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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

REPUBLICAN NATIONAL COMMITTEE, et al.	:	No. 447 MD 2022
Petitioners,	:	ANSWER OPPOSING APPLICATION FOR SPECIAL RELIEF
v.	:	
LEIGH M. CHAPMAN, et al.	:	
Respondents.	:	

ANSWER OF ADAMS COUNTY BOARD OF ELECTIONS OPPOSING PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA.R.A.P. 1532

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I. INTRODUCTION

Petitioners raise a very similar issue to one that has been litigated once before, namely, whether non-uniform "notice and cure" procedures amongst the 67 counties harm voters. See *Donald J. Trump for President, Inc. v. Boockvar*, 502 F.Supp. 3d 899 (M.D. Pa. 2020) (holding that counties implementing a notice-and-cure procedure did not violate Equal Protection and in fact *enhanced* the right to vote). This time around, however, Petitioners are also asserting that the General Assembly has somehow affirmatively denied counties the ability to notify voters of defective ballots.

Petitioners are also repackaging their notice-and-cure uniformity argument to convince this Court that there is "immediate and irreparable harm" to voters for purposes of issuing a preliminary injunction ahead of a contentious midterm election. See Memorandum of Law in Support of Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa.R.A.P. 1532 ("Petitioners' Memorandum"), Argument, Section I. Curiously, despite using uniformity as a basis for its preliminary injunction request, Petitioners make no reference to the relevant District Court's holding that non-uniform notice-and-cure procedures do not

create harm, but rather enhance the right to vote in those counties that apply them. See generally, Petitioners' Memorandum; see also, *Donald J. Trump,* 502 F.Supp.3d at 919-20. Rather, Petitioners solely focus on the Pennsylvania Supreme Court's determination that the Election Code does not *mandate* that counties adopt notice-and-cure procedures and twists the Court's holding to argue that the lack of a mandate equates to an affirmative denial of that power. See Petitioners' Memorandum (citing *Pennsylvania Democratic Party v. Boockvar,* 238 A.3d 345 (Pa. 2020)). Of course, it should be noted that in the same case relied upon by Petitioners, our Supreme Court determined that "the Election Code should be liberally construed so as not to deprive, *inter alia,* electors of their right to elect a candidate of their choice." *Pennsylvania Democratic Party,* 238 A.3d at 356.

Because Respondent Adams County Board of Elections does not believe that voter rights should be the victim of what amounts to a spat between political parties and branches of government, it feels compelled to oppose the request of Petitioners.

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II. STANDARD OF REVIEW

A preliminary injunction, which as a "harsh and extraordinary remedy," should only be granted if and when each of the following criteria has been fully and completely established by the petitioner: (1) the preliminary injunction must be necessary to prevent immediate and irreparable harm, (2) greater injury would result from the denial of the preliminary injunction than from the granting of it, (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct, (4) the petitioner is likely to prevail on the merits, (5) the injunction is reasonably suited to abate the offending activity, and (6) the public interest

will not be harmed if the injunction is granted. *Berwick Township v. O'Brien,* 148 A.3d 872, 890 (Pa.Cmwlth. 2016).

III. ARGUMENT

a. Permitting voters to correct defective ballots does not constitute immediate and irreparable harm to voters.

Petitioners do not convincingly point to any harm to voters, much less immediate and irreparable harm, caused by notice or cure. Petitioners rely solely on a theory of *per se* harm caused by some violation of the law by the counties. See Petitioners' Memorandum, pg. 14-17. In support of their theory, Petitioners point to Section 2642 ("Powers and duties of county boards") of the Election Code and hastily declare that none of the enumerated powers therein "authorize the development and implementation of their own bespoke cure procedures…". Memorandum of Law, pg. 6. Upon declaring this, Petitioners jump to the next conclusion that "cure procedures" must be illegal and therefore constitute *per se* harm. Memorandum of Law, pg. 14 (citing *Hempfield Sch. Dist. v. Election Bd. Of Lancaster County,* 574 A.2d 1190 (Pa.Cmwlth. 1990)). Petitioners overlook the relevant statute.

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The General Assembly provided county boards of elections with the power "[t]o make and issue such rules, regulations and instructions, not inconsistent with the law, as they may deem necessary for the guidance of … electors." 25 P.S. 2642(f). Providing "guidance" and "instructions" to electors is an essential and fundamental aspect of the job of the boards of elections. *Id.* Part of the guidance is informing voters how to cast a proper ballot. When

inevitable errors are made by voters at the ballot box or via mail, boards are granted the express authority by the General Assembly to provide instruction and guidance to those voters.

Of course, subsection (f) requires that any instructions and guidance may not be "inconsistent with the law." 25 P.S. 2642(f). Petitioners' apparent argument for such inconsistency with the law can be boiled down to this misguided proposition: that because the General Assembly outlined a single "cure procedure" for absentee/mail-in voters whose IDs could not be verified initially, see 25 P.S. 3146.8(h), the legislature therefore intended to outlaw all other "cure procedures." See Petitioners' Memorandum, pg. 6. There are two problems with this argument. First and foremost, the "cure" outlined in Section 3156.8(h) does not actually concern a ballot defect. Rather, it addresses the identity of the voter. 25 P.S. 3146.8(h). The Election Code only mentions ballot defects in the context of whether a ballot may be counted, and *not* how ballot defects may be remedied ahead of Election Day. To the extent that Petitioners' now urge this Court to write such a prohibition against notification and opportunity to correct such errors, Respondent asks this Court to reject that invitation as "it is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include." *Shafter Electric & Construction v. Mantia,* 96 A.3d 989, 994 (Pa. 2014).

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The second problem with Petitioners' claim is that it is impossible to determine what words or actions might be considered a "cure procedure" by the General Assembly because the terms "cure" and "cure procedures" are not statutorily defined, nor do they appear anywhere in the Code. Petitioners themselves make no attempt to define the terms, only loosely referring to efforts to remedy "signature and secrecy-envelope defects." Petitioners' Memorandum, pg. 2. Petitioners loose definition is neither helpful to this Court or to the 67 counties. Is merely notifying the voter of the defect enough to constitute a "cure procedure?" Or does it require

notification *and* some affirmative act to induce the voter to submit a valid ballot? Do "cure procedures" include directing voters to submit a provisional ballot separate from a defective ballot? Or does it only include changes to the original defective ballot? What about voiding a defective ballot and providing the voter with a new one at their request? How about a court-ordered ballot replacement? None of these questions are answered by Petitioners, yet they allege that they know some unlawful act has been committed by the boards. Is this a case of Justice Stewart's "I'll know it when I see it?" See *Jacobellis v. Ohio,* 378 U.S. 184 (1964). Petitioners are not alone, however. Our own Supreme Court did not define the term (which would have been far more problematic if it had either required boards to adopt "notice and opportunity to cure" policies or expressly disallowed it). See *Pennsylvania Democratic Party,* 238 A.3d at 372. As we throw around the term "notice and cure procedure" in the courts and in the legislature, or some variation thereof, we must remember that prohibiting an amorphous concept will likely impede the franchise of Pennsylvania voters. If no precise definition is offered by Petitioners, this Court cannot reasonably determine harm and certainly cannot fashion a narrowly-tailored equitable remedy to address any such harm.

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To the extent that Petitioners argue that the lack of uniformity in cure procedures among the counties will harm voters, at least one court has addressed that very issue to Petitioners' detriment. About a month after our Supreme Court determined that notice and cure procedures were not required to be implemented, the Trump campaign sued in federal court, arguing that the lack of uniformity of notice and cure procedures among Pennsylvania counties violated Equal Protection and harmed voters. In essence, the Trump campaign argued that if not every county could offer notice and the opportunity to cure small defects, then no county should,

just as Petitioners do here. The Middle District Court flatly rejected the Trump campaign's argument, holding that expanding the right to vote through notice-and-cure does not burden non-county residents:

> 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. And Plaintiffs' claim cannot stand to the extent that it complains that "the state is not imposing a restriction on someone else's right to vote." Accordingly, Defendant Counties' use of the notice-and-cure procedure (as well as Secretary Boockvar's authorization of this procedure) will be upheld unless it has no rational basis.
>
> Individual Plaintiffs' claims fail because it is perfectly rational for a state to provide counties discretion to notify voters that they may cure procedurally defective mail-in ballots. Though states may not discriminatorily sanction procedures that are likely to burden some persons' right to vote more than others, they need not expand the right to vote in perfect uniformity. All Plaintiffs have alleged is that Secretary Boockvar allowed counties to choose whether or not they wished to use the notice-and-cure procedure. No county was forced to adopt notice-and-cure; each county made a choice to do so, or not. Because it is not irrational or arbitrary for a state to allow counties to expand the right to vote if they so choose, Individual Plaintiffs fail to state an equal-protection claim.

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Donald J. Trump for President, Inc. v. Boockvar, 502 F. Supp. 3d 899, 919–20 (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), and *appeal dismissed sub nom. Signed v. PA*, No. 20-3384, 2021 WL 807531 (3d Cir. Jan. 7, 2021). In other words, contrary to the suggestion that the notice-and-cure practice was somehow harmful to voters and violated equal protection, the court determined that the practice actually *enhanced* the right to vote in those counties. That decision was affirmed on appeal by the 3rd Circuit Court of Appeals.

It makes little sense that counties that choose to enhance the right to vote should be required to reduce the protection of rights for its citizens so as to achieve parity with the counties where citizens enjoy lesser protections. In fact, the exact opposite of that theory is in the best interest of the electorate.

In sum, Petitioners make an insufficient case for harm. Notice and cure procedures do not cause *per se* harm, as that power is expressly granted to counties by the General Assembly, see 25 P.S. 2642(f), nor does the non-uniform application of such procedures among the counties cause harm to the voters. *Donald J. Trump for President, Inc.* 502 F.Supp. 3d at 919-20. In their quest for a victim, Petitioners only stumble upon an "enhanced" right to vote.

b. Greater injury would result for the *granting* of the preliminary injunction.

Petitioners largely rely on the same two arguments used in support of the "immediate and irreparable harm" criterion to attempt to satisfy this "greater injury" criterion, namely, (1) that the boards are somehow contravening some implied intention of the legislature by curing ballots, and (2) that the lack of uniformity will harm voters in counties that don't adopt curing procedures. Those arguments are adequately addressed in the previous section, but it should be stated that greater injury to voters would occur if this Court were to *grant* Petitioners' request for a preliminary injunction for a number of reasons. First, a preliminary injunction would necessarily lessen the protection of voting rights in those counties that adopt notice and cure procedures. Second, because of the lack of a legal definition of the term "notice and cure," county boards would not be able to apply the mandates of an injunction with any degree of certainty or uniformity. Third, assuming that mere notice, instruction, and guidance likely falls under the broad definition of "curing procedures," a preliminary injunction would both usurp an enumerated statutory power of the boards of elections under Section 2642(f) and may even act as a prior restraint on speech that is protected by the First Amendment. See *Nebraska Press*

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Association v. Stuart, 427 U.S. 539 (1976) (prior restraints on speech are presumptively unconstitutional). For those reasons, this Court should not grant Petitioners' request.

c. An injunction would upset the status quo, which allows counties the discretion to notify voters of ballot errors.

Notifying voters of errors on their mail-in ballots is the status quo for many counties, as outlined in Petitioners' own Application. As explained in a prior section, the county has the express authority by the legislature to advise and guide voters. 25 P.S. 2642(f). This power existed long before Act 77, and continued to be applied upon the advent of no-excuse mail-in ballots in Pennsylvania. An injunction, which would effectively impose a gag order on election officials to speak with constituents, would disrupt the status quo, usurp the power of the counties delegated to them by the legislature, and could not be narrowly tailored enough to only prohibit non-protected speech of election officials.

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d. Petitioner is not likely to prevail on the merits.

So far, no state or federal court has ruled that counties are forbidden from notifying voters of defective ballots. As noted above, our Supreme Court determined that county boards are not required to adopt notice and cure procedures, but did not go so far as to prohibit them. *Pennsylvania Democratic Party,* 238 A.3d 345. The federal district court, affirmed by the 3rd Circuit, rejected the primary claims underlying Petitioners' request for special relief here, namely, that lack of uniformity of cure procedures in any way harms voters. *Donald J. Trump for President, Inc.,* 502 F. Supp. 3d at 919–20. Rather, the federal court opined that such procedures, even applied inconsistently actually enhanced the right to vote. *Id.* Therefore, such claims related to uniformity are unlikely to prevail here.

With regard to the separation of powers arguments, Petitioners assert that counties, as arms of the executive branch, are infringing on the powers of the legislative branch, thus violating the separation of powers doctrine. The separation of powers doctrine stands for the proposition "that the executive, legislative, and judicial branches of government are equal and none should exercise powers exclusively committed to another branch." *Jefferson Cty. Court Appointed Emp. Ass'n v. Pa. Labor Relations Bd.,* 985 A.2d 697, 703 (Pa. 2009). Indeed, the counties could possibly violate the separation of powers doctrine if they exercised power not granted to them by the Legislature. However, as explained in prior sections, the General Assembly expressly granted county boards of elections with the power "[t]o make and issue such rules, regulations and instructions, not inconsistent with the law, as they may deem necessary for the guidance of … electors." 25 P.S. 2642(f). Petitioners cite no "inconsistency" in the exercise of those powers with the Election Code except for an unsupported belief that a single provision related to voter identification, 25 P.S. 3146.8(h), somehow precludes boards from notifying voters of ballots defects. Adopting Petitioners' reasoning would result in county boards being unable to exercise their basic powers enumerated under Section 2642(f). See 1 Pa.C.S. 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions.").

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e. An injunction is not an appropriate means for curing whatever ails Petitioners.

Simply put, an injunction prohibiting some ill-defined and amorphous mishmash of speech and actions would be impossible to tailor narrowly. Even if "cure procedures" were well-defined and relief could be narrowly-tailored, it is wholly inappropriate to lessen the protections of voter rights to either (1) achieve parity with the lesser protections of other counties, or (2) to

vindicate the powers of one branch of government. And, as mentioned above, an injunction affecting communication to voters may even chill constitutionally-protected speech of election officials and staff (not to mention voter protections). Therefore, injunctive relief is wholly inappropriate and would create more harm than good.

f. The public interest will be substantially harmed by the imposition of a preliminary injunction pending while mail-in ballots are being returned.

Petitioners' request for a preliminary injunction will have the effect of disenfranchising certain Pennsylvania voters under the guise of "uniformity" and "separation of powers." It is repugnant to our constitutional system that any political party would seek to weaponize the courts to lessen the protection of rights of Pennsylvania voters. To be clear, it is *not* the counties that are preventing the General Assembly from exercising its power to pass uniform "notice and cure" provisions related to mail-in ballots. It is the General Assembly's own inability to pass a bill palatable to the Governor for signature. As we all know, the General Assembly has a constitutional mechanism to bypass the Governor's veto, but it has yet to exercise it. This Court should reject the attempt of the Petitioners' to bypass that constitutional mechanism at the expense of voter rights protections.

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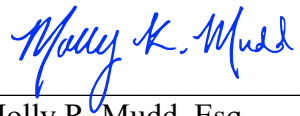
IV. CONCLUSION

This Court should deny Petitioners' request for a preliminary injunction to decrease the protections of voter rights in some counties to achieve parity with lesser-accorded rights in other counties, or for the resolution of some baseless power struggle between two branches of

government. The only potential harm in granting such a request is to the voter. Lessening voter protections for naked political gain is antithetical to our state and federal constitutions and must be rejected.

Respectfully submitted,



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