



**TABLE OF CONTENTS**

**INTRODUCTION**..... 1

**BACKGROUND** ..... 2

**PROCEDURAL HISTORY**..... 3

**QUESTIONS PRESENTED** ..... 5

**STANDARD OF REVIEW** ..... 6

**ARGUMENT**..... 6

    I.    PETITIONERS LACK STANDING (PRELIMINARY OBJECTIONS 1 AND 2). ..... 6

    II.   PETITIONERS’ CLAIMS FAIL ON THE MERITS AS A MATTER OF LAW (PRELIMINARY  
          OBJECTIONS 3, 4, 5, AND 6)..... 9

        a.  Count I fails to state a claim because the Election Code does not proscribe counties’  
            notice-and-cure procedures (Preliminary Objection 3)..... 10

        b.  Count II fails to state a claim because counties’ use of notice-and-cure procedures do  
            not violate election uniformity or equality provisions of the Pennsylvania Constitution  
            and Election Code (Preliminary Objection 4)..... 17

        c.  Count III fails to state a claim because the Elections Clause does not deprive the  
            General Assembly of the power to delegate authority to county boards of elections to  
            develop and implement notice-and-cure procedures (Preliminary Objection 5). ..... 18

        d.  Count IV fails to state a claim because counties’ notice-and-cure procedures are  
            consistent with the Election Code, do not harm Petitioners (or anyone else), and  
            enjoining such procedures would harm voters (Preliminary Objection 6). ..... 19

**CONCLUSION** ..... 20

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ams. for Fair Treatment, Inc. v. Phila. Fed’n of Tchrs.</i> , 150 A.3d 528 (Pa. Cmwlth. 2016) .....	7
<i>Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015).....	18
<i>Ball v. Chapman</i> , --- A.3d ---, 2023 WL 2031284 (Pa. Feb. 8, 2023) .....	7, 8, 11
<i>Bognet v. Boockvar</i> , No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 22, 2020).....	3
<i>Bognet v. Sec’y Commonwealth of Pa.</i> , 980 F.3d 336 (3d Cir. 2020).....	9
<i>In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election</i> , No. 2011-00874 (Pa. C.C.P. Phila. Cty. Nov. 9, 2020) .....	3
<i>In re: Canvass of Absentee and Mail-In Ballots of Nov. 3, 2020 Gen. Election</i> , No. 2020-18680 (Pa. C.C.P. Montg. Cnty. Nov. 5, 2020).....	3
<i>In re Canvassing Observation</i> , 241 A.3d 339 (Pa. 2020) .....	10
<i>Chevron USA, Inc. v. Echazabal</i> , 536 U.S. 73 (2002).....	12
<i>Commonwealth v. McClelland</i> , 233 A.3d 717 (Pa. 2020).....	14
<i>Corman v. Torres</i> , 287 F. Supp. 3d 558 (M.D. Pa. 2018).....	18
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020).....	8, 10
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 502 F. Supp. 3d 899 (M.D. Pa. 2020).....	3
<i>Donald J. Trump for President, Inc. v. Sec’y of Pa.</i> , 830 F. App’x 377 (3d Cir. 2020) .....	3, 8, 10, 19

<i>Giffin v. Chronister</i> , 616 A.2d 1070 (Pa. Cmwlt. 1992) .....	6
<i>In re Hickson</i> , 821 A.2d 1238 (Pa. 2003) .....	6, 7
<i>Kelly v. Pennsylvania</i> , 620 MD 2020 (Pa. Cmwlt. Nov. 20, 2020) .....	3
<i>Lance v. Coffman</i> , 549 U.S. 437 (2007) .....	9
<i>Linda Coal &amp; Supply Co. v. Tasa Coal Co.</i> , 204 A.2d 451 (Pa. 1964) .....	6
<i>Markham v. Wolf</i> , 136 A.3d 134 (Pa. 2016) .....	9
<i>Marx v. Gen. Revenue Corp.</i> , 568 U.S. 371 (2013) .....	12
<i>McLinko v. Degraffenreid</i> , 244 MD 2021 (Pa. Cmwlt. July 26, 2021) .....	3
<i>Miketic v. Baron</i> , 675 A.2d 324 (Pa. Super. 1996) .....	6
<i>Mixon v. Commonwealth</i> , 759 A.2d 442 (Pa. Cmwlt. 2000) .....	7
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020) .....	<i>passim</i>
<i>Pa. Pub. Util. Comm'n v. Zanella Transit, Inc.</i> , 417 A.2d 860 (Pa. Cmwlt. 1980) .....	6
<i>Pa. Tpk. Comm'n v. Hafer</i> , 597 A.2d 754 (Pa. Cmwlt. 1991) .....	6
<i>Perles v. Hoffman</i> , 213 A.2d 781 (Pa. 1965) .....	11
<i>Pittsburgh Palisades Park, LLC v. Commonwealth</i> , 888 A.2d 655 (Pa. 2005) .....	7
<i>Pub. Int. Legal Found. v. Boockvar</i> , 495 F. Supp. 3d 354 (M.D. Pa. 2020) .....	19

<i>Republican Nat'l Comm. v. Chapman</i> , 284 A.3d 207 (Pa. 2022) .....	4
<i>Soc'y Hill Civic Ass'n v. Pa. Gaming Control Bd.</i> , 928 A.2d 175 (Pa. 2007) .....	7
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914) .....	17
<i>Zicarelli v. Allegheny Cnty. Bd. of Elections</i> , No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020) .....	3
<i>Zicarelli v. Allegheny Cnty. Bd. of Elections</i> , No. GD-20-011654, 2020 WL 7012634 (Pa. C.C.P. Allegheny Cty. Nov. 18, 2020) .....	3
<b>Statutes</b>	
25 P.S. § 2602(q.1) .....	14
25 P.S. § 2641(a) .....	9, 18
25 P.S. § 2642 .....	9, 10, 17, 18
25 P.S. § 2642(f) .....	10, 11, 12
25 P.S. § 3146.2c(c) .....	15
25 P.S. § 3146.6(b)(2) .....	16
25 P.S. § 3146.8(a) .....	13, 14
25 P.S. § 3146.8(g) .....	13
25 P.S. § 3146.8(g)(1.1) .....	14
25 P.S. § 3146.8(g)(3) .....	15
25 P.S. § 3146.8(h) .....	12
25 P.S. § 3150.12b(a) .....	12
25 P.S. § 3150.16(b)(1) .....	13
25 P.S. § 3150.16(b)(2) .....	16
52 U.S.C. § 10101(e) .....	16
52 U.S.C. § 21082(a) .....	17

25 P.S. 3146.2c(c).....15

**Other Authorities**

Pa. Const. art I, § 5.....17

Pa. Const. art. VII, § 6 .....17

Pa.R.A.P. 1532.....4

Pa.R.Civ.P. 1028(a)(4).....5

Pa.R.Civ.P. 1028(a)(5).....5

U.S. Const. art. I, § 4, cl. 1.....9

RETRIEVED FROM DEMOCRACYDOCKET.COM

## INTRODUCTION

Pennsylvania voters have the right to vote by mail for any reason. A mail-in or absentee ballot (collectively, “mail ballot”) must be sealed in a secrecy envelope and placed into a second envelope; the elector must then complete the form declaration printed on the outer envelope and mail or drop off their ballot by 8 p.m. on election day. Voters (especially older voters) sometimes make mistakes when returning their ballots, such as forgetting to sign and date the declaration on the outer envelope or providing their birthdate instead of the date of voting. Consistent with the Commonwealth’s longstanding policy of safeguarding the franchise, many county boards of elections inform voters if they have made such a mistake and provide voters with the opportunity to ensure that their votes will be counted.

Petitioners ask this Court to prohibit county election officials from allowing eligible voters to remedy curable facial defects on their mail ballot envelopes, which would force county boards to reject ballots submitted by qualified voters because of observable technical defects that could easily be corrected. The Court should reject Petitioners’ attempt to disenfranchise eligible voters and uphold the county boards of elections’ authority under the Election Code to implement common-sense procedures to protect the right to vote.

The Amended Petition for Review should be dismissed because Petitioners lack standing and their claims fail as a matter of law. Petitioners’ purported desire for compliance with the Election Code, the Pennsylvania Constitution, and the U.S. Constitution constitute generalized grievances, which are insufficient to confer standing. Petitioners suffer no cognizable injury when county boards allow qualified voters to ensure their votes are counted. On the merits, there is no violation of any law. Neither the Election Code nor the Pennsylvania Constitution prohibits counties from developing their own notice-and-cure procedures; rather, counties are lawfully

granted the authority to do so by the General Assembly. There is no basis for declaring such procedures unlawful or enjoining their implementation, and doing so would only harm voters.

## BACKGROUND

In 2019, a Republican-led majority of 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 expansion of access to the ballot through the institution of no-excuse mail-in voting. As part of Act 77, the Election Code affirmed preexisting statutory requirements for submitting and counting mail ballots but did not address what county boards should do when confronted with a ballot envelope with observable errors or omissions.

In 2020, the Pennsylvania Democratic Party sought an injunction that would have required all county boards to provide notice and an opportunity to cure to voters whose mail ballots bore certain facial defects. *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 372 (Pa. 2020), *cert. denied sub nom. Republican Party of Pa. v. Degraffenreid*, 209 L. Ed. 2d 164, 141 S. Ct. 732 (2021). The Supreme Court of Pennsylvania concluded that boards were “not *required* to implement” cure procedures because neither the Pennsylvania Constitution nor the Election Code mandated them, *id.* at 374 (emphasis added), but it did not otherwise address county boards’ authority to proactively implement cure procedures. Consistent with the Supreme Court’s narrow ruling, the Secretary encouraged county boards to provide notice and an opportunity to cure facially defective mail ballots in the 2020 general election. Many boards did so.

After the 2020 elections revealed that Democrats relied on mail ballots at significantly higher rates than Republicans, then-President Trump’s campaign brought (among other challenges) an unsuccessful challenge against notice-and-cure procedures in federal court,



primarily arguing that allowing county boards discretion to implement cure procedures violated the U.S. Constitution's Equal Protection Clause. *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377 (3d Cir. 2020) (“*DJT I*”).<sup>1</sup> The district court dismissed the lawsuit. *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020). In affirming that dismissal, the Third Circuit recognized that “[n]ot every voter can be expected to follow [the mail vote] process perfectly” and that “the Election Code says nothing about what should happen if a county notices these errors before election day.” *DJT II*, 830 F. App'x at 384. The Third Circuit 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.*, and held that this “variation from county to county” did not offend equal protection principles. *Id.* at 388.

### PROCEDURAL HISTORY

On September 1, 2022, Petitioners filed an initial three-count Petition for Review seeking declaratory and injunctive relief to prevent county boards from developing or implementing notice-and-cure procedures. The Petition was opposed by the Secretary of the Commonwealth, numerous counties, and Intervenor-Respondents, including DSCC and DCCC, who subsequently filed Preliminary Objections.

---

<sup>1</sup> Petitioners and their supporters have turned to Pennsylvania courts in one lawsuit after another seeking to use the judiciary to undermine voting measures that Petitioners once supported. *See, e.g., McLinko v. Degraffenreid*, 244 MD 2021 (Pa. Cmwlth. July 26, 2021); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-cv-1831-NR (W.D. Pa. Nov. 25, 2020); *Kelly v. Pennsylvania*, 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. 18, 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. Cnty. Nov. 5, 2020); *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 22, 2020).

On September 7, Petitioners moved for special relief under Pa.R.A.P. 1532, seeking a preliminary injunction of the challenged notice-and-cure procedures until resolution of this litigation. On September 29, the Court denied that application, finding that Petitioners had “not proven that they are likely to succeed on the merits or that their right to relief is clear.” Mem. Op. at 9. On September 30, Petitioners appealed the Court’s decision to the Supreme Court of Pennsylvania, which, after expedited briefing, affirmed this Court’s order on October 21. *Republican Nat’l Comm. v. Chapman*, 284 A.3d 207 (Pa. 2022). Consistent with these rulings, many counties provided voters with notice and an opportunity to cure defective ballots during the 2022 general election.

Between October 28 and November 16, Respondents filed additional pleadings with this Court in opposition to Petitioners’ Petition for Review, and Petitioners filed responses, including to DSCC and DCCC’s Preliminary Objections. In accordance with the Court’s briefing schedule, DSCC and DCCC filed a Brief in Support of Preliminary Objections on January 6, 2023, and Petitioners filed an omnibus Brief in Opposition to Preliminary Objections on February 7. In the meantime, on January 30, Petitioners separately sought leave to file an amended petition. This Court subsequently granted that application, struck the previously filed Preliminary Objections, and ordered this new round of Preliminary Objections briefing based on the Amended Petition.

The Amended Petition largely tracks the Petitioners’ original petition with one addition: it adds an additional count to the initial petition. As a result, Petitioners now seek: a declaration that county boards are prohibited from developing and implementing notice-and-cure procedures absent explicit authorization from the General Assembly (Count I); a declaration that allowing county boards to implement their own notice-and-cure procedures violates election uniformity and equality provisions of the Pennsylvania Constitution and Election Code (Count II—the sole new

count); a declaration that adopting notice-and-cure procedures for federal elections without express authority from the General Assembly violates the Elections Clause of the U.S. Constitution (Count III); and an injunction prohibiting county boards from developing or implementing notice-and-cure procedures (Count IV).

### **QUESTIONS PRESENTED**

1. Should the Amended Petition be dismissed in its entirety for lack of standing, pursuant to Pa.R.Civ.P. 1028(a)(5), because Petitioners are not injured by the challenged notice-and-cure procedures or any alleged violation of the Elections Clause? (Preliminary Objections 1 and 2.)

2. Should the Amended Petition be dismissed for failure to state a claim, pursuant to Pa.R.Civ.P. 1028(a)(4), because the challenged notice-and-cure procedures are consistent with law? (Preliminary Objections 3, 4, 5, and 6.)

Intervenor-Respondents respectfully submit that each of the questions presented should be answered in the affirmative.

## STANDARD OF REVIEW

In reviewing preliminary objections in a case filed within this Court's original jurisdiction, the Court must "consider as true all well-pleaded facts which are material and relevant." *Pa. Tpk. Comm'n v. Hafer*, 597 A.2d 754, 756 (Pa. Cmwlth. 1991). But the Court may not accept legal conclusions, arguments, opinions, or unwarranted inferences. *Giffin v. Chronister*, 616 A.2d 1070, 1072 (Pa. Cmwlth. 1992). Petitioners cannot rely on factually unsupported conclusions, *Miketic v. Baron*, 675 A.2d 324, 331 (Pa. Super. 1996); *Pa. Pub. Util. Comm'n v. Zanella Transit, Inc.*, 417 A.2d 860, 861 (Pa. Cmwlth. 1980), and this Court may not supply facts that Petitioners have omitted from their pleading, see *Linda Coal & Supply Co. v. Tasa Coal Co.*, 204 A.2d 451, 454 (Pa. 1964).

## ARGUMENT

The Amended Petition fails at the outset because Petitioners suffer no cognizable injury when county boards of elections allow qualified voters to ensure that their votes are counted. Petitioners assert only generalized interests common to all voters; these interests are not sufficient to confer standing. Separately, the Petition also fails on the merits because the adoption of notice-and-cure procedures by county boards is fully consistent with the Election Code, the Pennsylvania Constitution, and the U.S. Constitution.

### **I. Petitioners lack standing (Preliminary Objections 1 and 2).**

Petitioners lack standing to bring this suit because they are not injured by county boards' implementation of notice-and-cure procedures or any alleged violation of the Elections Clause. To demonstrate 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." *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 v. Pa. Liquor Control Bd.*, 432 A.2d 1375, 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 lacks standing. *Soc’y Hill Civic Ass’n v. Pa. Gaming Control Bd.*, 928 A.2d 175, 184 (Pa. 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*, 888 A.2d at 660 (citing to *In re Hickson*, 821 A.2d 1238 at 1243); *see also Mixon v. Commonwealth*, 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (“it is hornbook law that a person whose interest is common to that of the public generally . . . lacks standing to attack the validity” of state action).

Petitioners fail to identify any concrete and distinct harm they have suffered as a result of some county boards implementing notice-and-cure procedures, which is fatal to their standing. The Pennsylvania Supreme Court recently rejected the argument that voters can establish standing based a theory “that the ballots they believe should not be counted would dilute their own.” *Ball v. Chapman*, --- A.3d ---, 2023 WL 2031284, at \*11 (Pa. Feb. 8, 2023). Nor can Petitioners rely on generalized interests such as the desire to have ballots counted accurately in accordance with the law—an interest shared by all citizens. *See In re Hickson*, 821 A.2d at 1243; *see also Ball*, 2023 WL 2031284, at \*10 (recognizing that “general grievance[s] about the correctness of governmental conduct” are insufficient for standing) (citations omitted). Petitioners focus on

differences in voting practices across counties, but courts have repeatedly held that county boards may “employ entirely different election procedures and voting systems within a single state” without imposing *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. *DJT II*, 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) (“*DJT I*”). Indeed, as discussed further below, the General Assembly has structured the Election Code to confer such discretion upon the sixty-seven county boards.

The Amended Petition also lacks any of the “particular facts” that the Pennsylvania Supreme Court determined were sufficient to confer standing on Republican organizations in the *Ball* litigation. Specifically, in this case: (1) Petitioners do not challenge guidance from the Secretary of the Commonwealth instructing county boards to take any particular action; (2) there have not been conflicting Commonwealth Court or federal judicial decisions with respect to whether counties may choose to implement notice-and-cure procedures; and (3) recognizing that county boards may allow voters to cure ballots will not waste organizational resources. *See Ball*, 2023 WL 2031284, at \*10-11.<sup>2</sup> Petitioners also do not argue that county boards discriminate against any group of voters or prevent any voter from voting when they allow voters to cure non-material defects. Nor could they. The county boards’ notice-and-cure opportunities *prevent* disenfranchisement and help eligible Pennsylvanians vote. By contrast, Petitioners’ requested relief would mean that fewer eligible voters would have their votes counted.<sup>3</sup>

---

<sup>2</sup> DSCC and DCCC address the standing analysis in *Ball v. Chapman* in more detail in the supplemental brief requested by this Court and submitted on February 27, 2023.

<sup>3</sup> Any alleged injury to 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 Petitioners’ purported informational harm.

Petitioners also lack standing to bring their challenge under the Elections Clause of the U.S. Constitution. The Elections Clause authorizes state legislatures and Congress to regulate the “Times, Places and Manner of holding Elections for Senators and Representatives.” U.S. Const. art. I, § 4, cl. 1. None of the Petitioners are members of the General Assembly (or any branch of government), nor are they authorized to sue on its behalf. And courts have repeatedly held that allegations that “the Elections Clause . . . has not been followed” involve “precisely the kind of undifferentiated, generalized grievance about the conduct of government that” does not present a cognizable case or controversy. *Lance v. Coffman*, 549 U.S. 437, 442 (2007); *see also Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 350 (3d Cir. 2020), *cert. granted, judgment vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (“Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly’s rights [under the Elections Clause].”). The Court should reach the same conclusion under Pennsylvania law, which similarly holds that litigants lack standing to assert generalized grievances. *See Markham v. Wolf*, 136 A.3d 134, 143–45 (Pa. 2016).

**II. Petitioners’ claims fail on the merits as a matter of law (Preliminary Objections 3, 4, 5, and 6).**

The Election Code gives county boards broad authority to administer elections. It provides that “[t]here shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a). “[C]ounty 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].” *Id.* § 2642. In particular, the Election Code requires boards to “inspect systematically and

thoroughly the conduct of primaries and elections,” *id.* § 2642(g), and it empowers boards to “instruct election officers in their duties” and “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of . . . elections officers and electors,” *id.* § 2642(f), (g). Consistent with this authority, county boards may adopt procedures within their respective counties that differ from procedures in other counties unless the Code dictates otherwise. *See, e.g., DJT I*, 493 F. Supp. 3d at 386; *DJT II*, 830 F. App’x at 388. As this Court recognized in denying Petitioners’ request for interim relief, “[t]he Election Code does not specifically prohibit County Boards from implementing notice and cure procedures” and “[t]he 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 to vote.” Mem. Op. at 9–10.

**a. Count I fails to state a claim because the Election Code does not proscribe counties’ notice-and-cure procedures (Preliminary Objection 3).**

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) (quoting *Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017)). Consistent with that principle, the Supreme Court of Pennsylvania has held that a command in the Election 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. Although the Election Code does not *require* county boards to implement notice and cure procedures, *see Boockvar*, 238 A.3d at 373, it does not prohibit them from doing so, either. The broad authority vested by the General Assembly in county boards allows individual boards to determine whether to take additional measures to ensure that voters in their counties can remedy correctible errors. *See DJT II*, 830 F.



App'x at 384 (“[T]he Election Code says nothing about what should happen if a county notices [defects on mail ballots] before election day.”).

The Supreme Court of Pennsylvania has consistently recognized 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 Ball*, 2023 WL 2031284, at \*16 n.156 (opinion of Justice Wecht, Chief Justice Todd, and Justice Donahue) (discussing Pennsylvania Supreme Court “jurisprudence that ambiguities are resolved in a way that will enfranchise, rather than disenfranchise, the electors of this Commonwealth”); *Perles v. Hoffman*, 213 A.2d 781, 784 (Pa. 1965) (“This Court has held, we repeat, that the [Pennsylvania] Election Code must be *liberally* construed...” (emphasis in original)). 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). The plain meaning of this conferral of authority is that boards have broad power to 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 at 356 (quotations and citations omitted).

Petitioners have not identified any provision in the Election Code that expressly prohibits county boards from providing notice and an opportunity to cure, and no such provision exists. Petitioners instead argue that mail ballots cannot be cured absent express authorization, inferring from the General Assembly’s silence that such authorization was deliberately withheld. But this argument has it backwards: because the General Assembly has not provided guidance on how

county boards should address ballots with facial defects, the boards have the authority under the Election Code to implement appropriate procedures “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). Petitioners’ arguments to the contrary are meritless.

*First*, Petitioners argue that the General Assembly allows a cure procedure for only one kind of defect—a voter’s initial lack of proof of identity—and that the express allowance of cure in that instance implies that no other cure procedures are available. *See* Am. Pet. ¶ 15. But the theory is strained at the outset because the General Assembly never defined a voter’s ability to show proof of identity as a “cure”—it is only Petitioners who characterize it that way. Moreover, the *expressio unius* canon the argument relies on “does not apply ‘unless it is fair to suppose that [the General Assembly] considered the unnamed possibility and meant to say no to it.’” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quoting *Barnhart v. Peabody Coal Co.*, 553 U.S. 149, 168 (2003)). The canon thus “depends on identifying a series of two or more terms or things that should be understood to go hand in hand,” at least one of which the General Assembly omitted from the statute. *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73, 81 (2002). Here, however, there is no “established series” of cure procedures, only some of which the General Assembly addressed. *Id.* And the procedure Petitioners identify applies to an entirely different stage of the voting process from the cure processes at issue here: *voter application* defects rather than *ballot* defects. When the county board receives an application for a mail ballot, it must “determine the qualifications of the applicant by verifying the proof of identification.” 25 P.S. § 3150.12b(a). If proof of identification cannot be verified upon *application*, the Code establishes specific requirements as to when and how the putative elector must confirm that they are in fact eligible to vote. *See id.* § 3146.8(h). But the Code is completely silent on what should be done when a county board

receives a *ballot* that clearly cannot be counted. In the absence of a contrary command in the text, this Court should not presume that the General Assembly intended to prohibit county boards from allowing voters to correct errors with their mail ballots so that their votes may be counted.

*Second*, Petitioners argue that the Election Code states that boards “shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections,” *id.* § 3146.8(a), and that it is therefore inconsistent with law for boards to do anything else. *See* Am. Pet. § 134(a). But other provisions of the Election Code show that this provision cannot be read to literally require boards to blindly place all mail ballots in a locked container until the canvass begins. In particular, 25 P.S. § 3150.16(b)(1) provides that “[a]ny elector who receives *and votes* a mail-in ballot . . . shall not be eligible to vote at a polling place on election day” and that “[t]he district register at each polling place shall clearly identify” such electors. *Id.* § 3150.16(b)(1) (emphasis added). This mandate can only be accomplished if county boards review incoming mail ballots to identify electors who voted by mail prior to election day, before placing such ballots in sealed or locked containers as § 3146.8(a) requires. Boards can identify curable defects as part of that same initial review process. Similarly, 25 P.S. § 3146.8(g) directs boards to pre-canvass mail ballots before the canvass begins. Pre-canvassing requires access to the mail ballots and would be impossible if the ballots could not be accessed until the canvass itself. The provision cited by Petitioners is therefore properly read as a direction requiring boards to securely maintain ballots, including by locking them up when they are not being used—not to literally keep them in a container from the instant they are received until the moment the canvass begins.

Moreover, this provision applies only to *valid* mail ballots—those sealed in envelopes “as provided under” the relevant article of the Election Code:

The county boards of election, upon receipt of official absentee ballots in sealed official absentee ballot envelopes *as provided under this article* and mail-in ballots as in sealed official mail-in ballot envelopes *as provided under Article XIII-D*, shall safely keep the ballots in sealed or locked containers until they are to be canvassed by the county board of elections.

*Id.* § 3146.8(a) (emphasis added). The phrase “as provided under” limits this requirement to ballots that are (or appear to be) properly completed, because ballots with facial defects are not “official [] ballots in sealed official [] ballot envelopes as provided under” the Code. *Id.* At a minimum, the phrase is ambiguous. *See Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) (because “‘provided’ . . . is a conjunction meaning ‘on the condition [of],’” the phrase “as provided under” “could reasonably mean [either] as defined by law” or, alternatively, “‘contingent on’ or ‘subject to’ law”). County boards therefore may adopt procedures for ballots that clearly do not comply with the Election Code (for example, because the declaration has omissions) and thus are not sealed “as provided under” the Election Code, rather than immediately locking away such ballots.

*Third*, Petitioners claim that notice-and-cure procedures are unlawful “pre-canvassing” activities, *see* Am. Pet. ¶¶ 134(b), (c), but this argument does not square with the Election Code. The Election Code requires counties to “meet no earlier than seven o’clock A.M. on election day to pre-canvass all ballots received prior to the meeting.” 25 P.S. § 3146.8(g)(1.1). But “pre-canvass” is defined as “the inspection *and opening* of all envelopes containing official absentee ballots or mail-in ballots.” *Id.* § 2602(q.1) (emphasis added). No board is opening any ballot envelope as part of their cure procedure; therefore, no board is doing anything before Election Day that meets the definition of “pre-canvass.”

*Fourth*, Petitioners allege that providing political parties or other organizations with information about voters with curable ballots is an unlawful disclosure of “the results of any

portion of any pre-canvass meeting prior to the close of the polls,” violates voters’ constitutional right to informational privacy, or is an impermissible delegation of “the duty to notify voters that their absentee or mail-in ballot is defective.” Am. Pet. ¶ 134(c), (d), (e). Even if these arguments were viable—which they are not—they would not support Petitioners’ requested relief prohibiting county boards from notifying voters about cure opportunities. But none of these arguments can be sustained.

As a threshold matter, inspecting an unopened ballot is not “pre-canvassing.” Nor can Petitioners’ contention that providing political parties or similar organizations with information about voters before the close of the polls survive scrutiny, because Pennsylvania law affirmatively *requires* that county boards provide information about mail voters to candidates, campaigns, and political parties *regardless of whether the county has implemented notice-and-cure procedures*. See 25 P.S. 3146.2c(c), *id.* § 3146.8(g)(3).<sup>4</sup> Finally, county boards do not have a legal “duty to notify voters that their absentee or mail-in ballot is defective,” thus the notice and cure process cannot be an impermissible delegation of that duty. In any event, Petitioners do not allege that county boards rely on “representatives of political parties, candidates, and/or special interest groups” to notify voters of defective ballots—instead, they allege the opposite, that the counties are notifying the voters of the defects themselves. See Am. Pet. ¶ 94 (Bucks County sends postcards to voters); *id.* ¶ 97 (Montgomery County emails voters); *id.* ¶ 98 (Philadelphia Board

---

<sup>4</sup> The Election Code requires county boards to publicly post “a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued,” and to “furnish a copy of such list to any candidate or party county chairman” on written request. 25 P.S. § 3146.2c(c). The board later must “provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed” to observers, including authorized representatives of candidates and political parties, 25 P.S. § 3146.8(g)(3). The Amended Petition does not allege that any county board provides “addresses, phone numbers, and/or email addresses of voters” to any third party, so this Court need not consider alleged privacy concerns regarding that information.

instructs voters on how to cure ballots); *id.* ¶ 101 (Northampton Board agreed to notify voters who return ballots without a secrecy envelope); *id.* ¶ 102 (Lehigh County agreed to explore the legality of notifying voters that they may have submitted a ballot with a secrecy envelope); *id.* ¶ 107 (Union County provides list to Union County Department of Elections’ staff); *id.* ¶ 108 (Luzerne County has a procedure similar to Union County).

*Fifth*, Petitioners claim that allowing voters whose mail ballots cannot be counted to cast a provisional ballot is either “[p]ermitting voters to cast a second vote” or requiring voters to perjure themselves by asserting that the provisional ballot is the only ballot they have cast. Am. Pet. ¶ 134(f), (g). But voting a provisional ballot is not “cast[ing] a second vote,” and is expressly authorized by Pennsylvania law if the county board has determined that the voter’s mail ballot is void. The Election Code states that “[a]n elector who requests a mail-in ballot and who is not shown on the district register as having voted may vote by provisional ballot.” 25 P.S. § 3150.16(b)(2); *see also* 25 P.S. § 3146.6(b)(2) (same for absentee voters). The district register must “identify electors who have received and voted mail-in ballots as ineligible,” *id.* § (b)(1), but nothing in the Election Code requires county boards to so identify electors whose ballots cannot be counted due to easily observable defects. *Cf.* 52 U.S.C. § 10101(e) (defining the word “vote” as including “all action necessary to make a vote effective including ... having such ballot counted”). It therefore is consistent with the Election Code for county boards to determine that a voter may cast a provisional ballot when their mail-in ballot cannot be counted. *See Boockvar*, 238 A.3d at 356 (recognizing “general principle[.]” that “the Election Code should be liberally construed”).<sup>5</sup>

---

<sup>5</sup> Federal law also requires states to allow use of a provisional ballot “[i]f an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote

Thus, just as the Supreme Court of Pennsylvania refused to impose a requirement not promulgated by the General Assembly in *Boockvar*, this Court should refuse to impose a *prohibition* where the statute is again silent. The Election Code allows boards to implement procedures “not inconsistent” with law, and Petitioners cannot demonstrate that providing eligible voters with the opportunity to have their votes counted violates the Election Code.

**b. Count II fails to state a claim because counties’ use of notice-and-cure procedures do not violate election uniformity or equality provisions of the Pennsylvania Constitution and Election Code (Preliminary Objection 4).**

Petitioners invoke the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens . . . shall be uniform throughout the State” and that “[e]lections shall be free and equal.” Pa. Const. art. VII, § 6; *id.* art I, § 5. But the Supreme Court of Pennsylvania has long held that “[a] law is general and uniform, not because it operates upon every person in the state, but because every person brought within the relations provided for in the statute is within its provisions.” *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914) (citing *De Walt v. Bartley*, 24 A. 185, 187 (Pa. 1892)). And the Election Code makes clear that “county boards of elections, *within their respective counties*, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act.” 25 P.S. § 2642 (emphasis added). Pennsylvania law therefore contemplates a somewhat decentralized election system in which county boards—acting within the boundaries of the Code—will set procedures for their respective counties. *See Boockvar*, 238 A.3d at 385 (“[F]rom its inception, Pennsylvania has envisioned a county-based scheme for managing elections within the

---

and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote.” 52 U.S.C. § 21082(a). Election officials therefore may not lawfully prohibit a voter who believes they are eligible to vote from completing a provisional ballot.

Commonwealth.”). That natural deviations occur as each county allocates its own resources in service to the unique needs of its voters is neither constitutionally nor statutorily wrong. As this Court noted in denying interim relief, “an election uniformity or equal protection claim . . . would plainly fail.” Mem. Op. at 24 n.15.

**c. Count III fails to state a claim because the Elections Clause does not deprive the General Assembly of the power to delegate authority to county boards of elections to develop and implement notice-and-cure procedures (Preliminary Objection 5).**

Petitioners’ request for a declaratory judgment that counties’ notice-and-cure procedures violate the Elections Clause also fails. 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) (“There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act”); *id.* § 2642 (“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].”). The Elections Clause does not deprive the General Assembly of the power to delegate such authority to county boards. *See Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (“The 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.”); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 816 (2015) (“it is characteristic of our federal system that States retain autonomy to establish their own governmental processes”). County boards of elections that develop procedures for allowing voters to cure or cancel mail ballots are therefore not regulating the “Manner of holding



Elections” in violation of the Elections Clause. Instead, they are exercising the lawful discretion granted by the General Assembly to resolve issues not directly addressed by statute.

- d. **Count IV fails to state a claim because counties’ notice-and-cure procedures are consistent with the Election Code, do not harm Petitioners (or anyone else), and enjoining such procedures would harm voters (Preliminary Objection 6).**

No injunction should issue in this matter because notice-and-cure procedures adopted by county boards are fully consistent with the Election Code. As explained above, *supra* Section II(a)-(b), 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.

The balance of equities further counsels against injunctive relief. None of the procedures at issue allows an individual to vote who is not otherwise qualified, and there are no allegations of fraud or other malfeasance. *See DJT II*, 830 F. App’x at 390–91 (noting that campaign did not allege, and there was no evidence of, fraud or other malfeasance that warranted granting injunctive relief). And “the public . . . has a great interest in safeguarding the right of every eligible, registered voter to make their voices heard in a national election.” *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 360 (M.D. Pa. 2020). 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 is fully consistent with Pennsylvania’s interest in protecting the franchise, and county boards have the flexibility to implement such procedures (or not) in accordance with local needs. Enjoining the use of notice-and-cure provisions, in contrast, would strip county boards of the authority granted by the Election Code and would harm voters across the Commonwealth whose ballots would be cast aside due to readily apparent and easily correctible errors that are detected before any votes are counted.

**CONCLUSION**

For the foregoing reasons, the Petition should be dismissed.

Dated: March 3, 2023

Respectfully submitted,

By: Adam C. Bonin

Uzoma N. Nkwonta\*  
Justin Baxenberg\*  
Alexander F. Atkins\*  
Daniela Lorenzo\*  
**ELIAS LAW GROUP LLP**  
250 Massachusetts Ave NW, Suite 400  
Washington, D.C. 20001  
Telephone: (202) 968-4490  
unkwonta@elias.law  
jbaxenberg@elias.law  
aatkins@elias.law  
dlorenzo@elias.law

Adam C. Bonin  
**THE LAW OFFICE OF ADAM C. BONIN**  
121 South Broad Street, Suite 400  
Philadelphia, PA 19107  
Telephone: (267) 242-5014  
Facsimile: (215) 827-5300  
adam@boninlaw.com

Timothy J. Ford (Pa. Id. No. 325290)  
Claire Blewitt Ghormoz (Pa. Id. No. 320816)  
**DILWORTH PAXSON LLP**  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102  
Telephone: (215) 575-7000  
Facsimile: (215) 575-7200  
tford@dilworthlaw.com  
cghormoz@dilworthlaw.com

RETRIEVED FROM DENVER COUNTY DOCKET