

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**RESPONDENT MONTGOMERY COUNTY BOARD OF
ELECTIONS’ PRELIMINARY OBJECTIONS TO
PETITIONERS’ PETITION FOR REVIEW IN THE NATURE OF
AN ACTION FOR A DECLARATORY JUDGMENT**

Respondent, Montgomery County Board of Elections (“Respondent”), presents the following preliminary objections to Petitioners’ Petition for Review Directed to Court’s Original Jurisdiction Seeking Declaratory and Injunctive Relief. Pa.R.A.P. 1532(b).

INTRODUCTION

In 2019, the General Assembly enacted Act 77, a comprehensive revision of the Election Code that made it easier for Pennsylvanians to participate in their democracy. One of the most significant changes to the Election Code made by Act 77 was the institution of no-excuse mail-in

voting—which at the time was an uncontroversial expansion of access to the ballot. In the months leading up to the 2020 General Election and in the years that have followed, Petitioners and their supporters have turned to Pennsylvania courts in multiple law suits challenging the voting measures enacted as a part of Act 77. *See, e.g., Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 22, 2022); *McLinko v. Degraffenreid*, 244 MD 2021 (Pa. Cmwlth. July 26, 2021); *Donald J. Trump for President, Inc. v. Sec’y of Pennsylvania*, 830 F. App’x 377 (3d Cir. 2020); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020); *Kelly v. Pennsylvania*, No. 620 MD 2020 (Pa. Cmwlth. Nov. 20, 2020); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. GD-20-011654, 2020 WL 7012634 (Pa. C.C.P. Allegheny Cty. Nov. 12, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2011-00874 (Pa. C.C.P. Phila. Cty. Nov. 9, 2020); *In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election*, No. 2020-18680 (Pa. C.C.P. Montg. Cty. Nov. 5, 2020).

In this latest challenge, Petitioners ask this Court to prohibit the Montgomery County Board of Elections, along with other county boards from allowing eligible voters to correct minor, curable defects on their mail ballot envelopes—in other words, to force them to reject all such otherwise-qualified

ballots—a request the Third Circuit denied when advanced by the Trump campaign in the 2020 election cycle. *Donald J. Trump for President, Inc.*, 830 F. App’x 377. Petitioners’ latest attempt to discard mail ballots on even the smallest of technicalities should be similarly rejected. Not only is it unsupported by any provision of the Election Code, but it also invites the Court to adopt an interpretive gloss that would deny qualified voters the franchise, ignoring the “overarching principle” guiding this Court’s analysis: that “the Election Code is to be liberally construed so as not to deprive voters of their right to elect a candidate of their choice.” *McCormick for U.S. Senate v. Chapman*, No. 286 M.D. 2022, 2022 WL 2900112, at *9, *14 (Pa. Cmwlth. June 2, 2022).¹ The Court should reject Petitioners’ attempt to disenfranchise eligible voters and uphold the county boards of elections’ express authority under the Election Code to implement common-sense procedures to protect the right to vote.

BACKGROUND

1. Under Pennsylvania law, a qualified elector may vote by mail for any reason. 25 P.S. § 3150.11.
2. To be counted, a mail-in or absentee ballot (collectively, “mail

¹ This Court’s Internal Operating Procedures allows the citation of “a single-Judge opinion . . . for its persuasive value.” 210 Pa. Code § 69.414(b).

ballot”) must be enclosed and sealed in a secrecy envelope and placed into a second outer envelope. The elector must then complete and sign the form declaration printed on the outer envelope and mail or drop off their ballot by 8 p.m. on election day. 25 P.S. § 3150.16(a).

3. During the 2020 general election, the Secretary of the Commonwealth encouraged—but did not require—county boards to provide notice and an opportunity to cure facially defective ballots.

4. Then-President Trump’s campaign brought an unsuccessful challenge in federal court, primarily arguing that allowing county boards discretion to implement cure procedures violated the United States Constitution’s Equal Protection Clause. *Donald J. Trump for President, Inc.*, 830 F. App’x 377.

5. The district court dismissed the lawsuit. In affirming that dismissal, the United States Court of Appeals recognized that “[n]ot every voter can be expected to follow [the mail-in vote] process perfectly” and that “the Election Code says nothing about what should happen if a county notices these errors before election day.” *Id.* at 384. The Third Circuit further observed that “[s]ome counties stay silent and do not count the ballots; others contact the voters and give them a chance to correct their errors.” *Id.* The Third Circuit’s opinion issued on November 27, 2020.

6. Petitioners initiated these proceedings nearly two years later, after two statewide primary elections and the 2021 municipal election. Their belated Petition for Review seeks: (1) a declaration that boards are prohibited from developing and implementing cure procedures absent explicit authorization from the General Assembly; (2) a declaration that adopting cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution; and (3) an injunction prohibiting boards from developing or implementing cure procedures.

PRELIMINARY OBJECTION 1
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (LACHES)

7. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

8. Petitioners' claims are barred by laches, an equitable doctrine that forecloses relief where (1) petitioners fail to exercise due diligence in bringing the action leading to a delay, and (2) the delay prejudices the opposing party. *Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020); *see also Stilp v. Hafer*, 718 A.2d 290, 293 (Pa. 1998). Both factors are met here.

9. *First*, Petitioners have, or easily could have, known for at least

two years that some county boards of elections provide voters with notice and an opportunity to cure mail ballot defects, yet they waited until *two months* before the general election to bring this suit. Indeed, Petitioners (as well as their candidates and supporters) have been closely scrutinizing and challenging the vote-by-mail process in Pennsylvania courts since the 2020 election cycle.

10. In fact, this action is not the first time that a third party representing Republican Party interests has sought to obtain a judgment prohibiting Pennsylvania election officials from notifying voters of, and allowing them to cure, non-material ballot defects. In 2020, the campaign of former President Donald Trump filed suit in federal court challenging the Secretary's authorization of notice-and-cure procedures for defective mail-in ballots. *Donald J. Trump for President, Inc.*, 830 F. App'x 377 (affirming dismissal). While the campaign's suit involved federal rather than state law claims, it challenged the actions of counties that "decided to reach out to [] voters to let them cure" ballots lacking secrecy envelopes. *Id.* at 384.

11. Additionally, as it pertains to Montgomery County specifically, Kathy Barnette, a then candidate for the 4th Congressional District, filed a Complaint for Declaratory and Injunctive Relief in federal court on November 3, 2020, seeking without success to have the Montgomery County Board of

Elections enjoined from implementing notice and cure procedures.²

12. The documents attached to the Petition itself also reveal that Respondents have been giving voters notice and an opportunity to cure for multiple election cycles. Pet. ¶ 65 Petitioners’ “complete failure to act with due diligence,” *Kelly*, 240 A.3d at 1256, and their decision to wait until mere months before an election to bring a claim they were well aware of for years, forecloses their last-minute request for disruptive relief.

13. *Second*, Respondents have been prejudiced by Petitioners’ delay. “Prejudice may be found where there has been some change in the condition or relations of the parties which occurs during the period the complainant failed to act.” *Stilp*, 718 A.2d at 294. Since 2020, Respondents have expended substantial resources and efforts to administer Pennsylvania’s vote-by-mail infrastructure, including the notice and cure procedures in place. Respondents have placed considerable resources into the development and implementation of a notice and cure procedure to allow for the correction of defects.

14. Because Petitioners could have brought this action at any time over the last two years but instead decided to delay until shortly before the

² Petitioner voluntarily dismissed this action on November 11, 2020 via a Notice of Dismissal filed by counsel, Thomas E. Breth.

2022 general election, the action should be dismissed with prejudice under the equitable doctrine of laches.

PRELIMINARY OBJECTION 2
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(5)
LACK OF CAPACITY TO SUE (STANDING)

15. Respondents incorporate the foregoing paragraphs as if set forth fully herein.

16. Even assuming, for the sake of argument only, that this action is not barred by laches, Petitioners nevertheless lack standing to bring this suit because they are not injured by Montgomery County's implementation of notice- and-cure procedures.

17. To have standing, petitioners must show that they have been "aggrieved," meaning that they have a "substantial, direct and immediate interest in the outcome of the litigation." See *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). A substantial interest is one that is distinct from and exceeds "the common interest of all citizens in procuring obedience to the law;" a direct interest is one where the challenged conduct caused petitioner's harm; and an immediate interest is one where the harm alleged is concrete, not speculative. *Id.* (quoting *Indep. State Store Union*, 432 A.2d 1375 at 1379–80 (Pa. 1981)); see also *Ams. for Fair Treatment, Inc. v. Phila. Fed'n of Tchrs.*, 150 A.3d 528, 533 (Pa. Cmwlth. 2016). The cornerstone of standing in

Pennsylvania is therefore that the party “must be negatively impacted in some real and direct fashion.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). If a party is not adversely affected by what it challenges, it cannot be aggrieved and therefore “has no standing.” *Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (2007). “In particular, it is not sufficient for the person claiming to be ‘aggrieved’ to assert the common interest of all citizens in procuring obedience to the law.” *Pittsburgh Palisades Park, LLC*, 888 A.2d at 660 (citing to *In re Hickons*, 821 A.2d 1238 at 1243).

18. Petitioners fail to identify any concrete and distinct harm they have suffered as a result of Respondent implementing notice-and-cure procedures. *In re Hickson*, 821 A.2d at 1243.

19. Petitioners’ allegations instead center on a mischaracterization of vote cancellation and dilution. That county boards may “employ entirely different election procedures and voting systems within a single state” does not, by itself, impose any injury so long as those procedures do not discriminate against certain groups of voters or infringe on an individual’s fundamental right to vote. *Donald J. Trump for President, Inc.*, 830 F. App’x at 388; *see also Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 383 (W.D. Pa. 2020). Here, Respondent’s notice and cure procedures

do not lead to voter disenfranchisement. Quite the opposite—voters that would otherwise be prevented from casting an effective mail ballot will now have an opportunity to ensure their ballots are counted. Meanwhile, Petitioners’ requested relief would result in *more* disenfranchisement, not less.

20. Finally, any injury to the Petitioners caused by a lack of clarity as to the notice-and-cure procedures in each county can be redressed by ensuring access to such information. Preventing votes from being counted for the sake of clarity is neither proportional nor reasonably related to the Petitioners purported informational harm.

PRELIMINARY OBJECTION 3
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
LACK OF CAPACITY TO SUE (STANDING)

21. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

22. Petitioners additionally lack standing to bring a challenge under the Elections Clause of the United States Constitution. The Elections Clause gives authority over the “Times, Places and Manner of holding Elections for Senators and Representatives” to the state legislatures U.S. Const. Art. I, § 4, cl. 1. Petitioners argue that “neither Boards nor any other organ or instrumentality of the State government may regulate” the manner in which elections are run, including by creating notice-and-cure procedures. Pet. ¶¶

95, 96. Therefore, Petitioners contend, Montgomery County and other county boards are violating the U.S. Constitution by creating notice-and-cure procedures in Pennsylvania. *Id.*; *see also id.* ¶ 9.

23. Yet, at no point in their Petition do Petitioners state what concrete and distinct harm they suffered as a result of Respondent, not the General Assembly, implementing notice-and-cure policies. *In re Hickson*, 821 A.2d at 1243. None of the Petitioners are members of the General Assembly (or any government branch for that matter), nor are they authorized to sue on its behalf. Any hypothetical harm Petitioners suffer is limited to the same “common interest of all citizens” in ensuring that the mandates of the U.S. Constitution are being followed, which is insufficient to establish standing. *Id.*

PRELIMINARY OBJECTION 4
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT I)

24. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

25. While the Election Code may not require county boards to implement notice and cure procedures, *see Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 373 (Pa. 2020), it does not prohibit county boards from providing voters whose mail ballots are defective with the opportunity to vindicate their right to vote. The broad authority vested by the General

Assembly in county boards instead allows individual boards to determine whether to take additional measures to ensure that voters in their counties can remedy correctible errors.

26. The Pennsylvania Supreme Court has consistently held 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.” *Boockvar*, 238 A.3d at 356; *see also Perles v. Hoffman*, 213 A.2d 781,784 (Pa. 1965) (“The Court has held, we repeat, that the [Pennsylvania] Election Code must be *liberally* construed...”) (emphasis in original).

27. The General Assembly determined that “county boards of elections, within their respective counties, shall exercise, in the manner provided by [the Election Code], all powers granted to them by this [Code], and shall perform all the duties imposed upon them by this [Code], which shall include ... [t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers, and electors,” 25 P.S. § 2642(f), and “[t]o investigate election frauds, irregularities and violations of [the Election Code],” *id.* § 2642(i).

28. Determining the scope of the county boards’ authority to promulgate rules, regulations, and instructions requires “listen[ing]

attentively to what the statute says, but also to what it does not say.” *In re Canvassing Observation*, 241 A.3d 339, 349 (Pa. 2020). Consistent with that principle, the Pennsylvania Supreme Court has held that a command in the Elections Code that does not specify relevant parameters may “reflect the legislature’s deliberate choice to leave such matters to the informed discretion of county boards of elections.” *Id.* at 350.

29. Petitioners’ argument that the General Assembly’s decision not to impose a cure procedure means that no county board may adopt such a procedure fails. While county boards may not adopt any such procedures that are “inconsistent with law,” where the law is silent, the board may adopt procedures to promote the purpose of the Election Code: “freedom of choice, a fair election and an honest election return.” *Boockvar*, 238 A.3d 345 at 356.

30. Petitioners do not allege that any specific notice-and-cure procedure is inconsistent with the Election Code.

31. The identified procedures allegedly utilized by the Montgomery County Board of Elections include various combinations of: (1) notifying the voter that there are problems with their ballot; (2) allowing voters to cure and resubmit their ballots; (3) allowing voters to cancel and replace their ballots; (4) notifying voters that their ballots have been cancelled by the board; and (5) allowing voters to cast a provisional ballot.

32. Petitioners have not identified any provision in the Election Code that prevents Montgomery County or any county board from contacting a voter to inform them of problems with their ballot. To the contrary, boards are empowered to “make and issue ... instructions to voters,” 25 P.S. § 2642(f), (i); these powers necessarily must include the power to contact voters when deemed necessary.

33. Nor have Petitioners identified any provision in the Election Code that prevents Montgomery County or any county board from canceling a mail ballot, or from allowing a voter to cancel a mail ballot that does not comply with the requirements of the Election Code.

34. Finally, Petitioners have not identified any provision in the Election Code that prevents Montgomery County or any county board from allowing a voter whose mail ballot does not comply with the requirements of the Election Code to cast a provisional ballot.

PRELIMINARY OBJECTION 5
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT II

35. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

36. The General Assembly, through the Election Code, has given county boards of elections responsibility for overseeing elections in their

respective counties. *See* 25 P.S. § 2641(a).

37. Montgomery County’s development of procedures for allowing voters to cure or cancel mail-in ballots is not regulating the “Manner of holding Elections.” Instead, the Board exercising discretion granted by the Legislature to resolve issues not directly addressed by statute. The Elections Clause does not deprive the Legislature of the power to delegate such authority to county boards.

PRELIMINARY OBJECTION 6
PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)
DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT III)

38. Respondent incorporates the foregoing paragraphs as if set forth fully herein.

39. No injunction should issue in this matter because notice-and-cure procedures adopted by the Montgomery County Board of Elections are fully consistent with the Election Code. The law does not prohibit a county board from taking action to prevent disenfranchisement when it receives a mail ballot that cannot be counted due to observable defects. Instead, it permits county boards to develop procedures to contact affected voters and provide them with the opportunity to have their votes counted.

40. Notifying voters that their ballots are not compliant with the Election Code and will not be counted, and providing voters with the

opportunity to vindicate their right to vote, does not cause any cognizable harm to Petitioners—or anyone else—that warrants an injunction.

41. Enjoining the use of notice-and-cure provisions would harm voters in Montgomery County and across the Commonwealth whose ballots will be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted.

Respectfully submitted,
MONTGOMERY COUNTY
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