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108 MM 2024

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 108 MM 2024

REPUBLICAN NATIONAL COMMITTEE and
REPUBLICAN PARTY OF PENNSYLVANIA
Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth, *et al.*,
Respondents.

APPLICATION OF RESPONDENTS THE BOARDS OF ELECTIONS OF ALLEGHENY, BUCKS, CHESTER, MONTGOMERY, AND PHILADELPHIA COUNTIES TO AMEND THEIR ANSWER IN OPPOSITION TO PETITIONERS' APPLICATION FOR THE EXERCISE OF KING'S BENCH POWER OR EXTRAORDINARY JURISDICTION

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Attorneys for Respondents the Boards of Elections of Allegheny, Bucks, Chester, Montgomery and Philadelphia Counties

Respondents the Boards of Elections of Allegheny, Bucks, Chester, Montgomery, and Philadelphia Counties (collectively, "County Respondents") respectfully move for an order permitting them to amend their Answer in Opposition ("Answer") to Petitioners' Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction by substituting the version attached hereto as Exhibit A. In support of this Application, County Respondents state as follows:

1. Pursuant to this Court's directive, County Respondents' Answer in Opposition to Petitioner's Application for the Exercise of King's Bench Power or Extraordinary Jurisdiction was due by 3:00 p.m. on September 20, 2024.

2. As County Respondents were finalizing their Answer and preparing the Table of Contents and Table of Citations, County Respondents encountered a formatting issue that they were unable to resolve prior to the 3:00 p.m. filing deadline.

3. Accordingly, to ensure a timely filing, County Respondents' Answer was filed without a Table of Citations.

4. County Respondents therefore seek to amend their Answer by substituting the version attached hereto as Exhibit A, which is identical to the initially filed version of the Answer except that it (1) contains a Table of Citations and (2) corrects certain formatting issues in the Table of Contents.

WHEREFORE, County Respondents respectfully request that this Application be granted and that the document attached as Exhibit A be docketed in lieu of (or, in the alternative, in addition to) the initially filed version of County's Respondents' Answer.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: September 20, 2024

By: /s/ *Robert A. Wiygul*
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EXHIBIT A

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Respondents the Boards of Elections of Allegheny, Bucks, Chester, Montgomery, and Philadelphia Counties (collectively, "County Respondents") submit this Answer in opposition to Petitioners' Application for the Exercise of King's Bench Power ("Application").[1]

I. INTRODUCTION

Yesterday, Petitioners sharply criticized another lawsuit brought against all 67 county boards of elections—which sought to enjoin certain existing election-administration practices—on the ground that the "2024 general election" was now "imminent."[2] As Petitioners (who were intervenor-respondents in that case) correctly observed, "the county boards are currently occupied with the vital and consuming task of administering the [] election over the next many weeks." "[R]equiring them to litigate this case on an expedited basis in the middle of election season," Petitioners explained, "would force them to divert limited resources from that task."[3]

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[1] Although the applicable rules required Petitioners to file a "pleading … prefaced by an application for leave to file such pleading," Pa. R. App. P. 3307(b), Petitioners have not filed any pleading (or any other numbered-paragraph set of averments); they filed only an application that is formatted and structured as a brief.

[2] Republican Intervenors' Opposition to Petitioners' Application to File an Amended Petition for Review ¶ 35, *Black Political Empowerment Project v. Schmidt*, No. 283 MD 2024 (Pa. Commw. Ct. filed Sept. 19, 2024).

[3] *Id.*

That disruption, Petitioners pointed out, should be dispositive in itself: "It would be both unfair and unworkable to the county boards—as well as to the public and the Commonwealth's voters—to force the county boards to proceed on [the] preferred schedule [of petitioners in that case], particularly when [the petition against the county boards] should have [been filed] months ago."[4] "Moreover," Petitioners warned, "any remedial order issued now for the 2024 general election threatens to unleash 'voter confusion,' 'chaos,' and an erosion of the public 'confidence in the integrity of our electoral processes that is essential to the functioning of participatory democracy.'"[5]

The undersigned County Respondents, in whose jurisdictions nearly 40% of all Pennsylvania registered voters reside, agree with these statements. We do not understand how the same parties who wrote those words could also, at almost the same time, file the present Application for Exercise of King's Bench Power, seeking to immediately enjoin longstanding (at least in some counties) board-of-election practices, which serve to protect the franchise.

The timing of the Application is inexcusable. Petitioners have known for years—since before the 2020 general election—that numerous county boards undertake to notify qualified electors whose initial mail-in or absentee ballot

[4] *Id.*

[5] *Id.* ¶ 36 (quoting *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 504-07 (Pa. 2006), and *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)).

submissions have certain technical defects (such as a missing signature on the ballot-return envelope), and to afford those electors an opportunity to have their vote counted by *timely* submitting a *fully compliant* ballot. Petitioners' presidential candidate challenged the lawfulness of these so-called "notice-and-cure" procedures following his loss in the 2020 general election. The federal courts squarely rejected his arguments.

Instead of promptly taking their challenge to state court, Petitioners sat on their hands through multiple elections. Then, on September 1, 2022—a few weeks *earlier* in the election season than the present Application—Petitioners filed a 67-county lawsuit in the Commonwealth Court, pressing the same arguments as their current Application. Petitioners sought an immediate preliminary injunction prohibiting all "notice-and-cure" procedures (and ultimately also raised a different issue—also resurrected in the present Application—regarding interpretation of the Election Code's provisions governing provisional ballots). Recognizing that the lawsuit sought to enjoin a variety of procedures implemented by a number of different counties, the Commonwealth Court directed the parties to develop a robust factual record. That court then denied the preliminary injunction application, observing that the 2022 general election was already underway, and that enjoining the procedures at issue in that election would cause confusion, disrupt election administration, and disenfranchise voters. Several months later, the

court dismissed the lawsuit for lack of subject-matter jurisdiction, directing Petitioners to bring their claims in the courts of common pleas of the specific counties whose procedures Petitioners challenged.

But Petitioners did not do so. Once again, they stood by as county boards continued to implement the procedures in multiple additional elections—without any issue, let alone "confusion" or "chaos." *See* Application at 1. (In fact, the Republican Party actively availed itself of these procedures to assist Republican voters whose initial mail-in/absentee ballot submissions were defective.) Then, 48 days before the next presidential election day, Petitioners re-filed their claims. They did not file them in the courts of common pleas, which are designed for fact-finding and familiar with their respective counties' election practices. Instead, forsaking their professed concern not to "trampl[e] on normal procedural rules,"[6] Petitioners ask this Court to invoke its extraordinary, rarely used King's Bench jurisdiction; to forego any factual development; and to immediately, peremptorily enjoin any and all notice-and-cure procedures pending resolution of the matter (which would effectively prohibit the procedures for the 2024 election before the Court decides the merits of Petitioners' claims).

A cynic might conclude that Petitioners' timing was calculated for maximum disruptive effect—and to cast an unwarranted cloud over the

[6] *Id.* ¶ 35.

Commonwealth's election, which is already underway. Regardless, disruption and confusion—prejudicing both election administrators and voters—will certainly be the result if this lawsuit goes forward, even if the Court ultimately denies relief. What is more, granting the Application would effectively reward what is at best an inexcusable lack of diligence, creating a perverse incentive for prospective petitioners in future election cycles.

These considerations, County Respondents respectfully submit, provide ample basis for this Court to decline to exercise original jurisdiction. But there is more. As discussed below, Petitioners' challenge is meritless. Under Petitioners' view of the law, county boards of elections must close their eyes to the fact that some absentee and mail-in ballot submissions contain defects, and may not provide electors with an opportunity to have their vote counted by remedying those defects before the polls close. Petitioners would turn "[t]he longstanding and overriding policy in this Commonwealth," which is "to protect the elective franchise," on its head. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 360-61 (Pa. 2020). They strain to find ways not merely to invalidate specific mail-in ballot submissions, but to ensure those electors are irrevocably disenfranchised—unable to vote by *any* means—in that election. Nothing in Pennsylvania law, or logic, requires that draconian result. Technical requirements for mail-in and absentee ballots are meant

to safeguard the integrity of the election and the secrecy of an elector's vote, not to serve as gratuitous traps for qualified electors.

II. FACTUAL BACKGROUND

A. Counties Have For Years Implemented Notice-and-Cure Procedures as Part of Their Processing of Absentee and Mail-In Ballots

County boards of elections receive absentee and mail-in ballots through the mail, in person at county offices, and through "drop boxes." 25 P.S. §§ 3146.6(a), 3150.16(a); *Pa. Democratic Party*, 238 A.3d at 361. However a ballot is received, counties must process it upon receipt. That processing includes scanning the ballots into the Statewide Uniform Registry of Electors (SURE) and recording "the return date, return method, and ballot status for all voted mail ballots received." Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes Version 3.0 (Apr. 3, 2023)[7]; *see also* 25 P.S. §§ 3146.9, 3150.17. In addition, county boards have a statutory obligation to review those ballot submissions and prepare before Election Day a poll book with a list of "electors who have [1] received and [2] voted" absentee or mail-in ballots. 25 P.S. §§ 3146.6(b)(1); 25 P.S. § 3150.16(b)(1).

[7] https://www.pa.gov/content/dam/copapwp-pagov/en/dos/resources/voting-and-elections/directives-and-guidance/2023-04-03-Examination-Absentee-Mail-In-Ballot-Return-Envelopes-4.0.pdf.

Those duties obligate county boards to review absentee and mail-in ballot submissions upon receiving them, *before* pre-canvassing or canvassing. During this initial review, county boards may observe or otherwise detect (*e.g.*, through use of an automatic sorting machine that can weigh submissions and determine their dimensions) a deficiency in a submission that, if left unresolved, would prevent the elector's votes from ultimately being canvassed and counted (such as failing to sign the ballot-return envelope or failing to place the ballot in the secrecy envelope). In conjunction with their statutorily-required initial review, certain county boards of elections have implemented procedures for notifying electors of mistakes and allowing them to cast a fully compliant ballot (whether electors have been informed of the mistake by the board or have independently discovered it) before the close of polls and the canvassing process.

Counties have implemented various forms of notice-and-cure procedures for years. For example, as Petitioners noted in their 2022 Commonwealth Court action, the Boards of Elections of Bucks, Montgomery, and Philadelphia counties have utilized various notice-and-cure procedures since at least 2020. Am. Pet. ¶¶ 94-98, *Republican Nat'l Comm. v. Chapman*, No. 447 MD 2022 (Pa. Commw. Ct. filed Feb. 17, 2023). In fact, the public record shows that notice-and-cure procedure for absentee ballots were in place in Montgomery County for "years prior" to the enactment of Act 77 of 2019 (which provided for no-excuse mail-in

voting) and the 2020 general election. *See* Hr'g Tr. at 56:20-24, *Barnette v. Lawrence*, No. 20-cv-05477 (E.D. Pa. Nov. 4, 2020), ECF No. 43.

Although the goal of these procedures is the same—to prevent an initially deficient ballot submission from resulting in disenfranchisement, and to provide voters an opportunity to cast a timely, fully compliant ballot—the procedures themselves are varied, consistent with Election Code's assignment of primary responsibility for election administration to the county boards. For example, where an elector returns a mail-in ballot in person to a county board employee, a "notice-and-cure" procedure could consist of the employee's pointing out that the elector neglected to handwrite a date on the ballot-return envelope, and handing the envelope back to the elector to allow her to add the information. According to Petitioners' view, however, even an elector who herself immediately realized that she had forgotten to date the envelope would not be allowed to ask for it to add the missing signature. Per Petitioners, the moment she handed her undated envelope to the employee across the counter, she was disenfranchised in that election with no recourse.

To take another example, a county board might notify a voter that she had returned a "naked ballot," *i.e.*, that her submission lacked a secrecy envelope, and then, if the voter so requested, cancel that mail-in ballot (each ballot has a unique barcode) and provide a new ballot package for the voter to complete and return.

During the 2022 litigation brought by Petitioners in the Commonwealth Court, the parties developed a factual stipulation with information about the specific procedures different counties had implemented. No such factual record has been developed with respect to the 2024 election cycle.

Notice-and-cure procedures are not mere window-dressing in the election-administration process; they make a vital difference in protecting the franchise for thousands of voters. For example, in the 2024 primary election alone, 1,818 Philadelphia electors were notified of an apparent defect in their absentee or mail-in ballot submissions. Of that number, 212 were able to have their vote counted by a "cured" absentee or mail-in ballot, and 131 were able to vote via a provisional ballot. In that same primary election, 1,433 Allegheny County electors were notified of a defective ballot submission, and 884 of them—*over 60%*—were ultimately able to cast a compliant ballot that was counted. As these numbers make clear, notice-and-cure procedures directly advance "the well-established public policy of [Pennsylvania] to favor enfranchisement." *Com., State Ethics Comm'n v. Baldwin*, 445 A.2d 1208, 1211 (Pa. 1982).

B. Notice-and-Cure Procedures Were Litigated During the 2020 Election Cycle

Notice-and-cure procedures were thrust into the spotlight as a result of litigation related to the 2020 General Election.

1. Notice-and-Cure Procedures Are Not Statutorily Required

Before the 2020 General Election, the Pennsylvania Democratic Party brought a lawsuit alleging "that the Pennsylvania Constitution and spirit of the Election Code *require* the [county] Boards to provide a 'notice and opportunity to cure' procedure." *Pa. Democratic Party*, 238 A.3d at 373 (emphasis added). The Secretary of the Commonwealth opposed the petitioner's request for an order requiring all county boards to implement such procedures, arguing that "that there is no statutory or constitutional basis for *requiring* the Boards to [do so]." *Id.* (emphasis added).

This Court agreed, concluded "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." *Id.* at 374 (emphasis added); *see also id.* ("Petitioner … cited no constitutional or statutory basis that would countenance *imposing* the procedure Petitioner seeks to require." (emphasis added)). The Court did not, however, address whether county boards of elections *may*, in the exercise of their discretion, implement notice-and-cure procedures.

2. Variations in Notice-and-Cure Procedures Do Not Violate Equal Protection Principles

After the 2020 General Election, the Trump Campaign and certain individual electors filed a federal lawsuit seeking to prohibit the Secretary from certifying Pennsylvania's election results. Among other things, the plaintiffs argued that "it is

unconstitutional for Pennsylvania to give counties discretion to adopt a notice-and-cure policy." *See Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899, 910 (M.D. Pa.) ("*Trump I*"), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020) ("*Trump II*"). After realizing that "such a broad claim [wa]s foreclosed" under Third Circuit precedent, the plaintiffs then argued that the Commonwealth's "lack of a uniform prohibition against notice-and-cure is unconstitutional." *Id.*

While the district court concluded that the plaintiffs lacked standing to sue, it also addressed the merits of the plaintiffs' equal protection claim. *Trump I*, 502 F. Supp. 3d at 914, 916. The court determined that the complaint failed to state a claim as to both the Trump Campaign and the individual-elector plaintiffs. *See id.* at 918-23. As for the individual elector plaintiffs, the court emphasized that county boards' implementation of notice-and-cure procedures "'imposes no burden on [the] Individual Plaintiffs' right to vote… Defendant Counties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties. Expanding the right to vote for some residents of a state does not burden the rights of others." *Id.* at 919 (emphasis in original). As a result, the court concluded that "it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots." *Id.* at 920.

As for the Trump Campaign's Equal Protection claim, the court added that:

> Many courts … have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state…. 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 (quotation marks and footnotes omitted).

On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the district court's decision to dismiss the plaintiffs' complaint with prejudice. *Trump II*, 830 F. App'x 377. The court held that "[a] violation of the Equal Protection Clause requires more than variation from county to county." *Id.* at 388. "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." *Id.* (internal quotations and citation omitted).

C. Petitioners Unsuccessfully Seek to Enjoin Notice-and-Cure Procedures on the Eve of the 2022 General Election

On September 1, 2022, almost two years after *Trump II* was decided, and only two months before the 2022 general election on November 8, 2022, Petitioners filed a lawsuit against two Department of State officials and each of Pennsylvania's 67 county boards of elections. Petitioners raised arguments

virtually identical to those they raise here: They contended that federal and Pennsylvania law prohibit county boards from implementing any kind of notice-and-cure procedures. *See* Petition, *Republican Nat'l Comm. v. Chapman*, No. 447 MD 2022 (Pa. Commw. Ct. filed Sept. 1, 2022). In their Amended Petition, they added another claim they rehash here, namely, that the Election Code prohibits electors who return a defective (and thus invalid) mail-in or absentee ballot from voting by means of provisional ballot. *See* Am. Petition ¶ 134(f), *Republican Nat'l Comm. v. Chapman*, No. 447 MD 2022 (Pa. Commw. Ct. filed Feb. 17, 2023).

On September 7, 2022, Petitioners moved for a preliminary injunction prohibiting "the County Boards from developing and implementing notice and opportunity to cure procedures" in the 2022 general election. *Republican Nat'l Comm. v. Chapman*, No. 447 MD 2022, 2022 WL 16754061, at *1 (Pa. Commw. Ct. Sept. 29, 2022), *aff'd by an equally divided Court*, 284 A.3d 207 (Pa.). After permitting multiple rounds of briefing, receiving evidence, and hearing argument from the parties, the Commonwealth Court denied the motion. The Court made three key holdings: "1. Petitioners have not proven that they are likely to succeed on the merits or that their right to relief is clear[;]" 2. "[G]reater harm will clearly result from granting the injunction, rather than denying it; granting the injunction will not maintain the status quo; the injunction is not reasonably [tailored] …; and the injunction will adversely affect the public interest[;]" and "3. Petitioners have

not presented concrete or sufficient evidence that the injunction is necessary to prevent immediate and irreparable harm." *Id.* at *4-5, 18 (emphasis omitted).

Regarding the merits, the Commonwealth Court recognized that "relevant and recent case law indicates that notice and opportunity to cure procedures implemented by County Boards have generally been accepted in order to fulfill the longstanding and overriding policy in this Commonwealth to protect the elective franchise." *Id.* at *4 (emphasis omitted). "The courts have held that any doubt about whether the Election Code authorizes County Boards to implement notice and cure procedures must be resolved in favor of preventing the inadvertent forfeiture of electors' right vote." *Id.* "County boards enjoy broad authority under Section 302(f) of the Election Code, 25 P.S. § 2642(f), to implement such procedures at their discretion to ensure that the electoral franchise is protected." *Id.*

But independent of the merits analysis, the equities weighed heavily against Petitioners' requested relief, particularly given that Petitioners had inexplicably filed their case (and their preliminary injunction motion) on the eve of the election. The Commonwealth Court acknowledged that granting "[s]uch] sweeping relief against the 67 County Boards"—that is, enjoining them from continuing to implement any notice-and-cure procedures—"would clearly cause greater injury than refusing the injunction, precisely because it would seriously harm the public interest and orderly administration of the 2022 General Election, *which is already*

well underway." *Id.* at *19 (emphasis in original). The court noted that counties were statutorily authorized to begin processing mail-in ballots applications and mailing ballots on September 19, *id.* (quoting Secretary's Brief (citing 25 P.S. §§ 3150.12a, 3150.15)), and that "[b]y the end of September, counties [had] likely [] mailed out tens of thousands of ballots," and voters were "streaming to election offices to request mail-in ballots in person, fill them out, and hand them in," *id.* As a result, "an order prohibiting notice-and-cure procedures in the November 2022 election would likely invalidate ballots already cast, confuse and upset electors, and disrupt the ongoing administration of the election." *Id.* That alone precluded preliminary injunctive relief.

After denying the preliminary injunction, the Commonwealth Court dismissed Petitioners' claims on jurisdictional grounds. Specifically, the court held that because Petitioners were challenging discretionary actions by certain county boards of elections, no Commonwealth official was an indispensable party, depriving the Commonwealth Court of subject-matter jurisdiction. Memorandum Opinion, *Republican Nat'l Comm. v. Chapman*, No. 447 M.D. 2022 (Pa. Commw. Ct. filed Mar. 23, 2023). The court found that "jurisdiction for an action challenging a County Board's development and implementation of notice and cure procedures properly lies in the respective County's court of common pleas." *Id.* at 28 (citing 42 Pa.C.S. § 931). Accordingly, the Commonwealth Court directed that

Petitioners should re-file their "suit in the respective courts of common pleas where notice and cure procedures are challenged." *Id.* at 28 n.39.

D. Petitioners Waited Another Two Years—and Three Additional Elections—Before Re-Filing Their Case in the Guise of a Purportedly Emergent King's Bench Petition

Petitioners did not appeal the Commonwealth Court's dismissal. But neither did they follow the court's instructions. Rather than re-filing their lawsuit, Petitioners sat on their hands as another nearly two years elapsed. During that time, three additional elections took place (the 2023 primary and general elections and the 2024 primary election). Thanks to the robust factual record developed before the Commonwealth Court, Petitioners knew full well that county boards were continuing to implement notice-and-cure procedures, as well as counting provisional ballots cast by electors whose mail-in ballot submission had been defective. But Petitioners took no action.

Then, on September 18, 2024, with another federal election (this time a presidential election) imminent, Petitioners finally re-filed their challenge to notice-and-cure procedures, recycling all of the arguments they trundled out in the 2022 suit. But rather than filing in the appropriate courts of common pleas, Petitioners have asked this Court to exercise its extraordinary King's Bench authority and accept this case in its original jurisdiction. Petitioners have also asked this Court to issue what would be the equivalent of an immediate,

preliminary injunction—without a hearing, fact-finding, or apparently even argument, *see* Application at 57—pending final resolution. Petitioners seek nothing less than a blanket, statewide injunction prohibiting any county board of elections from implementing any "notice-and-cure" procedure, or, indeed, even *notifying* an elector (before it is too late to take any corrective action) that her mail-in or absentee ballot submission was defective. *Id.* Petitioners would replace principles of transparency with a policy of concealment.

III. PETITIONERS' APPLICATION DOES NOT MEET THE STANDARD FOR EXERCISE OF THIS COURT'S KING'S BENCH AUTHORITY

This Court's King's Bench authority is an extraordinary power, which allows the Court to "assume plenary jurisdiction over a matter even where no dispute is pending in a lower court." *In re Bruno*, 101 A.3d 635, 669 (Pa. 2014). "The Court has generally called upon the powers of the King's Bench to supplement existing procedural process that had proven inadequate to carry out the judicial, administrative, or supervisory obligations of the Court in a matter that is expeditious and determinate." *Id.* at 670. The power is invoked only in "exceptional circumstances," *In re Estate of Smith*, 275 A.2d 323, 325 (Pa. 1971) (declining to exercise King's Bench authority), and "'exercised with extreme caution'" because it "'may be abused.'" *Bruno*, 101 A.3d at 670 (quoting *Commonwealth v. Balph*, 3 A. 220, 230 (Pa. 1886)). Importantly, the purpose of

King's Bench authority "is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court." *Id.*

County Respondents respectfully submit that, for multiple reasons, this is a paradigmatic example of a King's Bench application that should be denied. First, the emergency claimed in Petitioners' Application is one entirely of Petitioners' own contrivance. Petitioners could have filed this lawsuit at any point since 2020. Indeed, they *did* file it in 2022. But when it was dismissed without prejudice, Petitioners inexplicably waited another two years, until the eve of another national election, before re-filing—apparently, so they could then claim there was no time for the normal judicial process to play out. This Court's King's Bench authority should not be a means for Petitioners to circumvent the requirements of ordinary diligence. And Petitioners' inexcusable lack of diligence should not be the Court's (or Respondents') emergency. Granting Petitioners' Application would only serve to incentivize similar sandbagging in the future.

Second, beyond the hardship that entertaining this Petition would impose on the Court and Respondents, granting the relief Petitioners seek—that is, enjoining all county boards from implementing any notice-and-cure procedures in the 2024 general election that is already underway—would gravely harm the public interest; it would disrupt and confuse the election process, causing delays and

disenfranchising voters. On the other hand, Petitioners cannot credibly claim any injury from allowing such processes to continue, as they were content to allow them to proceed in multiple past election cycles. There is simply no injury done by permitting counties to provide means for qualified electors to have their votes counted (once and only once) by timely submitting fully compliant ballots.

Third, Petitioners' challenge to notice-and-cure procedures is meritless. Such procedures are well within the discretionary authority that the General Assembly has vested in county boards of elections. And as previous courts have found, making it easier for qualified electors to vote does not offend any constitutional principle of equal protection or uniformity.

Finally, to the extent Petitioners ask this Court to reject the Commonwealth Court's decision in *Genser v. Bulter County Board of Elections*, No. 1074 C.D. 2024, 2024 WL 4051375 (Pa. Commw. Ct. Sept. 5, 2024), and hold that electors with defective mail-in ballot submissions may not vote via provisional ballot, Petitioners' argument is not merely meritless but also foreclosed by the doctrine of collateral estoppel.

A. Petitioners Have Inexcusably Delayed in Bringing This Lawsuit, and Entertaining It with Respect to the 2024 General Election Would Severely Harm the Public Interest

Petitioners seek, in essence, a preliminary injunction that would have the effect of irrevocably prohibiting county boards from implementing notice-and-cure

procedures during the 2024 general election. That relief is barred by laches and related equitable principles prohibiting injunctions that harm the public interest. Put simply, Petitioners lack of diligence is manifest, and the prejudice an injunction would cause to election administrators and voters would be severe.

The timing of Petitioners' present Application is inexcusable. By every measure, it is even worse than the preliminary injunction motion they filed on the eve of the 2022 election.

Then, Petitioners had been on notice of the issues they challenged for at least two years. Now, they have been on notice for at least four years.

Then, Petitioners filed their lawsuit on September 1st, in advance of a November 8th election day. As the Commonwealth Court observed, that meant that the court could not rule on the application until after the election was already underway and tens (if not hundreds) of thousands of mail-in ballots had already been sent to voters. Issuing an injunction at that time would have severely disrupted election administration, as "the County Boards would then have [had] to modify their practices and procedures in response to the injunction **and would notably have [had] to do so when absentee and mail-in voting [was] already underway**." *Republican Nat'l Comm.*, 2022 WL 16754061, at *19 (emphasis in original). It would also have prejudiced voters, who may have assumed that they would be able to avail themselves of notice-and-cure procedures, have relied on the

availability of those procedures in deciding to vote by mail, and would not learn of the injunction in time to make different voting plans. Perhaps even more detrimentally, an injunction "at th[at] point in time would [have] further deprive[d] voters in counties who have been privy to such procedures for the past two years since the enactment of Act 77 the opportunities to have their votes counted, thus resulting in almost certain disenfranchisement of voters." *Id.*

Here, Petitioners did not file their lawsuit until September 18, in advance of a November 5th election day. In other words, despite having an additional two years to prepare their filing, Petitioners filed their Application more than *three weeks closer* to election day relative to when their 2022 lawsuit was filed. As Petitioners note, counties are already statutorily able to send out mail-in ballots. Montgomery County is in the process of printing and sending an initial batch of *over 100,000 mail ballots*. And the Montgomery County electors can, today, walk into the board of elections office to apply for, receive, fill out, and return a mail-in ballot in person. Other counties will soon follow if they have not already. By the time this Court would be in a position to rule on Petitioners' request for injunctive relief, it is likely that hundreds of thousands of mail-in ballots will have been sent out—and some substantial number already returned. Issuing an injunction in those circumstances, when "absentee and mail-in voting"—and notice-and-cure

processes—are "already underway," is a recipe for "confusion," "uncertainty," and disenfranchisement. *See Republican Nat'l Comm.*, 2022 WL 16754061, at 19.

Because an order prohibiting notice-and-cure procedures in the 2024 general election would—as a direct consequence of Petitioners' egregious delay in filing suit—likely invalidate ballots already cast, confuse and upset electors, and disrupt the ongoing administration of the election, this is a textbook case for the doctrine of laches. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020) (denying injunctive relief seeking to disqualify ballots where Petitioners filed suit 387 days and two elections after the challenged statutory provisions were enacted).

But even if Petitioners had not inexcusably delayed bringing their Application, fundamental principles of equity would preclude this Court from granting the relief Petitioners seek prior to the November 2024 election. As the Supreme Court of the United States has repeatedly reaffirmed—and Petitioners recognized in their separate filing only yesterday[8]—"[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

[8] *See supra* note 2.

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 Kahnoyan*, 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*, this 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 2024 general election is already underway. Equitable principles dictate that the Court deny Petitioners' Application to avoid the prejudice caused by confusing both electors and election administrators about an election that has already begun.

B. Petitioners' Claims Fail on the Merits

Although the considerations above are sufficient to deny Petitioners' Application, their challenge also fails on the merits.

1. Counties Have Discretion Under the Election Code to Implement Notice-and-Cure Procedures

The Election Code does not prohibit notice-and-cure procedures—and certainly does not do so categorically. County boards have "extensive powers" over election administration. *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Commw. Ct.), *aff'd*, 938 A.2d 401 (Pa. 2007). Among other things, the Election Code empowers county boards to "make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f). This statutorily-delegated rulemaking power gives counties discretion in administering elections where the General Assembly has left gaps to fill. *In re Canvassing Observation*, 241 A.3d 339, 346-51 (Pa. 2020).

Counties act well within this discretion when they implement notice-and-cure procedures in response to the Election Code's silence about how county

officials should respond if, during the initial review of mail-ballot submissions, they observe a deficiency that would prevent the ballot from ultimately being canvassed and counted.

This Court's decision in *In re Canvassing Observation*, confirms as much. That decision involved a challenge to the Philadelphia Board of Elections' rules, issued under 25 P.S. § 2642(f), regulating the observation of the canvassing process by candidate representatives. Specifically, the Board had required observers to remain "approximately 15-18" feet "from the first row of … desks" at which canvassing activities were conducted. *Canvassing Observation*, 241 A.2d at 342. The pertinent section of the Election Code did "not set a minimum distance between authorized representatives and canvassing activities"; it stated only that candidate representatives "shall be permitted to remain in the room" in which the canvassing activities take place. *Id.* at 344, 350 (quoting 25 P.S. § 3146.8(g)(1.1)). The Commonwealth Court, in the face of this silence, decided to effectuate what it perceived as "the intent of the Election Code" by requiring the Philadelphia Board to allow canvass watchers "to observe all aspects of the canvassing process within 6 feet." *In re Canvassing Observation*, No. 1094 C.D. 2020, 2020 WL 6551316, at *3-4 (Pa. Commw. Ct. Nov. 5, 2020), *vacated*, 241 A.3d 339 (Pa.). This Court held that given the absence of specific statutory minimum-distance requirements, the Commonwealth Court had improperly limited the authority delegated to the Board.

As the Court explained, "[t]he General Assembly, had it so desired, could have easily established such parameters; however, it did not." *In re Canvassing Observation*, 241 A.3d at 350. Accordingly, it "would be improper for th[e] Court to judicially rewrite the statute by imposing distance requirements where the legislature has, in the exercise of its policy judgment, seen fit not to do so." *Id.*

This Court "deem[ed] the absence of proximity parameters to reflect 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 'to make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of … election officers." *Id.* (quoting 25 P.S. § 2642(f)). Because the Philadelphia Board has "promulgated regulations governing the locations in which authorized representatives were permitted to stand and move about while observing the pre-canvassing and canvassing process," this Court could "discern no basis for the Commonwealth Court to have invalidated these rules and impose[d] arbitrary distance requirements." *Id.*

The same analysis and conclusion applies with equal force in this case. The Election Code does not prohibit the county boards from implementing notice-and-cure procedures. "The General Assembly, had it so desired, could have easily established such parameters; however, it did not." *Id.* Thus, "the absence of

[notice-and-cure] parameters "reflect[s] the legislature's deliberate choice to leave such matters to the informed discretion of county boards of elections." *Id.*

Petitioners' attempts to show that notice-and-cure procedures fall outside the discretionary authority bestowed by 25 P.S. § 2642(f) all fail.

(a) Notice-and-Cure Procedures Constitute "Rules, Regulations and Instructions" that are "Necessary for the Guidance of … Elections Officers and Electors"

Petitioners contend that county notice-and-cure procedures are *ultra vires* because they "establish new voter rights and obligations," as opposed to merely offering "guidance" to election officials and electors. Application at 39. Not so. In counties that implement such procedures, voters are not obligated to cure ballots that are defective, nor does notice-and-cure afford any right to a voter beyond their existing right to timely vote a fully-complaint mail-in or absentee ballot. County boards are merely exercising discretionary authority under the Election Code that is attendant to their obligation to verify that mail-in ballots have met all the Election Code's requirements to be valid and counted. In other words, these procedures do in fact "clarify how the Election Code will be implemented in [a] particular county," as Petitioners concede is permissible. *Id.* at 39.

(b) Notice-and-Cure Procedures Are Not "Inconsistent With Law"

Nor are notice-and-cure procedures "inconsistent with law." 25 P.S. § 2642(f). The plain meaning of the word "inconsistent" is "[m]utually repugnant

or contradictory; contrary, the one to the other, so that both cannot stand." *Inconsistent*, Black's Law Dictionary (3d ed. 1933); *accord Inconsistent*, Webster's New International Dictionary of the English Language (2d ed. 1930) ("in respect to logical relations, contradictory or inconsequent"). Thus, a rule is "not inconsistent with" law if it is not "contradictory" to a statute. *See Comm'r v. Standard Life & Acc. Ins. Co.*, 433 U.S. 148, 159 (1977) (because legislative history dictated National Association of Insurance Commissioners ("NAIC") rules apply "if they are 'not inconsistent' with accrual accounting rules," NAIC rules apply "except when the rules of accrual accounting indicate a contrary result" (emphasis added)); *see also, e.g.*, *Stearns-Groseclose v. Chelan Cnty. Sheriff's Dept.*, No. 04-312, 2006 WL 278247, at *1 (E.D. Wash. Feb. 3, 2006) (statute empowering agencies to make rules "'not inconsistent' with the provisions of the statute" "grants broad authority to … promulgate rules [the agencies] deem suitable"). In other words, so long as notice-and-cure is not "repugnant or contradictory" to any provision of the Election Code, then notice-and-cure is permitted.

Petitioners contend that, simply because the General Assembly "has not authorized" a statewide notice-and-cure procedure in the Election Code, that "*alone*" means County Respondents and other counties' efforts to allow voters to cure defects on their mail-in ballots are "inconsistent with law." Application at 26-

27. But that treats the beginning of the analysis as if it were the end. In all cases in which a county board has adopted a gap-filing rule, the Election Code will not have explicitly authorized the rule.

Petitioners are also wrong to suggest that this Court's decision in *Pennsylvania Democratic Party v. Boockvar* supports their position. This Court's conclusion that the Election Code does not expressly *require* county boards to implement notice-and-cure procedures does not resolve whether the Election Code *allows* counties to implement such procedures under their rulemaking authority. *Pa. Democratic Party*, 238 A.3d at 374. And judicial review of whether certain counties may continue to execute existing notice-and-cure procedures—as opposed to judicial review of whether counties without any such procedure must be ordered to adopt some—does not require this Court to decide any "policy questions" about "what the precise contours of the procedure would be," as would have been required of the Court in *Pennsylvania Democratic Party. Id.* County boards that are statutorily authorized to develop gap-filling rules that guide electors and election officials have already made the policy judgments that they are legislatively authorized to make under § 2642(f).

(c) Notice and Cure Is Not "Inconsistent with" Any of the Specific Election Code Provisions Identified by Petitioners

Petitioners attempt to argue that notice-and-cure procedures are categorically inconsistent with various provisions of the Election Code. But notice-and-cure procedures plainly are not "[m]utually repugnant or contradictory" to any of the cited provisions.

(i) Notice-and-Cure Procedures Are Not Contrary to the Ballot Security Requirement in 25 P.S. § 3146.8(a)

Petitioners are incorrect to assert that notice-and-cure procedures violate 25 P.S. § 3146.8(a), which directs county boards to "safely keep" absentee and mail-in ballot envelopes, submitted "in sealed official … ballot envelopes as provided under" Article XIII and Article XIII-D of the Election Code, in "sealed or locked containers" until canvassing on Election Day. Based on this provision, Petitioners contend that county boards "are not permitted to inspect … a mail-ballot package returned by a voter." Application at 33. But that is a plain overreading of provision, which merely dictates how the County Respondents must store mail-in ballots prior to canvassing.

Furthermore, Petitioners' interpretation is obviously wrong because county boards *must* review and process mailed ballots after receipt (and before any pre-canvassing or canvassing), to, among other things, log those ballots in the SURE

system, and prepare district registers identifying those electors "who have received and voted mail-in ballots." 25 P.S. 3150.16(b)(1); *accord* 25 P.S. § 3146.6(b)(1) (same requirement for absentee ballots); *see supra* Section II.A. The only way that the district register at each polling place can identify the electors who have received and voted absentee and mail-in ballots is for the county boards to review, inspect, and sort every submission they receive *before* Election Day.

Petitioners attempt to dismiss this initial review as "ministerial." Application at 35 n.4. But this just acknowledges that the Election Code does not merely permit, but actually mandates that county boards initially review and process mail-in and absentee ballot submissions. And nothing in Section 3146.8(a) (or elsewhere in the Election Code) prevents county boards from identifying and permitting cure of deficiencies identified during that process that, if left unresolved, would prevent the ballot from being canvassed.

(ii) Notice-and-Cure Procedures Are Not Contrary to the Election Code Provisions Concerning Pre-Canvassing

Similarly, Petitioners wrongly argue that notice-and-cure procedures are contrary to the Election Code's pre-canvassing procedures described in 25 P.S. § 2602(q.1) and 25 P.S. § 3146.8(g)(1.1). *See* Application at 33-34. Pre-canvassing, which begins on Election Day, is a process comprising inspection *and* opening *and* removal *and* counting *and* computing *and* tallying of ballots. 25 P.S.

§ 2602(q.1). Functionally, pre-canvassing is identical to the "canvassing" that takes place after the polls close, but votes tabulated during the pre-canvassing cannot be reported until polls have closed (and "canvassing" begins). 25 P.S. § 2602(q.1); *see also* 25 P.S. § 3146.8(g)(1.1), (2).

As noted above, other provisions of the Election Code *require* county boards of elections to inspect the outside of the envelopes containing mail-in ballots: How else could county boards know which voters had and had not submitted a mail-in or absentee ballot? Accordingly, it cannot be that *any* inspection, absent any of the other activities identified in the definition of pre-canvassing, is forbidden before Election Day. Petitioners' argument—that *any* review or inspection of ballot submissions constitutes pre-canvassing—contradicts the plain language of the statutory definition and would make it impossible for boards of elections to comply with their duties pursuant to P.S. §§ 3146.6(b)(1) and 3150.16(b)(1). No notice-and-cure procedure identified in the Application or, to County Respondents' knowledge, adopted by any county, involves opening envelopes and counting votes.[9]

[9] Petitioners contend that counties must open ballots to determine whether a mail-ballot includes a secrecy envelope. That is incorrect – several counties, including certain County Respondents, use machinery to process ballots that can determine whether a secrecy envelope has been included based on the mail-ballot's weight. In any event, utilizing an outer envelope with a punched hole is, again, not pre-canvassing, which involves the opening and removal of a mail-in ballot to count, compute, and tally its votes. Nor does such a process compromise secrecy in voting: Petitioners offer no evidence that any votes can actually be observed through
Continued on next page…

Nor does Petitioners' observation that pre-canvass participants may not "disclose the results of any portion of any pre-canvass meeting prior to the close of the polls" get them any further. Application at 45 (citing 25 Pa. C.S. § 3146.8(g)(1.1)). As highlighted above, this requirement reflects the fact that pre-canvassing (which encompasses counting and tallying ballots) occurs before polls close on Election Day. Notice-and-cure has nothing to do with (and doesnot entail) the premature release of election results (*i.e.*, vote counts), nor the premature opening or counting of any ballots.

(iii) Notice-and-Cure Procedures Are Not Contrary to Section 1308(h)(2) of the Election Code, 25 P.S. § 3146.8(h)(2), Which Addresses Proof of Identification Required for Absentee and Mail-In Ballot Applications

Petitioners also misuse the *expressio unius* canon of statutory construction to argue that 25 P.S. § 3146.8(h), a standalone statutory provision permitting electors to belatedly provide—after Election Day—proof of identification omitted from their absentee and mail-in ballot *applications*,[10] somehow necessarily implies that

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the punched holes; and even if they could, because ballots without secrecy envelopes must be disqualified and cannot be counted, no cast votes could possibly be revealed.

[10] Absentee and mail-in ballot *applications* must be accompanied by "proof of identification." 25 P.S. § 3146.2b(a) (absentee ballot applications); 25 P.S. § 3150.12b(a) (mail-in ballot applications). Pursuant to § 3146.8(h), "[f]or those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified … [i]f the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots."
Continued on next page…

the General Assembly intended to prohibit counties from allowing voters to take any steps, at any point in time, to remedy an initially deficient mail-in or absentee *ballot submission.* The *expressio unius* canon of construction on which Petitioners seem to rely—"the canon that expressing one item of a commonly associated group or series excludes another left unmentioned," *United States v. Vonn*, 535 U.S. 55, 65 (2002)—"has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *Vonn*, 535 U.S. at 65). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand." *Id*.

Here, 25 P.S. § 3146.8(h) authorizes electors to provide, *after* Election Day, proof of identification that is required for ballot *applications*.[11] That does not "go hand in hand" with the procedures at issue here, which relate to curing, *before* polls close on Election Day, initially deficient *ballot submissions*.

Read together, those provisions make clear that § 3146.8(h) has nothing to do with curing *ballot submissions*. Instead, § 3146.8(h) provides a procedure by which an elector can complete an otherwise incomplete absentee or mail-in ballot *application*.

[11] *See* 25 P.S. § 3150.12b(a) (for mail-in ballot applications, county boards must "determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant's permanent registration card."); 25 P.S. § 3146.2b(a) (stating same for approval of absentee ballot applications).

(d) Notice-and-Cure Procedures Do Not Violate the Federal Constitution or the Pennsylvania Constitution

Petitioners next argue that counties who communicate with voters that made an error when returning their mailed ballot are violating Pennsylvania's and the federal constitution. Specifically, they contend that ballot-curing procedures violate (1) Article VII, § 6 of the Pennsylvania Constitution (the "Elections Uniformity Clause"), (2) the Pennsylvania Constitution's Free and Equal Elections Clause, and (3) the Federal Equal Protection Clause. Separately, Petitioners also suggest that counties' exercise of their discretionary powers usurps legislative authority in violation of the Elections Clause and Electors Clause of the Federal Constitution.

(i) Notice-and-Cure Procedures Do Not Create Unconstitutional Disuniformity

Petitioners generally asserts that notice-and-cure procedures create "disuniformity and disparate treatment based on where voters live," merely because some counties elect not to allow for ballot-curing. Application at 30. Petitioners' argument reduces to the untenable position that every time two counties' election procedures differ in any respect, the result is an unconstitutional lack of authority. That is not reconcilable with the Election Code's delegation of authority to county boards, including in 25 P.S. § 2642(g), which the Supreme Court has made clear is perfectly "consistent with the uniformity of voting clause

in Article VII, Section 6." *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476, 491 (Pa. 2006). Further, Petitioners' argument would also eviscerate the broad discretionary powers that counties have to administer elections under 25 P.S. § 2642(f).

Contrary to Petitioners' assertion, notice-and-cure procedures do not result in the use of "different standard[s] to determine what is a legal vote." Application at 31 (quotations omitted). The reality is that in every county, mail-ballots are subject to the same rules under the Election Code: namely, that they may only be counted if timely returned and in compliance with mandatory requirements (e.g., that they are returned in a secrecy envelope nested in a ballot-return envelope signed by the voter). When a county allows a voter to cure a defective mail-ballot, that standard does not change. Instead, the county has made a discretionary decision as to how and to what degree it will facilitate electors' ability to submit a timely, valid ballot, no different from the various policy and procedural decisions that counties are entrusted to make in each election: including, for instance, decisions regarding the location of polling places, the number and location of satellite election offices, and whether and where to utilize ballot drop boxes.

(ii) Notice-and-Cure Procedures Are Not Contrary to Article VII, § 6 of the Pennsylvania Constitution

Petitioners misread Pennsylvania Constitution's Article VII, § 6 as applying

to the discretionary decisions of county boards of elections. By its terms, it does not – the Section applies only to "*laws* regulating the holding of elections by the citizens." Pa. Const. art. VII, § 6 (emphasis added). County procedures regarding notice-and-cure, implemented pursuant to 25 P.S. § 2642(f), are "rules, regulations [or] instructions," and plainly not laws. 25 P.S. § 2642(f). As such, the notice-and-cure procedures at-issue in this action are not even within the ambit of Article VII, § 6.

Moreover, this Court has explained that to comply with Article VII, § 6, "a law must treat all persons in the *same circumstances* alike.' But it is *only* those in 'the *same circumstances*' who must be treated alike; the Legislature is not forbidden to draw distinctions where difference in treatment rests on some substantial basis." *Appeal of Yerger*, 333 A.2d 902, 906 (Pa. 1975) (quoting *Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949)) (emphasis added); *accord Winston v. Moore*, 91 A. 520, 524 (Pa. 1914). In other words, the Constitution ensures that when county boards opt to provide notice of, and an opportunity to cure, deficient ballot submissions, they cannot do so only for some groups of voters (for example, members of one political party) and not others. Pennsylvania courts have long recognized that the Commonwealth's Constitution does not require that all election-related enactments "be *identical* in each minute detail for each election district." *Meredith v. Lebanon Cnty.*, 1 Pa. D. 220, 221 (Pa. Com. Pl. 1892), *aff'd*

sub nom. De Walt v. Bartley, 146 Pa. 529 (Pa. 1892) (emphasis in original).

(iii) Notice-and-Cure Procedures Are Not Contrary to the Federal Equal Protection Clause

Petitioners' federal Equal Protection Clause arguments fail for similar reasons. *See Banfield v. Cortes*, 110 A.3d 155, 177 (Pa. 2015) (analyzing claim under Pa. Const. art. VII, § 6 under Equal Protection caselaw because the "argument sounds in equal protection principles"). Indeed, as is true of Pa. Const. Art. VII § 6, "[a] violation of the Equal Protection Clause requires more than variation from county to county." *Trump II*, 830 F. App'x at 387. Accordingly, "[m]any courts" have shown that it is well-established—and inevitable—that "counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state." *Trump I*, 502 F. Supp. 3d at 922.

Trump I is particularly on point here: The federal court specifically ruled on whether county-level notice-and-cure procedures violate equal protection, finding the fact "[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." 502 F. Supp. 3d at 922. As the court explained, "[r]equiring 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. Thus, whether

Petitioners couch their argument in terms of election uniformity or Equal Protection principles, the claim is meritless.

(iv) Notice-and-Cure Procedures Are Not Contrary to Article I, § 5 of the Pennsylvania Constitution

Finally, Petitioners read the Pennsylvania Constitution's Free and Equal Elections Clause in a way that would turn the provision on its head. This Court has recognized that the provision provides a "guarantee[], to the greatest degree possible, [of] a voter's right to equal participation in the electoral process." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Permitting counties to implement notice-and-cure procedures helps to realize that guarantee by removing impediments to having one's vote counted. Conversely, if counties do *not* have the discretion to implement notice-and-cure procedures, a voter who makes a technical error in completing his ballot submission will lose "the right to cast his ballot and have it honestly counted." *Id.* at 810.

Petitioners' Free and Equal Elections Clause argument fundamentally misunderstands that the provision was enacted to *enfranchise* rather than *disenfranchise* voters. *See Ball v. Chapman*, No. 102 MM 2022, 2023 WL 2031284, at *16, n. 156 (Pa. 2023) (Wecht., J) ("in light of the Free and Equal Elections Clause" and the Supreme Court's "attendant jurisprudence," ambiguities in election laws "are resolved in a way that will enfranchise, rather than

disenfranchise, the electors of this Commonwealth."). As a result, "election regulations should be found constitutional if they are 'reasonable, neutral, and do not work a severe restriction on the right to vote.'" *Banfield*, 110 A.3d at 176. Therefore, under the Free and Equal Elections Clause, counties here may implement "reasonable, non-discriminatory" notice-and-cure procedures "to ensure honest and fair elections that proceed in an orderly and efficient manner." *Id.* at 176-77.

Though decided in the equal protection context, *Trump I* underscores that notice-and-cure procedures exemplify such reasonable and non-discriminatory policies. In particular, the *Trump I* court highlighted that notice-and-cure "'imposes no burden' on [the] right to vote…. [because] [c]ounties, by implementing a notice-and-cure procedure, have in fact *lifted* a burden on the right to vote, even if only for those who live in those counties." 502 F. Supp. 3d at 919 (emphasis in original). Put simply, "[e]xpanding the right to vote for some residents of a state *does not burden the rights of others*." *Id*. Because notice-and-cure procedures do not "restrict the right to vote," *Banfield* 110 A.3d at 177, and instead serve the Free and Equal Election Clause's fundamental purpose of enfranchising voters, Petitioners' Article I, § 5 claim also fails as a matter of law.

(v) Notice-and-Cure Procedures Do Not Contravene the Federal Elections Clause or Electors Clause

Also meritless are Petitioners' Elections Clause and Electors Clause claims. The Elections Clause of the U.S. Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. CONST. art. I, § 4, cl. 1. The Electors Clause similarly empowers states to "appoint, in such Manner as the Legislature thereof may direct," electors for a presidential election. U.S. CONST. art. II, § 1, cl. 2. According to Petitioners, these Clauses means that notice-and-cure procedures are invalid unless they are directly enacted by the Pennsylvania General Assembly. That is plainly wrong.

"State legislatures historically have [had] the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause." *Moore v. Harper*, 600 U.S. 1, 34 (2023); *accord Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 834 (D. Mont. 2020) (applying Elections Clause to uphold "Montana Legislature's decision to afford the Governor's statutory suspension power a role in the time, place, and manner of Montana's federal elections"). Further, the Supreme Court has recognized time and again that "[s]tates retain autonomy to establish their own governmental processes free from incursion by the Federal Government." *Arizona State Legislature v.*

Arizona Indep. Redistricting Comm'n, 576 U.S. 787, 789 (2015). In other words, "[t]he Elections Clause … affirmatively grants rights to state legislatures, and under Supreme Court precedent, *to other entities to which a state may, consistent with the Constitution, delegate lawmaking authority*." *Corman v. Torres*, 287 F. Supp. 3d 558, 572 (M.D. Pa. 2018) (emphasis added).

Here, as already shown, the Pennsylvania General Assembly has permissibly delegated authority under the Elections Clause to county boards. *See* 25 P.S. § 2642(f). Petitioners' Elections/Electors Clause claim fails as a matter of law.

2. Nothing in the Election Code Prohibits a Voter Who Returned a Defective Mail-In Ballot from Voting Provisionally on Election Day

In addition to challenging county boards' authority to implement notice-and-cure procedures, Petitioners argue that mail-in electors who return defective ballots are statutorily prohibited from completing provisional ballots on Election Day.[12] This separate challenge is also meritless.

First, as a threshold matter, the doctrine of collateral estoppel precludes Petitioners litigating this challenge in this action. Both of the two Petitioners here

[12] Petitioners are wrong to conflate county-level ballot curing with a voter's right to cast a provisional ballot. Whether or not a "[c]ounty has a ballot curing policy, [] the [Election] Code independently authorizes electors to vote by provisional ballot, and, when properly construed, it requires the County to count the provisional ballots here. That does not depend on any ballot curing process, whether optional or mandatory. The provisional ballot is a separate ballot, not a cured initial ballot." *Genser*, 2024 WL 4051375, at *16.

(the Republican National Committee and the Republican Party of Pennsylvania) have already raised this argument as party-intervenors in *Genser v. Butler Cnty. Bd. of Elections*, No. 1074 C.D. 2024 (Pa. Commw. Ct.) In its ruling, issued just three weeks ago, the Commonwealth Court decided this exact issue and held that the Election Code entitles a voter whose mail-in ballot was deemed defective to vote provisionally. *Genser*, 2024 WL 4051375, at *12 (Pa. Commw. Ct. Sept. 5, 2024)

Accordingly, collateral estoppel applies. Petitioners are parties in *Genser* who fairly and fully litigated this issue in that action. And because "[a] judgment is deemed final for purposes of res judicata or collateral estoppel unless or until it is reversed on appeal," the issue has been finally adjudged on its merits. *Shaffer v. Smith*, 673 A.2d 872, 874 (Pa. 1996). Thus, Petitioners are estopped from raising these arguments in this new action. (They may, of course, litigate them in an appeal from the Commonwealth Court's decision in *Genser*, which this Court has just allowed. But that is a separate proceeding.)

Second, aside from the collateral-estoppel bar, Petitioners' interpretation of and reliance on 25 P.S. § 3050(a.4)(5)(ii)(F) is incorrect. As discussed extensively in the Commonwealth Court's *Genser* opinion, this provision is only one of multiple Election Code provisions that address whether a voter may vote provisionally when they have previously returned a defective mail-in ballot. For

instance, 25 P.S. § 3150.16, entitled "Voting by mail-in electors" (and enacted in 2019), entitles a voter "who requests a mail-in ballot and *who is not shown on the district register as having voted* [to] vote by provisional ballot" (emphasis added). Another provision states that a provisional ballot "shall" be counted "if the county board of elections confirms that the individual *did not* ***cast*** *any other ballot*, including an absentee ballot, in the election." 25 P.S. § 3050(a.4)(5)(i) (emphasis added).

As the *Genser court* recognized, interpreting these provisions "require[s] [] consider[ing] the meaning of vote, voted, timely received, cast, and ballot," and "the Election Code does not define these words for purposes of the provisions at issue here." *Genser*, 2024 WL 4051375, at *12. Reading the relevant provisions *in pari materia*, the *Genser* court correctly found the language to be ambiguous, and determined that it was required to "look beyond the words of the statute so that it can have a meaning, and thus have effect, as the General Assembly intended." 2024 WL 4051375, at *14. Key to the *Genser* court's analysis was this Court's holding, in *Pa. Democratic Party*, that the purpose of the Election Code is "to obtain freedom of choice, a fair election and an honest election return." *Id*. (citing 238 A.3d at 356). As *Genser* persuasively concluded, this "objective is advanced by ensuring that each qualified elector has the opportunity to vote **exactly once** in each primary or election. Not zero times, which would deprive an elector of the

freedom of choice, and not twice, which would prevent an honest election return." *Id.* (emphasis in original).

Indeed, earlier in the *Pa. Democratic Party* opinion, this Court likewise observed that Pennsylvania's provisional voting regime was originally enacted in response to federal law requiring such regimes, itself motivated by a desire to "act as a fail-safe to ensure that voters can vote exactly once—not zero times and not twice." *Id*. at *7. (Pa. Commw. Ct. Sept. 5, 2024). In fact, this is the very purpose of provisional voting – it secures a voter's right to vote once in an election where the circumstances of their eligibility to do so are uncertain.[13]

[13] Petitioners challenge *Genser*'s holding on the basis that it department from a previous (non-precedential) Commonwealth Court ruling on this question. Application at 5, 20, 43. However, the *Genser* Court addressed this head-on, noting that in the prior case, the Commonwealth Court "did not consider the ambiguity that arises when [Section 3050(a.4)(5)(ii)(F)] is read together with" other relevant statutory language, nor had the court considered "the argument presented here: that only *valid* ballots" trigger Section 3050(a.4)(5)(ii)(F). *Genser*, 2024 WL 4051375, at *8 (emphasis added).

IV. CONCLUSION

Petitioners could—and should—have filed this lawsuit years ago. Instead, they have now *twice* filed suit on the eve of a major federal election, heaping unjustified burden on courts and election officials, and threatening disruption and disenfranchisement. Petitioners' latest gambit should be denied.

Respectfully submitted,

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