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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Petitioners,

v.

AL SCHMIDT, *et al.*,

Respondents,

and

DSCC, *et al.*,

Intervenor-Respondents.

Case No. 447 MD 2022

**INTERVENOR-RESPONDENTS’ PRELIMINARY OBJECTIONS TO PETITIONERS’  
AMENDED PETITION FOR REVIEW IN THE NATURE OF AN ACTION FOR A  
DECLARATORY JUDGMENT**

Intervenor-Respondents, DSCC and DCCC, present the following preliminary objections to Petitioners’ Amended Petition for Review Directed to Court’s Original Jurisdiction Seeking Declaratory and Injunctive Relief. Pa.R.A.P. 1532(b).

**INTRODUCTION**

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 institution of no-excuse mail-in voting—which at the time was an uncontroversial expansion of access to the ballot. But ever since the 2020 elections revealed that Democrats relied on mail-in ballots at significantly higher rates than Republicans, Petitioners and their supporters have turned to Pennsylvania courts in one lawsuit after another seeking to use the judiciary to undermine the pro-voter measures that Petitioners once supported. *See, e.g., 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) (“DJT IP”); *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); *Bognet v. Boockvar*, No. 3:20-cv-215, 2020 WL 6323121 (W.D. Pa. Oct. 22, 2020).

This latest challenge is a repeat of prior similar unsuccessful efforts. Petitioners ask this Court to prohibit county election officials from allowing eligible voters to correct minor, curable facial 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. *DJT II*, 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 Petitioners’ position unsupported by any provision of the Election Code, it 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).<sup>1</sup> And, when Petitioners were given this opportunity to amend their Petition, they responded by adding an election uniformity or equal protection claim foreclosed by this Court’s opinion denying their request for a preliminary injunction. Nothing has changed since then. 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.

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

2. To be counted, a mail-in or absentee ballot (collectively, “mail ballot”) must be enclosed and sealed in a secrecy envelope and placed into a second 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 U.S. Constitution’s Equal Protection Clause. *See DJT II*, 830 F. App’x. at 384-85.

5. The district court dismissed the lawsuit. In affirming that dismissal, the U.S. Court of Appeals for the Third Circuit 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.*, but clarified that “those local differences in implementing statewide standards do not violate equal protection,” *id.* at 388.

6. Petitioners initiated these proceedings nearly two years later, after two statewide primary elections and the 2021 municipal election. Shortly before the 2022 general election, Petitioners petitioned this Court for declaratory and injunctive relief to prohibit county boards from implementing notice-and-cure procedures and applied for a preliminary injunction to that effect. This Court denied the application for preliminary relief, finding that Petitioners had failed to establish a likelihood of success on the merits. Mem. Op. at 9. The Pennsylvania Supreme Court

affirmed, and many counties provided voters with notice and an opportunity to cure defective ballots during the 2022 general election.

7. Between October 28 and November 16, 2022, 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. On December 7, the Court issued an Order setting a schedule for briefing on Respondents' and Intervenor-Respondents' Preliminary Objections. Consistent with the Court's order, 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, 2023. Petitioners also filed an Application for Leave to File Amended Petition for Review on January 30, 2023. This Court granted the Application, struck the previously filed Preliminary Objections, and ordered this new round of Preliminary Objections briefing.

8. The Amended 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 allowing boards to adopt their own procedures violates Article VII, § 6 and Article I, § 5 of the Pennsylvania Constitution as well as 26 P.S. § 2642(g); (3) 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 (4) an injunction prohibiting boards from developing or implementing cure procedures.

**PRELIMINARY OBJECTION 1**  
**PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(5)**  
**LACK OF CAPACITY TO SUE (STANDING)**

9. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

10. Petitioners lack standing to bring this suit because they are not injured by any county's implementation of notice-and-cure procedures.

11. 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 Hickson*, 821 A.2d 1238 at 1243).

12. Beyond their generalized desire to have ballots counted accurately—an interest shared by virtually all citizens—Petitioners fail to identify any concrete and distinct harm they have suffered as a result of some county boards implementing notice-and-cure procedures. *In re Hickson*, 821 A.2d at 1243.

13. Petitioners’ allegations instead center on a mischaracterization of vote cancellation and dilution. Petitioners cannot establish standing based on “the Assumption that those who obtain absentee ballots . . . will vote for candidates . . . other than those for whom [they] will vote and thus will cause a dilution of [their] votes.” *Kauffman v. Osser*, 441 Pa. 150, 157 (1970); *see also Ball v. Chapman*, No. 102 MM 2022, 2023 WL 2031284, at \*11 (Pa. Feb. 8, 2023) (“This assumption was unsupported by facts, and its centrality to their arguments defeated their attempts to demonstrate injury that was ‘peculiar to them.’”).

14. Further, 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. *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). Here, the county boards’ 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.

15. 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 2**  
**PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(5)**  
**LACK OF CAPACITY TO SUE (STANDING)**

16. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

17. Petitioners additionally lack standing to bring a challenge under the Elections Clause of the U.S. 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, county boards are violating the U.S. Constitution by creating notice-and-cure procedures in Pennsylvania. *Id.*; *see also id.* ¶ 9.

18. Yet, at no point in their Amended Petition do Petitioners state what concrete and distinct harm they suffered as a result of county boards, 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 3**  
**PENNSYLVANIA RULE OF CIVIL PROCEDURE 1028(a)(4)**  
**DEMURRER (FAILURE TO STATE A CLAIM AS TO COUNT I)**

19. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

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

21. 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).

22. 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).

23. 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 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.

24. The particular grounds on which Petitioners claim that notice-and-cure procedures are “inconsistent with law” do not support the relief they seek:

- a. Petitioners assert that boards that provide an opportunity to cure “[f]ail to keep absentee and mail-in ballots safely in sealed or locked containers” until the canvass. Am. Pet. ¶ 134(a). But in context with other provisions of the Election Code, this provision cannot be read to literally require boards to blindly place all mail ballots in a locked container until the canvass begins; it instead requires that valid ballots be secured when not in use. Reviewing ballots on receipt to ensure that they are facially valid (and providing an opportunity to cure if not) is consistent with this requirement.
- b. Petitioners assert that notice-and-cure procedures are “pre-canvassing activities” that cannot be conducted before Election Day, Am. Pet. ¶ 134(b), and that notifying voters (or political parties) of curable ballots is unlawfully “[d]isclosing the results of any portion of [a] pre-canvass meeting prior to the close of polls,” *id.* ¶ 134(c). This assertion relies on a deliberate misreading of the statutory definition of “pre-canvass,” which means “the inspection *and opening* of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots.” 25 P.S. § 2602(q.1) (emphasis added). Petitioners do not allege that any board opens ballots while conducting notice and cure procedures; instead, Petitioners have deceptively omitted this highly relevant language from their quotation of the statute.
- c. Petitioners assert that boards violate voters’ constitutional right to informational privacy by disclosing “personally identifying information of voters, including but not limited to . . . addresses, phone numbers, and/or email addresses” to “political

parties, candidates, and special-interest groups.” Am. Pet. ¶ 134(d). But Pennsylvania law requires that county boards provide the names and addresses of mail-in voters to candidates, campaigns, and political parties regardless of whether the county has implemented notice-and-cure procedures, and additionally requires county boards to provide a list of electors whose mail ballots will be counted. *See* 25 P.S. 3146.2c(c), *id.* § 3146.8(g)(3). Petitioners moreover do not support this claim by alleging that any county board actually discloses voters’ phone numbers and/or email addresses to third parties.

- d. Petitioners assert that boards unlawfully delegate “the duty to notify voters that their absentee or mail-in ballot is defective.” Am. Pet. ¶ 134(e). Not only does this assertion lack factual and legal support, it also is inconsistent with Petitioners’ claim that boards lack the authority—let alone the duty—to contact voters regarding defective ballots. And even if Petitioners were correct, the remedy would be to require county boards to directly contact voters, not to prohibit counties from allowing notice-and-cure at all.
- e. Petitioners assert that allowing voters whose ballots are invalid under Pennsylvania law to vote provisionally violates the Election Code and requires voters to perjure themselves by stating that the provisional ballot “is the only ballot that [the voter] cast in this election.” Am. Pet. ¶¶ 134(f)–(g). But the Election Code does not specify that a voter whose mail ballot cannot be counted is ineligible to vote provisionally. And even if Petitioners were correct, the remedy would be to prohibit county boards from allowing voters to cure by voting a provisional ballot—a result that likely violates federal law. *See* 52 U.S.C. § 21082(a) (voters who declare they are

registered and eligible must be allowed to cast a provisional ballot in federal elections, which must be counted if election officials determine the voter is eligible).

25. 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 at 356.

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

26. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

27. Neither Article VII, § 6 nor Article I, § 5 of the Pennsylvania Constitution prohibit county boards from adopting county-specific notice-and-cure procedures.

28. This Court has already concluded—in bold—that **“an election uniformity or equal protection claim . . . would plainly fail.”** Mem. Op. at 24 n.15 (emphasis in original).

29. The Court's conclusion that varying county procedures does not offend election uniformity or equal protection principles is consistent with the Pennsylvania Supreme Court's longstanding recognition 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)).

30. The Election Code also 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), thus contemplating that county boards have discretion to administer elections as appropriate for that county. *See Boockvar*, 238 A.3d at 385 (“[F]rom its inception, Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth.”).

31. Differences between counties in the way they administer their elections are fully consistent with the Pennsylvania Constitution and the Election Code.

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

32. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

33. 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).

34. County boards of elections that develop procedures for allowing voters to cure or cancel mail-in ballots are not regulating the “Manner of holding Elections.” Instead, they are 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 IV)**

35. DSCC and DCCC incorporate the foregoing paragraphs as if set forth fully herein.

36. No injunction should issue in this matter because notice-and-cure procedures adopted by county boards are fully consistent with the Election Code, the Pennsylvania Constitution, and the U.S. Constitution. 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.

37. 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.

38. Enjoining the use of notice-and-cure provisions would harm voters 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.

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Respectfully submitted,

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