

**IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT**

**No. 149 MM 2020**

**IN RE NOVEMBER 3, 2020 GENERAL ELECTION**

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**MEMORANDUM OF LAW IN SUPPORT OF THE APPLICATION OF  
URBAN LEAGUE OF GREATER PITTSBURGH FOR INTERVENTION  
OR IN THE ALTERNATIVE TO FILE *AMICUS* BRIEF**

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
ARGUMENT .....	3
I. The Pennsylvania Constitution’s Due Process Guarantee Prohibits the Rejection of Ballots in the Absence of Notice and an Opportunity to Cure....	3
A. The Private Interest at Stake is Fundamental. ....	8
B. Signature Matching Results in a Substantial Risk of Erroneous Deprivation of Voting Rights. ....	11
C. Pennsylvania Has No Interest in Rejecting Ballots Without Providing Notice and an Opportunity to Cure. ....	16
II. The Pennsylvania Constitution’s Free and Equal Elections Clause Prohibits Signature Match Rejections Without Notice and Cure Procedures. ....	21
III. Allowing Private Signature Challenges Would Pose Grave Constitutional Concerns. ....	22
IV. The Court Has the Remedial Power to Order a Notice and Cure Procedure. ....	25
CONCLUSION .....	26

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Alvin v. Suzuki</i> , 227 F.3d 107 (3d Cir. 2000) .....	5
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	6
<i>Applewhite v. Com.</i> , No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014) .....	6
<i>Arizona Democratic Party v. Hobbs</i> , No. CV-20-01143-PHX-DLR, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020) .....	8
<i>Barefoot v. City of Wilmington</i> , 306 F.3d 113 (4th Cir. 2002) .....	6
<i>Bergdoll v. Kane</i> , 731 A.2d 1261 (Pa. 1999).....	6
<i>Bundy v. Wetzel</i> , 646 Pa. 248 (2018).....	7, 12, 18
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	6
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).....	7, 15
<i>Commonwealth v. Herman</i> , 161 A.3d 194 (Pa. 2017).....	22
<i>Commonwealth v. Koehler</i> , 229 A.3d 915 (Pa. 2020).....	23
<i>Cook v. Randolph Cty.</i> , 573 F.3d 1143 (11th Cir. 2009) .....	6

**TABLE OF AUTHORITIES**  
**(CONTINUED)**

	<b>Page(s)</b>
<i>Fla. Democratic Party v. Detzner</i> , No. 4:16cv607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016) .....	8
<i>Frederick v. Lawson</i> , No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020) .....	8
<i>La Follette v. Padilla</i> , No. CPF-17-515391, 2018 WL 3953766 (Cal. Super. Ct. Mar. 5, 2018) .....	8, 15
<i>League of United Latin American Citizens of Iowa v. Pate</i> , No. CVCV056403, 2019 WL 6358335 (Iowa Dist. Sep. 30, 2019).....	8
<i>League of Women Voters v. Commonwealth</i> , 645 Pa. 1 (2018).....	1, 18, 21, 24
<i>Martin v. Kemp</i> , 341 F. Supp. 3d 1326 (N.D. Ga. 2018).....	8, 9, 10, 15
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	<i>passim</i>
<i>McCutcheon v. FEC</i> , 572 U.S. 185 (2014).....	9
<i>Montanez v. Sec’y Pennsylvania Dep’t of Corr.</i> , 773 F.3d 472 (3d Cir. 2014) .....	12
<i>Nixon v. Com.</i> , 839 A.2d 277 (Pa. 2003).....	5
<i>Pa. Coal Mining Ass’n v. Ins. Dep’t</i> , 471 Pa. 437 (1977).....	12
<i>Pa. Game Comm’n v. Marich</i> , 666 A.2d 253 (Pa. 1995).....	4, 5, 7, 23

**TABLE OF AUTHORITIES**  
**(CONTINUED)**

	<b>Page(s)</b>
<i>Paul v. Davis</i> , 424 U.S. 693 (1976).....	5, 9
<i>Pennsylvania Democratic Party v. Boockvar</i> , No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) .....	<i>passim</i>
<i>R. v. Com., Dept. of Public Welfare</i> , 636 A.2d 142 (Pa. 1993).....	4, 5
<i>Richardson v. Texas Sec’y of State</i> , No. SA-19-CV-00963-OLG, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020) .....	8
<i>Robb v. City of Philadelphia</i> , 733 F.2d 286 (3d Cir. 1984) .....	5
<i>Saucedo v. Gardner</i> , 335 F. Supp. 3d 202 (D.N.H. 2018).....	<i>passim</i>
<i>Self Advocacy Solutions N.D. v. Jaeger</i> , No. 20-cv-00071, 2020 WL 2951012 (D.N.D. Jun. 3, 2020).....	8, 9, 15, 19
<i>Self Advocacy Solutions North Dakota v. Jaeger</i> , No. 3:20-CV-00071, 2020 WL 3068160 (D.N.D. June 5, 2020). .....	15, 16
<i>Shambach v. Bickhart</i> , 577 Pa. 384 (2004).....	24
<i>United States v. Classic</i> , 313 U.S. 299 (1941).....	6
<i>United States v. Starzecpyzel</i> , 880 F. Supp. 1027 (S.D.N.Y. 1995) .....	13
<i>United States v. Velasquez</i> , 64 F.3d 844 (3d Cir. 1995) .....	13
<i>Wesberry v Sanders</i> , 376 U.S. 1 (1964).....	9

**TABLE OF AUTHORITIES**  
**(CONTINUED)**

	<b>Page(s)</b>
<i>Wilkinson v. Austin</i> , 545 U.S. 209 (2005).....	9
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	6
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914).....	21
<i>Wolf v. Scarnati</i> , 233 A.3d 679 (Pa. 2020).....	22, 24
<i>Zessar v. Helander</i> , No. 05-C-1917, 2006 WL 642646 (N.D. Ill. Mar. 13, 2006).....	8, 9, 15
<b>Statutes</b>	
42 Pa. C.S. § 6111(c) .....	13
25 Pa. § 3146.8(h).....	19
25 Pa. Stat § 1308(g)(5)-(7).....	20
25 Pa. Stat § 3146.2b(d).....	19
25 Pa. Stat. § 3146.8(g)(3).....	17
25 Pa. Stat. § 3146.8(g)(5).....	19
25 Pa. Stat. § 3150.11 .....	17
25 Pa. Stat. § 3150.12b(a).....	17
25 Pa. Stat. § 3150.12b(c).....	19
<b>Other Authorities</b>	
Pa. Const. art. I, § 1.....	4, 20, 22
Pa. Const. art. I, § V.....	6, 8, 21

## INTRODUCTION

The Urban League of Greater Pittsburgh (“Urban League”) seeks intervention to present this Court with additional claims for relief not addressed by the Secretary’s petition.

First, in the event this Court disagrees with the Secretary and concludes that the Election Code *does* authorize county boards of elections to conduct signature matching, the Urban League contends that the Pennsylvania Constitution’s due process guarantee and its Free and Equal Elections Clause require that a voter be provided notice and an opportunity to cure before her vote is discarded because of a purported mismatched signature. Although this Court recently concluded that the Free and Equal Elections Clause did not require notice and cure procedures, *see Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) that decision was in the context of *voters* casting incomplete or inaccurate ballots. When an election official makes a subjective judgment that the signature on a ballot does not match an earlier signature, the voter has not cast an incomplete or inaccurate ballot. Indeed, most commonly, the *election official* has made an inaccurate determination of a mismatch. As Justice Wecht explained in his concurrence, this Court’s decision did not address whether the Pennsylvania Constitution would require a notice-and-cure remedy for subjective signature matching. As nearly every federal court to consider the question has concluded with

respect to the federal Due Process Clause, Pennsylvania’s Constitution—including its due process guarantee, a claim not at issue in the *Pennsylvania Democratic Party* case—likewise demands that ballots not be rejected on the basis of subjective signature matching absent notice and an opportunity to cure the alleged discrepancy. Should this Court disagree with the Secretary in this matter, the Urban League urges the Court to order any county board of elections engaging in signature matching to provide meaningful notice and an opportunity to cure before rejecting ballots.<sup>1</sup>

Second, the Urban League raises additional claims with respect to signature matching challenges by non-governmental officials. The Secretary contends that the Election Code’s plain text does not permit such challenges. The Urban League does not repeat the Secretary’s arguments, but rather writes to explain that even if the Code were ambiguous, an alternative conclusion would raise grave constitutional concerns, thus compelling the conclusion advocated by the Secretary. If non-governmental officials are permitted to challenge ballots on the basis of signature matching, the door would open to improper, partisan motivations animating challenges to signatures. Although a notice-and-cure procedure may suffice to

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<sup>1</sup> To be clear, the Urban League’s notice-and-cure claim only arises if the Court disagrees with the Secretary’s statutory interpretation. The Urban League notes that the U.S. District Court for the Western District of Pennsylvania this weekend came to the same conclusion as the Secretary, determining that “[a] plain reading of the Election Code demonstrates that it does not impose a signature-comparison requirement for mail-in ballots and applications.” Op., Dkt. 574, at 94, *Trump v. Boockvar*, No. 20-cv-00966-NR (W.D. Pa. Oct. 10, 2020).



remedy the risk of erroneous deprivation when a governmental official is making neutral judgments about signatures, *no procedure* is constitutionally sufficient to ward against subjective and possibly ill-motivated challenges by third-party, nongovernmental actors. Because a system that permitted such challenges would violate the Pennsylvania Constitution’s Free and Equal Elections Clause and its due process guarantee, this Court should adopt the Secretary’s statutory interpretation with respect to challenges by non-governmental officials.

## **ARGUMENT**

### **I. The Pennsylvania Constitution’s Due Process Guarantee Prohibits the Rejection of Ballots in the Absence of Notice and an Opportunity to Cure.**

If the Election Code permits absentee and mail-in ballots to be rejected on the basis of signature matching, then the Pennsylvania Constitution’s due process guarantee requires that voters be provided notice and an opportunity to cure before their ballots are rejected. In *Pennsylvania Democratic Party*, this Court concluded that the Free and Equal Elections Clause did not require notice and cure procedures “for mail-in and absentee ballots that voters have filled out incompletely or incorrectly.” 2020 WL 5554644, at \*20. This reasoning does not apply to rejections on the basis of signature matching, however, because in such cases the voter has not made any error—rather, it is the county board of elections that has likely made the error in wrongly concluding a signature does not match. *See Id.* at \*34 (Wecht, J., concurring) (“I view these issues as distinct from circumstances in which a ballot’s

validity turns on subjective assessments, such as signature mismatches assessed by poll workers with no training or expertise in matching signatures. . . . I do not view today’s Opinion as foreclosing the possibility of relief in a future case seeking the opportunity to address circumstances [such as signature matching.]”). Moreover, there was no due process claim in *Pennsylvania Democratic Party*. Just as nearly every federal court has concluded with respect to the federal Constitution’s Due Process Clause, the Pennsylvania Constitution’s due process guarantee likewise prohibits ballots from being rejected based upon subjective signature comparisons absent a robust notice and cure procedure.

The Pennsylvania Constitution’s due process protections derive from Article I, Section 1, which provides:

All [individuals] are born equally free and independent, and have certain inherent and indefeasible 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 happiness.

Pa. Const. art. I, § 1. This Court has held that the due process guarantees of the Pennsylvania Constitution “are not distinguishable from those of the 14th Amendment” and courts “may apply the same analysis to both claims.” *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 255 n.6 (Pa. 1995) (citing *R. v. Com., Dept. of Public Welfare*, 636 A.2d 142, 152-53 (Pa. 1993)). This co-extensiveness between the Pennsylvania and United States Constitutions applies to both procedural due

process, *see id.*, and substantive due process rights, *see Nixon v. Com.*, 839 A.2d 277, 286 (Pa. 2003).<sup>2</sup>

Determining whether a state action violates procedural due process follows a “‘familiar two-stage analysis,’ inquiring (1) whether ‘the asserted individual interests are encompassed within the fourteenth amendment’s protection of life, liberty, or property’; and (2) whether the procedures available provided the plaintiff with ‘due process of law.’” *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) (quoting *Robb v. City of Philadelphia*, 733 F.2d 286, 292 (3d Cir. 1984)); *Marich*, 542 Pa. at 230-31.

First, voting is a protected liberty interest. Such protected interests “attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and the United States Supreme Court has repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.” *R.*, 636 A.2d at 147 (quoting *Paul v. Davis*, 424 U.S. 693, 710–11 (1976)) (alterations omitted). Under the Pennsylvania Constitution, “the franchise is guaranteed by the Free and Equal Elections Clause.” *Pennsylvania Democratic Party*, 2020 WL 5554644, at \*31 (Wecht, J., concurring) (citing Pa. Const. art. I, § V). This guarantee signifies

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<sup>2</sup> Although the due process analysis is the same under the Pennsylvania and U.S. Constitution, the Urban League limits its claim for declaratory relief to the Pennsylvania Constitution’s due process guarantee.

that voting is a protected liberty interest because “[t]he Commonwealth recognizes the right of suffrage as ‘fundamental’ and ‘pervasive of other basic civil and political rights.’” *Applewhite v. Commw.*, No. 330 M.D. 2012, 2014 WL 184988, at \*18 (Pa. Commw. Ct. Jan. 17, 2014) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)); *see also Pennsylvania Democratic Party*, 2020 WL 5554644, at \*9 (recognizing the “longstanding and overriding policy in this Commonwealth to protect the elective franchise” (citation omitted)).

The U.S. Constitution similarly recognizes voting as a fundamental right and protected liberty interest. In *Anderson v. Celebrezze*, for example, the U.S. Supreme Court stated that voting rights affect “interwoven strands of ‘liberty’” including “the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” 460 U.S. 780, 787 (1983) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)).<sup>3</sup> By definition, this includes “the right of qualified voters within a state to cast their ballots *and have them counted*[.]” *United States v. Classic*, 313 U.S. 299, 315 (1941) (emphasis added). Thus, the right to vote is a liberty interest protected by due process requirements.

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<sup>3</sup> Other federal courts have reinforced that voting is a protected liberty interests. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (declaring that “voting is of the most fundamental significance under our constitutional structure”) (citation omitted); *Cook v. Randolph Cty.*, 573 F.3d 1143, 1152 (11th Cir. 2009) (noting that “[t]he Constitution guarantees procedural and substantive due process when a liberty interest is at stake,” including “the right to vote”); *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 n.5 (4th Cir. 2002) (“The right to vote . . . is certainly a protected liberty interest[.]”).

Second, to determine what level of process is due, Pennsylvania courts “employ the methodology of the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976),” *see Marich*, 542 Pa. at 230–31, a three-part test balancing “(1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation together with the value of additional or substitute safeguards; and (3) the state interest involved, including the administrative burden the additional or substitute procedural requirements would impose on the state,” *Bundy v. Wetzel*, 646 Pa. 248, 258 (2018) (citation omitted). Applying this test, due process requires that any ballot rejection based on signature verification in Pennsylvania can occur only after notice to the voter and providing an opportunity to cure a potential defect. The alternative of allowing counties to freely reject legitimate ballots using an arbitrary, unreliable signature verification process will result in Pennsylvania voters being erroneously denied their fundamental right to vote and violates the “essential principle of due process . . . that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation omitted). Thus, this Court should follow the bevy of courts that have applied *Eldridge* and held that signature matching complies with due process guarantees only if accompanied by pre-deprivation notice and cure. *See, e.g., Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL

5423898, at \*11–13 (D. Ariz. Sept. 10, 2020); *Richardson v. Texas Sec’y of State*, No. SA-19-CV-00963-OLG, 2020 WL 5367216, at \*19–31 (W.D. Tex. Sept. 8, 2020); *Self Advocacy Solutions N.D. v. Jaeger*, No. 20-cv-00071, 2020 WL 2951012, at \*8–12 (D.N.D. Jun. 3, 2020) (“SAS”); *Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696, at \*11–15 (S.D. Ind. Aug. 20, 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338–1340 (N.D. Ga. 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214–22 (D.N.H. 2018); *La Follette v. Padilla*, No. CPF-17-515391, 2018 WL 3953766, at \*1 (Cal. Super. Ct. Mar. 5, 2018); *League of United Latin American Citizens of Iowa v. Pate*, No. CVCV056403, 2019 WL 6358335, at \*17 (D. Iowa Sep. 30, 2019); *Zessar v. Helander*, No. 05-C-1917, 2006 WL 642646, at \*6–9 (N.D. Ill. Mar. 13, 2006); *see also Florida Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at \*6–9 (N.D. Fla. Oct. 16, 2016) (enjoining signature match law as violative of the Equal Protection Clause).

**A. The Private Interest at Stake is Fundamental.**

The first *Eldridge* factor weighs heavily in favor of prohibiting signature verification that disenfranchises voters without notice and cure protections. The private interest affected by signature matching rejections is high because Pennsylvanian’s right to vote is fundamental. *See* Pa. Const. Art. I, § 5. Indeed, “[t]here is no right more basic in our democracy than the right to participate in

electing our political leaders.” *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014); *see also Wesberry v Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”). Accordingly, courts considering mail-in signature verification programs without notice and cure safeguards have found that the first *Eldridge* factor strongly favors enhanced due process protections. *See, e.g., SAS*, 2020 WL 2951012, at \*9 (finding that “[t]he private interest at stake is the fundamental right to vote, so this first factor is entitled to substantial weight.”); *Martin*, 341 F. Supp. 3d at 1338 (same).

The statutory character of Pennsylvanians’ right to vote by mail does not lessen this weighty private interest. “A liberty interest . . . may arise from an expectation or interest created by state laws or policies[.]” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted); *accord Paul*, 424 U.S. at 710–11. Having affirmatively created a vote-by-mail system through which all eligible voters can exercise their fundamental right, the Commonwealth may not arbitrarily disenfranchise citizens who avail themselves of that process. *See Saucedo*, 335 F. Supp. 3d at 217 (“Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.”); *Zessar*, 2006 WL 642646, at \*5 (“[O]nce the State permits voters to vote absentee, it must afford appropriate due process protections . . . before

rejecting an absentee ballot.”) (citation omitted); *Martin*, 341 F. Supp. 3d at 1338 (“Having created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate protection.”).

The reality that the COVID-19 pandemic makes the upcoming November election the first general election in Pennsylvania with widespread mail-in voting further heightens the fundamental interests at stake. As the Centers for Disease Control and Prevention (“CDC”) has advised, “[l]imiting face-to-face contact with others is the best way to reduce the spread of” COVID-19 and to safely administer elections, officials should provide “a wide variety of voting options,” including mail-in voting and “any other feasible options for reducing the number of voters who congregate indoors in polling locations at the same time.”<sup>4</sup> Because Pennsylvania enables all voters to vote by mail to avoid these health risks, the volume of mail-in ballots will undoubtedly increase in November just as it did for the June 2020 primary compared to prior years.<sup>5</sup> The Commonwealth itself has predicted the

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<sup>4</sup> See “Social Distancing,” U.S. Centers for Disease Control and Prevention, Jul. 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (retrieved Oct. 7, 2020); “Considerations for Election Polling Places and Voters,” U.S. Centers for Disease Control and Prevention, Jun. 22, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (retrieved Oct. 7, 2020).

<sup>5</sup> See Kathy Boockvar, *Historic Primary Paves Way For Successful General Election In Pennsylvania*, THE BROOKINGS INST. (June 22, 2020), <https://brook.gs/2AWMGJa> (“In a matter of months, nearly 1.5 million voters cast their vote by mail-in or absentee ballot, 17 times the number that voted absentee in the 2016 primary, when approximately 84,000 absentee ballots were cast.”).



significant increase in and greater importance of mail-in voting in Pennsylvania in the 2020 election cycle, due in part to the COVID-19 pandemic. *See* Compl. For Decl. and Inj. Relief, Dkt. 1, at ¶ 42, *Commonwealth of Pennsylvania, et al. v. Louis DeJoy, et al.*, No. 2:20-cv-04096, (E.D. Pa. Aug. 21, 2020). That prediction has borne out, with one study aggregating Pennsylvania mail-in voting data showing that 92,750 voters have already returned their mail-in ballot as of October 7, with nearly 2.5 million requested mail-ballots still expected to be returned.<sup>6</sup> Thus, the private interest at stake is the fundamental right to vote, including the right to do so by mail under Pennsylvania law. The increasing volume of Pennsylvanians opting for this route in the midst of a global pandemic makes shoring up procedural safeguards to prevent unfounded deprivations of that important interest particularly compelling.

**B. Signature Matching Results in a Substantial Risk of Erroneous Deprivation of Voting Rights.**

The second *Eldridge* factor—the probable value of additional process in reducing the risk of erroneous deprivations—also indicates that ballots may not be rejected based upon signature matching without meaningful pre-deprivation procedural safeguards. By providing voters with pre-rejection notice and opportunity to cure any perceived signature deficiencies, Pennsylvania would give eligible voters

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<sup>6</sup> *See* Professor Michael McDonald, U.S. Elections Project, *Pennsylvania Early Voting Statistics*, <https://electproject.github.io/Early-Vote-2020G/PA.html> (last updated Oct. 7, 2020) (compiling data sourced from Pennsylvania Secretary of State).

a chance to correct erroneous determinations and ensure that they are not disenfranchised because of benign discrepancies or election official errors.

Requiring pre-deprivation notice is the “default rule” in procedural due process cases. *Montanez v. Sec’y Pa. Dep’t of Corr.*, 773 F.3d 472, 483 (3d Cir. 2014). And for good reason. Following the “general preference that procedural safeguards apply in the pre-deprivation timeframe” aligns with the overriding due process goal to “avoid[] erroneous deprivations before they occur.” *Bundy*, 646 Pa. at 258 (citing *Pa. Coal Mining Ass’n v. Ins. Dep’t*, 471 Pa. 437, 451 (1977)). This is especially true here because county boards of elections that engage in signature matching are virtually certain to erroneously reject valid ballots and do irreparable harm to voters.

Signature comparison is a complex, professionalized field that cannot be accurately performed by the untrained eye. As Dr. Linton A. Mohammed has opined, “[d]etermining whether signature features are ‘differences’ or ‘variations’ is one of the most difficult determinations in signature examinations, even for experienced [Forensic Document Examiners],” and laypeople “are highly likely to make mistakes when comparing signatures, particularly by erroneously rejecting signatures as inauthentic or non-matching when they are in fact written by the same individual.” Mohammed Decl. ¶¶ 28, 38. Pennsylvania’s evidentiary rules codify this understanding by establishing that signature comparison is the province of expert

testimony. 42 Pa. C.S. § 6111(c) (instructing that an expert’s signature opinion should be supported by his or her “statement of the principles on which he has based his work, the details of his work, and his opinion that the results are important to the point at issue, or the reasoning, analysis and investigation by which he has arrived at his opinion”); accord *United States v. Velasquez*, 64 F.3d 844, 850 (3d Cir. 1995) (noting that “the field of handwriting analysis consists of scientific, technical or other specialized knowledge” that is uniquely in the purview of trained experts). Thus, because “[s]ignature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people[,]” due process requires pre-deprivation safeguards. See *Pennsylvania Democratic Party*, 2020 WL 5554644, at \*34 & n.15 (Wecht, J., concurring) (citing *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1046 (S.D.N.Y. 1995)).

Disregarding the need for accurate expert analysis and permitting county boards of elections (or others lodging challenges) to engage in signature matching without due process protections would allow untrained laypeople to analyze the signatures of mail-in voters. This would result in uninformed decisions of the utmost constitutional consequence: whether to count a citizen’s validly cast vote. County election officials in Pennsylvania lack the tools and training to properly account for the fact that “illiterate writers, writers for whom English is a second language, elderly writers, disabled writers, and writers with health conditions tend to have less

pen control than most other writers, and therefore would have a greater range of variation in their signatures.” Mohammed Decl. ¶ 31. In states where signature matching is conducted, election officials are not required to compare the signature on the voter’s ballot with more than one signature in the voter’s file, contrary to expert methodology that “require[s] multiple specimen signatures for comparison with a questioned signature, and often more if issues such as age or illness are involved.” *Id.* ¶ 49. Election officials matching signatures also understandably cannot meet standard handwriting expert practices to spend significant time examining each individual signature to ensure an accurate comparison, and such “hasty decisions can lead to ballots being improperly rejected.” *Id.* ¶ 53. Thus, as a result of these sampling and time shortcomings, election officials “are more than 3 ½ times more likely to declare an authentic signature non-genuine” and mistakenly reject a valid ballot for this reason. *Id.* ¶ 40.

The important liberty interests at stake cannot be subjected to the whim of a flawed system that falls far short of due process standards. If Pennsylvania counties are permitted to conduct signature verification without pre-rejection notice and cure, voters have no recourse to establish the validity of their signature and ballot before it is too late; the right to vote in the affected election is irreversibly lost. Without a pre-deprivation process, “[i]t cannot be emphasized enough that the consequence of a moderator’s decision—disenfranchisement—is irredeemable.” *Saucedo*, 335 F.

Supp. 3d at 218 (citation omitted); *see also Loudermill*, 470 U.S. at 542. (noting that the “root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of” the protected interest at stake) (emphasis in original) (citations omitted).

To avoid the substantial risks of erroneous disenfranchisement, numerous courts have routinely found that providing notice and cure opportunities can relieve the due process deficiencies of signature verification programs without encumbering state election administration. *See, e.g., SAS*, 2020 WL 2951012, at \*9; *Martin*, 341 F. Supp. 3d at 1339; *La Follette*, 2018 WL 3953766, at \*1; *Saucedo*, 335 F. Supp. 3d at 218; *Zessar*, 2006 WL 642646 at \*9. Additional pre-deprivation procedures can be easily implemented in Pennsylvania because the voter’s verification information—including signatures—are contained on the outer envelope of the ballot. Thus, county election officials can compare signatures during the pre-canvassing period with ample time to notify voters and avoid erroneous rejections. In *Self Advocacy Solutions North Dakota v. Jaeger*, by comparison, the district court ordered county officials to “compare the signature[s]” during the pre-canvassing period “to identify whether the canvassing board is likely to determine that the signatures do not match” and facilitate notifying voters and offering cure opportunities. No. 3:20-CV-00071, 2020 WL 3068160, at \*2 (D.N.D. June 5, 2020). This Court can order similar relief and require county boards of elections to contact

voters on a rolling basis as ballots are received and before final vote counting by the canvassing board. Doing so would diminish any administrative burden on election officials and maximize the amount of notice and cure time for voters.

In sum, because of the high risk of mistaken deprivations, the second *Eldridge* factor—and basic fairness principles underlying due process—favors mandating pre-deprivation protections to avoid disenfranchising eligible Pennsylvania voters due to signature verification.

**C. Pennsylvania Has No Interest in Rejecting Ballots Without Providing Notice and an Opportunity to Cure.**

The third *Eldridge* factor also counsels in favor of mandating pre-deprivation notice and cure if Pennsylvania law permits signature verification. States have no legitimate interest in disenfranchising eligible voters without due process of law. Any abstract risk of mail-voting fraud or perceived administrative burden of offering additional pre-deprivation procedure cannot afford a countervailing interest to override voters' fundamental liberty interests at stake.

First, the Commonwealth has no cognizable interest in using signature matching without due process protections to prevent a risk of voter fraud. To begin with, mail-in voting fraud is vanishingly rare across the country despite numerous states using universal vote-by-mail systems for years,<sup>7</sup> and there is no evidence that

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<sup>7</sup> See, e.g., Elaine Kamarck and Christine Stenglein, Low Rates of Fraud in Vote-By-Mail States Show the Benefits Outweigh the Risks, THE BROOKINGS INSTITUTION (June 2, 2020),

due process-free signature matching would address any risk of fraud that simply does not exist in the Commonwealth. Rather, requiring procedural safeguards *advances* that purpose by expanding the information available to election officials from the most direct source—the voters themselves. Moreover, Pennsylvania law already guards against any risk of vote-by-mail misconduct in ways that better avoid wrongful disenfranchisement. At the front end, Pennsylvania requires election officials to determine the validity of a mail-in voter’s qualifications during the application process by comparing the information provided on the application against the voter’s registration information. *See* 25 Pa. Stat. §§ 3150.11, 3150.12b(a). On the back end during the canvassing process, each county board of elections must also validate absentee and mail-in ballots by “examin[ing] the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained” in the applicable voter registration file. *Id.* § 3146.8(g)(3). Accordingly, rejecting an eligible voter’s ballot based on a lay election officials’ conjectural inference of fraud from a supposed signature mismatch

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<https://brook.gs/3ct24tJ> (analyzing elections in universal vote-by-mail states—Colorado, Hawaii, Oregon, Utah, and Washington—and discrediting fraud concerns); Wendy Weiser & Harold Ekeh, *The False Narrative of Voter Fraud*, BRENNAN CTR. FOR JUSTICE (Apr. 10, 2020), [www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud](http://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud) (studying voter datasets and concluding it is “more likely for an American to be struck by lightning than to commit mail voting fraud”); Richard L. Hasen, *ELECTION MELTDOWN 128* (2020) (summarizing that “[t]he issue of organized voter fraud has now been put to the test in courts and in social science” and amounts to no more than “a sham perpetuated by people who should know better, advanced for political advantage”).

is ineffective to serve the Commonwealth's election integrity interests, but would effectively "discourage[] voters from participating in the electoral process because they have come to believe that" their vote does not count despite no fault of their own. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 814, (Pa. 2018). "Thus, if anything, additional procedures further the State's interest in preventing voter fraud while ensuring that qualified voters are not wrongly disenfranchised." *Saucedo*, 335 F. Supp. 3d at 220 (citation omitted).

In addition, there is no reasonable argument that providing mail-in voters with notice and an opportunity to cure benign signature verification issues would place an undue fiscal or administrative burden on the Commonwealth. At the outset, as a matter of law any "administrative burden of a notice-and-cure remedy is outweighed by the threat to the fundamental rights of voters whose ballots otherwise would not be counted." *Pennsylvania Democratic Party*, 2020 WL 5554644, at \*34 (Wecht, J., concurring). But this is particularly true here because the Commonwealth is already "in a position to provide for pre-deprivation process[,]” *see Bundy*, 646 Pa. at 259, given that it currently possesses the information and infrastructure to administer signature match notice and cure opportunities without significant administrative encumbrance.

County boards of elections currently collect voters' contact information through their registration and mail-in ballot applications, and can use that



information to provide voters with the constitutionally required pre-rejection notice and opportunity to cure any perceived signature mismatches. Election officials are also already required to provide notice to voters whose absentee ballot *applications* are rejected, 25 Pa. Stat §§ 3146.2b(d); 3150.12b(c), and to provide notice and a hearing for voters whose ballots are challenged by another voter, *id.* § 3146.8(g)(5). Indeed, the statutory scheme creates a time window for voters to resolve such ballot challenge issues, *see id.* § 3146.8(h), and signature verification issues could also be resolved in that same window. And as stated above, because the signature is on the exterior of the envelope this Court could order county boards of elections to contact voters on a rolling basis as ballots are received and before final vote counting by the canvassing board. *See, e.g., SAS*, 2020 WL 3068160, at \*2. These currently existing procedures establish that providing pre-rejection notice and cure for signature verification would not unduly burden the Commonwealth. *See Saucedo*, 335 F. Supp. 3d at 221 (concluding that pre-deprivation notice “would not entail significant administrative burdens,” especially when “procedures already exist which could be readily extended”); *SAS*, 2020 WL 2951012, at \*10 (making similar considerations).

In sum, Pennsylvania’s dual interests in efficiently counting all eligible votes while promoting election integrity are best served by the pre-deprivation notice and cure opportunities that due process requires, and any countervailing administrative burden pales in comparison to the fundamental rights involved in this case.

Therefore, the third *Eldridge* consideration also weighs in favor of applying due process guarantees to mandate that signature verification must coincide with pre-deprivation notice and cure.

\* \* \*

Pennsylvanians have a vital protected liberty interest at stake—the fundamental right to vote. The due process guarantees of Article I, Section 1 require that the Commonwealth may not deny voters this interest without first adopting and following appropriate procedural measures to guard against erroneous deprivations. Accordingly, if the Election Code is read to permit signature verification programs, then due process demands that voters be provided adequate notice and a meaningful opportunity to cure before any ballot may be rejected because of perceived signature deficiencies.<sup>8</sup>

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<sup>8</sup> Because the Election Code does not specify signature matching, it is likewise silent as to whether or not notice and cure procedures must be followed. This Court could thus declare the necessity of those requirements under the Pennsylvania Constitution without triggering Act 77's non-severability clause because such a determination would not declare any part of Act 77 invalid, it would merely require additional procedures to be followed.

Notably, the Trump campaign does not dispute that notice and an opportunity for cure must be provided for ballots slated for rejection because of signature matching; rather, it contends that the notice and hearing provision of § 1308(g)(5)-(7) applies to such ballots. *See* Summ. J. Br. (Sec'y Pet. Ex. D) at 18, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-cv-966 (E.D. Pa. Oct. 1, 2020). Regardless, the Pennsylvania Constitution demands that notice and an opportunity for cure be provided if signature matching is to occur.

## **II. The Pennsylvania Constitution’s Free and Equal Elections Clause Prohibits Signature Match Rejections Without Notice and Cure Procedures.**

The Pennsylvania Constitution’s Free and Equal Elections Clause likewise prohibits signature match rejections in the absence of a meaningful pre-rejection notice and cure process. The Pennsylvania Constitution provides that “[e]lections 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. This Clause is to be read “in the broadest possible terms” and was “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *Pennsylvania Democratic Party*, 2020 WL 5554644, at \*4 (quoting *League of Women Voters*, 178 A.3d at 804, 812 (2018)). Elections are free and equal under the Constitution when “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.” *Id.* at \*19 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). “[I]n enforcing the Free and Equal Elections Clause, this ‘Court possesses broad authority to craft meaningful remedies when required.’” *Id.* at \*18 (quoting *League of Women Voters*, 178 A.3d at 822).

As explained *supra* Part I, signature matching poses a high risk of erroneous deprivation—*i.e.*, it results in election officials wrongly identify signatures as being

from different people—and so a signature matching system that lacks notice and cure protections “den[ies] the franchise itself.” *Id.* at \*19. Valid votes are thus tossed and not counted with no notice to the voter and no recourse. Such a process is the antithesis of a “free and equal” election, and thus would constitute a straightforward violation of the Free an Equal Elections Clause.

### **III. Allowing Private Signature Challenges Would Pose Grave Constitutional Concerns.**

The Urban League reinforces the Secretary’s argument that allowing signature verification challenges by non-governmental entities such as candidates, parties, or other private actors would give rise to serious constitutional concerns under both due process and the Free and Equal Elections Clause. *See* App. for Invocation of King’s Bench Power at 22–24. Pennsylvania’s Election Code does not permit challenges by non-governmental actors based upon signature matching. However, to the extent there is any ambiguity on this question, “[u]nder the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction.” *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020) (quoting *Commonwealth v. Herman*, 161 A.3d 194, 212 (Pa. 2017)).

Allowing non-governmental private actors or entities to challenge the validity of a ballot based on the voter’s signature violates the Pennsylvania Constitution’s due process guarantees in Article I, Section 1. This “due process protection” in the

Commonwealth guards against procedure-less interest deprivations as well as “against an unconstitutional potential for bias[.]” *Commonwealth v. Koehler*, 229 A.3d 915, 932 (Pa. 2020); *see also Marich*, 666 A.2d at 254 (holding “that a mere possibility of bias under Pennsylvania law is sufficient to raise the red flag of protection offered by the procedural guaranty of due process” (citation omitted)). As discussed *supra* Part I, signature verification in general is rife with error-prone determinations and the high risk of wrongful voting rights deprivations. But if such signature verification is allowed, errors by county election officials tasked to uphold the neutral and outcome-blind application of the law can be at least partially addressed through pre-deprivation notice and cure.

Not so for private parties challenging ballots based on signature verification. Allowing such challenges would further aggravate the risks of wrongful ballot rejection because private challengers are even further removed from the objective expertise necessary to accurately verify a signature. But more fundamentally, permitting non-governmental signature challenges would also present the more pernicious danger of private actors making subjective assessments of signature invalidity based not on ballot security, but instead on harassment or biases against a particular voter’s ballot because of his or her suspected political preferences. Permitting private challenges to ballot signatures introduces a heightened risk of

alarming political or other biases, which would amount to a severe due process violation that even pre-deprivation notice and cure could not relieve.

Moreover, reading the Election Code to allow non-governmental signature verification challenges would violate the Pennsylvania Constitution's Free and Equal Elections Clause. The Free and Equal Elections guarantee for Pennsylvania voters also "guards against the risk of unfairly rendering votes nugatory." *League of Women Voters*, 178 A.3d at 814. As similarly stated above, allowing non-governmental entities or persons to challenge signature verification would violate this substantive guarantee, and enable private actors to disrupt the counting of eligible ballots from a certain subset of voters based on political or other illegitimate motivations. The Election Code should be read to avoid such constitutional infirmities.

Challenges to ballots by non-governmental entities or actors based on signature matching would contravene "longstanding and overriding policy in this Commonwealth to protect the elective franchise" and canons of statutory interpretation to "construe[] [the Election Code] liberally in favor of the right to vote." *Shambach v. Bickhart*, 577 Pa. 384, 392 (2004) (collecting cases). In keeping with these instructions, the Court should read the Election Code to prohibit non-governmental signature challenges "so as to avoid a finding of unconstitutionality"

under both due process and the Free and Equal Elections Clause. *See Wolf*, 233 A.3d at 696 (citations omitted).

#### **IV. The Court Has the Remedial Power to Order a Notice and Cure Procedure.**

The Court has the remedial power to order a notice and cure procedure if it concludes that the Election Code permits signature matching. *See Pennsylvania Democratic Party*, 2020 WL 5554644, at \*18. Such an order should require election officials to 1) make a determination upon receipt of absentee and mail-in ballots whether the board of elections is likely to conclude the signatures do not match and create a log of such ballots, 2) contact the voters by phone to confirm they voted the ballot and, if so, make a notation on the log to be accepted by the board of elections at the pre-canvass or canvass as proof the signatures match, and 3) send a mailed notice if the voter is not reached by phone informing the voter that their signature can be confirmed by calling, emailing, or mailing confirmation to the county board of elections verifying that they voted the ballot. The same procedures should be followed for any additional ballot questioned at the pre-canvass or canvass, and voters should be afforded the duration of the provisional ballot period to confirm their signatures. Voters should not be required to submit new or additional signatures. Such a remedy is consistent with that recently ordered by the United States District Court for the District of North Dakota. *See Ex. B* (Permanent

Injunction, Dkt. 36, *Self Advocacy Solutions, N.D. v. Jaeger*, No. 3:20-cv-00071 (D.N.D. Aug. 28, 2020),).

\* \* \*

It is imperative that this Court exercise its King's Bench powers to resolve this issue to ensure that thousands of Pennsylvania voters do not risk having their ballots wrongly rejected without any notice or opportunity to cure based upon subjective and error-prone signature comparison assessments of laypersons. This Court's involvement is particularly warranted in light of the federal litigation challenging the Secretary's Guidance, the statements of certain county boards of elections declining to follow that Guidance, and the substantial increase in voters casting mail-in ballots in light of the coronavirus pandemic. Pennsylvania voters must have confidence that they can safely cast their ballots by mail without risk of subjective and notice-free rejection of their ballots.

### **CONCLUSION**

For the foregoing reasons, the Court should assume jurisdiction over this matter, grant the Urban League's application to intervene, and in the event the Court concludes the Election Code permits signature matching, declare that the ballots may



not be rejected without notice and an opportunity to cure consistent with the remedy requested herein.

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**PUBLIC ACCESS POLICY CERTIFICATE OF COMPLIANCE**

It is hereby certified by the undersigned that this filing complies with the provision of the *Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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