

Filed 10/05/2022 Supreme Court Middle District

IN THE SUPREME COURT OF PENNSYLVANIA

No. 100 MAP 2022

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, and S. Michael Streib,

Petitioners/Appellants,

v.

Leigh M. Chapman, in her 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;
and All 67 County Boards of Elections
(See back of cover for list of County Respondents),

Respondents/Appellees.

REPRODUCED RECORD – VOLUME 2

Appeal from Commonwealth Court's Sept. 29, 2022 Order at No. 447 MD 2022

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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 Elections;
Cumberland County Board of Elections; Dauphin County Board of Elections;
Delaware County Board of Elections; Elk County Board of 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;
Washington County Board of Elections; Wayne County Board of Elections;
Westmoreland County Board of Elections; Wyoming County Board of Elections;
and York County Board of Elections,

Respondents/Appellants.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>REPUBLICAN NATIONAL COMMITTEE, <i>et al.</i>,</p> <p>Petitioners,</p> <p>v.</p> <p>LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth, <i>et al.</i>,</p> <p>Respondents.</p>	<p>No. 447 MD 2022</p>
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JOINT STIPULATION OF FACTS

On September 9, 2022, this Court entered a Scheduling Order which required the parties to file a joint stipulation of facts indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots. To facilitate compliance with the Court’s Order, eliminate the need for additional expedited discovery as well as the testimony of a representative of each county Board of Elections at the hearing of this matter, on September 12, 2022, counsel for Petitioners sent a letter via email to all counsel of record as of that date and via Federal Express next day delivery to those counties on behalf of whom counsel had not yet entered an appearance (the “September 12, 2022 Letter”), a copy of which is attached as Exhibit “A”).

The Boards of Election for Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Huntingdon County, Indiana County,

Jefferson County, Lawrence County, Northumberland County, Venango County, York County, Westmoreland County, and Chester County stipulate per the attached Exhibits “B”, “C”, and “D”, respectively.

The undersigned parties join this Joint Stipulation of Fact subject to the caveat that the Respondent Boards are stipulating only the facts that are applicable and known to them. Specifically, the parties, through their undersigned counsel, hereby stipulate to the following facts:

1. Please state whether the county on behalf of which you are responding has adopted and/or implemented one or more notice and opportunity to cure procedures with respect to voters’ failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a) (“Notice and Cure Procedure”) since the enactment of the amendment of Act 77 on October 31, 2019. This request does not apply to those procedures relating to proof of identification as set forth in 25 P.S. § 3146.8(h):

- Adams County – Since at least 2010, when the County’s current Elections Director joined the Elections Office, it has been the practice of election staff to notify voters of defective absentee or mail-in ballots by means of telephone, e-mail, or letter, and to provide them an opportunity to correct such defects in the presence of election staff in the Elections Office.
- Allegheny County – Since 2020, Allegheny County has informed voters, whose mail-in/absentee ballots lack required information. A letter from the Allegheny County Elections Division, a copy of which is attached hereto as Exhibit B, is mailed, by ordinary mail, to said voters. Accompanying this letter is a “fresh” declaration envelope and secrecy envelope.
- Beaver County – In the past, the Beaver County Bureau of Elections had implemented an informal notice and opportunity to cure procedure with respect to voters’ failure to comply with

signature or date requirements only for both absentee and mail-in ballots.

- Berks County – Does not proactively contact voters regarding mail-in/absentee ballot deficiencies for the purpose of providing them an opportunity to cure. As such, they do not have a “Notice and Cure” procedure. However, if a voter contacts them about a potential deficiency within their ballot, they will generally allow them the opportunity to cure prior to 8:00 p.m. on Election Day.
- Blair County - Prior to this past summer, when the decision was made to stop notifying voters of potential errors in their mail-in or absentee ballots of a potential error that would cause their ballot not to count, there was a practice to provide an opportunity to correct the same.
- Bradford County – Has not adopted and/or implemented notice and opportunity to cure procedures. However, it should be noted that, upon receipt, the ballot is scanned and if there is an error with the ballot the system automatically generates an email notice to the voter stating that there is a problem with the ballot. The County does not reach out to voters.
- Bucks County – See response attached as Exhibit “E”.
- Butler County - Has no such procedures in place. Butler County does not allow for a mail-in or absentee ballot (once received and stamped in at the Bureau of Elections) to be altered, corrected or in any way modified.
- Cameron County – Neither the County nor its Election Board have adopted or implemented one or more notice and opportunity to cure procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a).
- Clarion County – Follows the Election Code and does not use nor intends to use or adopt curing procedures for absentee/mail-in ballots.

- Cumberland County – Has not formally adopted and does not have set plans to formally implement notice and opportunity to cure provisions for absentee and mail-in ballots.
- Delaware County – The Board has not implemented any notice and opportunity to cure procedures.
- Erie County – The Board of Elections did not implement a "notice to cure" procedure during the 2020 election or for any election since then.
- Franklin County – Has not implemented any notice and opportunity to cure procedures.
- Juniata County – Has not adopted nor implemented any notice and opportunity to cure procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a) ("Notice and Cure Procedure") since the enactment of the amendment of Act 77 on October 31, 2019.
- Lehigh County – The Lehigh County Board of Elections permitted outer envelope corrections for absentee ballots prior to 2020, and since 2020 has notified voters and permitted curing with respect to voters' failure to comply with outer envelope requirements for mail-in as well as absentee ballots.
- Luzerne County – In answer, the Board of Elections and Registration refers to its September 16, 2022 Stipulation attached as Exhibit "F" hereto.
- Lycoming County – has adopted and/or implemented one or more notice and opportunity to cure procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a) ("Notice and Cure Procedure") since the enactment of the amendment of Act 77 on October 31, 2019.

- Montgomery County – Board of Elections has implemented notice and cure procedures for mail-in and absentee ballots in prior elections.
- Northampton County – The Board of Elections provides voters with an opportunity to fix an issue with the date or signature on an absentee or mail-in ballot prior to Election Day. Northampton County Board of Elections does not provide voters with an opportunity to fix an issue with the secrecy envelope prior to Election Day.
- Philadelphia County – See response attached as Exhibit “G”.
- Snyder County – The Board of Elections has no curative procedures policy in effect for the 2020 election.
- Somerset County – The Board of Elections has not implemented notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots.
- Sullivan County – At no time since the enactment of Act 77 on October 31,2019, has Sullivan County adopted and/or implemented one or more notice and opportunity to cure procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa.C.S.3146.6(a) and3150.16(a).
- Susquehanna County – Follows the Election Code and does not use nor intends to use or adopt curing procedures for absentee/mail-in ballots.
- Tioga County – If a voter provided a phone number on their application, and the County receives a mail-in/absentee and the voter forgot something on the envelope, or it’s missing a secrecy envelope, they try to call the voter.
- Union County – See response attached as Exhibit “H”.
- Wyoming County – At no time since the enactment of Act 77 on October 31,2019, has Wyoming County adopted and/or implemented one or more notice and opportunity to cure

procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa.C.S.3146.6(a) and 3150.16(a).

2. Of those counties which indicated in paragraph 1 above to having notice and opportunity to cure procedures, the counties below offer the following details regarding such procedures:

a. Whether the notice and cure procedure applied to both absentee and mail-in ballots and, if not, to which ballots did the notice and cure procedure apply:

- Adams County – The procedure applied to both absentee and mail-in ballots.
- Beaver County – The notice and cure procedure applied to both absentee and mail-in ballots.
- Blair County – The notice and cure procedure applied to both absentee and mail-in ballots.
- Lehigh County – The notice and cure procedure applied to both absentee and mail-in ballots.
- Lycoming County – The procedure applied to both absentee and mail-in ballots.
- Montgomery County – The notice and cure procedures applied to both absentee and mail-in ballots.
- Northampton County – In the 2020 General, 2021 Primary, 2021 Municipal, and 2022 Primary Elections, the notice and cure procedure applied to both absentee and mail-in ballots.

b. The specific defect or deficiency for which a notice and cure procedure was adopted and/or implemented:

- Adams County – The defect/deficiency that would trigger the procedure was an employee noting an unsigned or undated envelope.

- Beaver County – The defect/deficiency that would trigger the procedure was an employee noting an unsigned or undated envelope.
- Blair County – If a returned ballot was missing a signature or date (these were the only issues notification was provided for).
- Lehigh County – Lack of a signature and/or date on the outer envelope.
- Lycoming County – The defect/deficiency that would trigger the procedure was an employee noting an unsigned or undated envelope.
- Northampton County – In the 2020 General, 2021 Primary, 2021 Municipal and 2022 Primary Elections, if a mail-in or absentee ballot lacked a signature or date.

c. The steps taken to determine if an absentee and/or mail-in ballot was defective and/or deficient:

- Adams County – The steps taken were a review of the outer envelope to determine whether or not the envelope was adequately signed and dated.
- Beaver County – The only steps taken were a review of the outer envelope to determine whether or not the envelope was adequately signed and dated.
- Blair County – When time permitted, generally when ballots were initially mailed and returned immediately, they were reviewed for signature and date.
- Lehigh County – Review of the outer envelope upon receipt and security envelope during pre-canvassing.
- Lycoming County – If voter registration staff observed a missing signature and/or missing date on the back of an official ballot return envelope during the receiving process, and if voter registration staff could ascertain a phone number on file on the voter's registration record, voter registration staff attempted the phone number on file to inform the voter of the missing signature

and/or missing date. Determinations of missing signatures and/or missing dates were strictly preliminary, subject to formal, final determinations during the official pre-canvassing and canvassing activities.

- Northampton County – In the 2020 General, 2021 Primary, 2021 General, and 2022 Primary, all ballots were reviewed upon receipt to determine whether or not the envelope was adequately signed and dated as part of being scanned into the SURE system. The only distinction is the Department of State developed a new message in SURE for 2021 for ballots that lacked a date.

d. The time period for determining whether an absentee and/or mail-in ballot was defective:

- Beaver County – The defect/deficiency that would trigger the procedure was an employee noting an unsigned or undated envelope.
- Blair County – The defect/deficiency that would trigger the procedure was an employee noting a missing signature or date.
- Lehigh County – Determined during outer envelope review upon receipt and security envelope during pre-canvassing.
- Lycoming County – Aforementioned preliminary determinations of missing signatures and/or missing dates were made during the initial mail ballot receiving process, which consisted of dating and time-stamping received ballots, scanning the bar codes on the official return envelopes to log the received ballots into each voter's registration record in the SURE system, and sorting the received ballots for eventual pre-canvassing and canvassing activities.
- Northampton County – In all elections, all ballots are scanned into the SURE system upon receipt, at which point the deficiency would be noted.

e. The specific procedure(s) adopted and/or implemented, including but not limited to how notice was provided to the voter who had cast a defective and/or deficient ballot and the cure permitted:

- Adams County – The procedure consisted of attempting to notify the voter by means of telephone, e-mail, or letter and to provide them an opportunity to correct such defects in the presence of election staff in the Elections Office.
- Beaver County – Notice was only provided via phone call if the voter provided a phone number on their application for a mail-in or absentee ballot. All ballots with a missing element were segregated from other ballots that had both signature and date elements. The voter was notified and provided the option to come into the office to provide the missing element to their envelope. In very rare cases, if requested by the voter, voters were provided the opportunity to fill in a blank envelope designated for the voter transmitted via US mail and return said envelope with complete elements. Once received, staff would affix (via Scotch tape) the newly signed and dated back provided by the voter to the originally submitted envelope, without materially changing the original. Ballots would not leave the custody of the office upon their return either in-person or via mail.
- Blair County – If SURE contained a phone number for the voter, an attempt to call the voter was made to advise the voter that the voter's ballot may not counted due to the absence of a signature and/or date. The voter was told they could come in before 8:00 p.m. on election day to make this correction. If no number was available or the number on record was no longer in service or the person did not answer and there was no voicemail, no further action was taken.
- Lehigh County – The notice process is by email or phone for those voters who have provided that information, and if not and time permits, by letter. Voters are required to come to the office in person to cure the identified issues. If a voter has been notified by the Department of State that their ballot has been canceled, for whatever reason, including lack of a secrecy envelope, and calls Lehigh, Lehigh informs the voter that they can go to their polling place and cast a provisional ballot until 8 p.m. on election

day. Under the Stipulated Agreement in the Bausch case, E.D. Pa. Dkt. 22-cv-2111, while conducting pre-canvassing, the County will inform voters and party representatives when a ballot is submitted without its secrecy envelope. Lehigh will inform the voter they may cast a provisional ballot. Lehigh will not permit the voter to replace the naked ballot with another ballot.

- Lycoming County – If voter registration staff observed a missing signature and/or missing date on the back of an official ballot return envelope during the receiving process, and if voter registration staff could ascertain a phone number on file on the voter’s registration record, voter registration staff attempted the phone number on file to inform the voter of the missing signature and/or missing date. Affected voters who could be reached by phone were offered an opportunity to visit the county voter registration office in person to provide the missing signature or date, or to be mailed a replacement ballot and the original ballot voided, or were informed that they could vote in-person at their precinct by provisional ballot, which would be counted if their mail ballot was set aside during pre-canvassing and/or canvassing.
- Northampton County – In the 2020 General and 2021 Primary Elections, if the voter’s SURE record was accessible to the voter, it would be reflected as such. If the voter provided an email address, the SURE system would also send the voter an email. If the voter came into the Election Office prior to Election Day, the voter could fix the issue with the signature or date. During the pre-canvass, which began at 7:00 a.m. on Election Day, the County Board of Elections followed the guidance of the Department of State and provided candidates and party representatives on-site a list of names of voters whose ballots were set aside for a secrecy envelope issue or signature or date issue. If the voter discovered that their ballot was set aside during the pre-canvass, the voter potentially could go to the polling place and vote by provisional ballot. This process stopped after the 2021 Primary Election as candidates and parties did not ask for the list. In the 2021 Municipal and 2022 Primary Elections, if the voter provided an email address to the Department of State,

an email is automatically generated by the SURE system. The Election Division has no control over the email function of the Department of State through the SURE system. All voters whose ballots lack a signature or date but lack an email or phone number will be sent a form letter via regular mail advising them of the lack of a signature and/or date and how to address the issue. If time or staffing permitted, efforts were made to telephone voters. The Election Office does not plan to telephone voters moving forward.

f. The identity of the individual and/or individuals responsible for implementing the notice and cure procedure:

- Adams County – Election Office staff was responsible for contacting voters regarding the notice and cure procedure.
- Beaver County – All employees were part of the process.
- Blair County – Employees of the Elections/Voter Registration Office.
- Lehigh County – Office staff or Department of State provide notice.
- Lycoming County – Forrest Lehman, Director of Elections.
- Northampton County – With respect to signature or date issues, office staff would note an issue with a signature or date as part of scanning the ballot being scanned into the SURE system. For ballots lacking a secrecy envelope, party and candidate representatives had equal access on Election Day to the list of voters whose ballots were set aside.

g. The time period for providing notice to a voter that the voter's ballot had been determined to be defective and/or deficient:

- Beaver County – Voters would be called within 24 to 48 hours of their ballot being received if their information was on file.
- Blair County – No specific time period was established. As the election approached, less time was available for the staff to make these attempts, and the attempts were not made. A primary

reason for making the decision to cease notifying voters of these errors and providing an opportunity to correct was the fact that the practice was not uniform for all voters in Blair County.

- Lehigh County – No specific time period is established but notice attempt is made before Election Day if possible and on pre-canvassing if ballot lacks a security envelope.
- Lycoming County – Notice was attempted during the receiving process.
- Northampton County – In the 2020 General and 2021 Primary Elections, the time period for providing notice to a voter that the voter’s ballot had been determined to be defective and/or deficient was not provided by the County. In the 2021 Municipal and 2022 Primary Elections, the ballots were scanned upon receipt at the office.

h. The number of ballots determined to be defective and/or deficient and the reason and/or reasons the ballots were determined to be defective and/or deficient:

- Beaver County – It is unclear how many ballots were determined to be defective.
- Lycoming County – Unknown. Plaintiff appears to be asking for a catalogue of all ballots with missing signatures or dates that may have been “cured” over the course of 5 elections. No interim logs were kept to track informal determinations that were necessarily preliminary until formal, final determinations were made during pre-canvassing and canvassing activities. The county would have information about the number of mail ballots that were ultimately set aside during pre-canvassing and canvassing activities, as well as the number of mail ballots that were counted, but no records or count exists of mail ballots that were preliminarily determined to be missing a signature or date, but were subsequently cured prior to the formal, final pre-canvassing or canvassing determinations.
- Northampton County – For the 2020 General Election, 542 ballots were “Undeliverable,” 934 total votes were canceled and

2 ballots were marked “No Signature.” The state only has a single combined scan reason for both no signature and no date ballots. They have to scan both in under the CANCEL- NO SIGNATURE category. There is no further breakdown available. Due to state guidance at the time, no signature/no date/naked ballots were all scanned in under the CANCEL-VOTE CANCELLED category. In the 2021 Primary Election, 62 ballots were “Undeliverable,” there were 125 naked ballots, and 1,198 ballots were marked “No Signature.” In the 2021 General Election, 219 ballots were “Undeliverable,” there were 204 naked ballots, and 349 ballots were marked “No Signature.” In the 2022 Primary Election, 93 ballots were “Undeliverable,” there were 259 naked ballots, and 18 ballots were marked “No Signature.” In accordance with court decisions, all undated ballots for the 2022 Primary Election were counted, so the SURE scan reason was changed from CANCEL to VOTE RECORDED.

i. The number of voters to whom notice and the opportunity to cure any such defect and/or deficiency was given:

- Beaver County – The number of voters that notice was provided to is not readily available. Records were not kept at the time.
- Lycoming County – Unknown. Plaintiff appears to be asking for a catalogue of all ballots with missing signatures or dates that may have been “cured” over the course of 5 elections. No interim logs were kept to track informal determinations that were necessarily preliminary until formal, final determinations were made during pre-canvassing and canvassing activities. The county would have information about the number of mail ballots that were ultimately set aside during pre-canvassing and canvassing activities, as well as the number of mail ballots that were counted, but no records or count exists of mail ballots that were preliminarily determined to be missing a signature or date, but were subsequently cured prior to the formal, final pre-canvassing or canvassing determinations.
- Northampton County – The number of voters that notice was provided to is not readily available.

j. To the extent notice and an opportunity to cure was not given to a voter whose ballot was determined to be defective and/or deficient, the reason for the lack of notice to such a voter or voters:

- Beaver County – It is not clear how many voters did or did not receive notice, as records were not kept of contact made (see i above).
- Blair County – As the election approached, less time was available for the staff to make these attempts, and the attempts were not made. A primary reason for making the decision to cease notifying voters of these errors and providing an opportunity to correct was the fact that the practice was not uniform for all voters in Blair County.
- Lycoming County – Notice of a missing signature or missing date was provided if the voter had a phone number on file on their voter registration record.
- Northampton County – In the 2020 General, 2021 Primary, 2021 Municipal, and 2022 Primary Elections, if no contact information for voter was present in SURE system.

k. The number of ballots cured and the manner in which such ballots were cured:

- Beaver County – It is not clear how many voters did or did not cure the ballots.
- Lycoming County – Unknown. Plaintiff appears to be asking for a catalogue of all ballots with missing signatures or dates that may have been “cured” over the course of 5 elections. No interim logs were kept to track informal determinations that were necessarily preliminary until formal, final determinations were made during pre-canvassing and canvassing activities. The county would have information about the number of mail ballots that were ultimately set aside during pre-canvassing and canvassing activities, as well as the number of mail ballots that were counted, but no records or count exists of mail ballots that were preliminarily determined to be missing a signature or date,

but were subsequently cured prior to the formal, final pre-canvassing or canvassing determinations.

- Northampton County – For the 2020 General and 2021 Primary Elections, the county does not know how many ballots had signature or date issues fixed prior to Election Day during the 2020 General or 2021 Primary Elections as it did not keep those ballots separate from other ballots, as there was no guidance on segregation of ballots at the time. In the 2021 Municipal Election, 147 ballots were cured by voters coming into the office. In the 2022 Primary Election, 90 ballots were cured by voters coming into the office.

I. The source of the funding for the notice and cure procedure:

- Beaver County – The procedure was operated during the course of regular office operations with no unique funding source.
- Blair County – The procedure was operated during the course of regular office operations with no unique funding source.
- Lycoming County – Unknown. Plaintiff appears to be asking for a catalogue of all ballots with missing signatures or dates that may have been “cured” over the course of 5 elections. No interim logs were kept to track informal determinations that were necessarily preliminary until formal, final determinations were made during pre-canvassing and canvassing activities. The county would have information about the number of mail ballots that were ultimately set aside during pre-canvassing and canvassing activities, as well as the number of mail ballots that were counted, but no records or count exists of mail ballots that were preliminarily determined to be missing a signature or date, but were subsequently cured prior to the formal, final pre-canvassing or canvassing determinations.
- Northampton County – In the 2020 General, 2021 Primary, 2021 Municipal, and 2022 Primary Elections, the procedure was operated during the course of regular office operations with no unique funding source.

3. Please state whether the county on behalf of which you are responding intends to adopt and/or implement a notice and cure procedure for the 2022 November election:

- Adams County – The Elections Office will continue its policy outlined above.
- Allegheny County – Intends to continue the notice and cure procedures identified in paragraph 1 above.
- Beaver County – The office does not intend to implement a Notice and Cure procedure for the Fall 2022 election.
- Berks County – The office does not intend to implement a Notice and Cure procedure for the Fall 2022 election.
- Blair County – The office already determined prior to the filing of the Complaint and Application not to implement any notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots for the upcoming 2022 general election and, absent a change in the law, Blair County would continue with that position in future elections. Consistent with current statute, Blair County will allow voters who need to provide an ID in order for their mail-in or absentee ballot to count to do the same.
- Bradford County – The office does not intend to implement a Notice and Cure procedure for the Fall 2022 election.
- Bucks County – The Board intends to continue notifying voters regarding missing signatures for the upcoming election.
- Butler County – Has no plan in place to alter its past/current practice.
- Cameron County – Neither the County nor its Election Board intend to adopt and/or implement a Notice and Cure Procedure for the 2022 November election.
- Clarion County – Follows the Election Code and does not use nor intend to use or adopt curing procedures for absentee/mail-in ballots.

- Cumberland County – Has not formally adopted and does not have set plans to formally implement notice and opportunity to cure provisions for absentee and mail-in ballots.
- Delaware County – The Board does not intend to implement a notice and cure procedure.
- Erie County – The Board of Elections is contemplating a procedure which would notify the mail-in/absentee elector of curable defects on the face of the ballot. It may also consider notifying the mail-in/absentee elector of the rejection of their ballots and the necessity of voting in person at their polling district on the day of the election.
- Franklin County – The office does not intend to implement a Notice and Cure procedure for the Fall 2022 election.
- Juniata County – The office has no intention to adopt and/or implement Notice and Cure Procedure for the 2022 November election.
- Lehigh County – Lehigh intends to continue notifying voters regarding outer envelope issues for the upcoming election.
- Luzerne County – In answer, the Board of Elections and Registration refers to its September 16, 2022 Stipulation attached as Exhibit “G” hereto.
- Lycoming County – The current intent is to make preliminary, informal determinations of missing signatures and missing dates during the initial mail ballot receiving process and to provide notice to voters by phone where the voter has a phone number on file.
- Montgomery County – Board of Elections intends to continue notice and cure practice for future elections.
- Northampton County – Intends to provide notice to voters who have an issue with their signature prior to Election Day.
- Snyder County – The Board of Elections does not intend to adopt or implement a notice and cure procedure for the 2022 election.

- Somerset County – The Board of Elections is not implementing notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots.
- Sullivan County – The Board of Elections does not intend to adopt or implement a Notice and Cure Procedure for the 2022 November election.
- Susquehanna County – Follows the Election Code and does not use nor intend to use or adopt curing procedures for absentee/mail-in ballots.
- Wyoming County – The Board of Elections does not intend to adopt or implement a Notice and Cure Procedure for the 2022 November election.

4. If your answer to the preceding question is in the affirmative, please state:

a. Whether the notice and cure procedure will apply to both absentee and mail-in ballots, and if not, to which ballot the notice and cure procedure will apply:

- Allegheny County – The procedure applied to both absentee and mail-in ballots.
- Lehigh County – The notice and cure procedure will apply to both absentee and mail-in ballots.
- Lycoming County – The procedure applied to both absentee and mail-in ballots.
- Northampton County – Plans to resume the prior practice of creating a list of names of voters whose ballots are set aside during the pre-canvass and make that list available to party representatives or candidate representatives who are present on-site. Parties and candidates have an equal opportunity to contact voters about voting by provisional ballot as a result of the set aside of the ballot during the pre-canvass.

b. The specific defect or deficiency for which a notice and cure procedure was adopted and/or implemented:

- Lycoming County – The defect/deficiency that would trigger the procedure was an employee noting an unsigned or undated envelope.
- Northampton County – Since ballots without dates or incorrect dates are to be counted under applicable law, voters who submit ballots that have an issue with the date will not be contacted prior to Election Day. Otherwise, the practice remains the same as the most recent elections.

c. The steps to be taken to determine if an absentee and/or mail-in ballot was defective and/or deficient:

- Lehigh County – Review of the outer envelope upon receipt and security envelope during pre-canvassing.
- Lycoming County – If voter registration staff observed a missing signature and/or missing date on the back of an official ballot return envelope during the receiving process, and if voter registration staff could ascertain a phone number on file on the voter’s registration record, voter registration staff attempted the phone number on file to inform the voter of the missing signature and/or missing date. Determinations of missing signatures and/or missing dates were strictly preliminary, subject to formal, final determinations during the official pre-canvassing and canvassing activities.
- Northampton County – Ballots will be reviewed upon receipt to determine whether or not the envelope was adequately signed and dated as part of being scanned into the SURE system.

d. The time period for determining whether an absentee and/or mail-in ballot is defective:

- Lehigh County – Determined during outer envelope review upon receipt and security envelope during pre-canvassing.
- Lycoming County – Aforementioned preliminary determinations of missing signatures and/or missing dates were made during the

initial mail ballot receiving process, which consisted of dating and time-stamping received ballots, scanning the bar codes on the official return envelopes to log the received ballots into each voter's registration record in the SURE system, and sorting the received ballots for eventual pre-canvassing and canvassing activities.

- Northampton County – Ballots will be reviewed upon receipt.

e. The specific procedure(s) adopted and/or implemented, including but not limited to how notice will be provided to the voter who casts a defective and/or deficient ballot and the cure permitted:

- Lehigh County – The notice process is by email or phone for those voters who have provided that information, and if not and time permits, by letter. Voters are required to come to the office in person to cure the identified issues. If a voter has been notified by the Department of State that their ballot has been canceled, for whatever reason including lack of a secrecy envelope, and calls Lehigh, Lehigh informs the voter that they can go to their polling place and cast a provisional ballot until 8 p.m. on election day. Under the Stipulated Agreement in the Bausch case, E.D. Pa. Dkt. 22-cv-2111, while conducting pre-canvassing, the County will inform voters and party representatives when a ballot is submitted without its secrecy envelope. Lehigh will inform the voter they may cast a provisional ballot. Lehigh will not permit the voter to replace the naked ballot with another ballot. In addition, as part of that stipulation, Lehigh is evaluating whether it is permissible to notify voters and party representatives of possible naked ballots prior to the pre-canvassing, should Lehigh have the ability to identify naked ballots before the outer envelopes are opened.
- Lycoming County – If voter registration staff observed a missing signature and/or missing date on the back of an official ballot return envelope during the receiving process, and if voter registration staff could ascertain a phone number on file on the voter's registration record, voter registration staff attempted the phone number on file to inform the voter of the missing signature and/or missing date. Affected voters who could be reached by phone were offered an opportunity to visit the county voter

registration office in person to provide the missing signature or date, or to be mailed a replacement ballot and the original ballot voided, or were informed that they could vote in-person at their precinct by provisional ballot, which would be counted if their mail ballot was set aside during pre-canvassing and/or canvassing.

- Northampton County – A list of deficient ballots will be provided to party representatives or candidate representatives who are present on site. Parties and candidates have an equal opportunity to contact voters about voting by provisional ballot as a result of the set aside of the ballot during the pre-canvass.

f. The identity of the individual and/or individuals responsible for implementing the Notice and Cure Procedure:

- Lehigh County – Office staff or Department of State provide notice.
- Lycoming County – Forrest Lehman, Director of Elections.
- Northampton County – Party representatives or candidate representatives who are present on site will be responsible for implementing the Notice and Cure Procedure. Parties and candidates have an equal opportunity to contact voters about voting by provisional ballot as a result of the set aside of the ballot during the pre-canvass.

g. The time period for providing notice to a voter that the voter's ballot has been determined to be defective and/or deficient:

- Lehigh County – No specific time period is established, but notice attempt is made before Election Day, if possible, and on pre-canvassing if ballot lacks a security envelope.
- Lycoming County – Notice was attempted during the receiving process.
- Northampton County – The time period for providing notice will be dependent on party representatives or candidate representatives being present on site.

h. The source of funding for the implementation of the proposed Notice and Cure Procedure(s).

- Allegheny County – No unique funding source is utilized.
- Lycoming County – Unknown. Plaintiff appears to be asking for a catalogue of all ballots with missing signatures or dates that may have been “cured” over the course of 5 elections. No interim logs were kept to track informal determinations that were necessarily preliminary until formal, final determinations were made during pre-canvassing and canvassing activities. The county would have information about the number of mail ballots that were ultimately set aside during pre-canvassing and canvassing activities, as well as the number of mail ballots that were counted, but no records or count exists of mail ballots that were preliminarily determined to be missing a signature or date, but were subsequently cured prior to the formal, final pre-canvassing or canvassing determinations.
- Northampton County – No unique funding source is required since the notice procedure will be conducted by party representatives or candidate representatives who are present on site.

Dated: September 20, 2022

STIPULATED AND AGREED TO BY:

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EXHIBIT A

September 12, 2022

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RE: RNC et al. v. Chapman et al.

Dear Counsel:

As you may be aware, on September 9, 2022, the Court entered a Scheduling Order in the above-referenced matter. For reference, a copy of the Scheduling Order is attached. Paragraph 4 of that Order provides:

4. The parties shall file a joint stipulation of facts no later than **12:00 noon on Monday, September 19, 2022**, indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots.

In furtherance of the Court's order, and to streamline the presentation of evidence at the hearing, please provide answers to the following questions no later than September 15, 2022, in order to allow us sufficient time to compile the stipulation and to circulate the same to counsel for review.

1. Please state whether the county on behalf of which you are responding has adopted and/or implemented one or more notice and opportunity to cure procedures with respect to voters' failure to comply with signature and secrecy envelope requirements for absentee or mail-in ballots as set forth in 25 Pa. C.S. §§ 3146.6(a) and 3150.16(a) ("Notice and Cure Procedure") since the enactment of the amendment of Act 77 on October 31, 2019. This request does not apply to those procedures relating to proof of identification as set forth in 25 P.S. § 3146.8(h). If your answer to this question is in the negative, please proceed to question 3.

2. If your answer to the preceding question is in the affirmative, please state for each election from the 2020 Primary election through the 2022 Primary election:
 - a. Whether the Notice and Cure Procedure applied to both absentee and mail-in ballots and if not, to which ballots did the Notice and Cure Procedure apply;
 - b. The specific defect or deficiency for which a Notice and Cure Procedure was adopted and/or implemented;
 - c. The steps taken to determine if an absentee and/or mail-in ballot was defective and/or deficient;
 - d. The time period for determining whether an absentee and/or mail-in ballot was defective;
 - e. The specific procedure(s) adopted and/or implemented, including but not limited to how notice was provided to the voter who had cast a defective and/or deficient ballot and the cure permitted;
 - f. The identity of the individual and/or individuals responsible for implementing the Notice and Cure Procedure;
 - g. The time period for providing notice to a voter that the voter's ballot had been determined to be defective and/or deficient;
 - h. The number of ballots determined to be defective and/or deficient and the reason and/or reasons the ballots were determined to be defective and/or deficient;
 - i. The number of voters to whom notice and the opportunity to cure any such defect and/or deficiency was given;
 - j. To the extent notice and an opportunity to cure was not given to a voter whose ballot was determined to be defective and/or deficient, the reason for the lack of notice to such a voter or voters;

- k. The number of ballots cured and the manner in which such ballots were cured; and
 - l. The source of funding for the Notice and Cure Procedure.
3. Please state whether the county on behalf of which you are responding intends to adopt and/or implement a Notice and Cure Procedure for the 2022 November election.
4. If your answer to the preceding question is in the affirmative, please state:
- a. Whether the notice and cure procedure will apply to both absentee and mail-in ballots and if not, to which ballot the Notice and Cure Procedure will apply;
 - b. The specific defect or deficiency for which a Notice and Cure Procedure was adopted and/or implemented;
 - c. The steps to be taken to determine if an absentee and/or mail-in ballot was defective and/or deficient;
 - d. The time period for determining whether an absentee and/or mail-in ballot is defective;
 - e. The specific procedure(s) adopted and/or implemented, including but not limited to how notice will be provided to the voter who casts a defective and/or deficient ballot and the cure permitted;
 - f. The identity of the individual and/or individuals responsible for implementing the Notice and Cure Procedure;
 - g. The time period for providing notice to a voter that the voter's ballot has been determined to be defective and/or deficient; and
 - h. The source of funding for the implementation of the proposed Notice and Cure Procedure(s).

To save time, we request that you send your responses via email to all counsel for the Petitioners:

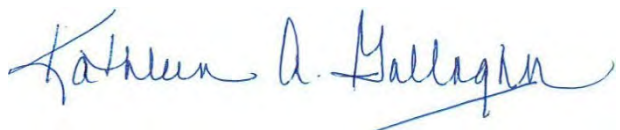
Page 5
September 12, 2022

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We appreciate your timely cooperation in this regard. Please feel free to contact us with any questions.

Very truly yours,



Kathleen A. Gallagher

KAG:jsp

cc: All Respondents who have not entered an appearance in this matter (via Federal Express)

EXHIBIT B

From: [Dupuis, Betsy](#)
To: [Jennifer Pepmeyer](#); [Kathleen Gallagher](#)
Cc: [Jewart, Anna S.](#); [Keegan, Sean](#); [Coyle, Casey A.](#); [Barnes, Jessica](#)
Subject: RE: RNC et al. v. Chapman et al. Stipulation
Date: Friday, September 16, 2022 2:48:35 PM
Attachments: [image.png](#)
[image.png](#)

Counsel:

Babst Calland represents the following parties in the *RNC et al. v. Chapman et al.* matter: Bedford County Board of Elections, Centre County Board of Elections, Columbia County Board of Elections, Dauphin County Board of Elections, Fayette County Board of Elections, Jefferson County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections and York County Board of Elections.

On September 12, 2022, Petitioners requested information from the defendants to compile a Joint Stipulation of Facts. In response to that request, please see the following information on behalf of the preceding counties:

- **Bedford County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Centre County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Columbia County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Dauphin County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Fayette County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Jefferson County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Huntingdon County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Indiana County Board of Elections:** No cure procedures implemented for the 2022 General Election re regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Lawrence County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Northumberland County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Venango County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **York County Board of Elections:** No cure procedures implemented for the 2022

General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

We have not yet received Lebanon County Board of Elections' response to Petitioners' inquiry letter but will supplement with their information once available. Should you have any questions on the foregoing information, do not hesitate to contact me.

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CONFIDENTIALITY NOTICE: This e-mail transmission, and any documents, files or previous e-mail messages attached to it may contain confidential information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, you are hereby notified that any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. If you have received this transmission in error, please immediately notify the sender. Please destroy the original transmission and its attachments without reading or saving in any manner. Thank you, Babst, Calland, Clements & Zomnir, P.C.

From: Jennifer Pepmeyer <jsp@glawfirm.com>
Sent: Friday, September 16, 2022 11:29 AM
To: mmudd@adamscounty.us; gianocsko@alleghenycounty.us; aopsitnick@opsitnickslaw.com; Dupuis, Betsy <BDupuis@babstcalland.com>; Coyle, Casey A. <CCoyle@babstcalland.com>; Jewart. Anna S. <AJewart@babstcalland.com>; Amy M. Fitzpatrick <amfitzpatrick@buckscounty.org>; Daniel D. Grieser <ddgrieser@buckscounty.org>; jvanderkam@stuckertyates.com; wwwhite@co.butler.pa.us; ttalarico@nwpalawyers.com; Catharine M. Roseberry <catharineroseberry@lehighcounty.org>; John A. Marlatt <jmarlatt@montcopa.org>; Maureen E. Calder <mcalder@montcopa.org>; RSantee@northamptoncounty.org; flavery@laverylaw.com; Ryan.Smith@phila.gov; Benjamin.Field@phila.gov; Michael.Pfautz@phila.gov; jdewald@mpvhlaw.com; jpgrimm@vorys.com; Mathews, Lauren L. <llmathews@vorys.com>; mguiddy@co.westmoreland.pa.us
Cc: Kathleen Gallagher <kag@glawfirm.com>; Russell Giancola <rdg@glawfirm.com>; Thomas W King III <tking@dmkcg.com>; tbreth@dmkcg.com
Subject: RNC et al. v. Chapman et al. Stipulation

ATTENTION: Email sent from outside Babst Calland.

Sent on behalf of Kathleen A. Gallagher:

I write in follow up to my letter of September 12, 2022. A copy of that letter is attached for your

convenience. To date, we have not received a response to that letter on behalf of the county you represent. As we stated in our letter of September 12, 2022, given the amount of time it will take to prepare the Court-ordered stipulation, and circulate same for your review and approval, we again ask that you forward the necessary information as soon as possible.

We appreciate your timely response. Please feel free to contact us with any questions.

Kindest regards,
Kathy

Jennifer S. Pepmeyer
Gallagher Giancola LLC
jsp@glawfirm.com
412.717.1900 (Main)
412.717.1901 (Fax)
3100 Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219



EXHIBIT C

From: Melissa Guiddy <MGUIDDY@co.westmoreland.pa.us>

Sent: Friday, September 16, 2022 4:37 PM

To: Kathleen Gallagher <kag@glawfirm.com>; Russell Giancola <rdg@glawfirm.com>;
tbreth@dkmkcg.com; tking@dkmkcg.com

Subject: Fwd: RNC et al v. Chapman et al

Dear Counsel:

In accordance with paragraph 4 of the Commonwealth's Court Order dated September 9, 2022, Westmoreland County has not implemented and does not plan to implement notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots for the November election.

Thank you,

Melissa A. Guiddy, Esquire

Office of County Solicitor

2 North Main Street, Suite 103

Greensburg, PA 15601

Phone: (724) 830-3553

mguiddy@co.westmoreland.pa.us

Call 2-1-1 for Social Services. Help Starts Here.

EXHIBIT D

The County of Chester
 Solicitor's Office
 Colleen Frens (Pa. No. 309604)
 Faith Mattox-Baldini (Pa. No. 323868)
 Nicholas J. Stevens (Pa. No. 322906)
 313 W. Market Street, Suite 6702
 West Chester, PA 19382
 T 610.344.6195, F 610.344.5995
 cfrens@chesco.org
 fmattoxbaldini@chesco.org
 nstevens@chesco.org

Attorneys for Chester County Board of Elections

Republican National Committee, <i>et al.</i> ,	:	In the Commonwealth Court of
	:	Pennsylvania
Petitioners,	:	
	:	Case No. 447 MD 2022
v.	:	
	:	
Leigh M. Chapman, <i>et al.</i> ,	:	
	:	
Respondents.	:	

CHESTER COUNTY BOARD OF ELECTIONS' RESPONSE TO SEPTEMBER 9, 2022 COURT ORDER

Pursuant to the Court's Order, paragraph 4, directing the parties to file a joint stipulation of facts "indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots," the Chester County Board of Elections ("County") responds as follows:

The Board of Elections has not implemented, nor plans to implement, a procedure to notify an elector that their mail-in or absentee ballot envelope fails to comply with the Election Code's requirements and to provide such an elector the opportunity to cure their noncompliant ballot envelope. In the 2022 Primary, the County did allow the political parties to review mail-in and absentee envelopes that failed to comply with the Election Code on election day and contact electors if they chose. The County itself took no affirmative steps to contact the electors, nor does it plan to do so in the future.

The County takes no position regarding other proposed stipulations submitted by other parties.

Dated: September 19, 2022

Respectfully,

/s/ Nicholas J. Stevens
Colleen Frens (Pa. No. 309604)
Faith Mattox-Baldini (Pa. No. 323868)
Nicholas J. Stevens (Pa. No. 322906)
The County of Chester
Solicitor's Office

*Attorneys for Chester County Board of
Elections*

EXHIBIT E

BUCKS COUNTY LAW DEPARTMENT
 Amy M. Fitzpatrick, Esquire
 First Assistant County Solicitor
 Attorney I.D. No. 324672
 Daniel Grieser, Esquire, Asst. County Solicitor
 Attorney I.D. No. 325455
 55 East Court Street, Fifth Floor
 Doylestown, PA 18901

STUCKERT AND YATES
 Jessica L. VanderKam, Esquire
 County I.D. No. 208337
 2 North State Street
 Newtown, PA 18940
Attorneys for Bucks County Board of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE, et. al.	:	
	:	
Petitioners,	:	
	:	Docket No. 447 MD 2022
v.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
Capacity as Acting Secretary of the	:	
Commonwealth of Pennsylvania, et. al.	:	
	:	
Respondents.	:	

BUCKS COUNTY BOARD OF ELECTIONS’ RESPONSE TO SEPTEMBER 9, 2022
COURT ORDER

Pursuant to the Court’s Order, Paragraph 4, directing the parties to file a joint stipulation of facts “indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots,” the Bucks County Board of Elections (“County”) responds as follows:

The Bucks County Board of Elections has utilized notice and cure procedures with respect to voters’ failure to comply with signature requirements for absentee

and mail-in ballots since November 2020. The Board intends to continue notifying voters regarding missing signatures for the upcoming election.

The County takes no position regarding other proposed stipulations submitted by other parties. The County's signature to the Joint Stipulation is solely as to the information provided in this Exhibit Response.

Respectfully submitted,

DATED: September 20, 2022

BUCKS COUNTY LAW DEPARTMENT

BY: /s/ Amy M. Fitzpatrick, Esquire
Amy M. Fitzpatrick, Esquire
First Assistant County Solicitor
Attorney I.D. No. 324672
55 East Court Street, 5th floor
Doylestown, PA 18901
(215) 348-6464

BY: /s/ Daniel D. Grieser, Esquire
Daniel D. Grieser, Esquire
Assistant County Solicitor
Attorney I.D. No. 325445
55 East Court Street, 5th floor
Doylestown, PA 18901
(215) 348-6464

STUCKERT AND YATES

BY: /s/ Jessica L. VanderKam, Esquire
Jessica L. VanderKam, Esquire
Attorney I.D. No. 208337
2 North State Street
Newtown, PA 18940

EXHIBIT F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	447 MD 2022
	:	
Leigh M. Chapman, in her official capacity	:	
as Acting Secretary of the Commonwealth	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

SUBMISSION OF RESPONDENT LUZERNE COUNTY BOARD OF ELECTIONS REGARDING STIPULATED FACTS

Pursuant to the Court's Order directing the parties to file a joint stipulation of facts, Respondent Luzerne County Board of Elections submits the following:

The Luzerne County Board of Elections has implemented a procedure regarding "notice and cure" of defective mail-in ballots since the November Election of 2020. This procedure essentially consists of an Election Day pre-canvass of ballots, with those defective mail-in ballots being identified and set aside. At several points during Election Day, a list of those electors whose mail-in ballots have been identified as defective is provided to the Bureau of Elections and designated representatives of the major political parties (and those other parties for whom contact information has been provided to the Board) who may (or may not) thereafter contact the electors.

The Board takes no position regarding other proposed stipulations submitted by the other parties.

Respectfully submitted,

/s/Joseph M. Cosgrove
Selingo Guagliardo LLC
Attorney I.D. No. 37130
jcosgrove@getyourselfagoodlawyer.com
Attorneys for Appellant
345 Market Street
Kingston, PA 18704
(570) 287-2400

CERTIFICATE OF COMPLIANCE

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.

Respectfully submitted,

/s/Joseph M. Cosgrove
Selingo Guagliardo LLC
Attorney I.D. No. 37130
jcosgrove@getyourselfagoodlawyer.com
Attorneys for Appellant
345 Market Street
Kingston, PA 18704
(570) 287-2400

EXHIBIT G

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, <i>et al.</i> ,	:	
Petitioners,	:	
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, <i>et al.</i> ,	:	
Respondents.	:	
	:	

**RESPONDENT PHILADELPHIA COUNTY BOARD OF ELECTIONS’
RESPONSE TO THE COURT’S ORDER OF SEPTEMBER 9, 2022**

Pursuant to the Court’s Order, paragraph 4, directing the parties to file a joint stipulation of facts “indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots,” the Philadelphia County Board of Elections responds as follows:

Since 2020, the Philadelphia Board of Elections has permitted voters issued “cancelled ballot notifications” due to a missing signature on the declaration envelope, due to a missing secrecy envelope, or due to the ballot being returned to the Board of Elections as “undeliverable” by USPS to vote by provisional ballot on Election Day or request a replacement ballot. In addition, voters who made a mistake on their ballot, such as an inadvertent mark in an oval for a candidate they do not intend to vote for, could request a replacement ballot from the Philadelphia

Board of Elections.

As of this date, the Philadelphia Board of Elections has not published updated voter information regarding cancelled ballots for the 2022 General Election and the Philadelphia Board of Elections practices are subject to change.

The Philadelphia Board of Elections, by submitting this letter, and in the interest of a joint stipulation in compliance with the Court's Order, has included this information by reference and its signature on the joint stipulation. By signing the stipulation, Philadelphia Board of Elections is only jointly stipulating to the information contained in this letter and takes no position at this time as to any other information contained in the joint stipulation.

DATE: September 20, 2022

Respectfully submitted,

BY:



Benjamin H. Field, Chief Deputy City Solicitor

Michael Pfautz, Deputy City Solicitor
Ryan B. Smith, Assistant City Solicitor
City of Philadelphia Law Department
One Parkway Building, 15th Floor
1515 Arch Street
Philadelphia, PA 19102-1595
Phone: (215) 683-5024

Counsel for Respondent Philadelphia Board of Elections

EXHIBIT H

**IN THE COMMONWEALTH COURT OF
PENNSYLVANIA**

Republican National Committee, et al :
Petitioners :
 :
v. :
 :
Leigh M. Chapman, et al :
Respondents : No. 447 M.D. 2022

**SUBMISSION OF RESPONDENT UNION COUNTY BOARD OF
ELECTIONS REGARDING STIPULATED FACTS**

Pursuant to this Court’s Order directing the parties to file a joint stipulation of facts, Respondent Union County Board of Elections, submits the following:

The Union County Board of Elections has implemented a procedure regarding “notice and cure” of defective mail-in ballots since the November Election of 2020. This procedure consists of an Election Day pre-canvass of ballots, with those defective mail-in ballots being identified and set aside. At several points during Election Day, a list of those electors whose mail-in ballots have been identified as defective is provided to the Union County Department of Elections’ staff and designated representatives of the major political parties (and those other parties for whom contact information has been provided to the Board) who may (or may not) thereafter contact the electors. The defective mail-in ballot is taped and posted on the pre-canvassing room of the Board of Elections, pending such opportunity to contact. Additionally, the Union County Department of Elections updates the SURE system accordingly. This procedure has been followed since receiving the direction from the Pennsylvania Department of State, via e-mail, on November 2, 2020 regarding such mail-in ballots.

The Board takes no position regarding other proposed stipulations submitted by the other parties.

McNERNEY, PAGE, VANDERLIN & HALL

By: /s/ Jonathan L. DeWald
Jonathan L. DeWald, Esquire
I.D. No. 314791
jdewald@mpvhlaw.com
Attorney for Respondent, Union
County Board of Elections
433 Market Street
Williamsport, PA 17701
Telephone: 570-326-6555
Facsimile: 570-326-3170

Dated: September 19, 2022

CERTIFICATES OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that a true and correct copy of the foregoing Praecipe to Enter Appearance, which document 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, was filed electronically and served via the Court's PAC File system, pursuant to the Pennsylvania Rules of Civil Procedure.

McNERNEY, PAGE, VANDERLIN & HALL

By: /s/ Jonathan L. DeWald
Jonathan L. DeWald, Esquire
I.D. No. 314791
jdewald@mpvhlaw.com
Attorney for Respondent, Union
County Board of Elections

433 Market Street
Williamsport, Pennsylvania 17701
Telephone: 570-326-6555
Facsimile: 570-326-3170

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**REPUBLICAN NATIONAL COMMITTEE, et
al.**

CASE NO: 447 MD 2022

v.

CHAPMAN, et al.

**OPPOSITION OF RESPONDENT DELAWARE COUNTY BOARD OF ELECTIONS
TO PETITIONERS’ APPLICATION FOR LEAVE TO FILE REPLY**

Respondent Delaware County Board of Elections (“Board”) Answer to Petitioners’ Application for Leave to File Reply in Support of Application Special Relief in the Form of a Preliminary Injunction (“Application for Leave”) and responds as follows:

PRELIMINARY STATEMENT

Petitioners’ request for leave to reply should be denied because 1) the argument that the Petitioners will not succeed on the merits of their action due, in part, to laches is not New Matter and is instead more appropriately decided under the standard set forth in *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc.*, 828 A.2d 995, 1001 (Pa. 2003); and 2) the requested relief denies the Board, and other Respondents, appropriate time to prepare responses to any new issues raised.

As an initial matter, Petitioners’ argument concerning the doctrine of laches misreads the Board’s Answer and uses this misreading as a basis to request additional briefing. Petitioners have filed two papers: a Petition for Review (“Petition”) and an Application for Emergency Relief (“Application”), which seeks a preliminary injunction while the underlying Petition for Review is pending. Petitioners are correct that their underlying Petition, governed by Pa. R.A.P.

1513, is subject to the rules of pleading according to the Pennsylvania Rules of Civil Procedure. *See* Pa. R.A.P. 1517. Their Application, however, is brought under Pa. R.A.P. 1532. Pa. R.A.P. 1532 provides that this Court may enter an injunction “on application.” That application, here the Application, is not subject to the same rules of pleading as the Petition for Review filed under Pa. R.A.P. 1513. Instead, applications made under Rule 1532 “are considered under the general standards governing those motions.” *Johnson v. Wetzel*, 271 A.3d 547 (Pa. Cmwlth. 2021). A motion for a preliminary injunction, unless included within a Complaint (which is not the case here), is not a pleading authorized by Pa. R.C.P. 1017, such that defenses are required to be pled as New Matter under Pa. R.C.P. 1030.¹

Here, the Board does not raise laches as an affirmative defense to the Application. Rather, the Board argues that Petitioners are not entitled to an injunction because they will not succeed on the merits of their Petition for a number of reasons, including that the Petition is barred by laches. Both Petitioners and the Board rely on the test for injunctions set forth in *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646–47, 828 A.2d 995, 1001 (Pa. 2003), which says that the party seeking an injunction “must show that it is likely to prevail on the merits.” In Paragraphs 11 through 17 of their Application, the Petitioners argue that they are entitled to injunctive relief, in part, because they are likely to succeed on the merits. *See, e.g.*, Application at ¶ 15. The Board asserted in response that, under *Summit Towne Center*, Petitioners are unlikely to succeed on the merits of the Petition, in part because the action is

¹ Pa. R.C.P. 1531, governing injunctions, does not provide for a specific form of application for a preliminary injunction or an answer/opposition. Moreover, while Petitioners request injunctive relief in Count III of their Petition for Review (subject to the rules of pleading under Pa. R.C.P. 1017 and 1030), their Application for Emergency Relief is an entirely separate filing seeking emergency injunctive relief, presumably before this Court rules on the injunction request in the underlying Petition. If Petitioners contend that their Application for Emergency Relief constitutes a Petition, *see* Pa. R.C.P. 206.1, any Answer is governed by Pa. R.C.P. 206.2 which does not call for the assertion of New Matter as a defense but instead only requires that respondents “state the material facts which constitute the defense to the petition.”

barred by laches. *See* Answer of Delaware Board of Elections at ¶¶ 11, 15. The laches argument is thus not an affirmative defense to the Application. Instead, it is part of an argument that Petitioners will not satisfy the fourth prong of *Summit Towne Center*, and that this Court should deny injunctive relief accordingly.

Additionally, Petitioners’ requested relief – filing a reply brief on Sunday, September 25th to respond to issues raised by the parties in their Answers – does not provide the Board and other Respondents sufficient time to brief any new arguments raised by Petitioners ahead of the hearing currently scheduled for September 28th.

Petitioners’ arguments in their Application need only be construed under the *Summit Towne Center* test. Yet in their Application for Leave to File Reply, Petitioners request relief to respond to the Board’s answer with “reasonable time to assess any new issues that may be introduced.” *See* Application for Leave to Reply at ¶ 16. If new issues may be introduced, it is unfair to allow only Petitioners to raise and brief them without affording the Board and other Respondents the opportunity to defend their positions and respond to new arguments. Accordingly, the Board respectfully requests that the Application for Leave to Reply be denied. In the event that this Court does grant the Application for Leave to Reply, the Board respectfully requests that it, any other Respondents who wish to participate, be afforded a brief surreply of 5 pages to be submitted by 5:00 p.m. on Monday, September 26th.

RESPONSE TO APPLICATION FOR LEAVE TO FILE REPLY

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted in part, denied in part. It is admitted that this Court granted the Board's Application for Relief allowing it to respond to the Application. All other allegations are denied as stated. Further, this Paragraph refers to a writing, which speaks for itself, and any characterization thereof is denied.

9. This Paragraph is directed to a party other than the Board and, as such, no response is required.

10. This Paragraph is directed to a party other than the Board and, as such, no response is required.

11. Denied. This Paragraph contains conclusions of law to which no response is required.

12. Denied. This Paragraph contains conclusions of law to which no response is required.

13. Denied. Further, this Paragraph contains conclusions of law to which no response is required.

14. Denied. Further, this Paragraph contains conclusions of law to which no response is required.

15. Denied.

16. Denied. By way of further response, this Application should be decided under the proper standard set forth in *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 573 Pa. 637, 646–47, 828 A.2d 995, 1001 (2003) which requires no further briefing.

17. Denied. This Paragraph purports to request the relief sought in the Application and no response is required thereto. Further, this Paragraph contains conclusions of law to which no response is required. To the extent this Paragraph contains allegations of fact directed to the Board, they are denied.

18. Denied.

Dated: September 21, 2022

Respectfully submitted,

/s/ Nicholas M. Centrella, Jr.

J. Manly Parks (74647)

Nicholas M. Centrella, Jr. (326127)

30 South 17th Street

Philadelphia, PA 19103

Tel.: (215) 979-1000

JMParks@duanemorris.com

NMCentrella@duanemorris.com

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. :

No. 447 M.D. 2022

Leigh M. Chapman, in her 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 :
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Elections; Clarion County Board of :
Elections; Clearfield County Board of :
Elections; Clinton County Board of :
Elections; Columbia County Board of :

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Elections; Cumberland County Board :
of Elections; Dauphin County Board of :
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Elections; Forest County Board of :
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of Elections; Indiana County Board of :
Elections; Jefferson County Board of :
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of Elections; Lancaster County Board :
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of Elections; Lehigh County Board of :
Elections; Luzerne County Board of :
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Elections; McKean County Board of :
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Elections; Mifflin County Board of :
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of Elections; Montour County Board of :
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of Elections; Northumberland County :
Board of Elections; Perry County :
Board of Elections; Philadelphia County :
Board of Elections; Pike County Board :
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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 :
Elections; Westmoreland County Board :
of Elections; Wyoming County Board of:
Elections; and York County Board of :
Elections, :
Respondents :

ORDER

AND NOW, this 22nd day of September 2022, upon consideration of the Applications for Leave to Intervene filed by the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and DCCC), and the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP) (collectively, Applications to Intervene), and following a status conference during which the parties agreed there is no objection to the proposed intervention, the Applications to Intervene are GRANTED.

The Court directs the Prothonotary to enter DSCC, DCCC, DNC, and PDP (collectively, Intervenors) on the docket in this matter as Intervenor-Respondents. The Prothonotary is further directed to docket DSCC and DCCC's and DNC and PDP's preliminary objections, which are attached to the respective Applications to Intervene.

It is further ORDERED as follows:

1. The hearing on Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 (Application for Preliminary Injunction), scheduled for Wednesday, September 28, 2022, at 10:00 a.m., in Courtroom 3001, Third Floor, Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, is CANCELLED.
2. The parties and Intervenors shall file and serve briefs (4 copies) **no later than 5:00 p.m. on Monday, September 26, 2022**, which shall address

laches as a potential bar to the relief requested in the Application for Preliminary Injunction, and **any remaining arguments pertaining to the six preliminary injunction criteria.**

3. The parties and Intervenors shall also file a joint stipulation of exhibits **no later than 5:00 p.m. on Monday, September 26, 2022.**

4. As discussed at the status conference held on this date, and there being no objection thereto, the Court will rule on the Application for Preliminary Injunction on the papers following the Court's receipt of the above briefs and joint stipulation of exhibits, unless otherwise ordered.



ELLEN CEISLER, Judge

Order Exit
09/22/2022

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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.

No. 447 MD 2022

Leigh M. Chapman, in her 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 Elections; :
Cumberland County Board of Elections; :
Dauphin County Board of Elections; :
Delaware County Board of Elections; :
Elk County Board of 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; :

1 Huntingdon County Board of Elections; :
 Indiana County Board of Elections; :
 2 Jefferson County Board of Elections; :
 Juniata County Board of Elections; :
 3 Lackawanna County Board of Elections; :
 Lancaster County Board of Elections; :
 4 Lawrence County Board of Elections; :
 Lebanon County Board of Elections; :
 5 Lehigh County Board of Elections; :
 Luzerne County Board of Elections; :
 6 Lycoming County Board of Elections; :
 McKean County Board of Elections; :
 7 Mercer County Board of Elections; :
 Mifflin County Board of Elections; :
 8 Monroe County Board of Elections; :
 Montgomery County Board of Elections; :
 9 Montour County Board of Elections; :
 Northampton County Board of Elections; :
 10 Northumberland County Board of Elections; :
 Perry County Board of Elections; :
 11 Philadelphia County Board of Elections; :
 Pike County Board of Elections; :
 12 Potter County Board of Elections; :
 Schuylkill County Board of Elections; :
 13 Snyder County Board of Elections; :
 Somerset County Board of Elections; :
 14 Sullivan County Board of Elections; :
 Susquehanna County Board of Elections; :
 15 Tioga County Board of Elections; :
 Union County Board of Elections; :
 16 Venango County Board of Elections; :
 Warren County Board of Elections; :
 17 Wayne County Board of Elections; :
 Westmoreland County Board of Elections; :
 18 Wyoming County Board of Elections; and :
 York County Board of Elections; :
 19 Respondents :

20
21

22 TRANSCRIPT OF PROCEEDINGS

23 Before: THE HONORABLE ELLEN CEISLER, Judge
 24 Date: September 22, 2022, 10:03 a.m.
 25 Place: Proceedings held via videoconference

1 APPEARANCES:

2 Kathleen A. Gallagher, Esquire
3 Thomas W. King, III, Esquire
4 For - Petitioners

5 Robert A. Wiygul, Esquire
6 For - Leigh M. Chapman, in her official
7 capacity as Acting Secretary of the
8 Commonwealth; and Jessica Mathis, in her
9 official capacity as Director of the
10 Pennsylvania Bureau of Election Services and
11 Notaries, Respondents

12 George M. Janocsko, Esquire
13 Lisa G. Michel, Esquire
14 For - Allegheny County Board of Elections,
15 Respondent

16 Cody L. Kauffman, Esquire
17 For - Berks County Board of Elections,
18 Respondent

19 Anna S. Jewart, Esquire
20 For - Bedford County Board of Elections,
21 Centre County Board of Elections, Columbia
22 County Board of Elections, Dauphin County Board
23 of Elections, Fayette County Board of
24 Elections, Jefferson County Board of Elections,
25 Huntingdon County Board of Elections, Indiana
County Board of Elections, Lawrence County
Board of Elections, Lebanon County Board of
Elections, Northumberland County Board of
Elections, Venango County Board of Elections,
and York County Board of Elections, Respondents

Amy M. Fitzpatrick, Esquire
Daniel D. Grieser, Esquire
For - Bucks County Board of Elections,
Respondent

Faith A. Mattox-Baldini, Esquire
Nicholas J. Stevens, Esquire
For - Chester County Board of Elections,
Respondent

Nicholas M. Centrella, Jr., Esquire
For - Delaware County Board of Elections,
Respondent

1 APPEARANCES (cont'd):

2 Catharine M. Roseberry, Esquire
3 For - Lehigh County Board of Elections,
4 Respondent

5 Joseph M. Cosgrove, Esquire
6 For - Luzerne County Board of Elections,
7 Respondent

8 Maureen E. Herron, Esquire
9 For - Montgomery County Board of Elections,
10 Respondent

11 Michael J. Vargo, Esquire
12 For - Northampton County Board of Elections,
13 Respondent

14 Benjamin H. Field, Esquire
15 For - Philadelphia County Board of Elections,
16 Respondent

17 Adam C. Bonin, Esquire
18 Alexander F. Atkins, Esquire (pro hac vice)
19 Daniela Lorenzo, Esquire (pro hac vice)
20 Uzoma N. Nkwonta, Esquire (pro hac vice)
21 For - Democratic Senatorial Campaign Committee
22 and Democratic Congressional Campaign
23 Committee, Possible Intervenors-Respondents

24 Kevin M. Greenberg, Esquire
25 For - Pennsylvania Democratic Party,
Possible Intervenor-Respondent

Clifford B. Levine, Esquire
For - Democratic National Committee and
Pennsylvania Democratic Party, Possible
Intervenors-Respondents

26 ALSO PRESENT:

27 Scott Jones, Information Technology Specialist
28 Daniel S. Volchok, Esquire
29 Seth P. Waxman, Esquire
30 Molly E. Zarefoss, Staff Attorney

1 THE COURT: All right. Can I -- can anyone hear
2 me?

3 MR. JONES: Yes, Judge. I can hear you fine.

4 THE COURT: Okay. Thanks. Thanks, Scott.

5 MR. JONES: Of course.

6 THE COURT: Oh, so where am I?

7 Anyway, needless to say, hi, everyone. For those
8 of you who don't know me, I'm Judge Ellen Ceisler, and I've
9 been assigned to this injunction matter. And I appreciate
10 you all being here and being on time.

11 So let me lay out how this is going to go today.
12 We are here today; it was scheduled as a status conference on
13 the petitioners' application for special relief in the form
14 of a preliminary injunction regarding prohibiting county
15 election boards from using notice -- notice and cure
16 procedures related to defective e-mail -- mail-in and
17 absentee ballots.

18 The petitioners in this case are the Republican
19 National Committee, the National Republican Senatorial
20 Committee, the National Republican Congressional Committee,
21 the Republican Party of Pennsylvania, and a number of
22 individual voters.

23 The petitioners in this case are Leigh Chapman, in
24 her official capacity as the Acting Secretary of the
25 Commonwealth; Jessica Mathis, in her official capacity as

1 Director of the Pennsylvania Bureau of Election Services and
2 Notaries; as well as the Board of Elections for all the
3 election boards in Pennsylvania.

4 So let me first start off with some ground rules
5 because this seems daunting, but I think I've come up with
6 some procedures to help us get through all of this pretty
7 quickly.

8 First of all, can everybody hear me okay? Just --
9 all right.

10 All right. So the first thing is definitely keep
11 your -- your microphones off. If -- do not have YouTube on
12 while you have this going because it creates a lot of static.
13 So make sure you don't have any kind of YouTube because this
14 is being live streamed right now.

15 Also, please remember we do have a stenographer
16 here today and every time somebody speaks you need to give
17 your name and who your client is. You have all been put on a
18 list as to your participation here when you signed in with
19 our IT person, so there will be a formal list of all the
20 participants. But with so many people I think it's -- it's
21 imperative for our stenographer that you each time give your
22 name and your -- and who your client is.

23 So when I got assigned this case, we originally
24 sent out a -- an order which directed certain filings in
25 terms of stipulations and answers, and we scheduled this

1 hearing -- this conference today in order to kind of get a
2 framework on how a potential injunction hearing would go.

3 And after spending a lot of time on this case this
4 past week, I started to question the necessity for an
5 evidentiary hearing. I believe that -- and I haven't made
6 any decisions yet. It's going to depend on -- on how we --
7 how we go today, but my feeling is that particularly in light
8 of the -- the joint stipulations of fact -- and I want to
9 thank Ms. Gallagher for that excellent idea of the
10 questionnaire. And it was very, very helpful.

11 So I don't see you right now.

12 At this point, my screen is only going to include
13 me and whoever is speaking so that I'm not distracted.

14 There we go.

15 Anyway, Ms. Gallagher, thank you for that.

16 I just -- I'm of the opinion because we have top
17 attorneys here -- and you have all done an amazing job in
18 your memorandums and your briefs, and I think that the folks
19 here have a very good handle on the legal issues that we face
20 today. And I think that the joint stipulation and some of
21 the exhibits that have been sent to me are, you know, very
22 helpful. So as we go through today, I want you to keep in
23 mind that there might not be any factual issues left for us
24 to decide, and so there might not be another hearing.

25 And for that reason, I decided at this point that

1 in the interest of transparency and creating a good record
2 just in case, I did decide to live stream this status
3 conference. I never live stream status conferences, but I
4 felt it was important in this situation. And I also brought
5 a stenographer on to create a record because as you all know,
6 time is absolutely of the essence here. We have absentee and
7 mail-in ballots being sent out already.

8 And I was not able to schedule a hearing earlier
9 than next Wednesday because we needed to give all the parties
10 time to get the stipulations and the responses. And next
11 Monday is a High Holy Day in the Jewish tradition, so a lot
12 of folks wouldn't be available that day. There's a lot of
13 travelling on Tuesday. So I think Wednesday was the earliest
14 that we could schedule a hearing.

15 And then, you know, I don't know what the outcome
16 will be, and I don't know -- but I suspect, strongly suspect
17 that whenever the decision is made, either party, one or the
18 other, or both would appeal to the Supreme Court. And in
19 light of the -- how -- how important this is and how I
20 believe that all of our board of elections and our Secretary
21 of State and everybody, you know, would need guidance on how
22 to proceed, that maybe we could resolve this during the day,
23 during today. I'm not going to make a decision, though.

24 So with that in mind, let me tell you how we're
25 going to move through this today. And this is how I think

1 we're going to be able to limit the number of attorneys who
2 have to -- who have to actually speak. The first thing we're
3 going to do is we're going to deal with the petitions to
4 intervene because that's going to determine -- hold on a sec;
5 okay -- that's going to determine who the attorneys are that
6 will be arguing through this conference today.

7 So basically we have two petitions to intervene.
8 It's the application to intervene of the Democratic Party's
9 National Senatorial Committee and the Democratic Party's
10 National Democratic Congressional Campaign Committee. And
11 the attorneys for these petitioners are counsel Adam Bonin,
12 Timothy Ford, Claire Blewitt Ghormoz. I think there were
13 some pro hac vice yesterday that were -- I -- I said --

14 MR. BONIN: That's correct, Your Honor.

15 THE COURT: -- it was fine.

16 Do -- can -- can somebody speak for -- one person
17 in terms of these petitions to intervene, one attorney for
18 all of you?

19 MR. BONIN: Yes, Judge. This -- this is Adam Bonin
20 on behalf of the proposed intervenors. And my colleague
21 Uzoma Nkwonta would like to speak to our petition to
22 intervene.

23 THE COURT: Oh, so not you then?

24 MR. BONIN: Not me.

25 THE COURT: Okay.

1 So then we also have the petition to intervene for
2 the respondents the Democratic National Committee and the
3 Pennsylvania Democratic Party. Counsel for these parties are
4 Clifford Levine, Emma Shoucair, Kevin Greenberg, Adam
5 Roseman, Lazar Palnick.

6 Is there one of you attorneys who can speak on
7 behalf of -- of this petition so we don't have all these
8 attorneys making the same arguments?

9 MR. LEVINE: Yes, Your Honor. This is Clifford
10 Levine. I will be speaking on behalf of the DNC and the
11 State Party.

12 THE COURT: Okay. Thank you.

13 And the only objections to these two petitions were
14 the respondents'.

15 So which counsel for the respondents can address
16 the petitions to intervene?

17 MS. GALLAGHER: Good morning, Your Honor. This is
18 Kathleen Gallagher.

19 THE COURT: Ms. Gallagher.

20 MS. GALLAGHER: And I will be addressing those.

21 If it is helpful to the Court, Mr. Levine and
22 Mr. King and I spoke earlier this week with respect to this
23 issue. And I just want to make it clear that our objections
24 to the petition as were set forth really go to speed and the
25 ability and an attempt potentially for just things that the

1 Court has just pointed out to have the issue proceed more
2 rapidly, right. And if we could have -- if -- they were not,
3 as is set forth in our papers. They really go to timeliness,
4 and not slowing the process down --

5 THE COURT: Okay.

6 MS. GALLAGHER: -- was our sole objection.

7 THE COURT: That's what I thought because I feel
8 that you would be hard-pressed to make a case --

9 MS. GALLAGHER: Correct.

10 THE COURT: So now that you understand how we're on
11 a rocket docket here, do you have any objections to these
12 petitions to intervene? Did the respondent --

13 MS. GALLAGHER: No, ma'am.

14 THE COURT: -- have any petitions to these
15 petitions to intervene?

16 MS. GALLAGHER: I'm sorry; I couldn't hear you.

17 THE COURT: Do the petitioners have any objections
18 then, knowing how this is going?

19 MS. GALLAGHER: No, ma'am.

20 THE COURT: Okay. So the petitions to intervene,
21 both petitions are granted. So that's good.

22 All right. Now I think it's important -- the next
23 issue I think we need to address is the laches issue. And
24 I'm wondering, you know, who -- who would want to speak on
25 behalf of that.

1 We -- I have to say that in my -- I think everybody
2 did an excellent job here, but I think that the most in-depth
3 analysis by the respondents in this case was done by the --
4 the intervenors. So I personally think that the intervenors
5 should -- should address the issues of laches and -- and the
6 other issues.

7 We have a lot of attorneys here that are
8 representing counties, and we might have to reach out to
9 those individual attorneys. But do the petitioners and the
10 intervenors have any objections to being the lead counsel in
11 starting to deal with the laches issue and then get into the
12 -- the actual injunction issues?

13 So, Mr. Levine, Mr. Bonin, Ms. Gallagher, who --
14 now that you know this is how we're going to do it -- we're
15 going to deal with laches. And then we're going to go into
16 -- I'm going to make it easy; we're just going to go into the
17 injunction requirements starting with 1, 2, 3, 4, 5, and 6.
18 And then I'm going to ask you both to make your arguments.

19 And to the extent that you need to introduce any
20 exhibits or refer to any exhibits, let us know because we
21 will at some point -- I don't know how quite yet -- enter
22 them into the record if we decide that this is the absolute
23 -- like, that we're not going to have any further hearings.
24 There might be -- if -- if there's a hearing necessary, if
25 there's additional briefing necessary.

1 But I certainly believe that the joint stipulation
2 of facts will need to be moved in. There's some e-mails.
3 There's -- there's not too much in the record which is why I
4 believe that a lot of this is -- is based on the law, taking
5 these facts and these stipulations and applying it to the law
6 which is the more complicated part, I think.

7 So, Mr. Levine -- is it Mr. Levine, Mr. Levine?

8 MR. LEVINE: Levine. Thank you, Your Honor.
9 Levine.

10 And I can start, although my colleagues from the --
11 the Democratic Congressional and Senate Campaign Committees
12 I'm sure will have something to offer here. But I would just
13 like to state --

14 THE COURT: Let me just say, Mr. Levine, I'm not
15 giving exact time requirements on anybody here, but I think
16 everybody needs to understand that I have absolutely read all
17 the pleadings, the briefs, the memorandums. I've read the
18 law. I've read the Election Code. I've read the joint
19 stipulation. So I really have a very clear understanding of
20 the law as it relates to all this and the facts.

21 So to the extent that you folks start to repeat
22 yourself or take too long, I'm going to stop you. Okay? So
23 I think it's important you understand that you need to stick
24 to the most important, salient facts. And then if any other
25 counsel feels that -- like, Mr. Bonin feels we missed

1 something, you can jump in. Okay?

2 MR. LEVINE: Thank you. Thank you, Your Honor.

3 THE COURT: All right.

4 MR. LEVINE: I actually think many of the counsel
5 participating in this conference were involved in the 2020
6 election. And I think we can go immediately to -- there was
7 the -- really kind of a -- almost a famous case at this
8 point, and that was the case where Rudy Giuliani showed up at
9 the Middle District courtroom in front of Judge Brann in
10 federal district court. And the issue there was that the
11 Trump Campaign was trying to disqualify certain votes after
12 the election.

13 And what's notable in that opinion is that Judge
14 Brann -- and I'm reading at page 907; Judge Brann is pointing
15 out the *Democratic Party versus Boockvar* case. That was the
16 case, of course, that the petitioners here rely upon in terms
17 of making the argument that there's no notice and cure.

18 And he specifically says that -- the Court -- and
19 the federal court says -- points out that the *Boockvar* did
20 not hold that any of these notice and cure provisions were
21 forbidden.

22 And then the Court again on page 907 is citing the
23 fact that counties --

24 THE COURT: What does this have to do with the
25 laches defense?

1 MR. LEVINE: Because -- because it was clear that
2 the Court was considering the question of -- it was clear as
3 day that -- that counties were undertaking a notice and cure.
4 There was a discussion that was being raised about whether
5 that somehow violated equal protection, whether that was
6 inappropriate.

7 Tom King, who is one of the counsel for the
8 petitioners, a friend of mine, Tom King was counsel for the
9 Trump Campaign. So the notion that everybody didn't know as
10 of November of 2020 that there were notice of cure issues.
11 And Judge Brann in that case and was subsequently -- and he
12 was subsequently --

13 THE COURT: All right. So let's just get to the
14 facts here. In this case, your -- the argument is that
15 they've known about this cure and notice but they didn't
16 actually file their petition for relief until when was it,
17 September?

18 MR. LEVINE: Two years later.

19 THE COURT: Okay. So tell me, how -- how has
20 anyone been prejudiced by this?

21 MR. LEVINE: Well, it's a significant prejudice
22 because the -- the election is scheduled this year for
23 November 8th, but, of course, with mail-in voting, the
24 mail-in voting process actually is starting now or next week
25 as counties are finalizing their ballot. So we're right now

1 in the season. So if we were to have an injunction hearing
2 next week, we're already starting to have mail-in votings.

3 The Democratic Party as have many of the candidates
4 represented really on both sides have made a tremendous
5 effort to notify voters as to what the requirements are so as
6 to not have votes disqualified. So there's a lot of
7 communication right now in the midst of the election. And so
8 here's something that's been going --

9 THE COURT: So how --

10 MR. LEVINE: -- on for two years.

11 THE COURT: How do you address the fact that the --
12 the Department of State by their own words and their website
13 as of yesterday said, If you don't take care of this and fill
14 it out as -- as you're required to do, your votes will not be
15 counted? So what is the prejudice when that is the position
16 of the Department of State at this point and the Secretary?

17 MR. LEVINE: Well, because I think that the -- the
18 parties and the candidates themselves actually have an
19 additional layer of notification. Obviously not a lot -- not
20 every voter is following the Secretary of State's website.
21 So let me give you an example, Your Honor.

22 In the *Boockvar* case, the Pennsylvania Supreme
23 Court ruled that if -- if a voter did not include the secrecy
24 ballot, the vote would not count. And there was actually a
25 whole campaign about naked ballots and people -- there were

1 television ads and notifications so that the public as a
2 whole could understand how to better fill out the ballot.
3 And that process began immediately in terms of providing that
4 sort of notification. There's been tremendous education that
5 -- that goes on in terms of notifying voters as to what they
6 need to do and how they can comply.

7 So here we are in the season. And as Your Honor
8 pointed out, if there's -- whatever the outcome, there could
9 potentially be an appeal to the state supreme court. So this
10 could be going into mid October when the bulk of the votes
11 are coming in with -- with a lot of uncertainty.

12 Plus we don't want voters -- it's also really
13 important, I think, that voters not question whether their
14 mail-in vote is going to count. So as long as there's this
15 pending litigation, there also might be this concern that
16 maybe I should not vote by mail; is there a better -- you
17 know, you effectively negate a whole aspect of the voting --

18 THE COURT: All right. Well -- all right. Well,
19 counsel, then, you know, part of this has to -- you have to
20 look at what, if any -- if the petitioners in this case
21 didn't exercise due diligence in -- in bringing this action
22 in light of the fact that these cure -- these notice and cure
23 policies and practices were in effect two years ago.

24 But I think that fails to take into account, A, the
25 efforts by the Legislature to impose or pass laws that have

1 cure and defect which was vetoed by the Governor. I don't
2 think it takes into account the negotiations that the parties
3 have had in trying to come up with some kind of resolution.

4 And also from what I understand in the record, both
5 in June and as close as September in an e-mail there was now,
6 you know, federal courts providing guidelines about cure and
7 defect that -- very recently that might not be proper under
8 some of the case law.

9 So how can you argue that they have been -- not
10 exercised due diligence in this? That's what I think we're
11 down on the -- the key to this.

12 MR. LEVINE: Okay. Thank you. So let me just
13 address that.

14 The -- I don't think it's reasonable for a party to
15 wait for legislation to pass. In other words, if there was a
16 concern about interpretation of a statute, one can go and
17 file a lawsuit. But even if you waited until Governor Wolf
18 vetoed the bill, that was in June of nine- -- of 2021. So
19 that's --

20 THE COURT: That was 2021 --

21 MR. LEVINE: -- over a year ago.

22 THE COURT: -- counsel? That was 2021?

23 MR. LEVINE: Yes. So he -- he vetoed that effort.
24 And -- and they waited for -- for that time.

25 In terms of the recent litigation in federal court,

1 that really involved the question of, If a voter doesn't
2 include the date, is that material? And what the Third
3 Circuit said was that it would violate the Civil Rights Act
4 if you did not count a vote because you know when the vote
5 arrived.

6 That really doesn't address the issue if there are
7 other alleged defects; if somebody doesn't print their name,
8 if there were some other problems, can the voter cure the
9 vote?

10 And I think this really goes to the heart of --
11 it's just noteworthy in this particular case that there's a
12 complaint here that some counties are doing things
13 differently but the -- this was the issue -- there was an
14 equal protection issue two years ago that Judge Brann
15 disposed of.

16 He said there's no equal protection and pointed
17 out, as has the Pennsylvania Supreme Court, that the *League*
18 *of Women Voters* case is actually encouraging votes --
19 voters -- not only they have the right to vote but they have
20 the -- the vote count. And Judge Brann specifically says
21 that, cites the famous case *Reynolds versus Sims*. You not
22 only have a right to rote but have a right that your vote
23 count.

24 And so we've now -- counties have a system. As the
25 Pennsylvania Supreme Court has indicated in the *Boockvar*

1 case, there is some flexibility. And our system allows for
2 that flexibility. There's specific statutory authority --

3 THE COURT: All right. We're getting --

4 MR. LEVINE: -- for counties to do this. So,
5 therefore --

6 THE COURT: We're getting off of -- we're getting
7 more into the merits. We're getting more into the merits
8 right now.

9 Mr. Bonin, did you want to add anything to this
10 argument before we let the respondents or any of your
11 counsel, any of your pro hac vice counsel want to intervene
12 or -- but let's just give all of you a chance to address the
13 laches argument.

14 MR. NKWONTA: Good morning, Your Honor. My name is
15 Uzoma Nkwonta on behalf of intervenors DSCC and D triple C.

16 THE COURT: Are you pro hac vice --

17 MR. NKWONTA: Your Honor, I just want to touch on
18 a --

19 THE COURT: Are you pro hac vice, sir?

20 MR. NKWONTA: Yes, Your Honor.

21 THE COURT: Welcome to Philadelphia.

22 MR. NKWONTA: Thank you.

23 I just want to --

24 THE COURT: At least that's where I am now anyway.

25 Okay.

1 MR. NKWONTA: Picking up on what Mr. Levine
2 mentioned, I wanted to highlight a couple of additional
3 points with respect to the two factors at issue here when
4 discussing laches.

5 The first point is the petitioners' lack of
6 diligence, right. So the -- the test for diligence according
7 to the Supreme Court, the Pennsylvania Supreme Court is not
8 what a party knows per se but what they might have known and
9 what information was in that party's reach and what
10 information they could have discovered with the exercise of
11 any type of diligence.

12 Now you've already heard from Mr. Levine that the
13 -- the RNC's candidate sued over these very practices in
14 2020. You've also heard both from Mr. Levine and from
15 petitioners' reply brief that there was some attempt to try
16 to amend these -- these -- or try to amend the law to -- to
17 eliminate these procedures or standardize these procedures
18 that failed in June 2021. So there is ample evidence here
19 that -- that these petitioners had notice or should have had
20 notice at least two years ago or at least June 2021.

21 And I'd like to point out that -- a case that we
22 cited in our filings, *Kelly v. Commonwealth*, which dismissed
23 petitioners' claims for -- for -- on laches grounds because
24 petitioners waited for over a year before challenging Act 77.
25 And that decision came down in -- I believe in November of

1 2020.

2 Well, the time span between the passage of Act 77
3 and the decision in *Kelly v. Commonwealth* in which the Court
4 found that petitioners were too late and applied laches, that
5 time span is shorter --

6 THE COURT: What was the issue in that case?

7 MR. NKWONTA: In -- in that case, the petitioners
8 sought to eliminate mail-in voting, and they challenged the
9 constitutionality of mail-in voting. And the Pennsylvania
10 Supreme --

11 THE COURT: All right. Well, you know, now -- now
12 we're in the thick of trying to see how mail-in -- this is --
13 this is an extraordinary change, and, you know, we're working
14 out the kinks.

15 So in the -- in the mail-in ballots, the no excuse
16 mail-in ballots, everyone is kind of trying to address how to
17 deal with it. So I don't think *Kelly* would be an appropriate
18 or -- you know, it's not the constitutionality of Act 77;
19 it's -- it's whether or not boards can make cures to
20 defective mail-in ballots. So it's not -- it's not -- it's
21 -- it's apples to oranges, that case.

22 MR. NKWONTA: I -- I agree that that case was about
23 the constitutionality of mail voting. And -- and that's not
24 exactly the reason why we cite it. The reason -- the reason
25 why we cite it and what we'd like the Court to look at is the

1 time span that the Court -- the Supreme Court considered to
2 be prejudicial and -- and an over-extensive delay which was a
3 year.

4 In this case, even -- even giving -- even at its
5 most -- at the most charitable interpretation of petitioners'
6 argument, they first learned about this issue at some point
7 in mid 2021. Well, we are past the point -- like, more than
8 a year has passed since then. So we already -- we already
9 have a delay that was longer than the delay at issue in *Kelly*
10 *v. Commonwealth*.

11 And then when you apply the Supreme Court's actual
12 standard in *Stilp*, the -- the diligence based on information
13 within their reach, not based on what they actually knew,
14 then we're looking at 2020. Even before the election in
15 2021, they should have known and in fact had constructive
16 knowledge of these practices that they did not challenge
17 until the eve of the election while the mail voting process
18 is underway.

19 THE COURT: How will you be prejudiced? How will
20 the voters be prejudiced if they just -- they're still
21 allowed to vote. And they're supposed to vote based on how
22 they're required to vote. They're supposed to read the
23 directions. And they have guidelines based on the Department
24 of State. What would be the prejudice?

25 MR. NKWONTA: Well, Your Honor, there are multiple

1 stakeholders who are prejudiced here. But in direct response
2 to your question, I'll start with the voters.

3 As I mentioned, the voting process, the mail voting
4 process is already underway. So you have voters who have
5 opted to vote by mail in counties which had previously
6 offered an opportunity to cure minor defects in ballots.
7 Those voters may not have opted to vote by mail had they
8 known that they could be disenfranchised simply because of --

9 THE COURT: So you're saying that they -- they
10 voted not, like, knowing that they could make mistakes?

11 MR. NKWONTA: Well, potentially; or some voters may
12 have voted not knowing that they may have had opportunities
13 or that some counties offered opportunities to correct
14 mistakes.

15 And the fact that we are now seeking to adopt a
16 rule -- or petitioners are advocating for a rule that would
17 disenfranchise all those voters after they have already
18 submitted their mail ballots for defects that would have been
19 cured before this case had arisen, that is -- that is
20 prejudicial. And -- and that's precisely the type of
21 prejudice that prevents courts from issuing rulings this
22 close to an election. And then we have to talk about the
23 prejudice to election officials and the election apparatus of
24 Pennsylvania in general.

25 And in response to the reply brief that was filed

1 late last night --

2 THE COURT: Yes. And I'm going to give -- I'm
3 going to give you folks an opportunity to -- I understand the
4 delay, so don't feel that you're hemmed in just by what you
5 say today. Okay?

6 MR. NKWONTA: Thank you, Your Honor.

7 Just to quickly respond on the issue of prejudice,
8 a factor that petitioners are missing here is the prejudice
9 to the election apparatus and to the machinery of the
10 election process. And -- and this is something -- and it's
11 surprising because this is an issue that the RNC and the NRSC
12 have spoken to --

13 THE COURT: Theoretically aren't you allowing the
14 election -- wouldn't this be freeing up the election boards
15 because now they don't have all these self-imposed notice and
16 cure procedures that they themselves have imposed? Don't
17 they have more time then to take care of the office? How are
18 they --

19 MR. NKWONTA: Well, they also have to --

20 THE COURT: How are they prejudiced by having less
21 work?

22 MR. NKWONTA: Well, they also have to retrain their
23 workers, right, and retrain their volunteers. They also have
24 to notify voters. And they also have to change any guidance
25 that they have previously issued. And they -- they have to

1 do that midstream again while the mail voting process is
2 underway. And they have to do that while administering
3 elections.

4 And -- and the prejudice -- the examples of
5 prejudice that I just listed to you, Your Honor, I didn't
6 actually just pluck them out of thin air; I plucked them from
7 a filing that the RNC and the NRSC had submitted to another
8 court back in June, arguing that even June was too late to
9 change election rules.

10 And this was in Georgia where the NRSC and the RNC
11 argued that at the very least, confused voters and groups
12 would inundate state and local officials with inquiries and
13 calls and state election officials would have to grapple with
14 a different set of rules, forcing them to re-educate and
15 retrain workers and volunteers throughout the state.

16 That has been their argument in other cases as to
17 why relief and injunctions even as early as June of election
18 year would be too late and would result in prejudice.

19 So if June -- if an injunction in June of election
20 year could cause that type of prejudice, what does that say
21 about an injunction that relates to mail voting and to the
22 rules that govern curing mail ballots while the mail voting
23 process is already underway just weeks before an election?

24 THE COURT: I think --

25 MR. NKWONTIA: And that is the prejudice that's at

1 issue here, Your Honor.

2 THE COURT: Okay. I think that -- I think that we
3 have counsel here representing Philadelphia County. And
4 there's certain counties that I recall that might actually
5 send out postcards and that sort of thing indicating notice
6 and cure; I'm not sure now.

7 If that's so, at this point, I think I'd like to
8 hear from one of their -- particularly Philadelphia, to hear
9 how this would prejudice them.

10 So do you mind, counsel, if we bring another --
11 another counsel on right now?

12 Philadelphia County, I know you have a couple
13 attorneys. Can you pick your lead counsel to discuss that,
14 what kind of prejudice this would cause you?

15 MR. FIELD: Yes. Good morning, Your Honor.
16 Benjamin Field for the City of Philadelphia Board of
17 Elections.

18 THE COURT: Good morning, Mr. Field.

19 MR. FIELD: Thank you for your time in considering
20 this matter on the timetable we've all been on.

21 THE COURT: Yeah.

22 MR. FIELD: I'll speak directly to the question
23 Your Honor asked, and then I want to make a few comments
24 about the broader laches issues because we did also make a
25 laches argument.

1 But to address the question of prejudice to a
2 county board, as an initial matter, I think the *Kelly* case,
3 while it is distinct on facts, makes clear in the principles
4 it's employing as to laches that prejudice both in the terms
5 of potentially disenfranchised voters as well as the entirety
6 of the efforts under the Election Code in a case of
7 preliminary injunctive relief during or in the immediate
8 aftermath of an election is the type of prejudice that can be
9 considered in laches.

10 And as Your Honor noted in starting this morning,
11 the mail-in ballot processes, indeed the entirety of our
12 client's processes in preparing for the November 8th general
13 election have begun and are ongoing.

14 That includes at the county level with all of our
15 residents their expectations of how they are going to vote,
16 the plans they have made to vote, filling out forms if they
17 choose to vote by mail to have a mail-in ballot provided to
18 them.

19 All of those expectations are settled and are based
20 on their past experiences, communications that have been
21 made, our client's efforts to ensure that Philadelphia
22 residents are aware of the various methods of voting and
23 aware that those methods have controls in place to safely
24 ensure that they can exercise their franchise; even if, say,
25 hey, a mistake happens, that is not the kind of thing that --

1 THE COURT: How do you educate --

2 MR. FIELD: -- undermines their franchise.

3 THE COURT: How do you educate Philadelphia voters
4 that if they make a mistake, they might be able to fix it?
5 How do you do that?

6 MR. FIELD: Well, so our county board has always
7 posted its procedures. And we've put the text of postings
8 from past cycles in the joint stipulation. But
9 Philadelphia's procedures are that if they receive a ballot,
10 for instance, that is identified as unsigned when it comes in
11 or it is identified as not -- without opening it, identified
12 as not having a security envelope in it, they code that in
13 the SURE system. There is an e-mail that goes to voters, and
14 our board of elections officials provide information that
15 those voters can then request -- request a replacement ballot
16 or appear at the polls and cast a provisional ballot.

17 THE COURT: So you educate the public and the
18 voters after they've made the mistake.

19 MR. FIELD: No. The education is an ongoing
20 process, Your Honor. And -- and I'll get to a couple
21 components of that.

22 First of all, our board of elections is comprised
23 of the three elected city commissioners here in Philadelphia.
24 They consistently and regularly do public events with
25 trusted, you know, local partners, making sure that the

1 communities understand that the election is safe; it is going
2 to be run in a fair and orderly fashion as they're required
3 to do under the Election Code; and that voters will be able
4 to effective cast their ballot. These are very --

5 THE COURT: How do you think --

6 MR. FIELD: -- important --

7 THE COURT: How do you think the Philadelphia
8 electorate would feel if they knew that you can cure or not
9 cure a ballot depending on what county you live in? I mean,
10 how -- how would that help anybody?

11 MR. FIELD: So --

12 THE COURT: There's some counties that don't do it.
13 There's some counties that do, do it. There's some counties
14 that don't know how they do it. How does that -- how does
15 that promote integrity and trust in our Pennsylvania
16 electoral system?

17 MR. FIELD: I -- I appreciate the question, Your
18 Honor. I think as an initial matter -- my own personal views
19 on that --

20 THE COURT: I'm getting -- I'm getting off on
21 the --

22 MR. FIELD: -- aren't the issue --

23 THE COURT: So I think that we should just -- so
24 you're saying that there you're -- you go out there and tell
25 people that, hey, if you make a mistake, there's these cure

1 procedures; that's what you go out there -- that's what your
2 commissioners go out and do?

3 MR. FIELD: Well, our commissioners communicate
4 about all the procedures available. They also train their
5 staff. They also put procedures in place for those things to
6 happen.

7 THE COURT: Okay. Let's just say --

8 MR. FIELD: And --

9 THE COURT: Let's just say that -- that the result
10 of this is that the injunction was granted. I don't have a
11 decision. Okay.

12 MR. FIELD: Uh-huh.

13 THE COURT: How would that change -- and we're
14 going to -- by the way, we're going to be talking about the
15 different defects and what the law is on those and what you
16 can and can't do because the law is allowing some defects to
17 be cured or not to be -- not to be -- dispose of the -- the
18 ballot. So we can talk about that. But how -- how would
19 they be prejudiced if they suddenly just stopped sending out
20 notices for certain types of defects? I mean --

21 MR. FIELD: Well, so I think there's -- there's two
22 points I'll look at. One is unquestionably that would
23 involve training staff on what to do and not do.

24 THE COURT: Okay. And how would that --

25 MR. FIELD: The time that --

1 THE COURT: How long would that take, like, an hour
2 or two?

3 MR. FIELD: No -- well, Your Honor, so the
4 Philadelphia apparatus for a general election includes a, you
5 know, large board of elections that is running, you know,
6 heavy machinery to sort ballots, to take in the hundreds of
7 thousands of mail-in ballots that come to the city, to print
8 and prepare the absentee/mail-in ballots, to --

9 THE COURT: None of this changes. None of this
10 changes. This is all just going to keep going.

11 MR. FIELD: So respectfully, Your Honor, I don't
12 agree that none of it changes. Certainly those processes --

13 THE COURT: What changes -- let me ask you, What
14 changes is once the absentee or mail-in ballot is -- however
15 it's received, whether through mail, whether it's in person
16 -- and we can talk about that --

17 MR. FIELD: Uh-huh.

18 THE COURT: -- it's going to be -- it's going to be
19 scanned through a machine, right?

20 MR. FIELD: Correct. They come in --

21 THE COURT: The SURE machine.

22 MR. FIELD: There are sorters.

23 THE COURT: And then under the Election Code, that
24 ballot shall be put immediately into a secure and locked
25 container of some type and not to be touched until the

1 pre-canvass.

2 So what is going to change except -- how are they
3 going to get it -- I mean, I'm going off topic here, but this
4 -- as -- I think that this discussion I'm having with counsel
5 for the Philadelphia Board of Elections is going to be
6 instructive in when -- in when we talk about the -- the
7 requirements for an injunction. You can see how I'm
8 analyzing these issues. Okay, everyone? So don't think this
9 is a waste that we're going off topic. I think I'm preparing
10 you for some difficult discussions, all of you, afterwards.

11 MR. FIELD: Your --

12 THE COURT: So I don't understand what changes.
13 What change -- how would you be prejudiced if suddenly you
14 can no longer reach out to -- to voters whose have defects
15 and not just deal with it during the pre-canvass?

16 MR. FIELD: So, Your Honor, again -- and some of
17 this I understand may be more appropriate in a discussion of
18 what injunctive relief may actually work, so I'll --

19 THE COURT: But your argument --

20 MR. FIELD: -- set that aside --

21 THE COURT: Your arguments regarding the prejudice,
22 you're not making any real arguments to me except the fact
23 that you'd have to tell the staff at the board of elections
24 what they -- what they should no longer do as it relates to
25 curing defects. The public doesn't know about any of this.

1 They only know about it when they get notice.

2 MR. FIELD: Well, so two points. One is I think
3 the public does know about this. And in our experience in
4 past elections when there are concerns about changes that may
5 be coming through court litigations right before the election
6 to forms of voting that the public is relying on, we get a --
7 my clients -- excuse me -- get a significant amount of
8 outreach and concern from residents of Philadelphia,
9 registered voters about what this will mean for their ability
10 to vote.

11 Each of these points of contact that are created by
12 consideration of this matter now require my clients to invest
13 resources that are fully occupied at the moment conducting
14 the core duties they have an obligation to do under the
15 Election Code.

16 So while I certainly understand that on the one
17 hand this could appear to be a very simple thing if we look
18 at it from a 30,000 foot level, it's important to recognize
19 that there is a large human apparatus that is doing this work
20 to make sure that elections happen across all of
21 Pennsylvania.

22 And here in Philadelphia, taking some of the time
23 in order to implement new practices at this time not only
24 takes time away from some of the core duties such as the
25 absentee ballots that are already going out and the mail-in

1 ballots that are being prepared to go out but then also just
2 in the existence of this case and the questions it poses for
3 voters takes another set of time that our clients have an
4 obligation to do to ensure that voters are confident in the
5 election.

6 And then we add to that to -- the fact that voters
7 who may have previously set up a plan to vote by mail-in
8 ballot may choose then to ensure that they have done
9 everything they can and show up and vote with provisional
10 ballots at the polls, causing -- causing further confusion in
11 the polling places. And each step of these things
12 potentially impairs the franchise for some registered voters
13 in Philadelphia.

14 And I can't stress enough for the Court how much
15 effort our clients put in the current election context to
16 ensuring that elections are fair; that they're orderly; that
17 the residents understand them and understand the rules by
18 which they can vote; and that they are conducted in a manner
19 that ensures the franchise for all residents of Philadelphia.

20 THE COURT: I -- I want to say that I am just so
21 impressed with all of the county board of elections and how
22 they've been handling all of these changes and with -- with
23 dignity and hard work and respect. So I just want you to
24 know that I am totally aware of that, and I'd like to put
25 that out there to all the board of elections.

1 So, all right. Well, I think I have a sense of
2 what your concerns are, and I appreciate you -- you
3 responding.

4 MR. LEVINE: Your Honor, this is Cliff Levine.
5 Could I just add a brief point in terms of the prejudice?

6 THE COURT: Well, wait. Can I let Mr. Bonin --
7 Mr. Bonin --

8 MR. LEVINE: Oh, absolutely. Absolutely.

9 THE COURT: Yeah; Mr. Bonin, did you want to add
10 anything to this, or did any of the intervenors besides Mr.
11 Levine need to --

12 MR. BONIN: I mean, look, I think my co-counsel, I
13 think the, you know, counsel for the board and for the other
14 intervenors have stated things well.

15 The only thing that I would add, although I believe
16 Mr. Field could speak to this better than I could, is, you
17 know, to the extent that the counties can no longer review
18 ballots sort of after they've been received, that puts more
19 pressure on them to review them sort of at the moment of
20 being handed off before they go into the drop boxes, you
21 know, before they get put into the secure containers because
22 at that point -- to the extent that, you know, they are
23 commanded under the Election Code to try to enfranchise
24 voters, you're now shifting, you know, a burden significantly
25 that all of these people at all of the drop box locations and

1 the like -- I -- I assume that the counties are going to want
2 to make sure that these people are fully trained and ready,
3 you know, in terms of the overall goal of the Election Code
4 and of these boards to enfranchise people.

5 THE COURT: Are there personnel at every drop box?

6 MR. BONIN: The counties would have to -- would
7 have to speak -- would have to speak to that. I don't want
8 to make any representations on their behalves.

9 THE COURT: Because, you know, it really isn't
10 processed until it's scanned through the SURE system.

11 MR. BONIN: Yeah; and even -- plus -- I mean, there
12 are all these -- you know, which gets into all of the
13 definitional issues of what does notice -- you know, what do
14 we mean by notice; you know, you know, because if we're
15 talking about --

16 THE COURT: We're going to get into that. Yeah.
17 All right. So there's no other additions to the laches or
18 prejudice or anything that you wanted to add or --

19 MR. BONIN: I mean, I -- I think Mr. Levine ably
20 spoke to it and certainly we would say this as well on behalf
21 of the D triple C and the DSCC that to the extent that
22 there's any higher, you know, fractional chance that a vote
23 is going to be rejected and now cannot be fixed after the
24 fact, that just means more money that we need to spend right
25 now because these ballots are about -- you know, are about --

1 are about to go out, to absolutely ensure that voters fully
2 understand all of the instructions in order to cast an
3 effective ballot. That means a lot of plans have to be
4 changed. And we are already within 50 days of -- of election
5 day.

6 THE COURT: Are there any other counsel from any of
7 the board of elections that feel they need to speak on
8 prejudice to their county if -- if the injunction were
9 granted, anything that hasn't been said by Philadelphia? If
10 so, get on -- get on --

11 MR. WIYGUL: Your Honor, this is Robert Wiygul.
12 I'm counsel for the Department of State respondents. I don't
13 want to jump the line --

14 THE COURT: Okay.

15 MR. WIYGUL: -- but I would like the opportunity to
16 address the prejudice point because I think there is -- there
17 are additional forms of prejudice to the preliminary
18 injunctive relief sought that have not yet been addressed.

19 THE COURT: Oh, yeah?

20 MR. WIYGUL: So if I may, Your Honor, yes, I think
21 from -- from -- and I think the county boards can probably
22 speak to their own forms of prejudice as Philadelphia already
23 has. But on a statewide level, we believe the laches
24 argument goes not just to the ultimate question of the
25 petition for review and whether it has to be dismissed or

1 denied, but right now the question is posed in the specific
2 context of the preliminary injunctive relief that's sought
3 with respect to this upcoming November election.

4 And I think as we pointed out in our papers in
5 weighing whether petitioners can satisfy the equitable
6 requirements for such relief, it's important, we believe, for
7 the Court to consider the fact that because of the timing of
8 when they brought their lawsuit, it is very likely that by
9 the time we actually get an adjudication of the merits of
10 this issue of notice and cure and whether it's permissible
11 that is final -- and as Your Honor said, we think it's very
12 likely that decision is going to be made by the Pennsylvania
13 Supreme Court when all is said and done -- if the -- if the
14 Court ultimately concludes that counties are permitted to
15 engage in at least some forms of notice and cure and this
16 Court, however, has issued a preliminary injunction of the
17 sort that petitioners are seeking which would bar the
18 counties from doing that, by the time we get a final
19 adjudication that says, well, it's actually permissible for
20 the counties to do that, it will almost certainly be too late
21 for many of the voters who would have been able to have their
22 vote cast and counted under the Supreme Court's ultimate
23 hypothetical decision that I'm talking about here but will be
24 out of luck with respect to the November election because of
25 the timing. And that would not have been an issue if

1 petitioners had acted diligently and brought their case and
2 raised these arguments at an earlier point in time. That's a
3 direct --

4 THE COURT: Now we're starting to repeat ourselves
5 on this issue. Okay. That's been very -- made very clear to
6 me.

7 So are there any other counsel for any boards here
8 that believe that the prejudice to your staff has not been
9 described in full?

10 MR. COSGROVE: If I may, Your Honor, this is Joseph
11 Cosgrove on behalf of the Luzerne County Board of Elections
12 and Registration.

13 THE COURT: Mr. Cosgrove, how are you, sir?

14 MR. COSGROVE: I'm well, Your Honor. And we
15 appreciate the time you're spending with us. Thank you.

16 I do want to just offer just a slight different
17 perspective that, you know, we -- we run elections in this
18 Commonwealth at the county level. It's the closest to the
19 voters themselves, and -- and it is --

20 THE COURT: Your prejudice, Mr. Cosgrove; how will
21 your client be prejudiced?

22 MR. COSGROVE: Well, it's the prejudice to the
23 deference that should be afforded the county boards. We've
24 made a decision; we've made a policy decision. Boards make
25 policy decisions all the time.

1 THE COURT: So we're getting into the merits now.

2 MR. COSGROVE: No, but the prejudice, I think, Your
3 Honor, is that if your -- the board -- our board has made a
4 decision -- actually ours is a quite benign policy. We've
5 made a decision and are implementing it right now. And
6 that's a decision, I think, that the Court is required to
7 give deference to. And interference at this point, given
8 that this has not been litigated in a time preceding this,
9 it's prejudices the board for the decision it has made and
10 will cause the board to have to adjust things in a way that
11 would --

12 THE COURT: Mr. Cosgrove, tell me exactly again
13 what Luzerne County does in terms of notice and cure. I -- I
14 don't have it all memorized. But what -- what are your
15 protocols?

16 MR. COSGROVE: As I said, it's very benign, Your
17 Honor. Luzerne County on election day as it's sorting
18 through the mail-in and absentee ballots, as it's sorting
19 through them, at several points during election day, it will
20 sort those ballots that have the defects that we're talking
21 about, these minor defects, set them aside and --

22 THE COURT: Tell me which minor defect.

23 MR. COSGROVE: Well, I don't have that right in
24 front of me, Your Honor, but --

25 THE COURT: That's important because, you know, the

1 Supreme Court has already ruled that some defects are not
2 minor, like the -- the security envelope. That's done; gone.
3 You don't get to cure that.

4 MR. COSGROVE: That is not an issue.

5 THE COURT: Okay. So -- and you don't get to cure
6 -- well, the date is kind of up in the air at this point.
7 And the signature is -- I forget; well, you know, the fed- --
8 the federal and Supreme Court are all over the place on this,
9 but we'll get to that.

10 So you're not doing anything that's totally wrong,
11 are you?

12 MR. COSGROVE: We're not doing anything wrong.
13 What we do is we set them aside but we notify the -- the
14 representatives of the major parties and the other minor
15 parties that have given us contact information. We notify
16 them, and we also notify the office of elections as well. So
17 it's public. It's there. It's posted.

18 We do nothing beyond that. The board does nothing
19 beyond setting those aside, providing that notice to
20 interested parties that -- the political parties. And if
21 they want to contact the voters, if they don't want to
22 contact the voters, that's out of our hands. Voters at that
23 point can cast provisional ballots; they can -- if they are
24 contacted. But we -- as I said, it's a benign process. We
25 do nothing else.

1 I believe there's one other county that mirrors
2 what we do; I think it's Union --

3 THE COURT: Yeah; at this point we're getting into
4 some of the merits. And I need to allow the respondents to
5 respond to this because we're going to be getting into these
6 kind of details about what would be permitted and what
7 wouldn't be permitted under the existing law. And what you
8 do, some of it is permitted at this point.

9 MR. COSGROVE: We believe so. And --

10 THE COURT: All right. We'll see. All right. So,
11 Mr. Cosgrove, thanks for jumping in.

12 MR. COSGROVE: Thank you, Your Honor.

13 THE COURT: And I want to hear from the respondents
14 now --

15 MS. FITZPATRICK: Thank you, Your Honor.

16 THE COURT: -- on the laches issue.

17 MS. FITZPATRICK: Thank you, Your Honor. Amy
18 Fitzpatrick on behalf of the County of Bucks Board of
19 Elections.

20 First I'd like to apologize for stepping away from
21 the hearing. Our building was evacuated, and so I apologize
22 both for stepping away and for missing the first portion of
23 Mr. Field's comments on behalf of Philadelphia. So I'll do
24 my best not to repeat, and I'll also speak --

25 THE COURT: I'm more interested in the respondents

1 right now from -- from the -- the ones who filed the petition
2 for review.

3 MS. FITZPATRICK: Pardon, Your Honor?

4 THE COURT: You're a respondent for Bucks County?

5 MS. FITZPATRICK: Correct.

6 THE COURT: All right. Well, don't we have counsel
7 here for the petitioners who filed the petitions for review?

8 Counsel, Ms. Gallagher, is that --

9 MS. GALLAGHER: I'm here, Your Honor.

10 THE COURT: I'd like you folks, you, counsel for
11 petitioners, at this point --

12 MS. GALLAGHER: Oh, I'm sorry.

13 THE COURT: -- to respond to -- to the laches
14 argument. I want to hear your position now. You've heard --

15 MS. GALLAGHER: Thank you, Your Honor. And thank
16 you again for taking the time.

17 There is one preliminary issue as we go into -- as
18 I believe the Court has said, into the merits. If I could
19 reserve some -- not objections but some additional evidence
20 we had planned to introduce at the hearing. I just want to
21 reserve that to be able to talk to the Court very briefly --

22 THE COURT: What evidence --

23 MS. GALLAGHER: -- about that.

24 THE COURT: -- would you want to -- right now tell
25 me.

1 MS. GALLAGHER: The population data county by
2 county as well as voter registration information which is
3 publicly available, which goes to our dilution claim. But we
4 can address that, you know, later.

5 THE COURT: I'm more interested in how this could
6 create kind of chaos around the --

7 MS. GALLAGHER: Right.

8 THE COURT: -- state and how come you waited this
9 long to file.

10 MS. GALLAGHER: Sure. Your Honor, with respect to
11 that issue, as we were all aware of the PA Supreme Court's
12 decision in *Pa.* -- what's common- -- often referred to as the
13 *Pa. Dems* case, and the Pennsylvania Supreme Court was very
14 clear, as was the Secretary of the Commonwealth in -- the
15 former Acting Secretary and her position in that regard, that
16 there is no statutory or other authority for the boards to
17 engage in -- in curing procedures and that that process is
18 best left to the province of the Legislature. That's
19 election cycle general -- the general election 2020 law.

20 We then did have the -- what we call -- refer to as
21 the *DJT* case, Judge Brann's decision which we'll address on
22 the merits.

23 Subsequent to that and as the Court has pointed
24 out, the Legislature immediately went into discussions -- and
25 we would present the legislative hearing -- to address the

1 issue which was brought and raised by the Supreme Court with
2 respect to notice and cure provisions.

3 That legislation was passed. The General Assembly
4 of the Commonwealth of Pennsylvania clearly indicated and
5 assumed what the PA Supreme Court says was its prerogative
6 and its sole right, we would argue, to enact notice and cure
7 provisions. That legislation was vetoed by Governor Wolf in
8 June of 2021.

9 THE COURT: Can you give me -- I tried to look it
10 up, but it was so long. It was, like, a thousand pages or
11 something -- some of the basic notice and cure provisions
12 that are maybe applicable to this case? Did they allow
13 notice and cure for signatures or naked ballots or dating or
14 undeliverable or whatever? Did they allow notice and cure in
15 that --

16 MS. GALLAGHER: Your Honor, I apologize. I do not
17 have HB 1200 in front of me at the moment.

18 THE COURT: Okay. Then let's keep moving on.

19 MS. GALLAGHER: And I -- but, however, to your
20 point, what has been discussed here -- and I don't want to go
21 far afield -- as minor corrections, that -- and that's
22 relevant to the laches argument -- is not the issue of the
23 secrecy envelope.

24 As the Supreme Court clearly held, all right, in
25 *Pa. Dems*, that -- that is constitutionally mandated --

1 THE COURT: Right.

2 MS. GALLAGHER: -- that a vote -- right, that's not
3 a minor --

4 THE COURT: Okay. So let's get back to --

5 MS. GALLAGHER: Okay. So when the legislation was
6 not passed in 2021, it would have been improper to bring a
7 claim on this when that legislation was passing.

8 As is outlined in our reply filed last evening, the
9 RNC then took very careful steps to begin to engage in an
10 information gathering process as to what the counties plan to
11 do prospectively. And they did that on two levels, both as
12 an internal investigation and via Right-to-Know requests.

13 One of those Right-to-Know requests was to Bucks
14 County. And as is pointed out in our memorandum, we did not
15 receive that information from Attorney Grieser who -- Grieser
16 -- I apologize -- who's on here as to the prospective intent
17 of Bucks County with respect to cures until August 2nd of
18 2022. We have that e-mail. August 2nd of 2022.

19 THE COURT: I'd like that -- I'd like that moved in
20 as an exhibit at some point.

21 MS. GALLAGHER: It is -- it would be. It is an
22 exhibit to our -- our -- our memorandum, and we would move
23 that in.

24 THE COURT: Okay.

25 MS. GALLAGHER: That was August 2nd of 2022.

1 What is also going on at that point goes then
2 clearly to the issue of -- and it's referred to two ways; we
3 apologize for that -- there's a disconnect -- the,
4 quote/unquote, Bausch or DonDiego litigation which took place
5 in May --

6 THE COURT: Right. And --

7 MS. GALLAGHER: -- and June.

8 THE COURT: -- it was signed on June 15th, 2022.

9 MS. GALLAGHER: And that --

10 THE COURT: The settlement agreements. Okay.
11 I'm --

12 MS. GALLAGHER: That --

13 THE COURT: I'm aware of that; I'm --

14 MS. GALLAGHER: That goes to --

15 THE COURT: -- aware of the terms.

16 MS. GALLAGHER: Correct.

17 THE COURT: So that's June of 2022.

18 MS. GALLAGHER: Correct, Your Honor.

19 THE COURT: Okay.

20 MS. GALLAGHER: And that litigation is settled via
21 the parties; the Secretary does not join. And for the first
22 time, there is of record documentation that the secrecy
23 ballot in the two relevant counties in that case are now
24 subject to cure. This lawsuit is filed within two and a half
25 months of that in order to allow us to obtain additional

1 information.

2 And what is also relevant there -- let's put aside
3 the -- the party committees as I'll refer to them. Not the
4 DSCC and all that. Let's look at who this impacts because we
5 have a group of other clients that we represent here, and
6 those are the voters. And one of those voters lives in one
7 of these counties. There are other voters who live in
8 Butler; former law professor Mike Streib who follows that and
9 says, Wait a minute; how is this being cured? I don't get to
10 have that cured in Butler County.

11 What's lost, I think, in some of the --

12 THE COURT: Would you --

13 MS. GALLAGHER: -- discussion here, this is not
14 about --

15 THE COURT: Ms. Gallagher --

16 MS. GALLAGHER: -- enfranchise --

17 THE COURT: Ms. Gallagher --

18 MS. GALLAGHER: Excuse me?

19 THE COURT: -- would you agree that there's no
20 other aspects of those settlement agreements that would have
21 illegal cure terms, because --

22 MS. GALLAGHER: Correct.

23 THE COURT: -- because otherwise it's mostly just
24 let's just try to figure out a better way to do it.

25 MS. GALLAGHER: Right. It -- it goes to the

1 secrecy ballots.

2 THE COURT: Right. So -- so you're -- mostly this
3 is just a matter of timing once you realized that in June
4 those federal courts and agreements which are promoting
5 improper cure mechanisms. I -- I understand. Why didn't you
6 file something then before -- why not then, because we're
7 really --

8 MS. GALLAGHER: Well, because at that point --

9 THE COURT: -- we're really in a tight squeeze
10 here.

11 MS. GALLAGHER: I understand that, Your Honor. But
12 at that point, we were still in the process of trying to
13 attempt to gather additional information with respect to
14 that. All right. We wanted to be thorough. We didn't want
15 to be knee-jerk.

16 You know, I mean, if we would have come in -- and
17 also there's an issue of ripeness with -- we then look at
18 what is harm. We have heard nothing here today, and that's
19 -- words are important. And while this was a status
20 conference, it's now being live streamed. The goal of this
21 petition is to have an equal playing field for every voter.
22 This is not -- and when we bandy about words like -- maybe
23 I'm old; I've been doing this for a long time --
24 disenfranchisement, there is no voter under this petition who
25 the franchise of voting is removed from.

1 This is about how ballots are counted and which
2 ballots count and which voters solely by virtue of where they
3 reside get a mulligan. Their votes are weighted because they
4 get a do-over where other voters do not. No one is
5 disenfranchised.

6 And if we are going to have confidence -- and I
7 would imagine that one thing -- I know Mr. Levine agrees;
8 we've been doing this a long time --

9 THE COURT: This sounds like --

10 MS. GALLAGHER: -- everyone would --

11 THE COURT: This sounds like a closing argument.

12 MS. GALLAGHER: I don't mean -- but -- but it's --
13 but that's what you've heard today. And those words matter.
14 This isn't about that. It's, How do we count these ballots?
15 And everyone has to count them the same.

16 THE COURT: But more importantly, you've --

17 MS. GALLAGHER: Again --

18 THE COURT: -- you've laid out why this was filed
19 when it was, because you didn't --

20 MS. GALLAGHER: Right.

21 THE COURT: -- you were working on legislation.
22 From what I hear, you were realizing that there were improper
23 settlement agreements as late as August. You find out that
24 one of the major counties is, you know, continuing to do
25 notice and cure that might not be legal under prior case law.

1 So that's your explanation for laches.

2 Anything else that you want to add for the
3 petitioners?

4 MS. GALLAGHER: That there's no harm, that the
5 petitioners, as set forth in our brief, have failed to
6 establish the harm.

7 THE COURT: How do you -- how do you address the --
8 the arguments that they're going to have to now change the
9 way they reach out to the public and train the public and
10 handle their mail-in ballots and that it -- that they've
11 already allowed that to happen? How do you address that?

12 MS. GALLAGHER: I address it on the basis, Your
13 Honor, that if it is an illegal act to begin with, all right,
14 the procedure has to be changed. And that's what's before --
15 is the effective issue before the Court: Are the counties
16 who have engaged in these processes doing so legally?

17 THE COURT: Okay. All right. Well, look, it's
18 already after 11. And I -- I do believe I have -- I've heard
19 enough on the laches.

20 And I'm still -- this was coming up suddenly; I
21 still -- in the order that was issued yesterday, respondents
22 are still entitled to add to this by sending me additional
23 briefing for something that we might have missed. So I am
24 going to stop argument on that at this point.

25 I'm -- counsel for Bucks County, you're welcome to

1 file a sur- -- a sur-reply or a reply. And any replies on
2 this issue I would like by tomorrow.

3 MS. FITZPATRICK: Your Honor -- Your Honor, if I
4 may, Amy Fitzpatrick on behalf of Bucks County. We would
5 also ask to enter into the record evidence that at a public
6 meeting on October 22nd, 2020, the --

7 THE COURT: 2020?

8 MS. FITZPATRICK: 2020; the issue of notice and
9 cure not only was deliberated and voted on but that members
10 of the local Republican Party were present for that meeting.
11 The county has continued that same notice and cure process
12 for the past five elections.

13 Additionally, the Right-to-Know process requires
14 that we provide information in response to those requests
15 within 30 days. So the idea that our Right-to-Know process
16 somehow delayed petitioners from obtaining information
17 doesn't stand.

18 MS. GALLAGHER: Your Honor, may I address that
19 please?

20 THE COURT: Sure.

21 MS. GALLAGHER: That Right-To-Know process was
22 repeatedly thwarted. And in fact it was met by repeated
23 objections and appeals. All right. There was no -- there
24 were no -- in fact, in point -- in one of those cases on a
25 Right-To-Know request, our agreement to a professional

1 courtesy when the lawyer from Philadelphia who was handling
2 that case was out on sick leave, all right, or had left and
3 we agreed to an extension of time was then used against us as
4 a waiver of our objection.

5 Bucks County -- I mean, that was resolved in August
6 of -- August 2nd of 2022. So this fallacy that they have to
7 reply within 30 days, yes, that's the law, but that law can
8 be we're not giving you the information.

9 THE COURT: Okay. All right. We're closing the --

10 MR. KING: Your Honor --

11 THE COURT: -- oral argument on -- on laches now,
12 and I'm going to talk about how you can respond to this later
13 on if there's more. But we have a lot to go through still.

14 MR. KING: Your Honor, this is Tom King. Could I
15 be heard for just a brief moment?

16 THE COURT: Sure. And, Mr. King, who -- who are
17 you again? You're with the petitioners?

18 MR. KING: Yes, ma'am. With the RNC, et cetera.

19 I just want to correct one thing that was said by
20 my friend and colleague Mr. Levine.

21 I was not counsel to the Trump Campaign in the
22 Brann case up in Williamsport. So I -- I did represent some
23 proposed intervenors. But I appreciate Mr. Levine
24 acknowledging me being here, but I was not the counsel for
25 the Trump Campaign which is one of the things that was said

1 about the laches issue. So thank you very much.

2 THE COURT: Okay.

3 MR. LEVINE: And, Your Honor, I would ask just very
4 briefly just one point of clarification. And I -- it's just
5 the idea of -- when we're talking about prejudice, it's not
6 just education or money; it's about votes not counting. That
7 -- that's significant.

8 And in terms of the prejudice, we actually had a
9 case in 2020 with the 45th Senate race, state senate race
10 with Brewster, Zicarelli where there were a number of votes
11 that didn't count. And so the outcomes of elections can be
12 impacted if you are disenfranchised.

13 And the other point --

14 THE COURT: Did you say Zicarelli?

15 MR. LEVINE: Yes. Yes, Your Honor.

16 THE COURT: So -- so was that vote -- didn't he
17 withdraw his appeal on that?

18 MR. LEVINE: Well, eventually. It's a woman,
19 Zicarelli. But -- but my point is there -- we had the vote.
20 It was a close race. And then there were a number -- there
21 were lots of questions about should votes count or not count.
22 And so there were a substantial number of votes that simply
23 didn't count for very minor issues. Like, for instance,
24 you're supposed to sign your name and print your name. So if
25 somebody signs their name but doesn't print their name,

1 that's a perfect example of --

2 THE COURT: Was that handled by Judge -- was that
3 handled by Judge Renée Cohn Jubelirer, that case?

4 MR. LEVINE: Well, that case -- the Ziccarelli case
5 was in federal court, Judge Ranjan. And then that was the
6 case that went up in terms of whether you count no date
7 ballots; that eventually made its way up to the state supreme
8 court.

9 THE COURT: Believe me, I -- I am very, very, very
10 cognizant of the fact that notice and cure depending on the
11 outcome could disenfranchise voters. So believe me, I am
12 paying very close attention.

13 MR. LEVINE: And that's the -- that's the prejudice
14 that we would offer, Your Honor.

15 THE COURT: All right. So let's move on,
16 everybody.

17 So I think we're going to go straight now -- we've
18 worked on the petitions to intervene. We've had, I think, a
19 pretty robust discussion on the laches. You're going to be
20 given some opportunity to give further responses by tomorrow.
21 So we have to move -- I am moving so quickly on this.

22 Let's now get into the meat and potatoes of this,
23 the injunction. And in this case, as all of you know, there
24 are six criteria that the petitioners have to meet. They
25 have to meet all of the criteria, and it's a heavy burden on

1 the petitioners in this case.

2 So there's a couple issues that I'd like you to
3 think about as we go through the various criteria, issues
4 that I had questions about as I was reading all of this, the
5 law, the cases, the code.

6 So most of the notice -- again, this joint
7 stipulation was very helpful to me. It seemed to me that
8 most of the reasons for cure procedures were no signature on
9 the outer envelope, no date on the outer envelope, missing
10 the secrecy envelope, and -- and the one that was
11 undeliverable.

12 So I think we have law on -- well, we'll -- we'll
13 get into -- I forget the law, but I don't know what the law
14 is on undeliverable. I don't know and -- and as we go
15 through the argument, someone explain it to me; what do
16 counties do if something is undeliverable? And is that even
17 a cure, because it's not even a vote yet. So that's one
18 thing I'd like people to answer as we go through this.

19 I want to know if counties where there are no cure
20 -- notice and cure defect procedures, because a lot of
21 counties said, No, we don't -- we don't have any of that,
22 what do they count? I mean, if -- if there's not a signature
23 or a date, are they counting them?

24 I don't understand the identification issue. So
25 once it's scanned by the -- by the SURE, the barcode, why

1 does the addition- -- why does the question of identification
2 come up? All right. You are allowed to cure under
3 identification. That's in the code, to provide notice of
4 identification. But what -- I mean, you can't get an
5 absentee ballot unless you identify yourself, or a mail-in
6 ballot. So I have -- I'm a little confused with that.

7 I want to know if there's a -- and this will all be
8 factual; I want to know if there's a difference in allowing
9 cures if there's personnel. Like, if I went and handed my
10 mail-in ballot right there to the person at the desk at
11 election board in my county and they see that I haven't
12 signed or dated it, are they allowed to bring it to my
13 attention, or, you know, does it only really matter after --
14 I mean -- I don't know.

15 I think it's different than once it's -- once
16 they've scanned it, it's supposed to go into a secure box,
17 and I don't think you can take that out under any
18 circumstances. So you need to think about that.

19 So, you know, all of these issues that I found I
20 think kind of speak in favor of the petitioners in this case
21 because here I am now thinking, well, who, what, where, when,
22 and how. Who knows what these counties are doing? And who
23 knows if it's -- so that's my concern here as -- as I think
24 about some of the issues with these kind of ad hoc notice and
25 cure procedures and what really is a defect.

1 THE COURT: So you all know that. Okay?

2 MS. GALLAGHER: I mean, the Court has zeroed in,
3 for lack of a better word, on really important points that go
4 to the heart of this matter.

5 It's not just what's occurring -- if we look at the
6 counties that -- and the multiple of -- multiples of them,
7 right, and one of the issues I wanted to raise with the
8 population data and the registration, the curing is occurring
9 in the --

10 THE COURT: It is necessary to prevent immediate
11 and irreparable harm that cannot be adequately compensated by
12 damages, that's your focus.

13 MS. GALLAGHER: The voters in the non-curing
14 counties do not get a do-over. This is about how --

15 THE COURT: We don't know that, do we?

16 MS. GALLAGHER: Excuse me?

17 THE COURT: We -- they just absolutely will just
18 throw the ballots away?

19 MS. GALLAGHER: Yes; well, not throw them away.
20 They -- they don't count. For example, if a ballot comes in
21 without a secrecy envelope, that ballot does not count.

22 THE COURT: That shouldn't count anywhere in
23 Pennsylvania.

24 MS. GALLAGHER: Well, we know that they are now in
25 some places, right. We know under the DonDiego settlement

1 that is going to happen. Those --

2 MR. VARGO: Your Honor --

3 THE COURT: Who's talking?

4 MR. VARGO: Michael Vargo on behalf of Northampton
5 County. I've -- I've tried to remain quiet about this issue,
6 but over and over and over again, the terms of the DonDiego
7 settlement are being misrepresented by the petitioners. And
8 I have to voice that complaint because it's happened
9 repeatedly previously and now it's happening again.

10 THE COURT: Mr. Vargo, I'm going to be absolutely
11 sure that you get to -- to weigh in on this then. Thank you
12 for letting us know. Okay? So let's let --

13 MR. VARGO: Your Honor --

14 THE COURT: Let's let her finish, and then I'll let
15 you respond to that. Okay?

16 Actually, Mr. Vargo, just tell us right now how
17 it's being misrepresented.

18 MR. VARGO: So there is no -- the -- the defective
19 ballot is not cured. The defect- -- in a case where the
20 ballot arrives without a secrecy envelope, that ballot is not
21 cured.

22 THE COURT: Okay.

23 MR. VARGO: The voter --

24 THE COURT: That's not what --

25 MR. VARGO: -- who made an error --

1 THE COURT: That's not what you read in the
2 settlement agreement, I think, though.

3 MR. VARGO: No; the voter who made -- who filed --
4 who -- who prepared that ballot is offered an opportunity to
5 file a provisional ballot. That is entirely different than
6 anything being done to cure the actual defective ballot. The
7 actual defective ballot is not cured.

8 The voter is offered an opportunity to vote
9 provisionally at their polling place, and the -- any
10 aggrieved party has absolutely every opportunity already
11 existing under the law to challenge that provisional ballot.
12 There is a full set procedure for challenging provisional
13 ballots that is absolutely unaffected. So it's -- we just
14 have to be very clear, there's nothing being done to cure
15 that defective ballot.

16 What is happening is someone who voted, who made a
17 mistake when they voted, just as if they showed up at the
18 wrong polling place and are then allowed to vote
19 provisionally, so someone who makes an error is offered the
20 opportunity to file a provisional ballot that is absolutely
21 subject to challenge --

22 THE COURT: So that means --

23 MR. VARGO: -- under all of the procedures that --

24 THE COURT: Mr. Vargo, that means, A, that you're
25 going to notify the voter; and, B, that they're going to have

1 an opportunity to cure. I think you're just --

2 MR. VARGO: Well --

3 THE COURT: -- you know, it's the same thing. I

4 don't see -- it's a play on words, and especially as it

5 relates to the naked ballots. There's -- you're not allowed

6 to do anything with those, my understanding of the --

7 MR. VARGO: Right. And --

8 THE COURT: -- law. So --

9 MR. VARGO: -- absolutely --

10 THE COURT: But you are; you're --

11 MR. VARGO: -- nothing is done.

12 THE COURT: -- notifying them. You're notifying

13 the voter: Hey, you made a mistake; come in and get a

14 provisional ballot. And you'll stamp the one void. But

15 goodness, that's exactly what we're talking about here.

16 MR. VARGO: And it's -- the same thing happens if a

17 voter walks into the wrong polling place.

18 THE COURT: Well --

19 MR. VARGO: They're told, You're in the wrong

20 place.

21 THE COURT: I understand --

22 MR. VARGO: So --

23 THE COURT: -- your argument, sir. And I'll --

24 I'll think about it as I think about what everybody says

25 here. So let's get back to prong number 1 with Ms.

1 Gallagher.

2 MS. GALLAGHER: Your Honor, for what we've just
3 heard, all right, that is the immediate and irreparable harm
4 which cannot be compensated by money if you are the voter, for
5 example, Professor Streib in Butler County.

6 If he votes by mail because Butler County has no
7 cure provisions, no notification procedures except for that
8 with respect to ID which we can talk about later, his vote
9 does not count as mandated by the PA Supreme Court. It
10 doesn't count. He doesn't get a do-over. He doesn't --

11 THE COURT: Okay. Well --

12 MS. GALLAGHER: -- have a second choice to have it
13 count twice -- to have it count, rather; not count twice.

14 THE COURT: Immediate and irreparable harm. Let's
15 -- let's stick with the arguments.

16 MS. GALLAGHER: I'm sorry, I couldn't --

17 THE COURT: The immediate and irreparable harm.

18 MS. GALLAGHER: His vote is diluted.

19 THE COURT: Okay.

20 MS. GALLAGHER: All right. And while I understand
21 the -- the reaction to the term of dilution, let's talk about
22 what it means in that sense. All right.

23 We normally hear of dilution with respect to
24 Section 2 of the Voting Rights Act. And although we're not
25 talking about that type of dilution, all right -- this is not

1 racially based dilution -- it is, to the Court's point,
2 residentially based dilution because when Professor Streib
3 only has one chance to have his ballot counted but the voter
4 in -- under the DonDiego settlement gets a second chance to
5 vote provisionally for having made the same error,
6 Mr. Streib's vote is diluted because --

7 THE COURT: So you're saying the dilution of votes
8 is an immediate and irreparable harm.

9 MS. GALLAGHER: Absolutely, Your Honor.

10 THE COURT: How is it immediate and irreparable?
11 You don't know if it's going to change the outcome.

12 MS. GALLAGHER: We don't have -- because the right
13 is individualized. Right. What we're talking about -- and,
14 again, it's not franchise. Any state can have multiple
15 levels of the franchise of voting. We have mail-in; we have
16 absentee, military, at the polls. Right.

17 But the methods for counting those ballots must be
18 the same within the franchise. And if -- statewide. You
19 can't vary in a state, right, within one type of franchise.
20 And that's exactly what's happening here. So the voter in,
21 let's say, Northampton, Philadelphia --

22 THE COURT: Ms. Gallagher, would you say that this
23 is more of a public perception issue, because in the last
24 time this was all discussed and litigated, it wouldn't have a
25 made a difference in -- in the votes. It wouldn't have made

1 a difference in the election. If they had counted them or
2 not counted them, the parties that won still would have won.
3 So is this more of -- how would you describe the harm --

4 MS. GALLAGHER: Voter integrity perhaps. It is all
5 about voter integrity, Your Honor, but it's much more than
6 that. During the course of this argument today, *Reynolds v.*
7 *Sims* was referenced. And while *Reynolds v. Sims* was enacted
8 under the context of redistricting, it is clear that the
9 Court's intention, the -- the right to vote and have one's
10 vote counted equally and we -- and that's what's happened
11 here. It's not outcome-determinative. It's not about, Does
12 -- Did my candidate win or lose? It's about, Was I on the
13 same playing field regardless of where I live in this
14 Commonwealth to have that vote count?

15 And the voters in the non-curing counties under
16 this construct do not have those same rights. They don't
17 even have the chance, to the Court's point. This is
18 happening in our major population centers. So the voters --
19 the non-curing is happening in lower populations which only
20 exacerbates the problems. They don't have a chance. They
21 don't have a chance to have their vote counted if they make a
22 mistake. And that's what no one on this call can say doesn't
23 happen.

24 THE COURT: Okay. Ms. Gallagher, did you want to
25 make any other points about prong 1, and is that going to be

1 all from the petitioners on prong 1?

2 MS. GALLAGHER: That's all, Your Honor.

3 THE COURT: Okay. So who from the respondents want
4 to address prong 1?

5 MR. WIYGUL: Your Honor, this is Robert Wiygul for
6 the Department of State respondents. I'd be happy to --

7 THE COURT: Okay.

8 MR. WIYGUL: -- speak to that issue.

9 The case law on this issue, I think, fortunately
10 for all of us at this juncture is legion. And it stands
11 decidedly for the proposition that the kind of vote dilution
12 theory of harm that petitioners have advanced and are relying
13 upon doesn't even succeed in stating a cognizable harm that
14 could confer standing, let alone irreparable harm that could
15 satisfy the requirements for preliminary injunctive relief.

16 We've cited those cases in our brief. They include
17 a case from the Pennsylvania Supreme Court which is in accord
18 with a raft of cases from the federal courts, including the
19 courts that decided the *Donald J. Trump* case in 2020 which
20 has been referenced repeatedly where the very arguments
21 raised by petitioners here were advanced. And I really mean
22 the exact same arguments.

23 They argued that the fact that some counties were
24 allowing notice and cure and others were not was a violation
25 of the rights of voters that burdened somehow the voting

1 rights of voters who lived in counties that didn't offer
2 notice and cure. And they said it violated the Election
3 Code. The exact same arguments.

4 And the Court squarely rejected them, and The Third
5 Circuit agreed. It said you are not burdened because you
6 live in a county and another county is allowing its voters to
7 vote; that if there is any harm there at all -- and I don't
8 think the -- the case law recognizes any harm from making it
9 easier for some people to vote -- it is felt equally by every
10 voter.

11 It's not localized to particular counties, because
12 the alleged harm is that there are some votes that have been
13 cast where the ballot submission, you know, was invalid,
14 according to petitioners. That affects every voter who
15 didn't cast a vote pursuant to notice and cure equally.

16 Judge Ranjan, another case that's been mentioned
17 repeatedly because this is well-trodden ground, in 2020 in
18 the Western District of Pennsylvania case, also brought by
19 the Donald J. Trump for President Campaign, looked at the --
20 essentially the same equal protection/uniformity arguments in
21 the context of drop boxes.

22 And there the argument was, again, some counties
23 are allowing or providing for drop boxes, making it easier
24 for their citizens to cast a vote, and others are not and
25 that's supposedly unfair and violates equal protection. And

1 the Court not only rejected the equal protection and
2 uniformity argument on the merits, but it also said it
3 doesn't state a cognizable harm.

4 So -- and petitioners have pointed to nothing on
5 the other side of that issue on point. The closest they come
6 is to point to redistricting cases and courts finding that if
7 you live in a packed or a cracked district, then, yes, your
8 vote is being treated differently because of where you live
9 than it is in other districts.

10 And in those circumstances and those circumstances
11 alone, the Supreme Court of the United States has recognized
12 a vote dilution theory. But, again, all of the cases that
13 have come after those cases have distinguished that theory of
14 vote dilution from the type of vote dilution that petitioners
15 are alleging here.

16 THE COURT: Mr. Wiygul, how would you, assuming
17 *arguendo*, because this is going to come up later, that it's
18 -- it's not statutorily -- statutorily allowed to have notice
19 and cure per the Supreme Court case law of *Pa. Dems* or -- I
20 mean case law *Pa. Dems* or in the statute, would that be per
21 se irreparable and immediate harm under some case law?

22 MR. WIYGUL: No, Your Honor. I don't -- I don't
23 believe it would --

24 THE COURT: A violation of the law is irreparable,
25 immediate harm per se?

1 MR. WIYGUL: Your Honor, there is case law -- I
2 understand the case law Your Honor is referring to, and it's
3 case law that says that a violation of a statute can be per
4 se irreparable harm for purposes of preliminary injunctive
5 relief.

6 I -- I -- I don't think those statutes excuse the
7 actual petitioners from showing that they've actually
8 suffered some cognizable harm from the violation, right,
9 because if that were true, it would just obliterate the
10 requirement of standing. Right. Anyone could say, I think
11 this statute is being violated, and --

12 THE COURT: But you have to prove --

13 MR. WIYGUL: -- get a preliminary injunction.

14 THE COURT: You have to prove that it's violated.
15 I mean, you just can't say it. You have to prove it.

16 MR. WIYGUL: But even more than that, Your Honor,
17 they also have to prove that they've suffered an injury in
18 fact as a result of that violation. And the courts, again,
19 have been very clear in Pennsylvania and elsewhere that this
20 kind of vote dilution, the argument that other people are
21 having a burden on their right to lift -- to vote lifted does
22 not impose any harm on people who happen to live in other
23 counties.

24 And I would -- I would further suggest, you know,
25 if there is a -- that petitioners' theory of the case in

1 terms of their theory of harm seems to me to be backwards. I
2 mean, their complaint seems to be we don't have an
3 opportunity to correct, say, a missing signature if we live
4 in this county because our county doesn't afford us that
5 right.

6 Well, the burden that they are complaining about is
7 a burden that is inflicted by their county. Right. So maybe
8 they have standing and they have a claim against their
9 county. Again, we don't think under the Pennsylvania Supreme
10 Court's decision in *Pennsylvania v. Boockvar* which said that
11 counties are not required to provide notice and cure. That
12 would be an uphill battle, I think. But they would clearly
13 have standing. They would have stated a cognizable injury.

14 But they haven't stated a cognizable injury. They
15 don't have standing to bring the claims they brought in this
16 lawsuit which are levelled against the counties that are
17 providing notice and cure procedures.

18 MS. GALLAGHER: May I respond?

19 THE COURT: Sure.

20 MS. GALLAGHER: Your Honor, I think this goes
21 really to the heart of the matter. The issue is, Are the
22 notice and cure procedures that have been implemented legal?

23 And if we can just talk through -- and we hear the
24 *Donald Trump* case bandied about and Ran- -- Judge Ranjan's
25 opinion. I would move that to the side. Let's look at the

1 equal protection claim which was raised in the *Donald Trump*
2 litigation which Judge Brann and then the Third Circuit
3 looked at.

4 There is a fundamental change since the time that
5 that opinion was issued. And that is this. And I apologize;
6 I wasn't prepared to argue merits today. So I'm going to do
7 my best. But at the time the Court opined, what they found
8 was that the reason -- they found the boards having,
9 quote/unquote, discretion to engage in these cure procedures
10 on the basis of the Legislature's failure to act, okay,
11 almost a -- a default discretionary standard.

12 While we disagree with that on its face -- and,
13 again, we have to keep in mind those cases were decided under
14 federal law, federal equal protection. There are no equal
15 protection claims in our case. This is a free and equal
16 election. This is not equal protection.

17 What has changed is that the Legislature did act.
18 The Legislature -- and it acted to say notice/cure is okay,
19 but that was vetoed. It is not as if -- the fact that the
20 legislation was vetoed does not somehow strip the Legislature
21 of what the PA Supreme Court recognized in the *Pa. Dems* case
22 which is that it has the sole -- sole authority to institute
23 cure procedures; no one else.

24 You know, there is the basic let's have some common
25 sense, words have meaning. If the PA Supreme Court could not

1 order statewide cures as the Pa. Democratic Party requested
2 on the basis of the same harm which is alleged here, by the
3 way, it follows then if the Court couldn't do it -- and it
4 did not decide that case, just as importantly, because it was
5 discretionary, because the boards had discretion; it decided
6 that case on the grounds that this is within the province of
7 the Legislature.

8 And even the Secretary herself in other contexts
9 has argued that the failure of the election -- of Act 77 or
10 the Election Code to specifically address an issue does not
11 give discretion to the county boards.

12 And I want to make one other point.

13 THE COURT: The Secretary --

14 MS. GALLAGHER: So --

15 THE COURT: The Secretary took a -- the position
16 that you're taking today in the -- in the *Pa. Democratic* --

17 MS. GALLAGHER: Correct. And in other contexts.

18 THE COURT: All right.

19 MS. GALLAGHER: This is not discretionary. It's no
20 more discretionary for the boards to engage in notice and
21 cure procedures than it would be for county boards to adopt
22 voter ID procedures.

23 I don't believe there's anyone on this call that
24 would say, Well, the legislation, House Bill 1300, which
25 included a voter ID provision and is not specifically

1 mentioned in the act gives every county board of elections
2 the right to institute its own voter ID procedures. No,
3 because that would be a violation of the election clause.

4 MR. LEVINE: Your --

5 MS. GALLAGHER: The fact that --

6 MR. LEVINE: Your Honor, could I --

7 MS. GALLAGHER: -- there's no harm, all right --

8 MR. LEVINE: When Ms. Gallagher is done --

9 MS. GALLAGHER: -- I don't understand --

10 MR. LEVINE: -- I'd like to respond.

11 MS. GALLAGHER: -- that concept.

12 THE COURT: Let her finish.

13 MS. GALLAGHER: I'm sorry.

14 THE COURT: All right.

15 So thank you for your clarifications, Ms.

16 Gallagher.

17 Mr. Levine, you are chomping at the bit.

18 Am I saying it right --

19 MR. LEVINE: Thank you, Your Honor.

20 THE COURT: -- Levine or Levine? I never remember.

21 I have family members named Shapiro. I don't know if it's

22 Shapiro or Shapiro, and I've been --

23 MR. LEVINE: Right. It's Levine, but that's fine.

24 That's --

25 THE COURT: Okay.

1 MR. LEVINE: All right. A couple -- there's a
2 couple points here.

3 Number one, this -- we're in --

4 THE COURT: Are you talking about prong 1 now?

5 MR. LEVINE: -- all sorts of new --

6 THE COURT: You're talking about prong 1, right?

7 MR. LEVINE: Well -- I'm sorry?

8 THE COURT: You're responding to -- representing
9 the -- the respondents on prong 1 now?

10 MR. LEVINE: Yes.

11 THE COURT: Okay.

12 MR. LEVINE: But I just want to say the fact that
13 the Legislature votes and the Governor vetoes, that's not a
14 law. That's our -- you know, that's fundamental. That's not
15 a law.

16 So to act as if the Legislature has somehow acted,
17 it -- it doesn't become a law until the Governor signs the
18 law and it's enacted. So we're really no -- so Ms. Gallagher
19 said something has really changed here because the
20 Legislature passed something that the Governor vetoed.
21 There's no change from 2020.

22 And what's really noteworthy here, I think, on a
23 couple things, the -- the arguments in 2020 were based on
24 equal protection. I would urge the Court to read the Brann
25 decision, 502 F. Supp. 3rd 899, because there they

1 specifically note -- Judge Brann notes the county -- or the
2 Secretary of the Commonwealth has basically allowed for
3 notice and cure; some counties are doing it; others are not.
4 The Republican -- Trump Campaign brings an equal protection
5 claim. And they say there's nothing that bars this. The
6 *Boockvar* case simply said, We're not going to mandate a cure
7 if none exists.

8 THE COURT: Are you talking about the *Pa. Dems*?

9 MR. LEVINE: Yes, the *Pa. Dems*.

10 THE COURT: That -- and I want every respondent to
11 hear me --

12 MR. LEVINE: No. No. But I'm just saying that the
13 Court --

14 THE COURT: Mr. Levine, don't interrupt me.

15 Every respondent needs to hear that you have all
16 inaccurately cited *Pa. Dems versus Boockvar*.

17 The Supreme Court has laid down in totally
18 unambiguous terms the fact that cure -- even minor cures and
19 defects, minor notice and defects is in the hands of the
20 Legislature. They denied outright relief from that. And all
21 of you just want to go to that one paragraph which says it's
22 not required but not read through the rest of the paragraph
23 nor read the final statement which is: Relief is denied.

24 So as far as I'm concerned -- and I think you all
25 need to hear that now -- that's settled. It's settled that

1 the Pennsylvania Supreme Court has said that any notice and
2 cure, even in minor irregularities, is a matter for the
3 Legislature. And the language is specifically geared towards
4 the situation we're in now which is that now everybody is
5 doing their own thing.

6 And I'm going to -- I'm going to quote you the
7 language. This is exactly the mischief that the Supreme
8 Court and in Justice Baer's decision was trying to resolve.

9 Well -- I can't find it right at this second.

10 Yeah, here we go. He says: To the extent that a
11 voter is at risk for having his or her ballot rejected due to
12 minor errors made in contravention of those requirements, we
13 agree that the decision to provide notice and opportunity to
14 cure to alleviate that risk is one best suited for the
15 Legislature. We express this agreement particularly in light
16 of the open policy questions attendant to that decision,
17 including what the precise contours of the procedure would
18 be, how the concomitant burdens would be addressed, and how
19 the procedure would impact the confidentiality and counting
20 of ballots, all -- all of which are best left to the
21 legislative branch of Pennsylvania's government. Thus, for
22 the reasons stated, the petitioner is not entitled to the
23 relief it seeks.

24 So as far as I'm concerned, the Supreme Court has
25 given me very clear marching orders on this.

1 MR. LEVINE: Your Honor -- Your Honor,
2 respectfully --

3 THE COURT: So I don't -- I -- and everybody just
4 -- all the respondents just say, Oh, it's not required and --
5 and whatever. But that's not what the -- this is exactly the
6 situation that Justice Baer was trying to avoid.

7 And, you know, the fact that -- you know, the fact
8 that -- I don't know precisely what was in that legislation
9 for notice and cure, but, you know, the -- you can't have it
10 both ways. You can't -- you can't, like, ignore attempts to
11 cure and -- and -- notice and cure and then -- and then now
12 we're in this predicament.

13 MR. LEVINE: Your Honor --

14 THE COURT: So I think that all --

15 MR. LEVINE: -- can I just respond briefly?

16 THE COURT: -- respondents need to hear exactly
17 what I said on that. We're going to get into some statutory
18 authority later, but that is my interpretation of
19 *Pennsylvania Dems versus Boockvar*, that it's not allowed. So
20 now you've got to give me some statutory authority. And
21 we'll get into that. So --

22 MR. LEVINE: Well, Your Honor, could I --

23 THE COURT: -- Mr. Levine, I'm having --

24 MR. LEVINE: -- just respond to that briefly?

25 THE COURT: -- a hard time with your argument here.

1 MR. LEVINE: Could I -- I -- Your Honor, the only
2 thing I would say is I think it's fair when you're -- when
3 you're analyzing the Supreme Court decision, it's fair to
4 look for what was being litigated, what was being asked by
5 the petitioner. The petitioner was asking for a mandatory
6 notice and cure. This is what the Court rejected.

7 The Court also was considering, for instance, drop
8 boxes and noted -- and noted there nobody was asking for a
9 mandatory --

10 THE COURT: I'm only interested in Count III which
11 was to cure -- notice and cure minor regularities.

12 MR. LEVINE: No, but it was a mandatory --

13 THE COURT: The --

14 MR. LEVINE: The petitioners were asking for a
15 mandatory ruling, and that's what the Supreme Court said it's
16 not mandated.

17 THE COURT: No, they said it's not --

18 MR. LEVINE: That was the --

19 THE COURT: And they said we're not giving you
20 relief. So it's not man- -- I think we're -- we're mincing
21 words here, so --

22 MR. LEVINE: No; there's -- well, respectfully,
23 there's a difference between what might be mandated, that
24 every county has to do the same thing because I think the
25 Court was concerned with, well, what would be the same thing;

1 how do we know what's -- you know, what should everybody be
2 doing.

3 Very different in the same election cycle when --
4 when the Secretary of State is saying, Well, counties are to
5 free to call somebody up. And it goes to your point, Your
6 Honor, that when somebody hand-delivers a ballot, the
7 question is, Can somebody say, Oh, So-and-So, you forgot to
8 put in your date or you've got to print your name here?
9 People do that; they hand in the ballot -- when people vote
10 in person, somebody might say, Oh, I inadvertently voted for
11 this; can I spoil my ballot before I put it in?

12 THE COURT: All right. Mr. Levine, you're getting
13 us --

14 MR. LEVINE: So all of those sort of --

15 THE COURT: You're getting us off track. You're
16 coming in, and you're getting us off track. So --

17 MR. LEVINE: Well, I'm just saying that it was man-
18 -- it was only a mandatory -- that was a request for
19 mandatory.

20 THE COURT: I need to hear from any other
21 respondents on prong 1. If anybody has any other respondents
22 on prong 1, please speak your piece now.

23 Anybody?

24 Immediate and irreparable harm cannot adequately be
25 compensated by damages.

1 We've heard a lot from Ms. Gallagher. I've read
2 the briefs. If anybody -- any respondents want to respond to
3 that at this point, now is your time.

4 MR. BONIN: Judge, Adam Bonin on behalf of
5 intervenors again. And I will make this brief.

6 And I hear what you're saying in terms of how
7 you're reading that packet -- that passage from the *Boockvar*
8 case. I -- I would respectfully contend that where now Chief
9 Justice Baer says, you know, that this was a matter best
10 suited for the Legislature, I don't believe that that's
11 synonymous with saying is solely for the Legislature. It's
12 -- it's -- in a way, it's no different than what Justice
13 Wecht --

14 THE COURT: So, again, we're -- we're getting into
15 another prong of the -- we're getting into the prong of
16 whether you're -- you -- they're likely to win on -- on the
17 law. Okay. So let's --

18 MR. BONIN: Okay.

19 THE COURT: All right. I'm really trying to stay
20 very focused here.

21 All right. So I don't hear anybody. Going once.
22 Going twice.

23 (No response.)

24 THE COURT: All right. Let's go to prong 2:
25 greater injury would result from refusing than from granting

1 the injunction and the issuance of an injunction will not
2 substantively harm other interested parties in the
3 proceedings.

4 Again, reminding you I've read all the law and the
5 briefs and the memos.

6 Respondent lawyer -- who's going to be representing
7 the petitioners, I mean, on -- on this count?

8 MS. GALLAGHER: That's me again, Your Honor.

9 THE COURT: Ms. Gallagher, were you -- are you
10 going to be the sole speaker today for the -- for the
11 petitioners?

12 MS. GALLAGHER: Yes, ma'am, unless -- you know, but
13 would defer to my co-counsel Mr. King if at some point he
14 wanted to weigh in.

15 THE COURT: Okay.

16 MS. GALLAGHER: But I am lead counsel.

17 THE COURT: All righty.

18 MS. GALLAGHER: Your Honor, we do rest on the brief
19 on that issue. But, again, the Court has pointed out the
20 very greater injury and harm which arises --

21 THE COURT: How did I point it out? How did I
22 point that out?

23 MS. GALLAGHER: Because of the mishmash. I was
24 going to quote your word, the mishmash of what's going on.

25 THE COURT: The mischief. The mischief.

1 MS. GALLAGHER: Mischief. Or mishmash; but
2 mishmash too if you look --

3 THE COURT: Yeah.

4 MS. GALLAGHER: -- at the stipulation, right, the
5 joint stipulation.

6 There are -- even within the curing counties, as
7 we'll refer to them, there's no guarantee or apparentness
8 that every voter whose vote, so, say, doesn't -- isn't
9 signed, all right, can be contacted. All right.

10 So you can't -- there's no equal application of the
11 counting of the ballots. So then the default question
12 becomes, If I'm in Philadelphia and they have this great
13 program and they've taken great steps for this reach out, all
14 right, to notify voters to come in and fix their vote so it
15 can be counted, what guarantee is there that every voter is
16 notified?

17 We have some counties that basically delegate the
18 authority of the boards to conduct and count ballots, have
19 delegated that authority to the political parties. Well,
20 what if I'm an Independent voter? Who do you contact to fix
21 my vote, help me make sure my ballot counts?

22 And this is exact- -- that's the greater harm. And
23 it is -- and then apply to the voters who have no cure
24 procedures, what we have is disparate treatment of voters
25 depending upon where they live; depending upon whether they

1 can contacted; depending upon whether or not they're a
2 Republican, a Democrat, an Independent, or and I mean no
3 slight to any of the other nonmajor parties. Every one of
4 those individuals are at risk for not getting the same
5 benefits. There's no equal application of what is a mess.

6 And, again, that's what the Secretary and, I
7 believe, the Supreme Court in *Pa. Dems* was saying, it's the
8 procedures; and how do you put this in place and how do you
9 make sure that it's equally applied? And leaving that to the
10 individual counties is exactly why, one of the reasons, apart
11 from the lack of statutory authority, that the Court and the
12 Secretary said, You can't do this; the Legislature has to do
13 this, because this is the harm. We don't have -- as this --
14 the Commonwealth sits right now, there is no equally applied
15 method for the counting of mail-in ballots.

16 THE COURT: Right. And the --

17 MS. GALLAGHER: And that on its face --

18 THE COURT: The respondents' position is that since
19 there's nothing in the statute disallowing it, they have it,
20 but we'll get to that on the merits. And --

21 MS. GALLAGHER: Right.

22 THE COURT: -- let me -- let me make a very -- a
23 charged statement here in terms of the irreparable -- the --
24 the greater injury. The -- this is mostly to the -- to the
25 respondents.

1 The state of our country at this point and the
2 state of our state in terms of how, you know, there is
3 confidence, public confidence in the integrity of our
4 election system, it's being eroded. And I'm not going to put
5 blame on anybody, but there is so little confidence in the
6 integrity of our election system. That's just as important
7 as I balance this, the right to vote. And we have to weigh
8 both of these paramount interests in this analysis.

9 And I do believe that, you know, if voters can --
10 can see that different counties manage it their own way and
11 some votes will count and some votes won't count, how is that
12 going to foster integrity in our -- in our electoral system?
13 I think that we've reached a breaking point in our country
14 and in our state and that -- you know, the reason I'm here
15 allowing this to be broadcast to anybody who wants is so they
16 understand these issues. And I think that we have to tread
17 very delicately at this point on what we permit and don't
18 permit.

19 So with -- understanding the competing public
20 interests at stake, I'd like the respondents to -- and I --
21 I'll make sure that I'm including anyone -- you know, if --
22 if I don't grant the injunction, for example, what will that
23 do to public trust in our election system if they know that
24 it's all different around the state?

25 Whoever wants to respond to that, please do because

1 that's when I'm grappling with now on this particular -- I
2 think that we owe the citizenry -- and I'm not the
3 Legislature. And I'm not the Board, and I'm not the
4 Secretary. I can't decide all of this. I can only just do
5 what I can to ensure public trust in the integrity of our
6 system. And to say my vote won't -- won't count but then
7 other votes do count, is that really fair too?

8 So who -- who from the respondents wants to address
9 this?

10 MR. WIYGUL: Your Honor, this is Robert Wiygul for
11 Department of State respondents.

12 THE COURT: Yeah. And, you know, you're not
13 helping matters either, you know, the Secretary of State
14 agreeing that there should not -- there should be legislative
15 -- and then putting out on your website that it won't be
16 counted. I mean, you're not helping the matter.

17 MR. WIYGUL: Your Honor, respectfully, if I can --
18 if I can speak to that issue, because I think our position --
19 the Secretary's position has been misstated by the
20 petitioners.

21 The Secretary did take the position in 2020 in the
22 *Pennsylvania Democratic Party* case that county boards of
23 election were not required -- they were not required as a
24 matter of the Election Code to offer notice and cure. The
25 Secretary, however, also believes that they are not

1 prohibited from doing so. And that was the position she took
2 in 2020 and the position that she is taking today. So
3 there's been no inconsistency --

4 THE COURT: Why can she take that position when the
5 Supreme Court said it's for the Legislature?

6 MR. WIYGUL: Because, Your Honor, as some other
7 respondents have noted, the question in that case -- and
8 that's -- and that's the question on which the Secretary took
9 the position -- was, Is there a legal basis for the Judiciary
10 to require all county boards of election to provide notice
11 and cure procedures? And we believed the answer to that
12 question was no.

13 We would respect-- -- that -- and that was the
14 question. And if you look at -- and obviously Your Honor
15 will read the opinion and draw -- draw the Court's own
16 conclusions --

17 THE COURT: Did you mean the Judiciary or the
18 Legislature when you -- when you just -- because you just
19 said it's the Judiciary.

20 MR. WIYGUL: I don't know -- the -- the question in
21 that case, Your Honor, was -- was whether -- the petitioners
22 in that case, the Democratic Party in that case was
23 arguing --

24 THE COURT: All right.

25 MR. WIYGUL: -- that the Judiciary should impose

1 notice and cure procedures on all counties. The Secretary
2 didn't think there was a basis for that. The Supreme Court,
3 as we read the opinion, agreed with us.

4 The Supreme Court -- that's -- so the Supreme
5 Court, when it said the Legislature there, I think, based on
6 all the contexts and the arguments, it was distinguishing the
7 legislative branch from the judicial branch. But, of course,
8 when the Legislature in -- by statute delegates policy making
9 authority to the county boards of elections, which it clearly
10 has in the Election Code --

11 THE COURT: Cite the -- just for the record, cite
12 the section. It's --

13 MR. WIYGUL: It's -- I believe it's 25 --

14 THE COURT: Twenty-six --

15 MR. WIYGUL: 25 Pa. Stat. --

16 THE COURT: 2642.

17 MR. WIYGUL: 2642. And 2642(f) is the provision
18 that I think everyone is focused on. As --

19 THE COURT: You know, we're going to get to the
20 merits right now. How do you square that with the fact that
21 the other section of the code 3146.8 specifically says as
22 soon as they get that ballot, it shall be kept in sealed and
23 locked containers until the canvass? So how do -- how do
24 these notice and cure things happen if the ballot is supposed
25 to be put in a locked thing right away? Do you open it up

1 and let people cure it before pre-canvass? I mean --

2 MR. WIYGUL: So -- so a couple of points in
3 response to that, Your Honor.

4 The first thing I would say -- and I happy to
5 address this argument, but that's not an argument that the
6 petitioners have actually made. They don't rely on that
7 provision at all. They rely on a different provision in the
8 Election Code which we've addressed. So I -- I don't think
9 that's an argument they presented.

10 That is an argument that was brought in federal
11 court in 2020 in a case my firm was involved in where
12 petitioners sued Montgomery County, alleging that their
13 notice and cure procedures were prohibited. And they relied
14 on that very section that Your Honor referred to. And the
15 Court ended up, I believe, denying the TRO that was sought,
16 and then petitioners voluntarily withdrew the case.

17 But the response in that case, which I believe is
18 correct, is that the same provisions or adjacent provisions
19 of the Election Code require county boards to engage in what
20 you might call an intake process when they receive their
21 mail-in and absentee ballots and they have to look at them
22 because need to note -- they need to examine them; they need
23 to sort them --

24 THE COURT: For the record -- for the record,
25 please cite the statute sections that you're referring to.

1 I'm pretty sure I have them, but it's going to make it clear
2 for everybody.

3 MR. WIYGUL: Yeah. I'm sorry, Your Honor. I don't
4 have -- I can maybe get those to you -- for you in a moment.
5 I don't have them in front of me right now. But they -- they
6 require the -- the county boards to make a district register
7 so that they know who has submitted absentee and mail-in
8 ballots that could be canvassed.

9 And so they have to inspect those. They have to
10 look and see who submitted them. They need to be scanned in
11 to the SURE system which also keeps a record. So they're --
12 they're required to undergo some sort of inspection of the
13 ballots when they come in. And, of course, in the course of
14 doing that, they are going to discover or may well discover
15 that there was no signature on there.

16 Now some of the counties as part of the sorting and
17 scanning process use equipment -- and this is all in their
18 submissions, I think; but they use equipment that weighs --
19 can weigh the ballots and can determine based on the weight
20 whether there was -- there is or is not a secrecy envelope
21 enclosed in that ballot.

22 So as part of that process that they are required
23 to engage in, the counties often identify the sorts of -- of
24 deficiencies that we're talking about in this case.

25 And there is -- there is nothing in the Election

1 Code that -- certainly nothing petitioners have cited -- and
2 I don't believe the section that Your Honor cited prohibits
3 it either -- that prohibits the counties when they discover
4 these deficiencies from notifying voters and telling them --
5 and there's -- there's no dispute in this case, by the way,
6 that the kinds of deficiencies that we're talking about are
7 deficiencies that if they were not corrected, right, if that
8 ballot was the only ballot submitted by the voter, that
9 ballot wouldn't be cast, because if it would be cast, we
10 don't have -- we don't get to notice and cure at all. Right.
11 So the -- the premise here is we're talking about what I will
12 call technical deficiencies that would be disqualifying if
13 not corrected.

14 But the other thing I think we should keep in mind
15 here is -- and this goes to the balance of harms point that
16 Your Honor started with -- what petitioners are trying to
17 prevent through their injunction is from qualified electors
18 who ultimately submit a timely ballot that is fully compliant
19 with the Election Code in every respect, keeping that vote
20 from being counted. I think that that is clearly a
21 significant harm that has to be weighed in the balance.

22 MR. GREENBERG: Hey, I'm still stuck in this
23 court --

24 MR. WIYGUL: And on the other side of the ledger,
25 Your Honor -- and, again, I -- I won't repeat myself and go

1 back to the standing point, but I think it's been unrefuted
2 -- there is -- there's no right on the part of petitioners to
3 prevent qualified electors who timely submit a fully
4 compliant ballot from having that ballot counted. Right.
5 And the argument seems to be if an elector initially hands in
6 a mail-in ballot and they neglect by -- by accident, by
7 happenstance, they were distracted, what have you, they
8 neglect to sign the envelope, that somehow a voter in another
9 county has a right not to have that vote counted. It just --
10 it just isn't so.

11 This is a case in which petitioners are arguing
12 that there are unqualified electors who are being able to
13 participate in the democratic process and somehow have --

14 THE COURT: That's not what they're saying.
15 They're not saying that they're not qualified electors.
16 They're saying they -- they shouldn't have -- the ones that
17 make mistakes or make errors shouldn't -- shouldn't be given
18 preference in certain situations in certain places, in
19 certain counties. That's what they're saying.

20 They're not saying that they're not qualified
21 electors. They're saying that they messed up on their
22 absentee and mail-in ballots and that who gets to have that
23 solved and who doesn't.

24 MR. WIYGUL: And I -- I think, Your Honor --

25 THE COURT: That's the issue here.

1 MR. WIYGUL: On the equal protection point, I would
2 just argue, again, there's a -- there's a fundamental
3 disconnect between petitioners' arguments in this injunction
4 proceeding and their petition.

5 They have not -- as they've conceded, they have not
6 brought any equal protection argument; they have not brought
7 any uniformity claim. They have three counts. The first is
8 any kind of a notice and cure is prohibited under the
9 Election Code. The second is it violates the Elections
10 Clause, which is substantively the same argument, right. If
11 it doesn't violate the Pennsylvania Election Code, then it
12 doesn't violate the Elections Clause. And the third count is
13 not a claim for relief -- or not a count -- a cause of action
14 at all; it's just a claim for injunctive relief.

15 Conspicuously absent is any of the uniformity or
16 equal protection arguments that have been the centerpiece of
17 the arguments by petitioners in this preliminary injunction
18 proceeding. And I can't tell you why they chose not to
19 actually bring those claims in this case. My own suspicion
20 is probably because they were squarely rejected by at least
21 two federal courts in 2020. But, nonetheless, they did not
22 bring them.

23 And so respectfully I don't see how they can obtain
24 injunctive relief on the basis of harms that purportedly
25 derive from a lack of uniformity or from unequal treatment.

1 They simply haven't brought those claims.

2 THE COURT: Thank you.

3 MR. GREENBERG: Your Honor, this is Kevin Greenberg
4 on behalf of the Democrat- -- Pennsylvania Democratic Party.
5 May I weigh in as well on this point?

6 THE COURT: Yes, sir.

7 MR. GREENBERG: Thank you, Your Honor.

8 Hold on. Let me start the camera.

9 I'm trying to manage your data flow.

10 I want to concur with what Mr. Wiygul said largely,
11 but there are a couple of points I want to call out
12 specifically. And as the person who drafted the *Pa. Dems*
13 case we've been talking so much about, the pleadings and sort
14 of thought that out, I want to be very clear.

15 I at no point sought and at no point was there any
16 argument that the counties that were doing cures should be --
17 should be dissuaded from doing so. That was never raised.
18 The Court did not go there sua sponte. At no point was that
19 a counterclaim brought in that action.

20 What we were asking for was a mandate that all 67
21 counties be forced to in a seven-day period do an outreach to
22 those voters. And we litigated that, and we lost that point.
23 But it was very clear that's what the Court was rejecting
24 which was that the courts would not force us to do -- would
25 not force the counties to do that which the Legislature had

1 not mandated they do. But at no point in that case did
2 anybody say, And those that are doing it can't.

3 I'm going to tell an embarrassing story for myself.
4 In 2006, I was a deputy city solicitor in Philadelphia. We
5 were fighting in federal court a series of things involving
6 the Gonzales justice department, and I was going to be busy
7 on election day working for the county. So I went down to
8 room 142 to vote in advance of the election day. I completed
9 my ballot, and I handed it across the counter without a
10 signature on the outside envelope. It was a permitted
11 absentee at the time.

12 The person on the other side of the counter handed
13 it back to me, not before everybody behind the counter
14 ridiculed me and laughed at me for some period of time as the
15 lawyer for the board not getting that right. But they handed
16 it back to me, and I was able to cure my ballot and vote
17 appropriately.

18 And that is the process that exists today. Adams
19 County submits in 2010. If you go through the evidence that
20 the petitioners have collected, there are a bunch of counties
21 who have done this. Somehow they would say that my appearing
22 at the counter allows them to do an intake that would cure it
23 but if I were to put it in the mail, would put it in a drop
24 box, that somehow would invalidate it.

25 And at the end of the day -- this goes back to -- I

1 want -- the point that Mr. Wiygul was making -- the harm here
2 is invalidating voters' votes. And what they're asking for
3 is not to keep a registered voter from -- an unregistered
4 voter -- these are all registered voters. These are all
5 voters who timely vote. We are not asking for post-election
6 cure. I did in 2020. I didn't get that. But we are not --
7 nobody has asked for post-election cure here. These are all
8 things that happen by 8:00 on election day.

9 And each county consistent with its geography, its
10 resources, its population can figure out how to best assist
11 voters the same way that if I paid the wrong property taxes,
12 they shouldn't seize my property and send it to sheriff's
13 sale without giving me a chance to fix it if they can do what
14 they can to help us.

15 THE COURT: So how do you -- how do you address,
16 you know, public distrust if -- if it is then received via --
17 not over the counter but it's supposed to be secure and no
18 one is supposed to touch it until pre-canvass? So then it
19 sounds like people can open up these secure things and start
20 going through envelopes and pulling out and then finding the
21 one that -- how --

22 MR. GREENBERG: No; Your Honor, nobody is asking
23 them to open an envelope before 7 a.m. on election day, just
24 to be crystal clear here.

25 First of all, they are --

1 THE COURT: Not open them, but just pull them out
2 and then --

3 MR. GREENBERG: No, they're not doing that. They
4 -- they can run it through a scanner that looks and weighs it
5 the way that, I guess, Mr. Wiygul was referring to a couple
6 of counties do it. But they never open that envelope; they
7 don't disrupt it. And it's always within the custody of the
8 board of elections. And --

9 THE COURT: How is the cure done then?

10 MR. GREENBERG: What?

11 THE COURT: How is the cure done if it's not --

12 MR. GREENBERG: Then -- then the voter is told to
13 come back, and they spoil that ballot. They shred it; they
14 tear it up and give you a new one to execute anew.

15 THE COURT: So they open that --

16 MR. GREENBERG: And that's --

17 THE COURT: Counsel, they open up that secure
18 container then.

19 MR. GREENBERG: Well, it -- the secure container is
20 at some level a fiction. There's actually a provision in the
21 Election Code that has never been changed requiring the City
22 of Philadelphia to keep all ballots in a fireproof box; and
23 if they don't keep it in a single fireproof box, the mayor
24 has a three-year jail sentence, mandatory. That's some
25 legacy language from 1850-something.

1 The lang- -- the important question is this: Does
2 the county keep them secure? And if the county chooses to
3 give it to the voter to spoil their one ballot -- and, again,
4 you've got to bring ID; you've got to prove who you are --
5 but allows the voter to revote that vote and distribute --
6 destroy the other one, it is akin to the provisional ballot.
7 What some counties -- what Mr. Cosgrove spoke about in
8 Luzerne County is that they don't allow you to spoil your
9 ballot; they just let you go vote provisionally a new one.
10 And when they void your one ballot, they've got a second one.

11 Each county has consistent with its population, its
12 resources, its density figured out a plan to do this. And
13 that is exactly what these same litigants and the same
14 counsel in 2020 argued time and time again in state and
15 federal courts with some voter dilution argument that was
16 rejected time and time and time again.

17 And so the fact that one law professor in Butler
18 County isn't given the right to fix his ballot doesn't mean
19 that a voter in Philadelphia who walks in City Hall and asks
20 a county employee, Where is the voting office? shouldn't be
21 allowed to receive help. This -- this injunction they've
22 asked you to issue would ban anybody who works in the City of
23 Philadelphia telling you where to go. Same thing is true in
24 every one of these counties.

25 And the -- where you draw the line on this is

1 something --

2 THE COURT: I think you're going a little far right
3 there. That's a little far.

4 MR. GREENBERG: It is. But the point is what the
5 Court and the Legislature can do is the Legislature could
6 draw lines. They have not done so. They have not passed a
7 law that has done so. And they have not done so with a
8 majority vote and the signature of the Governor or with the
9 veto override. So we don't have a law that does this.

10 If the Legislature hasn't provided these
11 parameters, then under the section Mr. Wiygul quoted of the
12 delegation to the counties under subsection (f), it's very
13 clear the counties can come up with appropriate procedures to
14 do so and if it does so within that, it is complying with the
15 law.

16 If the Legislature wants to draw hard rails, they
17 can do so, but they need to either get a governor's signature
18 or an override. And that's not the case here.

19 What the Court told me in 2020, to my chagrin, but
20 -- but I think correctly looking back on it, is the Court
21 wasn't going to do it for us. The Legislature can do this,
22 or where the Legislature hasn't expressly done so but it has
23 delegated it to the counties, the counties can do consistent
24 with their resources and the needs of their population.

25 THE COURT: Thank you.

1 MR. GREENBERG: Thank you.

2 MR. NKWONTA: Your Honor, this is Uzoma Nkwonta --

3 MS. GALLAGHER: Your Honor, may I respond?

4 MR. NKWONTA: -- on behalf of DSCC and D triple C.
5 May I add a few points --

6 THE COURT: Let me give --

7 MR. NKWONTA: -- to that, Your Honor?

8 THE COURT: Yeah.

9 Let me give a little more time, Ms. Gallagher, to
10 the -- to the respondents please.

11 MS. GALLAGHER: Thank you. I apologize.

12 THE COURT: That's okay.

13 MR. NKWONTA: Your Honor, in support of
14 respondents' interpretation of the Supreme Court's ruling in
15 *Pa. Dems*, I'd like to direct the Court to paragraph 56 of
16 petitioners' original petition. And in paragraph 56, they
17 appear to in a moment of candor agree with our interpretation
18 of that case.

19 They state that although *Pennsylvania Democratic*
20 *Party* answered the question of whether a court could require
21 the boards to implement a notice and opportunity to cure, and
22 italicizing the word require, they went on to state that
23 Pennsylvania law, specifically the Election Code, supplied
24 the answer as to whether county boards could adopt cure
25 procedures.

1 And then they went on to -- to provide some
2 analysis of the Election Code which we disagree with for the
3 reasons Mr. Wiygul and Mr. Greenberg have stated. But even
4 petitioners recognized the distinction in the *Pa. Dems* court
5 ruling. And that distinction is consistent with what
6 Mr. Greenberg has already explained as the issue that the Pa.
7 Dems were seeking to resolve which is whether counties were
8 required to -- to implement a -- a cure procedure.

9 And the reason why the specific relief requested is
10 important here, not -- and given -- given what Your -- Your
11 Honor has mentioned about -- about the opinion and what
12 Justice Baer mentioned, the reason why the specific relief is
13 -- is important is because that determines what portions of
14 the opinion are actually controlling and precedential and
15 what portions are dicta and which may be persuasive but are
16 not precedential and binding.

17 And -- and dicta, as the Pennsylvania Supreme Court
18 has recognized, is a -- an opinion that is passed on by the
19 Court but is not essential to the decision.

20 And so when the Pennsylvania Democratic Party is
21 seeking a mandatory cure for all 67 county boards of
22 elections and the Supreme Court denies that relief, well, any
23 discussion about whether a county may in its own discretion
24 provide a cure, that is not essential to the decision and
25 that is not essential to the relief sought by the Pa. Dems.

1 And that would be defined by the Pennsylvania Supreme Court
2 as dicta.

3 THE COURT: Well, I wouldn't call it dicta --

4 MR. NKWONTA: So all of that --

5 THE COURT: -- because the final sentence of that
6 opinion is: We deny the relief sought in Count III and IV of
7 the petition for review. They denied it.

8 The issue here becomes whether, you know, it
9 mandates that the Legislature has to do it or, you know -- is
10 -- are they forced to do it or -- or not? That's the issue.
11 But that's -- it's not dicta, that determination.

12 MR. NKWONTA: The rule -- the ruling that -- that
13 held that county boards were not mandated to offer a cure is
14 not dicta. That was the ruling.

15 But the question, going back to what Your Honor
16 just said, whether the -- the cure procedures may be provided
17 by county boards or must be provided by the Legislature, that
18 question has not been passed upon at least in any way that is
19 controlling or binding or settled as of now.

20 And to follow up on an additional point Your Honor
21 made about the -- the public trust in elections, which is an
22 important point, I would highlight, Your Honor, that what can
23 erode public trust in elections is voter -- voters being
24 disenfranchised, voters casting ballots that are ultimately
25 not counted.

1 And what -- what can further erode that trust is
2 when that decision not to count a ballot or reject a ballot
3 comes midway through or -- through the voting process or the
4 while the voting process is already underway and as a result
5 of -- of a case, of litigation that was strategically brought
6 years or at least many months after this issue had come to
7 bear and after this issue had become aware to everyone
8 involved in this litigation.

9 And so it's important for the Court to consider the
10 -- the potential impact of a ruling that would change the
11 rules, a ruling that would change the determination of
12 whether a ballot is counted or rejected and take that
13 discretion from the counties which is -- which is where the
14 discretion currently lies and remove that discretion midway
15 through the voting process.

16 And that does far more harm, we would posit to the
17 Court, than -- than a situation where different counties
18 adopt different procedures, because that is something that
19 has been around in -- for many years. And that is something
20 that is not new and is not uncommon.

21 Courts have had opportunities to pass upon
22 instances where different counties adopted different
23 procedures for administering elections. And the courts have
24 repeatedly found that that by itself did not amount to an
25 equal protection violation, nor did it even amount to an

1 injury.

2 Now, despite what -- despite whether petitioners
3 may claim uniformity is required here or is not required
4 here, the -- the fact of a county adopting a different
5 procedure from another county is not by itself the injury
6 that courts have found to erode public trust. But courts
7 have repeatedly found that disenfranchising voters,
8 especially on the eve of an election --

9 THE COURT: Well, counsel, I don't remember in my
10 65 years on earth that we've had this much public rancor and,
11 you know, having entire blocs of populations say that the
12 votes and the outcome are a lie and they're not going to
13 accept the votes. These are different times. We've got to
14 weigh, you know, the loss of a couple thousand votes with --
15 with -- you know, believe me, this is -- you've got to look
16 at the times we're in right now.

17 MR. NKWONTA: And I think that counsel is, Your
18 Honor, against --

19 THE COURT: I want to -- I want to ask Ms.
20 Gallagher something before I forget. So if you don't mind,
21 sir, just -- could you just step aside while I ask Ms.
22 Gallagher before I forget, because this is important.

23 Ms. Gallagher.

24 MS. GALLAGHER: Yes, ma'am.

25 THE COURT: I need for you to address the fact that

1 in your petition you don't -- they say you don't assert any
2 equal protection or -- or anything like that, that it was
3 just the violation of the Election Code, claim for
4 injunction. So, Ms. Gallagher, I need for you to address the
5 fact that you didn't address -- and this is what you're
6 saying is the harm.

7 MS. GALLAGHER: Correct, Your Honor. It is the
8 same harm which Mr. Greenberg sought in the *Pa. Dems* case.
9 All right. That was not an equal protection claim. In this
10 case, it's a violation of the free and equal election clause.
11 And we cite specifically on page 15 of our brief that the
12 Pennsylvania Constitution -- "Moreover, the disparate
13 approaches taken by the boards runs afoul of the Pennsylvania
14 Constitution's requirements that all laws regulating the
15 holding of elections by citizens shall be uniform throughout
16 the state."

17 THE COURT: Okay. So you did raise it.

18 MS. GALLAGHER: Yes. Yes, ma'am.

19 THE COURT: All right. Because I don't have every
20 paper memorized, you know, so --

21 MS. GALLAGHER: Right.

22 THE COURT: Okay.

23 MS. GALLAGHER: Okay. It's page 15.

24 And if I may, just one thing I want to address,
25 it's somewhat, when I hear the arguments, the exact reason

1 the Pa. Democratic -- there was a reason the Pa. Democratic
2 Party in its wisdom in 2020 sought a mandate of notice and
3 cure procedures. It was for this exact reason. That's why
4 it sought it, to avoid disparate treatment. All right.

5 And the Court -- it was clear; there is a
6 commonsense approach, Your Honor, as the Court has pointed
7 out, as to what the PA Supreme Court said. It's not dicta
8 when the highest court in this state, in the Commonwealth
9 said, We can't order that because only the Legislature can do
10 it. And that's what the Court said. And the commonsense --

11 THE COURT: So is your point that by implication,
12 we can't not order it, or something? I mean, just --

13 MS. GALLAGHER: Correct. Well, I think this is
14 important for what they said -- what they didn't say. They
15 didn't say it was discretionary. They didn't say, We can't
16 order it because the boards have discretion; we can't force
17 them which --

18 THE COURT: They say the statute allows them under
19 that one section because there's nothing --

20 MS. GALLAGHER: Excuse me?

21 THE COURT: The respondents' position is that the
22 statute 2642(f) allows them wide discretion. And --

23 MS. GALLAGHER: Correct, Your Honor.

24 THE COURT: -- there is -- it's open-ended, and
25 there's nothing that prohibits the --

1 MS. GALLAGHER: Oh, I believe it does. I believe
2 *Pa. Dems* prohibits it because --

3 THE COURT: Where in the statute does it --

4 MS. GALLAGHER: -- the law of this --

5 THE COURT: Where in the statute does it prohibit?
6 Where specifically in the statute --

7 MS. GALLAGHER: 302(f) says that the boards -- and
8 I -- let me just -- shall not make any rules or regulations
9 contrary to law. The law of this Commonwealth under *Pa. Dems*
10 is that only the Legislature can institute notice and cure
11 procedures.

12 THE COURT: Can you respond to Mr. Greenberg's
13 argument that what they were asking for in the *Pa. Dems* was
14 not -- I don't know how to phrase it; it wasn't -- they
15 weren't asking for mandatory -- you heard his argument.

16 MS. GALLAGHER: Well, they were asking for
17 mandatory cures. That's exactly what they asked for. They
18 asked for the Court to order that all boards adopt these
19 procedures, notice and cure procedures for what were then
20 technical violations.

21 And, again, I want to reserve the right to address
22 the issue we've just heard about --

23 THE COURT: But they didn't --

24 MS. GALLAGHER: -- the weighing of the envelopes.

25 THE COURT: But they didn't -- but they didn't --

1 the Supreme Court didn't grant that relief, but they didn't
2 say, Hey, the boards can still do it.

3 MS. GALLAGHER: No. They said, We can't do it
4 because only the Legislature can do it.

5 THE COURT: Yeah, but the courts can't do it.

6 MS. GALLAGHER: And that then becomes the law --

7 THE COURT: And that's true; the courts can't do
8 it.

9 MS. GALLAGHER: -- of the Commonwealth.

10 THE COURT: But the courts can't do it.

11 MS. GALLAGHER: The courts can't order it; the
12 courts can't order it because only the Legislature can create
13 a notice and cure procedure. So just a facial reading of
14 that, and then you look at 302(f) where the board cannot make
15 any acts which are contrary to law -- and I will flip my
16 pages to get the exact citation -- all right, the law is only
17 the Legislature can adopt a notice and cure procedure.
18 That's it. That's the law of the Commonwealth. That does
19 not give discretion to the boards to then do it.

20 And, again, it's the same harm that's sought to be
21 protected so that we don't have a mishmash of counties doing
22 all different things and a vote counts in one place but it
23 doesn't count in another place.

24 THE COURT: The Supreme Court also said that in --
25 in *Pa. Dems* that there are no notice and cure procedures in

1 the Election Code. They specifically said that. So --

2 MS. GALLAGHER: Correct.

3 THE COURT: All right. Well --

4 MR. KING: Your Honor, this is Tom --

5 THE COURT: These are very, very subtle,
6 interesting arguments.

7 Mr. King.

8 MR. KING: Your Honor, this is Tom King. Could I
9 add one thing to that on behalf of the petitioners?

10 So -- and many of these county boards would argue
11 and I've personally argued in the Fulton County case decided
12 by the Commonwealth Court that these boards have great
13 discretion. But you can't point to anything in those
14 statutes that specifically addresses this right of cure.

15 And so despite the broad discretion that the boards
16 are given, in the absence of statutory authority, we -- we
17 still apply Dillon's Rule statutorily and in the case law in
18 Pennsylvania. And so in the absence of statutory authority,
19 these boards lack any ability to institute these procedures.
20 It's not that it -- it's not that it -- it can say that you
21 can't -- that you can't do something; it has to say that you
22 can do something. Dillon's Rule is applicable to these --
23 these agencies.

24 THE COURT: What are you saying, Dillinge (ph) --

25 MR. KING: Dillon's Rule.

1 THE COURT: Oh, Dillon. Okay.

2 All right.

3 MR. KING: And so in the absence of specific
4 statutory authority, many of these boards take that position
5 that they have no authority to institute these procedures
6 simply because there is no law; they are creations of the
7 Legislature.

8 And so the Supreme Court got it exactly right.
9 There is no law providing for this broadness procedure; and,
10 therefore, it couldn't be ordered to be mandatory. And
11 likewise, these boards can't do it because there's nothing
12 that the Legislature has given them power-wise to create
13 these specific processes.

14 And I think it's a real stretch to read the
15 provisions applicable to county boards and try to suggest
16 that they somehow now -- and the Secretary is actually taking
17 the opposite position that -- that my colleagues took in the
18 -- in the Fulton County case -- to suggest now that there's
19 this broad authority for anybody to do whatever they want to
20 do under -- under -- under the Election Code.

21 I suggest that it has to -- there has to be some
22 nexus to the specific language of that statute that would
23 allow these boards to institute this. And even the argument
24 from Philadelphia and others that they're home rule charter
25 counties, they're not in a position to implement regulations

1 like this that would have an effect statewide that would not
2 otherwise be provided for. So even the home rule counties
3 don't have that ability.

4 Thank you very much.

5 MR. GREENBERG: If -- if I may respond, Your Honor?
6 This is Kevin Greenberg for the Democratic Party.

7 I just want to pick up -- to respond to things
8 Mr. King and Ms. Gallagher said. I want to be clear on two
9 points. There is express authority in the delegation to the
10 counties.

11 THE COURT: Tell me exactly the statute section.

12 MR. GREENBERG: It's the one Mr. Wiygul cited,
13 subpart (f). Hold on a second. It --

14 THE COURT: All right. I just want to make
15 sure that there's nothing --

16 MR. GREENBERG: It's 2642(f) --

17 THE COURT: Okay. That's it.

18 MR. GREENBERG: -- which reads --

19 THE COURT: All right.

20 MR. GREENBERG: -- the board shall have the power
21 to make and issue such rules, regulations and instructions,
22 not inconsistent with law, as they may deem necessary for the
23 guidance of voting machine custodians, elections officers,
24 and electors.

25 So their entire argument is that 2642(f) says they

1 can't do something contrary to law and, therefore, because
2 *Pa. Dems* says that it's best suited for the Legislature,
3 counties can't do it. And I want to be very clear. If
4 Justice Baer wanted to say it is reserved to the Legislature
5 or may only be made by the Legislature, he could have done
6 so. Instead, what he said is between the Court and the
7 Legislature, the Court is not going to do this because it is
8 best suited for the Legislature. And remember --

9 THE COURT: All right. So cure --

10 MR. GREENBERG: -- this was in the context --

11 THE COURT: So cure and defect provisions/protocols
12 is for the Legislature --

13 MR. GREENBERG: No.

14 THE COURT: -- not --

15 MR. GREENBERG: What he said is it's not --

16 THE COURT: -- not for the boards.

17 MR. GREENBERG: -- for the Court. It's not for the
18 Court. What he said is it's best for the Legislature, but in
19 this case where the Legislature has not acted but it has
20 instead expressly given broad authority to the counties to
21 administer, the counties can choose to administer it.

22 So this -- this entire claim that somehow there's
23 an equal protection violation -- there's a -- there's an
24 equality of counties which makes it free and equal which
25 therefore does this, it turns the Supreme Court's decision in

1 2020 on its head.

2 If we had won that case and if the Court said yes,
3 it must be uniform as it were and we must do this, then the
4 argument of what the uniform standard is would be an
5 interesting argument.

6 But instead what's happened here is that we've got
7 a perversion of the case where they've said, Because the
8 Court won't tell you that you have to do it at every sixty-
9 -- in all 67 counties and every one of those 67 systems has
10 to be same, therefore, you go to the bottom of the line of
11 whatever the least willing to assist their voters of those 67
12 is now what everybody must do.

13 And so it is a complete race to the bottom, and
14 that is not what the courts have said time and time again.
15 Vote -- voter dilution through equal protection type
16 arguments, which they're making, have -- I don't want to
17 repeat -- have been repeatedly rejected here.

18 And so the analysis that's here, the very fine
19 analysis is to look at 2642(f) which is a very broad
20 delegation unless it's contrary to law. And what would make
21 it contrary to law is an overbroad reading of *Pa. Dems* case.

22 And the *Pa. Dems* case isn't that broad. It is
23 specific to the facts we alleged. And we won some of those
24 claims; we lost some of those claims. But on this one, no
25 one ever lodged a counterclaim saying no county can do this.

1 It simply wasn't before the Court and therefore the Court
2 saying it won't go there, much like we shouldn't be going to
3 equal protection arguments here because it's not properly
4 before the Court.

5 Thank you.

6 MR. COSGROVE: If I -- Your Honor --

7 MS. GALLAGHER: May I respond, Your Honor?

8 THE COURT: I would like to hear from Ms. Gallagher
9 right away.

10 MS. GALLAGHER: Yes, Your Honor.

11 Speaking in terms of perversion of the opinion in
12 *Pa.* --

13 THE COURT: And, again, at this point, I don't want
14 people repeating themselves.

15 MS. GALLAGHER: Okay. No. No. But that -- to
16 address that point, it's clear the reading that Mr. Greenberg
17 and the respondents proffer of the discretion of the board
18 would mean that boards could independently adopt voter ID
19 laws; boards could independently adopt different methods of
20 voting; boards -- that is clearly not the law. The boards
21 are not autonomous --

22 THE COURT: Well, the boards --

23 MS. GALLAGHER: Excuse me.

24 THE COURT: I mean, the boards do have different
25 kinds of voting machines and different kinds of this and

1 that. So they're allowed to have different kinds of voting.
2 They're not allowed to change the law on -- on
3 identification, I suppose, but --

4 MS. GALLAGHER: Well, why not, because, Your Honor,
5 the law is very clear under *Pa. Dems* also there must be a
6 secrecy ballot. We now know and we've heard today, Well, we
7 can weigh the ballot. And when the Court posed the question,
8 But doesn't that somehow violate what you're supposed to be
9 doing with that ballot when it comes in -- I mean, if there
10 is anything that's clear, there must be a secrecy ballot or
11 that vote doesn't count.

12 THE COURT: All right. Can -- can I just stop and
13 ask one question that whoever thinks they can answer it best:
14 What does it mean when something is un- -- is returned as --
15 as undeliverable? What does that mean and what happens,
16 because that's considered a defect. But I don't know
17 specifically what that means.

18 So I don't know -- I -- I think probably -- I know
19 -- I think different counties are handling it differently; I
20 don't know that. It's hard to tell from the joint
21 stipulations. I do know that that is being considered.

22 So maybe Philadelphia, maybe the Department of
23 State, can -- can somebody explain to me how that works, if
24 it's considered a cure and how do you -- you know, is it
25 considered a defect and then how do you -- how do you cure

1 that?

2 MR. FIELD: Your Honor, Benjamin Field for --

3 THE COURT: Oh, good.

4 MR. FIELD: -- the City of Philadelphia Board of
5 Elections.

6 THE COURT: All right. Yeah, I need to get this --
7 I need to get some of these issues off the table now.

8 MR. FIELD: Understood. So I don't know what --
9 how undeliverable is being used, but I do know there are
10 circumstances where a mail-in ballot is requested and sent
11 out by my client and it is returned by the post office as
12 undeliverable.

13 THE COURT: Okay.

14 MR. FIELD: Now --

15 THE COURT: That's what it is then.

16 MR. FIELD: If I might, Your Honor --

17 THE COURT: So how -- how does Philadelphia handle
18 that then?

19 MR. FIELD: Well, so this is what I was about to
20 say, which is to connect to some of the discussions that have
21 been being had, the Election Code does not provide detailed
22 procedures what a county board of elections is supposed to
23 do --

24 THE COURT: Tell me what Philadelphia does.

25 MR. FIELD: -- when -- when that happens.

1 If we mail a package out, it comes back, we record
2 it as undeliverable in the SURE system. And then we're able
3 to send out a new package. And I believe, you know, in
4 Philadelphia that's the first steps that are taken. There
5 may be circumstances, although I don't know, in which a board
6 would try and research and make sure that --

7 THE COURT: Mr. Field, I wouldn't --

8 MR. FIELD: -- there might be additional
9 information to get that voter a ballot.

10 THE COURT: Listen, Mr. Field, I will not consider
11 that a defect. Okay. If it's undeliverable and there's no
12 vote made and they're just sending a new ballot out, not --
13 not a defect.

14 MR. FIELD: In turn --

15 THE COURT: So I can -- I can get rid of all of
16 that.

17 You know, respondents and petitioners, understand
18 that I'm not going to consider -- if it's not been a -- a
19 mail-in or absentee ballot that's actually had, you know,
20 voting done but a new one sent because it was undeliverable,
21 that's not a -- a defect. And I see no problem with anyone,
22 any board sending out -- you know, finding out who this voter
23 is or where the voter is as long -- as long as they do it
24 with everyone, I suppose.

25 MR. FIELD: I understand that, Your Honor. What

1 I'd like to emphasize is the process we're talking about here
2 is not a process that is specifically detailed in the
3 Election Code. And the Election Code unquestionably
4 delegates to local county boards the authority to make rules
5 and provide instructions to ensure that voters are able to
6 exercise their franchise when something happens that might
7 impair it.

8 And so in a legal analysis, a process with respect
9 to undeliverable ballots that we all, I hope, would agree is
10 unobjectionable is not actually different than the processes
11 boards put in place to ensure that voters have an opportunity
12 to do things like request replacement ballots, cast
13 provisional ballots, have knowledge that there may be a
14 problem with their ballot.

15 All of these things are within the authority of
16 county boards to take actions consummate with the Election
17 Code to ensure that the residents of that county are best
18 able to exercise that franchise and none of those actions
19 impair the franchise of anybody else across the Commonwealth,
20 much less anybody else within the county.

21 THE COURT: Okay. All right.

22 MS. FITZPATRICK: Indeed -- indeed, Your Honor, as
23 to Bucks County, how those undeliverable ballots are held --

24 THE COURT: Yes.

25 MS. FITZPATRICK: -- handled, rather, may have --

1 may provide more help to voters than a different county
2 within the state.

3 Within Bucks County, when we receive back a ballot
4 as undeliverable, we check the address, for instance. And if
5 the address was in error, it is resent with the correct
6 address. One might consider that aid to the voter or help to
7 the voter.

8 If the address is correct, we then provide a list
9 of those ballots to the parties who are free to contact those
10 voters to advise them that they may go to the polls and vote
11 because there was no ballot received back by the board of
12 elections.

13 This difference between the counties might
14 mean that --

15 THE COURT: That's not undeliverable, though.
16 That's reaching out in -- that's reaching out in a different
17 way. So that's not -- you're talking about just people you
18 sent out ballots who it never came back. So we're going now
19 beyond -- beyond an undeliverable.

20 All of this makes me anxious, just so you know. I
21 mean, if every county is doing their own thing in terms of
22 reaching out, I think this is what -- I think this is the
23 kind of mischief or the questions or concerns that Justice
24 Baer had.

25 I don't know. I haven't made a decision on this,

1 folks. I just need for you to know that. I mean, there's
2 nothing that I want less than for people not to have their
3 votes counted. And there's nothing I want less than to have
4 the public distrust in the system. It's a very difficult
5 balancing test here.

6 MS. FITZPATRICK: Your Honor --

7 MR. COSGROVE: May I -- may I just address --

8 MS. FITZPATRICK: Your Honor, on --

9 MR. COSGROVE: -- just one point briefly?

10 THE COURT: Wait a second.

11 MS. FITZPATRICK: Your Honor, on that point on
12 behalf of Bucks County respondents --

13 THE COURT: Yes. Go ahead. Finish, ma'am.

14 MS. FITZPATRICK: -- I wanted to speak to the harm.

15 We agree wholeheartedly, my client does, that faith
16 in our election is important just as ensuring that every vote
17 counts is.

18 And so to the harm if this injunction is granted,
19 Your Honor, it would -- in our county where we have
20 undertaken significant efforts to ensure faith in our
21 election process and have garnered bipartisan support for a
22 transparent and secure process, if this injunction were
23 granted, it would change the status quo in our county. It
24 would muzzle county employees and would require us to
25 withhold information from party representatives.

1 We think that all of these things in addition to
2 disenfranchising some voters would cause the significant harm
3 in reducing the faith in our election in Bucks County.

4 THE COURT: Thank you.

5 MR. COSGROVE: If -- if I may, Your Honor?

6 THE COURT: Mr. Cosgrove.

7 MR. COSGROVE: Thank you, Your Honor.

8 And I just want to point out two months after the
9 -- the *Democratic* decision, the Supreme Court in the *In Re:*
10 *Canvassing Observation* case stressed the discretion, and used
11 that word, in interpreting Section 2642, subsection (f),
12 stressed the discretion that is vested in the local boards.
13 And as the Court said, We deem that the proximity parameters
14 to reflect the Legislature's deliberate choice to leave such
15 matters to the informed discretion of county boards of
16 election, in interpreting 2642(f).

17 So the Court after Justice Baer's majority
18 opinion -- which I think we have a difference of opinion in
19 how that should be interpreted, but two months later, the
20 Court stressed again using the word discretion that the
21 Legislature deliberately chose to leave in the county boards.

22 And, again, the best- -- the investiture of
23 integrity in the electoral process has been left to the
24 county boards by the Legislature. So the power of the
25 Legislature has said, We are going to leave it to these local

1 boards that are in the closest proximity to the voters
2 themselves where trust is most manifest, and we will leave it
3 to them to exercise their discretion, their informed
4 discretion to do what 2642(f) says, to act not inconsistent
5 with the law as they deem necessary.

6 And so that's what's happened here. To carry out
7 their duties under the Constitution and the Election Code,
8 these boards have made their decisions on how best to do
9 that. If the Legislature, if it were to enact some provision
10 that changes that, it may do so, but it has not.

11 So the Supreme Court in a more recent decision than
12 *In Re: Dems* has stressed the discretion that must be
13 considered and -- and must be respected that the county
14 boards have, like ours and the others who have spoken.

15 THE COURT: And can you -- there's a couple *In Re:*
16 *Canvassing* decisions. Which -- which particular one are you
17 referring to, Mr. Cosgrove?

18 MR. COSGROVE: I will give you the cite, Your
19 Honor. This is 241 Atlantic Third 339 --

20 THE COURT: Okay.

21 MR. COSGROVE: -- at page 350.

22 THE COURT: Okay. I'm going to review that again.
23 I've looked at a lot of opinions. I don't have them --
24 they're all, like -- uh-oh, it's getting to be -- getting
25 weird.

1 (Laughter.)

2 THE COURT: Oh, wait, this is still being live; I
3 have to watch out.

4 Okay. Let's get back to -- give me a second to
5 regroup here.

6 MR. WIYGUL: Your Honor, may I -- if this is a good
7 juncture, Your Honor asked me before for some statutory
8 citations that I said I'd look into them. I'm -- I'm able to
9 provide those if that would be helpful to the Court.

10 THE COURT: Okay.

11 MR. WIYGUL: This is Robert Wiygul for the
12 Department of State respondents.

13 The point I was making is that the Election Code
14 actually requires county boards of elections to perform an
15 initial review and sorting of mail-in and absentee ballots as
16 they come in, and that process has been described.

17 The statutory citations -- there are two parallel
18 ones that are essentially the same. One -- one addresses
19 absentee ballots, the other mail-in ballots. The first one
20 is 25 Pa. Stat. 3146.6(b)(1). And the parallel one -- that's
21 absentee ballots. The parallel one for mail-in ballots is 25
22 Pa. Stat. 3150.16(b)(1). And it requires the boards of
23 elections to review and sort those ballots so that they can
24 prepare a district register that's sent to each polling
25 place. So they have to sort them by polling place, by

1 election district that identifies the voters who have -- who
2 have actually voted an absentee or mail-in ballot.

3 THE COURT: Okay. Thank you.

4 MR. WIYGUL: And if I can cite just one more
5 authority, Your Honor, on this question of the county boards
6 of elections delegated legislative authority under the
7 Election Code, this Court's decision in the *Nutter v.*
8 *Dougherty* case which is reported at 921 A.2d 44 describes the
9 provision -- the provision we've been focusing on, 25 Pa.
10 Stat. 2642(f), as vesting boards of elections with extensive
11 powers.

12 And I think the *In Re: Canvassing Observation* case
13 that Mr. Cosgrove cited -- I was also involved in litigating
14 that case -- also reinforces that -- that same point.

15 THE COURT: All right. Well, in -- in a lot of
16 ways, I think, some of our discussions on the various
17 requirements of getting an injunction we've been mixing in
18 and out.

19 So the movement -- the movant is likely to succeed
20 on the merits. There's been a pretty in-depth discussion on
21 the appropriate case law, the pertinent case law and the
22 statutes and -- and the interests at stake. So I think we
23 don't have to go through that. I think we've kind of
24 discussed that.

25 If anybody feels at this point -- we're going to

1 start maybe wrapping up and discussing next week and how we
2 can go from here because I honestly want to get a decision
3 made and an opinion out very soon. All right. I want --
4 whenever I decide this, I feel pretty strongly the Supreme
5 Court is going to take it, and I want them to be able to have
6 a full record.

7 So the injunction would restore their status quo.
8 The fact is that some parties here have argued that it would
9 disrupt it because of all the training, because of all the
10 procedures, because of all the -- the public interactions; it
11 would -- it would disrupt the status quo.

12 From my perspective, I'm looking at what the
13 Secretary of State indicates which is that it shouldn't be
14 counted. And so I don't know, or what the law is.

15 Do you want to, Ms. Gallagher, chime in on number
16 3, the injunction would -- would restore their status quo?
17 You've heard a lot of arguments that it would cause great
18 disruption in different counties.

19 MS. GALLAGHER: The only -- if it's not legal, Your
20 Honor, what is being done, all right, that disruption to an
21 illegal process shouldn't matter.

22 The Secretary of the Commonwealth is very clear,
23 the status quo is there's no right to cure and you don't get
24 -- there's just no right to cure. I mean, she goes on her
25 website and talks about: Take your time; fill your ballot

1 out; your ballot will be counted.

2 The disruption to the status quo is what's
3 happening at the board level. And I don't want to get back
4 into discretion versus nondiscretion at this point. We've
5 sort of discussed that greatly.

6 THE COURT: That would -- that would go to
7 succeeding on the merits. All right. So --

8 MS. GALLAGHER: Right.

9 THE COURT: All right.

10 MS. GALLAGHER: All right. The status quo is
11 disrupted by the curing that -- the notice and curing that's
12 being allowed to go on.

13 And, again, this concept of, if I can just address
14 it -- you know, there is in *In Re: Canvass 2020* -- and I
15 apologize; I don't have the cite. But it's the one about
16 dating, the date requirement, where Justice Dougherty is very
17 clear shall means shall. And the Supreme -- PA Supreme Court
18 in *Pa. Dems* said there shall be a secrecy envelope.

19 So the fact in this context that they're not just
20 processing the ballots when they weigh them, all right, so
21 they're -- let's say -- take that --

22 THE COURT: Ms. Gallagher, this leads us straight
23 to the one -- the one requirement under the injunction that
24 the requested injunction is reasonably suited to abate the
25 offending activity.

1 So you're basically saying no cure -- no notice and
2 cure should be done anywhere in the state. What particularly
3 are you asking that there shouldn't be notice and cure? We
4 know that you're asking as it relates to the -- the -- the
5 naked ballots or the lack of secrecy envelopes. It's not --
6 do you -- do you -- do you agree -- do you believe that it
7 relates to those that are returned as non-deliverable? Do
8 you think --

9 MS. GALLAGHER: Your Honor --

10 THE COURT: -- that's notice and cure?

11 MS. GALLAGHER: From -- the first part that I heard
12 of that where it was just a ballot wasn't received, all
13 right, you know, and it --

14 THE COURT: It was returned back to -- yeah, it was
15 returned back to the board of elections as undeliverable, so
16 that led the board to research --

17 MS. GALLAGHER: That's different.

18 THE COURT: All right. So you -- you wouldn't
19 consider that to be a problem?

20 MS. GALLAGHER: No, because that vote is -- that
21 ballot is never cast, right.

22 THE COURT: Okay. What about -- what about if
23 somebody hands their -- their ballot in face-to-face? If I
24 went in, Oh, you should sign that -- because I know when I
25 hand mine in that they look on the back and they check it all

1 out. What if someone just said, Oh, you better put your
2 signature there? Would you say that's a -- an improper cure
3 procedure?

4 MS. GALLAGHER: Well, it's improper -- Mr. Levine
5 and I and Mr. King discussed this the other day. So as the
6 Secretary has said, right now ballots -- and admonishes on
7 her website, ballots shall be signed and dated. All right.

8 The problem that arises with what would otherwise
9 be an innocuous clerk accepting the ballot, that the person
10 who happens to hand their ballot in that way instead of
11 dropping it in the mailbox or dropping it in a -- you know,
12 one of the collector boxes doesn't get that same opportunity.
13 And that's really the heart of our -- of our entire case. It
14 goes to election integrity at its utmost level.

15 Everybody has to be subject to -- within the method
16 of franchise selected, whether it's at the -- you know, vote
17 in person, whatever, it has to be the same rules for
18 everybody. And that's the problem we have here.

19 So, I mean, I would leave that to -- I'm not
20 punting, but I think that, you know, yeah, so if you hand it
21 to the clerk rather than dropping it in the mailbox, the
22 mailbox isn't going to say to you, Whoa, excuse me; you
23 didn't sign it. The Secretary of the Commonwealth is saying
24 it has to be signed and dated. All right. So why does the
25 person who gets -- who hands it to the clerk get that

1 benefit? That's the essence of this litigation.

2 MR. LEVINE: Your Honor --

3 MS. GALLAGHER: Not opining -- excuse me, Cliff;
4 just one second.

5 Not opining on whether these things, cures in and
6 of themselves are good or bad. That's the reason we didn't
7 file this lawsuit when the Legislature was grappling with
8 this issue.

9 And one other address -- issue I'd like to address
10 on that, this concept that the Governor and the Legislature
11 have to work it out for there to be a law, we all recognize
12 that, right, laws have to be signed. But to say that the
13 Legislature has not spoken simply because the Governor vetoed
14 this legislation completely undermines the whole issue of the
15 Elections Clause claim here. All right.

16 A gubernatorial veto cannot act as basically a -- a
17 default -- or excuse me; an elimination or a vitiation of the
18 rights of solely the Legislature to dictate the time making
19 and -- and manner of elections under Article I, Section 5 or
20 under Section 7 of the PA Constitution.

21 But heaven forbid if that happened. So does that
22 mean that when a governor vetoes the budget, that the
23 counties can go write their own? Of course not.

24 The power recognized in the Legislature as
25 recognized by the PA Supreme Court in *Pa. Dems* was clear. We

1 can all wrestle with the words, but it was clear. A court
2 that cares greatly shouldn't be voter integrity and election
3 integrity and in fact changed the laws of this Commonwealth
4 under *LWV* -- and I was there -- to apply the free and equal
5 Elections Clause for the first time in this Commonwealth's
6 history to redistricting. If it had that power to do it, it
7 would have. And it's not supposition. It didn't do it. It
8 didn't say, We can't because it's discretionary. It said, We
9 won't because it's up to the Legislature.

10 And the Legislature spoke. It passed legislation
11 that wasn't signed. But it took those steps, clearly
12 indicating it was not giving that discretion to the boards.

13 THE COURT: All right. So --

14 MR. LEVINE: Your Honor, if I could address that
15 for a moment?

16 THE COURT: -- it sounds like that will close it
17 for Ms. Gallagher.

18 Let me -- let's back up here and -- first of all, I
19 think everybody can agree at this point there really wouldn't
20 be any more factual -- need for a factual hearing at this
21 point. I mean, you have enough of the facts through the
22 counties and through that joint stipulation of the facts of
23 what the counties are doing as well as the law. So this
24 could be decided at this point on the papers and the -- and
25 the law.

1 Does every- -- if anybody doesn't agree with that
2 -- and I'm not saying that this will end all of your
3 opportunity to make argument, but is there anyone here who
4 disagrees with my understanding of this process in light of
5 the -- the time limitations?

6 MR. WIYGUL: Your Honor, this is Robert Wiygul for
7 Department of State respondents.

8 If I can, I'd like to give a qualified or
9 conditional agreement, and that is to say the way that I
10 understand the case that's presented by petitioners in their
11 petition for review -- which by the way, just to clarify one
12 point, petitioners' counsel said that they had raised an
13 equal protection argument in their brief in support of the
14 preliminary injunction. That is true. They did not raise it
15 in their petition.

16 THE COURT: Okay.

17 MR. WIYGUL: And that, of course, controls this
18 case. So that's one point.

19 The case, as I understand them to have framed it,
20 is at a very high altitude, as it has to be if this Court is
21 going to decide this on a statewide basis, right, the case is
22 no notice and cure procedures are permitted under the
23 Election Code. Any conceivable notice and cure procedure is
24 barred because of two reasons: one, because they say
25 *Pennsylvania Democratic Party v. -- versus Boockvar* said so;

1 and, two, they say because Section 3146.8(h) (2) allows voters
2 to provide proof of identification up to six days after the
3 election.

4 Those are their arguments as framed in their
5 petition. I agree those are legal arguments and the Court
6 can resolve those without a hearing.

7 I think it is extremely problematic, to say the
8 least, if petitioners are now suggesting that the Court could
9 somehow craft an injunctive order which would comprehensively
10 and with particularity deal with the permissible --
11 permissibility or not of every different variation of what
12 has been called notice and cure that we've seen across
13 potentially 67 counties.

14 THE COURT: There's --

15 MR. WIYGUL: And that's really --

16 THE COURT: Counsel, there's only, like, four that
17 are under dispute at this point.

18 MR. WIYGUL: Your Honor, I -- I don't know whether
19 that's actually true. I mean, frankly, it's still unclear to
20 me exactly what we mean by notice and cure and can you have
21 cure without notice where the voter takes the initiative --

22 THE COURT: Let me ask you, What would a new
23 hearing -- counsel, what would a new hearing -- would you --
24 would you suggest that every single county would have to get
25 up and go into great detail shouldn't be every single thing

1 they do?

2 MR. WIYGUL: Your Honor, I would answer that by
3 referring to our argument -- our threshold argument that this
4 Court lacks subject matter jurisdiction because the way these
5 cases have been brought in the past where a particular --
6 particular procedure has been challenged as opposed to a
7 broad statement that no notice and cure is permitted or that
8 any variation is an equal protection violation, they've been
9 brought in the courts of common pleas for each county and
10 with good reason, both because that's, we'd submit,
11 jurisdictionally required and because those are the courts
12 that have familiarity with the particular county boards and
13 are traditionally charged with making county specific --
14 county agency specific determinations.

15 So we think if that's the case that they want to
16 litigate, A, it's not the case they brought in their
17 petition; and, B, we don't think that could be done justly on
18 a statewide basis or, frankly, that it falls within this
19 Court's subject matter jurisdiction.

20 THE COURT: Okay. Thank you.

21 MS. FITZPATRICK: Your Honor, on behalf of Bucks
22 County with respect to whether additional evidence might be
23 called for, Bucks County is in agreement with the caveat that
24 I believe earlier in the hearing Your Honor suggested a
25 sur-reply might be appropriate.

1 And we would ask that we could attach an affidavit
2 to submit a couple points of evidence, including a link to
3 the publicly available recording of a public meeting as far
4 back as October of 2020 deliberating on notice and cure
5 procedures.

6 THE COURT: Okay.

7 Anybody else --

8 MR. LEVINE: Your Honor, just on behalf of the
9 Democratic intervenors, we would offer to submit some
10 evidence. We did not have the opportunity to --

11 THE COURT: What kind of evidence, counsel?

12 MR. LEVINE: -- to participate. We -- just the
13 lost vote. We think that the votes -- just the number of
14 votes that might have been disqualified become relevant here,
15 unless the Court -- so I have two questions for Your Honor.

16 Number one, we're not -- as I understand it, we're
17 not dealing at all with any uniformity or equal protection
18 issue. So it would be, therefore, irrelevant whether certain
19 counties do something and other counties don't. Is that
20 correct?

21 THE COURT: I haven't made any decisions yet.

22 MR. LEVINE: Well, if they haven't pled it, because
23 that -- then that would probably necessitate a hearing --

24 THE COURT: I'm not making any decisions right now
25 until I've had a chance to think through these issues.

1 What relevance would that be to you, sir?

2 MR. LEVINE: Well, so the -- the relevance is it --
3 because it -- to the extent we're into an equal --
4 essentially an equal protection claim, I think it would be
5 relevant for us to point out that these issues have been
6 addressed by the federal courts and have been rejected. So I
7 think that's relevant if we're going to get into the whole
8 uniformity and equal protection, what that means.

9 THE COURT: Okay.

10 MR. LEVINE: And if the issue is just simply an
11 interpretation of that one section of the *Pennsylvania*
12 *Democratic Party Boockvar* case, whether it was only mandatory
13 or whether there's no cure, then I think it's just a --
14 that's a simple -- I guess that's a simple interpretation of
15 the Court, but it doesn't deal with all of the problems in
16 terms of number of voters and who's voting by mail and how
17 this could --

18 THE COURT: Well, how would we ever find that out
19 at this point?

20 MR. LEVINE: Well, information from the Secretary
21 of State, information from the counties --

22 THE COURT: Well, we still --

23 MS. GALLAGHER: We asked that question --

24 MR. LEVINE: I mean, a lot of people will be
25 disenfranchised. A lot of people will be disenfranchised.

1 And so --

2 MS. GALLAGHER: Your Honor, if I can,
3 we specifically asked that --

4 THE COURT: Ms. Gallagher, let me just finish with
5 Mr. Levine.

6 MS. GALLAGHER: Oh, I'm sorry. I thought you
7 asked. I apologize.

8 THE COURT: Mr. Gal- -- Mr. Levine, was there
9 anything else?

10 MR. LEVINE: No.

11 THE COURT: Oh, okay. I thought you were
12 continuing.

13 I can't make a decision on that right now on the
14 spot. I have to really look through the petition for review
15 again and the -- the memorandum. And I -- and I need to look
16 back at some of the old cases we've been talking about. So
17 I'm not comfortable with making a decision on either of these
18 yet.

19 So, Ms. Gallagher, did you want to respond -- wait,
20 no, more importantly, is there anybody here who thinks that I
21 can decide this -- and you're helping me all by your comments
22 frame my analysis. But --

23 MS. JEWART: Your Honor, apologies. I -- I'm not
24 sure if my audio is working here, so apologies. I tried to
25 chime in earlier, and I believe I was having some microphone

1 issues. Anna Jewart with --

2 THE COURT: Can you identify yourself and who you
3 represent?

4 MS. JEWART: Yes. Yes, Your Honor. My name is
5 Anna Jewart. I represent shouldn't be 13 of the counties who
6 have not implemented the cure procedures.

7 THE COURT: And that's spelled J-E-W-A-R-T.

8 MS. JEWART: Yes, Your Honor. Stewart with a J.

9 THE COURT: For the court stenographer who's taking
10 this all down.

11 MS. JEWART: Yes.

12 THE COURT: Okay.

13 MS. JEWART: So we -- we represent Bedford, Centre,
14 Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana,
15 Lawrence, Lebanon, Northumberland, Venango, and York counties
16 at this point.

17 And I would -- I would just like to raise a general
18 objection as to the -- the application of any injunctive
19 relief as to these counties.

20 THE COURT: Counsel, somehow your camera has
21 shifted so we're just looking at your nice, neat desk.

22 MS. JEWART: Apologies.

23 THE COURT: Thank you.

24 MS. JEWART: I think -- I believe I have
25 microphones coming from one angle and now cameras coming from

1 another, so apologies.

2 THE COURT: It's okay. So -- so let me ask you, Do
3 you think that we need an evidentiary hearing?

4 MS. JEWART: I do not, but I -- I would just
5 appreciate the opportunity to chime in briefly, as I did try
6 when we were discussing some of the --

7 THE COURT: Of course. Go ahead.

8 MS. JEWART: -- elements earlier.

9 Thank you very much.

10 As to these counties that -- that we represent,
11 they -- they, as is uncontested, do not employ or intend to
12 employ any of the types of procedures that have been
13 complained about or are being discussed. Therefore, in
14 considering whether there could be any injunctive relief in
15 relation to these counties, essentially it -- it would be
16 doing nothing or attempting to prohibit actions that are not
17 occurring and have no -- there's no evidence that they would
18 occur.

19 We would just like to raise -- and, again, I
20 believe -- one of the reasons why I did not force the issue
21 of trying to speak up earlier is because there is a lot of
22 goings-on to be discussed in this matter, but we would
23 request --

24 THE COURT: Do you know if your counties, like,
25 discard if it's not a signature, it's not a date, or if it's

1 -- I mean, there is some ambiguity in some areas of the law.
2 There's no ambiguity on the lack of the security envelope.
3 But do you know what your counties' procedures are as it
4 regards to disqualifying a mail-in or absentee ballot if it
5 doesn't have certain -- if it has certain defects?

6 MS. JEWART: I -- I would have to get additional
7 details from each of the individual counties on the specifics
8 to confirm. What I've been advised and as we -- we
9 stipulated was that they have assured that all of the
10 procedures for which there is any sort of curing, so as far
11 identification or other items, are in accordance with the law
12 and are of the type that are not complained of in this
13 matter.

14 THE COURT: This is exactly the mischief or -- or
15 worries that we have. You know, they don't do notice and
16 cure, but we don't know what they actually decide is
17 defective at this point.

18 MS. JEWART: I understand that concern. I --

19 THE COURT: There really should be some very clear
20 legislation on this. There really should be.

21 MS. JEWART: I -- you know, that is something we
22 seem to all wish for, a little bit more clarity. But just in
23 terms of the application on to -- on to these counties,
24 there's no real complaint; there's no -- there's no harm.
25 The only harm alleged to the residents of our counties was

1 that we are not giving them additional --

2 THE COURT: I -- I recognize that any kind of --
3 depending on the outcome, an order would have to be so
4 carefully crafted so -- if it were, you know, to take
5 everybody's answers into account. I understand that.

6 MS. JEWART: So we -- we would just, you know,
7 request that if this is a matter that needs to be dealt with,
8 it -- it simply does not apply to us. We'd ask that we --

9 THE COURT: Well, if you're not -- if you're not
10 doing anything that you think is notice and cure, then what
11 difference would an order make to your counties, to your
12 clients?

13 MS. JEWART: Frankly, it's expenditure of the time
14 and resources having me here today. If this is just a matter
15 -- these are a lot of small counties. There's a reason why
16 we've taken on 13: their -- their resources, the time, the
17 money. This is taxpayer money that is going into this. And
18 our -- our consideration here is let's protect our counties;
19 let's get them to focus on getting this election done.

20 And if nobody disagrees with what we're doing, we
21 would request to be released and -- and be able to go
22 shouldn't be our business as usual because, you know, it --
23 it's costly to some of these smaller counties, as I believe
24 many of my colleagues here could attest.

25 THE COURT: Yes. I understand. And I really

1 appreciate -- is there anything else you needed to say on
2 behalf of your clients?

3 MS. JEWART: No, Your Honor. I appreciate your
4 patience with my technical issues.

5 THE COURT: It's fine. Thank God your desk was
6 neat.

7 (Laughter.)

8 THE COURT: You wouldn't want to see the side of
9 mine here.

10 MS. JEWART: I cleaned it earlier.

11 THE COURT: Thank you.

12 MS. JEWART: Thank you.

13 THE COURT: Okay. So anything else from anybody
14 shouldn't be -- would anybody want to be submitting further
15 evidence besides Bucks County, or -- or anything like that?

16 MR. FIELD: Your Honor, Benjamin Field for
17 Philadelphia County Board of Elections again.

18 I don't believe, although I'll put in a caveat
19 because there's a lot to digest from today, that --

20 THE COURT: Yes, there is a lot to digest.

21 MR. FIELD: -- we'd be submitting additional
22 evidence. But at the start of the hearing, Your Honor did
23 reference the potential for respondents to submit --

24 THE COURT: Yes.

25 MR. FIELD: -- additional briefing.

1 THE COURT: Right.

2 MR. FIELD: We'd obviously preserve our -- our
3 right to do that, although we'll review and try and keep
4 things appropriate for the Court in recognition of the amount
5 of information you have.

6 But I do want to respond to one aspect of this
7 conversation and a point Ms. Gallagher has made. And I say
8 this carefully and seriously. I am very understanding of the
9 Court's concern shouldn't be the public's perception of
10 practices across Pennsylvania and what that means for our
11 operations in elections. And, you know, my clients work
12 somewhat at the fulcrum of this and obviously have been
13 through some very difficult experiences in that regard.

14 THE COURT: Yes.

15 MR. FIELD: In 2020, there were an unprecedented
16 number of litigations about election processes starting at
17 the common pleas level, challenging processes of individual
18 counties. And repeatedly throughout, courts looked into
19 these, rejected allegations of fraud, found there was no fact
20 there --

21 THE COURT: There's no -- there's no discussion of
22 fraud here, you know.

23 MR. FIELD: Exactly. And that's the point I'd like
24 to make, Your Honor, which is that Ms. Gallagher used the
25 term voter integrity and we are not actually here -- and I

1 understand the Court's concerns. But we're not actually here
2 talking about voter integrity because no one, to my
3 knowledge, here is suggesting that the voters who are
4 availing themselves in counties of procedures that allow them
5 to try and ensure their votes are being counted are doing
6 anything other than exercising their most sacred duty as a
7 citizen here in the United States, nor, for that matter, are
8 the boards of elections -- and I'll speak for my client here,
9 Philadelphia County Board of Elections -- trying to do
10 anything other than exercise their authority and discretion
11 under the Election Code in the best way they can understand
12 it to ensure the residents of our county are able to exercise
13 their franchise.

14 This is not a matter of voter integrity. I
15 recognize that the Pennsylvania Election Code is challenging,
16 and it's very challenging for a lot of people to understand.
17 But we're here on a preliminary injunction with a series of
18 legal standards.

19 And as we saw in 2020, courts applying themselves
20 in that fashion is the best way to address confidence in the
21 elections. And upsetting at a preliminary level the
22 potential for people to exercise their franchise, their
23 throwing further confusion to the election is exactly the
24 kind of challenge that makes these elections more difficult
25 to operate for county boards and more difficult at large for

1 residents of Pennsylvania to exercise their franchise.

2 Thank you, Your Honor.

3 If I might ask what timeline Your Honor would --
4 would like additional materials submitted on?

5 THE COURT: I was just thinking that as soon as
6 this discussion was over, I -- I would talk with my -- my
7 clerks and we would issue a -- a briefing order by today.
8 So, you know, I would -- it -- I would really like to have
9 everything done by Monday so that I can do an opinion by next
10 week.

11 MS. GALLAGHER: May I -- Your Honor, may I ask a
12 question? I don't mean to interrupt. It's Kathleen
13 Gallagher with respect to that issue.

14 THE COURT: You know, I think that the issues
15 that -- you know, I need to give all respondents an
16 opportunity to respond to the laches -- laches issue and to
17 the extent that you've heard argument from either side on any
18 of the elements of the special injunction that you'd like to
19 add or if you believe that there's more exhibits. If someone
20 could -- if you could come up with a joint stipulation as to
21 the exhibits. There's really not much. You know, there's a
22 couple e-mails. There's the joint stipulation of facts
23 which, again, is really helpful. A couple e-mails.

24 Counsel for Bucks County would like to include some
25 information shouldn't be how they're involving the public in

1 these notice and cure procedures. Anything along those lines
2 would be helpful in me looking at that and -- and going
3 through the various criteria.

4 So that's -- and Mr. Levine makes a very good
5 point, but I'm not able to make a decision right now on those
6 -- on the issues presented by Mr. Levine. If he -- if he
7 prevails on that, it is a very easy end to this case, so --
8 anyway, I just haven't decided.

9 Ms. Gallagher.

10 MS. GALLAGHER: Yes, ma'am. One of the issues --
11 under the Court's -- we had asked for a reply -- the ability
12 to reply overall to the answers. And I understand there has
13 not -- not everyone has briefed --

14 THE COURT: You know, Ms. Gallagher, you've got to
15 -- you've got to admit, though, you know, this -- this time
16 crunch and the stress, you know, it -- it really does -- I --
17 the laches argument as I sit here right now becomes more
18 appealing to me by the respondents, but I haven't made a
19 decision. It's just that, wow, we're all going to have to
20 really -- all of us put our nose to the grindstone over the
21 next couple days on this. So I'm hoping we can all do it.

22 MR. KING: Your Honor, this is Tom King for the
23 petitioners.

24 If I could digress for just a minute and go back to
25 one of the questions you raised early on, the term

1 undeliverable and the -- and the Court inquired shouldn't be
2 it.

3 It's -- it can be more -- it can be an issue
4 because it's not just that I live at 456 Sheldon Road;
5 somebody typed 455; it didn't get to me; it went back, so
6 they corrected the address and sent it back to me. It's --
7 it's more than that in some instances.

8 So sometimes people are registered en masse at
9 locations. They may be homeless. They may be -- they may be
10 moving from one location to another. It's -- it's -- someone
11 mailing a ballot is -- to -- to an address other than that at
12 which the person is registered is -- does in fact become a
13 curing issue, in my opinion. So I just wanted to say that.

14 THE COURT: Well, it wouldn't be accepted then.
15 Don't have they to be living at a certain place for a certain
16 amount of time or be registered at a certain location?

17 MR. KING: Yes, ma'am. But that the -- if people
18 are curing -- and I suspect that that's the case; I can't
19 give you a specific example of that. But just in the
20 discussions here today, if people are curing by -- by sending
21 the ballot to a location other than at which the person is
22 registered.

23 And so Mary Jones registers at First Presbyterian
24 Church in Pittsburgh because she -- she is homeless. And so
25 -- or she -- for whatever reason, she registers there and so

1 do a whole bunch of other people. And so it comes back as
2 undeliverable.

3 And so if the -- if the election bureau is then
4 trying to seek out someone named Mary Jones at some other
5 address that is different than what was -- what was
6 registered, then in that case, undeliverable could in fact be
7 seen as ballot curing.

8 THE COURT: Well, thank you for complicating that
9 issue.

10 MR. KING: Thank you -- you're welcome. Thank you.

11 (Laughter.)

12 MR. KING: Thank you for hearing me out.

13 THE COURT: Does -- does anybody want to make any
14 final remarks to me at this point in terms of -- look, this
15 was presented to us, and I'm doing the best I can to include
16 everybody and come to a rational decision. And this was the
17 best that I could think of in the time that we had. So if
18 there's anybody out there who really feels that they need to
19 make a statement on any of the issues at this point, please
20 do that now.

21 MR. COSGROVE: Your Honor, it's Joe Cosgrove.

22 I just want to simply say that I -- I don't see,
23 for what it's worth, any need for any further hearing or
24 proceeding. So I think that can be dispatched pretty
25 quickly.

1 It's clear Your Honor has a grasp of what this --
2 the issues are. The very tight, concise relief that's being
3 requested can be addressed legally. The petitioners have a
4 high burden. We have issues to respond to on laches and on
5 the merits. And I think if you give us time to do that,
6 we'll do it and you'll have everything before you to render a
7 decision.

8 So for our sake -- and I -- I will echo what
9 Ms. Jewart said shouldn't be counties and the expenses -- us
10 attending a hearing in Harrisburg may not be the best
11 expenditure of taxpayer resources on an issue like this that
12 I think can be resolved purely on the law.

13 THE COURT: Well, thank you, sir. I appreciate
14 that.

15 I hope everybody raises their hand in agreement.

16 (Laughter.)

17 THE COURT: No, really, if anybody has anything to
18 say -- thank you, Mr. Cosgrove.

19 MR. LEVINE: Well, I would like to -- one option,
20 too, Your Honor, would be -- I do think there's a significant
21 laches issue and everybody is scrambling here. And if the
22 preliminary injunction was denied on the basis of laches and
23 we could even certify the very narrow question to the PA
24 Supreme Court as to what Justice Baer meant, we would have a
25 better understanding before we all spend a lot of time so we

1 understand what the Court said. And we could have a hearing
2 moving forward, and I think it could be denied based on
3 laches and allow for that certification of question.

4 THE COURT: Well, I absolutely need to give
5 respondents time to -- to deal with it in more detail. That
6 was what the order that was out yesterday said. So why don't
7 -- everybody -- we'll get a -- we'll get a scheduling order.
8 But get on to laches first. But try to get it -- we're going
9 to get you an order, but I -- I would say if you had
10 everything to me on Monday, that would give me enough time to
11 -- to work quickly.

12 You get me on Rosh Hashanah -- you get me on Rosh
13 Hashanah, everybody.

14 (Laughter.)

15 MR. GREENBERG: Thank you, Your Honor.

16 MS. GALLAGHER: Your Honor, just to be -- a point
17 of clarification, if I ask, is the briefing schedule only
18 going to address the reply to the laches argument?

19 THE COURT: No. No. It's going to address
20 everything. I might have laches be sooner and give you an
21 extra day or two on the other issues. But -- and, honestly,
22 Ms. Gallagher, you've got to -- you brought this; you and
23 your co-counsel have to respond as soon as possible --

24 MS. GALLAGHER: We will.

25 THE COURT: -- so they know -- so all the

1 respondents know what your arguments are in response to what
2 happened here today.

3 And I think that your big focus has to be on the
4 fact that maybe it wasn't raised in your petition for review
5 and only in your brief. That could be a pretty important
6 defect. I have to go back and look at it all again.

7 Yeah. That's pretty much it at this point. All --
8 the rest of it is going to be legal analysis, applying the
9 joint stipulation and what I heard today and any additional
10 evidence I get to the law. Okay?

11 MR. LEVINE: So there's no hearing on Wednesday or
12 -- or Thursday?

13 THE COURT: I -- I'm trying not to get a hearing on
14 Wednesday.

15 MR. LEVINE: Okay.

16 THE COURT: I mean, maybe we could do a video
17 hearing, but my point is not to have any more hearings. But
18 my point would be to try to get an opinion out by Wednesday
19 if I could --

20 MR. LEVINE: Okay.

21 THE COURT: -- okay, because I really need -- I
22 suspect whatever I do will be appealed. And I want the
23 Supreme Court, if they take it, to have as much time as they
24 need because these ballots are going out. These mail-in
25 ballots and absentee ballots are going out now. So we have

1 to give clarity to the county board of elections. We have to
2 give it to them really fast. Okay?

3 MS. GALLAGHER: Agreed.

4 MR. GREENBERG: Thank you, Your Honor.

5 THE COURT: All right. Well, thank you all so much
6 for your patience today, and be safe. And we'll have a
7 briefing order out later.

8 MS. GALLAGHER: Thank you.

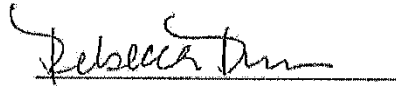
9 MR. COSGROVE: Thank you, Your Honor.

10 MS. JEWART: Thank you, Your Honor.

11 (Whereupon, the proceedings concluded at 1:09 p.m.)
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1 I hereby certify that the proceedings and evidence
2 are contained fully and accurately in the notes taken by me
3 on the proceedings held via videoconference of the above
4 cause and that this copy is a correct transcript of the same.

5
6 DATED: October 3, 2022

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9 Rebecca Toner, RFR

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20 (The foregoing certification of this transcript does not
21 apply to any reproduction of the same by any means unless
22 under the direct control and/or supervision of the certifying
23 reporter.)
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25

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**REPUBLICAN NATIONAL
COMMITTEE, et al.,**

No. 447 MD 2022

Petitioners,

vs.

**LEIGH M. CHAPMAN, in her
Official capacity as Acting
Secretary of the
Commonwealth, et al.,**

Respondents

**ANSWER TO PETITION FOR REVIEW DIRECTED TO COURT'S ORIGINAL
JURISDICTION SEEKING DECLARATORY AND INJUNCTIVE RELIEF**

Respondent, Lancaster County Board of Elections (hereinafter "LC Board"), by and through its counsel, Melvin E. Newcomer, Esquire, hereby files the following Answer to Petitioners' Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief, and states the following:

1.- 103. Respondent LC Board offers the following response to the averments in Paragraphs 1 - 103 of Petitioners' Petition for Review: The LC Board has adopted a policy that once a ballot has been recorded as received by the County, there is not a legal procedure for the County to return it to the voter or for the voter to alter it for any reason. This policy is reflected on LC Board's website and referenced in Paragraph 78 of Petitioners' Petition. Few of the

averments in Paragraphs 1 - 103 of the Petition relate directly to LC Board, and, in the interest of judicial economy, Respondent restates its current position in this pleading in response to each of the paragraphs of the Petition.

Respectfully submitted,

BY: /s/ Melvin E. Newcomer

Melvin E. Newcomer, Esquire

Attorney I. D. No. 27605

Attorney for Respondent,

LANCASTER COUNTY BOARD OF ELECTIONS

Dutch Gold Business Center

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Lancaster, Pennsylvania 17601

(717) 393-7885 - (717) 393-0382 (Fax)

melvinn@epix.net (e-mail)

Dated: September 26, 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE,	:	
<i>et. al.</i> ,	:	No. 447 MD 2022
	:	
Petitioners,	:	
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, <i>et al.</i> ,	:	
	:	
Respondents.	:	

**BRIEF IN OPPOSITION TO PETITIONERS’ APPLICATION FOR
PRELIMINARY INJUNCTION**

I. INTRODUCTION

County Boards of Election for Bedford County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Lebanon County, Northumberland County, Venango County and York County Boards of Elections¹ have already filed an answer opposing the Application for Preliminary Injunction filed by the Republican National Committee (“RNC”) and several other petitioners (collectively the “RNC”). In the Application, the RNC seeks a preliminary injunction enjoining Respondent County Boards of Election from “implementing procedures to notify voters that their mail-in or absentee ballots fail to comply with the Election Code’s

¹ Carbon County has recently joined this group of counties and also joins in this Brief.

signature and secrecy ballot requirements and giving such voters an opportunity to ‘cure’ noncompliant ballots (‘cure procedures’), except where expressly authorized under the Election Code.”

However, at least 14 of Pennsylvania’s 67 Counties—specifically, Bedford County, Carbon County, Centre County, Columbia County, Dauphin County, Fayette County, Jefferson County, Huntingdon County, Indiana County, Lawrence County, Lebanon County, Northumberland County, Venango County, and York County (collectively “Respondent Counties”)—have ***not*** implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code. Therefore, the Respondent Counties are ***not*** engaging in the alleged “unlawful” conduct that forms the basis for the RNC’s Application and underlying Petition for Review.

As such, the RNC cannot satisfy the rigorous standard for a preliminary injunction as to the Respondent Counties. A contrary finding requires this Court to issue an advisory opinion about hypothetical conduct on the part of the Respondent Counties, which violates a foundational principle of Pennsylvania law. Accordingly, this Court must, at minimum, deny the Application as to the Respondent Counties.

II. BACKGROUND

On September 1, 2022, the RNC filed a Petition for Review against Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth, Jessica

Mathis, in her official capacity as Director of Pennsylvania Bureau of Elections, and the Boards of Election for each of Pennsylvania’s 67 counties, including the Respondent Counties. Thereafter, on September 7, 2022, the RNC filed an Application for Preliminary Injunction. On September 9, 2022, this Court issued an Order, directing the parties, among other matters, to, *inter alia*, file a joint stipulation of facts “indicating which county boards of elections have implemented, or plan to implement, notice and opportunity to cure procedures with respect to absentee and/or mail-in ballots.”

On September 16, 2022, 13 of the 14 Respondent Counties² filed their Answer in Opposition to the Application, denying that they implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond curing for ballots for which proof of identification has not been received or could not be verified. (Joint Answer in Opposition to Application ¶¶1, 2, 6, 7, 8, 13, 15, 17). On September 20, 2022, the parties filed a Joint Stipulation of Facts. Per the Joint Stipulation:

- **Bedford County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

² Carbon County did not join in the Answer, because it had not retained the undersigned counsel or any other attorney to represent it in this matter at that time. However, and as the Affidavit attached as “Exhibit A” makes clear, like the other Respondent Counties, no cure procedures have been implemented by the Carbon County Board of Elections for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

- **Centre County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Columbia County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Dauphin County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Fayette County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Huntingdon County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- Indiana County Board of Elections:** No cure procedures implemented for the 2022 General Election re regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
- **Jefferson County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Lawrence County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Northumberland County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.
 - **Venango County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

- **York County Board of Elections:** No cure procedures implemented for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code.

(Joint Stipulation of Facts, Ex. B).

On September 22, 2022, this Court held a status conference. This Court issued an Order later that day, directing the parties to brief any remaining arguments pertaining to the criteria for a preliminary injunction, among other issues.

III. QUESTION PRESENTED

- A. Whether this Court should deny the RNC’s Application for Preliminary Injunction with respect to the Respondent Counties, where, *inter alia*, none of the Respondent Counties are engaging in the alleged “unlawful” conduct that forms the basis for the RNC’s Application and a contrary finding requires this Court to issue an advisory opinion about hypothetical conduct on the part of the Respondent Counties?

Suggested answer: Yes.

IV. ARGUMENT

- A. This Court Should Deny the RNC’s Application for Preliminary Injunction.**

A preliminary injunction is “somewhat like a judgment and execution before trial.” *Herman v. Dixon*, 141 A.2d 57, 577 (Pa. 1958). It is a “harsh remedy” that should only issue where “there is urgent necessity to avoid injury which cannot be compensated for by damages.” *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1282-83, 1286 (Pa. 1992) (citation and quotation marks omitted). In order to obtain preliminary injunctive relief, the party seeking the injunction must

show that: (1) the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (2) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (3) greater injury would result from refusing an injunction than from granting it and, concomitantly, that the issuance of an injunction will not substantially harm other interested parties in the proceedings; (4) the requested injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (5) the sought-after injunction is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *See, e.g., Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount., Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

The burden of proof with respect to these six elements falls squarely upon the party seeking injunctive relief. *See, e.g., Warehime v. Warehime*, 860 A.2d 41, 47 (Pa. 2004). “For a preliminary injunction to issue, ***every one of these prerequisites must be established.***” *Allegheny Cnty. v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added).

When properly applying the foregoing standard, it is evident that the RNC is not entitled to a preliminary injunction as to the Respondent Counties.

1. The requested injunction is not appropriate where the RNC cannot show irreparable harm; alleged harm is speculative

The requested injunction is not necessary to prevent immediate and irreparable harm vis-à-vis the Respondent Counties. *See, e.g., Summit Towne*, 828 A.2d at 1001. An injury is deemed irreparable if it cannot be adequately compensated by an award of monetary damages. *See, e.g., Cosner v. United Penn Bank*, 492, 517 A.2d 1337, 1341 (Pa. Super. Ct. 1986). For harm to be irreparable, moreover, “it must be irreversible.” *Schulman v. Franklin & Marshall College*, 538 A.2d 49, 52 (Pa. Super. Ct. 1988).

The plaintiff’s claimed irreparable harm “cannot be based solely on speculation and hypothesis.” *Greenmoor, Inc. v. Burchick Constr. Co.*, 908 A.2d 310, 314 (Pa. Super Ct. 2006); *see, e.g., Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (rejecting speculative considerations as legally insufficient to support preliminary injunction); *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1387 (Pa. 1978) (plurality) (stating that “actual proof of irreparable harm” required for preliminary injunction, and concluding that injunction granted in that case was improper because record failed to indicate irreparable harm); *Credit Alliance Corp. v. Phila. Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973) (trial court properly denied preliminary injunction where no showing made of necessity to avoid immediate and irreparable harm); *Sameric Corp. of Mkt. St. v. Gross*, 295 A.2d 277,

279 (Pa. 1972) (rejecting speculative considerations offered in support of preliminary injunction). Instead, in order to meet this heavy burden of proof, the plaintiff “must present [‘]concrete evidence[’] demonstrating [‘]actual proof of irreparable harm.[’]” *City of Allentown v. Lehigh Cnty. Auth.*, 222 A.3d 1152, 1160 (Pa. Super. Ct. 2019) (citation omitted).

Here, no such evidence of imminent and irreparable harm exists as to the Respondent Counties. This is because—even assuming, *arguendo*, that the RNC is correct that the Pennsylvania Supreme Court’s decision in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), prohibits counties from implementing cure procedures—the Respondent Counties have ***not*** implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by the Election Code. (Joint Stipulation of Facts, Ex. B; Joint Answer in Opposition to Application ¶¶1, 2, 6, 7, 8, 13, 15, 17; Ex. A ¶3). Consequently, any claimed harm on the part of the RNC with regard to the Respondent Counties is nothing more than “speculation and hypothesis.” *Greenmoor*, 908 A.2d at 314. On this basis alone, this Court should deny the requested injunction as to the Respondent Counties.

2. Because the Respondent Counties have no cure procedures, the RNC is not likely to prevail on the merits with respect to the Respondent Counties

In Counts I and II, the RNC raises declaratory judgment claims against all Respondents. (Pet. for Review ¶¶87-96).³ Each claim is based on the premise one or more Respondents implemented cure procedures for the 2022 General Election regarding absentee or mail-in ballots beyond what is permitted by law. (*See, e.g., id.* ¶92). However, with respect to the Respondent Counties, they have ***not*** implemented such procedures—a point which the RNC has conceded for 12 of the 14 Respondent Counties. (Joint Stipulation of Facts, Ex. B). Thus, even assuming that the RNC is correct in its interpretation of *Boockvar*, the RNC is not likely to prevail on the merits with regard to the Respondent Counties. This is a separate basis to deny the sought-after injunction. *See, e.g., Summit Towne*, 828 A.2d at 1001.

3. The remaining elements for a preliminary injunction are similarly lacking

The remaining elements for a preliminary injunction are similarly lacking. Because the Respondent Counties are not engaging in the alleged unlawful conduct, the blanket, statewide injunction sought by the RNC is unnecessary, overbroad, and

³ In Count III, the RNC purports to assert claim for “INJUNCTION PROHIBITING BOARDS FROM DEVELOPING OR IMPLEMENTING CURE PROCEDURES.” (Pet. for Review ¶¶97-103). However, an injunction is a remedy, ***not*** a cause of action.

not reasonably suited to abate the alleged offending activity. Likewise, the sought-after injunction will not restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. To the contrary, the injunction will alter the status quo at least with respect to the Respondent Counties, because they are not engaging in the alleged unlawful conduct.

In this same vein, the sought-after injunction will adversely affect the public interest, because it will create a dangerous precedent under which a party can obtain a preliminary injunction based on hypothetical conduct. Finally, greater injury will result from granting the sought-after injunction than refusing it. Each one of these grounds is a separate and independent basis to deny the RNC's Application. *Allegheny Cnty.*, 544 A.2d at 1307.

4. A contrary finding requires this Court to issue an advisory opinion about hypothetical conduct on the part of the Respondent Counties

Were this Court to issue the requested injunction even though the RNC cannot satisfy all six prerequisites for a preliminary injunction, this Court would be issuing an advisory opinion as to the Respondent Counties, because they are not engaging in the alleged unlawful conduct. *See, e.g., Stuckley v. Newtown Twp. Zoning Hearing Bd.*, 79 A.3d 510, 516 (Pa. 2013) (“An advisory opinion is one issued despite the lack of a justiciable case or controversy between the parties.”). Such an opinion violates a foundational principle of Pennsylvania law. *See, e.g., Pittsburgh*

Palisades Park, LLC v. Commonwealth, 888 A.2d 655, 659 (Pa. 2005) (“The courts in our Commonwealth do not render decisions in the abstract or offer purely advisory opinions.”). This Court should therefore refrain from enjoining the Respondent Counties from engaging in non-existent conduct.

V. **CONCLUSION**

For the foregoing reasons, this Court should deny the Application as to the Respondent Counties.

Respectfully submitted,

BABST, CALLAND, CLEMENTS
and ZOMNIR, P.C.

/s/ Elizabeth A. Dupuis

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County, Huntingdon County, Indiana
County, Lawrence County, Lebanon
County, Northumberland County,
Venango County and York County
Boards of Elections*

Dated: September 26, 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE,	:	
<i>et. al.</i> ,	:	No. 447 MD 2022
	:	
Petitioners,	:	
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, <i>et al.</i> ,	:	
	:	
Respondents.	:	

AFFIDAVIT OF
LISA DART, ELECTION DIRECTOR, CARBON COUNTY

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF CARBON

The undersigned, being duly sworn, hereby deposes and says as follows:

1. I am currently employed by the County of Carbon ("Carbon") as the Election Director. As part of my duties, I am familiar with the policies used by Carbon for Elections.
2. I have reviewed the Petition for Special Relief filed in the above-referenced matter.
3. I confirm that Carbon County has not used any notice and cure procedures, beyond what is permitted by the Election Code, and does not have any policies in place for use of the same in the 2022 Election.

{B2462324.2}

Signed this 26 day of September, 2022.



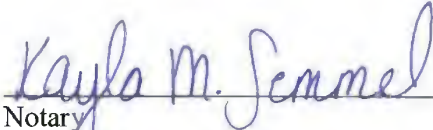
Lisa Dart, Election Director, Carbon County

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF CARBON

Sworn and signed before me, the undersigned officer, on this the 26 day of September, 2022.

IN WITNESS WHEREOF, I hereto set my hand and official seal.



Notary

Prothonotary, Carbon County, Pennsylvania

My Commission Expires January 1, 2024

CERTIFICATE OF COMPLIANCE

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.

Date: September 26, 2022

/s/ Elizabeth A. Dupuis

Elizabeth A. Dupuis, Esquire

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	No. 447 MD 2022
COMMITTEE, <i>et al.</i> ,	:	
Petitioners	:	
	:	
vs.	:	
	:	
LEIGH M. CHAPMAN, in her official	:	
capacity as Acting Secretary of the	:	
Commonwealth, <i>et al.</i> ,	:	
Respondents.	:	

**RESPONDENT, NORTHAMPTON COUNTY BOARD OF ELECTIONS’,
SUPPLEMENTAL BRIEF ON THE ISSUE OF PROVISIONAL BALLOTS IN
SUPPORT OF ITS RESPONSE TO PETITIONER’S APPLICATION FOR
PRELIMINARY INJUNCTION**

I. STATEMENT OF FACTS

This matter arises from Petitioner’s request for a preliminary injunction barring county boards of elections from taking certain actions characterized by the Petitioners as “notice” and “cure” of ballots that would otherwise be rejected.

It is not disputed that “naked” ballots, which is to say mail-in ballots that are received without a secrecy envelope, cannot be counted as votes under Pennsylvania Law. The lack of secrecy envelope violates the secrecy requirement of the Pennsylvania Election Code. As a result, in Northampton County, any “naked” mail-in ballot is not counted and the ballot is recorded as cancelled in the SURE system. As a result of his or her vote not being counted, the voter is not shown on the register as having voted.

In Northampton County, during the pre-canvass, beginning on or after 7:00 A.M. on election day, the name of any voter who, prior to the close of the polls at 8:00 P.M.,

is discovered to have submitted a “naked” ballot is provided to any party and/or candidate representative on-site during election day. The candidate or party representative may contact the voter to let them know that their mail-in ballot was not counted. Any voter who learns that his or her mail-in ballot was not counted may submit a provisional ballot. Petitioners have mischaracterized this process as notice and cure of a defective ballot. It is critical to note that the defective ballot itself is not cured, it is cancelled and not counted.

II. QUESTIONS PRESENTED

A. In Pennsylvania, is a voter who requests a mail-in ballot, whose mail-in ballot is not counted, permitted to vote by provisional ballot?

Suggested Answer: Yes.

B. In Pennsylvania, is a county Board of Elections permitted to take steps that would allow a voter to learn that their mail-in ballot was not counted including, but not limited to, letting candidate and/or party representatives know that a voter’s ballot was rejected and not counted?

Suggested Answer: Yes.

C. Should the Court deny the request for preliminary injunction for mail-in or absentee ballots which are unsigned and the voter corrects the signature issue before election day?

Suggested Answer: Yes.

III. LEGAL ARGUMENT

A. PROVISIONAL BALLOT

Pursuant to 25 P.S. sec. 3150.16(b)(2), a voter who requested a mail-in ballot but whose vote is not recorded has a clear statutory right to vote by provisional ballot. Specifically, “(2) An elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot.” 25 P.S. sec. 3150.16(b)(2). The text of the law could not be clearer that a voter who requested a mail-in ballot, but whose ballot was not counted for any reason including being rejected for lack of a secrecy envelope, is explicitly authorized to vote by provisional ballot.

At this time, mail-in ballots are only sent to those voters (electors) who request them. Therefore, any voter that submits a defective “naked” mail-in ballot is, by definition, a voter who requested a mail-in ballot. Furthermore, it cannot be reasonably disputed that a voter who submits a defective “naked” ballot will not “appear on the district register as having voted.” Such “naked” ballots are not counted, and the ballots are recorded as cancelled. Having satisfied both prongs of the test described in the statute, such a voter has an unambiguous right to vote by provisional ballot. Therefore, the only open question with regard to this issue is whether or not the board of elections can take action to inform the voter of their right to vote by provisional ballot.

In the instant matter, there is no question that Northampton County voters who have requested a mail-in ballot, but whose votes have not been recorded for any reason, including failure to use the secrecy envelope, have a statutory right to vote by provisional ballot. However, such a right is useless unless the voters can learn that their votes were not counted.

B. GUIDENCE TO ELECTORS

As indicated above, a voter whose defective mail in ballot is not counted has an unambiguous statutory right to vote by provisional ballot. Furthermore, the legislature has

granted the boards of elections broad power to provide instruction necessary for the guidance of voters. Specifically, pursuant to 25 P.S. sec. 2642, “The county boards of elections . . . shall exercise, . . . all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include . . . (f) To make and issue such . . . instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . electors.” As used in the election code, the term ‘electors’ refers to voters. Based on the clear text of this statute, a board of elections is permitted to issue instructions necessary for the guidance of voters.

The right to file a provisional ballot if your mail-in ballot is not counted is useless unless you know that your vote was not counted and are instructed about your statutory right to file a provisional ballot. There is no specific method of instruction required by the code. Thus, it is reasonable for a county to choose to give that instruction by informing individuals, such as representatives of candidates or political parties, that would be highly motivated to seek out the voter and advise the voter of his or her right to file a provisional ballot.

The legislature of Pennsylvania has granted the Northampton County Board of Elections to power to provide guidance to the voters of Northampton County. There is no reason to exclude the clear statutory right of voter who requested a mail-in ballot, but whose ballot was not counted, to file a provisional ballot from the aforementioned guidance. Therefore, the request for preliminary injunction should be denied with respect to the current policy and practice of Northampton County of advising representatives of political parties and candidates of the names of mail-in voters whose ballots have not been counted on election day because Petitioners cannot establish a likelihood of success on the merits.

C. UNSIGNED BALLOT

Respondent Northampton County Board of Elections incorporates by reference the arguments made by the other respondent Counties with respect to permitting voters to correct an issue with a signature or date on a mail-in or absentee ballot prior to Election Day. The Pennsylvania Election Code does not prohibit county election boards from contacting voters or allowing voters to be contacted to address an issue with a date or signature on a mail-in or absentee ballot prior to Election Day.

According to the Joint Stipulation of Facts, some counties had a process to contact voters who neglected to properly sign or date absentee ballots prior to the passage of Act 77 of 2019. It is presumed the Legislature had knowledge of such practice in 2019, but it failed to prohibit the practice.

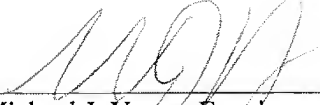
This Court should not read into the Election Code a prohibition where none existed. Petitioners are plainly unable to establish a clear right to relief or irreparable injury.

IV. CONCLUSION

For the aforementioned reasons, the request for preliminary injunction should be denied with respect to the current policy and practice of Northampton County of advising representatives of political parties and candidates of the names of mail-in voters whose ballots have not been counted on election day and also the long standing practice of contacting voters who failed to include a signature on the outer envelope of a mail-in or absentee ballot.

Respectfully Submitted:

Dated: Sept 26, 2022



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IN THE COMMONWEALTH COURT OF, PENNSYLVANIA

Republican National Committee, et al.	:	
	:	
Petitioners	:	Case No. 447 MD 2022
	:	
v.	:	
	:	
	:	
Respondents	:	
	:	
LEIGH M. CHAPMAN, in her official Capacity as Acting Secretary of the Commonwealth	:	
	:	
	:	
	:	
	:	

CERTIFICATE OF SERVICE

This is to certify that the foregoing Supplemental Brief was mailed by first class United States Mail and electronic mail, Postage Prepaid this 26th day of September 2022, upon the following counsel:

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mvargo@northamptoncounty.org

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL)	
COMMITTEE et al.,)	
Petitioners,)	ELECTION MATTER
v.)	
)	
LEIGH M. CHAPMAN, in her capacity)	No. 447 MD 2022
as Acting Secretary of the)	
Commonwealth of Pennsylvania et al.,)	
)	
Respondents.)	

MEMORANDUM OF LAW OF RESPONDENT ALLEGHENY COUNTY BOARD OF ELECTIONS IN OPPOSITION TO THE APPLICATION FOR PRELIMINARY INJUNCTION UNDER P.A.R.A.P. 1532

AND NOW COMES Respondent Allegheny County Board of Elections (Allegheny), by and through George M. Janocsko, Allegheny County Solicitor, Allan J. Opsitnick, Assistant County Solicitor, and Lisa G. Michel, Assistant County Solicitor, and files the within Memorandum of Law, setting forth as follows:

Respondent Allegheny joins in the Briefs and Memoranda filed by the other party Respondents in opposing the Application for Preliminary Injunction.

Additionally, Respondent Allegheny submits this Memorandum to address several points raised in its Answer to the Application and at the court proceeding held on September 22, 2022.

I. ARGUMENT

A. The Election Code Provides County Boards of Election with Requisite Authority

The Election Code grants the county boards of election broad jurisdiction for conducting elections in such county. *See* 25 P.S. § 2641. For example, the counties select and equip polling places. *Id.*, §2642 (b). Additionally, the county boards select and purchase “primary and election equipment of all kinds” consistent with the Act. *Id.*, §2642 (c). County boards also “appoint their

own employes, voting machine custodians, and machine inspectors” *Id.*, §2642 (d). Finally, county boards have the explicit statutory authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors. *Id.*, §2642 (f).

Contrary to Petitioner’s assertion that the Code requires uniformity across the Commonwealth’s election boards, this plain language dealing with the powers of county boards of elections cited above reveals that the Legislature fully contemplated heterogeneity across the Commonwealth and expressly permitted boards to implement practices that give effect to the voters’ right to cast their ballot. This is both legal and logical because the logistics and procedures required to conduct an efficient election in large urban counties such as Allegheny and Philadelphia differ from those that are rural and sparsely populated.

The Pennsylvania Supreme Court long has recognized this legislative intent and deemed that the absence of specific provisions reflects, “the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code ‘[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.’ 25 P.S. § 2642(f).” *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020), *cert. denied sub nom., Donald J. Trump for President, Inc. v. Degraffenreid*, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021).

B. Allegheny County’s Board of Elections’ Practice Regarding Mail-In Ballots

Act 77, enacted in 2019 revised the Election Code and, in addition to the long existent absentee ballot mailing procedure, the Act for the first time provided for no-excuse mail-in voting. *See* 25 P.S. §§ 3150.11- 3150.17. Act 77 provides for an interior secrecy envelope and a larger

mailing envelope which is printed with a declaration in the form prescribed by the Secretary of State that the voter is required to complete. *Id.*, §3150.14.

In 2020, when Act 77 became effective, Allegheny County thereafter implemented a procedure of returning by mail to the voters those ballots with apparent errors such as missing information, or information in the wrong response fields along with a letter reiterating the instructions and another exterior ballot envelope and secrecy envelope. *See*, Joint Stipulation of Exhibits, Allegheny-1. Voters then had the option to review and revise their exterior envelope and return it to the Allegheny Board of Elections by mail, at the Board's office or the then existing manned ballot return locations.

It is important to note that there is no statutory prohibition that prevents local boards from providing electors voting at their neighborhood polling place with guidance or to permit them an opportunity to comply with the law if that in person voter makes a mistake on his or her ballot. Correlatively, there is nothing that prohibits a county election board from providing voters who request and submit a ballot to be delivered via the mail with notice and an opportunity to comply with the declaration on the exterior postal envelope used to deliver their ballot.

“As the Supreme Court of the United States has explained, the right to vote comprises not just ‘the right of qualified voters within a state to cast their ballots,’ but also the right ‘to have their ballots counted.’” *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345, 387 (Pa. 2020), *cert. denied sub_nom.*, *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021)(Justice Wecht, concurrence, citing *United States v. Classic*, 313 U.S. 299, 314, 315, 61 S.Ct. 1031 (1941).

As the President Judge of this, the Commonwealth Court, observed mere months ago:

“ For almost 70 years, the Pennsylvania Supreme Court has recognized that

[t]he power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election **except for compelling reasons** The purpose in holding elections is to register **the actual expression of the electorate's will** and that computing judges should endeavor to see **what was the true result**. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote.

Appeal of James, 105 A.3d 64, 67 (Pa. 1954).

McCormick for U.S. Senate v. Chapman, NO 286 M.D. 2022, 2022 WL 2900112 *9. (emphasis in original).

Allegheny County strives to ensure the voters in this jurisdiction have adequate procedures in place to safeguard their rights to have their ballots counted.

B. THE APPLICATION IS BARRED BY THE EQUITABLE DOCTRINE OF LACHES

Numerous other county board of election respondents have raised in their New Matter or by Preliminary Objections the equitable doctrine of laches as a bar to the instant Petition. Allegheny joins these other Respondents' well-stated and well-reasoned arguments asserting that this doctrine is a bar to the instant Application.

At the virtual status conference on September 22, 2022, the Petitioners averred in opposition to the doctrine several reasons for waiting mere weeks before the county boards would be sending out mail-in ballots requested by voters. Among those reasons proffered by the Petitioners, to which Allegheny specifically addresses, were that there was a legislative effort which was vetoed by Governor Wolf in July, 2021, under which the General Assembly addressed the curing of voter error in completing the mail-in ballot declaration and that it could not proceed with its claim until it received Bucks County's responses to an open records request in early August, 2022.

As addressed at length by other Respondents and Intervenors, the Petitioners and others have, since 2020, filed numerous well-publicized actions in various courts challenging the provisions of Act 77. The instant Petitioners and their counsel herein also participated in the much discussed case of *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) where it was known to the parties that some counties were implementing procedures for cure.

As to the first issue, Petitioner cites no authority for its proposition that it was required to wait until the resolution of pending litigation to seek legal relief for what the Petitioners currently assert is necessary to prevent “immediate and irreparable harm.” Allegheny and a number of the other Respondents, including those with larger populations and metro areas, continued their adopted practices for the 2021 Primary and General Election and this year’s Primary Election. The Petitioners were seemingly unbothered by their asserted harm through these election cycles despite knowing that there were many elections boards within the Commonwealth which promulgated and implemented measures to assure voters an opportunity to have their mail-in ballots counted.

Next, Petitioners’ assertion that it was compelled to wait until it received information from Bucks County to file the instant action is similarly without merit. First, the Petitioner was aware of other populous counties having long standing mail-in ballot notice and cure procedures. Bucks County, in its Answer and New Matter to the Petition, explicitly pleads that their practices were a matter of public record and litigated in the matter of *Donald J. Trump for President, Inc. v Bucks County Board of Elections*, 2020-05627 (Bucks C.C.P. 2020). Answer and New Matter of Bucks County Board of Elections to Petition for Review Seeking Declaratory and Injunctive Relief, ¶128. Second, irrespective of whether it received information from Bucks County, Petitioners’ claim is premised on its assertion that *no* county board of elections has the authority to implement procedures relating to mail-in ballot cures absent explicit legislative authority. The Petitioners

plead that as of June 2022, the Northampton and Lehigh County Boards of Elections agreed to begin implementing procedures. Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532, ¶13. The Petitioners argue that the Bucks County documentation was a necessary arrow in their quiver and were required to delay filing until receipt of that County’s information. This is wholly inconsistent with Petitioners’ argument that even having one county implementing a procedure “*per se* constitutes immediate and irreparable harm.” *Id.*

The Court should not credit these arguments as valid reasons for Petitioners’ delay in filing the instant action on the eve of mailing ballots to voters.

CONCLUSION

For the reasons stated herein and those filed by other Respondents with whom Allegheny County Board of Elections joins, the Respondent Allegheny County Board of Elections respectfully requests this Honorable Court to deny the Application for Special Relief in the Nature of a Preliminary Injunction.

Respectfully submitted,
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Attorneys for Respondent Allegheny County
Board of Elections

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL	:	
COMMITTEE, et al.,	:	
	:	
	:	
Petitioners	:	
v.	:	No. 447 MD 2022
	:	
LEIGH M. CHAPMAN, et al.,	:	
	:	
Respondents	:	
	:	

BRIEF OF RESPONDENT MONTGOMERY COUNTY BOARD OF ELECTIONS IN OPPOSITION TO PETITIONERS’ APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

Respondent Montgomery County Board of Elections (“Respondent”), submits this brief in support of its Preliminary Objections and in opposition to the Petitioners’ Omnibus Reply in Support of Application for Special Relief in the Form of a Preliminary Injunction. In their Reply, Petitioners represented facts inaccurately, particularly with respect to the Respondent, to argue that its delay in commencing the present suit was reasonable and that such delay would not result in any harm.

However, a review of the evidence suggests that Petitioners intentionally delayed bringing the present suit with the goal of causing disruption and confusion as well as distrust among the Respondent’s electors. Because the Petitioners unreasonable delayed bringing this cause of action against the Respondent and the

delay will result in prejudice to the Montgomery County and its electors, this Court should find Petitioners claims barred by the Doctrine of Laches and dismiss Petitioners' Petition to Review.

I. ARGUMENT

Petitioners' Petition to Review is barred by the Doctrine of Laches

A. Inexcusable delay

Petitioners' claims are barred by laches, an equitable doctrine that forecloses relief where (1) petitioners fail to exercise due diligence in bringing the action leading to a delay, and (2) the delay prejudices the opposing party. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020); *see also Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). Both factors are met here.

Petitioners have known for at least two years that the Montgomery County Board of Elections provides voters with notice and an opportunity to cure mail ballot defects. Petitioners maintain that they have been engaged in efforts to gather information as to how individual boards of elections across the state conduct notice and cure, and the difficulty faced in obtaining any kind of detailed information has contributed to the late timing of their filing. As it pertains to Montgomery County, Petitioners have been well aware that the Montgomery County Board of Elections notifies mail-in and absentee electors of potential defects with their balloting materials and offers those electors the opportunity to cure the potential defects.

Indeed, counsel for Petitioner's were provided a very detailed explanation of the procedures followed by Montgomery County almost two full years ago, and based on that information alone would have had a sufficient basis to file their complaint against Montgomery County. *See Declaration of Lee Soltysiak*, Exhibit A. 56-85. Not only would they have had sufficient information to file an action on their own behalf, they could have filed a request to intervene in an already existing action in federal court in the Eastern District of Pennsylvania in November of 2020 wherein the exact same claims were raised by then candidate for the 4th Congressional District, Kathy Barnette.¹

In addition to the litigation initiated by the Republican candidate for congressional office in 2020, Petitioners should have been aware based on the coverage of the notice and cure process utilized by Montgomery County by a variety of major regional and national news outlets at the time. On November 2, 2020 the *NBC News* affiliate in Philadelphia ran a television segment wherein the chair of the Montgomery County Board of Elections stated that "Montgomery County has contacted voters who had some kind of defect with their ballot, they didn't sign the declaration, there is no privacy envelope. You have time to cure that before Election Day." *See Declaration of Lee Soltysiak*, Exhibit B. On November 5, *ABC National News* ran a story outlining the cure process in numerous states including

¹ Counsel for the Barnette campaign, Thomas Breth and Andrew Teitelman, filed suit against the Montgomery County Board of Elections on November 3, 2020 and voluntarily dismissed the same on November 11, 2020.

Pennsylvania and referenced Montgomery County specifically in stating that “officials notified voters directly about defective ballots and said 49 ballots were cured.” *See Declaration of Lee Soltysiak*, Exhibit C. Further, *Politico* published an article on November 4, 2020 focusing on the suit filed by the Barnette campaign and the fact that Montgomery County did indeed allow for voters to cure defects with mail-in and absentee ballots. *See Declaration of Lee Soltysiak*, Exhibit C.

Petitioners include in their own exhibits responses provided in 2021 from Montgomery County to right know requests from the Republican National Committee clearly identifying that the Montgomery County Board of Elections notified electors of potential defects with mail-in and absentee ballots and afforded those electors the opportunity to cure those defects. *See* Petitioner’s Exhibits 3, 5, 8.

Not only were Petitioners aware in late 2020, they arguably could have been aware of notice and cure procedures being used by Montgomery County for years prior. Before the adoption of Act 77, when electors were only permitted to vote by absentee ballot under certain specific conditions, the Montgomery County Board of Elections had a long standing practice of allowing absentee voters to cure defects with their ballots. *See Declaration of Lee Soltysiak*, Exhibit A. 56.

Petitioners’ have clearly demonstrated a “complete failure to act with due diligence,” *Kelly*, 240 A.3d at 1256. Their decision to wait until mere months before an election to bring a claim they were well aware of for years, forecloses their last-

minute request for disruptive relief.

B. Prejudice to Respondent

Contrary to Petitioners contention, the harm to the electors of Montgomery County is not vague and speculative. Rather, Respondent voters rely upon information provided by the County Board of Elections concerning the election process. As documented in its exhibits, Respondent have had an established procedure of reaching out to voters to alert them of defects regarding their submitted absentee or mail-in ballots. As previously stated, Respondent's procedure pre-dates Act 77. The reason for establishing this practice was to ensure voters who will not have the opportunity to get to the polls on Election Day will still have their absentee votes counted.

Based on the evidence of record, Montgomery County electors have been made aware that they will be contacted by the County if absentee or mail-in ballots with defects are submitted. During the November 2, 2020 *NBC 10 News* broadcast, Ken Lawrence, Chair of the Montgomery County Board of Elections, specifically stated that Montgomery County voters had the opportunity to cure defects with respect to their absentee or mail-in ballots prior to Election Day. *Id.* In addition, the Secretary of the Commonwealth appeared in the broadcast to confirm that the law

does not prohibit the Montgomery County Board of Elections from reaching out to voters to advise them of curable defects.

Moreover, the Montgomery County electors rely on the well-established policy that they will have an opportunity to cure such defects. The Montgomery County electors relied on the Election Board Chair who told them that they will be notified about defective ballots and given an opportunity to correct the defect. They relied on the Secretary of the Commonwealth who validated the legality of Montgomery County's notice and cure procedure.

A sudden change in this establish policy immediately before an election will only serve to exacerbate voter distrust in the election process. "In the age of distrust, legal uncertainty over election rules, never a good thing, is even more risky." Richard H. Pildes, *Election Law in an Age of Distrust*, 74 *Stanford Law Review Online* 100, 104 (2022) Since Montgomery County's notice and cure procedures have been followed for years without challenge by the Petitioners, the Montgomery County voters have trusted them as established and continued practice. Now, the Petitioners are seeking to harm voters by requesting a last-minute change in the law just prior to an election when they had the opportunity to raise the same challenge well before they filed this cause of action.

WHEREFORE, Respondent Montgomery County Board of Elections respectfully requests that this Court deny Petitioners' Petition for Review as barred by the Doctrine of Laches.

Respectfully submitted,
MONTGOMERY COUNTY SOLICITOR'S OFFICE

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Counsel for Montgomery County Board of Elections

Dated: September 26, 2022

CERTIFICATE OF COMPLIANCE

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.

/s/ Maureen E. Calder

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Counsel for Montgomery County
Board of Elections

Dated: September 26, 2022

Montgomery County Reaches Out to Voters Who Have Had Issues With Their Ballot

News story on NBC10 NOVEMBER 2, 2020

Anchors

In Montgomery County nearly half of all registered voters requested a mail-in ballot. And here's a little peace of mind for you. The County says that it has spent time reaching out to voters whose ballot have an issue. And in an attempt to have every vote count, NBC10's Deanna Durante tells you just because you sent the ballot in doesn't mean there isn't time to fix it.

Deanna Durante

Thousands of Montgomery County residents have voted by mail. Statewide more than two million ballots have been sent in across Pennsylvania.

Ken Lawrence

Montgomery County has contacted voters who had some kind of defect with their ballot, they didn't sign the declaration, there is no privacy envelope. You have time to cure that before election day.

Deanna Durante

If you are a voter who sent in a ballot and you get an email from your County or a letter, pay close attention to the return address or the email address. It could be an opportunity to fix the ballot before election day.

Kathy Boockvar

There is nothing in the law that would prohibit a county from reaching out to a voter because they had a ballot bounce back or an application bounce back.

Deanna Durante

The Secretary of State says counties statewide are working to correct ballots that may not otherwise be counted. She says the majority of ballot issues could be naked ballots, voters that didn't use the two

Page 2

envelopes to secure the ballot or address issues, or ballots that have been returned to the sender. For voters who choose to vote in person, Pennsylvania changed from its lever machines to ballots that have a paper trail. Each is individually scanned, and if a ballot is kicked back in the polling location, voters there have a chance to fix it before they leave.

Ken Lawrence

There is absolutely no difference and we have had absentee ballots for years now and we've always done that. If someone turns in their absentee ballot and they have not signed that, um we will contact that voter and give them the opportunity to correct that. We want everyone to vote.

Deanna Durante

The Secretary of State says that counties will be counting those ballots 24/7 after the polls close, but it still could take several days before winners are declared.

In Norristown, Deanna Durante, NBC10 News.

End

POLITICO

GOP effort to block 'cured' Pennsylvania ballots gets chilly reception from judge

By KATHERINE LANDERGAN and JOSH GERSTEIN

11/04/2020 11:30 AM EST

Updated: 11/04/2020 02:03 PM EST

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PHILADELPHIA — A federal judge gave a skeptical reception Wednesday to a Republican lawsuit seeking to throw out votes in a Pennsylvania county that contacted some voters to give them an opportunity to fix — or “cure” — problems with their absentee ballots.

During a morning hearing in Philadelphia, U.S. District Court Judge Timothy Savage said he was dubious of arguments from a lawyer for GOP congressional candidate Kathy Barnette, who argued that the Pennsylvania Supreme Court had concluded that the law prohibits counties from allowing voters who erred in completing or packaging their mail-in ballots to correct those mistakes.

“I’m not sure about that,” said Savage, an appointee of President George W. Bush. “Is that exactly what was said or is what was said was that there is no mandatory requirement that the election board do that?...Wasn’t the legislative intent of the statute we are talking about to franchise, not disenfranchise, voters?”

“This isn’t disenfranchising voters,” insisted Thomas Breth, an attorney for Barnette. “They can’t do this unless the election code provides them the authority to do this.”

But Savage chafed at the lawyer’s suggestion that a miscast absentee vote blocked a voter from fixing that ballot or casting a provisional ballot at the polls.

“It counts as your vote, but your vote is not counted,” the judge said quizzically.

The suit zeroes in on the practice of election officials in suburban Montgomery County to allow voters to fix so-called “naked ballots” as well as others with technical errors. The case appeared to challenge the county’s outreach effort as well, but Breth said Barnette isn’t objecting to that, only to the decision to permit so called “curing” of the ballots.

Montgomery County Chief Operating Officer Lee Soltysiak testified at the hearing that while he told reporters Tuesday that 49 ballots were cured, he now believes there are 93

votes in that category. He said they're now in a locked cabinet under 24-hour surveillance.

Breth said even that limited number of votes could be pivotal.

"These ballots may determine the outcome of the election," the GOP attorney said. "There is concrete evidence that this could impact not only the congressional [race], but also the entire election in the commonwealth."

During the legal arguments, Breth repeatedly invoked the 2000 U.S. Supreme Court decision in *Bush v. Gore*, saying that it established the principle that the Constitution's guarantee of equal protection of the laws was violated when election officials in a particular state followed different procedures in different jurisdictions.

"I know it pains people to mention Bush/Gore, but that's the analysis that would apply to this," the GOP lawyer said. "There's a disparity between those that have submitted defective ballots and those that have been able to 'cure,' to use their terminology, and those that have not....It is creating the same situation that Florida dealt with in 2000."

He later told reporters that there must be uniformity across the state and all of its counties.

"When you have one or more counties that deviating from uniform standards it begs into question the state's entire electoral process."

Breth's law firm is also involved in a lawsuit that's being heard today in Harrisburg, Pa. That suit is seeking to block election officials from counting provisional ballots submitted by voters whose absentee ballots were disqualified.

An attorney for Montgomery County, Michele Hangle, urged the judge not read into the code a prohibition that it does not contain.

"The election code is not meant to be a trap. It's not meant to trick voters into losing their vote," said Hangle. "The code gives counties the authority and the discretion to administer the election law....It's a very complicated process. There's a lot of discretion there."

Democrats also argued that Barnette and another voter Breth represents lack legal standing to pursue their claims. Treating every potential election law violation as grounds for a federal equal protection lawsuit would lead to legal chaos, the Democratic lawyers contended.

Breth asked the judge to order that the absentee ballots that were corrected in Montgomery County be set aside and not counted until their validity can be determined.

However, Montgomery election officials said their policy has been in place for years, so the plaintiffs should have filed suit well before they did so on Election Day.

Towards the end of the hearing, Savage was very blunt in his skepticism of Breth's arguments.

"I do not understand how the integrity of the election was affected," he said.

Breth will file a supplemental brief by 9 a.m. Thursday, and Hangle can respond by 9 a.m. Friday. Then it's expected that the judge will issue a ruling.

ABC News

What does it mean to 'cure' your ballot? Quirky rules that allow voters to make sure their vote is counted

Arizona and other battleground states allow voters to "cure" their ballots.

By [Kendall Karson](#)

November 5, 2020, 4:57 PM

All [five key battleground states still outstanding](#) — Pennsylvania, Arizona, Georgia, North Carolina and Nevada — [allow voters to "cure" their mail-in ballots](#).

If there is an issue with their absentee ballots, such as a signature-matching issue or a missing witness signature, these states allow voters a chance to fix their ballot in some form in order to help avoid their ballot being discarded and their vote not counting.

In at least 18 states, officials are required to notify voters over a missing signature or signature discrepancy and give the voter an opportunity to correct it, according to the [National Conference of State Legislatures](#).

In Pennsylvania, Republicans are seeking court intervention to toss out votes in one county that contacted some voters to give them an opportunity to fix their ballots. The lawsuit aims to throw out "as many as 10,000" deficient mail-in ballots that were "cured" during the pre-canvassing process before Election Day.

In some Pennsylvania counties, officials give voters the chance to correct or "cure" errors, such as in Bucks County, where about 1,600 voters were sent notices about ballot errors, and in Montgomery County, where officials notified voters directly about defective ballots and said 49 ballots were cured, according to [a local ABC affiliate](#).

In Arizona, if a signature is missing from the ballot affidavit, county recorders must reject the ballot, according to procedures from [the secretary of state](#). The recorder then must make "a reasonable and meaningful attempt to contact the voter via mail, phone, text message, and/or email, to notify the voter the affidavit was not signed and explain to the voter how they may cure the missing signature or cast a replacement ballot before 7:00pm on Election Day."

In Georgia, the secretary of state's website outlines that county [elections](#) officials contact voters whose ballots were rejected to provide them with the chance to "correct your ballot envelope."

"One of the most common reasons an absentee ballot is rejected is because it has not been properly signed," the [website](#) reads.

In Nevada, the secretary of state's office wrote in a FAQ for reporters Wednesday that voters who require a signature cure have until 5 p.m. on Nov. 12 to provide the required signature confirmation, and once that is done successfully by the deadline, the voter "will have their ballot counted."

And in North Carolina, before Election Day, officials, under new guidance, are to "spoil" a ballot if it is returned without a witness signature and issue a new one to the voter, unless the voter casts a ballot in-person. If there are other deficiencies, i.e missing voter signature, voter signature in wrong place, the county board will send a voter a certification form to sign and return to ensure that the ballot is counted.

Any ballots received between Election Day and Nov. 12 without witness signature will not be accepted and new ballot will not be issued. If there is a deficiency other than a missing signature those can be cured with a certification document until Nov. 12.

ABC News' Tonya Simpson and Alex Hosenball contributed to this report.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, *et al.*,

Respondents,

and

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Intervenors-Respondents.

No. 447 MD 2022

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

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231 Pa. Code §153113

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

II. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

2. *Petitioners’ Delay Prejudices The Public, Respondents, And Intervenors*

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

evidentiary and expectations-based.” *Energy Intelligence Group, Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industries & Service Workers International Union*, 2013 WL 4648333, at *18 (W.D. Pa. Aug. 29, 2013) (quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001)).

Petitioners’ reply says nothing about the latter (addressing only the former), but expectations-based prejudice unquestionably exists here. Such prejudice “is demonstrated by showing that the [party asserting laches] took actions or suffered consequences that it would not have, had the plaintiff promptly brought suit.” *Id.*

Had petitioners filed this action soon after they learned (or should have learned) about notice-and-cure procedures being employed in the commonwealth, voters could have made different decisions regarding how to vote in the election now underway, county boards could have taken different steps to administer the now-in-progress election, and the DNC and PDP could have both taken additional measures to educate their voters and changed their approach to getting out the vote, given the disproportionate effect the relief sought would have on Democratic candidates.

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

2. *Petitioners Cannot Assert An Equal-Protection Injury*

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

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

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

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

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

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

3. *Petitioners Cannot Show Any Irreparable “Vote-Dilution” Injury*

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

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

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

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

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

It is firmly established that the General Assembly “may, where necessary, confer authority and discretion in connection with the execution of the law.” *Chartiers Valley Joint Schools v. County Board of School Directors of Allegheny County*, 211 A.2d 487, 492 (Pa. 1965). The General Assembly has done so here, giving county boards broad authority “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 Pa. Stat. §2642(f). As the DNC’s and PDP’s answer explained (at 12-19), this expansive

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

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

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

[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the “notice and opportunity to cure” procedure sought by Petitioner. To the extent that

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

a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania’s government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

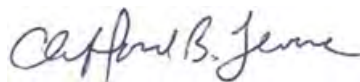
III. CONCLUSION

The application for a preliminary injunction should be denied.

September 26, 2022

Respectfully submitted,

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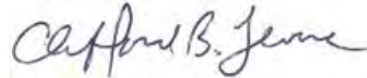
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CERTIFICATE OF COMPLIANCE

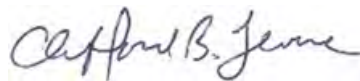
This filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.



CLIFFORD B. LEVINE

CERTIFICATE OF LENGTH

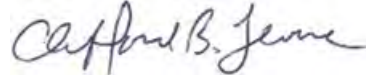
Pursuant to Pennsylvania Rule of Appellate Procedure 2135(a), I hereby certify that this brief has a word count of 6,538, as counted by Microsoft Word's word count tool.



Clifford B. Levine

CERTIFICATE OF SERVICE

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



CLIFFORD B. LEVINE

EXHIBIT A

IN THE IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

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

Respondents,

and

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

Intervenors-Respondents.

No. 447 MD 2022

SUPPLEMENTAL DECLARATION OF COREY PELLINGTON

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

I. Professional Experience

1. I currently serve as the Executive Director of the Pennsylvania Democratic Party (“PDP”). I have held that position since June of 2022.
2. Before that, I was the Deputy Executive Director of the PDP, starting in December of 2015.
3. Additionally, I have been the Chief Operations Officer since April of 2018.

4. As Executive Director of the PDP, I work with PDP officers and oversee the administration of the State Democratic Committee and state party activities, including the endorsement of statewide candidates.
5. Additionally, I oversee the operation of the Coordinated Campaign, a program that links all Democratic candidates on the ballot and conducts political, digital, communications, and field activities for all Democratic candidates running that cycle. I manage the full financial apparatus of the PDP coming to bear on each election cycle.
6. I also supervise campaign expenditures to help county-level parties and candidates, including mail programs.

II. PDP Generally

7. The Democratic National Committee (“DNC”) is the national umbrella organization for state parties. The PDP is the official state affiliate of DNC; what that means in practice is that nothing in our bylaws can contradict anything in the DNC bylaws (with the exception of primary endorsements in certain states). The PDP oversees 67 subsidiary county committees, whose bylaws in turn cannot contradict anything in the PDP bylaws.
8. The DNC has an interest in electing Democratic candidates and invests significant resources in state parties, including the PDP.
9. Among other things, the PDP communicates with voters concerning the timing of and how to participate in upcoming elections; encourages them to participate in the selection of the party’s nominees; and encourages them to support the party’s nominees during the general election.
10. The PDP represents the interests of Democratic voters in Pennsylvania by supporting candidates who share these voters’ values. As of August 4, 2022, there were roughly three-and-a-half million registered Democrats throughout the Commonwealth.
11. The PDP also represents the interests of Democratic candidates by providing campaign resources, logistical support, and coordination with other candidates. The number of Democratic candidates varies by year and cycle.

12. In 2020, for example, the PDP represented the interests of Democratic nominees for President and Vice President; four Democratic candidates for statewide row offices; 18 Democratic congressional candidates; 25 Democratic State Senate candidates; and roughly 203 Democratic State House candidates.
13. In 2018, the PDP represented the interests of Democratic candidates for Governor and United States Senate; 18 Democratic congressional candidates; 25 Democratic candidates for State Senate; and roughly 203 Democratic State House candidates.
14. This year, the PDP represents the interests of Democratic nominees for Governor and Lieutenant Governor, United States Senate, 17 Democratic Congressional candidates, 25 Democratic candidates for State Senate, and roughly 203 Democratic State House candidates.

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

15. The DNC and the PDP share the goal of universal voter participation. That means that we take steps to facilitate safe, secure, and convenient voting so that an any eligible voter may exercise their right to vote. In our experience, allowing any qualified voter to vote by mail increases participation.
16. Using two recent state-run Democratic primaries as examples—one prior to no-excuses mail-in voting under Act 77, and one after Act 77 took effect—illustrates the point: In 2019, before Act 77 took effect, the Democratic primary participation was approximately 835,000; in 2021, by contrast, in a primary with similar offices, the turnout was over 1.1 million, a 32% increase. I believe that Act 77 is one of the principal reasons for this increase in voter participation.
17. In the 2020 general election, roughly 2.6 million voters voted by mail. Of these voters, roughly 65% or 1.7 million were registered Democrats.
18. As of October 4, 2021, over 700,000 voters had requested to be placed on the “permanent” vote by mail application list for 2021, which allows them to receive a mail-in ballot automatically for both elections this year. Of these voters, roughly 72% or 500,000 are registered Democrats. According to the Department of State, nearly

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

IV. PDP Encourages its Voters to Vote By Mail

19. Consistent with its goal to elect Democrats to public office, the PDP shifted its strategy around voting by mail gradually after Act 77's passage, in response to changes on the ground and the law's interpretation in the courts.
20. In particular, as a result of Act 77, the PDP invested vastly more resources than before in a robust set of programs, including digital outreach, communications, field, and get-out-the-vote ("GOTV") that both encourage our voters to vote by mail and support their efforts to do so.
21. These programs consume an enormous amount of time, money, and effort. For example, our digital and communications teams educated voters on (1) the availability of mail voting for all qualified voters and (2) how to vote by mail in accordance with the requirements of the law. These efforts are conducted by mail and online.
22. Our field efforts have similarly shifted to conducting substantial voter contact around voting by mail.
23. Finally, PDP's GOTV program has fundamentally changed. Before Act 77, we conducted that program only in the four days preceding an election. Now, we work the entire *month* before the election, from when voters first receive their mail-in ballots to the receipt deadline for ballots. This vast expansion in the scope of the GOTV program has required wholesale revisions in the allocation of our resources.
24. In short, the PDP has invested significant time and money encouraging its voters to utilize the vote-by-mail option.
25. If Pennsylvania courts were to impose additional burdens on voting by mail that are not imposed on in-person voting, that would negatively and disproportionately affect Democratic voters.
26. In addition, PDP has an interest in preserving the confidence and trust it has built with voters over the four full election cycles Act 77 has been in effect and increased mail-in voting has become available.

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

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

28. Since the enactment of Act 77, voters have had the opportunity to vote in person, by mail, or provisionally. When voters vote in person, they interact with election judges and representatives of the various county boards of election.
29. An in-person voter has the opportunity to ask questions of board representatives.
30. In the event the in-person voter makes an error on his or her ballot, that voter is allowed to spoil the ballot and obtain a new ballot.
31. Upon information and belief, many counties account for the number of spoiled ballots.
32. Further, if in-person voters have some confusion with the voting process, representatives of county boards of election typically communicate with that voter to assist the voter in casting a vote that will be counted.
33. The lawsuit brought by the Republican National Committee (RNC), the Republican Party of Pennsylvania (State GOP) and others seeks to impose limitations on notice and cure only for mail-in voters and not in-person voters.
34. In analyzing the impact of such a policy on implications for the DNC and PDP (including their shared goal of universal voter participation), I have reviewed information about recent elections contained on the official website of the Pennsylvania Secretary of the Commonwealth. My analysis is set forth below.

A. Review of Recent Elections

35. In the Presidential Election of 2020, Democrat Joseph R. Biden received a total of 3,458,299 votes, broken down as follows:¹
 - (a) In-person: 1,409,341
 - (b) Mail-in: 1,995,691
 - (c) Provisional: 53,168
36. Republican Donald J. Trump received a total of 3,377,674 votes, broken down as follows:
 - (a) In-person: 2,731,230
 - (b) Mail-in: 595,538
 - (c) Provisional: 50,874
37. Of the total of 2,591,299 mail-in votes cast, approximately 77% were for Biden and 23% were for Trump.
38. In absolute terms, for the 2020 Presidential race, Democratic voters cast 1,400,153 more mail-in votes than Republicans. (1,995,691 – 595,538 = 1,400,153).
39. In the 2022 Primary Election for Governor, votes for the Democratic candidate broke down as follows:²
 - (a) In-person: 694,912
 - (b) Mail-in: 522,146
 - (c) Provisional: 6,384

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

²

<https://www.electionreturns.pa.gov/Home/SummaryResults?ElectionID=94&ElectionType=P&IsActive=0>

40. In the 2022 Primary Election for Governor, votes for the Republican candidates for Governor (in the aggregate) broke down as follows
 - (a) In-person: 1,200,905
 - (b) Mail-in: 144,725
 - (c) Provisional: 1,799
41. As a percentage of mail-in votes, 78% were cast in the Democratic Primary for Governor and 22% were cast in the Republican Primary for Governor.
42. In absolute terms, the number of mail-in voters for the Democratic candidate exceeded the number of mail-in voters for the Republican candidates in the 2022 Gubernatorial Primary Election by 377,421 votes ($522,146 - 144,725 = 377,421$).
43. My experience with the PDP makes me believe a blanket prohibition on curing minor defects with mail-in ballots would do damage to voter participation. It would create an additional barrier to using a method of voting that has become very popular with voters.
44. Additionally, as is evident from the election results cited above, any prohibition on notice and cure for mail-in votes will disproportionately disenfranchise Democratic voters.

B. Rejection Rate of Mail In Ballots

45. Upon information and belief, there have been a number of votes that have been rejected by county boards of election due to technical deficiencies, such as ballots submitted without a secrecy envelope or missing a name, date, or signature on the outer ballot declaration.
46. The notice-and-cure procedures implemented by many county boards of election reduce this number and provide an opportunity for qualified voters to be able to submit a vote that is counted.
47. While a statistical impact of the effect of any change in counties' notice-and-cure procedures may ultimately be a question for expert analysis, in light of the expedited time frame for the current phase of this litigation, I have calculated the effect as follows, using the rates provided by the Allegheny County Board of Elections as a basis to

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

C. Application of Rejection Ration to Recent Elections

48. Given the general rejection rate in Allegheny County and the disproportionately high number of mail-in votes cast for Democratic candidates, an absolute ban on a notice and cure program in every county would favor Republican voters and candidates.
49. In the Presidential race of 2020, a 1.5% reduction in mail in votes would have translated into a reduction in Joe Biden's numbers by 29,935 votes (1.5% x 1,995,691) and a reduction in Donald Trump's numbers by 8,933 (1.5% x 595,538) and thus a net reduction to the Democratic candidate of 21,002 votes (29,935 – 8,933). Given that Biden's margin of victory was 80,555, the net mail-in votes lost, without an opportunity to cure, would exceed 25% of the margin of victory.
50. In the 2021 Municipal Election, there was a statewide race for a position on the Pennsylvania Supreme Court. Republican candidate Kevin Brobson received 1,397,100 votes statewide, and Democratic candidate Maria McLaughlin received 1,372,182 votes, a difference of 24,918 votes.³
51. Also in the Municipal Election, there was a statewide race for a position on the Pennsylvania Commonwealth Court. Democratic candidate Lori Dumas received 1,297,253 votes and Republican candidate Drew Crompton received 1,274,899 votes, a difference of 22,354 votes.

3

<https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=84&ElectionType=G&IsActive=0>

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

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

53. The DNC and the PDP would also have to invest resources in overcoming heightened voter confusion if voters in counties that previously had a system of notice and cure were barred from continuing to fix minor errors on their mail-in ballots.
54. Conservatively, a digital campaign carried out by the Party to educate voters in the final weeks of the Election would cost \$2-3 million, subject to fundraising, if targeted to reach Democratic voters.
55. Additionally, the Party would also advertise on television in the affected counties and media markets to inform voters that there will be no opportunity to correct minor errors with their ballots, and to ensure voters get the information they need to ensure their votes are counted. That effort will cost substantially more than a purely digital effort.

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

Dated: September 26, 2022



Corey Pellington

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et. al. :

Petitioners, :

v. :

Docket No. 447 MD 2022

LEIGH M. CHAPMAN, in her official capacity
as Acting Secretary of the Commonwealth of
Pennsylvania, et al.,

Respondents.

**BRIEF OF RESPONDENT BUCKS COUNTY BOARD OF ELECTIONS IN
OPPOSITION TO APPLICATION FOR SPECIAL RELIEF IN THE FORM
OF A PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532**

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I. INTRODUCTION

This case concerns the Republican National Committee's efforts to disenfranchise qualified voters in Bucks County by prohibiting the Bucks County Board of Elections from providing notice to its voters that there may be a minor defect with the voter's outer declaration envelope that can be easily corrected prior to Election Day. The Bucks County Board of Elections simply seeks to continue to provide excellent customer service to its residents.

Petitioners, in their seemingly endless efforts to undermine the integrity of elections, have filed this meritless lawsuit just as the Board of Elections is about to send out and subsequently receive mail-in and absentee ballots to voters. Their goal is obvious – to sow uncertainty and distrust in the public on the eve of Election Day when all there is to find are elections that are being run fairly and securely for all voters. There is no doubt Petitioners seek to undermine the voters' faith in our electoral process.

What have Petitioners argued in support of their position that they've waited until the last minute to file and demand immediate injunctive relief? First, they cite a legislative bill that was not passed into law to justify their arguments. Second, they search in vain for a provision of the Election Code that supports their position and after finding none, they argue that the omission of statutory language permitting a Board of Election to assist voters equates to a prohibition on such communications,

guidance, and assistance. Third, they baldly misconstrue the holding of our Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar*. Fourth, they completely ignore the fact that these issues have already been litigated in federal court, and as it relates to Bucks County, in our very county as well.

This meritless Application for a preliminary injunction, and the underlying Petition for Review, should be denied.

The Bucks County Board of Elections joins in the Briefs filed by the Department of State and offers the following supplemental argument.

II. ARGUMENT: PETITIONERS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

In ruling on a request for preliminary injunction, a trial court has grounds to deny relief where it properly finds that any one of the following “essential prerequisites” for a preliminary injunction is not satisfied. *See Maritrans GP*, 602 A.2d at 1282-83 (requirements for preliminary injunction are “essential prerequisites”); *County of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988) (“For a preliminary injunction to issue, every one of the[] prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.”).

The Pennsylvania Supreme Court set forth the criteria for the issuance of preliminary injunction in *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003):

1. Petitioners must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. *Singzon v. Dep't of Pub. Welfare*, 436 A.2d 125, 127-28 (Pa. 1981); *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164, 1167-68 (Pa. 1977); *Ala. Binder & Chem. Corp. v. Pa. Indus. Chem. Corp.*, 189 A.2d 180, 184 (Pa. 1963).
2. Petitioners must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. *Maritrans GP*, 602 A.2d at 1283; *Valley Forge Historical Soc'y v. Washington Mem'l Chapel*, 426 A.2d 1123, 1128-29 (Pa. 1981); *Ala. Binder & Chem. Corp.*, 189 A.2d at 184.
3. Petitioners must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. *Valley Forge Historical Soc'y*, 426 A.2d at 1128-29; *Herman v. Dixon*, 141 A.2d 576, 577-78.

4. Petitioners must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. *Anglo-Am. Ins. Co. v. Molin*, 691 A.2d 929, 933-34 (Pa. 1997); *Maritrans GP*, 602 A.2d at 1283-84; *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 440 (Pa. 1982); *Singzon*, 436 A.2d at 127-28.
5. Petitioners must show that the injunction it seeks is reasonably suited to abate the offending activity. *John G. Bryant Co.*, 369 A.2d at 1167-71; *Albee Homes, Inc. v. Caddie Homes, Inc.*, 207 A.2d 768, 771- 73 (Pa. 1965).
6. Petitioners must show that a preliminary injunction will not adversely affect the public interest. *Maritrans GP*, 602 A.2d at 1283; *Philadelphia v. District Council 33, AFSCME*, 598 A.2d 256, 260-61 (Pa. 1991).

Petitioners fail miserably to meet the foregoing criteria.

a. Providing Excellent Customer Service To Voters Does Not Constitute Immediate Or Irreparable Harm.

Once the mail-in and absentee ballots are mailed out, the staff of the Bucks County Board of Elections reviews incoming mail-in and absentee ballot envelopes continuously as they are delivered to its office. That review process is primarily done by equipment that can sort the ballot envelopes into voting districts, confirm

the ballot envelope was the same envelope that was mailed out to the voter, and can verify if certain information is missing from the declaration on the outer envelope. If certain information is missing from the outer envelope, such as a signature or date, the staff at the Bucks County Board of Elections mails a postcard to the voter notifying the voter of the defect and informing the voter that they can contact the Board of Elections office regarding remedying the problem so long as they do so by 8:00 p.m. on Election Day.

Petitioners argue that the immediate and irreparable harm that they suffer relates to the Boards of Elections contacting qualified voters to alert them to the fact that there may be a minor defect with their outer envelope. There are no laws that prohibit this, and Petitioners have not identified any provision in the Election Code for this Court to rely upon in reviewing this issue that prevents Bucks County Board of Elections or any county board from contacting a voter to inform them of problems with their ballot. To the contrary, boards are empowered to “make and issue ... instructions to voters,” 25 P.S. § 2642(f), (i); these powers necessarily must include the power to contact voters when deemed necessary.

Petitioners wish this Court to prohibit Boards from giving notice to voters of the defect not because there is a law prohibiting this provision of customer service to our citizens, but because the Boards do not engage in identical procedures in doing so. However, our courts have already opined that “county-to-county variations do

not show discrimination. Counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. Even when boards of elections vary . . . considerably in how they decide to reject ballots, those local differences in implementing statewide standards do not violate equal protection. *NE. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 635-36 (6th Cir. 2016); see also *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) (recognizing that equal protection lets different counties use different voting systems). *Id.* at 388, citing *Donald J. Trump for President, Inc.*, 2020 U.S. Dist. LEXIS 188390, 2020 WL 5997680, at *44 (collecting cases).

“In Pennsylvania, each county runs its own elections. 25 Pa. Stat. § 2641(a). Counties choose and staff polling places. § 2642(b), (d). They buy their own ballot boxes and voting booths and machines. § 2642(c). They even count the votes and post the results. § 2642(k), (l). In all this, counties must follow Pennsylvania's Election Code and regulations. But counties can, and do, adopt rules and guidance for election officers and electors. § 2642(f). And they are charged with ensuring that elections are “honestly, efficiently, and uniformly conducted.” *Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, 830 Fed. Appx. 377, 382 (3rd Cir. 2020).

The General Assembly has determined that “county boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the

duties imposed upon them by this [Code], which shall include ... [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), and “[t]o investigate election frauds, irregularities and violations of [the Election Code],” *id.* § 2642(i).

Determining the scope of the county boards’ authority to promulgate rules, regulations, and instructions requires “listen[ing] attentively to what the statute says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Elections Code that does not specify relevant parameters may “reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections.” *Id.* at 350.

Petitioners’ argument that the General Assembly’s decision not to impose a cure procedure means that no county board may adopt such a procedure fails. While county boards may not adopt any such procedures that are “inconsistent with law,” where the law is silent, the board may adopt procedures to promote the purpose of the Election Code: “freedom of choice, a fair election and an honest election return.” *Boockvar*, 238 A.3d 345 at 356. Indeed, county boards may be “best suited” to identify the procedures needed to effectuate votes in their district based on their residents’ needs and county resources. To find that the Board’s lawful assistance to

the voters constitutes irreparable harm would fly in the face of these purposes.

b. There Would Be No Injury In Refusing To Grant The Injunction.

Petitioners must show to this Court that a greater injury would result from refusing their request to stop County Boards of Election from providing good customer service to their voters. They argue that the “mishmash of cure procedures” violates the Election Code (though it fails to identify which section of the Election Code) and disadvantages Petitioners because they have an inadequate period of time to “properly educate their members regarding the exact rules applicable to mail-in and absentee ballot voters.” *See* Petitioner’s Application at 6. Petitioner’s failure to allege the specific violation speaks for itself. Petitioner’s argument that they need more time to educate their voters is similarly meritless. The Bucks County Board of Election has been providing notice to electors in Bucks County regarding facially deficient problems with their outer ballot envelopes since 2020 and has been providing this service to all of its voters for four (4) elections so far: Primary and General Election in 2020; Primary and General Election in 2021; and Primary Election in 2022. Candidates and the political parties in Bucks County are well aware of the notice and cure procedure, as the same has been discussed in public meetings of the Board of Elections. In fact, the political parties, specifically the Bucks County Republican Committee, was present at a public Board of Elections meeting wherein the procedure of notice and cure was discussed and approved as far

back as October 2020 and have been aware of the procedure for the past four election cycles. *See* Affidavit of Bucks County Board of Elections Director Thomas Freitag attached as Exhibit Bucks-1 (“Freitag Affidavit”). At the public meeting of the Bucks County Board of Elections on October 22, 2020, the Board discussed their procedures for notice and cure of facially defective outer envelopes containing ballots and voted to use this notice and cure practice and procedure for the benefit of all Bucks County voters. *Id.* The Board further discussed providing a listing of any voters who received notice of their facially defective ballot envelope and voted to provide this information to the political parties upon their request of same. *Id.* The representative of the Bucks County Republican Committee asked questions about how the lists would be distributed to the parties and was informed of those procedures. *Id.* Subsequently, and since General Election 2020, both political parties have requested said lists and are continued to be provided said lists by Bucks County Board of Elections. *Id.* For Petitioners to claim that they have not had adequate time to educate their members as a basis for demanding an injunction and claiming denial of same would cause them greater injury is simply not supported by the facts.

c. Petitioners Seek To Disrupt The Status Quo, Not Preserve The Status Quo.

The third criteria Petitioners must establish is that a preliminary injunction would preserve the status quo. To the contrary, Respondent has had a long-standing procedure of allowing electors the opportunity to cure minor defects with respect to absentee or mail-in ballots and this procedure is consistent with legislative intent that the Election Code be liberally construed so as not to deprive voters of their right to elect a candidate of their choice. As set forth above, the Bucks County Board of Elections has been providing this assistance to voters for four (4) elections now. It is a service that the voters use to ensure their votes are counted. Mail-in and absentee ballots are about to be sent out to voters, and the staff will use their best efforts to contact voters who mistakenly return an outer envelope that does not bear a signature and/or date to give those voters an opportunity to fix that error. This service complements the Board of Election's responsibility – its mandate – to run a fair and honest election. Disrupting that service, muzzling county employees, and prohibiting the boards of election from providing information to the political parties does nothing to protect the status quo. Petitioners mislead the Court by arguing that they are seeking to preserve the holding in *Pa. Democratic Party v. Boockvar*; the Court did not rule that Election Boards were prohibited from allowing electors to correct minor defects identified by Election Boards. It simply held that the Boards were not required to provide such notice to voters.

d. Petitioner's Petition for Review Is Unlikely To Prevail On The Merits.

For all of the foregoing reasons, the Petition for Review has no merit and Petitioner is unlikely to prevail. In addition, the issue Petitioners raise has already been unsuccessfully challenged in federal court, where the claim was made that allowance of county boards' discretion to implement cure procedures violated the United States Constitution's Equal Protection Clause. *See Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020). The Court dismissed the lawsuit, noting: "[n]ot every voter can be expected to follow this process perfectly. Some forget one of the envelopes. Others forget to sign on the dotted line. Some major errors will invalidate a ballot. For instance, counties may not count mail-in ballots that lack secrecy envelopes. But the Election Code says nothing about what should happen if a county notices these errors before election day. Some counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors." *Donald J. Trump for President, Inc. v. Sec'y Pennsylvania*, 830 Fed. Appx. 377 (3d Cir. 2020). Further, Petitioners' allegations center on a mischaracterization of vote cancellation and dilution. That county boards may "employ entirely different election procedures and voting systems within a single state" does not, by itself, impose any injury so long as those procedures do not discriminate against certain groups of voters or infringe on an individual's fundamental right to vote. *See Donald J. Trump for President, Inc.*, 830 F. App'x at 388; *see also Donald J. Trump for President, Inc. v. Boockvar*, 493 F.

Supp. 3d 331, 383 (W.D. Pa. 2020). Respondent’s notice and cure procedures do not lead to voter disenfranchisement. Quite the opposite—voters that would otherwise be prevented from casting an effective mail ballot will now have an opportunity to ensure their ballots are counted. Meanwhile, Petitioners’ requested relief would result in *more* disenfranchisement, not less.

Petitioners have not identified any provision in the Election Code that prevents Bucks County Board of Elections or any county board from contacting a voter to inform them of problems with their ballot. To the contrary, boards are empowered to “make and issue . . . instructions to voters,” 25 P.S. § 2642(f), (i); these powers necessarily must include the power to contact voters when deemed necessary.

No injunction should issue in this matter because notice-and-cure procedures adopted by the Bucks County Board of Elections are fully consistent with the Election Code. The law does not prohibit a county board from taking action to prevent disenfranchisement when it receives a mail ballot that cannot be counted due to observable defects. Instead, it permits county boards to develop procedures to contact affected voters and provide them with the opportunity to have their votes counted.

e. An Injunction Would Cease Notice to Voters But The Injunction Is Not Narrowly Tailored.

The injunction Petitioners seek should be denied because it is “not narrowly tailored to correct the alleged wrong.” *Wheels Mech. Contracting & Supplier, Inc. v. W. Jefferson Hills Sch. Dist.*, 156 A.3d 356, 361 (Pa. Commw. Ct. 2017). A “preliminary injunction concludes no rights and is a final adjudication of nothing.” *Philadelphia Fire Fighters’ Union, Loc. 22, Int’l Ass’n of Fire Fighters, AFL-CIO v. City of Philadelphia*, 901 A.2d 560, 565 (Pa. Commw. Ct. 2006) (internal quotation marks omitted). Yet here, given the fact that county boards of election are on the eve of sending out mail-in and absentee ballots to voters and then receiving them back from said voters, granting Petitioners’ requested injunction might will serve, as a practical matter, as a final adjudication of the county boards’ ability to implement notice-and-cure procedures for this election cycle. That, in turn, would ensure that every qualified elector whose ballot submissions contained technical deficiencies will be disenfranchised, even though the Court may ultimately conclude notice-and-cure procedures are permissible.

f. The Requested Injunction Will Adversely Affect the Public Interest.

Notifying voters that their ballots are not compliant with the Election Code and will not be counted and providing voters with the opportunity to ensure their vote will be counted, does not cause any cognizable harm to Petitioners—or anyone else—that warrants an injunction. Enjoining the use of notice-and-cure provisions would harm voters in Bucks County and across the Commonwealth whose ballots

will be cast aside due to readily apparent and easily correctible errors on the outer envelope, which are detected before any ballots are canvassed or counted.

And though Respondent does not believe there to be any doubt about whether the Election Code permits county boards to implement notice-and-cure procedures, if the Court has doubt, same must be resolved in favor of preventing inadvertent forfeiture of electors' right to vote. "[T]he overarching principle guiding the interpretation of the Election Code is that it should be liberally construed so as not to deprive electors of the right to elect a candidate of their choice." *Chapman v. Berks Cnty. Bd. Of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *13 (Pa. Commw. Ct. Aug. 19, 2022); accord *In re Major*, 248 A.3d 445, 450 (Pa. 2021), reargument denied (Apr. 12, 2021). The "goal must be to enfranchise and not to disenfranchise the electorate," *Pa. Democratic Party*, 238 A.3d at 361 (quoting *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972)), in accordance with the "longstanding and overriding policy in this Commonwealth to protect the elective franchise," *id.* (quoting *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004)). Thus, as established by well-settled Pennsylvania precedent: [T]he power to throw out a ballot for minor irregularities ... must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disenfranchised at an election except for compelling reasons.... The purpose in holding elections is to register the actual expression of the electorate's will and that

computing judges should endeavor to see what was the true result. There should be the same reluctance to throw out a single ballot as there is to throw out an entire district poll, for sometimes an election hinges on one vote. *Id.* (quoting *Appeal of James*, 105 A.2d 64, 67 (Pa. 1954)). Consequently, when a Pennsylvania court is provided with two reasonable interpretations of the Election Code, one which would enfranchise electors and one which would “disenfranchise[]” and “restrict[] voters’ rights,” the Court must adopt the “construction of the Code that favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.” *Pa. Democratic Party v. Boockvar*, 238 A.3d at 361.

Finally, Petitioner’s demand on the eve of an election to disrupt the status quo procedures that have been in place for four (4) elections is frankly designed to cause public confusion and distrust in our electoral system. These efforts to curtail good government services to its citizens are completely unwarranted and have no basis in law. Petitioners seek to simply disrupt the electoral process by waiting until the very last minute to file a meritless suit that will no doubt be used to erroneously and publicly vilify the sanctity of our Commonwealth’s electoral process, without any evidence whatsoever of any impropriety. The Republican National Committee is purposely seeking to undermine faith in our elections, whereas our Board has worked tirelessly to be a transparent source of public information to voters, candidates and political parties alike.

II. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF LACHES.

Petitioner's Petition seeking injunctive relief and declaratory judgment is barred by the doctrine of laches, as they have had more than ample time to bring such a lawsuit prior to the eve of mail-in and absentee ballots being mailed out and returned to the county boards of election. Equity has established the doctrine of laches to preclude actions that are brought without due diligence, and which result in prejudice to the non-moving party. *Brodt v. Brown*, 172 A.2d 152 (Pa. 1961). Application of laches requires the party asserting it to establish two elements: (1) a delay arising from the complaining party's failure to exercise due diligence and (2) prejudice to the asserting party resulting from the delay. *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmwlth. 2004) *citing Stilp v. Hafer*, 718 A.2d 290, 292 (Pa. 1998). A determination as to whether the complaining party acted with due diligence will depend on what that party might have known based on the information within its reach. Prejudice can be found where a change in the condition or relation of the parties occurs during the time the complaining party failed to act.

As set forth in Section I(b) above, the Bucks County Board of Election has been providing notice to electors in Bucks County regarding facially deficient problems with their outer ballot envelopes since 2020 and has been providing this service to all of its voters for the last four (4) elections following the enactment of Act 77. At the public meeting of the Bucks County Board of Elections on October

22, 2020, the Board discussed their procedures for notice and cure of facially defective outer envelopes containing ballots and voted to use this notice and cure practice and procedure for the benefit of all Bucks County voters. *See* Freitag Affidavit. The Board further discussed providing a listing of any voters who received notice of their facially defective ballot envelope and voted to provide this information to the political parties upon their request of same. *Id.* Subsequently, and since the General Election 2020, both political parties have requested said lists and are continued to be provided said lists by Bucks County Board of Elections.

A challenge at this late date prejudices the Boards of Elections who are in the midst of preparing for a General Election, but most importantly it prejudices the electorate who has come to rely upon and expect this governmental service, and will no doubt lose faith in the electoral system if yet another last-minute change is thrust upon it before Election Day. Further, Petitioners offer no explanation for their failure to raise this issue in the two years since notice and cure procedures have been in place. Their failure to do so cannot be excused by lack of knowledge or due diligence, as the procedures were of public record, and discussed in a public meeting of the Bucks County Board of Elections. Petitioners offered no objection then, despite political parties being present and having since taken advantage of the notice and cure services for their own political purposes. Indeed, this last-minute action is

tantamount to mischief. For these reasons, the doctrine of laches should bar Petitioner's demand for a temporary and immediate injunction.

III. PETITIONERS' CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL.

In 2020, Donald J. Trump, then-candidate, filed suits in federal and state court regarding the issue of notice and cure.

In federal court, his campaign challenged giving voters notice and letting them cure ballot defects, claiming violations of equal protection. *See Donald J. Trump for President, Inc. v. Sec'y Pa.*, 830 F. App'x 377, 390 (3d Cir. 2020). The Court reflected on the fact that the Campaign had already litigated these issues in state court and in denying relief stated: "The Campaign cites no authority for those propositions, and we know of none." *Id.* at 387. Further, the Court opined that the Campaign could have raised its complaints regarding notice and cure at an earlier juncture, and failure to do so barred it from relief. *Id.*

On a local level, the Campaign filed a Petition on Election Day, 2020, in the Bucks County Court of Common Pleas, Docket No. 2020-05627, raising complaints about the notice and cure procedures in Bucks County. Said Complaint was denied and dismissed; was not appealed; and is a final order. *Donald J. Trump for President, Inc. v. Bucks County Board of Elections*, 2020-05627 (Bucks C.C.P. 2020).

As discussed in *Allen v. McCurry*, 449 U.S. 90, 94 (U.S. 1980), the doctrine of res judicata precludes the parties or their privies from relitigating issues that were or could have been raised in an earlier action when there is a final judgment on the merits of an action. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Further, under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153 (1979). As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153-154. Modern collateral estoppel doctrine no longer requires mutuality; a litigant who was not a party to the initial litigation may now use collateral estoppel to avoid relitigating issues already ruled upon. *In re Stevenson*, 40 A.3d 1212, 1222 (Pa. 2012).

Relitigation of the notice and cure issue, after it has already been disposed of by the Third Circuit Court of Appeals and our state courts unnecessarily subjects counties to repeated costs and the trouble of multiple lawsuits arising out of the same meritless complaints. It is inequitable to expect the Board of Elections to litigate this issue every election.

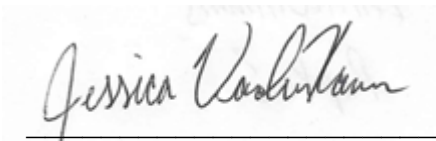
IV. CONCLUSION.

For all the foregoing reasons, Petitioner's Application for Special Relief in the Form of an Injunction should be denied.

Respectfully submitted,

Date: September 26, 2022

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First Assistant County Solicitor
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*Attorneys for Respondent,
Bucks County Board of Elections*

EXHIBIT BUCKS-1



County of Bucks

BOARD OF ELECTIONS and REGISTRATION COMMISSION
Administration Building, 55 East Court Street, Doylestown, PA 18901
Elections 215-348-6154 Registration 215-348-6169 Fax 215-348-6387

Board of Elections

ROBERT J. HARVIE, JR. *Chairman*
DIANE M. ELLIS-MARSEGLIA, LCSW
GENE DIGIROLAMO

THOMAS A. FREITAG
Director

1. I have served as the Bucks County Director of Elections since December 2019. I began my employment in the Board of Elections in 2014 as a registrar and was promoted to election coordinator in 2015. In my capacity as Bucks County Director of Elections, I have first-hand knowledge of the records and operations of the Board of Elections (“BOE”).
2. As Director, I strive to provide a fair and transparent election as well as assistance to Bucks County voters to ensure election integrity and faith in our election process.
3. Our BOE routinely assists voters in a variety of ways, including identifying their polling location, requesting mail-in ballots, providing educational materials, and identifying where ballot drop-boxes are located throughout the County. I train my staff to assist voters, whether by phone or in-person, with questions regarding the procedures to complete the mail-in ballot process.
4. If a voter arrived at the BOE with a mail-in or absentee ballot that did not contain a signature or date on the outer return envelope, my staff is trained to inform the voter that, in order to accept the ballot, the voter must sign or date the envelope.
5. During the 2020 General Election, and for each election after, Bucks County has also notified voters whose mail-in or absentee ballots had apparent declaration envelope deficiencies. Specifically, my staff have notified voters by sending them a postcard alerting them of the deficiency and informing them, “for your vote to count, your ballot must be cured by ... (Election Day).” A true and correct copy of the current version of this postcard is attached as **Exhibit A**.
6. This notification practice was discussed during a public Bucks County Board of Elections (the “Board”) meeting on October 22, 2020. Present at the meeting were the three Bucks County Commissioners, County staff, myself, and Joseph Cullen, Esq. Mr. Cullen serves as the Bucks County Republican Party Vice-Chair and routinely attends Board meetings. This meeting can be viewed in its entirety at <https://fb.watch/fzi-RXIUBa/>.
7. The recording of October 2020 meeting is 97 minutes. At the 23:45 mark, the three County Commissioners, who are the voting members of the Board, began discussing ballots that were received that were unsigned or undated. I explained to the Board how the BOE were sending notification postcards out to voters with declaration envelope deficiencies for the November 2020 General Election. The issue of notifying the political parties was also raised.

8. At 37:07, a motion was made “to authorize the Board of Election staff to generate a list of names and addresses of those who have declaration envelope issues to make available upon request to the parties.” The motion was seconded and approved unanimously.
9. At 38:46, Mr. Cullen asked a follow-up question about the list, asking how the parties request the list. I answered his question.
10. The Board also discussed the possibility of curing “naked” ballots at the October 2020 meeting. I explained to the Board how our machine could distinguish between envelopes containing both a secrecy envelope and a ballot versus envelopes containing only a ballot. However, no motion was made to provide notice to voters with “naked” ballots. The BOE does not notify voters whose ballots lack a secrecy envelope.
11. On November 13, 2020, the Chairs of the County Democrat and Republican Parties lauded the efforts of the BOE in conducting the election in a “fair, transparent, and accountable” fashion. A true and correct copy of a letter to the editor is attached as **Exhibit B**.
12. The practices of notifying the political parties of voters who have declaration or signature issues and sending out postcards to voters have continued since the November 2020 election. Unless directed otherwise, I plan to continue this practice for the November 2022 General Election.
13. Bucks County expects the November 2022 ballot to be sent out to mail-in and absentee voters on October 5, 2022. Our notice and cure process will start a few days later when the BOE starts receiving curing-related phone calls. The BOE will also begin sending notice and cure postcards upon receipt of envelope deficiencies.

I, Thomas A. Freitag, make these statements under penalty of perjury to the best of my knowledge information and belief as more fully set forth in 18 Pa. C.S. § 4904.

Date: 09/26/2022

Signature: 
THOMAS A. FREITAG
DIRECTOR
BOARD OF ELECTIONS

**NOTICE: YOU FAILED TO SIGN
AND/OR DATE YOUR MAILED
BALLOT.**

- Please contact The Bucks County Board Of Elections Office as soon as possible to remedy this.
- For your vote to count, your ballots must be cured by 8:00 PM on Tuesday, May 17, 2022 (Election Day).

Call 215-348-6154 or email Elections@BucksCounty.org for more information.
Our office hours are 8:00 AM to 5:00 PM,
Monday-Friday.

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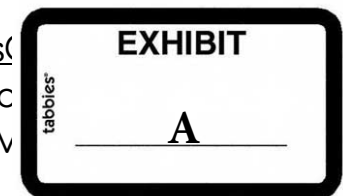
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Doylestown PA 18901**



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MORE-VOICES | Opinion *This piece expresses the views of its author(s), separate from those of this publication.*

Both parties praise the Bucks County Board of Elections

By John Cordisco and Pat Poprik

Published 2:47 p.m. ET Nov. 13, 2020

Editor's Note: The following is an open letter to Thomas Freitag, director of the Bucks County Board of Elections.

Dear Tom,

On behalf of both the Bucks County Democratic and Republican committees, we want to thank you and your team at the Bucks County Board of Elections for your work throughout this cycle.

We recognize that successfully running an election this year was no easy feat. Overseeing a presidential election, with a brand new mail-in voting law, in the midst of a global pandemic, posed a set of challenges not faced by any Board of Elections to date. The long days, nights, and weekend hours your staff put in at three offices across the county were critical, and your dedication is truly appreciated.

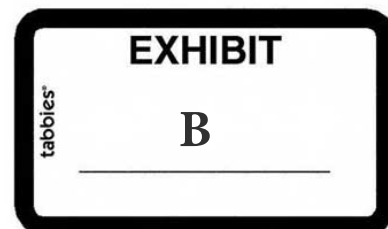
While we may each support different candidates, we both want the process to be fair. We all worked very hard here in Bucks County, along with your staff and our County Commissioners, to ensure that the process was fair, transparent, and accountable in way that should give our voters confidence in the accuracy of the reported outcome.

We also owe our gratitude to the many of the men and women working for the county in other departments who answered the call for help from the Board of Elections. These employees came from a diverse geographic, political, and professional background, and their participation demonstrated an incredible level of dedication to the electoral process.

Finally, we must thank the voters of Bucks County. We experienced record turnout from both parties despite brand new voting machines and long lines at many polling places. It is encouraging to see so many of our friends, neighbors, and family taking part in such an important election.

Please share our deepest gratitude to the entire Board of Elections staff for their hard work, dedication, and cooperation. Their behind-the-scenes efforts are far too often taken for granted, and we hope they understand our appreciation for, and recognition of, all that they do.

John F. Cordisco chairs the Bucks County Democratic Committee. Patricia K. Poprik chairs the Bucks County Republican Committee.



IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 447-MD-2022

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary for the Commonwealth, *et al.*,

Respondents.

**BRIEF OF *AMICUS CURIAE* LAWYERS DEMOCRACY FUND
IN SUPPORT OF PETITIONERS**

Ronald L. Hicks, Jr. (PA49520)

Jeremy A. Mercer (PA86480)

PORTER WRIGHT MORRIS &
ARTHUR LLP

6 PPG Place, Third Floor

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STATEMENT OF INTEREST OF AMICUS CURIAE

Lawyers Democracy Fund (LDF) is a non-profit organization established to promote the role of ethics, integrity, and legal professionalism in the electoral process. To accomplish this, LDF primarily conducts, funds, and publishes research and in-depth analysis regarding the effectiveness of current and proposed election methods, particularly those that fail to receive adequate coverage in the national media. Robust defense of reasonable, validly-enacted election laws is essential to achieve these goals. As part of its mission, LDF is a resource for lawyers, journalists, policy-makers, courts, and others interested in elections.

LDF has filed numerous amicus briefs in courts around the country, including the United States Supreme Court, in an effort to edify courts and assist them in reaching just and accurate decisions in cases concerning issues of election administration. LDF recently filed an amicus brief in the United States Supreme Court in *Harper v. Moore* (Case No. 21-1271) in defense of the authority of state legislatures to set the rules of federal elections, pursuant to Article I, Sec. 4, cl. 1 of the U.S. Constitution, without being countermanded by other branches of state government. *See* Brief for Lawyers Democracy Fund And State Legislators As *Amicus Curiae* In Support of Petitioners (U.S. Supreme Ct., Case No. 21-1271). That issue is present here as local election officials attempt to establish ballot cure

procedures in conflict with the legislative intent of the General Assembly, which alone has the authority to enact cure procedures.

The effort by Petitioners to prevent several County Boards of Elections (“Boards”) from acting on their own initiative and adding to the law prescribed by the General Assembly is of utmost importance. LDF supports efforts to ensure the upcoming 2022 general election and future elections are conducted in accordance with the rules that the General Assembly has prescribed, or has declined to prescribe, by law. For these reasons, LDF has an interest in Petitioners’ Petition for Review and Preliminary Injunction.

SUMMARY OF ARGUMENT

As set forth in Petitioners' Petition for Review filed on September 1, 2022, the Election Code, passed by the General Assembly and signed into law by the Governor, authorizes cure procedures for absentee and mail-in voters' ballots in only one narrow circumstance: "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified." 25 P.S. § 3146.8(h). It is in this circumstance alone that a voter may cure his or her ballot and not for any other defect. *See id.* Thus, Pennsylvania law is clear that there is one, and only one, situation in which an absentee or mail-in voter is able to cure a defect in their ballot.

Despite that clarity, some Boards have on their own implemented for the upcoming November 2022 General Election cure procedures of their own design that allow voters to rectify their deficient ballots in a broad range of circumstances not authorized by the Election Code. These local variances have included, but are not limited to, implementing notice-and-cure procedures for replacing ballots with missing inner secrecy envelopes.

Meanwhile, not all Boards have engaged in this *ultra vires* action. Many were planning to faithfully comply with the state law as enacted by the General Assembly. The lack of uniformity in voting procedures throughout the Commonwealth made for the difficult task of determining the extent and significance of the variances. In

some jurisdictions, the local rules were not publicly announced and were sprung on the upcoming election in June of this year.

Nevertheless, Petitioners needed to determine accurately which Boards were acting outside the scope of their authority. The only way to make that determination was through the use of Right-to-Know Requests, a time-consuming and cumbersome process. Then, Petitioners needed time to assess the legal significance of the variances. As soon as Petitioners determined which Boards were acting outside their authority and analyzed the legal significance of the variances, Petitioners brought this lawsuit, seeking to enjoin that illegal conduct.

Petitioners filed their action on September 1, 2022, before any Board sent out a single ballot for the upcoming November 2022 General Election. On September 22, 2022, this Court heard arguments on Petitioners' request for a timely preliminary injunction to maintain the status quo and prevent unlawful conduct. Also, during this argument, the Court heard argument on the Boards' defense that Petitioners' lawsuit should be dismissed under the doctrine of laches.

LDF submits this brief to support Petitioners' position that the doctrine of laches should not be applied to Petitioners' claims for three reasons. First, Petitioners exercised due diligence when bringing their claims. Second, Respondents will not suffer prejudice resulting from any delay, as Petitioners are asking that an existing law be upheld and enforced. Third, Petitioners' claims are

distinct from *Kelly v. Commonwealth* and aim to prevent disenfranchisement among Pennsylvania voters.

ARGUMENT

A. Respondents Have Not Carried Their Burden to Show that the Doctrine of Laches Applies to Petitioners' Claims.

Laches is an “equitable defense” that “bars relief when a complaining party is guilty of want of due diligence in failing to promptly institute an action to the prejudice of another.” *Smires v. O'Shell*, 126 A.3d 383, 393 (Pa. Commw. Ct. 2015)(internal citations omitted). Because the doctrine of laches is an affirmative defense, “the burden of proof is on the defendant or respondent to demonstrate unreasonable delay and prejudice.” *Commonwealth ex rel. Corbett v. Griffin*, 596 Pa. 549, 563 (Pa. 2008). To prevail on this affirmative defense, Respondents must establish “(1) a delay arising from [Petitioners’] failure to exercise due diligence, and (2) prejudice to the [Respondents] resulting from the delay.” *Stilp v. Hafer*, 553 Pa. 128, 134 (Pa. 1998). The question of laches is a factual one, determined by examining the circumstances of each case. *See Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). Respondents have not carried their burden here.

1. Petitioners exercised due diligence.

The doctrine of laches requires that a petitioner “discover those facts which were discoverable through the exercise of reasonable diligence.” *Sprague v. Casey*, 520 Pa. 38, 45 (Pa. 1988)(citing *Turtzo v. Boyer*, 370 Pa. 526, 88 A.2d 884 (1952)).

Thus, a petitioner must exercise diligence in discovering the facts surrounding his claim and ascertain the legal consequences of those facts. *Id.*

Here, Petitioners clearly demonstrated due diligence in discovering the facts and legal consequences of the facts surrounding their claim. In advance of the upcoming general election, Petitioners used the state's Right-to-Know law in attempts to verify and assess all 67 Boards' individual processes for handling and canvassing absentee and mail-in ballots. Many of those local policies were not published and remained in flux as of the Spring of this year. Determining the rules each of these 67 different local jurisdictions intended to implement was a complicated task. This effort would have been an easier if all local boards had adopted and published their rules on the Internet, but Petitioners had no choice but to chase down and verify each jurisdiction's rules one-by-one.

Several Boards eventually responded in June of this year to Petitioner's Right-to-Know requests and verified that they would implement notice-and-cure procedures for absentee and mail-in ballots that lack an inner secrecy envelope. Petitioners then had to analyze the legal significance of those rules and ascertained that the Boards employing that procedure were not following the Election Code and, consequentially, were creating a non-uniform procedure for conducting the upcoming General Election. *See Bush v. Gore*, 531 U.S. 98 (2000) (varying balloting and vote counting rules in the same election violates the Equal Protection

Clause of the U.S. Constitution). Thus, Petitioners were forced to bring this lawsuit to compel compliance with the Election Code as written by the General Assembly and signed into law by the Governor—on September 1, 2022, *before* any ballot was sent out by any Board to be casted in the upcoming November 2022 General Election.

Respondents have represented that Petitioners' claims could have been brought any time after the 2020 election. However, Respondents are not challenging election rules adopted in 2020 and 2021. Respondents are challenging rules adopted for the upcoming 2022 election first announced by various local boards in a June 2022 declaration that some jurisdictions would implement notice-and-cure procedures. It was at that time that Petitioners learned many boards intended to countermand the ballot cure rules set by the Election Code. It is clear under Pennsylvania law that a period of a two to three months does not constitute a failure to exercise due diligence. The Pennsylvania Supreme Court ruled in *Sprague v. Casey* that a six-and-one-half-month delay in bringing an action challenging an election did not constitute laches. *See, e.g., Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). Here, petitioners are not even challenging a past election like the plaintiffs in *Sprague* but rather are challenging unlawful ballot cure procedures to be used in a future election. Because Petitioners exercised reasonable due diligence in investigating and bringing their claims, the Boards cannot carry their burden to

demonstrate the first required element for application of laches, namely that petitioners did not exercise due diligence in bringing their action.

2. Respondents will not suffer prejudice from the alleged delay.

Even if the Court were to determine that Petitioners failed to exercise due diligence, resulting in an undue delay, Respondents will not suffer prejudice from that alleged delay because the Boards employing the unauthorized cure procedure are in patent violation of the Pennsylvania Election Code.

As the Pennsylvania Supreme Court recently stated, in analyzing the Election Code, “to the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of [Election Code] requirements, we agree that the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.” *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020). The Legislature determined that such a cure procedure should be permitted in one, and only one, situation. *See* 25 P.S. § 3146.8(h) (allowing a cure provision only “[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.”).¹

¹ Additionally, Section 1308(a) and (g)(1.1) of the Election Code state:

(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

Instead of following the Election Code, and instead of adhering to the Supreme Court’s express statement that ballot cure procedures are “best suited for the Legislature,” certain Boards have taken it upon themselves to create and employ a cure provision for other errors in absentee and mail-in ballots. Simply put, the Boards lack that authority,² and any requirement that they follow the law is, as a matter of law, is not prejudicial to them. While Respondents may claim this action will disenfranchise voters and erode public trust in elections, thus causing prejudice, the Pennsylvania Supreme Court has ruled otherwise. *See Boockvar*, 238 A.3d at --

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).

(g) ...

(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(a) & (g)(1.1) (emphasis added).

² The Election Code empowers Boards to “make and issue such rules, regulations and instructions, ***not inconsistent with law***, as they deem necessary for the guidance of voting machine custodians, election officers and electors.” 25 P.S. § 2642(f). This power does not include the power to make and implement rules that are contrary to the Election Code. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234, n. 14 (Pa. 2004).

---. Furthermore, it will be Petitioners who will suffer prejudice should the Court not hear this case and allow the Boards to engage in *ad hoc* cure procedures, which will result in the upcoming General Election being administered non-uniformly throughout the Commonwealth and in violation of the Election Code.

Moreover, the lawsuit was filed, and Petitioners were in court requesting an injunction, before any ballots have been issued to the voters. Since that time, the Boards have done everything possible to delay a merits decision. They cannot invoke laches to insulate their unlawful conduct.

Accordingly, the Boards cannot carry their burden to demonstrate the second required element for application of laches.

3. The facts and issues of this case are distinct from *Kelly v. Commonwealth*.

Respondents' citation to *Kelly v. Commonwealth* to support applying the doctrine of laches in this case is unavailing. In *Kelly*, petitioners challenged the constitutionality of Act 77 of 2019 establishing universal mail-in voting in the Commonwealth of Pennsylvania. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020). The Pennsylvania Supreme Court dismissed the petition on the basis of laches because petitioners brought the action days before the Boards were required to certify election results and after millions of Pennsylvania voters had "expressed their will" in both the June 2020 Primary Election and November 2020 General Election. *Id.* The Supreme Court also was concerned with prejudice to respondents

resulting from the disenfranchisement of Pennsylvanian voters. *Id.* Those same facts and concerns are not present here.

First, Petitioners brought this lawsuit well in advance of the 2022 General Election after learning from the Boards that certain jurisdictions were going to employ unauthorized cure provisions. The Commonwealth Court already has rejected the argument that laches should bar similarly filed petitions, including a petition filed between elections which sought “expedited relief ‘in sufficient advance’ of the November 2021 General Election so that electors would not have their votes disqualified.” *McLinko v. Commonwealth*, No. 14 MAP 2022, 2022 Pa. LEXIS 1124, at *17 (Pa. 2022)(citing *McLinko v. Commonwealth*, 270 A.3d 1243, 1269 (Pa. Commw. Ct. 2022); *McLinko v. Commonwealth*, 270 A.3d 1278, 1280 (Pa. Commw. Ct. 2022)).

Second, unlike the petitioners in *Kelly*, Petitioners in this case are not challenging the law but seeking to enforce compliance with the law. In fact, it is Respondents who are challenging the law by employing unauthorized cure procedures, usurping the authority of the General Assembly, and seeking to obstruct a merits decision by the Court.

Third, the relief Petitioners seek will not result in the disenfranchisement of Pennsylvania voters like the relief sought by petitioners in *Kelly*. The Pennsylvania Supreme Court already has ruled the Legislature is best suited to determine when

and in what manner cure provisions should be employed for errors in absentee and mail-in ballots. *See Pa. Democratic Party*, 238 A.3d at 374. Petitioners are simply asking this court to affirm and enforce that ruling here, ensuring that all Boards follow the same procedural safeguards as drafted by the General Assembly, and treating all voters of the Commonwealth equally.

CONCLUSION

Respondents have not carried their burden to demonstrate that the doctrine of laches applies here. Petitioners exercised due diligence in exploring the factual and legal significance of the Boards' procedures for curing errors in absentee and mail-in ballots. After learning in June of this year that certain Boards intended to violate the Election Code, Petitioners promptly brought this lawsuit. Additionally, Respondents cannot be prejudiced by this lawsuit as Petitioners simply are seeking to require all Boards to follow the Election Code, especially when the Pennsylvania Supreme Court already has determined that it is the Legislature, and not the Boards, that has authority to determine when and what cure provisions should be employed. Finally, *Kelly v. Commonwealth* is inapposite and does not support or require application of laches here.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE,
et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, *et al.*,

Respondents,

and

DSCC, *et al.*,

Intervenor-Respondents.

Case No. 447 MD 2022

**INTERVENOR-RESPONDENTS DSCC AND DCCC'S SURREPLY IN
OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION**

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INTRODUCTION

Petitioners’ challenge to procedures that county boards have employed for more than two years comes far too late, and this Court should find it barred by laches. Their theory of the case and requested injunction is undeveloped, challenging the amorphous concept of ballot “curing” without ever defining precisely what they mean by the term or what specific acts they seek to enjoin. And by thrusting this fire drill upon the Court and election officials around the Commonwealth, demanding that new standards for administering absentee and mail-in voting (collectively, “mail voting”) be adopted across all 67 counties—*while voting is already underway*—they ask this Court to affirmatively act to inject chaos and confusion into the electoral process, further undermining public confidence in elections. The injury that would follow from granting Petitioners the relief they request would be severe and irreparable, not least of all because it would *disenfranchise* thousands of eligible voters for nothing more than minor, easily correctible mistakes on their mail ballots—mistakes that most larger Pennsylvania counties have long allowed voters to correct in order to ensure that their ballots are counted.

Petitioners bear a heavy burden to satisfy all prerequisites to justify the issuance of the extraordinary relief of a preliminary injunction, and they fail to do so. They do not demonstrate a clear right to relief because they cannot point to a single authority that precludes county boards from adopting cure procedures; their

strategic delay in bringing this lawsuit prejudices the parties, election workers, and voters; their requested relief seeks to alter the status quo in the middle of the voting process by enjoining procedures that have been in place for over two years; and greater injury—the disenfranchisement of lawful voters, which undermines public confidence in the election process—will result if Petitioners prevail. For all of these reasons, Petitioners application should be denied.

ARGUMENT

I. Laches bars Petitioners’ proposed preliminary injunction.

A. Petitioners could have brought this action years ago.

Petitioners cannot pretend that this action was brought in a timely manner because all relevant facts were publicly available more than two years ago. Petitioners implausibly assert that they “were not aware of the cure procedures being challenged until quite recently.” Reply at 4. But that excuse—even if true (and it almost certainly is not)—misses the point. When considering whether a claim is barred by laches, “[t]he correct inquiry . . . is to focus not upon what the plaintiff knows, *but what he might have known*, by the use of the means of information within his reach, with the vigilance the law requires of him.” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988) (emphasis added).

Petitioners should have known no later than November 2020 that some (but not all) counties allow voters the opportunity to cure a defective mail ballot. On

November 9, 2020, the Trump campaign sued then-Secretary of the Commonwealth Kathy Boockvar and seven county boards of elections in federal court over these very procedures. The suit alleged that the counties unlawfully “provided their mail-in voters with the opportunity to cure mail-in and absentee ballot deficiencies,” Verified Compl. for Declaratory and Injunctive Relief ¶ 6, *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-cv-02078-MWB, 2020 WL 6562045 (M.D. Pa. Nov. 9, 2020). The campaign’s argument was rejected by the district court on November 21, 2020, in a decision affirmed by the Third Circuit six days later. *See generally Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020), *aff’d sub nom. Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377 (3d Cir. 2020) (“DJT IP”), *appeal dismissed sub nom. Signed v. PA*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021).

This Court need not indulge the fiction—peddled by Petitioners—that the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and Republican Party of Pennsylvania were totally unaware of the procedures challenged by the Trump campaign in November 2020. But even if, somehow, these Petitioners did not *actually know* of the Trump campaign’s lawsuit, they certainly *could have found out* at some point before they finally initiated this action in September 2022. *See Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998) (applying laches and finding plaintiffs had

access to facts supporting their claim based on legislative procedures that were available to the public).

Indeed, even Petitioners acknowledge that they face “the same factual setting as existed in 2020” and that “the Election Code remains as it existed in 2020.” Pet. for Review ¶ 35; Mem. of Law in Supp. of Pets.’ App. (“Memo”) at 23. This suit could have been brought at any time between then and now. Under the circumstances, “[t]he want of due diligence demonstrated in this matter is unmistakable.” *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom. Kelly v. Pennsylvania*, 141 S. Ct. 1449 (2021).

B. Petitioners’ strategic delay prejudices the parties and the public.

Respondents and Intervenors have previously described the ways in which they are prejudiced by Petitioners’ decision to wait until shortly before the election to bring this action, including that granting the relief Petitioners request would force Respondents and Intervenors to expend significant resources implementing new procedures while voting already is underway. *See, e.g.*, DSCC and DCCC’s Resp. in Opp’n to Pets.’ App. for Prelim. Inj., at 21. This Court also should consider the severe prejudice to the public that would be caused by granting Petitioners’ requested relief, particularly at this late stage

As this Court recognized during the proceedings held on September 22, concerns exist regarding the integrity of the electoral process. But it is *Petitioners’*

late-filed challenge, and not variation among county practices, that undermines public confidence. The General Assembly has long decided that Pennsylvania's elections are primarily administered by 67 county boards of elections, rather than a central agency, and county-by-county variance is both inevitable and proper. *See* 25 P.S. §§ 2641(a), 2642; *DJT II*, 830 F. App'x at 388. As Judge Brann wrote in *Boockvar*, “[i]t is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose” via notice and cure procedures, and the proper remedy for some counties’ refusals to empower their voters to correct minor outer ballot envelope errors is assuredly *not* to cancel the votes of Pennsylvanians in other counties. 502 F. Supp. 3d at 920; *see also Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (recognizing the “longstanding and overriding policy in this Commonwealth to protect the elective franchise”) (citations omitted). Indeed, the Pennsylvania Supreme Court has reiterated that “[o]ur goal must be to enfranchise and not to disenfranchise [the electorate].” *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972).¹

Petitioners’ strategic delay in bringing this challenge, however, unnecessarily creates chaos and confusion. This Court (and, inevitably, the Pennsylvania Supreme

¹ This matter does not involve fraud in any way, and Petitioners do not so allege. Even if they did, it is well-settled that “although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (internal quotation marks omitted).

Court) is being asked to make decisions that could result in significant changes to election processes on an artificially compressed timeline in which briefs and opinions must be thrown together in days rather than considered over the course of weeks or months. Already, every county board of elections in the Commonwealth is diverting resources that could be spent preparing for an orderly election into litigating this action. And the relief Petitioners seek would result in votes being discarded that otherwise would be cured and counted. In some situations, last-minute election litigation may be necessary to vindicate the right to vote; this is not one them. Nor can there be any question that a political party strategically waiting until shortly before an election to launch a suit aimed at making voting more difficult is the type of gamesmanship that severely undermines public confidence in elections.

Compounding the appearance of gamesmanship, the RNC has consistently argued that changing election administration rules close to an election is improper—at least when the changes would make it easier for eligible voters to cast ballots and have them counted. *See, e.g., In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, ECF No. 194 at 9–10 (N.D. Ga. June 24, 2022) (RNC argued that a “motion for a preliminary injunction must be denied because it ask[ed the] Court to interfere with Georgia’s elections laws shortly before voting” began which would have created “confusion and hardship” for voters and “[a]t the least, confused voters and groups would inundate state and local officials with inquiries and calls”); *League of*

Women Voters of Florida v. Florida Secretary of State, 2022 WL 4078870, at *8–9 (11th Cir. 2022) (RNC argued that “late judicial tinkering with election laws causes well-known harms to political parties”) (internal quotations omitted). Yet now that changing the status quo in Pennsylvania would result in votes being *thrown out*, the RNC argues that a preliminary injunction at this late stage is appropriate. Their position runs exactly counter to the governing principle in Pennsylvania that the franchise should be protected and is but another reason why allowing this last-minute litigation to proceed would undermine public confidence.

II. Petitioners cannot meet the standard required to issue preliminary relief.

As this Court has noted, Petitioners must establish *every one* of the six preliminary injunction factors; if there is one factor that they cannot establish, “there is no need to address the others.” *Cnty. Of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988). For the reasons discussed in previous briefs, Petitioners have not established *any* of the six factors. While the Court expressed that some of the factors present potentially challenging factual or legal questions, that is all the more reason to deny a request for extraordinary injunctive relief altering voting rules while mail voting is underway. *See, e.g., Greene v. Raffensperger*, No. 22-CV-1294-AT, 2022 WL 1136729, at *28 (N.D. Ga. Apr. 18, 2022) (denying preliminary injunction sought shortly before primary election “[g]iven the preliminary stage of the proceedings, the difficulty of the legal questions posed, and Plaintiff’s failure to . . .

establish[] a likelihood of success on the merits”); *Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (“where there are novel or complex issues of law or fact that have not been resolved a preliminary injunction should be denied”). Moreover, at least four of the six relevant factors *clearly* weigh against granting the requested injunction, obviating the need for this Court to consider the others.

A. A preliminary injunction is not necessary to prevent immediate and irreparable harm.

Petitioners cannot establish that they are harmed in any cognizable way by the possibility of eligible voters in some counties being allowed to cure their ballots. At the September 22 status conference, counsel for Petitioners repeatedly argued that the harm necessitating an injunction is that county-to-county differences in cure procedures violate Pennsylvania’s Free and Equal Elections clause and result in “residence-based” disparities and vote dilution. But the Petition claims only that cure procedures should be enjoined for violating the Election Code and the Elections Clause of the U.S. Constitution. *See* Pet. ¶¶ 86–103; *Ioannidis v. Wolf*, 260 A.3d 1091, 2021 WL 2834611 at *3 n.5 (Pa. Cmwlth. 2020); *Pa. Med. Providers Ass’n v. Foster*, 613 A.2d 51, 53 n.3 (Pa. Cmwlth 1992).² Any claims or purported injuries

² Indeed, the Petition only mentions Pennsylvania’s Free and Equal Elections clause *once* while summarizing the Supreme Court’s holding in *Pennsylvania Democratic Party*, Pet. ¶ 46, and only mentions dilution *once* in asserting that cure procedures

resulting from the variation in county procedures across the Commonwealth are not properly before the Court; and even if they were, Petitioners' arguments lack merit.

As the Court noted during the September 22 proceedings, county boards have broad discretion to administer elections “within their respective counties,” 25 P. S. § 2642. As a result, election procedures have always differed from one county to another because “[e]ach county has its own voting system.”³ Boards have, for example, discretion to “select and equip their own polling places,” 25 P. S. § 2642(b), select and maintain voting machines, 25 P. S. § 2642(c), conduct their own trainings of election officers, 25 P. S. § 2642(g), canvas and certify ballots, 25 P. S. § 2642(k), and “make and issue [their own] rules, regulations, and instructions, not inconsistent with law,” 25 P. S. § 2642(f). These differences have existed election after election, allowing county boards to meet the unique needs of their population without undermining the integrity or public perception of voting across the state, and courts routinely have rejected the argument that this creates a constitutional problem. *See, e.g., Donald J. Trump for President, Inc. v. Boockvar*, 493 F.Supp.3d 331, 342–43 (“*DJT I*”) (W.D. Pa. Oct. 10, 2020); *see also Hendon v. N.C. State Bd. Of*

violate the Code, Pet. ¶ 34. While the Petition vaguely complains of “unequal treatment,” *e.g.*, Pet. ¶¶ 82–85, it makes no claim on that basis and never even mentions “disparities” or “Equal Protection.”

³ Pa. Dep't of State, *Voting in PA*, DOS Voting & Election Information, <https://www.vote.pa.gov/Voting-in-PA/Pages/default.aspx> (last accessed Sep. 26, 2022).

Elections, 710 F.2d 177, 181 (4th Cir. 1983) (“A state may employ diverse methods of voting, and the methods by which a voter casts his [or her] vote may vary throughout the state.”).

A holding that differences in election administration across counties create a cognizable harm would not only run afoul of existing caselaw and upend Pennsylvania’s longstanding county-based election administration status quo, it would cast undue suspicion over the way elections are administered nationwide. The Court should reject Petitioners’ attempts to circumvent longstanding precedent based on a purported injury that has been rejected time and again by courts around the country. *See, e.g., DJT II*, 830 F. App’x at 388 (“Reasonable county-to-county variation is not discrimination. *Bush v. Gore* does not federalize every jot and tittle of state election law.”); *Wexler v. Anderson*, 452 F.3d 1226, 1231–33 (11th Cir. 2006) (“Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.”) (cleaned up); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (“Under [appellants’] theory, unless California foists a new system on all fifty-eight counties at once, it creates ‘unconstitutional vote-dilution’ in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court’s controlling

precedent, or our case law suggests that we can micromanage a state’s election process to this degree.”).

B. Issuance of a preliminary injunction would substantially harm other interested parties.

Every eligible voter who returns a mail ballot to a county board with an evident error that the county currently allows voters to cure will be harmed by a preliminary injunction. Under current procedures, these voters would have the opportunity to cure their ballot so that their vote may be cast and counted. If a preliminary injunction is granted, they will not have that opportunity and their votes will not count. “It is . . . a well-settled principle of Pennsylvania election law that ‘[e]very rationalization within the realm of common sense should aim at saving the ballot rather than voiding it.’” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1071 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 141 S. Ct. 1451 (2021). Here, that principle strongly counsels against entering a preliminary injunction that could functionally disenfranchise a significant number of Pennsylvania voters.

C. A preliminary injunction would not restore the status quo ante.

Petitioners acknowledge that when “the grant of relief necessitates a change in status at the time a court grants injunctive relief . . . the relief must not change the status that existed between the parties just before the conflict between them arose.” Mem. at 19 (quoting *Hatfield Twp. v. Lexon Ins. Co.*, 15 A.3d 547, 556 n.6 (Pa.

Cmwlth. 2011)). The operative question therefore is what status existed “just before” this action. The facts are clear: for at least two years before this action was filed (and through at least five elections), the status quo has been that some county boards allow voters the opportunity to cure mail ballots. Petitioners argue that the status quo ante is that which existed before any board adopted a cure procedure. Mem. at 20. If Petitioners wished to maintain that status quo, they should have brought this action two years ago. *See supra* Part I.

D. The requested preliminary injunction is not reasonably suited to abating the allegedly offending activity.

While Petitioners make vague references to county boards providing voters with notice and cure opportunities, they do not explain what specific practices they challenge, which specific counties they allege are engaging in wrongdoing, or even what the scope of “notice” and “cure” is. Instead, Petitioners sued *every* county board just weeks before mail voting began and, relying only on non-specific examples of potential cure procedures in just five counties, ask this Court to prohibit all county boards “from developing and implementing cure procedures.” Pet. at 29; Memo at 34. But without clarity on what “cure procedures” are, this Court cannot craft a meaningful preliminary injunction. For example, it is unclear whether Petitioners’ requested injunction would prevent a board of elections worker from reviewing a voter’s ballot envelope—even if that voter expressly so requests—to confirm whether the voter has properly completed the ballot declaration. Would saying “You

still need to sign that” constitute forbidden notice and cure? That is part of the reason why both laches and the public interest counsel against granting such relief at the eleventh hour on an expedited schedule that prevents careful exploration of these questions.

The ambiguity regarding which cure procedures Petitioners seek to enjoin is exacerbated by the lack of clarity regarding which counties employ cure procedures and the specifics of those that do. Although the County Respondents’ Joint Stipulation of Facts provided valuable insights on these questions, it omitted information regarding over a third of Pennsylvania’s counties, so the full scope of the proposed injunction is unknown.⁴

As Petitioner’s repeatedly emphasize, *e.g.*, Pet. ¶ 47; Pets.’ App. for Prelim. Inj. ¶ 17; Memo at 22, the Pennsylvania Supreme Court’s rationale for refusing to *require* a notice and cure procedure throughout the Commonwealth included “the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and

⁴ The Joint Stipulation does not provide information about Armstrong, Cambria, Carbon, Clearfield, Clinton, Crawford, Elk, Forest, Fulton, Greene, Lackawanna, Lancaster, McKean, Mercer, Mifflin, Monroe, Montour, Perry, Pike, Potter, Schuylkill, Warren, Washington, or Wayne Counties. Although the Joint Stipulation indicates that only 12 of Pennsylvania’s 67 counties intend to employ cure procedures in 2022 (Adams, Allegheny, Bucks, Erie, Lehigh, Lycoming, Luzerne, Montgomery, Northampton, Philadelphia, Tioga, and Union), they include many of the most populous counties in the Commonwealth.

how the procedure would impact the confidentiality and counting of ballots.” *Pa. Democratic Party v. Bookvar*, 238 A.3d 345, 374 (Pa. 2020). But what Petitioners fail to acknowledge is that the counties that employ cure procedures have addressed these questions in conformance with the particular needs of their county, as authorized by the Election Code. 25 P.S. § 2642(f). Any injunction will alter this status quo and force these counties to chaotically revise their thoughtfully developed procedures while in the middle of administering absentee and mail-in voting.

CONCLUSION

This action is barred by laches because Petitioners failed to exercise due diligence in bringing their claims. Furthermore, issuing a preliminary injunction while mail voting is well underway would force the Court to answer complicated questions without the benefit of time or discovery and create more harm than preserving the status quo. The Application for Preliminary Injunction should be denied.

Dated: September 26, 2022.

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DSCC and DCCC*

** Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I, Claire Blewitt Ghormoz, certify that Intervenor DSCC and DCCC's Surreply in Opposition to Petitioners' Application for Preliminary Injunction contains 3,603 words as prescribed by Pa.R.A.P. 2135.

Submitted by:

Attorney for Intervenor-Respondents

DSCC and DCCC

Signature:

/s/ Claire Blewitt Ghormoz

Attorney No.:

320816

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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.

Dated: September 26, 2022

/s/ Claire Blewitt Ghormoz
Claire Blewitt Ghormoz

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee, *et al.*, :
:
Petitioners, :
:
v. : 447 MD 2022
:
Leigh M. Chapman, in her official capacity :
as Acting Secretary of the Commonwealth :
et al., :
:
Respondents. :

**BRIEF OF RESPONDENT LUZERNE COUNTY BOARD OF ELECTIONS
PURSUANT TO THIS COURT'S ORDER OF SEPTEMBER 22, 2022**

Introduction:

The Court has directed the parties and Intervenors (parties) to file and serve briefs regarding two issues: (1) the potential of laches as a bar to the relief Petitioners seek; and (2) any argument relative to the remaining criteria for issuance of a preliminary injunction. In addition, the Court has directed the parties to file a joint stipulation of exhibits. The Luzerne County Board of Elections (Board)¹ has submitted its exhibit for that joint filing (attached as Exhibit 1). In so doing, the Board takes no position regarding the acceptance or consideration of any exhibit submitted by any other party. Further, the Board takes no position

¹ Pursuant to Section 8.04 of the Luzerne County Home Rule Charter (as amended), the official name of the Board is the "Luzerne County Board of Elections and Registration."

regarding any argument which may be submitted by any other party in its brief, but instead offers the present submission relative to the impact Petitioners' position has and will continue to have on the Board's duties until this matter is resolved.

Argument:

I. Laches

As noted in its submission to the stipulated facts as directed by this Court's September 9, 2022 Order (attached as Exhibit 2), the Board has implemented a procedure regarding defective mail-in and/or absentee ballots (mail-in ballots) since the November 2020 election, and each primary, general, municipal and special election thereafter. This procedure is quite anodyne, and encompasses no offense with which Petitioners' requests seek to address.² While that fact alone should extract the Board from Petitioners' efforts, it also makes clear that if the Board's mail-in correction procedure were somehow violative of any electoral or constitutional provision, remedial action could have been sought long before the date the present petition was filed. As such, Petitioners' action is barred by laches.

As this Court is well aware, county boards are already in the midst of administering the November 2022 election. Mail-in ballot processes are underway

² As noted in its stipulated fact submission, the Board simply compiles a list of those defective mail-in ballots as they are pre-canvassed on Election Day, and several times that day notifies the major political party (and other party) representatives who have provided contact information, and also provides this information to the Election Bureau. The Board takes no further action such as contacting the elector.

(as are those relative to overseas and military voters), but those who have relied on the Board's protective procedures since November 2020 regarding defective mail-in ballots are now in limbo given the Board's tabling of consideration of those procedures in light of this litigation. Exhibit 1. That disruption has already negatively impacted the voters of Luzerne County and interfered with the Board's statutory and constitutional duties to effectuate a smooth electoral process. This is the height of prejudice to the Board and its obligations to the electorate.

"Equity has established the doctrine of laches to preclude actions that are brought without due diligence and which result in prejudice to the non-moving party." *In re Wissahickon Playground*, No. 2492 CD 2015, 2017 WL 1152563, at 2, n.5 (Pa. Cmwlth. Mar. 28, 2017)(cited pursuant to Commonwealth Court I.O.P. § 69.414; quoting *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Cmwlth. 2004)).

In *Koter*, this Court addressed a challenge to the results of a referendum dealing with the Home Rule Charter of the City of Wilkes-Barre. Although the challenging petitioners had waited "nearly thirteen months following the election" to mount their challenge, the trial court accepted their position and overturned the referendum results. *Id.* at 31, 34. In reversing, this Court held that the trial court "erred in failing to apply the equitable doctrine of laches to preclude the suit." *Id.* at 35.

The *Koter* court explained further that the petitioners' argument that its reason for delay, i.e., that the election board had not implemented the results of the referendum for nearly a year after the election, was incorrect since "the triggering event for the challenge was not the government's implementation of the referendum," but was when the election results were clear: "A determination as to whether the complaining party acted with due diligence will depend on what the party might have known based on the information within its reach." *Id.* at 34.

In the present case, the nearly two year old procedure which the Board has implemented to address defective mail-in ballots was adopted in public session, provided to the representatives of the political parties (including those party entities affiliated with Petitioners) and has been functioning undisturbed through repeated elections since 2020. The "triggering event" for Petitioners' to take action so vastly preceded the date upon which it instituted the present case as to unquestionably satisfy the "lack of due diligence" prong of the laches doctrine.

With equal certainty, requisite "prejudice" has likewise been established.

As noted above, the Board has disrupted its usual conduct of elections by deferring further implementation of the defective mail-in ballot procedure. Exhibit 1. As further noted, this disruption coincides with the conduct of the November election which is *already* underway through processing of mail-in and overseas ballot requests and other electoral mandates. Long ago, our Supreme Court (in a

different but analogous context) noted the wisdom of applying the doctrine of laches so as to assure "government service may be disturbed as little as possible ..." *Com. ex rel. Oliver v. City of Wilkes-Barre*, 73 A.2d 420, 421 (Pa. 1950)(internal citation omitted). In such circumstances, "the application of the doctrine of laches [is] peculiarly appropriate in the interests of justice and sound public policy." *Id.*

The *Koter* court echoed a similar sentiment. Finding that "[p]rejudice can be found where a change in the condition or relation of the parties occurs during the time the complaining party failed to act," the Court noted that the petitioners' "challenge at this late date prejudices the Board since it has already begun to act upon the referendum's terms, and ***prejudices the electorate*** that has enacted the provision and awaits its implementation." *Koter*, 844 A.2d at 34 (emphasis added).

In the present case, the Board has "already begun to [en]act" procedures for conduct of the instant election which is being conducted at this moment. This "disturb[ance]" to "government service," *Com. ex rel Oliver, supra*, is precisely the type of prejudice laches is designed to abate.

But the *Koter* court recognizes an additional aspect of prejudice when laches is considered in the electoral context. In *Koter*, laches was appropriately applied given the prejudice to the "***electorate***" itself, which had a right to rely on the provision at issue. The same is true in the present case, where, as noted previously, the voters of Luzerne County have come to rely with equal value on the procedures

the Board has implemented regarding defective mail-in ballots. This reliance has now so rooted in the repeated election cycles since November 2020 that allowing Petitioners' claim to advance further will only exacerbate the already existing prejudice.

Elections abhor uncertainty. As Election Day approaches, Petitioners' delay in bringing this action becomes more damaging to the certainty voters are entitled to assume in their elections. Principles of equity provide a remedy to that uncertainty in a case such as this. That remedy is application of the doctrine of laches which will bring this matter to the swift end it deserves.

II. Preliminary injunction: Petitioners cannot succeed on the merits

Without conceding Petitioners' ability to satisfy any of the six prongs necessary to obtain preliminary injunctive relief, the Board wishes to direct the Court's attention to the question of "success on the merits." As Petitioner cannot so prevail, the preliminary injunction must be denied.

At the status conference the Court held on September 22, 2022, part of the discussion addressed the question of whether county boards of election are authorized to enact any "notice and cure" policies regarding defective mail-in ballots. This discussion centered on the Supreme Court's refusal to *require* boards to implement such policies as noted in *Pa. Democratic Party v. Boockvar*, 238

A.3d 345 (Pa. 2020) and the U.S. District Court for the Middle District of Pennsylvania's recognition that the boards *may* adopt such policies. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D.Pa. 2020). It is the Board's position that its policy is lawful and consistent with the discretion vested in it by law: "[I]t is perfectly rational for a state to provide counties *discretion* to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920 (emphasis added).³ It is this "discretion" which the Board has exercised in its defective mail-in ballot procedure. As the Supreme Court has recognized, the "legislature[]" has made a "deliberate choice" regarding "the informed discretion of county boards of elections, who are empowered by Section 2642(f) of the Election Code '[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of ... elections officers.'" *In re Canvassing Observation*, 241 A.3d 339, 350 (Pa. 2020), *cert. denied sub nom. Donald J. Trump for President, Inc. v. Degraffenreid*, 209 L. Ed. 2d 172, 141 S. Ct. 1451 (2021)(citing 25 P.S. § 2642(f)).

Unless otherwise directed (or actually prohibited) by amendment to the Election Code, the defective mail-in ballot procedure which the Board has implemented (and which is now disrupted by the present action) is well within the

³ As noted, the Board's procedure is so passive as to leave any notification of voters to others if they so wish.

"informed discretion" of the Board. Against this backdrop, Petitioners' cannot sustain their claim and will not prevail on the merits. Their request for injunctive relief must fail.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Exhibit 1

September 21, 2022 Election Board Meeting

Radick, Paula <Paula.Radick@luzernecounty.org>

Sat 9/24/2022 8:20 PM

To: Joseph Cosgrove <JCosgrove@getyourselfagoodlawyer.com>;

Dear Judge Cosgrove:

On behalf of the Luzerne County Board of Elections and Registration (Board), please be advised that on Wednesday, September 21, 2022, on the advice of the Luzerne County Office of Law, the Board deferred action to reaffirm for the General Election 2022 the same procedure relative to defective mail-in and absentee ballots that it has implemented since the General Election of 2020, pending resolution of RNC, et al., v. Chapman, et al.

Paula L. Radick

Paula L. Radick, Esquire

Assistant Solicitor

Luzerne County Office of Law

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Exhibit 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	
v.	:	447 MD 2022
	:	
Leigh M. Chapman, in her official capacity	:	
as Acting Secretary of the Commonwealth	:	
<i>et al.</i> ,	:	
	:	
Respondents.	:	

SUBMISSION OF RESPONDENT LUZERNE COUNTY BOARD OF ELECTIONS REGARDING STIPULATED FACTS

Pursuant to the Court's Order directing the parties to file a joint stipulation of facts, Respondent Luzerne County Board of Elections submits the following:

The Luzerne County Board of Elections has implemented a procedure regarding "notice and cure" of defective mail-in ballots since the November Election of 2020. This procedure essentially consists of an Election Day pre-canvass of ballots, with those defective mail-in ballots being identified and set aside. At several points during Election Day, a list of those electors whose mail-in ballots have been identified as defective is provided to the Bureau of Elections and designated representatives of the major political parties (and those other parties for whom contact information has been provided to the Board) who may (or may not) thereafter contact the electors.

The Board takes no position regarding other proposed stipulations submitted by the other parties.

Respectfully submitted,

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Respectfully submitted,

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth of
Pennsylvania, et al.,

Respondents.

No. 447 MD 2022

**COMMONWEALTH RESPONDENTS' POST-HEARING BRIEF IN
OPPOSITION TO PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION
UNDER PA. R.A.P. 1532**

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I. INTRODUCTION

This lawsuit—which Petitioners sat on for two years—presents arguments that were rebuffed in November 2020¹ and asserts a theory of injury that has been resoundingly rejected by courts across the country. Worse, because of its inexcusable timing, Petitioners’ request for immediate relief puts Pennsylvania voters—and this Court—in an unfair and untenable position. Among many other inequities, Petitioners’ requested injunction threatens to disenfranchise thousands of voters, *even if this Court or the Supreme Court ultimately rules that Petitioners have no viable claims*. And it would entangle this Court in superintending election procedures of 67 county boards of elections from now until at least November 8.

Not only does Petitioners’ application violate all principles of equity; this Court cannot even consider it. Because no Commonwealth entity is an indispensable party here, this Court lacks subject matter jurisdiction. Exercising jurisdiction because county boards of elections are parties, as Petitioners urge, would not only radically re-shape election litigation in Pennsylvania, but also make this Court the new home for all litigation involving organs of county government.

The Acting Secretary of the Commonwealth and Director of the Bureau of Elections (collectively, “Commonwealth Respondents”) submit this supplemental

¹ Compare Petition for Review *with* First Amended Verified Complaint for Declaratory and Injunctive Relief ¶¶ 6, 125-31, 152-59, 168-69, *Donald J. Trump for President, Inc. v. Boockvar*, No. 20-2078 (E.D. Pa. Nov. 15, 2020) (ECF 125) (attached as Exhibit 1 hereto).

brief to address a few selected points implicated by Petitioners’ Omnibus Reply Brief and the September 22, 2022 hearing: (1) this Court lacks subject matter jurisdiction over this case; (2) Petitioners have not alleged any cognizable injury; (3) preliminary injunctive relief is barred by laches; and (4) Petitioners have not pled an equal protection claim, which would, in any event, fail as a matter of law.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE

As a threshold matter, this Court cannot issue a preliminary injunction because it lacks subject matter jurisdiction over this case. *See* Commw. Resps. Opp. Br. 10-15. “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*.” *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008).

A. The Commonwealth Respondents Are Not Indispensable Parties to Petitioners’ Lawsuit, Which Challenges Discretionary Acts by Particular County Boards of Elections

For the Court to exercise jurisdiction under 42 Pa.C.S. § 761(a)(1), as Petitioners believe it should, Pet. ¶ 13, “the Commonwealth must be *an indispensable party* to the action.” *In re Petition for Enf’t of Subpoenas*, 214 A.3d 660, 664 (Pa. 2019) (emphasis added). A Commonwealth party is indispensable only if the specific “claim and the relief sought” implicates a “right or interest” of

the Commonwealth party that is “essential to the merits of the issue.” *Centolanza v. Lehigh Valley Diaries, Inc.*, 658 A.2d 336, 339 (Pa. 1995) (holding that although Commonwealth agency had an interest in the case, that interest was not essential to the merits of the issue presented in the case, so the agency was not an indispensable party). This Court has stated that “a Commonwealth agency should not be declared an indispensable party unless meaningful relief cannot conceivably be afforded without the sovereign itself becoming involved.” *Pa. State Educ. Ass’n v. Dep’t of Educ.*, 516 A.2d 1308, 1310 (Pa. Commw. Ct. 1986). And “neither naming nor serving a Commonwealth party alone is sufficient to establish indispensability.” *In re Petition for Enf’t of Subpoenas*, 214 A.3d at 667; accord *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conservation & Nat. Res.*, 201 A.3d 278, 281 (Pa. Commw. Ct. 2018).

The two Commonwealth officials named by Petitioners in this lawsuit—the Acting Secretary of the Commonwealth and Director of the Bureau of Elections—are not indispensable parties. The Petition for Review does not allege any unlawful action by the Department of State. Nor do Petitioners challenge any Department of State requirement or statewide practice. Instead, they contest discretionary, county-level practices, alleging that “several County Boards of Elections ..., *acting on their own initiative*, are [allegedly] departing from [purported statutory] rules.” Pet. ¶ 1 (emphasis added).

Moreover, Petitioners can plainly obtain adequate relief without the involvement of the Department of State. Their own prayer for relief effectively concedes that point. *See id.* at p. 29 (seeking “permanent injunction prohibiting the Boards from developing and implementing cure procedures”).

To be sure, the Commonwealth Respondents have an *opinion* about whether county boards of elections have discretionary authority to implement notice-and-cure procedures—an opinion that Petitioners have consistently misrepresented.² But having a view about a legal issue presented in a case, without more, does not make a person or entity an indispensable party. *See Centolanza*, 658 A.2d at 339; *see also Lewis v. Robertson*, No. 13-92, 2013 WL 5674495, at *7 (S.D. Miss. Oct. 17, 2013) (where state official “has neither the responsibility nor the authority” to make the challenged determination, but rather such determination is made by

² Petitioners have repeatedly asserted that the Department of State agrees with them that county boards of elections are categorically prohibited from implementing notice-and-cure procedures. As this litigation has shown, that is simply incorrect. Petitioners rely solely on an answer to a single “Frequently Asked Question” (FAQ) on the Department’s website, in which the Department stated that, because “your mail-in ballot *can’t be opened* until Election Day,” “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election.” Pet. ¶ 55 (emphasis added). As this case makes clear, there are multiple ways to implement notice-and-cure procedures that do not involve opening a ballot.

Moreover, Petitioners overlook the purpose of the FAQ. One of the Department’s primary goals is to protect the right to vote and to maximize the ability of qualified electors to have their votes counted. Some county boards apparently have elected *not* to offer any notice-and-cure procedures, and voters in those counties therefore will not be given notice of a deficient submission. Accordingly, to minimize the risk of disenfranchisement, the Department has consistently urged voters to vigilantly comply with all requirements applicable to mail-in and absentee ballot submissions. The FAQ identified by Petitioners is consistent with that approach.

counties, the relief plaintiffs sought against state official was “illusory” even if state official had offered an opinion on the matter).³

Put simply, Petitioners are improperly attempting to bootstrap a case against certain local agencies, *i.e.*, county boards of elections, into this Court’s original jurisdiction. This Court lacks jurisdiction to entertain those claims, which must be asserted, if at all, separately against each county board allegedly implementing notice-and-cure procedures in the court of common pleas of that county. *See* Commw. Resps. Opp. Br. 15 n.3; *see also id.* 14 n.2.

B. Petitioners’ Jurisdictional Argument, If Adopted, Would Overturn Decades of Settled Law and Void Hundreds If Not Thousands of Past Judicial Decisions

Petitioners’ breathtaking assertion that this Court has jurisdiction because *each of the county boards of elections themselves* is a Commonwealth agency, Pet’rs Omnibus Reply 7-9 (Sept. 21, 2022), contravenes decades of well-established law.

³ In their Omnibus Reply Brief (Sept. 21, 2022), Petitioners fail to identify any “decision or exercise of authority by the Department of State Respondents” that they are challenging. *Id.* at 10. And Petitioners do not dispute that they can obtain effective relief without the involvement of those Respondents. Their sole argument that the Department of State Respondents are indispensable parties rests—perplexingly—on a *May 20, 2020* email from the Secretary opining that county boards may not “set aside an absentee or mail-in ballot solely because the voter forgot to properly insert it into the official election ballot envelope.” *Id.* at 11. But that is not the issue in this case; that issue was resolved by the Supreme Court’s subsequent decision in *Pennsylvania Democratic Party v. Boockvar*, which held that ballots returned without an official election ballot envelope may not be counted. 238 A.3d 345, 380 (Pa. 2020). The issue in this case is whether county boards of elections have *discretionary* authority to provide qualified electors with notice that their initial mail-in or absentee ballot submission was deficient, and/or an opportunity to timely submit a *fully compliant* ballot so that their vote may be counted.

Pennsylvania Supreme Court authority makes clear that county boards are *not* part of the Commonwealth government. *See, e.g., In re Voter Referendum Petition Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009) (explaining that a county board of election is “a local agency”). That conclusion makes perfect sense. As Petitioners themselves point out, county boards of elections “are not bureaus within the Department of State,” but rather separate agencies, each responsible for administering elections within its own county. Pet’rs Omnibus Reply 8-9. And county boards are composed “of the county commissioners of [each] county.” 25 P.S. § 2641(a). “Where [a respondent] entity operates [only] 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 trial courts.” *Blount v. Phila. Parking Auth.*, 965 A.2d 226, 232 (Pa. 2009) (internal quotation marks omitted).⁴

The Supreme Court’s recent decision in *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020), only underscores this point. That case, like this one, challenged discretionary procedures and regulations adopted by the Philadelphia

⁴ Relying on *Philadelphia Parking Authority v. AFSCME*, 845 A.2d 245 (Pa. Commw. Ct. 2004), Petitioners argue that county boards of elections are Commonwealth authorities rather than local authorities because they were created by statute rather than by the counties themselves. Pet’rs Omnibus Reply 8. But the Supreme Court rejected the *AFSCME* line of Commonwealth Court cases in *Blount*, making clear that the question whether an entity is a local or state authority is *not* controlled by who creates it. *See Blount v. Phila. Parking Auth.*, 920 A.2d 215, 218-19 (Pa. Commw. Ct. 2007), *rev’d*, 965 A.2d 226 (Pa. 2009); *see also Blount*, 965 A.2d at 230 (citing *T&R Painting Co. v. Phila Housing Auth.*, 353 A.2d 800, 801 (Pa. 1976)) (explaining that housing authorities are local agencies notwithstanding that they are created by statute).

Board of Elections pursuant to its delegated legislative authority under 25 P.S. § 2642(f). *See Canvassing Observation*, 241 A.3d at 350. The Trump Campaign brought that case against the Board *in the Court of Common Pleas of Philadelphia County*. *Id.* at 343. If Petitioners were correct that county boards are Commonwealth agencies, the Supreme Court would have dismissed the case for lack of subject matter jurisdiction because the Commonwealth Court has *exclusive* original jurisdiction (subject to exceptions not pertinent here) over cases brought against Commonwealth parties. 42 Pa.C.S. § 761(b). But not only did the Supreme Court *not* find a lack of jurisdiction; our High Court vacated the Commonwealth Court’s order *and reinstated the order entered by the Court of Common Pleas*. *Canvassing Observation*, 241 A.3d at 351.

Indeed, accepting Petitioners’ jurisdictional argument would have the effect of voiding hundreds, if not thousands, of previous judicial decisions. As this Court is well aware, for decades, the courts of common pleas have, consistent with *Canvassing Observation*, heard and decided cases in which the board of elections of that county is named as a respondent. If county boards are Commonwealth agencies, all those cases were decided without jurisdiction, and each of those judgments is therefore void.⁵ *Domus, Inc. v. Signature Building Systems of Pa.*,

⁵ The fact that decisions by county boards of elections are directly appealable to the courts of common pleas, rather than this Court, *see, e.g., In re Canvass of Absentee and Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1062-63 (Pa. 2020), further confirms the

LLC, 252 A.3d 628, 640 (Pa. 2021) (“A judgment is void if the issuing court lacked jurisdiction of the subject matter . . .”). Moreover, going forward, *this Court would be required to hear, in its exclusive original jurisdiction, every single case brought against any county board of elections*—or, for that matter, any other organ of county government. That cannot be—and is not—the law. Unsurprisingly, Petitioners fail to cite a single case holding that county boards are Commonwealth agencies.

Petitioners’ jurisdictional arguments are meritless. This Court lacks jurisdiction to enter the preliminary injunction Petitioners seek.

III. PETITIONERS HAVE NOT SHOWN EVEN COGNIZABLE INJURY, LET ALONE IRREPARABLE HARM GREATER THAN THE HARM THAT WOULD BE CAUSED BY THEIR REQUESTED INJUNCTION

Under *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003), Petitioners must make two separate injury-related showings to obtain an injunction. First, Petitioners must show “that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.” 828 A.2d at 1001. Second, Petitioners must show that “greater injury would result from refusing an injunction than from granting it, and,

error of Petitioners’ jurisdictional argument. As a general matter, this Court has *exclusive* jurisdiction over appeals from the decisions of Commonwealth agencies. 42 Pa.C.S. § 763(a)(1). By contrast, the courts of common pleas typically exercise exclusive jurisdiction over appeals from local agency decisions. 42 Pa.C.S. § 933(a)(2), (c)(1).

concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings.” *Id.* Petitioners satisfy neither requirement.

As previously demonstrated, Petitioners have not even articulated a *cognizable* harm caused to them by notice-and-cure procedures. *See* Commw. Resps. Opp. Br. 16-23. During the September 22, 2022 hearing, Petitioners identified only one way in which notice-and-cure provisions purportedly injure them: they allegedly “suffer the risk of having votes being treated unequally based on their county of residence; effectively, their validly-cast votes will be diluted by the counting of unlawfully ‘cured’ ballots that failed to meet the Election Code’s minimal criteria.” Pet’rs Memo. in support of Prelim. Injunction at 18. But courts have repeatedly and resoundingly rejected this kind of vote-dilution theory of injury, *including when dismissing claims based on a lack of uniformity in implementation of notice-and-cure procedures. See Trump*, 502 F. Supp. 3d at 919, *aff’d sub nom. Donald J. Trump for President, Inc. v. Sec’y of Pa.*, 830 F. App’x 377, 388 (3d Cir. 2020). Other examples include:

- In *Kauffman v. Osser*, the Pennsylvania Supreme Court held that plaintiff electors challenging statutes allowing certain categories of electors to vote absentee lacked standing because they were not concretely injured by counting the at-issue ballots: “the interest which [the plaintiffs] claim[ed] [was] nowise peculiar to them but rather [was] an interest common to that of all other qualified electors.” 271 A.2d 236, 240 (Pa. 1970).
- In *Bognet v. Secretary Commonwealth of Pennsylvania*, the Third Circuit Court of Appeals explained that a cognizable claim for vote dilution under

the Equal Protection Clause “is concerned with votes being weighed differently. Instead, Plaintiffs advance an Equal Protection Clause argument based solely on state officials’ alleged violation of state law that does not cause unequal treatment.” 980 F.3d 336, 355 (3d Cir. 2020), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

- “The logical conclusion of the Voter Plaintiffs’ theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state’s legislatively enacted election code, there is a particularized injury in fact sufficient to confer Article III standing on every other voter Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the ‘proper application of the Constitution and laws’—a proposition that the Supreme Court has firmly rejected.” *Bognet*, 980 F.3d at 360.
- In *Wood v. Raffensperger*, the Eleventh Circuit Court of Appeals held that a plaintiff could not claim injury by asserting that “the inclusion of unlawfully processed absentee ballots diluted the weight of his vote.” 981 F.3d 1307, 1314 (11th Cir. 2020).
 - “[N]o single voter is specifically disadvantaged’ if a vote is counted improperly, even if the error might have a ‘mathematical impact on the final tally and thus on the proportional effect of every vote.’ Vote dilution in this context is a ‘paradigmatic generalized grievance that cannot support standing.’” *Id.* at 1314-15 (quoting *Bognet*, 980 F.3d at 356).
- “[A]s our sister courts have found, a vote cast by fraud, mailed in by the wrong person, or otherwise compromised during the elections process has an impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged. Therefore, Plaintiffs fail to show that the injury was ‘concrete and particularized’” and thus lack standing. *Election Integrity Project Cal., Inc. v. Weber*, No. 21-32, 2021 WL 4501998, at *4 (C.D. Cal. June 14, 2021).
- In *Toth v. Chapman*, decided earlier this year, a three-judge federal court rejected the plaintiffs’ vote-dilution theory because “[n]othing [wa]s preventing [the plaintiffs] from voting, and their votes are not otherwise

disadvantaged relative to those of the entire population of Pennsylvania.” No. 22-208, 2022 WL 821175, at *7 (M.D. Pa. Mar. 16, 2022).⁶

At the September 22, 2022 hearing, Petitioners only response was to point out that vote-dilution theories of standing have been accepted *in gerrymandering cases* such as *Reynolds v. Sims*, 377 U.S. 533 (1964). But the case law above squarely rejects Petitioners’ analogy. As that authority explains, being placed in a malapportioned or racially gerrymandered district *does* inflict a concrete and particularized injury conferring standing; by contrast, the counting of other qualified electors’ ballots that allegedly fail to comply with state election law does not. *See, e.g., Bognet*, 980 F.3d at 357 (“The Voter Plaintiffs’ reliance on ... *Reynolds* is misplaced.”).

Finally, it is noteworthy that Petitioners here do not actually contend that they have cast (or will cast) a ballot that was (or will be) rejected because of the lack of a notice-and-cure procedure in their county. Thus, even if such a hypothetical injury would somehow give Petitioners standing to sue *other* county boards that *do* implement notice-and-cure procedures—and it would not, *see Trump II*, 502 F. Supp. 3d at 919 (“[e]xpanding the right to vote for some residents of a state does not burden the rights of others”)—Petitioners fail to allege any such injury.

⁶ *Accord, e.g., King v. Whitmer*, 505 F. Supp. 3d 720, 735-36 (E.D. Mich. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247, 251-54 (D. Vt. 2020).

In discussing the balance-of-harms injunction factor, Petitioners also disregard the substantial harms to electors and the county boards of election that would result from granting the injunction. Those harms include disrupting election administration and the virtual certainty that an injunction would disenfranchise some qualified electors who would otherwise be able to cast timely, fully compliant ballots. *See infra* Section IV.B.3; *Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *29 (Pa. Commw. Ct. Aug. 19, 2022) (Cohn Jubelirer, P.J.) (recognizing “disenfranchising qualified Pennsylvania electors” as harm for purposes of balance-of-harms injunction factor).

IV. LACHES PRECLUDES PRELIMINARY INJUNCTIVE RELIEF

A. Petitioners Did Not Diligently Pursue Their Claims

Petitioners—led by the Republican National Committee—try to explain away their failure to bring their claims earlier by suggesting that they just recently learned that Pennsylvania counties are implementing notice-and-cure procedures. Pet’rs Reply at 4. That is false. On November 9, 2020, Republican National Committee Chairwoman Ronna McDaniel and others held a joint press conference regarding the November 2020 general election that focused on notice-and-cure

practices in Pennsylvania, complaining that “[v]oters in some counties were allowed to cure their ballots whereas voters in other counties were not.”⁷

But even accepting Petitioners’ assertion at face value, “[t]he test for due diligence is not what a party knows, but what he might have known by the use of information within his reach.” *Wheels Mech. Contracting & Supplier, Inc. v. W. Jefferson Hills Sch. Dist.*, 156 A.3d 356, 362 (Pa. Commw. Ct. 2017). The Petition for Review and publicly available materials demonstrate that information about county boards of elections’ use of notice-and-cure procedures has been readily available to Petitioners since at least November 2020:

- The Petition for Review cites the Philadelphia Board’s notice-and-cure policy, taken from the Board’s public website *as of November 1, 2020*. See Pet. ¶ 70, Ex. C.
- The independent investigative journalism website Spotlight PA published a *November 3, 2020*, article describing notice-and-cure procedures in York, Erie, and Luzerne counties in the 2020 election. See *Republicans Seek to Sideline Pa. Mail Ballots that Voters Were Allowed to Fix*, Spotlight PA (Nov. 3, 2020), <https://tinyurl.com/3r2cxm9s>.
- FactCheck.Org, a project of the Annenberg Public Policy Center of the University of Pennsylvania, published a *November 13, 2020*, article regarding notice-and-cure procedures in Pennsylvania in the 2020 election. *Ballot ‘Curing’ in Pennsylvania*, FactCheck.org (Nov. 13, 2020) <https://tinyurl.com/y5rcwnpa>.

⁷ *Kayleigh McEnany & Ronna McDaniel Press Conference Transcript: Lawsuits Over Election Disputes*, Rev Transcription (Nov. 9, 2020) (emphasis added), <https://tinyurl.com/2p8x7dun>; see also Video of RNC Chair McDaniel and White House Press Secretary McEnany News Conference, C-SPAN (Nov. 9, 2020), <https://tinyurl.com/2p8s6krs>.

- Other major media outlets published articles in fall 2020 about Pennsylvania county boards of elections’ notice-and-cure procedures in the November 2020 election.⁸
- On *November 21, 2020*, the District Court for the Middle District of Pennsylvania dismissed a lawsuit brought by the Republican Party’s presidential candidate challenging the implementation of notice-and-cure procedures by some but not all Pennsylvania county boards of election. The Third Circuit Court of Appeals swiftly affirmed. *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 906 (M.D. Pa.), *aff’d sub nom. Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377 (3d Cir. 2020).

Given their arguments in this lawsuit, it is irrelevant when Petitioners received notice of any *particular* county’s notice-and-cure procedures. Petitioners have not sued only particular county boards. Petitioners have sued all county boards, seeking a declaratory judgment and injunction prohibiting *any conceivable* notice-and-cure procedure in Pennsylvania, on the ground that the Pennsylvania Election Code *categorically* prohibits so-called “notice and cure.” *See, e.g.*, App. for Special Relief in the Form of a Prelim. Injunction under Pa. R.A.P. 1532 at 9; *see also* Proposed Order. Thus, the question before the Court is when Petitioners should have known, as a general matter, that *any* county board of elections was permitting notice-and-cure. As the *Donald J. Trump* lawsuit confirms, that information has been public and prominent for years.

⁸ *See, e.g.*, *GOP effort to block ‘cured’ Pennsylvania ballots gets chilly reception from judge*, Politico (Nov. 4, 2020), <https://tinyurl.com/2p9nmka5>.

Petitioners also suggest that their delay should be excused because they needed to wait to bring this action until after Governor Wolf vetoed House Bill 1300, which Petitioners assert would have addressed notice-and-cure procedures. Reply at 3-4. Putting aside the complete irrelevancy of failed legislation, which did *not* change the law,⁹ Governor Wolf vetoed House Bill 1300 *in June 2021*.¹⁰ Petitioners delayed another 14 months, and two entire elections, before initiating this action. That is unquestionably undue delay for laches purposes. *See Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020) (per curiam) (challenge to mail-in voting barred by laches after two-election, 13-month delay).

B. Granting Relief Despite Petitioners’ Delay Would Prejudice the County Boards of Elections and Electors Across the Commonwealth

For multiple reasons, granting relief despite Petitioners’ inexcusable delay would be severely prejudicial.

⁹ Petitioners are wrong to suggest that *unenacted, vetoed* legislation offers any insight into the correct construction of the Election Code and whether the Code permits county boards of elections to implement notice-and-cure procedures. Simply put, “there is no rule of statutory interpretation which justifies drawing a binding inference from the failure to enact proposed legislation.” *Hovatter v. CSX Transportation, Inc.*, 193 A.3d 420, 426 (Pa. Super. Ct. 2018). “It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.” *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *accord Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1747 (2020) (Failed legislation “offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier [legislature] did adopt.”). The Court should reject Petitioners’ invitation to make such a misstep here.

¹⁰ *See* Letter, Office of the Governor of the Commonwealth of Pennsylvania (June 30, 2021), <https://tinyurl.com/2645tv5p>.

1. **Petitioners’ Delay Threatens to Disrupt Election Administration and Confuse Electors**

As the Supreme Court of the United States has repeatedly reaffirmed, “[w]hen an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.” *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). This “important principle of judicial restraint” is aimed at preventing two separate types of prejudice: (1) “voter confusion,” and (2) “election administrator confusion.” *Democratic Nat’l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Avoiding late judicial intervention in elections “protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.” *Id.*

Courts across the country have described the effects of “late judicial tinkering” in related terms, all sounding in prejudice for the purposes of laches:

- “Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so.” *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016).
- In *Curtin v. Virginia State Board of Elections*, the court denied a motion for preliminary injunction “pursuant to the equitable doctrine of laches” because, when enjoining election laws close to an election, “the public also suffers prejudice, in a sense, as granting the requested relief may result in

confusion amongst election officials as well as voters.” 463 F. Supp. 3d 653, 660 (E.D. Va. 2020).

- “[T]he Supreme Court has indicated that any court order that affects an election—meaning here the grant of a preliminary injunction but not the denial of one—can be presumed to cause prejudice to the extent the court order is issued close to an election.” *Memphis A. Phillip Randolph Institute v. Hargett*, 473 F. Supp. 3d 789, 801 (M.D. Tenn. 2020) (denying preliminary injunction).
- “The timing of election litigation matters. Any claim against a state electoral procedure must be expressed expeditiously. . . . [B]elated election litigation risks giving voters incentive to remain away from the polls. On this reasoning, we have rejected as late claims brought too close in time before an election occurs.” *Trump v. Wisc. Elections Comm’n*, 983 F.3d 919, 925 (7th Cir. 2020), *cert. denied* 141 S. Ct. 1516 (2021) (internal quotation marks and citations omitted) (applying laches to reject request for injunctive relief).
- “[F]or a court to resolve an election dispute, the court must receive the case early enough to order relief that would not disrupt the larger election.” *In re Kahnayan*, 637 S.W.3d 762, 764 (Tex. 2022).

Time and again, courts sitting in Pennsylvania have applied the same or

similar principles to avoid this type of prejudice:

- In *Williams v. Osser*, the district court refused to award preliminary injunctive relief because it was “too close to primary election day to allow meaningful preliminary injunctive relief with respect to the 50-day registration cut off.” 326 F. Supp. 1139, 1141 (E.D. Pa. 1971).
- In *Pennsylvania Democratic Party v. Republican Party of Pennsylvania*, the district court refused to enter a preliminary injunction because “Plaintiff’s dilatory conduct ‘weighs decidedly against granting the extraordinary relief it seeks’—especially ‘where, as here, an election is looming.’” No. CV 16-5664, 2016 WL 6582659, at *4 (E.D. Pa. Nov. 7, 2016) (quoting *Republican Party of Pa. v. Cortés*, No. 16-5524, 2016 WL 6525409, at *4 (E.D. Pa. Nov. 3, 2016)).

- In *McLinko v. Degraffenreid*, the Commonwealth Court refused, in September 2021, to grant prospective relief affecting mail-in voting because the November 2021 general election was “already underway.” Order dated September 24, 2021, *McLinko v. Degraffenreid*, No. 244 M.D. 2021 (Pa. Commw. Ct.).
- In *Kelly v. Commonwealth*, the Pennsylvania Supreme Court held that laches barred a challenge to mail-in voting brought after the November 2020 general election, including because “due consideration must also be accorded to the rights of those voters who cast ballots in good faith reliance upon the laws passed by their elected representatives.” 240 A.3d 1255, 1257-58 (Pa. 2020).

The November 2022 general election is already underway. As of September 19, county boards of elections were statutorily authorized to (1) process mail-in ballot applications and (2) send ballots to electors on the permanent mail-in voting list. *See* 25 P.S. §§ 3150.12a, 3150.15. Equitable principles require that the Court deny the injunction to avoid the prejudice caused by confusing both electors and election administrators about an election that has already begun.

2. A Preliminary Injunction Would Raise as Many Questions as It Resolves, Entangling This Court in the Administration of the November 2022 Election

These equitable principles have particular force here, where the requested preliminary injunction would burden—rather than aid—qualified electors’ ability to have their vote counted, and where the injunction would almost certainly embroil this Court in further litigation before the November 2022 election.

Commonwealth Respondents respectfully submit that it is simply not feasible to

craft an injunction prohibiting “notice and cure” procedures—particularly on the timeline Petitioners have forced on the Court, and without an evidentiary hearing—that will not give rise to further litigation regarding the proper interpretation and scope of the order. It is virtually inevitable that some voter, candidate, or party will assert that certain procedures not expressly described in the order constitute prohibited “notice and cure,” and/or will contend that a county board has *wrongly* concluded that it is prohibited from engaging in certain practices that actually fall outside the injunction’s scope.

That likelihood was vividly illustrated in the hearing on September 22, 2022, when one of Petitioners’ counsel asserted that allowing an elector whose outgoing mail-in ballot was returned as “undeliverable” to vote could constitute a prohibited “cure” procedure. By way of example only, the following questions (and many others) are also likely to arise between entry of the injunction sought by Petitioners and the close of the polls on Election Day:

- Does the injunction prohibit an elector from curing a ballot when a voter hand-delivers it to a county board of elections, if a board employee immediately identifies a defect on the outer envelope of the ballot (*e.g.*, a missing signature)?
- Are county boards prohibited from allowing voters to “cure” deficient submissions on their own initiative, even if the counties do not provide “notice”?
- Are county boards prohibited from entering the results of their pre-canvassing activities into the Statewide Uniform Registry of Electors (SURE) system, *see* 25 Pa.C.S. § 1222, since that system will provide an

automatic notice of ballots flagged as invalid to voters who have provided their email address?

- Are county boards prohibited from canceling and replacing mail-in ballots at the request of a voter who realizes she made a mistake, where the voter states that she has mailed the ballot, but the county has not yet received it?
- If not, may the county boards cancel and replace mail-in ballots *before* the voter has mailed them?
- If not, does that mean that voters who spill coffee on their ballot, or whose ballot never reaches them, have forfeited the right to vote?

Put differently, the difficulties would not end upon entry of the injunction sought by Petitioners. If this Court grants preliminary relief, there will be an open injunction that will require *this* Court to play election referee for each of the 67 county boards of election for the next six weeks—stepping into a role typically filled by the 67 courts of common pleas. As this Court answers each question that is put to it, county boards will have to further modify their practices and procedures in response, all while absentee and mail-in balloting are underway. This is exactly the sort of confusion and prejudice laches is meant to avoid—and that Petitioners’ delay in filing suit has threatened.

3. By Delaying, Petitioners Have Guaranteed That Any Preliminary Injunctive Relief Will Disenfranchise Electors in This Election Cycle, Even If Respondents Ultimately Prevail on the Merits

Given the timing of Petitioners’ lawsuit, granting preliminary relief would irreparably disenfranchise electors irrespective of whether Petitioners’ claims are

ultimately rejected on the merits. With just six weeks until Election Day, Petitioners ask this Court to stop processes intended to protect the right to vote. Petitioners’ requested injunction would effectively serve as a final adjudication of the county boards’ ability to implement notice-and-cure procedures for this election cycle. That, in turn, would ensure that every qualified voter whose ballot submission contains a technical deficiency—which, based on past elections, will likely amount to thousands of qualified Pennsylvania electors¹¹—will be disenfranchised, *even if this Court, or the Pennsylvania Supreme Court, ultimately concludes on the merits that notice-and-cure procedures are permissible.*¹² That is unmistakably grave prejudice that would directly result from Petitioners’ delay. Such prejudice is, by itself, a sufficient basis to deny Petitioners’ application.¹³

¹¹ See Affidavit of Jonathan Marks (attached as Exhibit 2 hereto). Commonwealth Respondents emailed this Affidavit to the other parties at 2:05 p.m. on November 26, 2022, requesting that it be included in the Joint Stipulation of Exhibits. Because it apparently was not, Commonwealth Respondents attach it here.

¹² Even if there were somehow time for this Court to reach a final judgment on the merits—and for the Supreme Court to adjudicate an appeal from that judgment—before Election Day, by then, it will inevitably be too late to salvage the votes of certain electors. These voters would have been able to cure an initially deficient submission had they received earlier notice, but will be unable to do so by the time a final ruling on the merits is entered in Respondents’ favor (because, for example, they are away from their county of residence).

¹³ See, e.g., *In re Khanoyan*, 637 S.W.3d at 769 (denying a request for election-related preliminary equitable relief because “[t]hough technically temporary, such a stay order at this juncture would have permanent effects,” and the “resulting disruption, delay, and confusion ... would all be for nothing if the Court ultimately decided that relief is unwarranted”); see also *Trans Pac. Ins. Co. v. Trans-Pac. Ins. Co.*, 739 F. Supp. 240, 247 (E.D. Pa. 1990) (denying injunction because effect would be irreversible: “[i]f preliminarily enjoined, defendant effectively could be deprived permanently” of at-issue interest).

4. The Injunction Petitioners Seek Would Exacerbate Public Concerns Over Election Administration, Not Ameliorate Them

At the September 22, 2022 hearing, the Court expressed understandable concern over the public’s faith in the integrity of elections, observing that the political climate following the November 2020 election has undermined public confidence in the democratic process. The Acting Secretary of the Commonwealth and Department of State share that concern. That election deniers, conspiracy theorists, and purveyors of disinformation have cynically attempted to sow baseless doubts about the integrity of American elections is unquestionably a threat to the health of our democracy.

But the reality—as opposed to the propaganda—is that Pennsylvania elections are free, fair, and secure, and the Department of State is committed to ensuring that they remain so in the future. And this case has nothing to do with fraud or preventing unqualified persons from participating in political decision-making. What Petitioners now seek is a preliminary injunction, while administration of the November 2022 election is already underway, prohibiting county boards of elections from continuing to implement procedures (some of which have been in place for years) to allow their qualified voters to cast timely, fully compliant ballots and have them counted. Commonwealth Respondents

respectfully submit that such an order would not increase public confidence in the election process, but rather diminish it.

V. THE PETITION FOR REVIEW DOES NOT INCLUDE AN EQUAL PROTECTION CLAIM, AND ANY SUCH CLAIM WOULD FAIL AS A MATTER OF LAW

The Commonwealth Respondents' brief in opposition to the application for preliminary injunction explains, at length, that Petitioners are not entitled to injunctive relief because Petitioners are not "likely to prevail on the merits" of their claim. *Summit Towne Centre*, 828 A.2d at 1001 (Pa. 2003). *See* Commw. Resps. Br. at 23-40. At the September 22, 2022, hearing, Petitioners' chief "merits" argument was that notice-and-cure procedures are implemented in a non-uniform manner across Pennsylvania's counties. That argument warrants a response here.

First, Petitioners "cannot set forth a claim not asserted in their complaint." *Lewicki v. Washington Cnty.*, No. 2371 C.D. 2013, 2014 WL 10316922, at *7 (Pa. Commw. Ct. Dec. 4, 2014). Here, there are only three counts set forth in the Petition for Review: Count I alleges that the Pennsylvania Election Code categorically prohibits notice-and-cure procedures; Count II alleges that notice-and-cure procedures therefore also violate the Elections Clause of the U.S. Constitution; and Count III simply seeks injunctive relief for the alleged violations set forth in Counts I and II. Conspicuously absent is any count seeking relief based

on alleged violation of equal-protection or uniformity clauses in the Pennsylvania or U.S. Constitution.

Second, even if Petitioners had brought an equal protection claim, it would fail as a matter of law. In *Trump*, two federal courts squarely held that the plaintiffs’ challenges to counties’ varying notice-and-cure provisions failed to state a claim under the Equal Protection Clause. The district court explained that “[m]any courts ... have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state.” 502 F. Supp. 3d at 922. “Requiring that every single county administer elections in exactly the same way would impose untenable burdens on counties, whether because of population, resources, or a myriad of other reasonable considerations.” *Id.* at 922-23 (internal citation omitted). Thus, “[t]hat some counties may have chosen to implement [notice-and-cure] guidance (or not), or to implement it differently, does not constitute an equal-protection violation.” *Id.* at 922.

The Third Circuit Court of Appeals agreed and affirmed: “A violation of the Equal Protection Clause requires more than variation from county to county.... These county-to-county variations do not show discrimination.... Even when boards of elections ‘vary considerably’ in how they decide to reject ballots, those

local differences in implementing statewide standards do not violate equal protection.” *Trump*, 830 F. App’x at 388.

Moreover, even if Petitioners could make out an equal protection claim (they cannot), the injunction they seek would be an improper remedy. Instead of asking this Court to “extend a benefit to [voters who live in counties that do not offer notice-and-cure procedures], thus leveling up and bringing [those voters] on par with other who already enjoy the right,” Petitioners demand that this Court “level down by withdrawing the benefit from those who currently possess it.” *Trump*, 502 F. Supp. 3d at 920. But “the preferred rule in a typical case is to extend favorable treatment and level up.” *Id.* (internal quotation marks omitted). Put differently, equal protection principles do not subject voting rights to a lowest-common-denominator straitjacket, where all Pennsylvania electors are at the mercy of the county that does the least to protect the voting rights of its residents. The federal court rejected the Trump Campaign’s equal protection argument on this ground as well. *See id.* at 920-21.

It is thus no wonder that Petitioners did not reassert an equal protection claim here.

VI. CONCLUSION

Petitioners’ application for a preliminary injunction should be denied.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 26, 2022

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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.

Dated: September 26, 2022

/s/ Robert A. Wiygul

Robert A. Wiygul

EXHIBIT 1

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Ud`W`S`f`Z`W`A`W`g`V`W`A`A`j`f`W`V`W`W`A`a`V`A`W`A`S`[`A`V`A`Th`[a`g`e`A`f`W`f`[a`A`X`Z`W`A`f`[r`A`A
Canvass of Absentee Ballots of April 28, 1964, Primary Election&A.AFS(AA! A(VA
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f`Z`W`A`W`U`f`[a`A`V`W`t`e`g`e`W`A`X`Z`W`A`d`V`A`q`e`Z`S`^`r`A`A`[V`W`f`[X`Z`W`A`S``W`d`S`V`A`f`Z`W`d`A
q`f`W`U`Z`[U`S`^`[f`[U`S`S`A`A`V`^`W`U`f`a`g`e`A`A`^`a`i`A`A`S`e`S`A`S`TeW`f`W`S`^`a`S`A`W`e`g`T`e`f`S`f`[h`W`A
b`d`a`h`[e`[a`e`r`A`Z`S`A`W`A`U`W`e`e`S`A`e`S`X`W`Y`g`S`a`X`Z`A`e`f`d`S`g`S`A`V`d`W`e`W`d`Z`W`A`W`U`d`W`U`k`A
S`V`A`Z`W`A`U`f`[k`a`X`Z`W`A`S`^`a`S`A`V`A`g`e`f`A`Z`W`d`W`X`T`W`A`W`d`h`W`A`S`W`A`S`^`a`f`e`S`e`f`[`A`

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Ballots of Nov. 4, 2003 Gen. Election, 2.-A7,(VA+,-&A+,-+-.A#FS(A,*(AA

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-+/*(+1 5See also Pa. Dem. Party v. Boockvar&S`eWDA(A--ACC A,*,*&A*,*AFS(A
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 dWhWfZAW`f[faAZWMA^WUfZWA^WUfadaA[USSA[^[Sf[aaAZWMAWUfadteA
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B;M?H^A^1^A^S^f^A^%//(\^A^A^W^B^o^o^c^k^v^a^r^9^a^g^d^f^A^X^g^d^f^Z^W^A^U^g^V^W^q^Z^S^f^A^S^[\^`[\^A^T^S^`^`af^A
f^Z^S^f^A^e^A^`af^A^W^`U^`ae^W[V^A^f^Z^W^A^f^S^f^g^f^a^d[`^k^S^`V^S^f^W^V^A^W^U^d^W^W^A^W^b^W^A^`*must be
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S^d^W^A^A^`a^`Y^W^e^A^b^W^U^f^W^K^A^Z^W^A^U^S^`W^`^W^U^f[faSdV^e^A^A^g^T^W^B^H^A^U^Z^S^`^`W^`Y^W^A^A
i^S^f^U^Z^W^d^S^A^Z^W^A^`^`[\^Y^A^S^U^W^e^A^A^`a^`f^W^S^V^W^A^A^1^A^`S^`V^S^f^W^e^A^Z^S^f^A^`^`b^a^b^W^d^`k^A^S^e^f^A
S^T^e^W^`f^W^S^W^A^A^S^[\^`[\^A^T^S^`^`af^e^S^d^W^A^A^T^W^e^S^X^W^]R^P^b^f^Q^A^A^A^`A^e^W^S^`W^a^U^J^W^V^A
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W^`W^U^f[a^`e^A^T^a^S^d^V^e^(\^A^A^;^`W^U^f[a^`A^9^a^V^W^A^H^W^U^f[a^`A^A^*^2^#^S^S^&^Z^A^S^A^A

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," ***Guidance On Approving Absentee and Mail-In Ballot Applications and Canvassing Absentee and Mail-In Ballots***" AA

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fZWAW^WUf[taSdVSA`VATkAS^^isfUZWdadaWeW[fAfZWA
ba^^[`YASUWA`shall compare the elector's signature

on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote:

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+'' *The Prevalence of Unsolicited Mail-In Votes*

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TS^^afq&Aa_WAaUg_W`fWUSAWSAS`kASeXagdAX[hWSA^fe&SAS[`WAfWZagYZA
fZWkAZSVÄ`afÄfZW_eW^hWVAegSbbf[USf[a`eAXafA_TS^afe(A

+*/(CadWahWdSCAZWba^^[`YAaUSf[a`eA`A;^WUf[a`ASk&AafWdeAWdW
[`Xad_WVZSfAZWk_AgefAafWbdah[e[a`S^^kAWUSgeWVAkZSVSbb[WVAdAS[^`A
hafWeWAWZagYZAaeWafWdeAWbadfZSfZWKW[fZVAbb^WVAdAdAWUW[h_WVÄ
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+*0(KafWdeAWbadfWVA`YAW`[WZAdYZfaAafWÄbWdea`AWUSVgZWKÄ
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fZWISAbWSdWMAW[da^^[`YbASUWfZÄfZW[gÄhafWVÄS[^`ÄadÄTeW`fWVAafeÄ
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+*1(F^S[`f[XXSeÄÄShWdAWbadfÄAafWdeZaÄiWdWÄe[fWVAÄa_WÄ[ÄZWÄ
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fZWMAWUW[h_WVÄATS^^afe&VÄZW`ÄZWÄfW_bfWVAafWÄbWdeaiWdWÄVÄ
fZSfZWKZSVÄafWVTKÄS[^`Ä`ÄSfÄWSeÄÄVaUg_W`fWUSAWSAS`kASeXagdAX[hWSA^fe&SAS[`WAfWZagYZA^^Ä
iad]WdeÄ^VÄWafWdeZSfZWKWdWUadVSeZSh[`YS`dWSÄafWVTKÄS[^`ÄZWkÄ
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dWX^WUfWVAVZSfA`aA_S[^['`ATS^^afAA`SVATWW`AeW`f(

+*3(7Ai[f`Wee&AZaASeAdWcg[dWAfWdAh[e[a`S^^kAWUSgeWVafWdA
iSeA[VW`f[X[SE`Sh`YAWcgWefVAVS[^['`ATS^^afAhWfZagYZZWafWZSVafA
Va`WeA&Ua`fSUFWZWA^WYZWAgAfKAW^WUf[a`X[X[UaMA_b^S[`S`TagfZSh`YA
faAgT_[fSA`dah[e[a`S`AS^^afAVASeASVh[eWZSfASdYWgATWdKAWbgT^[US`
hafWdeAWjbWd[W`UWVWfWVgV(AA

," ***The Misadministration of the Election by the County Election Boards
and Poll Workers.***

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bg^^Se[VWAWdiZAAiWdWAA[efWVAVZWA^^AA]eSeAWYfWVAAafW(AZWA^^A
iSfUZWdWbadfZWSd[YZAVAgVYAWAWUf[a`dW`fZaeWafWdAZSfXWkAWVWVAA
dWfgd`A^SfWdAS`VAdWbadfAfZW[dA`S_WASeAS`afZWZAVS`WA`AZSfa](SeA[`A

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eWUgdWZWA[^WVTS^^afeAWd[WAVS`V`ASUW[VAg`eWUgdWajWcaL`AefSU]eaAA
bSbWVAVeb[fWVd`afWefAAafWdaAAa^^iSfUZWdeAA`e`fS`UW`AW`W`fd`VAg`fk&A
SAa^^Aad]WdATeWdhW`S[^['`ATS^^afeAW[`Y[AbdabWd`kAA[^WVAVZWAad]WdeA

b^SUWZ~~W~~AS[^]`ATS^^afedWfgd`WAZWba^^[`Yb^SUWkA`'bWdeahafWdeASASYA
i[fZagfAid[f]^YAqha[VrAa`AfZW_AadAafZWdi[eWAVWefdak]^YAfZW_(A

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faAZWba^^[`Yb^SUW~~S~~fWdWS^[I]^YZsfAZWba^fWdZSVAS[^]WbAU^gVWMAZW`A
dWfgd[^]`YAWAS[^]`ATS^^af(AZWhafWdSeAafAbWd_[ffWVAegT_[fASAdah[e[a`S^A
TS^^afA[^]`ASUUadVS`UWAI[fZAfZWAEfSfgfW(AAA

++-(?`A`^WYZWagfk&A^S[^]fXXZShWUW[hWVbdfZSfba^A ad]WdeA
iWdWAEWdh]^YafWdhafWdah[e[a`S^^kAegUZSA SkAZSfAZWba^^Ad]WdUag^VA
VWfWd_]^WAIz[UZAAUS`V[VSfWeAfZWAW^WUfadAhafVSVATSAfZAWAdAbdah[e[a

++.(?`A`W`fdWag`fk&SAba^^Ad]WdAWbadfWZShAWdea`SAbWSd[^]SfAZWA
ba^^eA`VAV_[ff]^YZSfAZWkiAWdWAWiAQVdeWbAWdedSAZWIZ`AFW``ek^hS`[SA
hafWde&AiWdWA`a`WfZW^WeeAbdah[VWVAbdah[e[a`S^AaShAW(Aa`AiZ[UZAA

++/(?`A`ZWefWdag`fk&SAWbdWeW`fSfSWAWbaWeWVgd[^]YAZWbaW'
US`hSecA`TeWdhWZWA^WUf[a`ad]WdUag`f[^]YAAWbadfWVA aXAS[^]`ATS^^afeA
fZSfA WdWAUWadAafZWdi[eWAS_SYWVAd[^]YAZWAWUZS`[IWVSA^afAbW`[^]YA
bdaUWecAA_WAXAZaeWAS^^afaAWdWafAZS^XSAVAd]WdeAZSVASZSdVIA_WA
[VW`f[Xk[^]YAZaiSWAdWeeAS`V)adAfaAdWUf[XkAfZWAE[eegW(A

++0(?`A`ZWefWdag`fk&SA`TeWdhWfAWeeWSA^SiWVWca^gf[abAWUWeeA
XadAWd'hafWSVAg`VWd'hafWSA^afeAZWAEWdhWfAWeeWbaWAWU[a`Aiad]WA
dWebae[T^YAAWca^h[^]YAWd'hafWSAVAg`VWd'hafWVSA^afeAkAegT`WUf[hW^kA

VWfWd_[`i`YAAfZWAA^WUfada VWAUAZae WAAfZWAA_bfkHafW(A ZWaTeWdhWdA
 dWbadfZSfAAg_WdageAefS`UWAAWAA^WUfada WdA^fWdVZWAAWd'hafWISA^afA
 TkAUZS`Y[`YAhafWeAfZSfAZSVATWW`A_Sd]WVAXadA:a`SZWA(AUSdg[VAAfaS
 ++1(?`A W^SiSdWAg`fk&A`A TeWdhWdXWUag`fkAXX[UWAAWdhWegAWeA
 dW^SfWAAS[^(`AafWVA^afeAW[`YUS``WVZdagYZSUZ[`WAgdaAdX[hWAWeA
 TWXadWVA^AW[`YUag`fWVAZWSAaf[`YASUZ[`WsdWZageWghWdh[eaSd[hWVA
 faS VVdWzeAfZWAAAUZ[`WSeA_S`Xg`Uf[a[`YZAgbWdh[eaSdWVAbadfWVA
 fZSfAfZWATSdAUaVWeAA`AfZWATS^afeA_gfAA TWAAqVWXWUf[hW(r

++2(?`A: W^SiSdWAg`fk&Aa^^ASfUZWdaTeWdhWVAfAWSecWhW#AS
 V[XXWdW^f`YAUSf[a`eAg_WdageAefS`UWAAhafWdeZAAiWdWA^VZWKZSVA
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 fZWAgdeWXXWAV`Wds^WUf[a`S[^(`ATS^afeAW^hWdWAAVZWdWAAWAg^f`b^WA
 [`efS`UWAAZ[UZAAalW`AAAS[^(`ATS^afeAWdWAAWdWAAV^WAVdWeeWS&AA
 TS^afAW[`YASAA[XXWdWS`WAASeWVAfZWASdd[WdshWAV`UWAA^hWd[S]AA
 faAZaeWSAVdWeeWZWAASdd[WdshWASfAZWAAVab^WAAeWAS_WeAAWdWAAfZWA
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,*,&AZSfAUSdd[WidVAWA^VA AUa^^WUeWbSdsSWAAW^[hWdAS[^['ATS^^afeA
V[dWUfaAZWegbWdh[eaa\ ASVV[f[a`&AS[f[XXSAWAXadSf[a`AfZSfAZWegdbaeWA
aXAfZSfAbdaUWeAXadAfZWaegebWdh[eadafaAZS`VAefS_AASZW(A_SA^

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Uneven Treatment of Absentee and Mail-Ballots That Fail to Include a Secrecy Envelope or Otherwise Comply with the Mandates of the Election Code.
A

+,+(IZWASfgfackhdah[e[a`eA AfZWAWUf[a`9aVWSVAUfA1A`ha^h['YA
STeW`fWSWAA_S[^['ATS^^afeAA AfAdWbae WAW[fZWUdWfSakA]hSdAdAZWA
9ag`fkA;^WUf[a`8a SdVefXWAdWW'dS`YfaWdAASffW_bfASeUWdfS[hAfWdAW`fA
adAg^WafAXdSgVZW`ASnafWZSeAWWUSefAAh[a^Sf[a`AXAfeAWjb^[U[fS`VSfWe(AA
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_S`VSfWeAdAZWUSef`YaXSA`dW^[SThAWra[SAS`STeW`fWUAS[^['ATS^^afAZWA
=W`WdSeAW_T`kiAW[YZWZWSUfadaWsd[`YAfZSfAgWef[a`&VAfA[VafAhWef&A
S`VZSeAfAhWefWS`&A[eUdWf[adAg^W`_S][`YAgfZad[fkAAHWUdWfSakA]hSdA
S`V)adAZWAg`fkA;^WUf[a`8a SdVefAAWiW[YZAeWWSUfadaAWfWd_[`YZAVfZWdA

adA`afA`faAUag`fASAbSdf[Ug^S8AeW`fWAA_ S[(` A`TS^^afAZag^VAWAg`fW(AA

[Pennsylvania Democratic Party&A,*,*AFS\(AB;M?HA.21,ASA%1-\(](#)

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faAZWA^WUf[aWbAVSfWZVeW]efdgUf[a`eaA[feA`WTe[fSWAA`A[feAaU[S^AVV[SA
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dW_W_TWadAAAW`VZW[ISX^afeAq`S]WV&eAi[fZagfAZVeWUdWUkAW^abWZAA
q`S]WVPS^^afraVNS_bS[Y`WhW[AU^gVWWhWdSaUSUAW^W[WPAAVAV^WUf[a`A
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dg^WSAVAAfAbdW'US`hSesAeW`fWVAafeWsd^kAdAWjS_b^WBA`W_aUdSBA^^A
iSfUZW8AbdaSUZW@WAS`fl&AZWXS[d_S`AXAZWASdVAXAWU[a`eAXadIA`kVWdA
9ag`fk&A`VSe]WZA`XadAXad_Sf[a`A`Aeba[^WVSA^afeAAZSXWZBA^iSfUZWd&A
S`VZ[eAWS_Uag^UgdZAV_(A`XfWebWS][`YifAZAZWAg`fkAa^[U[fa&ZS[d_S`A
AS`flAVWU^[`WAAa^SfWZVeASfgfW&AWSWA^WUf[faAVYAfZWAW'US`hSeeAA
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+ ,0(8gfAUWdfSfZ W 9Ag`fkA;^WUf[a:SaSdVeAdaUWWVWVW'US`lsA
_S[^['ATS^^aM'hW^abWcAdfaA^WUf[aSkAa^ADahW_TWd&A,* &SAVAdZaeWA
TS^^afcfZSfASU]WSA[``WdAWUdWWkAW^abWZWAfWdeWdWaf[X[WVdAdfaA
;^WUf[a:SkA['AdVWdaUgdWAWAS^V[fkAaf[YAdah[e:aS^^kaA;^WUf[a:SkA
SfAfZW[dAbba^^[YA^aNSf[a'(A

+ ,1(IS]WAZ[^SVW^bZAgfk&AdAVjS_b^W(AAdWX^WUfASWAUg_WA
f[f^WVQS`UW^^WSAafAdaf[X[USf[a^AXad_Sf[a`&rAZ[^SVW^SAAg`fkAeW`fAA
q`af[X[USf[a`afWafWdeZaeWATS^^aiSeAUS`UW^^WVLSgeW&XAfZWdWSea`e&A
fZWAS^^afASeAdWfgd`WVZagfASa[Y`SfgdWAFZWAWU^SdSfA`hW^abWdAiSeA
VWfWd_[`WASU]SAWUdWWkAW^abWZASVW^bZAgfkAS^aiWVZaeWafWdeA
faUgdWZeWVXWUASef`YAbdah[e:a`S^AS^^afAA;^WUf[aSkrAadAWcgWef[qSA
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Cancelled Ballot Notification Information&A[f(^k)-^S*2BGASef[e[fWVdh(AI&A
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9ag`fkAiWdWAVfWd_[`iZWfZWS^^afeAWdWce[YAS`A`WdeAWUdWWkAW^abW&A
XadAVjS_b^W&Z[UZAS``afA TWAWfWd_[`WVZagfA_S`[bg^Sf`YAZWAgfWdA
W`hW^abWpXWVZ[WAW^abW&A`YAWA`hW^abWAAAZWAZfWA]YZ[`YAWA

W`hW^abWdagYZAdf[`YAdAUS``[`YAWcg[b_W`fWUAAZ[eA]`VAaXAS_bWd[`YA
ecgSdW^lgAVWd_[`WdZAWWY[e^SfgdWteSfVSwrAZSfA_S[^[`Ahaf[`YAUS``afA
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[`Xad_Sf[a`AaAbSdfkA`VAUS`V[VsfWAbdWeW`fSf[WdYAZWAWUS`hSeeAZSfA
[VW`f[X[WAAfWdZaeWAS^^afZShWA`W`W`WUfAAZSAZaeWafWdeASkATWA
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;^WUf[a:SkAAAdAdah[e[a`S^AS^^afeAA`^WUf[a:SkA[`AdVWdAAJgdWAV[VAVXWUf[hWA
_S[^[`ATS^^afeSAkA`adWAAg`f[WAAVaf(ABS`USefWNA&AAWef_adW^S`SVA
8Wd]eAg`f[WAAAdWjS_b^WAXafAUa`fSUhAfWdZAAegT_[ffWAAW`XWUf[AWafeA
adA[hWZAW`SAbbadfg`[fkAAJgdWAAWkA`b^kAA`^aiWVAAW`Si`S`VAdWSfWZAWA
TS^^afeASeA[`hS^[VAS`VAdWXgeWVAA`AAUag`fAfZW_(

+-(8WUSgeWAAg`f[WAAZAA`^aiWVeASfW`Si`S`VA[VAAfAdah[WAAJgdWA
bdaUW`SAAWSh[`AAbgT^[USSAAVAAg`f[WAAZAA`a^SfWAA`S`Si`S`VA[VAdah[VWA
SAJgdWAAUW`SAAWSh[`kAA`_aUdSf[USAAW`VS`fAA`VgUAA`SdWVfAAWAg_bA

9S_bS[Y` (AfAWbd[hVZWAWe[VWXXSiXg^hafWcAVSiSdVWA[ea`bba`W`fA[fZA
g`^SiXg^AhafWe(AA

.” Uneven Treatment of Watchers and Representatives at the County Election Boards’ Canvassing of Ballots.

+,-(?`AWhWdkeAS`UWAWdWASSTeW`fwAAAS[^[`ATS^^afAAbW`WASVA
US`hSeeWNkAAAg`fkAV^WUf[LaSdVbaA`iSfUZWdsAVAS`hSeeAWbdWeW`fSfWbWAA
^WYS^bWAd_[ffWfAATWAdWeWAASeeA; ^WUf[a9AVWAWUf[a`A*2#TS&A F(H(A
[mA-.0\(2#AS](#)LSfUZWdeAS^^AWAWd_[ffWfAATWAdWeWifAW`AfZWW`hW^abAWe
Ua`fS[^[`YAXX[U[STAW`fMWAAafSAVAS[^[`ATS^^afSAWA`WSNAZW`AgUZAA
TS^^afeASdWAAUag`fWVAS`VASSWadWAWF(H(AmA-.0(2#Y\$#+(+\$AS`VA#Y\$#,\$

+--(Fa^^iSfUZWdsAVAS`hSeeAWbdWeW`fSfWbWAAWAdfS`fAgdbaeWA
aXSeegd[`YhafWdeAS`V[VSfWcaA[USbAdf[Wc&WAba^[f[USTaV[WciZAA_SkA
cgWef[a`AZWXS[d`WcaAZWAW^WUf[baAUWec&SfAZWeS_WAeAUa`VgUfWVA
Ua_b^[S`UWfAZWSA&S`V[A`a`WASNAaddWUSA`WdA[UZAAdafWUfZAWAWYd[fkA
S`VAS^[V[faAZWafWSAVW`egdWZASAV^WUf[scWAAbAW`&S[d&VAa`Wef(AA

+,-(:WXW`VS`ZSAWAAS^^aiWVSAUZWdsAAWbdWeW`fSfWbWAAWeW`fA
iZW`AZWAAVcg[dWWAU^SdSf[a`AW`hW^abWcAS[^[`YAXX[U[STeW`fVSWAS[
^[`ATS^^afSAWA`h[WiWVAAXX[U[W`IZW&AZWIS^^afA`hWbaWcUWA`WS&AA
iZW`AgUZAS^^afSAWA`g`fWSAAWUadVAVfASVSAZWdeWdWVbTAAWUgd[k
bWdea``WSAVSA`WfS^ASdd[USWAA`AZWSAWdWAWdWAW[WA`W`[`Y&SAVA

Uag`f[`Y^WdWS[`Y^SUW^AeWcgW`f^k&S^AbZke[US^`k^baee[T^W^A[Wi^ZW^A
W`hW^abWe^Aad^ATS^^afe(A

+-(?`A9 W`fdWag`fk&^ZW^AW`fdSbd^W`US`hSee[`Ya^USf[a`S^eAS^AS^SW^A
TS^^daa_(^AZW^W`fghi^S^eAegUZ^AS^f^ZW^A^i^S^fUZW^d^V^A^f^ZShW^WS`[`YXg^SU^UW^ee^A
fa^TeWdhW^US`hSee[`Y^AV^STg^Sf[a^ba^UW^e^AS^S[^`^S`V^S^TeW`fW^S^Aafes^S^W^A
[`^XSU^f^ZW^A^i^S^fUZW^d^S^A^TeWdhW^d^Z^AA^W^d^W^A^WeWU^hg^W^af^S^Ufg^S^^^TeWdhW^A
fZW^ATS^^afe^AegUZ^A^fZS^f^A^fZW^k^AUag^V^AUa`X[d_^Aad^k^k^A^W^A^f^ZW^A^Z^W^A^As^([V

+0(?`AZ[^SVW^b^Z^S^A^k^&^ba^i^S^fUZW^d^S^A^S`hSee^W^bd^WeW`W^f^W^d^W^A
VW`[WV^ASU^U^W^e^W^S^W^d^A[`Aea_W^A[`efS`UWe(A^A

+1(?`A`W^SiSdWag`fk&^TeWdhW^d^W^W`[WSU^UW^e^S^A^SU]^Aaa_`A
Uag`f[`Y^SdWS(A^fW^S^A^JagdfadVWd[Wg^U^f[a`&^ZW^A^i^S^fUZW^d^S^A^V^A^US`hSee^A
dWbdWeW`fSf[hW^e^W^AS^^S^A^aiWV^W^Z^W^S^U]^Aaa_`AUag`f[`Y^SdWS^A^DahW`TWd^A
/&A^*,*&^A^TeWdhW^g^f^A^ch^k^X[hW^A^gfW^e^W^hW^d^A^Zagde(A`gd[`Y^Z^WS^A^aiWV^A
aTeWdhSf[af[A^W^A^Z^W^S^U]^Aaa_`AUag`f[`Y^SdWS^A^TeWdhW^d^W^e^W^W^e^A^X^A
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+2(EfZWd^AW`ek^hS`[S^Ag`f[We^A^dah[VW^S^fUZW^d^A^fZ^S^bbdabd[SfW^A
SUUW^e^W^W^i^ZW^A^i^S^A^Wcg[dW^k^A__a`iWS^fZ^A^Si(A^A^aiWhWd^W^W^VS`fe^A
[`fW`f[a`S^^K^AV`[W^Z^A^Ag_b^A9S_bS[Y^ASU^UW^e^A`aTefdgUfW^A^TeWdhSf[a^S^A^V^A
W`egdW^S^U[fk&^W`k[`Y^AS`[`fXXS^A^AZW^d^We[VW^e^A^W`ek^hS`[S^AZW^WcgS^A
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+3(L[fZbSdf[Ug^shWYSda/WZWFZ[^SVW^bZ[SfKkA8aSdVAX;AWU]a`e&A
fZWASdVAg^VafAbWd_[fZWag_bA9S_bS[Y`teA SfUZWdeAWAfZ]`A0WAA
qS^^ASebWUferaAXAfZWAdW`US`hSee[`YadaUWeefAA VdWUfda`fdShW[a`A aXA
9a__a`iWS^fZA9 agdf@gVY9ZA[ef[`WfAIS`aA9S``a`teA DahW_TW/dA*,*AEdVWdA
qdWcg[d[`YZfS^`AS`V[VSfWesUZWadS`V[VSfWAdWesW[hWfAbVd_[ffWfAA
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ZagdeA^SfWdAfZWAiad]WdeASAWfZWAiSfUZWdeAiWdWfSAfWAV[fZ]`A0AXWWf
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.4.*A dWbadfAWX^WUfZSVAW^SiSdWAg`fkA ZSVdWUW[hSWAgfA+.&***A
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/" Mail-in Ballots Received After 8 p.m. On Election Day

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 d W U W [h W V A a ` A D a h W _ T W d A . & A , * & A i W d W A ` a f A e W b S U S U W [h X X U a _ A A S ^ ^ a f e A d
 ; ^ W U f [a ` A : S k & A S ` V A f Z W A 9 ag` f k A d W X g e W V A f a A S ` e i W d A S W e f A S V [f [a ` S ^ A c
 +. / (7 ^ e a A A W ^ S i S d W A 9 ag` f k & A A T e W dh W d A W A g ` f k A X X [U W A i Z W d W A S [^
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 J H 8 A V d [h W e A A ^ S e f [U A Y A [f Z A A e W S S A A S U U a _ b S ` k [` Y b S b W d A S ^ ^ a f e A Z W A
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 U a ` V g U f [` Y e A S f W i [V W A A _ g ^ f [U a g ` f k A W ^ W U f [a [d A ^ h [` Y A X W V W A S S ` V [V S f W e & A
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S^^aiS`UW&AASUfAdAa_[ee[a`&AAXAZWda^^WUf[SA`AUag`f[`YAxA`'bWdea`&A
bdah[e[a`S^SA`TeW`fVSWAS[^(`ATS^^af&ASAS`WdS`VfAaUSf[a`efZSfSdWA
Ua`fdSdkaAZWAVUf[a9AVWteAS`VSfadkhdah[e[a`eASAWAdfZStahWdA`ef[fgfWeA
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bSfUZiad]A`XAV`ZaUd^W&ZSfASdkA`da`_Nag`fkA`AUag`fkA`AS`fSfWi[VWAWUf[a`A
[`ha`h[`YAXWVWSS`ASfW[VWAS`V[VsfWf&ASfWZAV`AgS`AdafWUf[9`SgeWaXA
fZWA<agdfWW`fZA7_W`VPWfeAA-.A<(AHgbb(A,VASBA)32

+3(8WUSgeWAS`VSdVfAZWAA`VgUfAX`SfWi[VWAWUf[a`ha`h[`YA
XWVWSS`ASfWAS`V[VsfWd&AV`Y[AZagfA`_[fSf[a`AZWUSef[`YSAV`Nag`f[`YA
aXhafW&SdWfa`TWg`[Xad`&F`S[`f[XeAZShWSA`WefW[VWdWefAW`egd[`YfZSfAZWA
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SV_[`[efdSf[a`AXAZWahW_TWd&A`*A=W`Wds^WUf[a`SAdheAZWAg`f[WeAXAZWA
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S`AVcgSTAE[e]AZAafZWUf[A]IW`eAZWgd[eV[Uf[a`([Aunn v. Bloomstein&AJ\(H\(A](#)

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W`Suf_W`fe([AZSfA015](#) See also [Ariz. State Legislature v. Ariz. Indep. Redistricting
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/s/ Linda A. Kerns Ä
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Counsel for Plaintiffs

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EXHIBIT 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL
COMMITTEE, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
Acting Secretary of the Commonwealth of
Pennsylvania, et al.,

Respondents.

No. 447 MD 2022

AFFIDAVIT OF JONATHAN MARKS

I, Jonathan Marks, declare and affirm under the penalties of 18 Pa.C.S.

§ 4904 that:

1. I am the Deputy Secretary for Elections and Commissions for the Department of State (the “Department”) of the Commonwealth of Pennsylvania, a position I have held since February 2019. Prior to being appointed as Deputy Secretary, I served as Commissioner for the Department’s Bureau of Commissions, Elections and Legislation. I submit this Affidavit in opposition to Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction.

2. In my current and former positions, I have been responsible, together with the Secretary of the Commonwealth and other officials, for helping to lead the Department’s efforts to ensure that Pennsylvania’s elections are free, fair, secure, and accessible to all eligible voters. In that capacity, I have worked closely with

county executives, elections directors, and personnel in the Commonwealth's 67 counties.

3. On October 31, 2019, Governor Wolf signed into law Act 77 of 2019, which amended Pennsylvania's Election Code in several respects.

4. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots. Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

5. The first statewide election following the effective date of Act 77 was the 2020 primary election, which was held on June 2, 2020.

6. For every election since Act 77 took effect, the Department of State has directed county boards of elections to record, in the Statewide Uniform Registry of Electors system ("SURE system"), certain information regarding the mail-in and absentee ballots sent to and returned by voters. The SURE system, which was established pursuant to statutory requirements, contains a database of all registered electors in the Commonwealth.

7. Among other things, the Department of State has directed county boards of elections to identify absentee or mail-in ballots that are set aside, and not included in the tabulated election results, because of a deficiency in the voter's

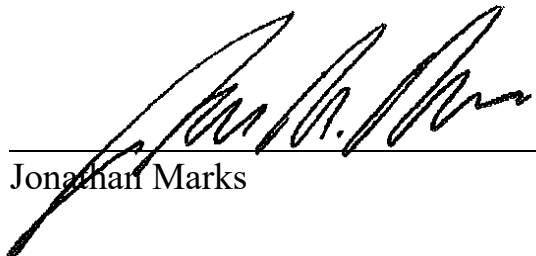
ballot submission, such as the voter’s failure to sign the declaration printed on the outer ballot-return envelope or the absence of an inner “secrecy envelope.”

8. As recorded in the SURE system, on a statewide basis, there were 17,743 such deficient absentee and mail-in ballot submissions in the November 2020 election.

9. As recorded in the SURE system, on a statewide basis, there were 8,843 such deficient absentee and mail-in ballot submissions in the November 2021 election.

I declare that the facts set forth in this Affidavit are true and correct. I understand that this Affidavit is made subject to the penalties for unsworn falsification to authorities set forth in 18 Pa.C.S. § 4904.

Executed on September 26, 2022.


Jonathan Marks

**CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY**

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

GALLAGHER GIANCOLA LLC

Dated: October 5, 2022

/s/ Kathleen A. Gallagher
Kathleen A. Gallagher
Russell D. Giancola

Counsel for Petitioners