶ 21. NPPEF's sole alleged injury is that as a result of the Boards' adherence to the law, NPPEF will "continue diverting resources in this and future elections from its other voter education and mobilization efforts." *Id.* ¶ 23(a)-(c).
- f. Petitioner Casa San Jose "connects, supports, and advocates with and for the Latino community toward a Pittsburgh region that celebrates Latino culture, welcomes immigrants, and embraces inclusion, dignity, and respect." *Id.* ¶ 24. Casa San Jose's sole alleged injury is that as a result of the Allegheny Board's adherence to the law, Casa San Jose will "continue diverting resources in this and future elections from its other voter education and mobilization efforts." *Id.* ¶ 26(a)-(e).
- g. Petitioner Pittsburgh United "strives to advance social and economic justice in the Pittsburgh region." *Id.* ¶ 27. Pittsburgh United's sole alleged injury is that as a result of the Allegheny Board's adherence to the law, Pittsburgh United will "continue diverting resources in this and future elections from its other voter education and mobilization efforts." *Id.* ¶ 30(a)-(d).
- h. Petitioner the League of Women Voters of Pennsylvania (the "League") is "dedicated to helping the people of Pennsylvania exercise their right to vote, as protected by the law." *Id.* ¶ 31. The League's sole alleged injury is that as a result of the Boards' adherence to the law, the League will "continue diverting resources in this and future elections from its other voter education and mobilization efforts[.]" *Id.* ¶ 33(a)-(e).
- i. Petitioner Common Cause Pennsylvania ("Common Cause") is a "good government organization." *Id.* ¶ 34. Common Cause's sole alleged injury, as with its fellow Petitioners, is that as a result of the Boards' adherence to the law, it will "continue diverting

resources in this and future elections from its other voter education and mobilization efforts[.]” *Id.* ¶ 36(a)-(d).

42. These contentions do not and cannot support standing for at least five independent reasons.

43. *First*, “an organization’s expenditure of resources alone ordinarily does not confer standing,” and an organization cannot “base standing on the diversion of resources from one program to another.” *Ball*, 289 A.3d at 19 & n.103 (citing *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 79 (3d Cir. 1998)). But that is all the Petition alleges.

44. *Second*, Petitioners challenge “an existing interpretation of settled law” and therefore lack standing to bring this pre-enforcement challenge. *Ball*, 289 A.3d at 19.

45. This is true in two respects. In the first place, the date requirement has been upheld in *Ball* and *Pennsylvania State Conference of the NAACP*. The “existing interpretation of settled law,” therefore, is that the date requirement is mandatory and enforceable. *Id.*

46. In the second place, the very arguments Petitioners advance here were before the Pennsylvania Supreme Court in *Ball*—and in upholding the date requirement, the Pennsylvania Supreme Court rejected them. *See Ball*, 289 A.3d at 14-15 (discussing Free and Equal Elections Clause arguments raised by the parties), 16 n.77 (discussing lack of “functionality” of the date requirement); Brief of

Respondent in *Ball*, 2022 WL 18540590, at \*37 (“Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution's Free and Equal Election Clause[.]”); Brief of Intervenor-Respondents DCCC, DNC and PDP in *Ball*, 2022 WL 18540587 at \*1-2 and \*8-10 (discussing lack of meaningful function of date requirement), \*29-32 (making argument under Free and Equal Elections Clause).

47. Petitioners lack standing to challenge this “existing interpretation of settled law,” including the Free and Equal Elections Clause, in this pre-enforcement suit. *Ball*, 289 A.3d at 19.

48. Petitioners are merely attempting to take another bite at the apple on an issue which has already been decided by the Pennsylvania Supreme Court by arguing that they will have to expend resources to comply with this settled point of law as part of an ongoing effort, through the courts, “to compel the Commonwealth to act in a way that aligns with its mission or its investment of resources.” *Id.* That is insufficient, as a matter of law, to confer standing in a pre-enforcement request for declaratory relief. *See id.*

49. *Third*, Petitioners lack standing because neither they nor their members are “confronted with a choice between complying with the law or forfeiting their claimed rights.” *Firearm Owners*, 261 A.3d at 490; *see also id.* at 495 (Wecht, J, concurring) (declaratory judgment actions exist to alleviate an “impossible choice”);

*id.* (Wecht, J., concurring) (“[s]tatutes, regulations, and ordinances require citizens to conform their behavior to the requirements of the law[,]” so standing does not exist to bring a pre-enforcement challenge if petitioners “[m]erely [] lack the desire to conform, or simply [] find the requirements of the law distasteful. . . . Discomfort with legal requirements, without more, does not confer standing.”).

50. Petitioners and their members face no choice between complying with the date requirement and exercising the right to vote. To the contrary, by complying with the date requirement, Petitioners’ members *are* exercising their right to vote. Indeed, those members can simply follow the rules and date their absentee and mail-in ballots like the millions of other voters who have voted by mail in Pennsylvania in compliance with the date requirement, and their ballots will be counted.

51. *Fourth*, Petitioners’ claim that they are injured by the Boards’ adherence to the Election Code does nothing more than generalize the abstract “interest in obedience to the law.” *Ball*, 289 A.3d at 14.

52. In this latest attempt to defeat the date requirement, Petitioners fail to explain or articulate *any* specific facts as to how the application of the enforcement of the date requirement or the date requirement itself has a particularized impact on their mission to help the specific groups which they have been created to assist. In other words, other than generalized allegations, they have failed to demonstrate why their groups are affected in a way which differs from the general public when it

comes to the requirement to date the outer envelope of an absentee and/or mail-in ballot. That Petitioners purport to advance the interests of minorities or the elderly (*see* Pet. ¶¶ 8, 11, 14, 18, 21, 24, 27, 34, 78) alone is not enough, particularly since Petitioners sue only two Boards and, thus, seek no relief on behalf of minority or elderly voters in Pennsylvania's 65 other counties.

53. Absent such particularized evidence that the policies being challenged impact the specific Petitioners in a direct way, they cannot demonstrate standing.

54. For each of the above reasons, Petitioners lack standing and the Petition should be dismissed.

WHEREFORE, the Republican Intervenors hereby request that this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing the Petition for Review.

**B. SECOND PRELIMINARY OBJECTION: PURSUANT TO RULE 1023(1) AND (4), PETITIONERS HAVE NO REDRESSABLE CLAIMS AGAINST THE SECRETARY BECAUSE THE SECRETARY'S GUIDANCE IS NOT LEGALLY BINDING OR ENFORCEABLE.**

55. The Republican Intervenors incorporate the foregoing paragraphs as if fully set forth herein.

56. Petitioners seek an order and declaration against the **Secretary** which provides, in part:

that enforcement of the Election Code's envelope dating provisions, 25 P.S. §§ 3146.6(a), 3150.16(a), to reject timely mail

ballots submitted by eligible voters, based solely on the absence of a handwritten date on the mail ballot return envelope is unconstitutional under the Free and Equal Elections Clause, Pa. Const. art. I, § 5.

57. Petitioners predicate their claim against the Secretary solely on the “Guidance” he issued on November 3, 2022 and April 3, 2023 (collectively the “Guidance”). Pet. ¶¶ 42, 79.

58. Petitioners specifically allege that the Guidance to set aside and not count timely-submitted absentee and mail-in ballots that do not comply with the date requirement directly affects Petitioners’ members and interferes with their ability to carry out their mission of increasing voter turnout and participation. *See id.* ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36.

59. The Guidance is nothing more than a non-binding, non-legally enforceable and accurate recitation of the well settled law in Pennsylvania regarding the date requirement: “A ballot-return envelope with a declaration that is not signed or dated is not sufficient and must be set aside, declared void, and may not be counted”; and any declarations ‘that contain a date deemed by the county board of elections to be incorrect should be set aside and [not counted].’” Pet. ¶ 42 (quoting Guidance).

60. The Guidance has *no* effect on whether any individual’s absentee or mail-in ballot is counted and, thus, does not harm Petitioners, let alone result in any of Petitioners’ members’ ballots being rejected. As this Court has explained, the

“Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Republican Nat’l Comm.*, slip op. at 20; *see also* 25 P.S. § 2642 (setting out powers of boards of election); 25 P.S. § 2621 (setting out Secretary’s limited powers).

61. In fact, this Court has previously acknowledged that the Secretary has *admitted* to lacking such authority or control. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*10 (Pa. Commw. Ct. Aug. 19, 2022) (acknowledgement by the Secretary that he “does not have the authority to direct the Boards to comply with [a court order]”).

62. Thus, it is well established that a guidance issued by the Secretary is merely advisory, not mandatory, and not legally binding on the county boards of elections, which solely determine whether ballots are valid and will be counted in accordance with the Election Code. *See Republican Nat’l Comm.*, slip op. at 13-14, 18-22; Pa. House of Representatives, State Gov’t Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State’s Election Guidance*, (Jan. 21, 2021), at 23-24 available at <https://tinyurl.com/4wxjvd4c>; *see also Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2021 WL 101683, at \*5, n.6 (W.D. Pa. Jan. 12 2021) (“[U]nder Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of elections ultimately determine what ballots to count or

not count in the first instance.”); *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1078, n.6 (Pa. 2020) (“the Secretary has no authority to definitively interpret the provisions of the Election Code”).

63. This is also evident from the Pennsylvania Supreme Court’s order in *Ball*. The petitioners in *Ball* named the Secretary as a respondent and challenged the Secretary’s then-existing guidance instructing the county boards of election to canvass and pre-canvass “[a]ny ballot return envelope that is undated or dated with an incorrect date but that has been timely received by the county.” 289 A.3d at 8.

64. The *Ball* Court held that undated and incorrectly date ballots are invalid under Pennsylvania law and ordered that such ballots may not be counted. That Order was directed only to the county boards of election, *not* to the Secretary. *See*, November 1, 2022 Order (attached as **Exhibit B** (“The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . .”)).

65. In declining to direct its Order to the Secretary, the Supreme Court implicitly recognized that the Secretary lacks authority to bind county boards of elections on whether to count or not count ballots and, thus, that the Secretary’s guidance was not legally enforceable nor a basis for redressing the harm of ballots not being counted.

66. Here, because the Secretary’s Guidance has no binding legal effect, as a matter of law, it cannot be the cause of any alleged injury claimed in the Petition.



Thus, there is no order which this Court can issue against the Secretary that will provide Petitioners with the relief they seek: prohibition on enforcement of the date requirement.

67. Rather, as in *Ball*, to the extent any actionable injury has occurred, any relief afforded Petitioners must be directed at the county boards of election as they are the bodies vested with the power to decide to count or not count undated or incorrectly dated absentee and mail-in ballots.

68. Petitioners therefore have failed to assert a redressable claim against the Secretary. *See generally Chadwick v. Caulfield*, 834 A.2d 562, 570 (Pa. Super. Ct. 2003) (listing redressability as a requirement of standing); *Firearm Owners*, 261 A.3d at 492 (discussing redressability) (Wecht, J, concurring).

69. Petitioners thus lack standing as to the Secretary and the Petition should be dismissed as to any claims against him.

WHEREFORE, the Republican Intervenors hereby request this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing Petitioners' Petition.

**C. THIRD PRELIMINARY OBJECTION: UNDER RULE 1028(1), THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE SECRETARY IS NOT A PROPER OR INDISPENSABLE PARTY IN THIS CASE.**

70. The Republican Intervenors incorporate the foregoing paragraphs as if fully set forth herein.

71. As Petitioners have stated no redressable claims against him, the Secretary is not a proper party or an indispensable party to this action and, as a result, Petitioners' claims fall outside the original jurisdiction of this Court.

**a. Legal Standards Concerning the Court's Original Jurisdiction.**

72. Petitioners allege that this action arises within this Court's original jurisdiction under 42 Pa. C.S. § 761(a)(1). *See* Pet. at ¶ 7. Section 761(a)(1) states: “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the *Commonwealth government*, including any officer thereof, acting in his official capacity . . . .” (emphasis added).

73. Section 102 of the Judicial Code defines the “Commonwealth government” as:

the government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.

42 Pa. C.S. § 102.

74. Although the Secretary is an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Republican Nat’l Comm.*, slip op. at 17; *see also Pa. Sch. Bds. Ass’n, Inc. v. Commonwealth. Ass’n of Sch. Admin’rs*,

696 A.2d 859, 867 (Pa. Commw. Ct. 1997) (“[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper.”)).

75. Rather, for the Court to exercise jurisdiction under 42 Pa. C.S. §761(a)(1) “against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Republican Nat’l Comm.*, slip op. at 17 . “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Id.*

76. “Thus, the main inquiry for determining whether a party is indispensable involves whether justice can be accomplished in the absence of the party.” *Id.* at 17-18.

77. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Id.* at 18.

78. On the other hand, “where a petitioner ‘seeks absolutely no [actual] relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Id.*

**b. The Secretary is Not a Proper or Indispensable Party Because any “Guidance” Issued by Him is Not Legally Binding or Enforceable.**

79. The Petition makes clear that the claims against the Secretary stem only from his Guidance regarding not counting undated or incorrectly dated absentee or mail-in ballots. *See, e.g.*, Pet. ¶¶ 42, 79.

80. But the Secretary’s Guidance is not legally binding or enforceable. *See supra* Part III.B.

81. The Petition does not allege that the Secretary has legal authority to decide which ballots to count and which ballots to reject. Nor could it, because the Secretary has no such authority. *See supra* Part III.B.

82. Rather, that legal authority rests solely with the county boards of election. *See supra* Part III.B.

83. Accordingly, as this Court has previously held, because guidance issued by the Secretary is not legally binding, the issuance of such guidance cannot make the Secretary a proper or indispensable party. *See Republican Nat’l Comm.*, slip op. 18-22.

84. Specifically, in *Republican National Committee*, where claims were asserted against the former Acting Secretary because of her issuance of guidance about certain aspects of Act 77, this Court found that the Acting Secretary was not

an indispensable party because the petitioners could obtain relief from the county boards of elections without the Acting Secretary's involvement. See *id.* at 20-22.

85. Here, as well, because the Secretary has not and cannot bind county boards of elections with respect to the decision whether to count ballots that do not comply with the date requirement, Petitioners can obtain no meaningful relief against him and can obtain adequate relief against the county boards of election without the involvement of the Secretary. See *id.*

86. Accordingly, because the Secretary is not a proper or indispensable party to this action, the Petition falls outside this Court's original jurisdiction and this Court lacks subject matter jurisdiction over it.

WHEREFORE, the Republican Intervenors hereby request this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing Petitioner's Petition.

**D. FOURTH PRELIMINARY OBJECTION PURSUANT TO PA. R.C.P. 1028(A)(1): THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PETITIONERS' CLAIMS AGAINST THE BOARDS.**

87. The Republican Intervenors incorporate the foregoing paragraphs as if fully set forth herein.

88. "Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth." *Seitel Data, Ltd.*, 92 A.3d at 859 (quoting *Commonwealth v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009)). This

Court has original jurisdiction only “where such jurisdiction is conferred by any statute.” *Id.*

89. Because “[i]t is axiomatic that subject matter jurisdiction is the indispensable foundation of a court’s power to adjudicate the issues in a particular case,” this Court must address subject matter jurisdiction before reviewing the merits of Petitioners’ claims. *In re J.M.Y.*, 218 A.3d 404, 415 (Pa. 2019).

90. Petitioners allege that “[t]his Court has original jurisdiction over this Petition for Review pursuant to 42 Pa. C.S. § 761(a)(1).” Pet. ¶ 7.

91. Section 761(a)(1) gives this Court original jurisdiction over civil actions “[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity.”

92. However, as demonstrated in Preliminary Objection No. 3 above, the Secretary of the Commonwealth is not a proper or indispensable party here. Therefore, this Court has subject matter jurisdiction only if county boards of elections are part of the Commonwealth government for purposes of 42 Pa. Cons. Stat. § 761.10.

93. This exact issue has already been addressed and settled by this Court in *Republican National Committee v. Schmidt*.

94. In that case, several political committees and voters brought suit against the Secretary, the Director of Elections of the Commonwealth, and all 67 county

boards of elections seeking declaratory and injunctive relief challenging actions undertaken by the respondents with regard to ballot curing practices.

95. After the Court determined that the Secretary was not an indispensable party, it turned to whether it had original jurisdiction over the county boards of elections, which it acknowledged hinged on whether the boards are “Commonwealth agencies.” *Republican Nat’l Comm.*, slip op. at 22.

96. Relying on the analytical framework set forth in *Finan v. Pike County Conservation District*, 209 A.3d 1108 (Pa. Commw. Ct. 2019), this Court concluded that the 67 county boards of elections are not Commonwealth agencies but, instead, are local agencies for jurisdictional purposes. It therefore dismissed the petition for lack of subject matter jurisdiction. *Id.* at 24-27.

97. This Court’s decision and the logic behind it are controlling here. The county boards of elections are not “Commonwealth agencies” for jurisdictional purposes and, therefore, the Court lacks subject matter jurisdiction and should dismiss the Petition.

WHEREFORE, the Republican Intervenors hereby request this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing Petitioner’s Petition.

**E. FIFTH PRELIMINARY OBJECTION PURSUANT TO PA. R.C.P. NO. 1028(A)(5) AND 1032(2): PETITIONERS' FAILURE TO JOIN THE REMAINING 65 COUNTY BOARDS OF ELECTIONS, WHO ARE INDISPENSABLE PARTIES TO THIS ACTION, REQUIRES DISMISSAL.**

98. In the alternative, in the event the Court determines that it has subject matter jurisdiction to hear these claims, the failure to join indispensable parties, namely the election boards of the other 65 counties in the Commonwealth, likewise warrants result dismissal.

99. “Whenever it appears by suggestion of the parties or otherwise ... that there has been a failure to join an indispensable party, the court shall ... dismiss the action.” Pa. R.C.P. 1032(2).

100. Thus, it is a bedrock principle of Pennsylvania law that all “indispensable parties” to an action must be named; otherwise, the Court lacks jurisdiction to hear the case. *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002), as amended (Apr. 30, 2002).

101. A party is deemed to be indispensable when “his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *Id.* (citing *Vernon Twp. Water Auth. v. Vernon*, 734 A.2d 935, 938 n.6 (Pa. Commw. Ct. 1999)).

102. Petitioners have named only the Secretary and 2 Boards as Respondents. But in at least two ways, the relief they seek implicates the legal rights



and obligations of Pennsylvania's 65 other county boards of elections that "are so connected with [Petitioners'] claims . . . that no decree can be without impairing those rights." *Id.*

103. First, Petitioners suggest that invalidating the Secretary's Guidance will require all 67 county boards of elections, and not just the Boards named as Respondents, to stop "setting aside mail ballot envelopes with missing or incorrect voter-written dates." Pet. ¶ 79. That suggestion is incorrect: the Guidance is not binding, the Secretary has no authority to decide whether any ballots should be counted, county boards of election alone wield that authority, and all county boards of election are bound to follow the binding Order in *Ball* not to count absentee and mail-in ballots that do not comply with the date requirement. *See supra* Part III.B.

104. County boards of election cannot be relieved from compliance with the Pennsylvania Supreme Court's Order in *Ball* through a judicial order in a case in which they are not named parties. *See supra* Part III.B.

105. Thus, to the extent that the relief Petitioners seek would affect the other 65 county boards of elections and require them *to count* undated or incorrectly dated ballots that the *Ball* Order requires them *not to count*, those county boards are indispensable parties in this suit, and the Petition should be dismissed for failure to join them. *See* Pa. R.C.P. 1032(2); *Polydyne*, 795 A.2d at 496.

106. Second, even if Petitioners' requested relief of invalidation of the date requirement is limited to the 2 Boards named as Respondents, *see* Pet., Prayer for Relief, ¶¶ a-c, the other 65 county boards of election are still indispensable parties whose non-joinder requires dismissal of the Petition.

107. If granted, Petitioners' requested relief would establish "varying standards to determine what [is] a legal vote" from "county to county" across the Commonwealth and, thus, potentially ensnare all 67 county boards of elections in an Equal Protection violation. *Bush v. Gore*, 531 U.S. 98, 106-07 (2000).

108. The 65 other counties not named in this action thus have rights which are "connected with the claims of the litigants," and which would be impaired if the relief Petitioners seek is granted. *Polydine*, 795 A.2d 495.

109. The consequence of failing to join an indispensable party is clear: the Court lacks jurisdiction, and the action must be dismissed. Pa. R.C.P. 1032(2). Courts have routinely acknowledged that "in the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of that missing party." *Damico v. Royal Ins. Co.*, 556 A.2d 886, 887 (Pa. Super. Ct. 1989) (citing *Columbia Gas Transmission v. Diamond Fuel Co.*, 346 A.2d 788 (Pa. 1975)).

110. Accordingly, where, as here, Petitioners failed to join numerous indispensable parties to the action, the Court has no jurisdiction to order relief, and,

even if the Court determines it has subject matter jurisdiction, the action must nonetheless be dismissed.

WHEREFORE, the Republican Intervenors hereby request this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing Petitioners' Petition.

**F. SIXTH PRELIMINARY OBJECTION, DEMURRER PURSUANT TO RULE 1028(A)(4): AS A MATTER OF LAW, THE PETITION FAILS TO STATE A VIOLATION OF THE FREE AND EQUAL ELECTIONS CLAUSE BASED ON APPLICABLE LAW, INCLUDING BINDING PENNSYLVANIA SUPREME COURT PRECEDENT.**

111. The Republican Intervenors incorporate the foregoing paragraphs as if fully set forth herein.

112. The Pennsylvania Supreme Court has expressly held that the date requirement in §§ 3146.6(a) and 3150.16(a) is mandatory and failure of a voter to comply with it results in an invalid ballot. *Ball*, 289 A.3d at 21-22.

113. The Supreme Court reached this holding after the parties raised arguments that the date requirement violates the Free and Equal Elections Clause and lacks a meaningful function with regard to whether a vote should count. *See id.* at 14-16 & n.77.

114. At its heart, the Petition raises the same arguments and nothing more.

115. Elections have rules. The judiciary should not rewrite those rules or declare them unconstitutional simply because a voter failed to follow them and,

accordingly, had his or her ballot rejected. *E.g., generally, Ins. Fed'n of Pa., Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009); *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017); *accord Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissent) (“When a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied ‘the right to vote.’ Rather, that individual’s vote is not counted because he or she did not follow the rules for casting a ballot. ‘Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.’” (citing *Brnovich v. DNC*, 594 U.S. 647, 669 (2021))); *Pa. State Conf. of NAACP*, 97 F.4th at 133-34 (agreeing with Justice Alito that the date requirement does not “deny” anyone “the right to vote” for this reason).

116. Thus, a voter does not suffer constitutional harm when his ballot is rejected because he failed to follow the rules for completing or casting it. As the Pennsylvania Supreme Court held over a century ago (and recently reaffirmed in *Pa. Dems.*), “[t]he power to regulate elections is legislative” and “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Pa. Dems.*, 238 A.3d at 373-74 (quoting *Winston*, 91 A. at 522).

117. Simply put, the Free and Equal Election Clause is not a panacea intended to remedy all voter complaints and does not preclude the General Assembly from adopting neutral ballot-casting rules like the date requirement.

118. The Petition should, accordingly, be dismissed as a matter of law.

a. **Applicable Legal Standards for Declaring a Statute Unconstitutional.**

119. A party seeking to strike down a statute (or part of a statute) as unconstitutional must meet an extremely high bar.

120. The “starting point” is the presumption that “all legislative enactments” are constitutional and “[a]ny doubts are to be resolved **in favor** of a finding of constitutionality.” *Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000) (emphasis added).

121. “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” *DePaul v. Commonwealth*, 969 A.2d 536, 545 (Pa. 2009) (citation omitted); *accord*, *Mixon*, 759 A.2d at 447.

122. This presumption of constitutionality is “strong.” *Id.* Indeed, a “statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.” *Pa. Env’t Def. Found.*, 161 A.3d at 938 n.31.

123. “[E]lection regulations should be found constitutional if they are ‘reasonable, neutral, and do not work a severe restriction on the right to vote.’” *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015). This is because “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Id.* at 176-77 (citations omitted).

124. Moreover, the Pennsylvania General Assembly—not the judiciary—holds the sole power to write the laws for the Commonwealth. The Pennsylvania Supreme Court has repeatedly reaffirmed this basic principle, stating that the judiciary “may not usurp the province of the legislature by rewriting [statutes] ... as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018).

125. The Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed’n of Pa., Inc.*, 970 A.2d at 1122 n.15 (emphasis in original). Thus, courts cannot take unilateral action to rewrite the law, as that would overstep the bounds of their authority. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016); *Cali v. City of Philadelphia*, 177 A.2d 824, 835 (Pa. 1962).

126. “[E]diting” a statute “amount[s] to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971).

127. For courts to assume “the power to write legislation would upset the delicate balance in our tripartite system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev’d on other grounds*, 529 U.S. 277 (2000).

128. This principle applies with particular force to question of election administration because “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston*, 91 A. at 522.

129. “The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Id.*

130. While election laws are to be read liberally and in favor of the franchise, any such liberal construction rule cannot allow the Court to “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee & Mail-In Ballots*, 843 A.2d at 1231 (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976) (“[W]e cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.”)); *see also Ball*, 289 A.2d at 26.

131. The Pennsylvania Constitution is even more explicit regarding the separation of powers in the context of absentee voting. It provides:

The ***Legislature*** shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper

polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Pa. Const. art. VII, § 14(a) (emphasis added).

**b. The Petition, as a Matter of Law, Fails to Allege a Violation of the Free and Equal Elections Clause.**

132. Petitioners argue that applying 25 P.S. §§ 3146.6(a) and 3150.16(a) to reject absentee and mail-in ballots violates the Free and Equal Elections Clause and that no court has addressed this issue. *See* Pet. ¶¶ 61, 81-91.

133. While framed as a constitutional challenge, Petitioners are asking this Court to weigh in on the political branches' bipartisan policy judgment regarding the regulation of elections.

134. The Court cannot accept that invitation. Election laws should be invalidated only when there is a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors.” *Patterson v. Barlow*, 60 Pa. 54, 75 (1869); *see also In re Nomination Papers of Rogers*, 908 A.2d 948, 954 (Pa. Commw. Ct. 2006) (“[O]ur Supreme Court has applied a ‘gross abuse’ standard to determine whether election statutes violate the ‘free and equal’ clause, thereby giving substantial deference to the judgment of the legislature.”). On the face of the



Petition, no such abuse has been alleged, nor can it be alleged. Accordingly, the Petition should be dismissed as a matter of law.

135. First, as a matter of law, Petitioners' argument is based on an incorrect reading of the Free and Equal Elections Clause and its purpose.

136. Second, Petitioners' position ignores the arguments and record that were before the Supreme Court when it decided *Ball*.

**i. The Purpose and Scope of the Free and Equal Elections Clause.**

137. Article I, Section 5 of the Pennsylvania Constitution provides that “[e]lections shall be free and equal.” Pa. Const. art. I § 5. The purpose of this provision is to “ensure that each voter will have an equally effective power to select the representative of his or her choice, free from any discrimination on the basis of his or her particular beliefs or views.” *League of Women Voters*, 178 A.3d at 809. “Pennsylvania voter[s] must have the same free and equal *opportunity* to select his or her representatives.” *Id.* at 814 (emphasis added).

138. While the Free and Equal Election Clause guarantees that each voter shall have equal *opportunity* to cast a vote in the election, it does not—nor has it ever been interpreted to—restrict the authority of the Legislature to adopt ballot-casting rules. To the contrary, it is well-established that “every citizen who meets the age and residency requirements is entitled to vote in all elections, **subject, however, to ‘such laws requiring and regulating the registration of electors as**

**the General Assembly may enact.’** The authority of the legislature to promulgate laws regulating elections was settled long ago.” *Mixon*, 759 A.2d at 450 (emphasis added). “Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.” *Id.* at 449 (quoting *Winston*, 91 A. at 520); *see also Pa. State Conf. of NAACP*, 97 F.4th at 133-134 (holding that the date requirement does not “den[y] . . . the right to vote”).

139. Thus, as the Pennsylvania Supreme Court noted in *Pa. Dems.*, “elections are ‘free and equal’ for constitutional purposes when, inter alia, ‘the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.’” 238 A.3d at 372-73 (quoting *Winston*, 91 A. at 523).

140. In other words, neutral ballot-casting rules do not violate the Free and Equal Elections Clause. *See id.*; *Mixon*, 759 A.2d at 449-50; *see also Pa. State Conf. of NAACP*, 97 F.4th at 133-34 (date requirement does not “deny” the “right to vote”).

141. The date requirement is a neutral ballot-casting rule and, therefore, does not violate the Free and Equal Elections Clause. *See Pa. Dems.*, 238 A.3d at 372-73; *Mixon*, 759 A.2d at 449-50. Nor is compliance with the date requirement “difficult.” *Pa. Dems.*, 238 A.3d at 373. According to Petitioners’ own data, only 0.0021% (4,000 out of 1,900,000) of all ballots cast and only 0.0056% of all mail

ballots cast (4,000 out of 714,315) in the recent 2024 primary elections were discarded due to an incorrect or missing date. *See* Pet. ¶¶ 70 and 73 and Exhibit 1. The vast majority of Pennsylvania mail voters therefore complied with the requirement, and the requirement causes no constitutional harm.

142. For these same reasons, Petitioners' apparent argument that a strict scrutiny standard should apply (*see* App. for Prelim. Inj., ¶ 13) is incorrect. The fundamental "right to vote" is not implicated here, since, as in the above-cited cases, the neutral date requirement does not deprive any voter of an equal opportunity to vote. Moreover, even when applied to reject a ballot, the date requirement does not "deny" anyone the "right to vote." *Pa. State Conf. of NAACP*, 97 F.4th at 133-34. And there is no fundamental "right to vote" by absentee or mail-in ballot where, as here, Pennsylvania allows all voters to vote in person without complying with the date requirement. *See, e.g., McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-808 (1969); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020).

143. There is therefore no basis to apply strict scrutiny here. Instead, under the well-established standards laid out above, Petitioners' claims fail.

144. Indeed, Petitioners' claim is that the Free and Fair Elections Clause requires counting of ballots which failed to comply with the requirements that the Legislature established for those ballots. *See* Pet. ¶¶ 81-91. However, Petitioners

do not argue that any voters are not being given the *opportunity* to vote. They do not argue—nor could they argue in light of their own data showing that millions of voters have voted by mail in compliance with the date requirement—that the date requirement is so onerous as to be tantamount to a denial of the opportunity to vote.

145. Instead, they simply argue that the date requirement is “meaningless,” and should not lead to the invalidation of ballots from voters who fail to comply. However, it is not the role of courts—let alone of Petitioners—to rewrite the General Assembly’s duly-enacted legislation. *See, e.g., Pa. Dems.*, 238 A.3d at 373 (Free and Equal Elections Clause “cannot create statutory language that the General Assembly chose not to provide”); *Winston*, 91 A. at 454 (noting that “[t]he power to regulate elections is legislative”).

146. And Petitioners are incorrect that the date requirement is “meaningless” because the requirement serves “unquestionable purpose[s]” in safeguarding the integrity of Pennsylvania’s elections. *In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d at 1090-91 (Opinion of Dougherty, J., joined by Saylor, C.J., and Mundy, J.).

147. Petitioners’ claims fail as a matter of law and should be rejected.

**ii. The Supreme Court’s Decision in *Ball* Rejected Petitioners’ Arguments.**

148. Critically, the Pennsylvania Supreme Court in *Ball* rejected the precise arguments Petitioners now raise when it upheld the date requirement as

“unambiguous and mandatory” such that a voter’s failure to comply with it renders the ballot legally “invalid.” 289 A.3d at 20-23. The Pennsylvania Supreme Court had before it both arguments raised under the Free and Equal Elections Clause, as well as record evidence purporting to show that the date requirement does not serve a meaningful function. *Id.* at 14-15 (discussing Free and Equal Elections Clause arguments raised by the parties), 16 n.77 (discussing lack of “functionality” of the date requirement); Brief of Respondent in *Ball*, 2022 WL 18540590, at \*37 (“Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution's Free and Equal Election Clause[.]”); Brief of Intervenor-Respondents DCCC, DNC and PDP in *Ball*, 2022 WL 18540587 at \*1-2 and \*8-10 (discussing lack of meaningful function of date requirement), \*29-32 (making argument under Free and Equal Elections Clause).

149. The current arguments before the Court are no different in substance.<sup>4</sup>

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<sup>4</sup> Petitioners actually refer to *Ball* in an unavailing attempt to argue that it left remaining ambiguity in the law. However, in footnote 156 of *Ball* (the portion cited by Petitioners), Justice Wecht referenced the Free and Equal Elections Clause in discussing possible ambiguities in the Materiality Provision of the Civil Rights Act of 1964. Justice Wecht’s opinion was not adopted by a majority of the Supreme Court, was not an application of the Clause to Act 77, and was premised on a potential ambiguity in the federal statute. Here, the Supreme Court has held that the relevant statutory provisions in Act 77 are unambiguous. Moreover, the Third Circuit’s recent decision in *Pennsylvania State Conference of the NAACP*, 97 F.4th 120, upholding the date requirement against a Materiality Provision challenge renders Justice Wecht’s reference in *Ball* moot.

150. Petitioners raise only arguments which have been duly considered (and rejected) by the Supreme Court of Pennsylvania within the last two years. There is simply no basis for this Court to contravene the clear holding of *Ball* by granting the directly contrary relief which Petitioners now seek. Again, this is particularly true given the high bar required to be met to declare a statute unconstitutional.

**iii. If the Court Holds That 25 P.S. §§ 3146.6(a) and 3150.16(a) Are Unconstitutional, It Must Strike Act 77 In Its Entirety.**

151. Finally, it is clear that if this Court *were* to accept Petitioners' argument that the date requirements of 25 P.S. §§ 3145.6(a) and 3150.16(a) are unconstitutional, it would necessarily mean striking Act 77 in its *entirety*.

152. Act 77 makes clear that: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void." Section 11 of Act 77. Thus, the invalidation of the date requirement, which was included among the interrelated overhauls to the Election Code contemplated by Act 77, would necessarily mean that the entirety of the Act must be invalid.

153. This point was specifically addressed by Judge Wojcik in his partial dissent in *McClinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., dissenting in part) ("Section 11 of Act 77 contains a 'poison pill'

that would invalidate all of Act 77’s provisions if this Court determines that any of its provisions are invalid... [t]hus, if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.”).

154. Such a result would be a necessary outcome, given that “[a]s a general matter, nonseverability provisions are constitutionally proper.” *Id.* at 1278 (quoting *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006)).

155. Thus, if the Court grants the relief requested by Petitioners and holds that application of the date requirement is unconstitutional, then by its own terms, Act 77 **in its entirety**—which created the system of “no excuse” mail-in voting under which the voters in question cast their ballots—must be deemed stricken.

156. Petitioners appear to try to avoid the “poison pill” provision of Act 77 by seeking an order which merely enjoins *enforcement* of the date requirement, rather than declaring the requirement to be *invalid*. This proposed workaround is a distinction without a difference. It is also inconsistent with well-established law regarding constitutional challenges and provides no escape from striking the entirety of Act 77 if Petitioners are granted their requested relief.

157. A challenge to a law on constitutional grounds may take the form of a “facial” challenge, or an “as-applied” challenge. *E.g.*, *Benezet Consulting LLC v. Sec’y Commonwealth of Pa.*, 26 F.4th 580, 585 (3d Cir. 2022); *Peake v. Commonwealth*, 132 A.3d 506, 517 (Pa. Commw. Ct. 2015). “[A]n ‘as applied’

challenge is a claim that the operation of a statute is unconstitutional in a particular case while **a facial challenge indicates that the statute may rarely or never be constitutionally applied.**” *Benezet*, 26 F. 4th at 585 (citing 16 C.J.S. Constitutional Law § 243) (emphasis added). Importantly, “as-applied relief must be limited to the specific plaintiffs and circumstances of the litigation.” *Id.* (citing *Doe v. Reed*, 561 U.S. 186 (2010)).

158. The argument presented by Petitioners is, in both the substance of the argument and the relief sought, clearly a facial challenge. The relief which Petitioners now seek would affect *all* voters and county election officials—either in the Commonwealth, *see* Pet. ¶ 79, or in the two counties whose Boards they have named in this suit. Further, Petitioners fail to explain how the statutory language at issue could *ever* be enforced or effectuated without creating the same alleged constitutional issues that Petitioners now assert. *See Nextel Commc'ns of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue*, 171 A.3d 682, 706 (Pa. 2017) (Baer, J., concurring) (noting that where “challenge necessarily implicates the facial validity of the [statute],” it is necessary to find the statute constitutionally valid or invalid). Simply put, this is clearly a facial challenge to the date requirement.

159. Given the above law, Petitioners’ request *must* be viewed as a facial challenge to the statutory language and be viewed in conjunction with Act 77’s nonseverability provision. If the Court were to grant Petitioners their requested



relief, the result would be precisely the sort of piecemeal disassembly of Act 77 that the General Assembly clearly intended to avoid by including a nonseverability clause. Such a result would not only be contrary to the intent of the Legislature but would invite future piecemeal attacks from opponents of portions of nonseverable legislation in the future.

160. However, even if Petitioners' challenge is somehow viewed as seeking only "as-applied" relief, it would still be necessary for the Court to invalidate Act 77 based on the nonseverability provision.

161. A statute may be invalidated even where a challenge is made on "as-applied" grounds. *See Nextel*, 171 A.3d at 706; *Citizens United v. FEC*, 558 U.S. 310 (2010). Petitioners' argument is, in effect, that mandating requirements such as dating the outer envelope could result in voters who do not comply losing the right to vote. This requirement is required by the statute, not a decision of the county boards of elections. Accordingly, if the Court *were* to accept Petitioners' argument, it would necessarily require a finding that the statutory language itself is invalid, and thus—based on the nonseverability provision—a finding that the entirety of Act 77 is invalid.

WHEREFORE, the Republican Intervenors hereby request this Honorable Court enter an Order sustaining the Preliminary Objections and dismissing Petitioners' Petition.

Dated: June 7, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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*Counsel for Intervenors*

# EXHIBIT A

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

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Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
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Elections; Elk County Board of :  
Elections; Erie County Board of :  
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Elections; Forest County Board of :  
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Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
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Board of Elections; Perry County :  
Board of Elections; Philadelphia County :  
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Elections; Warren County Board of :  
Elections; Wayne County Board of :

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

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),<sup>1</sup> and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)<sup>2</sup> (all collectively referred to as Petitioners), filed a petition for review directed to this Court’s original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

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<sup>1</sup> The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term “Petitioners” used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

<sup>2</sup> Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court’s Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,<sup>3</sup> against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),<sup>4</sup> and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth’s 67 County Boards of Elections (County Boards).<sup>5</sup> In the Amended Petition, Petitioners again challenge the various County Boards’ actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code’s (Election Code)<sup>6</sup> signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards’ “practice of conducting these pre-cavass activities” before Election Day “under the guise of [notice and opportunity to cure] procedures” is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court’s holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

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<sup>3</sup> On this date, the Court, *inter alia*, granted Petitioners’ unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

<sup>4</sup> By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

<sup>5</sup> Notwithstanding its apparent omission from the caption, as noted in this Court’s September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat’l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff’d by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

<sup>6</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)<sup>7</sup> & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);<sup>8</sup> and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).<sup>9</sup> (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),<sup>10</sup> as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

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<sup>7</sup> The free and equal elections clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

<sup>8</sup> It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

<sup>9</sup> The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

<sup>10</sup> 42 Pa.C.S. §§ 7531-7541.



DCCC)<sup>11</sup> (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

### **Background & Procedural History**

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code<sup>12</sup> and, further, statewide injunctive relief prohibiting

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<sup>11</sup> The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

<sup>12</sup> See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

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

the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.<sup>13</sup>

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.<sup>14</sup> As noted above, Respondents filed nine sets of POs, and eight

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

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

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

25 P.S. § 3146.8(h).

<sup>13</sup> In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

<sup>14</sup> The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,<sup>15</sup> to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

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Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

<sup>15</sup> Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

## Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures<sup>16</sup> not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,<sup>17</sup> and *Pennsylvania State Education*

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<sup>16</sup> In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

<sup>17</sup> It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

*Association v. Department of Community and Economic Development*, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),<sup>18</sup> and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),<sup>19</sup> and that County Boards are thus prohibited

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happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

<sup>18</sup> Section 302(f) provides that County Boards have 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 P.S. § 2642(f).

<sup>19</sup> Section 1308(a) provides:

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

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);<sup>20</sup> however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).<sup>21</sup> (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

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<sup>20</sup> Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots**, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added).

<sup>21</sup> Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).  
. . . .

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(1.1).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)<sup>22</sup> They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

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<sup>22</sup> Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).<sup>23</sup> (See Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

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<sup>23</sup> Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).



dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.<sup>24</sup>

### **Standard of Review**

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

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<sup>24</sup> Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.

### **Subject Matter Jurisdiction**

Commonwealth Respondents (PO 1) and some County Boards<sup>25</sup> first argue that this Court lacks subject matter jurisdiction<sup>26</sup> under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

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<sup>25</sup> These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

<sup>26</sup> See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,<sup>27</sup> regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)<sup>28</sup> Petitioners therefore claim that

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<sup>27</sup> According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman*, issued November 1, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

<sup>28</sup> Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),<sup>29</sup> and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”)).<sup>30</sup>

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were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

<sup>29</sup> Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

<sup>30</sup> Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the

In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cmwlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

*Office of Att’y Gen. ex rel. Corbett v. Locust Twp.*, 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

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General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity . . . .” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

**“Commonwealth government.”** The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlth. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlth. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018)).<sup>31</sup> ““Thus, the main inquiry for determining whether a party is indispensable

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<sup>31</sup> Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,<sup>32</sup> “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

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<sup>32</sup> This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes



count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,<sup>33</sup> but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. *Compare* 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), *with* 25 P.S. §§

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<sup>33</sup> *See* 25 P.S. §§ 2621, 3159.

2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,<sup>34</sup> to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

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<sup>34</sup> Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (*See* <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law<sup>35</sup> qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr’g, Inc.*

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<sup>35</sup> Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

*v. Phila. Hous. Auth.*, 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

*Finan*, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;

implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners . . . .” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he 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,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(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.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county . . . .” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that “[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth” and that “[t]hey are separate and stand-alone government agencies”).

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,<sup>36</sup> which are governed by the Election Code,<sup>37</sup> all signs point to the County Boards

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<sup>36</sup> In *Finan*, this Court declined “to expand this Court’s original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies.” *Finan*, 209 A.3d at 1115-16.

<sup>37</sup> This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]



falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,<sup>38</sup> and the Amended Petition is dismissed.<sup>39</sup>



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ELLEN CEISLER, Judge

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(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

<sup>38</sup> Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

<sup>39</sup> Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners :

v. :

Al Schmidt, in his official :  
capacity as Acting Secretary of the :  
Commonwealth; Jessica Mathis, in :  
her official capacity as Director of the :  
Pennsylvania Bureau of Election :  
Services and Notaries; Adams County :  
Board of Elections; Allegheny County :  
Board of Elections; Armstrong County :  
Board of Elections; Beaver County :  
Board of Elections; Bedford County :  
Board of Elections; Berks County Board :  
of Elections; Blair County Board of :  
Elections; Bradford County Board of :  
Elections; Bucks County Board of :  
Elections; Butler County Board of :  
Elections; Cambria County Board of :  
Elections; Cameron County Board of :  
Elections; Carbon County Board of :  
Elections; Centre County Board of :  
Elections; Chester County Board of :  
Elections; Clarion County Board of :  
Elections; Clearfield County Board of :  
Elections; Clinton County Board of :  
Elections; Columbia County Board of :  
Elections; Crawford County Board of :

No. 447 M.D. 2022

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Elections; Cumberland County Board :  
of Elections; Dauphin County Board of :  
Elections; Delaware County Board of :  
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Elections; Erie County Board of :  
Elections; Fayette County Board of :  
Elections; Forest County Board of :  
Elections; Franklin County Board of :  
Elections; Fulton County Board of :  
Elections; Greene County Board of :  
Elections; Huntingdon County Board :  
of Elections; Indiana County Board of :  
Elections; Jefferson County Board of :  
Elections; Juniata County Board of :  
Elections; Lackawanna County Board :  
of Elections; Lancaster County Board :  
of Elections; Lawrence County Board :  
of Elections; Lebanon County Board :  
of Elections; Lehigh County Board of :  
Elections; Luzerne County Board of :  
Elections; Lycoming County Board of :  
Elections; McKean County Board of :  
Elections; Mercer County Board of :  
Elections; Mifflin County Board of :  
Elections; Monroe County Board of :  
Elections; Montgomery County Board :  
of Elections; Montour County Board of :  
Elections; Northampton County Board :  
of Elections; Northumberland County :  
Board of Elections; Perry County :  
Board of Elections; Philadelphia County :  
Board of Elections; Pike County Board :  
of Elections; Potter County Board of :  
Elections; Schuylkill County Board of :  
Elections; Snyder County Board of :  
Elections; Somerset County Board of :  
Elections; Sullivan County Board of :  
Elections; Susquehanna County Board :  
of Elections; Tioga County Board of :  
Elections; Union County Board of :  
Elections; Venango County Board of :  
Elections; Warren County Board of :  
Elections; Wayne County Board of :

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

## **ORDER**

AND NOW, this 23<sup>rd</sup> day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



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ELLEN CEISLER, Judge

# EXHIBIT B

RETRIEVED FROM DEMOCRACYDOCKET.COM

**[J-85-2022]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

DAVID BALL, JAMES D. BEE, JESSE D. : No. 102 MM 2022  
DANIEL, GWENDOLYN MAE DELUCA, :  
ROSS M. FARBER, LYNN MARIE :  
KALCEVIC, VALLERIE SICILIANO- :  
BIANCANIELLO, S. MICHAEL STREIB, :  
REPUBLICAN NATIONAL COMMITTEE, :  
NATIONAL REPUBLICAN :  
CONGRESSIONAL COMMITTEE, AND :  
REPUBLICAN PARTY OF PENNSYLVANIA, :

Petitioners

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL :  
CAPACITY AS ACTING SECRETARY OF :  
THE COMMONWEALTH, AND ALL 67 :  
COUNTY BOARDS OF ELECTIONS, :

Respondents

**PER CURIAM**

**DECIDED: November 1, 2022**

**AND NOW**, this 1<sup>st</sup> day of November, 2022, upon review of the briefs of the parties and *amici*, the Petitioners' request for injunctive and declaratory relief is granted in part and denied in part. The Pennsylvania county boards of elections are hereby **ORDERED** to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes. See 25 P.S. §3146.6(a) and §3150.16(a).

The Court is evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. §10101(a)(2)(B).

We hereby **DIRECT** that the Pennsylvania county boards of elections segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes.

The Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania have standing. Petitioners David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae Deluca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, and S. Michael Streib are hereby **DISMISSED** from the case for lack of standing.

Opinions to follow.

Chief Justice Todd and Justices Donohue and Wecht would find a violation of federal law.

Justices Dougherty, Mundy and Brobson would find no violation of federal law.


Judgment Entered 11/01/2022

  
CHIEF CLERK

**VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE**

I, Alex Latcham, Senior Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Preliminary Objections are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

  
\_\_\_\_\_  
Alex Latcham  
Senior Deputy Political Director  
Republican National Committee

Date:

06/06/24

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**VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA**

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Preliminary Objections are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Angela Alleman  
Executive Director  
Republican Party of Pennsylvania

Date:

6/7/24

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**VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE**

I, Alex Latcham, Senior Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Alex Latcham  
Senior Deputy Political Director  
Republican National Committee

Date:


06/06/24

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**VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA**

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

  
\_\_\_\_\_  
Angela Alleman  
Executive Director  
Republican Party of Pennsylvania

Date:

6/7/24

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**CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

I certify that 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.

THE GALLAGHER FIRM, LLC

/s/ Kathleen A. Gallagher

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

BLACK POLITICAL EMPOWERMENT  
PROJECT, POWER INTERFAITH,  
MAKE THE ROAD PENNSYLVANIA,  
ONEPA ACTIVISTS UNITED, NEW  
PA PROJECT EDUCATION FUND,  
CASA SAN JOSÉ, PITTSBURGH  
UNITED, LEAGUE OF WOMEN  
VOTERS OF PENNSYLVANIA, AND  
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as  
Secretary of the Commonwealth,  
PHILADELPHIA COUNTY BOARD  
OF ELECTIONS, AND ALLEGHENY  
COUNTY BOARD OF ELECTIONS,

Respondents.

Case No. 283 MD 2024  
Original Jurisdiction

**PROPOSED ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2024, upon consideration of the Application for Leave to Intervene filed by the Republican National Committee and the Republican Party of Pennsylvania, it is hereby ORDERED, ADJUDGED, AND DECREED that the Petition is GRANTED. The Republican National Committee and the Republican Party of Pennsylvania are permitted to intervene in the above-captioned matter. The Court hereby DIRECTS the Commonwealth Court Prothonotary to enter the names of the Republican National Committee and the Republican Party of Pennsylvania on the

docket in this matter as Intervenor-Respondents and DOCKET the Intervenor-Respondents' Preliminary Objections.

BY THE COURT:

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