

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, POWER INTERFAITH,
MAKE THE ROAD PENNSYLVANIA,
ONEPA ACTIVISTS UNITED, NEW
PA PROJECT EDUCATION FUND,
CASA SAN JOSÉ, PITTSBURGH
UNITED, LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, AND
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD
OF ELECTIONS, AND ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL
COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,
Intervenors.

Case No. 283 MD 2024
Original Jurisdiction

**MEMORANDUM IN OPPOSITION TO PETITIONERS’
APPLICATION FOR SUMMARY RELIEF**

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INTRODUCTION

Sometimes, silence speaks louder than words. For all the words that Petitioners, the Democratic Intervenors, and the Secretary (collectively, “Movants”), devote to their latest joint assault on the General Assembly’s date requirement, two of their omissions independently decide this case and render everything else they say irrelevant.

First, Movants do not even address the lion’s share of the procedural defects in this suit that the Republican National Committee and Republican Party of Pennsylvania (collectively, “Republican Intervenors”) pointed out in their Preliminary Objections now docketed with the Court. *See* June 10, 2024 Order. Most glaringly, no Movant explains how this Court has subject matter jurisdiction. Only the Petitioners address this issue at all—in one paragraph. *See* Pet. Br. 36-37.

Thus, neither they nor any of their allies even *mention*—let alone take seriously—Judge Ceisler’s opinion in *Republican National Committee v. Schmidt*, No. 447 M.D. 2022 slip op. at 20 (Pa. Commw. Ct. Mar. 23, 2023) (attached as Exhibit A), on which Republican Intervenors’ Preliminary Objections are based, *see* Prelim. Objs. 24-33. Yet that case is entirely on point. Petitioners’ only basis for suing the Secretary is his non-binding Guidance regarding the date requirement. *See* Pet. Br. 37. Thus, under *Republican National Committee*, the Secretary is not a proper or indispensable party. *See* Republican Intervenors’ Summary Relief Br. 11-

15 (“Summary Relief Br.”); *Republican Nat’l Comm.*, Ex. A at 13-14, 18-22; *see also* Respondent Boards Statement 6 (confirming that they “have set aside and not counted absentee and mail-in ballots that arrive in undated or misdated outer return envelopes” “in compliance with the Pennsylvania Supreme Court’s order in *Ball*,” not the Secretary’s Guidance) (“Boards Br.”).

Accordingly, again under *Republican National Committee*, the proper defendants—the ones who actually decide whether mail-ballot declarations are properly filled out—are the 67 county boards of elections. *See* Summary Relief Br. 15-18; *Republican Nat’l Comm.*, Ex. A at 13-14, 18-28.¹ But as Judge Ceisler held, naming the county boards is insufficient to invoke this Court’s jurisdiction—and Petitioners named only two county boards, Allegheny County and Philadelphia County (collectively, “the Boards”), in any event. *See* Summary Relief Br. 15-18; *Republican Nat’l Comm.*, Ex. A at 13-14, 18-28. Indeed, the only differences between *Republican National Committee* and this case are that the Republican petitioners in *Republican National Committee* joined all 67 county boards, while Petitioners here, now supported by the Democratic Party, have joined only the two Boards. Thus, because the Court lacked jurisdiction in *Republican National Committee*, it lacks jurisdiction here, too.

¹ This Brief uses “mail ballot” to refer to both an absentee ballot, *see* 25 P.S. § 3146.6, and a mail-in ballot, *see id.* § 3150.16.

Second, Movants fail to plausibly distinguish the Pennsylvania Supreme Court’s controlling decisions rejecting their Free and Equal Elections claim: *Pennsylvania Democratic Party*—which upheld the *entire* declaration mandate of which the date requirement is part—and *Ball*. See Summary Relief Br. 28-31. Movants, moreover, fail to cite a *single* case invalidating a ballot-casting rule under the Free and Equal Elections Clause. Not one. This confirms what Republican Intervenors have already proven: the Clause serves important functions, but it does not give the Judiciary a freewheeling license to second-guess and usurp the General Assembly’s power to set ballot-casting rules. Summary Relief Br. 31-40; *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (“While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.”).

Movants offer various other merits arguments, but all fail. There is no precedential support for Petitioners’ and Democratic Intervenors’ invitation to wield the Free and Equal Elections Clause to apply strict scrutiny to any ballot-casting rule that results in a vote not “being counted”—a shocking proposal that, unsurprisingly, even the Secretary does not endorse. In fact, the Pennsylvania Supreme Court’s precedent *forecloses* applying strict scrutiny here. See *Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) (“To subject every voting regulation to strict scrutiny ... would tie the hands of states seeking to assure that elections are operated equitably

and efficiently.”); *Pa. Democratic Party*, 238 A.3d at 372-80 (not applying strict scrutiny to challenges to declaration mandate or secrecy-envelope rule). There is no basis in Pennsylvania, analogous state, or federal constitutional law for Movants’ various proposed interest-balancing tests. Summary Relief Br. 43-54. Invalidating the date requirement would also violate the Elections and Electors Clauses of the U.S. Constitution. *Id.* at 54-55. And barring enforcement of the requirement would invalidate all of Act 77 and universal mail voting in Pennsylvania. *Id.* at 55-58.

Even if Petitioners could overcome these fatal omissions in their arguments, they cannot prove that this Court may even grant their requested relief. Petitioners did not seek any relief against the two Boards in their Petition, *see* Pet. ¶ 92, but now purport to do so, *see* Pet. App’n ¶ 73. Any such relief, however, would render the date requirement non-mandatory in two counties but leave it mandatory in the other 65 counties. It therefore would violate the Pennsylvania Constitution’s requirement that “[a]ll laws regulating the holding of elections by the citizens ... shall be uniform throughout the State,” Pa. Const. art. VII, § 6, and the Equal Protection Clause, *Bush v. Gore*, 531 U.S. 98 (2000).

Finally, the equities counsel against awarding the Petitioners any relief at this late juncture. Even after the Pennsylvania Supreme Court refused to accept their Free and Equal Elections argument in *Ball*, Plaintiffs waited a year and a half to resurrect this claim—instead pursuing various other failed attacks on the date

requirement. They waited to pursue this several-times-over backup theory until the middle of a contentious election year. As the Pennsylvania Senate leaders point out, “Petitioners and their counsel” have “treat[ed] the Pennsylvania and federal judiciary like a roulette wheel, constantly testing out novel theories hoping they will eventually win something.” Legislators’ Br. 26. This gamesmanship threatens to destabilize Pennsylvania’s election rules, undermine confidence in election integrity, and damage the credibility of the Pennsylvania Judiciary. It will also harm Republican Intervenors. The Court should not reward Movants’ last-minute maneuvering. Rather, as explained more fully below, the Court should deny Petitioners’ Application for Summary Relief and grant Republican Intervenors’ opposing Application for Summary Relief.

COUNTERSTATEMENT REGARDING FACTS

Petitioners err when they suggest that the parties, including Republican Intervenors, agreed to the facts—and *only* the facts—presented in their Petition and Application for Special Relief in the Nature of a Preliminary Injunction. *See* Pet. App’n 5. Indeed, Republican Intervenors’ Preliminary Objections were also “in the record at the June 10, 2024 status conference,” *id.*, but Petitioners’ brief makes clear that they do not agree to the facts presented there, *see* Prelim. Objs. ¶ 146 (noting that the date requirement serves “unquestionable purpose[s]”).

Instead, the parties agreed that, for the sake of judicial efficiency, there was no need for further discovery or an evidentiary hearing before the Court could consider applications for summary relief. That is because “[t]he facts necessary to decide” this case and the various defenses “are well-known to the parties,” as “fulsome discovery” and factual and legal presentations have already taken place in prior date-requirement litigation. Pet. App’n 5. Thus, as the Secretary has explained, the parties may invoke facts and evidence from those prior cases here, as well as other matters appropriate for judicial notice. See Sec’y Br. 5 n.3.

The Secretary and the Boards agree because they rely upon facts that were not presented in the Petition or preliminary injunction application. See, e.g., Sec’y Br. 19-21 (discussed *infra* 25-27); Boards Br. 3-4. Republican Intervenors also highlight below facts and evidence that have repeatedly been presented in prior date-requirement litigation, including cases in which Petitioners and the Secretary were parties or *amici*. Those include the rejection rate for mail ballots due to noncompliance with the secrecy-envelope requirement upheld in *Pennsylvania Democratic Party*, see *infra* 26-27, as well as “pleadings and judgments,” Sec’y Br. 5 n.3, from *Commonwealth v. Mihaliak*, which underscores the date requirement’s anti-fraud purpose, see *infra* 46-47; *Ball v. Chapman*, 289 A.3d 1, 15 (Pa. 2023) (noting evidence from *Mihaliak*); *Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *31 n.39 (W.D. Pa. Nov. 21, 2023) (similar), *rev’d*, *Pa. State Conf. of*

NAACP v. Sec’y Commonwealth of Pa., 97 F.4th 120 (3d Cir. 2024). Petitioners make no mention of any of these facts and evidence, even though they are properly before the Court. *See* Sec’y Br. 5 n.3.

STANDARD OF REVIEW

“At any time after the filing of a petition for review in an appellate or original jurisdiction matter,” this Court “may on application enter judgment if the right of the applicant thereto is clear.” Pa. R.A.P. 1532(b). “Summary relief is similar to summary judgment under the Pennsylvania Rules of Civil Procedure.” *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 216 A.3d 448, 458 (Pa. Commw. Ct. 2019). Summary relief therefore is not appropriate where the applicant has no “clear” right to “the requested relief under the law.” *Id.*

ARGUMENT

I. THE COURT SHOULD DISMISS THE PETITION DUE TO ITS MYRIAD PROCEDURAL DEFECTS.

The Court should grant summary relief and dismiss the Petition for lack of standing, lack of subject matter jurisdiction, and failure to join indispensable parties. *See* Prelim. Objs. 13-37; Summary Relief Br. 11-24. Movants largely ignore these procedural defects, and fail to overcome them.

A. Petitioners Lack Standing To Sue The Secretary.

Republican Intervenors have already shown that Petitioners lack standing to sue the Secretary. *See* Summary Relief Br. 11-15. In truth, to make the point,

Republican Intervenors could have simply copied and pasted this Court’s decision in *Republican National Committee v. Schmidt* and just changed the petitioners’ names.

Republican National Committee is indeed indistinguishable from this case. The Secretary’s only action Petitioners challenge is the Secretary’s Guidance. See Pet. ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79; Pet. Br. 37. But as this Court explained in *Republican National Committee*, the Secretary “does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely upon the County Boards.” *Republican Nat’l Comm.*, Exhibit A at 20 (the Secretary’s “duties and responsibilities” under the Election Code “are limited”). Accordingly, as Judge Ceisler and other courts have held, any Secretary guidance regarding administration of elections does not affect the county boards’ legal obligations and is not legally binding or enforceable against them. See *Republican Nat’l Comm.*, Exhibit A at 13-14, 18-22; see also *In re Canvass of Absentee & Mail-In Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1078 n.6 (Pa. 2020) (“[T]he Secretary has no authority to definitively interpret the provisions of the Election Code.”); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, 2:20-cv-1831-NR, 2021 WL 101683, at *5 n.6 (W.D. Pa. Jan. 12, 2021) (“[U]nder Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of

elections ultimately determine what ballots to count or not count in the first instance.”).

Thus, there is no “causal connection” between the Secretary’s Guidance and Petitioners’ alleged harm of county boards not counting noncompliant mail ballots. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 473 (Pa. 2021). Accordingly, moreover, a court order invalidating the Guidance would not “redress” Petitioners’ alleged harm. *See id.* at 474. Petitioners therefore lack standing to sue the Secretary. *See* Summary Relief Br. 11-15.

The two Boards’ Statement of Position confirms this result. The Boards do not even *mention* the Secretary’s Guidance. *See* Boards Br. 1-6. Instead, they clarify that they “have set aside and not counted absentee and mail-in ballots that arrive in undated or misdated outer return envelopes” “*in compliance with the Pennsylvania Supreme Court’s order in Ball.*” *Id.* at 6 (emphasis added). And they “will continue to do so, absent an order from this Court or the Pennsylvania Supreme Court directing [them] to handle such ballots in a different manner.” *Id.* In other words, invalidation or rescission of the Secretary’s Guidance will not result in the Boards counting noncompliant ballots. *See id.* The Secretary’s Guidance thus has no causal connection to Petitioners’ alleged harm, that harm cannot be redressed by an order against the Secretary, and Petitioners lack standing to sue the Secretary. *See id.*; *see also* Summary Relief Br. 11-15.

Notably, too, the Secretary does not endorse Petitioners' theory that his Guidance injures them by binding county boards. After all, saying so would imperil other guidance the Secretary may wish to issue and require reversing the Secretary's prior contrary representations to this Court. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at *10 (Pa. Commw. Ct. Aug. 19, 2022) (the Secretary acknowledging he "does not have the authority to direct the Boards to comply with [a court order]"); Pa. House of Representatives, State Gov't Comm. Hearing, *In re: Election Oversight Pennsylvania Department of State's Election Guidance*, (Jan. 21, 2021), at 23-25 (previous Secretary acknowledging that a Secretary's guidance is not directory), available at <https://tinyurl.com/4wxjvd4c>.

Petitioners do not counter any of this. They merely assert that "the issuance of [the Secretary's] guidance was the basis for the Republican National Committee's petition concerning the dating requirement in *Ball*." Pet. Br. 37. Petitioners are correct that the *Ball* petitioners—who included Republican Intervenors here—named the Secretary as a respondent and challenged the Secretary's then-existing Guidance. *Ball*, 289 A.3d at 8. But that is inconsequential here for at least three reasons.

First, *Ball* involved an exercise of the Pennsylvania Supreme Court's King's Bench power, *see id.* at 8 n.2, which is not constrained by the statutory limits on this

Court's jurisdiction at issue in *Republican National Committee*, see 42 Pa. C.S. § 761(a)(1); see also Summary Relief Br. 15-18.

Second, the guidance challenged in *Ball* created a “lack of clarity” regarding whether county boards were required to enforce the date requirement—and threatened to cause inconsistent enforcement of the requirement across the Commonwealth in the 2022 general election. See 289 A.3d at 13, 19-20. In particular, at the time of *Ball*, Commonwealth Court opinions and “vacated” federal court opinions offered “contradictory” holdings regarding whether the date requirement is mandatory. *Id.* at 19. The challenged Secretary’s guidance was an “unambiguous” statement advocating one of those “competing” holdings. *Id.* It therefore created a risk that some county boards would enforce the requirement while others might not. See *id.* The *Ball* petitioners sought the Pennsylvania Supreme Court’s “clarity” so that all county boards would apply the date requirement consistently. See *id.* at 13, 19-20.

Here, by contrast, there is no “lack of clarity” or “contradictory” judicial precedent, *id.* at 13, 19, because *Ball* and *Pennsylvania State Conference of the NAACP* unambiguously require all county boards to enforce the date requirement and not to count noncompliant ballots. See, e.g., Boards Br. 6. The Guidance Petitioners challenge reflects this uniformity in decisional law. Thus, unlike in *Ball*, Petitioners are not seeking to prevent inconsistent application of the date

requirement (but, in fact, to *create* it, *see infra* Parts I.D, III). Instead, they “facially challenge[] an existing interpretation of settled law,” which the Pennsylvania Supreme Court has held is insufficient to establish standing. *See Ball*, 289 A.3d at 19.

Third, the *Ball* petitioners *also* named all 67 county boards of elections and, thus, could secure a uniform order directing all 67 boards to enforce the date requirement. *See id.* at 1. That is exactly what happened in *Ball*, where the Pennsylvania Supreme Court issued a remedial order directed only to the boards, *not* to the Secretary. *See* 284 A.3d 1189, 1192, November 1, 2022 Order (attached as Exhibit B) (“The Pennsylvania county boards of elections are hereby ORDERED to refrain from counting . . .”)) (“*Ball* Order”). In fact, the *Ball* order did not require the Secretary to do *anything*—including rescind or modify the challenged guidance whose position among “contradictory” judicial precedent *Ball* overruled. *See id.* Petitioners here, however, have named only the two Boards, so if they were to secure any relief, it would not bind the 65 other county boards. *See infra* Parts I.D, III.

Thus, *Republican National Committee*—which issued *after Ball*—controls the question before this Court. Movants saw Republican Intervenors’ arguments on this point in the Preliminary Objections *before* Movants filed their current briefs. *See* Prelim. Objs. 9-10, 23-27. Yet remarkably, Movants say *nothing* about *Republican National Committee*. Any belated response in their opposition briefs is,

quite frankly, sandbagging, as Republican Intervenors will not have an opportunity to reply.

B. This Court Lacks Subject Matter Jurisdiction Because The Secretary Is Not A Proper Or Indispensable Party.

This Court lacks jurisdiction under 42 Pa. C.S. § 761(a)(1). *See* Summary Relief Br. 15-18. Although the Secretary is an “officer” of the Commonwealth, his joinder in this case does not establish jurisdiction because he is not an “indispensable party to the action.” *Republican Nat’l Comm.*, Exhibit A at 17. The relief Petitioners seek obviously *must* be “accomplished in the absence of” the Secretary because any order invalidating the Guidance will *not* result in any county board of elections counting undated or misdated mail ballots. *Id.* at 17-18; *supra* Part I.A; Summary Relief Br. 11-18; *see also* Boards Br. 6.

Once again, *Republican National Committee* is dispositive. *See Republican Nat’l Comm.*, Exhibit A at 18-22. There, because the then-Acting Secretary’s guidance was not binding on county boards, Judge Ceisler held that “meaningful relief” could be accomplished in his absence through suits against county boards and, thus, that he was not an indispensable party. *Id.* Judge Ceisler therefore dismissed the case for lack of subject matter jurisdiction. *See id.* at 18-28.

The same is true here, and the Court should dismiss the Petition for lack of jurisdiction. *See* Summary Relief Br. 15-18. Petitioners can obtain the relief they seek only by suits against county boards filed in each board’s home county. *See id.*

Once again, Republican Intervenors previously made this argument at length in a filing Movants saw before filing their briefs. *See* Prelim. Objs. 23-27. Once again, Movants say nothing in response.

C. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against The Boards.

This Court also lacks jurisdiction over any claims Petitioners purport to plead against the two Boards. *See* Summary Relief Br. 19-20. *First*, the Petition seeks no redress against the two Boards. *See* Pet. ¶ 92; Summary Relief Br. 19; *Firearm Owners Against Crime*, 261 A.3d at 474. *Second*, even if Petitioners can fix that pleading failure by purporting to seek relief against the Boards now, *see* Pet. App'n ¶ 73, the Court still lacks jurisdiction because the Boards are local authorities, not “agencies” of the “Commonwealth government,” 42 Pa. C.S. § 761.(a)(1); Summary Relief Br. 19-20. As Judge Ceisler previously held in *Republican National Committee*, county boards are not “Commonwealth agencies” whose joinder can bring a case within the Court’s original jurisdiction. *Republican Nat’l Comm.*, Exhibit A at 22; Summary Relief Br. 19-20.

Republican Intervenors also made this argument in their Preliminary Objections, *see* Prelim. Objs. 31-33, yet Movants say nothing relevant in response.

D. In The Alternative, Petitioners Failed To Join Indispensable Parties.

Even if the Court had jurisdiction and Petitioners had sought relief against the two Boards, the Court still should dismiss the Petition because Petitioners failed to join indispensable parties: the 65 other county boards of elections. Summary Relief Br. 21-24.

The other county boards are indispensable parties for two reasons. *First*, any order purporting to affect the other county boards' enforcement of the date requirement (which cannot issue in a case in which they are not parties, *see* Summary Relief Br. 21-23), affects "rights" and obligations they hold that "are so connected with the claims of the litigants that no decree can be made without impairing those rights." *Polydyne, Inc. v. Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002); *see also* Summary Relief Br. 21-23.

Second, ordering just the two Boards *not to enforce* the date requirement would create disuniformity across the Commonwealth because the 65 other boards are bound to *continue to enforce* it under *Ball*. *See* Summary Relief Br. 23-24; Boards Br. 6. As a result, voters who cast undated or misdated mail ballots in Allegheny or Philadelphia Counties, on the one hand, would not be treated "alike" with voters who cast such ballots in any of the other 65 counties. *Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949). Any order creating this disuniformity would violate the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 6 ("All laws regulating the

holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the [s]tate ...”); *Kerns*, 69 A.2d at 393 (“To be uniform in the constitutional sense, such a law must treat all persons in the same circumstances alike.”); *Winston v. Moore*, 91 A. 520, 524 (Pa. 1914) (similar). It would also violate the U.S. Constitution’s Equal Protection Clause. *See Bush*, 531 U.S. at 106-07 (courts violate Equal Protection Clause when they order different “counties [to] use[] varying standards to determine what [constitutes] a legal vote” in the same election); *see also* Summary Relief Br. 23-24.

Movants’ only response to these problems is a footnote in Petitioners’ brief, which obliquely addresses only the second point. Petitioners insist “other county boards of elections would be expected to heed [a] ruling” from this Court or the Pennsylvania Supreme Court invalidating the date requirement in a case in which they are not named parties. Pet. Br. 38 n.12. But there is no basis for that insistence: Like the Boards named here, the 65 unnamed boards remain bound to “compl[y] with the Pennsylvania Supreme Court’s order in *Ball*” absent a court order “directing [them] to handle such ballots in a different manner.” Boards Br. 6; *see also Ball* Order; Summary Relief Br. 23-24; *Chapman*, 2022 WL 4100998 (involving county boards that declined to count noncompliant ballots notwithstanding prior Commonwealth Court opinion), *overruled on other grounds*, *Ball*, 289 A.3d 1. Such

an order, however, may issue against them only in a case in which they are named parties. It cannot issue here. *See* Summary Relief Br. 23-24.

The Court should decline Petitioners' request to create disparate election rules across the Commonwealth in violation of the Pennsylvania Constitution and U.S. Constitution shortly before a presidential election. It should deny Petitioners' Application and grant Republican Intervenors' Application.

II. THE COURT SHOULD ENTER JUDGMENT AGAINST PETITIONERS BECAUSE THEIR CLAIMS FAIL ON THE MERITS.

Even if Petitioners could overcome the myriad procedural defects in this suit, the Court should still enter judgment against them because their claims fail on the merits. *See* Summary Relief Br. 24-58.

A. The Pennsylvania Supreme Court Has Rejected Free and Equal Elections Challenges To The Date Requirement.

The Court should reject Petitioners' Free and Equal Elections challenge to the date requirement because the Pennsylvania Supreme Court has already done so. *See* Summary Relief Br. 28-31.

In *Pennsylvania Democratic Party*, the Pennsylvania Supreme Court upheld mandatory application of the *entire* declaration mandate for mail ballots—which encompasses the “fill out, date, *and* sign” requirements—without requiring an opportunity to cure, 238 A.3d at 372-74 (quoting 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added)); *see also* Summary Relief Br. 28-29. Indeed, the Free and Equal

Elections Clause does not require counting mail ballots that “voters have filled out incompletely or incorrectly,” even where voters have committed only “minor errors” on the declaration. *Pa. Democratic Party*, 238 A.3d at 374; *see also id.* at 373 (“so long as a voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative[s] of his or her choice,” which is all the Clause guarantees). That is because the Clause “leaves the task of effectuating [its] mandate” to “the Legislature.” *Id.* at 374. It thus rests with the General Assembly to decide both “the procedures for casting and counting a vote by mail” and whether even “minor errors” in complying with those procedures warrant rejection of the ballot. *Id.*; *see* Summary Relief Br. 28-29.

Here, the General Assembly has decided that the date requirement portion of the declaration mandate upheld in *Pennsylvania Democratic Party* is itself mandatory—and that even “minor errors” in complying with it warrant rejection of a mail ballot. 238 A.3d at 374. The date requirement therefore does not violate the Free and Equal Elections Clause. *See id.* The Pennsylvania Supreme Court reiterated this conclusion in *Ball*, when it rejected a statutory challenge to the date requirement in the face of Free and Equal Elections arguments. *See Ball*, 289 A.3d at 14-16 & n.77; *see* Summary Relief Br. 29-31.

Petitioners do not address *Pennsylvania Democratic Party*’s holding on this point. *See* Pet. Br. 13. They also claim that the Free and Equal Elections challenge

to the date requirement was not before the Court in *Ball*. *See id.* Petitioners are mistaken. *See* Brief for Respondents in *Ball*, 2022 WL 18540590, at *37 (“Imposing draconian consequences for insignificant errors could, as is the case here [] implicate the Constitution’s Free and Equal Elections Clause[.]”); Democratic Intervenors’ *Ball* Br., 2022 WL 18540587, at *1-2 & *8-10 (discussing alleged lack of purpose), *29-32 (making argument under Free and Equal Elections Clause and urging Court to apply interest-balancing test). While those arguments partially sounded in constitutional avoidance, the Pennsylvania Supreme Court did *not* accept or acknowledge any constitutional problem with mandatory application of the date requirement, demonstrating that it saw no serious constitutional question in the case.

Indeed, the court expressly *noted* that it heard and considered Free and Equal Elections challenges to the date requirement. *See Ball*, 289 A.3d at 14-15 (discussing Free and Equal Elections arguments raised by the parties); *id.* at 16 n.77 (discussing alleged lack of “functionality” of the date requirement). Not a single Justice endorsed those challenges.

Movants claim that a footnote in Justice Wecht’s opinion supports their position because it refers to the Free and Equal Elections Clause in a part of the opinion not speaking for the court. *See* Pet. Br. 13. But he was referring to interpreting potential ambiguities in the federal Materiality Provision—*not* the date requirement. *See Ball*, 289 A.3d at 27 n.156. While actually speaking for the court,

Justice Wecht held that the date requirement is unambiguous and mandatory. *See id.* at 20-23. And neither he nor any other Justice suggested the date requirement violates the Free and Equal Elections Clause. *See, e.g., id.* at 14-16 & n.77, 20-23.

Instead, the court upheld the date requirement in an opinion that remains binding on county boards and this Court. *See, e.g.,* Boards Br. 6. For this reason alone, the Court should deny Petitioners' Application and grant Republican Intervenors' Application.

B. The Date Requirement Does Not Violate The Free and Equal Elections Clause.

Even if the Court concludes that the Pennsylvania Supreme Court has not resolved this precise question, it should still reject Petitioners' Free and Equal Elections claim because controlling law makes clear that the date requirement comports with the Clause. *See* Summary Relief Br. 31-48.

1. The Date Requirement Comports With The Free and Equal Elections Clause's Equal-Opportunity Guarantee.

Petitioners bear a heavy burden of proof: They must overcome the strong presumption of constitutionality, *see* *Mixon v. Commonwealth*, 759 A.2d 442, 447 (Pa. Commw. Ct. 2000), by showing that the date requirement "clearly, palpably, and plainly violates the Constitution," *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801 (Pa. 2018). Their Free and Equal Elections claim thus requires them to prove that the date requirement "make[s] it so difficult [to vote] as to amount

to a denial” of “the franchise.” *Id.* at 810. Petitioners and the other Movants have not done so and cannot do so. As part of the constitutional declaration mandate and like the constitutional secrecy-envelope rule, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d at 372-80; Summary Relief Br. 31-36.

Indeed, the Pennsylvania Supreme Court has *never* invalidated a neutral ballot-casting rule under the Clause. *See* Summary Relief Br. 31. Even now, Movants have failed to identify any such case. Nor could any such case exist: The Free and Equal Elections Clause’s plain text and history, and the authoritative case-law construing it, make clear that it does not constrain the General Assembly’s authority to adopt neutral ballot-casting rules like the date requirement.

The Clause directs that “[e]lections shall be free and equal,” Pa. Const. art. I, § 5, and delegates the “task of effectuating that mandate to the Legislature,” *Pa. Democratic Party*, 238 A.3d at 374. It therefore does not empower Pennsylvania courts to second-guess the General Assembly’s policy judgments when it comes to adopting ballot-casting rules, to “create statutory language that the General Assembly chose not to provide,” or “to rewrite the Election Code to align with a litigant’s notion of good election policy.” *Id.* at 373.

Rather, what the Clause guarantees is that all Pennsylvania voters “have the same free and equal *opportunity* to select [their] representatives.” *League of Women*

Voters, 178 A.3d at 814 (emphasis added). This equal-*opportunity* guarantee does not ensure that all voters will avail themselves of the opportunity. It therefore does not *exempt* voters from having to comply with neutral ballot-casting rules the General Assembly enacts to govern how voters complete and cast their ballots, such as the declaration mandate of which the date requirement is part and the secrecy-envelope requirement. *See id.*; *see Pa. Democratic Party*, 238 A.3d at 372-80; *see* Summary Relief Br. 31-36. Instead—as the Secretary explained in *Pennsylvania Democratic Party*—the Clause guarantees that all voters will be *subject to* the same ballot-casting rules and will enjoy “equally effective power to select the representatives of [their] choice” so long as they “follow[]” those rules. 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

The date requirement therefore comports with the Clause. It grants *every* Pennsylvania voter “the same free and equal opportunity” to vote by mail in compliance with the date requirement or to vote in person *without even being subject to* the date requirement. *League of Women Voters*, 178 A.3d at 814. In other words, it carries out the Clause’s guarantee that all Pennsylvania voters wield “equally effective power to select [their] representative[s]” so long as they “follow[] the requisite voting procedures.” *Pa. Democratic Party*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

Nor does the date requirement “make it ... difficult” to vote, let alone “so difficult as to amount to a denial” of “the franchise.” *League of Women Voters*, 178 A.3d at 810; *see* Summary Relief Br. 35-36. In the first place, Pennsylvania law permits *all* voters to vote in person without complying with the date requirement, *see, e.g.*, 25 P.S. § 2811, and a requirement that is inapplicable to an entire universally available method of voting does not make voting “so difficult as to amount to a denial” of “the franchise,” *League of Women Voters*, 178 A.3d at 810. That is especially true here, where according to Petitioners’ own figures, the majority of Pennsylvania voters vote in person and, thus, are not even subject to the date requirement. *See* Summary Relief Br. 35; *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (recognizing that legislative regulation of the mail voting “privilege” cannot violate the right to vote).

In the second place, even when it comes to mail voting, the date requirement is not “so difficult” to comply with “as to amount to a denial” of “the franchise.” *League of Women Voters*, 178 A.3d at 810; *see* Summary Relief Br. 35-40. Petitioners’ own position contemplates as much, since they do not challenge the “fill out” and “sign” aspects of the constitutional declaration mandate—and they offer no explanation as to how *dating* the declaration is more difficult. Moreover, signing and dating documents is a mandatory and common feature of life, and it amounts to nothing more than the “usual burdens of voting” in Pennsylvania and across the

country. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.); *id.* at 204-09 (Scalia, J., concurring); *see also* Summary Relief Br. 35-37. “[B]ecause voting necessarily requires some effort and compliance with some rules, the concept of a voting system ... that furnishes an equal ‘opportunity’ to cast a ballot”—such as Pennsylvania’s system under the Free and Equal Elections Clause—“must tolerate the ‘usual burdens of voting.’” *Brnovich v. DNC*, 594 U.S. 647, 669 (2021) (quoting *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.)); *see also* *League of Women Voters*, 178 A.3d at 814 (Free and Equal Elections Clause guarantees “equal opportunity”).

Indeed, dating a ballot declaration is far less difficult than performing other tasks—such as filling out the *entire* declaration, *including* the signature and date fields, or placing the ballot in a secrecy envelope—that the Pennsylvania Supreme Court has upheld under the Free and Equal Elections Clause. *See Pa. Democratic Party*, 238 A.3d at 372–80. And dating a ballot declaration is far less difficult than tasks the U.S. Supreme Court has upheld as non-burdensome and constitutional. *See, e.g., Crawford*, 553 U.S. at 198 (“the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering ... required documents, and posing for a photograph” to obtain a photo identification); *Brnovich*, 594 U.S. at 678 (“Having to identify one’s own polling place and then travel there to vote does not exceed the ‘usual burdens of voting.’”).

Movants *never* explain how complying with the date requirement is difficult, let alone “so difficult as to amount to a denial” of “the franchise.” *League of Women Voters*, 178 A.3d at 810. They offer no evidence or argument regarding the objective *burden* imposed by the date requirement—which is the gravamen of the analysis under controlling case-law. *See id.*; *see also* Summary Relief Br. 38.

Instead, they apparently believe that an unconstitutional difficulty is shown by the mere number of mail ballots that were not counted in past elections due to noncompliance with the date requirement. *See* Pet. Br. 9-10. They are mistaken. Indeed, the only support any Movant cites for this position is the Secretary’s citation to a solo concurrence by Justice Wecht, who suggested he might deem a rule unconstitutional if it results in an “intolerable ratio of rejected ballots.” Sec’y Br. 18 (citing *Pa. Democratic Party*, 238 A.3d at 389 (Wecht, J., concurring)). That concurrence has not been accepted as the law in Pennsylvania. Rather, the Pennsylvania Supreme Court’s Free and Equal Elections jurisprudence turns on the *objective* burden imposed by the challenged rule—*i.e.*, whether the challenged rule “make[s] [voting] so difficult as to amount to a denial” of “the franchise”—not the number of voters who fail to comply with it. *League of Women Voters*, 178 A.3d at 810; Summary Relief Br. 38.

But even if the number of noncompliant ballots were relevant, Petitioners’ own figures demonstrate that the date requirement does not result in an “intolerable

ratio of rejected ballots,” Sec’y Br. 18, or impose an unconstitutional burden. Those figures show that only 0.85% of mail ballots returned statewide in the 2022 general election were rejected due to noncompliance with the requirement. *See* Summary Relief Br. 38-39. They also show that the rate of noncompliance *decreased* to only 0.56% in the 2024 primary elections. *See id.* at 39.

The Secretary recites numbers from recent elections that have not been part of the record in prior date-requirement cases and are not recited by Petitioners. *See supra* 5-7. In any event, those numbers only further confirm that the date requirement does not impose an unconstitutional burden. The Secretary reports noncompliance rates of 0.84% in the 2022 general election (10,500 out of 1,244,000), 0.82% for the 2023 primary election (4,918 out of 597,000), 0.54% in the counties that enforced the date requirement in the 2023 primary election (1,354 out of 250,580), and 0.62% in the 2024 primary election (4,468 out of 715,811). *See* Sec’y Br. 19-21.

In other words, more than 99% of Pennsylvania mail voters complied with the date requirement even on all of the figures Petitioners and the Secretary point to. A requirement that over 99% of mail voters complied with—and that the majority of Pennsylvania voters did not have to comply with because they voted in person—cannot be “so difficult” to comply with “as to amount to a denial” of the “franchise.” *League of Women Voters*, 178 A.3d at 810; *see also* Summary Relief Br. 37-40. And

these noncompliance rates are lower than the historic noncompliance rate under the secrecy-envelope requirement that the Pennsylvania Supreme Court upheld in *Pennsylvania Democratic Party*. See 238 A.3d at 376-80; Summary Relief Br. 39.²

Movants therefore have wholly failed to show that compliance with the date requirement is “so difficult as to amount to a denial” of “the franchise.” *League of Women Voters*, 178 A.3d at 810. Instead, they attempt to move the goalposts, offering a smattering of arguments to stretch the Free and Equal Elections Clause to subject the date requirement to searching judicial scrutiny. Each of these arguments is irreconcilable with the Clause and controlling case-law.

2. Pennsylvania Law Forecloses Petitioners’ Request For Strict Scrutiny.

Petitioners and Democratic Intervenors first argue that the Court should apply strict scrutiny to *any* election regulation that results in ballots not being counted because voting is a “fundamental” right. Pet. Br. 16-20; Dem. Br. 17-20. This

² The Boards also point to figures regarding an alleged “disproportionate[]” effect of the date requirement on “elderly Pennsylvania voters,” Boards Br. 3, that are not mentioned by Petitioners, *see supra* 5-7. Even on their face, those figures are not probative for at least two reasons. For one, they come only from Philadelphia County and a single election, not from the Commonwealth as a whole or multiple elections, so they say virtually nothing about “elderly Pennsylvania voters” statewide across elections. Boards Br. 3. For another, they say nothing about the *rate* at which elderly voters and other voters *used* mail ballots. See *id.* at 3-4. Accordingly, they are entirely consistent with the (very real) possibility that elderly voters vote by mail at a higher rate than other voters and, thus, have a *lower* noncompliance rate with the date requirement than other voters. See *id.*

audacious proposal has no legal basis—and, in fact, Pennsylvania law *forecloses* it. *See* Summary Relief Br. 40-41. As the Pennsylvania Supreme Court has explained, “to subject every voting regulation to strict scrutiny” would unduly “tie the hands of” the General Assembly when it “seek[s] to assure that elections are operated equitably and efficiently.” *Petition of Berg*, 713 A.2d at 1109 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)). And wielding the Free and Equal Elections Clause to achieve that outcome would turn the Clause on its head: “While the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature,” not the Judiciary. *Pa. Democratic Party*, 238 A.3d at 374; *see also Winston*, 91 A. at 522 (“regulat[ing] elections” is quintessentially “legislative” function).

Thus, it is unsurprising that *none* of the cases Petitioners and Democratic Intervenors cite supports extending strict scrutiny to the date requirement. Some are not even voting-related cases. *See, e.g., James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984) (cited at Pet. Br. 19); *Pap’s A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (cited at Pet. Br. 19). Another was a ballot-access challenge brought under the First Amendment, not a ballot-casting challenge brought under the Free and Equal Elections Clause. *See In re Nader*, 858 A.2d 1167 (Pa. 2004), *abrogated on other grounds by In re Vodvarka*, 140 A.3d 639 (Pa. 2016) (cited at Pet. Br. 19).

The other cited cases recognize that voting is a fundamental right but actually *rule out* extending strict scrutiny to ordinary ballot-casting rules. *See* Pet. Br. 16-19; Dem. Br. 17-20; *see also* Summary Relief Br. 40-43. The most obvious example is *Pennsylvania Democratic Party* (cited Pet. Br. 16; Dem. Br. 18), where the Pennsylvania Supreme Court agreed that the right to vote is fundamental, but did not apply strict scrutiny to the challenged ballot-casting rules, including the declaration mandate of which the date requirement is part. *See* 238 A.3d at 372-80. The same is true of *Kuznik v. Westmoreland Cnty. Bd. of Comm'rs*, 902 A.2d 476 (Pa. 2006) (cited at Pet. Br. 18-19), where the Pennsylvania Supreme Court again noted that voting is a fundamental right but did not apply strict scrutiny. And both this Court and the Pennsylvania Supreme Court expressly declined to apply strict scrutiny in *Petition of Berg* (cited at Pet. Br. 19), *see* 712 A.2d 340, 342-43 (Pa. Commw. Ct. 1998); 713 A.2d at 1109.

Petitioners' and Democratic Intervenors' proposed approach thus contravenes their own cited authorities. The lone case Petitioners cite that mentioned strict scrutiny in connection with adjudicating challenges to an election regulation is unpublished and easily distinguishable. *See Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *20 (Pa. Commw. Ct. Jan. 17, 2014) (cited at Pet. Br. 19). That case dealt with a voter-ID law that, critically, state officials were not "implement[ing]" "according to its terms." *Id.* at *9. Because the ID-issuance

process was “fraught with illegalities” and other problems, it was “difficult to obtain” a valid ID. *Id.* at *18. Indeed, the Court found that “hundreds of thousands” of people were at risk of being denied access to voting “through no fault of their own.” *See id.* at *20 & n.25. In those circumstances, the Court agreed that the regulation “ma[de] it so difficult [to vote] as to amount to a denial” of “the franchise.” *Id.* at 19 (quoting *Winston*, 91 A. at 523).

Applewhite thus confirms that the Free and Equal Elections standard is whether the challenged regulation “makes it so difficult [to vote] as to amount to a denial” of “the franchise.” *See id.*; Summary Relief Br. 33 (quoting *Winston*, 91 A. at 523). The date requirement is constitutional under that standard because it does not block anyone—let alone “hundreds of thousands” of voters—from voting “through no fault of their own.” *Applewhite*, 2014 WL 184988 at *20 & n.25.

Beyond these cases, the vast majority of cases Movants cite involved *statutory construction*, not constitutional challenges under the Free and Equal Elections Clause. *See, e.g., Shambach v. Bickhart*, 845 A.2d 793, 796-99 (Pa. 2004) (identifying statutory ambiguity and “liberally constru[ing]” statute) (cited at Pet. Br. 16); *Petition of Cioppa*, 626 A.2d 146, 148-49 (Pa. 1993) (identifying rule of statutory construction but holding provision was unambiguous) (cited at Pet. Br. 16; Dem. Br. 6); *In re Luzerne Cnty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (holding as to “proper interpretation” of statute) (cited at Pet. Br. 16; Dem. Br. 7-8); *In re*

Petitions to Open Ballot Boxes, 188 A.2d 254, 256 (Pa. 1963) (applying statute) (cited at Dem. Br. 8, 19-20); *Appeal of James*, 105 A.2d 64, 66 (Pa. 1954) (cited at Pet. Br. 16; Dem. Br. 8); *Appeal of Norwood*, 116 A.2d 552, 554-55 (Pa. 1955) (applying Pennsylvania secret-ballot rule and concluding voter did not “identif[y]” himself within meaning of statute) (cited at Dem. Br. 8, 18-19); *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 538-40 (Pa. 1964) (refusing to consider argument raised for first time on appeal and declining to reach statutory arguments) (cited at Pet. Br. 28; Dem. Br. 7-8); *Appeal of Gallagher*, 41 A.2d 630, 632 (Pa. 1945) (interpreting and applying statute) (cited at Dem. Br. 8, 19).

Such authority is irrelevant here because the Pennsylvania Supreme Court has already construed the date requirement and held it to be unambiguous and mandatory. *See Ball*, 289 A.3d at 20-23; *see also* Pet. Br. 27-28. That helps explain why Movants avoid analogizing the facts of any of those cases to those here—preferring instead to splice irrelevant statements from their context.

Democratic Intervenors come the closest of any of the Movants to attempting to analogize to existing precedent, but their attempt falls short. In particular, they assert that three cases—*Appeal of Norwood*, *Appeal of Gallagher*, and *In Re Petitions to Open Ballot Boxes*—prove that Pennsylvania “need[s] a compelling state interest to justify the disqualification of ballots.” Dem. Br. 19. But none of these cases applied the Free and Equal Elections Clause or *any* sort of constitutional

scrutiny. In all three cases, the court was applying Pennsylvania’s *statutory* secret-ballot rule. *See Norwood*, 116 A.2d at 554-55; *Appeal of Gallagher*, 41 A.2d at 631-32; *In re Petitions to Open Ballot Boxes*, 188 A.2d at 256. As with Movants’ other statutory-interpretation cases, these cases are irrelevant in light of *Ball*, say nothing about the Free and Equal Elections Clause, and provide no basis to extend strict scrutiny to—much less to invalidate—the date requirement.

If more were somehow needed, Petitioners’ and Democratic Intervenors’ premise—that the date requirement implicates a “fundamental” right, *see* Pet. Br. 16; Dem. Br. 17—flies in the face of existing case-law. To be sure, the right to vote is fundamental. Federal and state courts across the country, however, have held that there is no fundamental right *to vote by mail* and, thus, that laws regulating voting by mail do not implicate a fundamental right. *See McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403-05 (5th Cir. 2020). Rather, absentee and mail voting are conveniences “designed to make voting more available to some groups who cannot easily get to the polls” and, thus, “do not themselves deny ... the exercise of the franchise.” *McDonald*, 394 U.S. at 807-08. And “[s]ince the privilege of absentee voting” or mail voting “is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” *Bell*, 227 N.W. at 802.

Indeed, if there were a fundamental right to vote by mail, then Pennsylvania was in material breach of its voters' constitutional rights until 2019, when the General Assembly first enacted universal mail voting in Act 77. Merely to state that proposition is to prove the conclusion. Petitioners' and Democratic Intervenors' proposed strict-scrutiny approach contemplates a fundamental right to mail voting and, thus, fails for that reason as well.

Finally, Movants do not address the implications of applying strict scrutiny to every, or even some, mandatory ballot-casting rules. Those implications are stunning. *See* Summary Relief Br. 41-42. Petitioners' and Democratic Intervenors' proposed approach would invert the Free and Equal Elections Clause and, in effect, dramatically rewrite the Pennsylvania Constitution and its separation of powers.

After all, the Clause delegates the "task of effectuating" its "free and equal" mandate to the General Assembly, *Pa. Democratic Party*, 238 A.3d at 374, but extending strict scrutiny to ballot-casting rules would improperly transfer the "legislative" function of regulating elections to the Judiciary. *Winston*, 91 A. at 522; *see also Pa. Democratic Party*, 238 A.3d at 373-74. Courts would be forced to routinely "second-guess the policy choices of the General Assembly," *Ins. Fed'n of Pa. Inc. v. Commonwealth, Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009), under a standard of review that is "strict in theory, but fatal in fact," G. Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court*:

A Model For Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972). Numerous ordinary ballot-casting rules—including the secrecy-envelope and signature requirements—would certainly be declared unconstitutional. *Contra Pa. Democratic Party*, 238 A.3d at 372-80.

The Court should decline the invitation to amend the Pennsylvania Constitution under the guise of this case and, instead, faithfully apply the Free and Equal Elections Clause to uphold the date requirement portion of the General Assembly’s constitutional declaration mandate. *See id.* at 373-74; Summary Relief Br. 31-48.

3. Movants’ Various Alternative Approaches Misstate The Law.

Petitioners, Democratic Intervenors, and the Secretary propose three alternative approaches for extending judicial scrutiny to the date requirement under the Free and Equal Elections Clause. All contravene the Clause’s plain text and history, as well as the governing case-law.

First, Petitioners and the Democratic Intervenors assert that the Free and Equal Elections Clause creates a “right to have one’s vote counted” *regardless* of the individual’s compliance with ballot-casting rules. Pet. Br. 19; Dem. Br. 5. For this notion, Petitioners cite *Winston v. Moore*, which recognized that each eligible voter has the “right to cast his ballot and have it *honestly* counted.” 91 A. at 523 (emphasis added). *Winston* itself makes clear that this reference to “honest

counting” means that ballots must be counted according to uniform rules and that similarly situated voters must be treated “alike,” *id.*; election officials could not, for example, decline to count votes just because they were cast in Cumberland County. But “honest[] count[ing]” *according to* uniform rules is not an *exemption from* the rules. *Id.* Thus, neither *Winston* nor the “honestly counted” principle have *ever* been understood to liberate voters from the obligation to follow the General Assembly’s ballot-casting rules—and Movants offer no authority that they have.

Indeed, had *Winston* done so, the Pennsylvania Supreme Court would have been required to strike down the declaration mandate and secrecy-envelope requirement in *Pennsylvania Democratic Party*—but it instead *upheld* both sets of rules. *See* 238 A.3d at 372-80. And *Winston* itself could not have reaffirmed the General Assembly’s authority to set ballot-casting rules, so long as it does not “make [voting] so difficult as to amount to a denial” of “the franchise itself.” *Winston*, 91 A. at 523. That is the standard of review for ballot-casting rules under the Clause. *See also* Summary Relief Br. 23-27.

That standard is a high one—and it makes perfect sense. What the Clause guarantees is that all Pennsylvania voters have “the same free and equal opportunity to select [their] representatives,” *League of Women Voters*, 178 A.3d at 814, “so long as [they] follow[] the requisite voting procedures” established by the General Assembly, *Pa. Democratic Party*, 238 A.3d at 373. Only procedures that deny the

“franchise” violate this equal-opportunity guarantee. *See League of Women Voters*, 178 A.3d at 810.

In that respect, federal right-to-vote jurisprudence is similar. The U.S. Supreme Court long recognized that the “right to vote” entailed a right to require election officials to count a ballot *so long as* it is “lawful and regular” and thus “entitled to be counted.” *United States v. Mosley*, 238 U.S. 383, 385-86 (1915). It did not contemplate a right to be *free* from neutral, generally applicable state laws governing the act of casting a ballot. *See, e.g., id.* As the Third Circuit and Justice Alito recently explained, “[e]ven the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.” *Pa. State Conf. of NAACP*, 97 F.4th at 133-35 (Ambro, J.) (quoting *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissental)); *see also* Summary Relief Br. 25-26.

Second, Petitioners hedge their bet on strict-scrutiny review by contending that *Pennsylvania Democratic Party* established a three-tiered test to evaluate election regulations under strict scrutiny, intermediate scrutiny, and rational-basis review. Pet. Br. 26-27 (citing *Pa. Democratic Party*, 238 A.3d at 385). And, they insist, the date requirement should at least be assessed under one of those “two lesser levels of scrutiny.” *Id.* But *Pennsylvania Democratic Party* did no such thing. In the portion of the opinion Petitioners cite, the Pennsylvania Supreme Court was not

discussing the Free and Equal Elections Clause or even the Pennsylvania Constitution. Instead, it was discussing what it believed was the relevant standard for a *federal* right-to-vote claim under the First and Fourteenth Amendments (and *upheld* Pennsylvania’s residency requirement for poll watchers under that standard). *See Pa. Democratic Party*, 238 A.3d at 380-86. The remainder of the opinion conclusively confirms this reading: when the *Pennsylvania Democratic Party* court discussed the petitioner’s challenges to ballot-casting rules under the Free and Equal Elections Clause, it made no mention of the tiers of scrutiny or *any* type of scrutiny. *See id.* at 372-80.

Petitioners’ other cited cases, *see* Pet. Br. 27, also do not support extending rational-basis scrutiny to the date requirement. None addressed the Free and Equal Elections Clause or a voting-related law. *See Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (due process and restrictions on employment); *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995) (federal Equal Protection Clause and restrictions on right to parent); *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954) (due process and restrictions on size of retail signs).

Third, unsurprisingly, the Secretary does not sign onto Petitioners’ bid for strict or intermediate scrutiny. Instead, he argues that all ballot-casting rules must merely be “reasonable, non-discriminatory regulations.” Sec’y Br. 16. That proposed test sounds exactly like rational-basis review. Democratic Intervenors also

concede that, if strict scrutiny does not apply, a test resembling rational-basis review does. Dem Br. 18 (“When an election regulation does not severely restrict the right to vote, the Pennsylvania Supreme Court has been more deferential—so long as the regulation genuinely advances the Commonwealth’s interest in ensuring honest and fair elections.” (cleaned up)). As previously explained and confirmed below, the date requirement *easily* satisfies that standard. Summary Relief Br. 45-54; *infra* Part II.D.

But in truth, there is no support even for the Secretary’s and Democratic Intervenors’ invitation to use rational-basis or “reasonable, non-discriminatory” review to second-guess ordinary ballot-casting rules. The cases cited by the Secretary do not justify his proposed test, much less invalidation of the date requirement portion of the General Assembly’s declaration mandate. *See* Sec’y Br. 16. For example, the discussion the Secretary points to in *Banfield v. Cortés*, 110 A.3d 155 (Pa. 2015), did not address the Free and Equal Elections Clause or a challenge to a ballot-casting rule. *See* 110 A.3d at 176-77. Instead, it addressed challenges under various other provisions of the Pennsylvania and U.S. Constitutions to the Secretary’s certification of electronic voting machines used only in certain counties. *See id.*; *see also* Sec’y Br. 17 (citing *Banfield* in support of standard for federal constitutional claims). The Pennsylvania Supreme Court, moreover, *rejected* all of those challenges. *See* 110 A.3d at 176-77. *Banfield* thus

is doubly irrelevant: it does not suggest, much less prescribe, the analysis for Petitioners' Free and Equal Elections challenge to a ballot-casting rule, and its *rejection* of constitutional challenges lends no support for *accepting* Petitioners' constitutional challenge here.

DeWalt v. Bartley, 24 A. 185 (Pa. 1892) (cited at Sec'y Br. 16), was also not a ballot-casting challenge, but a Free and Equal Elections challenge to a law establishing rules for candidates to qualify for the ballot, prohibitions on electioneering in polling places, rules for poll watchers, and measures to protect ballot secrecy. *See* 24 A. at 186-88. If anything, that case supports *upholding* the date requirement: The Pennsylvania Supreme Court upheld the law because “[t]here is no doubt of the power of the legislature to regulate elections” and the law did not make voting “so difficult and inconvenient as to amount to a denial” of the franchise. *Id.* at 186. The same is true of the date requirement. *See* Summary Relief Br. 31-48.

Independence Party Nomination was a statutory interpretation case, not a constitutional case, that in any event reaffirmed that “the Legislature has the power to regulate the details of place, time, manner, etc.” for elections. *Independence Party Nominations*, 57 A. 344, 345 (Pa. 1904) (interpreting provision as to party nominations) (cited at Sec'y Br. 16). And *Shankey v. Staisey*, 257 A.2d 897 (Pa.

1969) (cited at Sec’y Br. 16), upheld against a *federal* Equal Protection Clause challenge a rule regulating ballot access by minor political parties. *Id.* at 899, 902.

More bizarrely still, the Secretary claims that *Pennsylvania Democratic Party* applied his “reasonableness” test to challenged regulations. Sec’y Br. 16. It did not. The court *upheld* the secrecy-envelope rule and the rejection of mail ballots due to signing and dating errors, without engaging in any sort of interest-balancing or evaluating the policies supporting those rules. *Pa. Democratic Party*, 238 A.3d at 372-80. And it reaffirmed that the Free and Equal Elections Clause “leaves the task of effectuating [its] mandate to the Legislature.” *Id.* at 374. *Pennsylvania Democratic Party* thus decisively rejected the invitation to scrutinize the General Assembly’s policy choice to adopt the date requirement. This Court should, too.

C. Other States’ “Free And Equal Elections” Precedents And Federal Right-To-Vote Precedents Foreclose Petitioners’ Claims.

The law of other States with “free and equal” elections constitutional provisions confirms that summary relief against Petitioners is warranted. *None* of those States has applied its version of that provision to invalidate a ballot-casting rule. *See* Summary Relief Br. 43-45.

Petitioners and Democratic Intervenors say nothing of this point. The Secretary offers a string cite of six out-of-state cases without analysis or even parentheticals. *See* Sec’y Br. 17. Notably, *none* of the six state constitutional provisions implicated in the Secretary’s cited cases corresponds to the twelve state

constitutional provisions that the Pennsylvania Supreme Court has identified as analogous to the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 813 n.71. And none of the cited cases features ballot-casting rules similar to the date requirement, let alone rejects one. *See Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1082 (Mont. 2024) (voter-registration and ballot-distribution rules); *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326, 331-32, 341 (Mass. 2018) (upholding voter-registration rule); *Guare v. New Hampshire*, 117 A.3d 731, 736 (N.H. 2015) (voter-registration rule); *League of Women Voters of Wis. Educ. Network v. Walker*, 851 N.W.2d 302, 313-14 (Wis. 2014) (“assum[ing] without deciding, that reasonableness functions as an independent limit on election regulation” and upholding challenged provision); *In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007) (applying federal-right-to-vote standard and upholding voter-identification provision); *Craig v. Peterson*, 233 N.E.2d 345, 348 (Ill. 1968) (statutory interpretation).

In at least two ways, federal right-to-vote precedent likewise confirms that Petitioners err in seeking *any* judicial scrutiny of the date requirement—and that their claim fails. Summary Relief Br. 45-46. In the first place, the date requirement cannot implicate, let alone violate, any right to vote because it regulates only mail voting and is inapplicable to in-person voting. *See id.* Courts considering federal

right-to-vote challenges have held that regulations on just one method of voting cannot violate the right to vote where an alternative method of voting remains available and not subject to the regulation. *See McDonald*, 394 U.S. at 807-808; *Crawford*, 553 U.S. at 201 (opinion of Stevens, J.); *Tex. Democratic Party*, 961 F.3d at 403-05; Summary Relief Br. 45-46. And it is especially implausible that Act 77—which Petitioners acknowledge “has been a boon for voter participation in the Commonwealth,” Pet. Br. 6—violates the Free and Equal Elections Clause or denies any right to vote merely by insisting that mail ballots be dated.

In the second place, regulations that impose only the usual burdens of voting likewise do not implicate, let alone violate, the right to vote—and the date requirement is just such a regulation. *See* Summary Relief Br. 36-37, 47-49; *supra* 23-24. When dealing with only the usual burdens of voting, courts should respect the dignity and autonomy of citizens and presume that they are capable of reading ballot-casting instructions and doing simple things like signing and dating a document. *See* Legislators’ Br. 14-15 (making this point). The Court should reject Petitioners’ invitation to do just the opposite.

D. The Date Requirement Easily Satisfies Rational-Basis Scrutiny, If Applicable.

Even if Movants were correct that controlling precedent allowed this Court to analyze the date requirement under rational-basis review, *see* Pet. Br. 26-27; Dem. Br. 18, or “reasonable, non-discriminatory” review, *see* Sec’y Br. 16, the Court still

should uphold the date requirement because it passes this deferential version of review with flying colors, *see* Summary Relief Br. 46-54.

Rational-basis review is one of the most forgiving standards of review in American law, and laws reviewed under this standard are “overwhelmingly likely to be upheld.” M. Barnes & E. Chemerinsky, *The Once and Future of Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1077 (2011). Courts must uphold a law under rational-basis review if there is *any* conceivable basis to uphold it. *FCC v. Beach Communications*, 508 U.S. 307, 315 (1993). And those attacking a statute’s rationality “have the burden to negat[e] every conceivable basis which might support it.” *Id.* Courts, moreover, are “not bound by the parties’ arguments as to what legitimate state interests [a policy] seeks to further,” but are instead “obligated to seek out other conceivable reasons for validating a state [law].” *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004). Courts cannot deem a law irrational just because it may not succeed in bringing about its goals. *Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50 (1966). Nor can a court “overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice.” *Powers*, 379 F.3d at 1217 (citing *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979)).

On the burden side of the scale, the date requirement imposes only trivial burdens on voters that are significantly *smaller* than the burdens imposed by voting

rules that have already been upheld by the Pennsylvania Supreme Court and the United States Supreme Court. *See supra* 23-24; *see also Pa. Democratic Party*, 238 A.3d at 372-80; *Crawford*, 553 U.S. at 198 (opinion of Stevens, J.); *Brnovich*, 594 U.S. at 678; Summary Relief Br. 34-38, 49.

Oddly, Petitioners and the Democratic Intervenors do not actually offer arguments as to how the date requirement burdens voters. They focus instead on the fact that less than 1% of mail ballots are rejected due to noncompliance with the date requirement—a fact that *proves* that the date requirement is not unconstitutionally burdensome. *See supra* 25-27. And they certainly do not grapple with how courts assess burden under the type of balancing standard they want this Court to adopt. *See* Summary Relief Br. 47-49.

On the state-interest side of the scale, the date requirement is more than amply justified by several such interests, including the interests in orderly election administration, solemnity, and deterring and detecting election fraud. *See id.* at 49-54. Movants' various attempts to rebut this showing fail.

To start, Movants try to narrow the universe of state interests the Court can consider, suggesting that only the precise interests previously outlined by Justice Dougherty can be considered, Pet. Br. 22-26; Dem. Br. 13, or even that only interests explicitly identified by the Legislature itself are relevant, Pet. Br. 21-22. But as Movants admit, the authorities they cite for this proposition pertain to “strict

scrutiny” review, not rational-basis review. *See id.* at 21. Strict scrutiny has no application here, *see supra* Part II.B.2—and rational-basis review operates differently.

Under rational-basis review, those attacking a statute “have the burden to negate every conceivable basis which might support it.” *Beach Communications*, 508 U.S. at 315 (cleaned up); *Powers*, 379 F.3d at 1217 (courts are “obligated to seek out other conceivable reasons for validating a state [law]”). Therefore, this Court must consider not only the justifications for the law presented by the Pennsylvania Supreme Court and Republican Intervenors, but also whether *any other* justifications could support the law. *Beach Communications*, 508 U.S. at 315.

In any event, Movants have failed to rebut the interests Republican Intervenors previously identified (in this case as well as others) as supporting the date requirement. *First*, Movants try and fail to discount the date requirement’s role in election administration. *See, e.g.*, Dem. Br. 9. As the Secretary explains, he has issued *guidance* that county boards *should* stamp a mail ballot upon receiving it and *should* enter the time the ballot was received in the SURE System. Sec’y Br. 6; *see also* Pet. Br. 23; *Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *21. And, the Secretary insists, county boards ordinarily do that. Sec’y Br. 7.

But the Secretary does not (and cannot) claim that county boards will *always* follow these procedures. If a county board did not timestamp a mail ballot upon

receipt—even by mistake—then the handwritten date *might* need to be used to determine whether the ballot was timely. Indeed, Judge Matey recognized that the date requirement would serve an important role in this situation, or if there was a problem with the SURE system. *See Migliori v. Cohen*, 36 F.4th 153, 165 (3d Cir. 2022) (Matey, J., concurring in judgment), *vacated Ritter v. Migliori*, 143 S. Ct. 297 (2022), and *majority holding disavowed, Pa. State Conf. of NAACP*, 97 F.4th at 128. The happenstance of present procedures cannot render the General Assembly’s *statute* unconstitutional, or prevent it from insisting on a useful backstop in election administration. *Cf. In re Canvass of Absentee & Mail-In Ballots*, 241 A.3d 1058, 1091 (Pa. 2020) (opinion of Justice Dougherty, Chief Justice Saylor, and Justice Mundy).

Second, Movants simply ignore the fact that signature-and-date obligations are universal and promote solemnity in filling out important documents. That is why Pennsylvania requires signatures and dates *all the time*. *See* Summary Relief Br. 36 & n.2, 51. And the Fifth Circuit recently cited this interest when it upheld a challenged voting law requiring an original signature on documents. *Vote.Org v. Callanen*, 89 F.4th 459, 489 (5th Cir. 2023).

Third, Movants insist the date requirement cannot detect and deter fraud. *See, e.g.,* Dem. Br. 10. But the date requirement has *already* been used to detect and deter fraud. Summary Relief Br. 51-52; *see also Migliori v. Lehigh Cnty. Bd. of Elections.*,

No. 5:22-cv-00397, 2022 WL 802159, at *14 (E.D. Pa. Mar. 16, 2022) (Leeson, J.) (explaining this point). In *Commonwealth v. Mihaliak*, prosecutors used the handwritten date as evidence that an individual fraudulently cast a ballot in her deceased mother's name. CP-36-CR-0003315-2022 (Lancaster Cnty. 2022); see Exhibit C (*Mihaliak* charging document).

The Democratic Intervenors suggest that, in cases like that, ballots would not be counted and potential fraud would be flagged because the SURE System notes when electors die. Dem Br. 10; see also *Pa. State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *31 n.39. But *Mihaliak* demonstrates how the date requirement still plays a significant role in identifying fraud. The fraudster could have argued that her mother filled out the ballot, placed it in the mail, and died before it was received by the county board. But the handwritten date—written after the mother died—disproved that obvious defense and helped prosecutors secure a guilty plea and sentence. See *Mihaliak*, CP-36-CR-0003315-2022.

Finally, Movants point to the Third Circuit's statement that the date requirement "serves little apparent purpose." *Pa. State Conf. of NAACP*, 97 F.4th at 125; Pet. Br. 7; Dem. Br. 3, 11-12. That statement was dictum, and the Third Circuit never addressed the State's interests in documenting the date the voter completed the ballot as part of trustworthy election administration, solemnity, or in deterring or

detecting fraud. *See* Summary Relief Br. 53-54. It therefore is not even persuasive with respect to the questions presented here. *See id.*

Bizarrely, the Democratic Intervenors (alone) argue that the Third Circuit's statement collaterally estops Republican Intervenors from defending the date requirement. Dem. Br. 11-12. That is silly multiple times over. For one thing, the Third Circuit did not say that the date requirement serves *no* purpose; it opined there was "*little apparent purpose.*" *Pa. State Conf. of NAACP Branches*, 97 F.4th at 125 (emphasis added). Moreover, the issue whether the date requirement advances any state interests was *irrelevant* in that case addressing the federal Materiality Provision—as the Republican Intervenors argued, the district court agreed, *see Pennsylvania State Conf. of NAACP v. Schmidt*, 2023 WL 8091601, at *22-34, and the Third Circuit acknowledged by upholding the date requirement notwithstanding its own statement, *see* 97 F.4th 120. Thus, the issue “whether the date requirement serves any purpose” is not “the same” as the issue presented in the federal case, there is no “final judgment on the merits” of that issue, and no party had a “full and fair opportunity to litigate the issue” in the federal case. Dem. Br. 11-12 (citing *In re Coatesville Area Sch. Dist.*, 244 A.3d 373, 379 (Pa. 2021)). Democratic Intervenors' collateral estoppel argument therefore fails on its own terms. *See* Dem Br. 12.

If anything, under Democratic Intervenors' logic, *Movants* are collaterally estopped from relitigating whether the date requirement denies “the right to vote.”

Pa. State Conf. of NAACP, 97 F.4th at 133. That issue *was* presented in the federal case, the issue “is the same” in this case, the Third Circuit entered “a final judgment on the merits” of it, and Petitioners, Democratic Intervenors, and the Secretary “had a full and fair opportunity to litigate”—and *did* litigate—“the issue in the prior action.” *In re Coatesville Area Sch. Dist.*, 244 A.3d at 381; *see supra* Part II.B. The Court should deny Petitioners’ Application and grant Republican Intervenors’ Application.

E. Invalidating The Date Requirement Would Violate The U.S. Constitution.

Invalidating the date requirement would be such an unprecedented and unreasonable interpretation of the Free and Fair Elections Clause that it would violate the Federal Constitution. Summary Relief Br. 54-55. Movants say nothing in response on this point. Putting Pennsylvania law on the rack to satisfy Petitioners’ political agenda would only invite review by the U.S. Supreme Court. *Moore v. Harper*, 600 U.S. 1, 34-36 (2023). The Court should deny Petitioners’ Application for this reason alone.

F. Declaring The Date Requirement Unconstitutional Would Strike Act 77 And Universal Mail Voting In Pennsylvania.

Finally, if this Court *were* to accept Petitioners’ argument that the date requirement is unconstitutional, it would necessarily mean striking universal mail voting in Pennsylvania under Act 77’s non-severability provision. *See* Summary Relief Br. 55-58.

Movants offer two responses. *First*, they claim that declaratory relief against *enforcement* of the date requirement would not result in any provision of Act 77 being “held invalid.” Act 77 § 11; Pet. Br. 32-33. That proposed workaround does not work.

A challenge to a law on constitutional grounds may take the form of a “facial” challenge, or an “as-applied” challenge. *E.g.*, *Benezet Consulting LLC v. Sec’y Commonwealth of Pa.*, 26 F.4th 580, 585 (3d Cir. 2022); *Peake v. Commonwealth*, 132 A.3d 506, 517 (Pa. Commw. Ct. 2015). “[A]n ‘as applied’ challenge is a claim that the operation of a statute is unconstitutional in a particular case while a *facial* challenge indicates that the statute may rarely or never be constitutionally applied.” *Benezet*, 26 F. 4th at 585 (citing 16 C.J.S. Constitutional Law § 243) (emphasis added). Importantly, “as-applied relief must be limited to the specific plaintiffs and circumstances of the litigation.” *Id.* (citing *Doe v. Reed*, 561 U.S. 186 (2010)). Here, Petitioners are bringing a facial challenge: The relief they seek would affect *all* voters and, on their theory of how the Secretary’s guidance work, bind all county officials. Pet. ¶ 79. And because Plaintiffs bring a facial challenge, a remedy in their favor would result in a provision of Act 77 being “held invalid” and, thus, trigger the non-severability provision. Act 77 § 11.

Even if the Court could somehow conceive of Petitioners’ claims as being as-applied, an order in their favor would still have the effect of holding a provision of

Act 77 “invalid.” *Id.* After all, accepting Petitioners’ argument requires this Court to say that the General Assembly’s command to date mail ballots is “invalid” under the Pennsylvania Constitution. Therefore, Act 77’s non-severability provision would apply. *See McLinko v. Dep’t of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting) (recognizing Act 77’s non-severability provision presents an open question).

Second, Petitioners claim that Act 77’s non-severability provision is unenforceable. Pet. Br. 34-36. They rely on *Stilp v. Commonwealth*, which confronted a “boilerplate” non-severability provision. 905 A.2d 918, 973 (Pa. 2006). But *Stilp* recognized that “as a general matter, nonseverability provisions are constitutionally proper.” *Id.* at 978. That is especially true where non-severability provisions arise from “the concerns and compromises which animate the legislative process.” *Id.* And here, the non-severability provision was an important reason Act 77 was passed as part of a difficult and historic political compromise in which Democrats gained a vast expansion of mail voting and Republicans bargained for regulations of mail voting designed to promote orderly election administration and election integrity. *See* Summary Relief Br. 56-58; Legislators’ Br. 24; *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 396 (W.D. Pa. 2020) (explaining that Act 77 represented a “balance” between expanding voting options and adopting establishing “safeguards . . . to catch or deter fraud and other illegal

voting practices.”). Now Movants, including the Democratic Party, seek to preserve the Democratic Party’s part of the bargain in Act 77 while excising the agreed-upon exchange given to Republicans. That opportunism is legitimately foreclosed by Act 77’s non-severability provision. *See Stilp*, 905 A.3d at 978.

Petitioners respond that they do not understand why the Republican legislators would care about the date requirement, which they deem “pointless.” Pet Br. 36. Yet Democratic legislators have, in the past couple years, introduced multiple proposals to repeal the date requirement. *See* Legislators’ Br. 20-22. These proposals have been debated by the General Assembly. *Id.* None of those efforts has succeeded because a controlling bloc of the General Assembly obviously continues to believe the date requirement is important—as several leaders in the Pennsylvania Senate confirm to the Court in their *amicus* brief. *Id.* Instead of seeking legislative change in court, Petitioners, Democratic Intervenors, and the Secretary should try to convince their elected representatives that the date requirement is “pointless.” Pet Br. 36.

Petitioners also object that enjoining Act 77 would have negative public policy consequences. Pet. Br. 35-36. Petitioners brought this lawsuit, so those consequences would be of Petitioners’ making. Act 77’s non-severability provision was obviously designed to protect the political compromises in the Act from opportunistic lawsuits like this one that seek to rebalance the Act in favor of one

political party. If Petitioners are truly worried about imperiling the rest of Act 77 and universal mail voting in Pennsylvania, they can dismiss their Petition.

III. PETITIONERS' REQUESTED RELIEF VIOLATES THE PENNSYLVANIA AND U.S. CONSTITUTIONS.

Petitioners did not seek any relief against the two Boards in their Petition, *see* Pet. ¶ 92, but now purport to ask the Court for a declaration and injunction requiring “Respondents” to count mail ballots with a missing or incorrect date, Pet. App’n ¶ 73.

Even if the Court believes that Petitioners can show a constitutional defect in the date requirement—and can amend their Petition through their Application—it still should deny their requested relief. Enjoining just two county boards would result in disparate treatment of identically situated voters across the Commonwealth based on their county of residence. In particular, that relief would compel the 2 Boards *to count* ballots that fail to comply with the date requirement, while the 65 other boards would remain compelled *not to count* such ballots under *Ball*. *See* 289 A.3d 1; Boards Br. 6; *supra* Part I.D.

Any such relief, therefore, would not “treat all persons in the same circumstances alike,” *Kerns*, 69 A.2d at 393; *Winston*, 91 A. at 524, and therefore would violate the Pennsylvania Constitution’s mandate that “[a]ll laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the state,” Pa. Const. art. VII, § 6. And by requiring “counties

[to] use[] varying standards to determine what [constitutes] a legal vote” in an election for the same office, such relief would also violate the Equal Protection Clause of the U.S. Constitution, *see Bush*, 531 U.S. at 106-07; *see also* Summary Relief Br. 23-24. The Court therefore should deny Petitioners’ requested relief regardless of its view of the merits.

IV. PETITIONERS ARE EQUITABLY BARRED FROM RECEIVING INJUNCTIVE RELIEF BEFORE LITIGATION CONCLUDES.

Finally, even if the Court believes Petitioners are likely to succeed on the merits, it should deny injunctive relief until litigation concludes for equitable reasons. As Petitioners acknowledge, “[t]o justify the award of a permanent injunction, the party seeking relief must establish [1] that his right to relief is clear, [2] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [3] that greater injury will result from refusing rather than granting the relief requested.” Pet. Br. 14 (quoting *Kuznik*, 902 A.2d at 489).

In *Kuznik*, the Pennsylvania Supreme Court applied this standard to reverse an injunction issued by this Court in favor of voters just over three months before an election. *See* 902 A.2d at 488-508. The court reasoned in part that the petitioners could not carry their burden on the third prong because their requested relief would result in “voter confusion” and “chaos.” *Id.* at 504-07.

So too here, Petitioners in all events cannot satisfy their burden on the third prong because any harm from denying an injunction is outweighed by the harm to

Pennsylvania, Pennsylvania voters, and Republican Intervenors. In the first place, invalidating a sovereign State’s law “clearly inflicts irreparable harm,” *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018), and does irreparable “damage ... to the authority of” the General Assembly, *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurral).

Enjoining the date requirement would also impose irreparable harm on Pennsylvania voters—particularly if such an injunction issues now, on the eve of the 2024 general election. Such an injunction will lead to “voter confusion” and “chaos,” *Kuznik*, 902 A.2d at 503-07 (reversing injunction in part on this basis), and a “consequent incentive to remain away from the polls,” *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); *see also* Declaration of Angela Alleman ¶ 32 (attached as Exhibit D) (“Alleman Decl.”). “Voters who fear their legitimate votes will be outweighed by fraudulent ones” that will go undetected with the date requirement enjoined “will feel disenfranchised.” *Purcell*, 549 U.S. at 4. There will be rushed appeals to the Pennsylvania Supreme Court and, potentially, the U.S. Supreme Court. *See, e.g., Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (2020) (equally divided vote in October 2020 on whether to stay Pennsylvania Supreme Court rule change). The date requirement—which has already bounced in and out of effect repeatedly over the last few election cycles, would likely be put back into effect, confusing voters. *See* Legislators’ Br. 25; Alleman Decl. ¶ 32.

At the same time, a judicial order barring enforcement of something as mundane and commonsensical as the date requirement would erode public confidence in the integrity of Pennsylvania's elections and Pennsylvania's courts. *See, e.g., DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurral) (noting importance of “judicial restraint” in this context); *id.* at 30 (Gorsuch, J., concurral) (“Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”). Such “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4; Alleman Decl. ¶ 32.

Moreover, enjoining the date requirement would inflict irreparable harm on Republican Intervenors. Republican Intervenors' substantial efforts to train and educate poll watchers, volunteers, candidates and voters regarding the date requirement would be wasted—and could not be recovered if any injunction is later reversed. *See* Alleman Decl. ¶¶ 11-23. Republican Intervenors, moreover, would be required to invest unrecoverable resources in revising their training and voter education programs. *See id.* ¶¶ 26-28. An injunction would threaten to confuse Republican voters, reduce voter confidence in Pennsylvania's elections, and reduce turnout by Republican voters. *See id.* ¶ 32. It would also alter the competitive environment in which Republican Intervenors, their candidates, and their voters seek to elect Republicans to office. *See id.* ¶ 33. And it could even alter the outcome of

elections to Republican Intervenors’ detriment, as has happened in three recent Pennsylvania elections in which the date requirement was not enforced. *See id.* ¶¶ 34-38. In all three of those elections, the Republican candidate would have prevailed if the date requirement had been enforced, but another candidate was declared the winner when election officials declined to enforce the date requirement and counted noncompliant ballots. *See id.*

There is no basis to inflict these harms on the public and Republican Intervenors now—particularly in light of Petitioners’ substantial delay and strategic forum-shopping in bringing their Free and Equal Elections challenge. *See, e.g., Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (“Delay in seeking enforcement of [asserted] rights, however, tends to indicate at least a reduced need for” the “drastic” step of injunctive relief). Petitioners have been crusading against the date requirement for years. They argued that mandatory application of the date requirement would violate the Free and Equal Elections Clause in late 2022. *See supra* 18-19. After that gambit to eliminate the date requirement failed, they tried several *other* theories in various federal and state courts. One and a half years later, they try again—in the middle of a contentious presidential election in which Pennsylvania’s electoral votes may be dispositive.

Such inequitable conduct forecloses granting any remedy against the date requirement until this litigation concludes. A Minnesota court recently denied

injunctive relief in a lawsuit challenging a mail-ballot casting rule solely on equitable grounds—even where it *agreed* with the plaintiffs on the merits and accepted that the challenged rule “could result in the unlawful disenfranchisement of many eligible voters.” *Minn. All. for Retired Ams. Educ. Fund v. Simon*, 62-cv-24-854 (Minn. Dist. June 6, 2024) (slip op. at 28) (Exhibit E). The court reasoned that changing the rule before the election would be inequitable because it would cause a “scramble” shortly before the election. *Id.* at 29. Further, the plaintiffs had “been on notice [of the challenged rule] for years” but only “brought [the] action at the beginning of the 2024 election year.” *Id.*

That principle is even more obviously applicable here. Whereas the *Minnesota Alliance* plaintiffs at least filed suit “at the beginning” of 2024, *id.*, Petitioners waited to file until May 29. *See* Pet. And to reiterate the words of the Pennsylvania Senate leaders: “Petitioners and their counsel” have “treat[ed] the Pennsylvania and federal judiciary like a roulette wheel, constantly testing out novel theories hoping they will eventually win something.” Legislators’ Br. 26. Movants say precisely nothing to justify waiting until the middle of 2024 to file this politically charged lawsuit. This Court should not reward such maneuvers. It should reject Plaintiffs’ tardy request for relief against the date requirement and withhold any order against the date requirement until this litigation concludes in an orderly manner.

CONCLUSION

The Court should deny Petitioners' Application for Summary Relief and grant Republican Intervenors' Application for Summary Relief.

Dated: July 8, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

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EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :
National Republican Senatorial :
Committee; National Republican :
Congressional Committee; Republican :
Party of Pennsylvania; David Ball; :
James D. Bee; Debra A. Biro; Jesse D. :
Daniel; Gwendolyn Mae Deluca; Ross :
M. Farber; Connor R. Gallagher; Lynn :
Marie Kalcevic; Linda S. Kozlovich; :
William P. Kozlovich; Vallerie :
Siciliano-Biancaniello; S. Michael :
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :
capacity as Acting Secretary of the :
Commonwealth; Jessica Mathis, in :
her official capacity as Director of the :
Pennsylvania Bureau of Election :
Services and Notaries; Adams County :
Board of Elections; Allegheny County :
Board of Elections; Armstrong County :
Board of Elections; Beaver County :
Board of Elections; Bedford County :
Board of Elections; Berks County Board :
of Elections; Blair County Board of :
Elections; Bradford County Board of :
Elections; Bucks County Board of :
Elections; Butler County Board of :
Elections; Cambria County Board of :
Elections; Cameron County Board of :
Elections; Carbon County Board of :
Elections; Centre County Board of :
Elections; Chester County Board of :
Elections; Clarion County Board of :
Elections; Clearfield County Board of :
Elections; Clinton County Board of :
Elections; Columbia County Board of :
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :
of Elections; Dauphin County Board of :
Elections; Delaware County Board of :
Elections; Elk County Board of :
Elections; Erie County Board of :
Elections; Fayette County Board of :
Elections; Forest County Board of :
Elections; Franklin County Board of :
Elections; Fulton County Board of :
Elections; Greene County Board of :
Elections; Huntingdon County Board :
of Elections; Indiana County Board of :
Elections; Jefferson County Board of :
Elections; Juniata County Board of :
Elections; Lackawanna County Board :
of Elections; Lancaster County Board :
of Elections; Lawrence County Board :
of Elections; Lebanon County Board :
of Elections; Lehigh County Board of :
Elections; Luzerne County Board of :
Elections; Lycoming County Board of :
Elections; McKean County Board of :
Elections; Mercer County Board of :
Elections; Mifflin County Board of :
Elections; Monroe County Board of :
Elections; Montgomery County Board :
of Elections; Montour County Board of :
Elections; Northampton County Board :
of Elections; Northumberland County :
Board of Elections; Perry County :
Board of Elections; Philadelphia County:
Board of Elections; Pike County Board :
of Elections; Potter County Board of :
Elections; Schuylkill County Board of :
Elections; Snyder County Board of :
Elections; Somerset County Board of :
Elections; Sullivan County Board of :
Elections; Susquehanna County Board :
of Elections; Tioga County Board of :
Elections; Union County Board of :
Elections; Venango County Board of :
Elections; Warren County Board of :
Elections; Wayne County Board of :

Elections; Westmoreland County Board :
of Elections; Wyoming County Board of:
Elections; and York County Board of :
Elections, :
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),¹ and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)² (all collectively referred to as Petitioners), filed a petition for review directed to this Court's original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

¹ The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term "Petitioners" used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

² Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,³ against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),⁴ and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth's 67 County Boards of Elections (County Boards).⁵ In the Amended Petition, Petitioners again challenge the various County Boards' actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code's (Election Code)⁶ signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards' "practice of conducting these pre-canvass activities" before Election Day "under the guise of [notice and opportunity to cure] procedures" is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

³ On this date, the Court, *inter alia*, granted Petitioners' unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

⁴ By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

⁵ Notwithstanding its apparent omission from the caption, as noted in this Court's September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

⁶ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)⁷ & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);⁸ and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).⁹ (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),¹⁰ as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

⁷ The free and equal elections clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

⁸ It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

⁹ The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

¹⁰ 42 Pa.C.S. §§ 7531-7541.

DCCC)¹¹ (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

Background & Procedural History

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code¹² and, further, statewide injunctive relief prohibiting

¹¹ The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

¹² See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.¹³

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.¹⁴ As noted above, Respondents filed nine sets of POs, and eight

(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately]

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h).

¹³ In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

¹⁴ The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,¹⁵ to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

¹⁵ Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures¹⁶ not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,¹⁷ and *Pennsylvania State Education*

¹⁶ In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

¹⁷ It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

Association v. Department of Community and Economic Development, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),¹⁸ and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),¹⁹ and that County Boards are thus prohibited

happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

¹⁸ Section 302(f) provides that County Boards have authority “[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).

¹⁹ Section 1308(a) provides:

(a) 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. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);²⁰ however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).²¹ (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

²⁰ Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **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. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added).

²¹ Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).
....

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(1.1).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)²² They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

²² Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).²³ (See Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

²³ Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.²⁴

Standard of Review

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

²⁴ Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.

Subject Matter Jurisdiction

Commonwealth Respondents (PO 1) and some County Boards²⁵ first argue that this Court lacks subject matter jurisdiction²⁶ under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A.2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

²⁵ These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

²⁶ See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,²⁷ regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)²⁸ Petitioners therefore claim that

²⁷ According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman*, issued November 1, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

²⁸ Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),²⁹ and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”)).³⁰

were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

²⁹ Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

³⁰ Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the

In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cwmlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

Office of Att’y Gen. ex rel. Corbett v. Locust Twp., 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

“Commonwealth government.” The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlth. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlth. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018)).³¹ “‘Thus, the main inquiry for determining whether a party is indispensable

³¹ Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,³² “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “‘where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

³² This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes

count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,³³ but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. Compare 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), with 25 P.S. §§

³³ See 25 P.S. §§ 2621, 3159.

2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,³⁴ to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

³⁴ Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (See <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law³⁵ qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr’g, Inc.*

³⁵ Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

v. Phila. Hous. Auth., 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

Finan, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;

implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code 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) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he 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,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that "[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth" and that "[t]hey are separate and stand-alone government agencies").

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,³⁶ which are governed by the Election Code,³⁷ all signs point to the County Boards

³⁶ In *Finan*, this Court declined "to expand this Court's original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies." *Finan*, 209 A.3d at 1115-16.

³⁷ This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]

falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,³⁸ and the Amended Petition is dismissed.³⁹



ELLEN CEISLER, Judge

(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

³⁸ Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

³⁹ Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :
National Republican Senatorial :
Committee; National Republican :
Congressional Committee; Republican :
Party of Pennsylvania; David Ball; :
James D. Bee; Debra A. Biro; Jesse D. :
Daniel; Gwendolyn Mae Deluca; Ross :
M. Farber; Connor R. Gallagher; Lynn :
Marie Kalcevic; Linda S. Kozlovich; :
William P. Kozlovich; Vallerie :
Siciliano-Biancaniello; S. Michael :
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :
capacity as Acting Secretary of the :
Commonwealth; Jessica Mathis, in :
her official capacity as Director of the :
Pennsylvania Bureau of Election :
Services and Notaries; Adams County :
Board of Elections; Allegheny County :
Board of Elections; Armstrong County :
Board of Elections; Beaver County :
Board of Elections; Bedford County :
Board of Elections; Berks County Board :
of Elections; Blair County Board of :
Elections; Bradford County Board of :
Elections; Bucks County Board of :
Elections; Butler County Board of :
Elections; Cambria County Board of :
Elections; Cameron County Board of :
Elections; Carbon County Board of :
Elections; Centre County Board of :
Elections; Chester County Board of :
Elections; Clarion County Board of :
Elections; Clearfield County Board of :
Elections; Clinton County Board of :
Elections; Columbia County Board of :
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :
of Elections; Dauphin County Board of :
Elections; Delaware County Board of :
Elections; Elk County Board of :
Elections; Erie County Board of :
Elections; Fayette County Board of :
Elections; Forest County Board of :
Elections; Franklin County Board of :
Elections; Fulton County Board of :
Elections; Greene County Board of :
Elections; Huntingdon County Board :
of Elections; Indiana County Board of :
Elections; Jefferson County Board of :
Elections; Juniata County Board of :
Elections; Lackawanna County Board :
of Elections; Lancaster County Board :
of Elections; Lawrence County Board :
of Elections; Lebanon County Board :
of Elections; Lehigh County Board of :
Elections; Luzerne County Board of :
Elections; Lycoming County Board of :
Elections; McKean County Board of :
Elections; Mercer County Board of :
Elections; Mifflin County Board of :
Elections; Monroe County Board of :
Elections; Montgomery County Board :
of Elections; Montour County Board of :
Elections; Northampton County Board :
of Elections; Northumberland County :
Board of Elections; Perry County :
Board of Elections; Philadelphia County:
Board of Elections; Pike County Board :
of Elections; Potter County Board of :
Elections; Schuylkill County Board of :
Elections; Snyder County Board of :
Elections; Somerset County Board of :
Elections; Sullivan County Board of :
Elections; Susquehanna County Board :
of Elections; Tioga County Board of :
Elections; Union County Board of :
Elections; Venango County Board of :
Elections; Warren County Board of :
Elections; Wayne County Board of :

Elections; Westmoreland County Board :
of Elections; Wyoming County Board of:
Elections; and York County Board of :
Elections, :
Respondents :

ORDER

AND NOW, this 23rd day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



ELLEN CEISLER, Judge

EXHIBIT B

[J-85-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DAVID BALL, JAMES D. BEE, JESSE D. : No. 102 MM 2022
DANIEL, GWENDOLYN MAE DELUCA, :
ROSS M. FARBER, LYNN MARIE :
KALCEVIC, VALLERIE SICILIANO- :
BIANCANIELLO, S. MICHAEL STREIB, :
REPUBLICAN NATIONAL COMMITTEE, :
NATIONAL REPUBLICAN :
CONGRESSIONAL COMMITTEE, AND :
REPUBLICAN PARTY OF PENNSYLVANIA, :

Petitioners

v.

LEIGH M. CHAPMAN, IN HER OFFICIAL
CAPACITY AS ACTING SECRETARY OF
THE COMMONWEALTH, AND ALL 67
COUNTY BOARDS OF ELECTIONS,

Respondents

PER CURIAM

DECIDED: November 1, 2022

AND NOW, this 1st day of November, 2022, upon review of the briefs of the parties and *amici*, the Petitioners' request for injunctive and declaratory relief is granted in part and denied in part. The Pennsylvania county boards of elections are hereby **ORDERED** to refrain from counting any absentee and mail-in ballots received for the November 8, 2022 general election that are contained in undated or incorrectly dated outer envelopes. See 25 P.S. §3146.6(a) and §3150.16(a).

The Court is evenly divided on the issue of whether failing to count such ballots violates 52 U.S.C. §10101(a)(2)(B).

We hereby **DIRECT** that the Pennsylvania county boards of elections segregate and preserve any ballots contained in undated or incorrectly dated outer envelopes.

The Republican National Committee, the National Republican Congressional Committee, and the Republican Party of Pennsylvania have standing. Petitioners David Ball, James D. Bee, Jesse D. Daniel, Gwendolyn Mae Deluca, Ross M. Farber, Lynn Marie Kalcevic, Vallerie Siciliano-Biancaniello, and S. Michael Streib are hereby **DISMISSED** from the case for lack of standing.

Opinions to follow.

Chief Justice Todd and Justices Donohue and Wecht would find a violation of federal law.

Justices Dougherty, Mundy and Brobson would find no violation of federal law.

Judgment Entered 11/01/2022


CHIEF CLERK

EXHIBIT C

COMMONWEALTH OF
PENNSYLVANIA
COUNTY OF: Lancaster



POLICE CRIMINAL COMPLAINT
COMMONWEALTH OF PENNSYLVANIA
VS.

Magisterial District Number: 02-2-02

MDJ: Hon. **BRUCE A. ROTH, ESQ**
150 NORTH QUEEN STREET
SUITE 120
Address: **LANCASTER, PA 17603**
Telephone: **717-295-2000**

DEFENDANT:

(NAME and ADDRESS):

CHERYL

MIHALIAK

First Name

Middle Name

Last Name

Gen

NCIC Extradition Code Type

- | | | | |
|--|---|--|------------------------------------|
| ☐ 1-Felony Full | ☐ 5-Felony Pend. | ☐ C-Misdemeanor Surrounding States | ☐ Distance: |
| ☐ 2-Felony Ltd. | ☐ 6-Felony Pend. Extradition Determ. | ☐ D-Misdemeanor No Extradition | |
| ☐ 3-Felony Surrounding States | ☐ A-Misdemeanor Full | ☐ E-Misdemeanor Pending | |
| ☐ 4-Felony No Ext | ☒ B-Misdemeanor Limited | ☐ F-Misdemeanor Pending Extradition Determ. | |

DEFENDANT IDENTIFICATION INFORMATION

Docket Number CR-126-22	Date Filed 06/03/22	OTN/LiveScan Number R 300522-5	Complaint 150	Incident Number DA-22-0138	Request Lab Services? ☐ YES ☒ NO
GENDER ☐ Male ☒ Female	DOB [REDACTED]	POB	Add'l DOB		Co-Defendant(s) ☐
AKA	First Name	Middle Name	Last Name		Gen.

RACE ☒ White ☐ Asian ☐ Black ☐ Native American ☐ Unknown

ETHNICITY ☐ Hispanic ☒ Non-Hispanic ☐ Unknown

HAIR COLOR ☒ GRY (Gray) ☐ RED (Red/Aubn.) ☐ SDY (Sandy) ☐ BLU (Blue) ☐ PLE (Purple) ☐ BRO (Brown)
☐ BLK (Black) ☐ ONG (Orange) ☐ WHI (White) ☐ XXX (Unk/Bald) ☐ GRN (Green) ☐ PNK (Pink)
☐ BLN (Blonde/Strawberry)

EYE COLOR ☐ BLK (Black) ☒ BLU (Blue) ☐ BRO (Brown) ☐ GRN (Green) ☐ GRY (Gray)
☐ HAZ (Hazel) ☐ MAR (Maroon) ☐ PNK (Pink) ☐ MUL (Multicolored) ☐ XXX (Unknown)

DNA ☐ YES ☒ NO	DNA Location	WEIGHT (lbs.) 160
FBI Number	MNU Number	
Defendant Fingerprinted? ☐ YES ☐ NO		Ft. HEIGHT in. 5 11
Fingerprint Classification		

DEFENDANT VEHICLE INFORMATION

Plate #	State	Hazmat ☐	Registration Sticker (MM/YY)	Comm'l Veh. Ind. ☐	School Veh. ☐	Oth. NCIC Veh. Code	Reg. same as Def. ☐
VIN	Year	Make	Model	Style	Color		

Office of the attorney for the Commonwealth ☒ Approved ☐ Disapproved Because:

(The attorney for the Commonwealth may require that the complaint, arrest warrant affidavit, or both be approved by the attorney for the Commonwealth prior to filing. See Pa.R.Crim.P.507.)

Andrew J. Gonzalez
(Name of the attorney for the Commonwealth)

[Signature]
(Signature of the attorney for the Commonwealth)

6/3/22
(Date)

I, **MARTIN, LARRY**

(Name of the Affiant)

10158

PSP/MPOETC-Assigned Affiant ID Number and Badge #

of **LANCASTER CO DETECTIVES**

(Identify Department or Agency Represented and Political Subdivision)

PA036013A

(Police Agency ORI Number)

do hereby state: (check appropriate box)

1. ☒ I accuse the above named defendant who lives at the address set forth above
☐ I accuse the defendant whose name is unknown to me but who is described as

☐ I accuse the defendant whose name and popular designation or nickname are unknown to me and whom I have therefore designated as John Doe or Jane Doe

with violating the penal laws of the Commonwealth of Pennsylvania at [**301**] **Lancaster City**
(Subdivision Code) (Place-Political Subdivision)

150 N QUEEN ST LANCASTER, PA 17603

in **Lancaster** County [**36**] on or about **Between 04/26/2022 0001 and 04/26/2022 2359**
(County Code) (Offense Date)



POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: 06/03/2022	OTN/LiveScan Number	Complaint 150	Incident Number DA-22-0138
Defendant Name	First: CHERYL	Middle:	Last: MIHALIAK	

- I ask that a warrant of arrest or a summons be issued and that the defendant be required to answer the charges I have made.
- I verify that the facts set forth in this complaint are true and correct to the best of my knowledge or information and belief. This verification is made subject to the penalties of Section 4904 of the Crimes Code (18 Pa.C.S. § 4904) relating to unsworn falsification to authorities.
- This complaint consists of the preceding page(s) numbered 1 through 4.
- I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing of confidential information and documents differently than non-confidential information and documents.

The acts committed by the accused, as listed and hereafter, were against the peace and dignity of the Commonwealth of Pennsylvania and were contrary to the Act(s) of the Assembly, or in violation of the statutes cited.

(Before a warrant of arrest can be issued, an affidavit of probable cause must be completed, sworn to before the issuing authority, and attached.)

June 3, 2022 DA [Signature]
(Date) (Signature of Affiant)

AND NOW, on this date _____ I certify that the complaint has been properly completed and verified.
An affidavit of probable cause must be completed before a warrant can be issued.

02-2-02
(Magisterial District Court Number)

[Signature]
(Issuing Authority)





POLICE CRIMINAL COMPLAINT

Docket Number:	Date Filed: 06/03/2022	OTN/LiveScan Number	Complaint 150	Incident Number DA-22-0138
Defendant Name	First: CHERYL	Middle:	Last: MIHALIAK	

The acts committed by the accused are described below with each Act of Assembly or statute allegedly violated, if appropriate. When there is more than one offense, each offense should be numbered chronologically.

(Set forth a *brief* summary of the facts sufficient to advise the defendant of the nature of the offense(s) charged. A citation to the statute(s) allegedly violated, without more, is not sufficient. In a summary case, you must cite the specific section(s) and subsection(s) of the statute(s) or ordinance(s) allegedly violated.

Inchoate Offense	☐ Attempt 18 901 A	☐ Solicitation 18 902 A	☐ Conspiracy 18 903	Number of Victims Age 60 or Over _____
------------------	--	---	---	--

☒ Lead?	1	4101	(a)(3)	of the	PA Crimes Code	1	M1		250
	Offense #	Section	Subsection		PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if Applicable)	Accident Number	☐ Interstate	☐ Safety Zone	☐ Work Zone
---------------------------------	--------------------	-------------------------------------	--------------------------------------	------------------------------------

Statute Description (Include the name of the statute or ordinance):

FORGERY-UTTER FORGED WRIT

Acts of the accused associated with this Offense:

PACC 4101(a)3 Forgery

IN THAT, on or about April 26, 2022, THE DEFENDANT did unlawfully utter a writing, namely, a commercial instrument or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations, which said actor knew to be forged, with intent to defraud or injure TO WIT: Cheryl Mihaliak completed a mail in voter ballot for her deceased mother and signed her mother's name to the ballot. It was returned to the Lancaster County Board of Elections.

Inchoate Offense	☐ Attempt 18 901 A	☐ Solicitation 18 902 A	☐ Conspiracy 18 903	Number of Victims Age 60 or Over _____
------------------	--	---	---	--

☐ Lead?	2	3517	-	of the	25	1	M2		
	Offense #	Section	Subsection		PA Statute (Title)	Counts	Grade	NCIC Offense Code	UCR/NIBRS Code

PennDOT Data (if Applicable)	Accident Number	☐ Interstate	☐ Safety Zone	☐ Work Zone
---------------------------------	--------------------	-------------------------------------	--------------------------------------	------------------------------------

Statute Description (Include the name of the statute or ordinance):

Acts of the accused associated with this Offense:

Any person who shall forge or falsely make the official endorsement on any ballot or wilfully destroy or deface any ballot or wilfully delay the delivery of ant ballot. TO WIT: Cheryl Mihaliak completed a mail in voter ballot for her deceased mother and signed her mother's name to the ballot.



Police Criminal Complaint

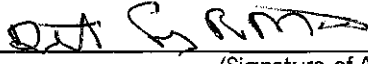
Docket Number:	Date Filed: 06/03/2022	OTN/LiveScan Number	Complaint 150	Incident Number DA-22-0138
Defendant Name	First: CHERYL	Middle:	Last: MIHALIAK	

AFFIDAVIT OF PROBABLE CAUSE

- 1) On April 28, 2022, I (Detective Larry R. Martin) was assigned to investigate an alleged voter fraud incident. I received information from Christa Miller Chief Clerk/ Chief Registrar of the Lancaster County Board of Elections and Registration Commission.
- 2) Christa Miller stated she received a mail in ballot from Teresa J. Mihaliak signed and dated April 26, 2022. The ballot for the democrat primary was received on April 28, 2022, by her office. However, Christa Miller reported that Teresa J. Mihaliak was deceased on April 14, 2022. Christa Miller said this was confirmed by an obituary and records from the Department of Health. She said Teresa J. Mihaliak was removed from the voter rolls on April 25, 2022.
- 3) Christa Miller stated that Teresa J. Mihaliak's ballot was requested by Cheryl Mihaliak on March 17, 2022, Cheryl Mihaliak requested her own ballot on March 17, 2022. Christa Miller reported both Teresa Mihaliak and Cheryl Mihaliak's ballots were returned on April 28, 2022.
- 4) On May 5, 2022, at 1641 hours I spoke with Cheryl Mihaliak. During that conversation Cheryl Mihaliak told me that she did vote for her mother and signed her ballot after her mother died. Cheryl Mihaliak said that she knew who her mother was going to vote for and decided to vote for her after she died. Cheryl Mihaliak said she filled out her mother Teresa J. Mihaliak ballot and signed her ballot.
- 5) Due to the above information, I request that a summons be issued for defendant Cheryl Mihaliak.

I, LARRY MARTIN, BEING DULY SWORN ACCORDING TO THE LAW, DEPOSE AND SAY THAT THE FACTS SET FORTH IN THE FOREGOING AFFIDAVIT ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

I CERTIFY THAT THIS FILING COMPLIES WITH THE PROVISIONS OF THE CASE RECORDS PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA THAT REQUIRE FILING OF CONFIDENTIAL INFORMATION AND DOCUMENTS DIFFERENTLY THAN NO-CONFIDENTIAL INFORMATION AND DOCUMENTS.


(Signature of Affiant)

Sworn to me and subscribed before me this _____ day of _____, _____.

_____, Date _____, Magisterial District Judge

My commission expires first Monday of January,

SEAL

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

Criminal Docket



Commonwealth of Pennsylvania
v.
Cheryl Mihaliak

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CASE INFORMATION

<u>Judge Assigned:</u>	Magisterial District Judge Bruce A. Roth	<u>Issue Date:</u>	06/03/2022
<u>OTN:</u>	R 300522-5	<u>File Date:</u>	06/03/2022
<u>Arresting Agency:</u>	Lancaster County, District Attorney	<u>Arrest Date:</u>	
<u>Complaint No.:</u>	DA-22-0138	<u>Incident No.:</u>	DA-22-0138
<u>Disposition:</u>	Waived for Court	<u>Disposition Date:</u>	07/25/2022
<u>County:</u>	Lancaster	<u>Township:</u>	Lancaster City
<u>Case Status:</u>	Closed		

STATUS INFORMATION

<u>Case Status</u>	<u>Status Date</u>	<u>Processing Status</u>
Closed	07/25/2022	Completed
	06/03/2022	Awaiting Preliminary Hearing

CALENDAR EVENTS

<u>Case Calendar</u>	<u>Schedule</u>		<u>Schedule</u>
<u>Event Type</u>	<u>Start Date</u>	<u>Start Time</u> <u>Room</u>	<u>Judge Name</u> <u>Status</u>
Preliminary Hearing	06/29/2022	2:00 pm	Magisterial District Judge Bruce A. Roth Continued
<i>Continuance Reason: Defendant Attorney Request</i> <i>Requested By: Attorney Michael Todd Winters</i>			
Preliminary Hearing	07/25/2022	2:00 pm	Magisterial District Judge Bruce A. Roth Scheduled
Formal Arraignment	08/26/2022	9:00 am Courtroom A	Scheduled

DEFENDANT INFORMATION

<u>Name:</u>	Mihaliak, Cheryl	<u>Sex:</u>	Female
<u>Date of Birth:</u>	06/13/1961	<u>Race:</u>	
<u>Address(es):</u>			
<u>Other</u>			
831 Third Street Lancaster, PA 17603			

Advised of His Right to Apply for Assignment of Counsel?	Yes
Public Defender Requested by the Defendant?	No
Application Provided for Appointment of Public Defender?	No
Has the Defendant Been Fingerprinted?	No

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

Criminal Docket



Commonwealth of Pennsylvania

v.

Cheryl Mihaliak

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CASE PARTICIPANTS

Participant Type	Participant Name	OTN/LOTN	Docket Number	Was Sworn In?	Has Testified?
Prosecution	Commonwealth of Pennsylvania				
Arresting Officer	Martin, Larry R.				
Defendant	Mihaliak, Cheryl				
Witness for the Commonwealth	Miller, Christa				

BAIL

Bail Set:

Nebbia Status: None

Bail Action Type	Bail Action Date	Bail Type	Percentage	Amount
Set	07/25/2022	Unsecured		\$2,500.00

CHARGES

# Charge	Grade	Description	Offense Dt.	Disposition
1 18 § 4101 §§ A3	M1	Forgery - Utters Forged Writing	04/26/2022	Withdrawn
2 25 § 3517	M2	Forging And Destroying Ballots	04/26/2022	Waived for Court

DISPOSITION/SENDERING DETAILS

Case Disposition	Disposition Date	Was Defendant Present?
Waived for Court	07/25/2022	Yes
Offense Seq./Description	Offense Disposition	
1 Forgery - Utters Forged Writing	Withdrawn	
2 Forging And Destroying Ballots	Waived for Court	

ATTORNEY INFORMATION

Private	Assistant District Attorney
Name: Michael Todd Winters, Esq.	Name: Jennifer Lauren Ponessa, Esq.
Representing: Mihaliak, Cheryl	Representing: Commonwealth of Pennsylvania
Counsel Status: Active	Counsel Status: Active
Supreme Court No.: 077976	Supreme Court No.: 319222
Phone No.: 717-584-1895	Phone No.: 717-299-8100
Address: 53 N Duke St Ste 318 Lancaster, PA 17602	Address: Lancaster County Da's Office 50 N Duke St Lancaster, PA 17602-2805

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

Criminal Docket



Commonwealth of Pennsylvania

v.

Cheryl Mihaliak

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DOCKET ENTRY INFORMATION

Filed Date	Entry	Filer	Applies To
07/25/2022	Bail Set	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Formal Arraignment Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/25/2022	Waiver of Preliminary Hearing	Cheryl Mihaliak	Cheryl Mihaliak, Defendant
07/25/2022	Waived for Court	Magisterial District Judge Bruce A. Roth	Cheryl Mihaliak, Defendant
07/25/2022	Docket Transcript Printed	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
07/22/2022	Attorney Active	Jennifer Lauren Ponessa, Esq.	Commonwealth of Pennsylvania, Prosecution
06/24/2022	First Class Summons Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/13/2022	Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
Event: Preliminary Hearing-07/25/2022 2:00PM- 2:05PM			
Testify On Behalf Of: Commonwealth of Pennsylvania			
06/13/2022	First Class Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
06/13/2022	Preliminary Hearing Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/13/2022	Preliminary Hearing Continued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/09/2022	Attorney Active	Michael Todd Winters, Esq.	Cheryl Mihaliak, Defendant
06/06/2022	Certified Summons Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/06/2022	Certified Fingerprint Order Accepted	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
Event: Preliminary Hearing-06/29/2022 2:00PM- 2:15PM			
Testify On Behalf Of: Commonwealth of Pennsylvania			
06/03/2022	First Class Subpoena Issued	Magisterial District Court 02-2-02	Christa Miller, Witness for the Commonwealth
06/03/2022	Certified Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	First Class Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
Report to Agency: Lancaster Police Dept			
Authority: Roth, Bruce A.			
Report From: 6/3/2022 12:00:00 AM			
Report To: 6/29/2022 12:00:00 AM			
06/03/2022	Certified Fingerprint Order Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Preliminary Hearing Scheduled	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant
06/03/2022	Criminal Complaint Filed	Magisterial District Court 02-2-02	

Magisterial District Judge 02-2-02

DOCKET TRANSCRIPT

Docket Number: MJ-02202-CR-0000126-2022

Criminal Docket



Commonwealth of Pennsylvania

v.

Cheryl Mihaliak

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DOCKET ENTRY INFORMATION

Filed Date	Entry	Filer	Applies To
06/03/2022	First Class Summons Issued	Magisterial District Court 02-2-02	Cheryl Mihaliak, Defendant

July 25, 2022

Date

A handwritten signature in black ink, appearing to read "Re RA".

Magisterial District Judge Bruce A. Roth



RETRIEVEDFROMDEMOCRACYDOCKET.COM

EXHIBIT D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Black Political Empowerment Project *et al.*,

Petitioners,

v.

Al Schmidt *et al.*,

Respondents.

No. 283 MD 2024
Original Jurisdiction

DECLARATION OF ANGELA ALLEMAN

COMMONWEALTH OF PENNSYLVANIA)

) SS:

COUNTY OF DAUPHIN)

Angela Alleman who having been first duly sworn, deposes and states as follows:

1. I am an adult over the age of 18.
2. I have personal knowledge of the matters in this declaration.
3. I am currently the Executive Director of the Republican Party of Pennsylvania (the “RPP”).
4. The RPP is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15).
5. The RPP supports and seeks to uphold free and fair elections for all

Pennsylvanians.

6. The RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections consistently throughout the Commonwealth.

7. The RPP's members include all registered Republican voters, candidates, and officeholders in Pennsylvania.

8. The RPP's core business includes supporting Republican candidates for federal, state, and local office in Pennsylvania and preserving and promoting a free and fair electoral environment in which Republican candidates can win election.

9. Accordingly, the RPP, on behalf of itself and its members, including its voters, nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

10. Additionally, the RPP devotes substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania.

11. RPP has statutory rights to appoint both poll watchers to observe casting, counting, and canvassing of ballots at the polling place, 25 P.S. § 2687(a), and an "authorized representative" to "remain in the room" at the county board of elections and observe the pre-canvass and canvass of "absentee ballots and mail-in ballots," *id.* §§ 3146.8(g)(1.1)-(2).

12. RPP has exercised these statutory rights in the past several election cycles and is doing so again for the 2024 elections.

13. In conjunction with its Election Day Operations (“EDO”), the RPP devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day, to observe the casting and counting of ballots at the polling place, and to observe the pre-canvass and canvass of absentee and mail-in ballots at the county board of elections.

14. As part of its EDO, the RPP also devotes substantial time and resources toward the recruitment and training of a “ground team” of lawyers throughout the Commonwealth who stand ready on Election Day to assist poll workers, poll watchers, and volunteers should questions arise as to elections laws or the voting process within the Commonwealth.

15. The RPP has devoted substantial time and resources in mobilizing and educating voters in Pennsylvania in the past many election cycles, is doing so again in 2024, and will do so in future election cycles.

16. Each of the RPP’s EDO, training, and voter education programs relies upon, utilizes, and is built upon the clear language of the Election Code.

17. In particular, following the enactment of Act 77, which fundamentally changed the manner in which Pennsylvanians are permitted to vote, most notably

by providing a new universal mail-in voting regime, RPP significantly updated and altered its EDO, training, and voter education programs.

18. Following the enactment of Act 77, RPP substantially increased the amount of its time and resources dedicated to educating voters, poll workers, poll watchers, volunteers, and its legal teams throughout Pennsylvania's 67 counties regarding the provisions of Act 77.

19. RPP's EDO, training, and voter education programs include training and information regarding the requirements for voters to cast lawful and valid ballots, and the governing rules delineating unlawful and invalid ballots and preventing election officials from pre-canvassing, canvassing, or counting such ballots.

20. I am aware that, in a case brought by the RPP and other parties, the Pennsylvania Supreme Court held that General Assembly's date requirement for absentee and mail-in ballots is mandatory and that non-compliant ballots may not be counted. *See Ball v. Chapman*, No. 102 MM 2022 (Pa. Nov. 1, 2022) (per curiam).

21. I am also aware that the United States Court of Appeals in the Third Circuit has held—in accordance with arguments advanced by RPP and other appellants—that the General Assembly's date requirement is valid under the federal Materiality Provision and does not deny any individual the right to vote.

See Pa. State Conf. of NAACP v. Sec’y Commonwealth of Pa., 97 F.4th 120 (3d Cir. 2024).

22. I am aware that the law in Pennsylvania is that undated or incorrectly dated absentee and mail-in ballots may not be counted.

23. RPP’s EDO, training, and voter education programs include training and information regarding the General Assembly’s date requirement.

24. I understand that the Petitioners in this case seek a declaration and injunction from the Court ordering the Secretary of the Commonwealth, the Allegheny County Board of Elections, and the Philadelphia County Board of Elections not to enforce the date requirement but instead to count absentee and mail-in ballots that do not comply with that requirement.

25. Any such declaration and injunction—and any change in the governing law around the date requirement that the Court might order in this case—would harm the RPP in its core business by rendering its EDO, training, and voter education programs less effective, wasting the resources it has devoted to such programs, and requiring it to expend new resources to update those programs.

26. In particular, the RPP will be required to alter its statewide EDO, training, and voter education programs to specify that the date requirement is valid and mandatory in counties not covered by any declaration or injunction of this Court, but not in the any counties covered by any such declaration or injunction.

27. If the RPP alters its EDO, training, and voter education programs to reflect any declaration or injunction of the Court invalidating the date requirement, it will again have to alter those materials if that order is stayed or reversed in the future.

28. Altering its statewide EDO, training, and voter education programs will harm RPP in its core business by requiring it to divert resources from its intended mission of nominating, promoting, and assisting Republican candidates in Pennsylvania and of educating, mobilizing, assisting, and turning out voters in Pennsylvania.

29. The RPP also has a strong interest in preserving its victories in *Ball v. Chapman* and *Pa. State Conference of the NAACP v. Secretary*, which upheld uniform, mandatory application of the General Assembly's date requirement across all Pennsylvania counties and, thus, contributes to free and fair elections on behalf of all Pennsylvanians.

30. Any court order invalidating mandatory application of the date requirement anywhere in the Commonwealth undermines this interest, may create disuniformity in application of the date requirement across Pennsylvania, and undermines free and fair elections on behalf of all Pennsylvanians.

31. For at least three reasons, any such order would also harm RPP in its core business of securing election of Republican candidates to office.

32. In the first place, any such order would threaten to create voter confusion, to reduce voter confidence in the integrity of Pennsylvania's elections, and to decrease voter turnout in Pennsylvania, including by members of the RPP.

33. In the second place, such an order would alter the competitive environment surrounding elections in Pennsylvania in which the RPP, its members, its voters, and its candidates exercise their constitutional rights to vote and to participate and seek to elect Republican candidates to office.

34. In the third place, such an order would also harm the electoral prospects of Republican candidates in Pennsylvania; make it more difficult for the RPP, its members, its voters, and its candidates to win elections; and may change the outcome of elections in Pennsylvania.

35. Including in the official vote total ballots that did not comply with the date requirement has flipped the result in three elections in Pennsylvania since 2020. In each of those elections, the Republican candidate would have prevailed if the noncompliant ballots had not been included in the vote total. In other words, in each of those elections, including the noncompliant ballots in the vote total flipped the outcome and resulted in a Democratic candidate being declared the winner and a Republican candidate being declared the loser.

36. The first was the State Senate race involving Republican Nicole Zicarelli in 2020. *See In re Canvass of Absentee and Mail-in Ballots of November*

3, 2020 General Election, 241 A.3d 1058 (Pa. 2020).

37. The second was the Court of Common Pleas race involving Republican David Ritter in 2021. *See Migliori v. Cohen*, 36 F.4th 153, *cert. granted and judgment vacated*, *Ritter v. Migliori*, 143 S. Ct. 297 (2022)

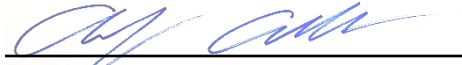
38. In the third, a court order changed the apparent result of the November 2023 election for Towamencin Township Board of Supervisors (Montgomery County). The Republican candidate, Richard Marino, prevailed by 4 votes over his Democratic challenger, Kofi Osei, with all ballots counted under the rules in effect on election day, November 7, 2023. A court order issued two weeks later. Invoking that order, the Montgomery County Board of Elections counted six ballots that did not comply with the date requirement. Including those ballots in the vote total resulted in a tie between Mr. Marino and Mr. Osei. On November 30, 2023, the Montgomery County Board of Elections resolved that tie through a casting of lots by which Mr. Osei was declared the winner. Mr. Osei, rather than Mr. Marino, was eventually sworn into office. The Third Circuit eventually reversed the court order on which the Montgomery County Board of Elections had relied to change the result of the election. *Pa. State Conf. of NAACP*, 97 F.4th 120.

39. I declare under penalty of perjury under the law of the Commonwealth of Pennsylvania that the foregoing is true and correct. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to

unsworn falsification to authorities.

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Signed on the 27th day of June 2024, at Harrisburg, Dauphin County,
Pennsylvania, United States of America.



Signature

Angela Alleman

Printed Name

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EXHIBIT E

STATE OF MINNESOTA
RAMSEY COUNTY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Minnesota Alliance for Retired Americans
Educational Fund, et al.,

62-CV-24-854

Plaintiffs,

v.

ORDER AND MEMORANDUM

Steve Simon, in his official capacity as
Minnesota Secretary of State,

Defendant.

This case came before the court on May 23, 2024, for a hearing on Plaintiffs' motion for a temporary injunction, Defendant's motion to dismiss Plaintiffs' amended complaint, and the motions filed by proposed intervenors, the Republican National Committee and the Republican Party of Minnesota.

Amran A. Farah, Esq., Uzoma N. Nkwonta, Esq., Richard A. Medina, Esq., William Hancock, Esq., and Marisa O'Gara, Esq., appeared for Plaintiffs. Assistant Attorneys General Angela Behrens, Madeline DeMeules, Allen Cook Barr, Emily Anderson, and Justin Erickson appeared for Defendant. Benjamin L. Ellison, Esq., John M. Gore, Esq., and Louis J. Capozzi III, Esq., appeared for the proposed intervenors.

Based on the submissions and counsel's arguments, the court issues the following:

Order

1. Plaintiffs' motion for a temporary injunction is denied without prejudice.
2. Defendant's motion to dismiss is denied.
3. The proposed intervenors' motion to intervene is denied without prejudice.

Edward Sheu
District Court Judge

Summary

When treating Plaintiffs' factual allegations as true, which the court must at this stage, Plaintiffs Minnesota Alliance for Retired Americans Educational Fund and Teresa Maples have shown they have standing to bring their claims and have stated claims for relief.

With respect to registered absentee voters, Minnesota's witness requirement does not violate the Voting Rights Act of 1965, because the witness does not vouch for any of the voter's qualifications. With respect to individuals seeking to both register and vote absentee, the witness requirement appears to violate the Voting Rights Act of 1965, because the witness, who must be a registered voter or member of a class, must vouch for the witness's residency, which is one of the statutory criteria for voting eligibility.

The witness requirement could invalidate a registered absentee voter's ballot due to paperwork mistakes required for voting, namely, the certificate of eligibility form on the absentee ballot envelope the witness must complete for the ballot to be accepted, and such paperwork mistakes are immaterial to the voter's qualifications, thereby violating the Civil Rights Act of 1964. For those seeking to register and vote absentee, a paperwork mistake the witness makes when verifying a voter's residency could be material to determine the voter's qualifications, and rejecting such a ballot would not violate the Civil Rights Act of 1964.

Plaintiffs have shown they are likely to succeed on the merits and may be harmed if the witness requirement is not waived, but, without more information, this court believes the balance of harms does not support temporary injunctive relief at this time.

The proposed intervenors have not shown their status as parties in this action is appropriate at this time, but their filings will be treated as amici.

Memorandum

I. The materiality provision in the Civil Rights Act of 1964, and the vouching prohibition in the Voting Rights Act of 1965.

The Civil Rights Act of 1964 (CRA) provides, among other things,

No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election

52 U.S.C. § 10101(a)(2)(B).

The CRA defines the term “vote” to include “all action necessary to make a vote effective including, but not limited to . . . casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast.” 52 U.S.C. §§ 10101(a)(3)(A), 10101(e).

Section 201 of the Voting Rights Act of 1965 (VRA) provides, in part,

(a) No citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State.

(b) As used in this section, the term “test or device” means any requirement that a person as a prerequisite for voting or registration for voting . . . prove his qualifications by the voucher of registered voters or members of any other class.

52 U.S.C. § 10501.

II. Minnesota’s witness requirement for absentee voting.

In Minnesota, an eligible voter must be (1) at least 18 years old; (2) a United States citizen; and (3) a Minnesota resident for at least 20 days immediately before the election. Minn. Stat. § 201.014, subd. 1. A person is ineligible to vote if they (1) have been convicted of treason or are incarcerated for a felony conviction, (2) are under a guardianship with

suspended voting rights, or (3) have been found incompetent. *Id.*, subd. 2. Eligible voters may vote in person on election day, by mail or in-person absentee ballot, or in-person early voting. Minn. Stat. §§ 203B.02, subd. 1, .81, subds. 1, 1a, .30, subd. 2, 204C.10. Regardless of how they vote, every eligible voter must first register. Minn. Stat. § 201.018, subd. 2. Each voting method requires proof of residency. Minn. Stat. §§ 201.054, subd. 1, .071, subd. 1.

Under Minn. Stat. § 203B.02, subd. 1, any eligible voter may vote absentee as provided in Minn. Stat. § 203B.04-.12. Under Minn. Stat. § 203B.07, subd. 3, all absentee voters must find a witness who is (1) a registered Minnesota voter, (2) a notary public, or (3) a person authorized to administer oaths. The witness must sign a “certificate of eligibility,” printed on the absentee ballot signature envelope, stating that the ballots were displayed to the witness unmarked, the voter marked the ballots in the witness’s presence without showing how they were marked, or, if the voter was physically unable to mark them, that the voter directed another individual to mark them, and, if the voter was not previously registered, the voter has provided proof of residence as required by Minn. Stat. § 201.061, subd. 3. *Id.* The voter must also sign the “certificate of eligibility,” which includes “a statement to be signed and sworn by the voter indicating that the voter meets all of the requirements established by law for voting by absentee ballot.” *Id.*

Once received by local officials, each absentee ballot signature envelope is examined by at least two members of the local ballot board. Minn. Stat. § 203B.121, subd. 2(a). The board members must examine each signature envelope and mark it “accepted” or “rejected.” *Id.* A signature envelope is only “accepted” if most members agree “the certificate has been completed as prescribed in the directions for casting an absentee ballot.” *Id.*, subd. 2(b)(5). If not, the signature envelope, and the ballot, will be rejected. *Id.*, subd. 2(c)(1).

Defendant, the Minnesota Secretary of State, administers this state's election laws, and adopts rules, forms, and procedures for absentee voting. Minn. Stat. § 203B.09. As required by statute, Defendant has promulgated Minn. R. 8210.0500 and Minn. R. 8210.0600.

Rule 8210.0500 prescribes absentee-voting instruction forms. They include a notice that absentee voters require a witness, who must be one described in Section 203B.07, subdivision 3. Rule 8210.0600 prescribes the form of the required statement of an absentee voter. One section of the signature envelope is completed by the voter, and another section states, "Witness must complete this section." *Id.*, subp. 1a. For registered voters, the witness certifies, (1) "the voter showed me the blank ballots before voting," (2) "the voter marked the ballots in private or, if physically unable to mark the ballots, the ballots were marked as directed by the voter," (3) "the voter enclosed and sealed the ballots in the ballot envelope," and (4) "I am or have been registered to vote in Minnesota, or am a notary, or am authorized to give oaths." *Id.* If the voter needs to register, the witness must also certify that "the voter registered to vote by filling out and enclosing a voter registration application in this envelope" and "the voter provided proof of residence," choosing from among a list of acceptable forms of proof of residence. *Id.*, subp. 1b.

At least two ballot board members must review the absentee ballots and reject those that fail to comply with the witness requirement. Minn. Stat. § 203B.121 subd. 2(c)(1). An absentee voter's ballot is rejected if the witness (1) omits their signature, (2) omits their street name or number, (3) omits their city, (4) lists an address that appears to be outside of Minnesota, or (5) lists a PO Box. *See* Minn. R. 8210.2450.

Defendant has also promulgated an Absentee Voting Guide, which is "designed to aid election officials in the administration of absentee voting," and which instructs how to accept

or reject ballots based on compliance with the witness requirement. This guide includes examples of ballots that should be rejected for failure to comply with the witness requirement. For example, ballots in which the witness omits their street address or city should be rejected even if other address information is included on elsewhere.

According to Defendant, in the 2022 general election, 2,525,873 Minnesotans voted. 687,062 returned absentee ballots. 5,479 absentee ballots were rejected due to failure to comply with the witness requirements: 4,032 were rejected because the witness did not sign; 931 were rejected because the witness did not provide an address; and 516 were rejected because the witness did not indicate on the voter registration application what residency document the voter supplied. May 9, 2024 Maeda Decl. ¶ 19.¹

III. Plaintiffs' allegations.

Plaintiff Minnesota Alliance for Retired Americans Educational Fund (the Alliance) is a nonpartisan Minnesota nonprofit organization with over 84,000 members in Minnesota and over 9,000 in Ramsey County. Its mission is to ensure social and economic justice and full civil rights for retirees, through grassroots advocacy, contributions to labor and electoral campaigns, and participation in get-out-the vote campaigns. Many of the Alliance's members live alone or have mobility challenges that make in-person voting difficult. The Alliance expends money and volunteer time educating its members on Minnesota's absentee-voting witness requirement and finding members who can serve as witnesses, which money and volunteer time could otherwise be spent on other mission-critical election-related programs.

¹ According to <https://www.sos.state.mn.us/election-administration-campaigns/data-maps/absentee-data/> (link to "Download a spreadsheet of statewide absentee voting statistics 2014-2022," last accessed June 14, 2024), 4,592 absentee ballots were rejected because the witness did not sign, 1,224 because the witness did not provide a Minnesota address, title, or notary stamp, and 563 because the witness did not mark any proof.

Plaintiff Teresa Maples is a qualified and registered Minnesota voter and an Alliance member. She is 70 years old and lives alone in Redwing. Her medical conditions present mobility issues making it hard to leave her home and find a witness or notary. In the past, her son or neighbors have served as a witness, but her son has recently passed away, and she has moved into a new building and does not know her neighbors. She will have a hard time finding a witness for her absentee ballot for the November 2024 election.

Plaintiff Khalid Mohamed is a qualified and registered Minnesota voter. He is a member of the Somali-American community and routinely votes absentee. He has struggled to find a registered voter or notary in his community who will witness his ballot. In the past, he has had to have friends or acquaintances locate a witness for him, and expects to have trouble finding a witness for the November 2024 election.

Plaintiffs allege that, by administering and enforcing the witness requirement for absentee voting, Defendant has violated the VRA, or the CRA, and has injured and will continue to injure them and other absentee voters. Plaintiffs assert the witness requirement unlawfully requires vouching by a registered voter or member of a class, in violation of the VRA, or unlawfully invalidates ballots due to errors or omissions in the witness statement that occur through no fault of the voter, and that are immaterial to determining the voter's qualifications, in violation of the CRA. Plaintiffs ask the court to enjoin the witness requirement for absentee ballots and authorize unregistered absentee voters to submit proof of residency without a witness certification.

IV. Procedural history.

Plaintiffs commenced this action on February 15, 2024, to which Defendant filed a motion to dismiss. On March 15, 2024, the Republican National Committee and the

Republican Party of Minnesota (Republican Committees) filed a notice of intervention and proposed answer, to which Plaintiffs objected. On April 25, 2024, the Republican Committees moved to intervene and for leave to file a motion to dismiss. On May 1, 2024, Plaintiffs filed an amended complaint, and on May 2, 2024, a temporary-injunction motion. Defendant renewed its motion to dismiss, and the Republican Committees moved to join in the motion. On May 23, 2024, the court heard argument on all pending motions.

V. Analysis.

A. Rule 12 standard.

Minnesota is a notice-pleading state and requires that a pleading contain only information sufficient to fairly notify the opposing party of the claim against it. *DeRosa v. McKenzie*, 936 N.W.2d 342, 346-47 (Minn. 2019) (complaint may include broad general statements that may be conclusory); Minn. R. Civ. P. 8.01 (pleading to contain a short and plain statement showing the pleader is entitled to relief and a demand for the relief sought).

In considering a motion filed under Minn. R. Civ. P. 12.02(e), the court considers the facts alleged in the complaint as true and must construe all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). “A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader’s theory, to grant the relief demanded.” *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014).

A complaint should not be dismissed unless it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist that would support granting the relief demanded. *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). It is immaterial whether the plaintiff can prove the facts alleged. *Martens v. Minn. Mining & Mfg.*,

Co., 616 N.W.2d 732, 739 (Minn. 2000). The showing a plaintiff must make in order to survive a Rule 12.02(e) motion is minimal. *State by Smart Growth Mpls. v. City of Mpls.*, 954 N.W.2d 584, 594 (Minn. 2021). “All pleadings must be construed so as to do substantial justice.” *Halva v. Minn. State Colls. & Univs.*, 953 N.W.2d 496, 501 (Minn. 2021).

But a claim is legally insufficient and must be dismissed if there is no possibility that evidence can be produced that would entitle the plaintiff to the relief demanded. *Forslund v. State*, 924 N.W.2d 25, 33 (Minn. Ct. App. 2019). A complaint alleging mere labels and conclusions cannot survive a Rule 12.02(e) motion, and the court is not bound by legal conclusions or incorrect legal statements. *Bahr v. Cappella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010); *Halva*, 953 N.W.2d at 501-02.

A court may consider documents embraced by a complaint, legislative history, and matters of public record, without converting a Rule 12.02(e) motion into one for summary judgment. *N. States Power Co. v. Minn. Metro. Council*, 684 N.W.2d 485, 490 (Minn. 2004); *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995).

B. Temporary injunction standard.

“A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor.” Minn. R. Civ. P. 65.02(b). In considering a request for a temporary injunction, courts consider five factors. *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). They are (1) the “nature and background of the relationship between the parties,” (2) the “harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial,” (3) the “likelihood that one party or the other will prevail on the merits,” (4) the “aspects of the fact situation, if any, which permit or require consideration of public policy,”

and (5) the “administrative burdens involved in judicial supervision and enforcement of the temporary decree.” *DSCC v. Simon*, 950 N.W.2d 280, 286-87 (Minn. 2020) (citation omitted).

For a temporary injunction, a party must show a likelihood of success or irreparable harm. *DSCC*, 950 N.W.2d at 286 (“Because a temporary injunction is granted before a trial on the merits, a showing of irreparable harm is required to prevent undue hardship to the party against whom the injunction is issued.”) (quotation omitted); *Haley v. Forcelle*, 669 N.W.2d 48, 58 (Minn. Ct. App. 2003) (court may consider issuing a temporary injunction if “a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits”).

“A temporary injunction is an extraordinary remedy. Its purpose is to preserve the status quo until adjudication of the case on its merits.” *Miller*, 317 N.W.2d at 712 (citation omitted). But a court “has the power to shape [injunctive] relief in a manner which protects the basic rights of the parties, even if in some cases it requires disturbing the status quo.” *N. Star State Bank of Roseville v. N. Star Bank Minn.*, 361 N.W.2d 889, 895 (Minn. Ct. App. 1985) (citation omitted). Whether to grant a temporary injunction is “largely an exercise of judicial discretion.” *Hvamstad v. City of Rochester*, 276 N.W.2d 632, 632 (Minn. 1979).²

C. Plaintiffs have standing.

Defendant first argues Plaintiffs lack standing to bring their claims. To have standing, a party must have “a sufficient stake in a justiciable controversy to seek relief from a court.” *Growe v. Simon*, 2 N.W.3d 490, 499 (Minn. 2024) (citation omitted). A party can obtain standing (1) if it has “suffered some injury in fact,” or (2) if it is the beneficiary of

² Defendant argues that a temporary injunction cannot be based on inadmissible evidence. See *Lumbar v. Welsh*, No. A06-1232, 2007 WL 1531971, at *5 (Minn. Ct. App. May 29, 2007). Plaintiffs argue it can. See *Dexon Comput., Inc. v. Modern Enter. Sols., Inc.*, No. A16-10, 2016 WL 4069225, at *4 (Minn. Ct. App. Aug. 1, 2016).

“some legislative enactment granting standing.” *Id.* Mere chance of injury is insufficient, rather, the injury must be both actual or imminent, not conjectural or hypothetical, and fairly traceable to the challenged conduct. *Minn. Voters All. v. State*, 955 N.W.2d 638, 642 (Minn. 2021). An injury in fact is a concrete and particularized invasion of a legally protected interest. *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007).

For purposes of ruling on a motion to dismiss for lack of standing, courts must accept as true all material allegations in the complaint and must construe the complaint in favor of the complaining party. *Stone v. Invitation Homes, Inc.*, 986 N.W.2d 237, 248 (Minn. Ct. App. 2023), *aff’d* 4 N.W.3d 489 (Minn. 2024); *Forslund*, 924 N.W.2d at 32 (at pleading stage, general allegations of injury suffice).

An organization can assert associational standing on its members’ behalf if its members’ interests are directly at stake or if they have suffered an injury-in-fact. *Snyder’s Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 301 Minn. 28, 33, 221 N.W.2d 162, 165 (1974); *Builders Ass’n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012). Direct standing requires a direct injury beyond an abstract interest or concern. *Byrd v. Indep. Sch. Dist. No. 194*, 495 N.W.2d 226, 231 (Minn. Ct. App. 1993). When challenging a law, an organization typically must show the law caused the organization to divert resources or impaired its mission or services. *Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004); *In re Trade Secret Designations*, No. A20-827, 2021 WL 1247948, at *5 (Minn. Ct. App. Apr. 5, 2021). In Minnesota, there is a “liberal standard for organizational standing.” *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003).

Further, “the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules

of justiciability, even when they address issues of federal law” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617, 109 S. Ct. 2037, 2045 (1989); *Growe*, 2 N.W.3d at 499 n.6 (“Our court is not bound by the standing constraints of Article III”). *See also* Miriam Seifter and Adam B. Sopko, *Standing for Elections in State Courts*, 102 Univ. of Ill. L. Rev. Vol. 2024 at 117 (DRAFT—April 2024) (suggesting that at least 35 states have relaxed the requirement for individualized injury in the context of elections).³

Defendant argues the individual Plaintiffs have not shown sufficient injury because they are registered voters who have successfully voted absentee in the past and only speculate about having trouble finding a witness to vote absentee again. Defendant contends these Plaintiffs need only have a witness observe them voting, and not affirm anything regarding qualifications, so there is no imminent danger Plaintiffs will have to prove their qualifications to vote absentee. Defendant argues neither individual Plaintiff can show they will be unable to find a witness by November, if they choose to vote absentee, and each resides in counties with thousands of registered voters. Defendant states that only 5,479 absentee ballots were rejected in the 2022 election, no Plaintiff previously had a rejected absentee ballot, and federal laws protect the right to vote not the preferred means of voting.

Defendant further contends the Alliance lacks standing because the witness requirement is not a new law the Alliance must divert resources to address, the Alliance has not identified the resources it must divert for the witness requirement, and the Alliance has not identified with admissible evidence any member injured by the witness requirement.

Plaintiffs argue they are qualified voters, have voted absentee in the past and intend to do so again, and will face the witness requirement this year. *See Common Cause/Ga. v.*

³ Available at <https://ssrn.com/abstract=4803103>, last accessed on June 3, 2024.

Billups, 554 F.3d 1340, 1352 (11th Cir. 2009) (voters who would have to present photo identification have standing). Plaintiffs allege it would be burdensome to find a witness and do not have to show they have already been disenfranchised. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (plaintiff need not have the franchise wholly denied to suffer injury). And Plaintiffs argue their claims on the merits do not relate to standing. *See FEC v. Cruz*, 596 U.S. 289, 298, 142 S. Ct. 1638, 1647-48 (2022).

Further, the Alliance points out at least one of its members, Ms. Maples, has standing, and its remaining 84,281 Minnesota members, who are retired, rely heavily on absentee voting, and many live alone and have mobility challenges. The Alliance has to divert resources to help its members navigate the witness requirement in order to vote, and need not quantify how much it has spent to do so. The Alliance's membership grows as people retire, and some must register in Minnesota for the first time, so the fact the witness requirement has been in effect for decades is irrelevant. Plaintiffs further note that *Liebert v. Millis*, Civ. No. 23-672-JDP, 2024 WL 2078216 (W.D. Wis. May 9, 2024), which Defendant and proposed intervenors heavily rely on, found adequate standing.

This court concludes Plaintiffs have sufficiently alleged standing. Ms. Maples is 70 years old, lives alone, has numerous, serious health conditions, and must vote absentee (or risk her health trying to go to the polls in November). She does not know anyone in her new apartment building and does not have any family in the area, as her son died last year. It is hardly a choice that she must vote absentee, she need not wait until she has been unable to vote absentee before seeking relief from the court, and it appears speculative to say that she can find a witness to come to her apartment to certify her ballot. The court finds Ms. Maples is an appropriate person to bring these claims. *See Citizens for Rule of Law v. Senate Comm.*

on Rules & Admin., 770 N.W.2d 169, 174 (Minn. Ct. App. 2009) (“Standing focuses on whether the plaintiff is the proper party to bring a particular lawsuit.”).

Since Ms. Maples is an Alliance member with standing, the Alliance has standing too. Further, the Alliance will have to continue to spend its time and resources on educating and assisting its members regarding the witness requirement rather than other aspects of its mission. The Alliance incurs time and expense on a postcard campaign to ensure its members, including those registering to vote here for the first time, know about and can try to comply with the witness requirement. May 2, 2024 Madden Decl. ¶ 10. The membership changes with the population, and general elections occur only every other year, so the fact that the witness requirement has existed a long time is not relevant to whether injury has been alleged, as ongoing absentee-voting education, outreach, and support is constantly necessary. It is understandable that the Alliance’s members, like Ms. Maples, including those past retirement age and with health problems, seek to vote absentee, and Plaintiffs have adequately shown they will struggle to find witnesses to vote absentee, and will divert resources to assist its members comply with the witness requirement. Most authority the parties have cited regarding challenges to the VRA and the CRA did not address standing, largely concluded the challengers had standing, or rely on stricter federal standards for standing. This court concludes Plaintiffs have sufficiently alleged standing.⁴

D. Plaintiffs have not brought a rule-making challenge.

Defendant contends Plaintiffs’ allegations appear to challenge the validity of Rules 8210.0500 and 8210.0600, which may only be challenged through a petition to the

⁴ Plaintiffs do not address whether Mr. Mohamed has asserted a sufficient injury. The court agrees he may lack standing, but that does not require dismissal of all Plaintiffs’ claims.

Minnesota Court of Appeals under Minn. Stat. § 14.44. Plaintiffs point out their claims do not directly challenge the Rules but rather whether Section 203B.07 violates federal law. The court agrees with Plaintiffs' characterization of its claims. Plaintiffs' references in the amended complaint to the rules governing the absentee-voting process relate to Plaintiffs' challenge to the enabling statute. To the extent Section 203B.07 is invalid, then its corresponding rules are also invalid. This court has jurisdiction over Plaintiffs' claims.

E. Plaintiffs have stated a VRA claim for those seeking to register to vote absentee.

Plaintiffs allege the witness requirement is a "prerequisite for voting" because an absentee voter who fails to satisfy the requirement will have their ballot rejected, and the witness requirement forces such voters to prove their "qualification by . . . voucher of [a] registered voter[] or" a class of those who can administer oaths. For all absentee voters, the witness must sign a "certificate of eligibility," or the ballot will be rejected, and if the voter is also registering absentee, the witness must also attest that the voter provided proof of residence. In either scenario, the absentee voter's exercise of their right to vote is subject to the voucher of a registered voter or class of persons authorized to administer oaths.

Defendant argues the witness requirement is not unlawful vouching, because the voter is the sole person attesting to their eligibility to vote. The witness attests only that the witness observed the voter mark a previously unmarked ballot and place it in the ballot envelope, and for a first-time voter, that the voter showed the witness proof of residency. Defendant argues that the witness attestations for registered voters clearly relate only to observing the mechanics of voting, and the witness merely certifies routine election administration—secret balloting, and confirming the same person who applied for, received, and returned the ballot, is the same person who marked the ballot. Defendant argues the

term “certificate of eligibility” is not controlling.⁵ Further, the witness attestation for same-day registration is designed to mirror the process that would occur in person for a first-time voter: the witness acts as an election judge to verify the voter has maintained a Minnesota residence for the last twenty days, from a specified list of documents, which is not a determination the voter actually has such residency but merely whether the voter provided the requisite proof. In this way, the absentee ballot scheme is merely lawful vote-casting regulation, and no voter must have their eligibility vouched for.

Plaintiffs argue a qualified witness must sign the certificate for an absentee ballot to be accepted. The witness requirement is therefore a prerequisite to voting absentee, because ballots are rejected that lack a witness signed “certificate of eligibility.” Further, for those registering to vote, the witness verifies one of the criteria for a voter’s eligibility, namely, Minnesota residency; since the witness must verify eligibility, the witness must vouch for the voter’s qualifications to vote. This voucher must be done by a registered voter or member of another class (since notaries and those who administer oaths are a “class” because they are groups with unique qualifications under Minnesota law). And having made absentee voting available, Plaintiff argues Defendant may not administer it in a way that violates the VRA.

No Minnesota case has addressed application of the VRA to Minnesota’s witness requirement. The parties mostly point to decisions from other jurisdictions, regarding other states’ absentee voting procedures, and regarding overall interpretation of the VRA.

Defendant first points to *Bell v. Gannaway*, 303 Minn. 346, 345, 227 N.W.2d 797, 803 (1975), where the Court held that absentee voting was a privilege, its procedures were

⁵ Minn. Stat. § 203B.07, subd. 3, is entitled, “Eligibility certificate.” Minn. Stat. § 645.49 directs that statutory headings are mere catchwords indicating only the statute’s subject matter.

mandatory and to be strictly construed, and courts must balance the benefits of absentee voting with the need to ensure honest elections. *Bell* did not involve a challenge under the VRA or the CRA, relied on caselaw from 1937, predating the federal voting laws from 1964 and 1965, and seems inapplicable when considering claims under the VRA.

In response, Plaintiffs cite *Voto Latino v. Hirsch*, Civ. Nos. 23-861, 23-862, 2024 WL 230931, at *26 (M.D.N.C. Jan. 21, 2024), and *Saucedo v. Gardner*, 335 F. Supp.3d 202, 217 (D.N.H. 2018), for the proposition that a state, having offered a particular method of voting, must ensure that method counts all eligible votes.

Defendant cites *Ind. Democratic Party v. Rokita*, 458 F. Supp.2d 775, 840 (S.D. Ind. 2006), which noted that absentee voting is inherently different from in-person voting. And *Ne. Ohio Coal. for the Homeless*, 837 F.3d 612, 629 (6th Cir. 2016), which held that requiring absentee voters accurately provide their address and birthdate on ballot envelopes is not a “test or device” under the VRA. But these cases refer to information the voter provides.

Defendant next cites *People First of Ala. v. Merrill*, 457 F. Supp.3d 1179, 1224 (N.D. Ala. 2020), where a witness certification that a voter attested to their identity was not a voter-eligibility requirement, and *Thomas v. Andino*, 613 F. Supp.3d 926, 961-62 (D.S.C. 2020), which similarly held that a witness observing the voter complete and sign the ballot was not improper vouching. Plaintiffs argue that *People First of Ala.* held that while the witness requirement did not violate the VRA, the notary requirement did, and that *Andino* held that a device required for the voter’s identification was a voucher. In *People First of Ala.*, a notary had to verify the voter’s identity, and it was legally required that a voter prove their identity in order to vote. 457 F. Supp.3d at 1225. In *Thomas*, the witness did not have to be a registered voter or class member, and only had to confirm the voter completed and signed

the document. 613 F. Supp.3d at 961-62. By contrast here, the witness must be a registered voter or class member, and there is no voter identification aspect to the witness requirement.

The parties largely contest the application of *Liebert*, where the court granted summary judgment on VRA and CRA challenges to Wisconsin's absentee-voting scheme, and concluded that a witness-certification requirement was not unlawful vouching, nor an immaterial voter-qualification restriction. In *Liebert*, the court found the witness certification, stating "the above statements are true," with respect to whether the absentee voter was entitled to vote and had properly completed the absentee ballot, was not a certification of the voter's qualifications. *Id.*, at *5. That is because it would be virtually impossible for any witness to do so, and past absentee ballots might have to be rejected. The *Liebert* court interpreted the text, purpose, and history of the Wisconsin statute, and concluded the witness certification must refer only to the witness's observations of the voting procedures, and was not improper vouching. *Id.*, at *6-7.

Plaintiffs argue *Liebert* misapplied the applicable portions of the VRA, and dealt with a Wisconsin statute that is materially different from Minnesota's in significant respects. Plaintiffs contend the VRA prohibits any requirement that a person "prove his qualifications by the voucher" of another regardless of whether the witness's voucher is substantively irrelevant to qualifications. Plaintiffs also argue that, in *Liebert*, the parties had agreed the witness signature was not used to determine eligibility, whereas here that is contested.

Having considered all arguments and authorities, including those filed by the Republican Committees, this court concludes that, for a registered Minnesota voter seeking to vote absentee, the witness requirement merely certifies that a witness observed that the voter—as opposed to someone else—completed the ballot. Only the absentee voter certifies

they are eligible to vote, that is, that he or she meets all the statutory criteria under Section 201.014. The witness does not verify any aspect of the registered voter's qualifications. In fact, for a registered voter, it is unclear if the witness would even know if the voter was the one who had applied for or received the absentee ballot, is an eligible or registered voter, or is who they claim to be. The witness, in any event, merely certifies observing a person completing the absentee ballot. The fact the witness completes an eligibility certificate, for a registered absentee voter, does not mean, substantively, that the witness is actually certifying any aspect of the voter's eligibility to vote.

For those registering to vote absentee, however, the witness does more than merely observe a person completing a ballot. Here, the witness also verifies the voter's residency, which is an eligibility criterium under Section 201.014, subdivision 1. The witness must therefore vouch for the fact that the absentee voter is, in part, eligible to vote, and the witness must be a registered voter, or member of a class of unique individuals. *Cf. People First of Ala.*, 457 F. Supp.3d at 1225 n.50 (holding that notaries were a class). The court agrees that absentee voting, now used by more than a quarter of Minnesota voters, must comply with the VRA. Plaintiffs have validly stated a claim that the witness requirement for absentee voter registration violates the VRA's vouching prohibition.

F. Plaintiffs have stated a CRA claim for registered absentee voters.

Plaintiffs contend that Minnesota's witness requirement violates the CRA's materiality provision because it denies the right to vote due to paperwork mistakes that are immaterial in determining voter qualifications. Even for new registrants and voters updating their registration, the witness attestation is immaterial to the voter's qualifications, as the witness merely attests that a document was presented and performs no other examination,

comparison, or authentication of the document. Unless the witness serves to “prove [the] qualifications” of the registrant by voucher—in contravention of the VRA—then the attestation of a witness is not material in determining eligibility. The certificate on the absentee ballot signature envelope is a record or paper, and completing this certificate is an act necessary for voting. Failing to comply with the witness requirement is an “error or omission on any record or paper,” and neither a signed witness statement nor a witness’s address, title, or notary stamp are material to determining whether a voter is eligible.

Defendant argues the materiality provision applies only to mistakes on documents used to determine voter eligibility, not documents or procedures that eligible voters use to cast votes. Defendant argues this conclusion is supported by the CRA’s plain language and legislative history, other courts’ interpretation, and the fact other laws exist and are necessary to ensure the orderly administration of fair elections without bearing directly on a voter’s eligibility. Defendant argues absentee voting is a privilege,⁶ and a broad reading of the materiality provision would thwart reasonable policy choices regarding the fair and orderly administration of elections, and require the state to disregard other voting errors that relate to how people vote. *See In re Contest of Gen. Election of Nov. 8, 2008*, 767 N.W.2d 453, 462 (Minn. 2009) (absentee voters must strictly comply with statutory provisions).

Defendant characterizes the witness requirement as solely an attestation of the voter’s conduct, and the CRA refers only to mistakes such as minor misspellings or mistakes in age or length of residence, not errors after election officials have determined an individual

⁶ Plaintiffs argue absentee voting is not a privilege, since the state has made it available and therefore must do so in a way that complies with federal law, and it is not always a choice. *See Voto Latino*, 2024 WL 230931, at *26; *Saucedo*, 335 F. Supp.3d at 217; *see also* Minn. Stat. §§ 204B.45-.46 (mail ballots may be only means of voting for some).

is qualified. Defendant points to the surrounding provisions in Section 10101(a), which refer to voter-qualification procedures and determinations, not vote-casting documents like absentee-ballot envelopes. Defendant contends the materiality provision serves to prevent discrimination in voter-registration procedures, rather than post-registration activities.

No Minnesota authority has addressed whether the witness requirement for absentee voting conflicts with the CRA. The parties refer the court to other jurisdictions' authority and seem to agree with a test articulated in *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008), where the court suggested the correct interpretation of the materiality provision "asks whether, accepting the error as true and correct, the information contained in the error is material to determining the eligibility of the applicant."

Defendant relies primarily on *Liebert*, and the majority opinion in *Penn State Conf. of NAACP Branches v. Sec'y Commonwealth of Penn.*, 97 F.4th 120, 127, 131 (3d Cir. 2024), *pet. for rehr'g filed* (Apr. 10, 2024), which interpreted the CRA's materiality provision as inapplicable to vote-casting rules, noted that voter qualification determinations and voting procedures are different, and a state's election administration would be unduly burdened by a contrary interpretation. Defendant cites *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003), which held the materiality provision applied to registration forms, and federal district court cases similarly interpreting the materiality provision as applicable to paperwork relating to initial eligibility determinations. Defendant agrees some courts have applied the materiality provision to vote-casting measures, but distinguishes them as not addressing whether the provision applies after an individual has been determined eligible to vote.⁷

⁷ But for those both voting and registering to vote absentee, without a compliant witness certification, the ballot will be rejected regardless of whether they are already deemed eligible or without an eligibility determination.

For those registering to vote absentee, Defendant argues the witness certifications are material to determining voter qualifications under Minnesota law, because the witness in that instance acts as an election judge verifying the voter furnished appropriate proof of residency. *See Ind. Democratic Party*, 458 F. Supp.2d at 841 (“verifying an individual’s identity is a material requirement.”).

Plaintiffs argue that Defendant admits the witness requirement is material for determining the qualifications of those seeking to register absentee. Both scenarios, absentee voters who are registered and those seeking to both register and vote absentee, employ the same “certificate of eligibility” documents, and the materiality provision’s plain language applies to a paper or record required for voting. Section 10101(a)(2)(B) covers all papers relating to any application, registration, or other act requisite to voting, without distinguishing papers related to eligibility from papers related to vote casting. Plaintiffs argue Defendant’s interpretation is circular (applying where an “error relates to a voter’s qualification but is immaterial in determining the voter’s qualification”), and would render superfluous the phrase “any ... act requisite to voting,” when it ought to be given meaning.⁸

Plaintiffs contend the divided Third Circuit panel, and *Liebert*, the only cases adopting Defendant’s interpretation, are incorrect, and other courts have agreed the materiality provision covers voting requirements unrelated to registration. *See, e.g., Vot.org. v. Ga. State Elec. Bd.*, 661 F. Supp.3d 1329, 1340 (N.D. Ga. 2023) (denying Rule 12 motion and construing materiality clause as plausibly applicable to pen-and-ink requirement on absentee ballot); *La Union del Pueblo Entero v. Abbott*, Civ. No. 21-844-XR, 2023 WL 8263348, *14 (W.D. Tex.

⁸ “Requisite” means “[r]equired either by rule or by the nature of things; necessary.” Black’s Law Dictionary (11th ed. 2019).

Nov. 29, 2023) (law requiring absentee ballot have ID matching voter-registration ID violated materiality provision); *Common Cause v. Thomsen*, 574 F. Supp.3d 634, 636 (W.D. Wis. 2021) (materiality provision not limited to voter registration, and under Wisconsin law, voter was not qualified without compliant ID, so having ID was material); *Org. for Black Struggle v. Ashcroft*, 493 F. Supp.3d 790, 803 (W.D. Mo. 2020) (absentee ballot applicant's identifying information on ballot application and envelope material to voter qualification); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018) (materiality violation when statute required elector's birth year on absentee ballot).

Further, *Liebert* diverged from *In re Ga. Senate Bill 202*, Civ. Nos. 21-1284, 21-1259, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023), where the court held, "the determination whether an individual is qualified to vote occurs through the absentee ballot application process and is therefore complete before a voter ever receives an absentee ballot." In that case, an absentee voter having to list their birthdate on the ballot envelope was immaterial to determining their qualifications to vote, and according to the defendants only to determine identification. *Id.* The court invalidated a requirement that rejected absentee ballots where the already qualified voter failed to put their birthdate on the ballot envelope. *Id.* The court also rejected the argument that completing the outer envelope of the absentee ballot was not an act requisite to voting, since the materiality provision prohibits the denial of the right to vote, defined broadly, and completing the outer envelope was an act necessary to vote "because without it, the vote will not count." *Id.* at *10.

Plaintiff argues Defendant's slippery-slope concerns are unfounded, as other cases have shown the materiality provision is limited to paperwork errors. *See, e.g., Friedman v. Snipes*, 345 F. Supp.2d 1356, 1370-71 (S.D. Fla. 2004) (late ballot not being counted is not

covered by materiality provision); *Common Cause/Ga. v. Billups*, 439 F. Supp.2d 1294, 1358 (N.D. Ga. 2006) (photo ID requirement not covered by materiality provision). The phrase “other act requisite to voting” must have been deliberately added to include more than just voter application and registration paperwork, and Congress was in fact concerned with other paperwork necessary to vote. *See Allen v. Milligan*, 599 U.S. 1, 39-40, 143 S. Ct. 1487, 1515 (2023) (declining to use surrounding language to narrow the meaning of a statute’s broad term describing VRA election procedures). Plaintiffs argue the materiality provision only covers the denial of the right to vote, and only paperwork that is necessary for voting (e.g., not the ballot). The “certificate of eligibility” envelope fits squarely under the materiality provision as paperwork necessary for determining voter eligibility.

Plaintiffs acknowledge *Vote.Org. v. Callanen*, 89 F.4th 459, 487-88 (2023), where a voter signature requirement was material for identification, and *League of Women Voters of Ark. v. Thurston*, Civ. No. 20-5174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023), where proving voter identity was material to determining eligibility. But for those already registered, proving a voter’s identity is immaterial to determining the voter’s eligibility to vote. *See Mi Familia Vota v. Fontes*, Civ. No. 22-509-PHX-SRB, 2024 WL 862406, at *37-38 (D. Ariz. Feb. 29, 2024) (birthplace requirement on voter application immaterial to voter qualifications even if used to verify registered voter’s identity). Similarly here, a registered Minnesota absentee voter has already proven their eligibility to election officials.

Plaintiffs also point to *Ford v. Tenn. Senate*, Case No. 06-2031DV, 2006 WL 8435145, at *11-12 (W.D. Tenn. Feb. 1, 2006), which reasoned that, because “vote” is defined in the CRA, Section 10101(e), to include all actions necessary to make a vote effective, including but not limited to registration or other action required by law prerequisite to voting, casting

a ballot, and having such ballot counted, a law invalidating votes where a voter had failed to sign both an application for a ballot and the poll book, was an immaterial error.

This court believes the CRA's plain language, when considering its broad definition of "vote," compels the conclusion that paperwork errors on documents necessary to have a vote counted must be disregarded unless the errors are material to determining the voter's eligibility to vote. Examining the surrounding text of the CRA's materiality provision is necessary only if the plain language of the materiality clause is ambiguous, and here the CRA broadly defines the term "vote" to include "all action necessary to make a vote effective," including without limitation "casting a ballot, and having such ballot counted and included." If there is any kind of mistake on any record or paper, relating to any act required to vote, and if that mistake is immaterial to determining whether the voter is eligible under state law to vote, the mistake must be disregarded. The CRA does not specify who may have made the mistake, nor the type of document, so long as the document relates to an act necessary to having a vote counted, and is not material to the voter's qualifications. A contrary interpretation would render meaningless the phrase "other act requisite to voting."

Mistakes that may properly result in rejection of absentee ballots are those that are material in determining whether the person is eligible to vote, and mistakes that are not on documents relating to any act needed for voting. For example, according to Defendant's website, in the 2022 general election, 13,698 absentee ballots were rejected, and most were based on paperwork mistakes that are material to the voter's qualifications or the voter having properly completed the absentee ballot (e.g., insufficient or defective voter registration information, voter number and signature not matching, voter failed to sign ballot, etc.). The certificate of eligibility is on a document needed for having an absentee

voter's ballot accepted and counted. The signature envelope on which the certificate of eligibility is printed is a record or paper, and it relates to act necessary for voting, but the witness portion is immaterial to the voter's qualifications. *See In re Contest of Gen. Election Held on Nov. 4, 2008*, 767 N.W.2d at 461-62 (absentee voters held to strict compliance but election officers' mistakes should not result in rejection).

Ballot board members reject absentee ballots if there are mistakes on the certificate of eligibility the witness completes, and for registered voters those mistakes do not relate to whether the voter was eligible to vote, because their eligibility was already determined when they applied for and received their absentee ballot. For them, the witness does not attest to the voter's qualifications—only that the voter in fact completed the ballot. Although Minnesota law does not require voter identification, the witness does not even attest to the voter's identity, or that the voter is the one who applied for or received the absentee ballot forms. The witness merely attests to witnessing a person fill out the ballot. The registered voter attests to his or her own qualifications to vote, and signs the ballot under penalty of perjury (and subject to felony charges if done falsely). If a registered voter's witness's errors were corrected, the correct information would be immaterial to whether the voter is eligible.

For a first-time registrant, the witness attestation is material to the absentee voter's eligibility. By inspecting the voter's proof of residency, and therefore confirming or rejecting that the first-time absentee voter has displayed one of the required proofs of residence, the witness is necessarily determining that one of the statutory criteria is met for whether the voter is qualified. This is material to the voter's qualifications, so a paperwork mistake in this instance is not a CRA violation.

G. Whether a temporary injunction should be granted.

Plaintiffs primarily argue a temporary injunction should be granted because they are likely to succeed on the merits of their claims and will suffer great irreparable harm. As to the merits, for those reasons stated above, the court believes Plaintiffs are likely to prevail on their VRA claims as to those seeking to register to vote absentee, and on their CRA claims as to those already registered seeking to vote absentee.

As to the balance of harms, Plaintiffs argue that restrictions on fundamental voting rights constitute irreparable injury, and once disenfranchisement occurs there can be no redo. “There is no doubt that the right to vote is fundamental.” *Schroeder v. Simon*, 985 N.W.2d 529, 545 (Minn. 2023). It is “a fundamental and personal right essential to the preservation of self-government.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003) (citation omitted). Further, “all qualified voters have a constitutionally protected right . . . to have their votes counted . . .” *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 1378 (1964), *reh’g denied*, 379 U.S. 870, 85 S. Ct. 12 (Oct. 12, 1964). The harm of voter disenfranchisement may outweigh concerns of confusion and disrupting an election. *La Union del Pueblo Entero*, 2023 WL 8263348, at *26. Plaintiff also argues that public policy favors protecting federal statutory rights, the fundamental right to vote, and permitting as many qualified voters to vote as possible. Plaintiffs argue the nature of the parties’ relationship, and administrative burdens, are not particularly relevant factors.

Defendant argues the individual Plaintiffs are registered voters and have never had trouble voting absentee, the Alliance has not identified any of its members who have yet to be disenfranchised due to the witness requirement, and Plaintiffs’ claims are not urgent.

Further, Minnesota's election system would be disrupted and unduly burdened by an untimely change to the witness requirement. *See Def.'s May 9, 2024 Br.; Maeda Decl.*

For purposes of Defendant's motion to dismiss, the court accepts as true that the Alliance's members are all retirees, overwhelmingly vote by mail, and will have a hard time finding a witness to vote absentee. Some live alone, would have to travel to vote, or have mobility problems. The Alliance will have to continue diverting time and resources to assisting its over 84,000 Minnesota members try to comply with the witness requirement. And Ms. Maples has numerous serious health issues, lives alone, has no nearby family, and recently moved to a building where she does not know any neighbors.

The court also agrees the witness requirement could result in the unlawful disenfranchisement of many eligible voters. Based on 2022 numbers, more than 25% of Minnesota voters may now rely on absentee voting. Although a small number of the 2022 absentee ballots were rejected, over 5,000 were rejected due to paperwork mistakes by the witness and had nothing to do with the voter's errors or qualifications. *See Contest of Gen. Election of Nov. 8, 2008*, 767 N.W.2d at 462 (vote "should not be rejected because of irregularities, ignorance, inadvertence, or mistake . . . on the part of the election officers."). The witness certificate of eligibility is required for an absentee vote to be counted, and the absentee voter's ballot will be rejected and not even examined for eligibility, much less counted, unless the witness certification on the ballot envelope is completed correctly and thoroughly. There is a risk that many eligible Minnesota voters will be disenfranchised through no fault of their own, solely based on immaterial defects on the envelope containing their otherwise correctly completed absentee ballot.

At the same time, if the witness requirement were eliminated now, the court appreciates that Defendant will have to scramble for the November 2024 general election. Absentee voting begins September 20, 2024. Defendant would incur substantial expense to reprint absentee voting ballots, commence a state-wide public education campaign for voters and election officials, develop new voter outreach materials, and other time and expense. *See Madea Decl.* Defendant would not suffer harm insofar as it must comply with the VRA or CRA, but the court agrees with Defendant's concerns regarding the balance of harms, at least at this stage, before the parties have completed discovery and, presumably, moved for summary judgment.

Further, Plaintiffs have been on notice of the witness requirement for years, brought this action at the beginning of the 2024 election year, and brought their temporary-injunction motion on for hearing just seven months before the general election, with even less time for Defendant to change absentee ballot packages and a wide array of preelection procedures. The court remains open to revisiting Plaintiffs' motion, but believes at this time the balance of harms does not support temporary injunctive relief.

H. The Republican Committees have not shown a right to intervene as parties.

The Republican Committees have sought to intervene as parties in this action, oppose Plaintiffs' temporary-injunction motion, and support Defendant's Rule 12 motion. Plaintiffs oppose intervention, and Defendant has no objection.

Minn. R. Civ. P. 24.01 establishes four requirements for intervention as of right: (1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties. *Mpls. Star & Tribune Co. v. Schumacher*, 392

N.W.2d 197, 207 (Minn. 1986). Rule 24.01 was designed to protect non-parties from having their interests adversely affected by litigation conducted without their participation. *BE & K Const. Co. v. Peterson*, 464 N.W.2d 756, 758 (Minn. Ct. App. 1991). The purpose of Rule 24.01 is to encourage more extensive use of intervention. *Englerup v. Potter*, 302 Minn. 157, 162, 224 N.W.2d 484, 487 (1974).

But an application for intervention as of right must do more than assert an interest in independent representation. The applicant must also carry a minimal burden of showing that the existing parties may not adequately represent their interests. *Jerome Faribo Farms, Inc. v. Cnty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990), *rev. denied* (Minn. Mar. 15, 1991) (applicants for intervention of right must show their interests in a proceeding “are imperiled by the existing parties”). A non-party’s interests can be adequately represented by a real party in interest who vigorously pursues the matter. *See State ex rel. Donnell v. Jourdain*, 374 N.W.2d 204, 206 (Minn. Ct. App. 1985) (applicant’s interests were adequately represented by real stakeholder who vigorously pursued the suit).

Alternatively, Minn. R. Civ. P. 24.02 allows for permissive intervention and requires that the proposed intervenors timely apply, their interests have “a common question of law or fact” with the action, and there would be no undue delay or prejudice to existing parties.

Besides supporting Defendant’s position entirely with respect to dismissal of Plaintiffs’ claims and opposition to temporary injunctive relief, the Republican Committees claim a separate interest in this action, specifically, seeking and winning political office and doing so with the existing witness-requirement rules in place. The Republican Committees argue that eliminating the witness requirement would give their opponents a competitive advantage, an interest Defendant does not share, and the Republican Committees do not

have to manage additional administration concerns like Defendant does, and therefore can guarantee their interest in this action is protected if granted party status.

The Republican Committees claim that, if Plaintiffs succeed in this action, the Republican Committees will necessarily be impaired because they and their members will be forced to participate in an illegally structured competitive environment, and a broader array of competitive tactics than state law would otherwise allow. The Republican Committees claim changing the rules for absentee voting would disadvantage them and their members because more Democrats vote absentee or by mail than Republicans. Further, the Republican Committees argue Defendant may not defend the existing absentee-ballot rules as forcefully or zealously as the Republican Committees would, for administrative, policy, or other reasons, the Republican Committees have strategic reasons for defending existing rules while Defendant is merely tasked with carrying out the rules, and the Republican Committees may wish to defend against Plaintiffs' claims differently than Defendant would.

The Republican Committees further argue Defendant does not object to intervention, the standard for intervention is minimal, and their interest could be harmed absent intervention as a party. The Republican Committees contend there would be no prejudice by permissive intervention, and sound policy supports their participation in this action.

Plaintiffs argue the Republican Committees do not have a unique and cognizable interest in this action that would be impaired by its disposition, the record shows Defendant is adequately representing the Republican Committees' interests, and a generalized interest in fair elections, the integrity of the election process, a generalized grievance, and a desire to maintain existing law, are insufficient interests to intervene. Plaintiffs point to *Liebert*, where the Republican Party affiliates were denied intervention, and the *DSSC* case involved

intervention when Defendant had acquiesced to change the voting rules, which is not the case here. Plaintiffs argue the authorities the Republican Committees have cited either involve no objection to intervention, or situations where intervention was appropriate given the politicized nature of the issues and existing parties.

The Republican Committees have filed a timely application to intervene, and there appears to be minimal prejudice to existing parties if the Republican Committees were parties. The Republican Committees support the existing absentee-balloting rules as Defendant does, so the issues are whether they have additional interests that may only be protected by their intervention, and whether Defendant will adequately represent them.

The court finds the Republican Committees do not show how they will be harmed if intervention is denied. The Republican Committees do not show how the outcome of this action, in their absence as a party, might make it harder for their members to vote or have ballots counted, or require them to divert resources to educate or assist impacted voters comply with voting requirements. *See, e.g., Issa v. Newsom*, Civ. No. 20-1044-MCE-CKD, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020); *Paher v. Cegavske*, Civ. No. 20-243-MMD-WGC, 2020 WL 2042365, at *2-3 (D. Nev. Apr. 28, 2020); *cf. La Union del Pueblo Entero*, 29 F.4th at 306 (intervention appropriate when party's committees would expend significant resources to poll watch). Here, the relief Plaintiffs seek would make absentee voting easier for all Minnesotans, including from among Plaintiffs' members who cannot go to the polls due to mobility or other limitations, and those in smaller municipalities where absentee voting is the only way to vote. Further, an interest tied to competitive advantage must be tied to an ongoing, unfair advantage. *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022).

Relieving absentee voters of the witness requirement, if required by federal law, would not harm the Republican Committees' interests.

The Republican Committees cite *Grove*, 2 N.W.3d 490, however, that case originated in the Minnesota Supreme court and did not address Rule 24, the Republican Party clearly had a direct interest in whether one of its candidates could appear on a ballot, and there was no analysis of the standards for intervention. The Republican Committees also cite *DSCC*, 950 N.W.2d at 284, but again there was no Rule 24 analysis in that case. And *Erlandson*, 659 N.W.2d at 726, and *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 910 (Minn. 2006), where there was also no discussion of the intervention standards. Here, Plaintiffs are not DFL or Democratic committees, and permitting the Republican Committees' intervention would tacitly invite such committees to also move to intervene, which would threaten to make this action a political dispute rather than a legal one involving application of federal voting laws to state voting law, equally applicable to all political parties.

The Republican Committees also fail to show how their interests will be impaired in this action. Plaintiffs seeks to enforce federal voting laws, which the Republican Committees cannot reasonably assert they have an interest in opposing. *See Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (a law that "makes it easier for some voters to cast their ballots by mail" does not burden anyone's right to vote). If successful, Plaintiffs' action benefits all Minnesotans needing to vote absentee regardless of party affiliation, so the Republican Committees cannot show any interest that will be impaired. The Republican Committees argue that the relief Plaintiffs seek will require the Committees to divert resources to reeducate voters and staff that the witness requirement is now waived, which will cause harm, expense, confusion, or result in some people not voting. But as to reeducation, time,

and expense, Defendant would face the same consequences, the court is not granting immediate temporary injunctive relief at this time, and the court does not find credible the notion that some people may not vote if absentee voting is made easier.

Finally, Defendant has adequately, and vigorously, defended against Plaintiffs' claims. While Defendant is not and will not represent partisan interests, Defendant represents the sovereign interest of fair elections where all valid ballot regulations are enforced, which is what the Republican Committees argue as their primary goal. The court agrees with Plaintiffs that this action involves only two sides—those who claim the witness requirement violates federal voting laws and those who do not.

Further, the Republican Committees need not be an additional defendant at this time, and the court does not find disposition of this action may impair the Committees' ability to protect their interest or that Defendant is not already representing their interest. The Republican Committees seek no relief in this action that is different than what Defendant seeks, and the court could grant no relief against the Republican Committees nor enjoin or compel them in any way if made parties. At this time, there is no concern Defendant is not vigorously defending against Plaintiffs' claims.

The court agrees the Republican Committees have added legal arguments Defendant has not, and therefore the Republican Committees' briefs and arguments ought to remain part of the record and may be considered amici in this action. *See Fletcher Props., Inc. v. City of Mpls.*, 2 N.W.3d 544, 561 (Minn. Ct. App. 2024) (citation omitted), *rev. granted* (Minn. May 14, 2024) (purpose of amicus is "to inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation.").

VI. Conclusion

For the foregoing reasons, the court denies Defendant's motion to dismiss, and denies for now Plaintiffs' temporary-injunction motion and the Republican Committees' intervention motion.

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VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Alex Latcham, Senior Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Memorandum in Opposition to Petitioners' Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

Alex Latcham

Alex Latcham
Seniority Deputy Political Director
Republican National Committee

Date: 07/08/2024

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Memorandum in Opposition to Petitioners' Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Angela Alleman
Executive Director
Republican Party of Pennsylvania

Date: 7/8/24

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum contains 13,829 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Kathleen A. Gallagher
Counsel for Republican Intervenors

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher
Counsel for Republican Intervenors

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BLACK POLITICAL EMPOWERMENT
PROJECT, POWER INTERFAITH,
MAKE THE ROAD PENNSYLVANIA,
ONEPA ACTIVISTS UNITED, NEW
PA PROJECT EDUCATION FUND,
CASA SAN JOSÉ, PITTSBURGH
UNITED, LEAGUE OF WOMEN
VOTERS OF PENNSYLVANIA, AND
COMMON CAUSE PENNSYLVANIA,

Petitioners,

v.

AL SCHMIDT, in his official capacity as
Secretary of the Commonwealth,
PHILADELPHIA COUNTY BOARD
OF ELECTIONS, AND ALLEGHENY
COUNTY BOARD OF ELECTIONS,

Respondents,

REPUBLICAN NATIONAL
COMMITTEE AND REPUBLICAN
PARTY OF PENNSYLVANIA,
Intervenors.

Case No. 283 MD 2024
Original Jurisdiction

**RESPONSE IN OPPOSITION
TO PETITIONERS' APPLICATION FOR SUMMARY RELIEF**

Intervenors the Republican National Committee and Republican Party of Pennsylvania (collectively, “the Republican Intervenors”), by and through their undersigned counsel, respectfully submit their Response to the Application for Summary Relief filed by Petitioners (“Application”) and aver as follows:

1. Petitioners have submitted an Application for Summary Relief pursuant to Pennsylvania Rule of Appellate Procedure 1532(b).

2. Pennsylvania Rule of Appellate Procedure 1532 addresses Special and Summary Relief. In pertinent part, Rule 1532 provides:

Rule 1532. Special and Summary Relief

...

- (b) Summary relief. At any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.

Pa. R.A.P. 1532(b).

3. “Summary relief is similar to summary judgment under the Pennsylvania Rules of Civil Procedure.” *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 216 A.3d 448, 458 (Pa. Commw. Ct. 2019). Summary relief therefore is not appropriate where the applicant has no “clear” right to “the requested relief under the law.” *Id.*

4. In deciding a motion for summary relief, an application may be granted if a party's right to judgment is clear, *see* Pa. R.A.P. 1532(b), and no issues of material fact are in dispute. *Sanders v. Commonwealth of Pennsylvania, Board of Probation and Parole*, 651 A.2d 663, 665 n.3 (Pa. Commw. Ct. 1994).

5. The Commonwealth Court has further explained that when ruling on an application for summary relief, “we must view the evidence of record in the light most favorable to the non-moving party and enter judgment only if there is no

genuine issue as to any material facts and the right to judgment is clear as a matter of law.” *Eleven Eleven Pennsylvania, LLC v. State Board of Cosmetology*, 169 A.3d 141, 145 (Pa. Commw. Ct. 2017) (quoting *Markham v. Wolf*, 147 A.3d 1259, 1270 (Pa. Commw. Ct. 2016) (citation omitted)). The moving party bears the burden of proving the absence of any genuine issue of material fact. *Stuski v. Philadelphia Authority for Industrial Development*, 162 A.3d 1196, 1199 (Pa. Commw. Ct. 2017).

6. For the reasons set forth in the Republican Intervenors’ Memorandum in Opposition to Petitioners’ Application for Summary Relief, as well as its own Application for Summary Relief and supporting Brief, and its Preliminary Objections to the Petition, each of which are incorporated by reference as if fully set forth herein, Petitioners are unable to demonstrate any entitlement to relief, and the Petition should be dismissed on the following grounds.

A. Petitioners Cannot Establish a Clear Right to Relief Because Petitioners Rely Solely on the Facts Set Forth in the Petition and the Application for Special Relief in the Nature of a Preliminary Injunction.

7. Petitioners suggest that during the June 10, 2024 status conference, the parties, including Republican Intervenors, agreed to the facts—and *only* the facts—presented in their Petition and Application for Special Relief in the Nature of a Preliminary Injunction (“Pet. App’n”). See Pet. App’n at 5.

8. Petitioners’ suggestion is erroneous as the parties agreed that, for the sake of judicial efficiency, there was no need for further discovery or an evidentiary

hearing before the Court could consider applications for summary relief because “[t]he facts necessary to decide” this case and the various defenses “are well-known to the parties,” as “fulsome discovery” and factual and legal presentations have already taken place in prior date-requirement litigation. *Id.*

9. Petitioners’ suggestion is also nonsensical as Republican Intervenors’ Preliminary Objections (“Prelim Objs.”) were also “in the record” at the June 10, 2024 status conference. *Id.* Yet Petitioners have made it clear that they do not agree to the facts presented in the Preliminary Objections. *See e.g.* Prelim. Objs. ¶ 146 (noting that the date requirement serves “unquestionable purpose[s] in safeguarding the integrity of Pennsylvania’s elections”).

10. Moreover, the Secretary and the Boards each rely upon facts that were not presented in the Petition or the Application for Preliminary Injunction. *See, e.g.,* the Secretary of the Commonwealth’s Brief in Support of Petitioners’ Application for Relief, at 19-21; Respondents Allegheny and Philadelphia County Boards of Elections’ Statement of Position Regarding Summary Relief (“Boards Br.”), at 3-4.

11. Petitioners however ignore these facts—which are also properly before the Court—and instead attempt to rely solely on the facts set forth in the Petition and the Application for Special Relief in the Nature of a Preliminary Injunction in a misguided attempt to establish a clear right to the relief.

12. Petitioners' attempt must fail as it is well settled that, a movant's right to relief is not clear if it supports its motion only with its own testimony, *see Borough of Nanty-Glo v. American Surety Co. of NY*, 163 A. 523, 524 (Pa. 1932) ("However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence").

13. This is especially true where the non-movant presents conflicting testimony on a material issue such that witness credibility must be weighed. *See, e.g., Koken v. Commw. Professional Group*, 2006 Phila. Ct. Com. Pl. LEXIS 73, at *5 (Phila. Com. Pl. 2006) ("Since both parties rely upon affidavits to support their positions regarding whether premiums are due from CPG to RIC under the Agreement, this issue is not susceptible to summary judgment.") (citing *Nanty-Glo*); *Hodosh v. Block Drug Co.*, 786 F.2d 1136, 1143 (1986) ("The fact issues herein must be resolved by trial in which the conflicting views of the experts will be subject to the refining fire of cross-examination.").

14. Accordingly, Petitioners' right to relief is not clear and this Court should deny Petitioners' Application for Summary Relief.

B. Petitioners Lack Standing to Sue the Secretary.

15. Petitioners' only basis for suing the Secretary is his Guidance regarding the date requirement. *See* Petition for Review Addressed to the Court's Original Jurisdiction ("Pet.") at ¶¶ 10, 13, 17, 20, 23, 26, 30, 33, 36, 42-43, 79; Memorandum of Law in Support of Petitioners' Application for Summary Relief at 37.

16. However, this Court has previously held that Guidance issued by the Secretary is not binding on county boards of election. In *Republican National Committee v. Schmidt*, Judge Ceisler held that Secretary Guidance regarding the administration of elections does not affect the county boards' legal obligations and is not legally binding or enforceable against them. *Republican National Committee v. Schmidt*, No. 447 M.D. 2022 (Pa. Commw. Ct. Mar. 23, 2023) (slip opinion attached as **Exhibit A**), at 13-14, 18-22 ("Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards.").

17. The same result has likewise been reached by the Pennsylvania Supreme Court in *In re Canvass of Absentee & Mail-In Ballots*, where the court concluded that "[T]he Secretary has no authority to definitively interpret the provisions of the Election Code..." 241 A.3d 1058, 1078 n.6 (Pa. 2020).

18. Thus, there is no "causal connection" between the Secretary's Guidance and Petitioners' alleged harm of county boards not counting noncompliant mail

ballots. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 473 (Pa. 2021). Accordingly, a court order invalidating the Guidance would not “redress” Petitioners’ alleged harm. *See id.* at 474.

19. As a result, and as set forth more fully in Republican Intervenors’ Preliminary Objections at 24-33 and Republican Intervenors’ Summary Relief Brief at 11-15 (“Summary Relief Br.”), Petitioners lack standing to bring this action against the Secretary.

20. Movants have failed to address their own lack of standing or to provide this Court with any plausible legal theory to support the same. Movants’ failure to do so is understandable, as there is no legal basis for Petitioners to bring the instant claim against the Secretary given Judge Ceisler’s holding in *Republican National Committee v. Schmidt*.

21. Petitioners therefore lack standing to sue the Secretary and the Petitioners’ Application for Summary Relief should be denied, the Preliminary Objections of Republican Intervenors should be sustained, and the Petition should be dismissed.

C. This Court Lacks Subject Matter Jurisdiction Because the Secretary is Not a Proper or Indispensable Party.

22. As set forth in Republican Intervenors’ Preliminary Objections and in their Summary Brief, this Court lacks subject matter jurisdiction under 42 Pa. C.S. § 761(a)(1). *See* Prelim. Objs. at 23-27, Summary Relief Br. at 15.

23. Because an order invalidating the Guidance will *not* result in any county board of elections counting undated or misdated mail ballots, the relief Petitioners seek obviously can be “accomplished in the absence of” the Secretary. *See* Exhibit A at 18-22, *see also* Summary Relief Br. at 11-18; Boards Br. at 6.

24. As a result, and consistent with Judge Ceisler’s finding in *Republican National Committee*, the Secretary is not an indispensable party to this matter. *Id.* *See* Exhibit A at 18-22.

25. Petitioners however fail to counter this fundamental defect or to establish any basis as to why Judge Ceisler’s holding in *Republican National Committee* is not persuasively controlling here.

26. Therefore, Petitioners’ Application for Summary Relief should be denied, the Preliminary Objections of Republican Intervenors should be sustained, and the Petition should be dismissed for lack of subject matter jurisdiction. *See id.* at 18-28.

D. The Court Lacks Subject Matter Jurisdiction Over Any Claims Against the Boards.

27. Initially, the Petition seeks no redress against the two Boards. *See* Pet. ¶ 92; Summary Relief Br. 19; *Firearm Owners Against Crime*, 261 A.3d at 474. Further, even if Petitioners were able to correct that pleading deficiency by purporting to seek relief against the Boards now, *see* Pet. App’n ¶ 73, the Court still

lacks jurisdiction because the Boards are local authorities, not “agencies” of the “Commonwealth government.” 42 Pa. C.S. § 761.10; Summary Relief Br. at 19-21.

28. As Judge Ceisler previously held in *Republican National Committee*, county boards are not “Commonwealth agencies” whose joinder can bring a case within the Court’s original jurisdiction. *Republican Nat’l Comm.*, Exhibit A at 22; Summary Relief Br. at 19-21, *see also* Prelim. Objs. at 31-33.

29. Petitioners have proffered no relevant legal basis as to why Judge Ceisler’s holding in *Republican National Committee* is not persuasive on this issue.

30. Accordingly, Petitioners’ Application for Summary Relief should be denied, the Preliminary Objections of Republican Intervenors should be sustained, and the Petition should be dismissed.

E. In The Alternative, Petitioners Failed to Join Indispensable Parties.

32. Alternatively, even if the Court had jurisdiction and Petitioners had sought relief against the two Boards, the Court still should dismiss the Petition because Petitioners failed to join indispensable parties: the 65 other county boards of elections, whose “rights” and obligations “are so connected with the claims of the litigants that no decree can be made without impairing those rights.” *Polydyne, Inc. v. Philadelphia*, 795 A.2d 495, 496 (Pa. Commw. Ct. 2002); *see also* Summary Relief Br. at 21-24.

33. Further, ordering just the two Boards *not to enforce* the date requirement would create disuniformity across the Commonwealth because the 65 other boards are bound to *continue to enforce* it under *Ball*, resulting in differential treatment of voters throughout the Commonwealth in violation of the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 6 (“All laws regulating the holding of elections by citizens, or for the registration of electors, shall be uniform throughout the state ...”); *see also Kerns v. Kane*, 69 A.2d 388, 393 (Pa. 1949); Summary Relief Br. at 23-24. It would also violate the U.S. Constitution’s Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000).

34. Petitioners fail to provide any legal authority to establish why the remaining 65 county boards are not indispensable parties to this action.

35. Accordingly, Petitioners’ Application for Summary Relief should be denied, the Preliminary Objections of Republican Intervenors should be sustained, and the Petition should be dismissed.

F. Petitioners’ Claims Fail on the Merits.

36. Petitioners’ Free and Equal Elections challenge to the date requirement fails because the Pennsylvania Supreme Court has already rejected such a claim. *See* Summary Relief Br. at 28-31.

37. In *Pennsylvania Democratic Party*, the Pennsylvania Supreme Court upheld mandatory application of the *entire* declaration mandate for mail ballots—

which encompasses the “fill in, date, *and* sign” requirements—without requiring an opportunity to cure, 238 A.3d at 373-74 (quoting 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added)); *see also* Summary Relief Br. at 28-29.

38. The Pennsylvania Supreme Court reiterated this conclusion in *Ball v. Chapman*, when it rejected a statutory challenge to the date requirement in the face of Free and Equal Elections arguments. *See Ball*, 289 A.3d 1, 14-16 (Pa. 2022); *see* Summary Relief Br. at 29-31.

39. Petitioners fail to establish any plausible basis as to why the Pennsylvania Supreme Court’s decisions in *Pennsylvania Democratic Party* and *Ball* are not dispositive of Petitioners’ Free and Equal Elections Clause claim.

40. Essentially, the date requirement is a neutral, non-discriminatory ballot-casting rule that does not violate the Free and Equal Elections Clause. *See Pa. Dem. Party*, 238 A.3d at 372-80; Summary Relief Br. at 31-36.

41. Petitioners fail to cite a single case in which any court of the Commonwealth—let alone the Pennsylvania Supreme Court—has invalidated a neutral ballot casting such as the date requirement.

42. Petitioners’ failure in this regard is understandable as the Pennsylvania Supreme Court has *never* invalidated a neutral ballot-casting rule like that challenged here under the Free and Equal Elections Clause. *See* Summary Relief Br. at 31.

43. Moreover, Petitioners and Democratic Intervenors contend that the Court should apply strict scrutiny to *any* election regulation that results in ballots not being counted because voting is a “fundamental” right. *See* Pet. Br. at 16; Dem. Br. at 17-20. Such an argument, however, is foreclosed by the holdings of the Pennsylvania Supreme Court in *Petition of Berg*, 713 A.2d at 1109 (citing *Burdick v. Takushi*, 504 U.S. 428 (1992)) and *Pa. Dem. Party*, 238 A.3d at 372-80 (not applying strict scrutiny to challenges to declaration mandate or secrecy-envelope rule); *see* Summary Relief Br. at 40-41.

44. In apparent recognition of the inapplicability of a strict scrutiny analysis to the date requirement, Movants assert various other proposed interest-balancing tests for this Court’s analysis of the date requirement, such as a rational basis review, *see* Pet. Br. at 26-27; Dem. Br. at 18, or “reasonable, non-discriminatory” review, *see* Sec’y Br. at 16. Simply put, there is no basis in Pennsylvania, any analogous state, or federal constitutional law for Movants’ assertions. Summary Relief Br. at 43-54.

45. To the extent the Court finds that controlling precedent allows it to analyze the date requirement under the rational basis test, the Court should uphold the date requirement because it passes such a test with flying colors. *See* Memorandum in Opposition at 42-46, Summary Relief Br. at 46-54.

46. Invalidating the date requirement would also violate the Elections and Electors Clauses of the U.S. Constitution. Summary Relief Br. at 54-55.

47. Additionally, granting Petitioners' request for relief requires this Court to hold that the General Assembly's command to date mail ballots is "invalid" under the Pennsylvania Constitution. Therefore, Act 77's non-severability provision would apply. *See McLinko v. Dept' of State*, 279 A.3d 539, 609-610 (Pa. 2022) (Brobson, J., dissenting) (recognizing Act 77's non-severability provision presents an open question); Memorandum in Opposition at 50-53.

48. Finally, even if the Court believes Petitioners are likely to succeed on the merits, it should deny injunctive relief until litigation concludes for equitable reasons. *See* Memorandum in Opposition at 54-59.

WHEREFORE, for all of these reasons and those stated in the Republican Intervenors' Memorandum in Opposition to Petitioners' Application for Summary Relief, Republican Intervenors' Application for Summary Relief and Memorandum in Support of Republican Intervenors' Application for Summary Relief, and Preliminary Objections, the Republican Intervenors respectfully request this Honorable Court deny Petitioners' Application for Summary Relief and enter judgment dismissing the Petition.

Dated: July 8, 2024

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

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Counsel for Intervenors

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :
National Republican Senatorial :
Committee; National Republican :
Congressional Committee; Republican :
Party of Pennsylvania; David Ball; :
James D. Bee; Debra A. Biro; Jesse D. :
Daniel; Gwendolyn Mae Deluca; Ross :
M. Farber; Connor R. Gallagher; Lynn :
Marie Kalcevic; Linda S. Kozlovich; :
William P. Kozlovich; Vallerie :
Siciliano-Biancaniello; S. Michael :
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :
capacity as Acting Secretary of the :
Commonwealth; Jessica Mathis, in :
her official capacity as Director of the :
Pennsylvania Bureau of Election :
Services and Notaries; Adams County :
Board of Elections; Allegheny County :
Board of Elections; Armstrong County :
Board of Elections; Beaver County :
Board of Elections; Bedford County :
Board of Elections; Berks County Board :
of Elections; Blair County Board of :
Elections; Bradford County Board of :
Elections; Bucks County Board of :
Elections; Butler County Board of :
Elections; Cambria County Board of :
Elections; Cameron County Board of :
Elections; Carbon County Board of :
Elections; Centre County Board of :
Elections; Chester County Board of :
Elections; Clarion County Board of :
Elections; Clearfield County Board of :
Elections; Clinton County Board of :
Elections; Columbia County Board of :
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :
of Elections; Dauphin County Board of :
Elections; Delaware County Board of :
Elections; Elk County Board of :
Elections; Erie County Board of :
Elections; Fayette County Board of :
Elections; Forest County Board of :
Elections; Franklin County Board of :
Elections; Fulton County Board of :
Elections; Greene County Board of :
Elections; Huntingdon County Board :
of Elections; Indiana County Board of :
Elections; Jefferson County Board of :
Elections; Juniata County Board of :
Elections; Lackawanna County Board :
of Elections; Lancaster County Board :
of Elections; Lawrence County Board :
of Elections; Lebanon County Board :
of Elections; Lehigh County Board of :
Elections; Luzerne County Board of :
Elections; Lycoming County Board of :
Elections; McKean County Board of :
Elections; Mercer County Board of :
Elections; Mifflin County Board of :
Elections; Monroe County Board of :
Elections; Montgomery County Board :
of Elections; Montour County Board of :
Elections; Northampton County Board :
of Elections; Northumberland County :
Board of Elections; Perry County :
Board of Elections; Philadelphia County:
Board of Elections; Pike County Board :
of Elections; Potter County Board of :
Elections; Schuylkill County Board of :
Elections; Snyder County Board of :
Elections; Somerset County Board of :
Elections; Sullivan County Board of :
Elections; Susquehanna County Board :
of Elections; Tioga County Board of :
Elections; Union County Board of :
Elections; Venango County Board of :
Elections; Warren County Board of :
Elections; Wayne County Board of :

Elections; Westmoreland County Board :
of Elections; Wyoming County Board of:
Elections; and York County Board of :
Elections, :
Respondents :

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE CEISLER

FILED: March 23, 2023

In this original jurisdiction action, the Republican National Committee (RNC), and the Republican Party of Pennsylvania (RPP) (collectively, Republican Committee Petitioners),¹ and David Ball, James D. Bee, Debra A. Biro, Jesse D. Daniel, Gwendolyn Mae DeLuca, Ross M. Farber, Connor R. Gallagher, Lynn Marie Kalcevic, Linda S. Kozlovich, William P. Kozlovich, Vallerie Siciliano-Biancaniello, and S. Michael Streib (collectively, Voter Petitioners)² (all collectively referred to as Petitioners), filed a petition for review directed to this Court's original jurisdiction seeking declaratory and injunctive relief (petition for review or petition) on September 1, 2022, and later a First Amended Petition for Review Directed to

¹ The National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC) voluntarily terminated their claims against all Respondents via praecipe on January 30, 2023. As such, the term "Petitioners" used throughout this opinion does not include either the NRSC or the NRCC, except where indicated.

² Voter Petitioners are 12 registered voters who reside in Washington County, Cambria County, Northampton County, Indiana County, Beaver County, Westmoreland County, Allegheny County, Fayette County, Delaware County, and Butler County, who regularly vote in both primary and general elections. (First Amended Petition for Review (Amended Pet.) ¶¶ 33-44.) They repeat that they intend to vote for candidates in all races, including for federal and statewide offices, that will be on the ballot in the 2022 General Election, notwithstanding that election has since passed. (Amended Pet. ¶ 45.)

Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief (Amended Petition), on February 17, 2023,³ against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),⁴ and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries (collectively, Commonwealth Respondents); and the Commonwealth's 67 County Boards of Elections (County Boards).⁵ In the Amended Petition, Petitioners again challenge the various County Boards' actions in developing and implementing notice and opportunity to cure procedures with respect to absentee and mail-in ballots that fail to comply with the Pennsylvania Election Code's (Election Code)⁶ signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards' "practice of conducting these pre-canvass activities" before Election Day "under the guise of [notice and opportunity to cure] procedures" is in direct contravention of multiple provisions of the Election Code; the Pennsylvania Supreme Court's holding in *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020); article I, section 5 and article VII, section 6 of the Pennsylvania

³ On this date, the Court, *inter alia*, granted Petitioners' unopposed Application for Leave to File Amended Petition for Review, and struck as moot the preliminary objections filed to the original petition for review.

⁴ By Order dated February 16, 2023, this Court substituted Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, as a party respondent for Leigh M. Chapman, in her official capacity as former Acting Secretary of the Commonwealth pursuant to Pennsylvania Rule of Appellate Procedure 502(c), Pa.R.A.P. 502(c).

⁵ Notwithstanding its apparent omission from the caption, as noted in this Court's September 29, 2022 Memorandum Opinion in this case, the Court considers the Washington County Board of Elections to be a Respondent in this case. *See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 3 n.2, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022).

⁶ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

Constitution, Pa. Const. art. I, § 5 (free and equal elections clause)⁷ & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);⁸ and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).⁹ (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),¹⁰ as well as statewide, permanent injunctive relief enjoining the 67 County Boards from implementing such procedures and prohibiting the Acting Secretary from issuing any guidance as to such procedures in violation of the Election Code.

Presently before the Court are the Preliminary Objections (POs) of: (1) Commonwealth Respondents; (2) Bucks County Board of Elections; (3) Bedford, Carbon, Centre, Columbia, Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York County Boards of Elections; (4) Chester County Board of Elections; (5) Delaware County Board of Elections; (6) Montgomery County Board of Elections; (7) Philadelphia County Board of Elections; (8) the Democratic National Committee and the Pennsylvania Democratic Party (DNC and PDP); and (9) the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee (DSCC and

⁷ The free and equal elections clause provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

⁸ It provides: “All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State,” with certain exceptions not applicable to this case. Pa. Const. art. VII, § 6.

⁹ The Elections Clause provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators.” U.S. Const. art. I, § 4, cl. 1.

¹⁰ 42 Pa.C.S. §§ 7531-7541.

DCCC)¹¹ (all collectively referred to as Respondents, unless otherwise indicated). Respondents ask the Court to dismiss Petitioners' Amended Petition based on (1) lack of subject matter jurisdiction; (2) lack of standing (3) laches; and (4) legal insufficiency and/or failure to state a claim as to all counts.

For the reasons that follow, the Court sustains the POs asserting lack of subject matter jurisdiction and dismisses as moot the remaining POs.

Background & Procedural History

By way of brief background, Petitioners initially alleged in the petition for review that several County Boards took it upon themselves to develop and implement notice and opportunity to cure procedures with respect to absentee and mail-in ballots that failed to comply with the Election Code's signature and ballot secrecy requirements, for the November 8, 2022 General Election and beyond, in direct contravention of the Election Code and the Supreme Court's holding in *Pennsylvania Democratic Party*; and that the County Boards' cure procedures usurped the General Assembly's exclusive legislative authority to adopt cure procedures and constituted a violation of the authority granted to the General Assembly to regulate the manner of federal elections under the Elections Clause. They requested declarations in those regards, as well as a declaration that the County Boards may not adopt **cure** procedures other than as the General Assembly expressly provided in the Election Code¹² and, further, statewide injunctive relief prohibiting

¹¹ The Court permitted the intervention of the DNC and the PDP, and the DSCC and the DCCC on September 22, 2022.

¹² See Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, which provides:

(h) For those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified:

the 67 County Boards from developing or implementing **cure** procedures and directing the Acting Secretary to take no action inconsistent with such injunction order.¹³

Petitioners then filed the Amended Petition upon leave of this Court on February 17, 2023. Also on that date, this Court set an expedited briefing schedule, and further directed the parties to file and serve separate briefs addressing the Supreme Court's recent decision in *Ball v. Chapman*, 289 A.3d 1 (Pa. 2023), and the effect of that decision, if any, on the instant matter. The Court also indicated, among other things, that following the filing of the above briefs, the Court would determine whether this matter would be argued or decided on the papers.

The Parties have complied with this Court's February 17, 2023 Order and filed pleadings and/or POs and comprehensive supporting briefs, as well as briefs addressing *Ball*.¹⁴ As noted above, Respondents filed nine sets of POs, and eight

(1) Deleted by [the Act of October 31, 2019, P.L. 552, No. 77 (Act 77), effective immediately]

(2) If the proof of identification is received and verified prior to the sixth calendar day following the election, then the county board of elections shall canvass the absentee ballots and mail-in ballots under this subsection in accordance with subsection (g)(2).

(3) If an elector fails to provide proof of identification that can be verified by the county board of elections by the sixth calendar day following the election, then the absentee ballot or mail-in ballot shall not be counted.

25 P.S. § 3146.8(h).

¹³ In a single-Judge Memorandum Opinion and Order issued on September 29, 2022, this Court denied Petitioners' separate request for preliminary injunctive relief because Petitioners failed to meet their heavy burden of proving entitlement to such sweeping relief. On appeal, the Supreme Court affirmed this Court's decision on the basis that the Justices were evenly divided on the question before them. *See RNC I, aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022).

¹⁴ The following Parties filed briefs addressing the Supreme Court's decision in *Ball*: Berks County; DNC and PDP; Montgomery County; Bedford, Carbon, Centre, Columbia,

Answers, some with New Matter,¹⁵ to the Amended Petition. Petitioners filed responses generally opposing the POs, and an omnibus brief addressing all of the POs. In light of the Parties' comprehensive filings, and the proximity of the May 16, 2023 Municipal Primary Election and the County Boards' distribution of absentee and mail-in ballots to voters, the Court determined that argument was not necessary and, by Order dated March 16, 2023, directed that the POs and responses opposing them would be decided on the papers already filed, without oral argument, unless otherwise ordered.

Dauphin, Fayette, Jefferson, Huntingdon, Indiana, Lawrence, Lebanon, Northumberland, Snyder, Venango, and York Counties (collectively, Bedford County, et al.); Lehigh County; Chester County; Commonwealth Respondents; Philadelphia County; Bucks County; Petitioners; Delaware County; Allegheny County; Luzerne County; Potter County; and DSCC and DCCC.

Lehigh, Bucks, and Delaware Counties join in Montgomery County's brief. Chester County joins in Commonwealth Respondents' and Philadelphia County's briefs. Allegheny County joins in all Respondents' briefs to the extent they address, among other things, lack of standing.

Berks and Potter Counties take no position on *Ball*'s applicability to this case, and Bedford County, et al., Luzerne County, and DNC and PDP opine that *Ball* is not relevant to this case. DNC and PDP additionally opine that *Ball* reaffirms the broad authority of County Boards in administering elections. Aside from Petitioners, the other Respondents observe that *Ball* is applicable here with respect to, *inter alia*, standing and the broad authority of County Boards.

¹⁵ Adams, Allegheny (with New Matter), Berks, Lehigh, Luzerne, Northampton (with New Matter), and Potter Counties filed Answers to the Amended Petition, generally denying the averments of the Amended Petition. In addition to filing an Answer, Luzerne County filed a Statement in Lieu of Brief in Support of Answer. Blair County filed a no answer letter, indicating therein that it will not be filing an answer in this case.

In its New Matter, Allegheny County contends that Petitioners claims are barred by laches and res judicata, that this Court lacks subject matter jurisdiction, and that Petitioners failed to state a claim upon which relief can be granted and lack standing. (Allegheny Ans. & New Matter ¶¶ 1-5.) Northampton County asserts in its New Matter that Petitioners' claims are barred by laches and the applicable statute of limitations, and that Petitioners have failed to state a claim upon which relief may be granted and failed to exhaust other remedies available to them. (Northampton Ans. & New Matter ¶¶ 163-66.)

Amended Petition

In their Amended Petition, Petitioners repeat the same background information regarding Voter Petitioners and Republican Committee Petitioners, respectively, and the factual circumstances of the case described in this Court's September 29, 2022 Memorandum Opinion, which the Court will not repeat here in its entirety for the sake of brevity. (*See Republican Nat'l Comm. v. Chapman* (Pa. Cmwlth., No. 447 M.D. 2022, filed Sept. 29, 2022) (single-Judge op.) (Ceisler, J.) (*RNC I*), slip op. at 11-17, *aff'd by evenly divided court*, 284 A.3d 207 (Pa. 2022) (Oct. 21, 2022) (Pa., No. 100 MAP 2022); *compare* original petition for review ¶¶ 2-12, 13-39, 40-64, 65-80, 82-85, 86-92 (count I), 93-96 (count II), 97-103 (count III), *with* Amended Pet. ¶¶ 2-23, 27, 28-52, 53-77, 93-104, 111-14, 117-20, 127-33 (Count I), 152-55 (Count III), 156-62 (Count IV).)

The Court observes, however, that in the Amended Petition, Petitioners add to their argument from their original petition that the County Boards are prohibited from developing and implementing **notice and cure** procedures¹⁶ not expressly created by the General Assembly, now asserting and seeking a declaration under the DJA that the Boards' implementation of such procedures directly violates the Election Code's various pre-canvassing and provisional ballot provisions; that the furnishing of voters' personally identifying information to political party representatives, candidates, and/or special interest groups violates voters' constitutional right to informational privacy under article I, section 1 of the Pennsylvania Constitution, Pa. Const. art. I, § 1,¹⁷ and *Pennsylvania State Education*

¹⁶ In their Amended Petition, Petitioners now highlight "**notice and cure** procedures," as opposed to just "**cure** procedures" mentioned in the original petition for review.

¹⁷ It provides: "All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own

Association v. Department of Community and Economic Development, 148 A.3d 142 (Pa. 2016); and that the Acting Secretary has issued guidance directing the County Boards to engage in pre-canvass activities under the guise of making “administrative determinations” and statements encouraging the Boards to contact voters whose defective ballots have been cancelled due to errors on the ballots’ outer envelopes so they may have the opportunity to have their votes count. (See Amended Pet. ¶¶ 29, 79-92, & 134-35 (Count I).)

As to the pre-canvass and provisional ballot provisions specifically, Petitioners newly argue that notice and cure procedures are “inconsistent with law” under Section 302(f) of the Election Code, 25 P.S. § 2642(f),¹⁸ and directly violate the Election Code, because “[t]he Election Code tightly constrains what Boards may do with absentee and mail-in ballots once they receive them.” (Amended. Pet. ¶¶ 76, 78.) In this regard, they first assert that absentee and mail-in ballots must be kept in sealed or locked containers until Election Day under Section 1308(a) of the Election Code, 25 P.S. § 3146.8(a),¹⁹ and that County Boards are thus prohibited

happiness.” Pa. Const. art. I, § 1. Petitioners do not develop this argument in the Amended Petition.

¹⁸ Section 302(f) provides that County Boards have authority “[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).

¹⁹ Section 1308(a) provides:

(a) 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. An absentee ballot, whether issued to a civilian, military or other voter during the regular or emergency application period, shall be canvassed in accordance with subsection (g). A mail-in ballot shall be canvassed in accordance with subsection (g).

25 P.S. § 3146.8(a).

from doing anything else with the ballots until Election Day. (*Id.* ¶¶ 79-80.) Second, they claim that notice and cure procedures are effectively an “inspection . . . of” absentee and mail-in ballots under the definition of “pre-canvass” in Section 102(q.1) of the Election Code, 25 P.S. § 2602(q.1);²⁰ however, they highlight that County Boards cannot begin the pre-canvass of those ballots until 7:00 a.m. on Election Day under Section 1308(g)(1.1) of the Election Code, 25 P.S. § 3146.8(g)(1.1).²¹ (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

²⁰ Section 102(q.1) provides:

(q.1) The word “pre-canvass” shall mean **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. The term does not include the recording or publishing of the votes reflected on the ballots.

25 P.S. § 2602(q.1) (emphasis added).

²¹ Section 1308(g)(1.1) provides:

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).
. . . .

(1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours’ notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

25 P.S. § 3146.8(g)(1.1).

and/or internet notification to voters via the SURE System and others regarding signature, date, or secrecy envelope defects in absentee or mail-in ballots following their “inspection” is “inconsistent with law” because Section 1308(g)(1.1)’s prohibition on nondisclosure of the results of the pre-canvass until the polls close on Election Day necessarily includes a prohibition on the disclosure of a Board’s determination that a ballot will not count due to such a defect. (*Id.* ¶¶ 83-85.) Last, Petitioners acknowledge that those voters who requested absentee and mail-in ballots but did not cast them may vote provisionally. (*Id.* ¶ 90 n.2 (citing Sections 1306(b)(2)-(3) and 1306-D(b)(2)-(3) of the Election Code, 25 P.S. §§ 3146.6(b)(2)-(3), 3150.16(b)(2)-(3)).)²² They argue, however, that the County Boards cannot encourage voters who improperly cast their absentee or mail-in ballot to cast a second vote via provisional ballot, claiming this “cure” essentially requires voters to make knowingly false statements subject to the penalty of perjury on their provisional ballots. (Amended Pet. ¶¶ 87-92 (citing Sections 1306(b)(1), 1306-D(b)(1), and 1210(a.4)(2) of the Election Code, 25 P.S. §§ 3146.6(b)(1) (providing that an elector who receives and votes an absentee ballot “shall not be eligible to vote at a polling place on election day”), 3150.16(b)(1) (same with respect to mail-in ballots), 3050(a.4)(2) (requiring an elector to sign affidavit prior to voting a provisional ballot)).)

Petitioners also add a new Count II to the Amended Petition, in which they request a declaration that the disparate approaches taken by the County Boards with respect to notice and cure procedures violate the free and equal elections clause (Pa. Const. art. I, § 5), the clause requiring uniformity in the laws regulating the holding

²² Section 1306 was added to the Election Code by the Act of March 6, 1951, P.L. 3. Section 1306-D was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77).

of elections in the Commonwealth (Pa. Const. art. VII, § 6), and Section 302(g) of the Election Code, 25 P.S. § 2642(g).²³ (See Amended Pet. ¶¶ 136-51 (Count II).)

Petitioners seek declarations from this Court under the DJA that the County Boards' development and implementation of notice and cure procedures violates Pennsylvania law and is prohibited, (Amended Pet. ¶¶ 127-35 & Wherefore Clause, pp. 34-35 (Count I) & ¶¶ 136-51 & Wherefore Clause, p. 38 (Count II)); and that the adoption of such procedures not expressly authorized by the General Assembly for federal elections violates the Elections Clause of the United States Constitution (Amended Pet. ¶¶ 152-55 & Wherefore Clause, p. 39 (Count III)). They further seek a statewide, permanent injunction prohibiting the County Boards from developing or implementing notice and cure procedures. (Amended Pet. ¶¶ 156-62 & Wherefore Clause, p. 41 (Count IV).) In addition to the relief sought in Counts I, II, and IV, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Notably, Petitioners further allege that this Court has original jurisdiction over the Amended Petition under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), "because this matter is asserted against Commonwealth officials in their official capacities." (Amended Pet. ¶ 28.)

As mentioned above, Commonwealth Respondents and some County Boards have filed the following POs, asserting that the Amended Petition should be

²³ Section 302(g) provides that County Boards have authority "[t]o instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

dismissed based on this Court's lack of subject matter jurisdiction, Petitioners' lack of standing, the doctrine of laches, and the legal insufficiency of the Amended Petition and/or Petitioners' failure to state a claim as to some or all counts of the Amended Petition.²⁴

Standard of Review

In ruling on preliminary objections, the Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that may be drawn from the averments. *Meier v. Maleski*, 648 A.2d 595, 600 (Pa. Cmwlth. 1994). This Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. *Id.* The Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on the claim, and the Court must resolve any doubt in favor of the petitioner. *Id.* “[The Court] review[s] preliminary objections in the nature of a demurrer under the above guidelines and may sustain a demurrer only when a petitioner has failed to state a claim for which relief may be granted.” *Armstrong Cnty. Mem’l Hosp. v. Dep’t of Pub. Welfare*, 67 A.3d 160, 170 (Pa. Cmwlth. 2013).

Because it is jurisdictional, the Court will first address the POs asserting the Court lacks subject matter jurisdiction, followed by the other POs, if necessary.

²⁴ Specifically, Delaware County, Commonwealth Respondents, Chester County, and Philadelphia County demur to the Amended Petition based on lack of subject matter jurisdiction, lack of standing, and failure to state a claim as to all or various counts of the Amended Petition.

Bucks County and DSCC and DCCC demur to the Amended Petition based on lack of standing and failure to state a claim. Bucks County additionally asserts, along with Montgomery County, that laches bars the relief sought in the Amended Petition.

Bedford County, et al. and DNC and PDP demur to the Amended Petition solely based on failure to state a claim.

Subject Matter Jurisdiction

Commonwealth Respondents (PO 1) and some County Boards²⁵ first argue that this Court lacks subject matter jurisdiction²⁶ under Section 761(a)(1) of the Judicial Code, 42 Pa.C.S. § 761(a)(1), because neither of the Commonwealth Respondents is an indispensable party to this matter; the County Boards are neither Commonwealth agencies nor part of the Commonwealth government, and, as such, the County Boards must be sued in their respective local court of common pleas; and the Acting Secretary has only limited powers over the County Boards relating to elections. (Cmwlth. Resp'ts' POs ¶¶ 33-55 (citing *In re Voter Referendum Pet. Filed Aug. 5, 2008*, 981 A.2d 163, 170 (Pa. 2009)), Cmwlth. Resp'ts' Br. at 14-23; Delaware POs ¶¶ 10-37, Delaware Br. at 3-7 (citing *Finan v. Pike Cnty. Conserv. Dist.*, 209 A.3d 1108, 111 (Pa. Cmwlth. 2019), and *Blount v. Phila. Parking Auth.*, 965 A2d 226, 231-32 (Pa. 2009)); Chester POs ¶¶ 37-54, Chester Br. at 12-14; Phila. POs ¶¶ 47-72 (citing *Blount*), Phila. Br. at 15-20.) Commonwealth Respondents further assert that Petitioners do not challenge any Department of State (Department) requirement or statewide practice, and they have not alleged what, if any, type of action the Acting Secretary might take here if Petitioners' requested relief is granted. (Cmwlth. Resp'ts' POs ¶¶ 39-40, 43-46 (citing ¶ 116 of the Amended Petition); Chester POs ¶ 53; Chester Br. at 16 (noting the Amended Petition fails to seek any meaningful relief from either Commonwealth Respondent).) Chester County additionally highlights an inconsistency in paragraphs 68 and 103 of Petitioners' Amended Petition, noting that paragraph 103 asserts injunctive relief is necessary to stop Commonwealth Respondents from "encouraging" implementation of notice

²⁵ These include: Delaware County (PO 1), Chester County (PO 2), and Philadelphia County (PO 1).

²⁶ See Pa.R.Civ.P. 1028(a)(1).

and cure procedures, but that paragraph 68 cites guidance showing Commonwealth Respondents oppose implementation of notice and cure procedures. (Chester POs ¶¶ 48-51; Chester Br. at 15-16.)

Petitioners respond that this Court has subject matter jurisdiction because the Acting Secretary is an indispensable party, and the County Boards are part of the Commonwealth government. (Pet’rs’ Omnibus Br. at 16-17.) As support for their assertion the Acting Secretary is an indispensable party, Petitioners point to the Acting Secretary’s November 3, 2022 guidance, issued in response to the Supreme Court’s November 1, 2022 order in *Ball*,²⁷ regarding the mechanics of absentee and mail-in voting and the County Boards’ inspection of ballots and whether a right to cure exists, as well as the former Acting Secretary’s recent litigation against three County Boards in *Chapman v. Berks County Board of Elections* (Pa. Cmwlth., No. 355 M.D. 2022, filed August 19, 2022), regarding whether Boards may exercise discretion to count absentee and mail-in ballots without dates or with incorrect dates. (Pet’rs’ Omnibus Br. at 17.) Petitioners claim that the Acting Secretary’s guidance “is precisely the type of inspection included within the definition of ‘pre-canvass’ under the Election Code, which cannot begin until 7:00 a.m. on Election Day”; thus, according to Petitioners, the Acting Secretary is instructing the County Boards to directly violate the Election Code. (*Id.* at 17-18.)²⁸ Petitioners therefore claim that

²⁷ According to Petitioners, the Acting Secretary issued guidance on this date, directing County Boards to examine all absentee and mail-in ballots to determine if the return envelopes are signed and dated. (Pet’rs’ Omnibus Br. ¶ 17 (citing Pa. Dep’t of State, *Guidance on Undated and Incorrectly Dated Mail-in and Absentee Ballot Envelopes Based on the Pennsylvania Supreme Court’s Order in Ball v. Chapman*, issued November 1, 2022, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/2022-11-03-Guidance-UndatedBallot.pdf> (last visited Mar. 22, 2023).)

²⁸ Further, and notwithstanding that the 2022 General Election has already occurred, Petitioners again point to the Acting Secretary’s guidance issued days before that election, in which former Acting Secretary Chapman “encouraged” County Boards to contact voters whose ballots

this case challenges actions taken by the Acting Secretary, thus making him an indispensable party. (*Id.* at 18.) Petitioners do not address in their Amended Petition or subsequent briefs whether Director Mathis is an indispensable party.

As for the County Boards, Petitioners assert they are not “local authorities” excluded from the definition of “Commonwealth government,” as they are not created by political subdivisions. (Pet’rs’ Omnibus Br. at 19.) Rather, the County Boards are formed by statute, i.e., Section 301(a) of the Election Code, 25 P.S. § 2641(a) (relating to county boards of elections and membership), and, thus, they constitute a component part of the “Commonwealth government” as that term is defined under 42 Pa.C.S. § 761. (*Id.* at 18-19 (pointing to definition of “Commonwealth government” and specifically “boards” in the definition in 42 Pa.C.S. § 102, and citing *In re Nom. Pets. of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021),²⁹ and *Cnty. of Fulton v. Sec. of the Cmwlth.*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021) (stating that both the Secretary and County Boards “are government agencies created by the General Assembly”)).³⁰

were cancelled due to defects so that those voters could have the opportunity to have their vote count. (Pet’rs’ Omnibus Br. at 18 (citing an inactive link to the Department’s website).)

²⁹ Petitioners’ reliance on *In re Nomination Petitions of Griffis*, 259 A.3d 542 (Pa. Cmwlth. 2021), for the proposition that the 67 County Boards are part of the Commonwealth government for jurisdictional purposes is misplaced, as the case was properly brought in this Court’s **appellate** jurisdiction and involved review of a trial court’s order denying the objectors’ petitions to set aside the nomination petitions of a candidate for office who failed to properly file her statement of financial interests (SOFI) with the “governing authority” of a specific county. This Court held that the candidate’s filing of her SOFI with the county elections office satisfied the requirements of the applicable statute and regulations because the county’s commissioners were the “governing authority” of that county and the county’s board of elections under the Election Code. *In re Griffis*, 259 A.3d at 548.

³⁰ Petitioners’ reliance on *County of Fulton v. Secretary of the Commonwealth*, 276 A.3d 846, 861 (Pa. Cmwlth. 2021), is also misplaced, as it dealt with responsibilities of the Secretary and the County Boards in relation to election equipment. In that case, this Court noted that it was not clear whether the Secretary or the County Boards had the responsibility of preventing tampering with election equipment, but that “[b]oth are government agencies created by the

In considering this PO, the Court “begin[s] with the undisputed basic principle that this Court, as any other court, must have subject matter jurisdiction over a controversy because, without it, any judgment rendered would be void.” *Stedman v. Lancaster Cnty. Bd. of Comm’rs*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019) (quoting *Patterson v. Shelton*, 175 A.3d 442, 449 (Pa. Cmwlth. 2017)). “Thus, ‘whenever a court discovers that it lacks jurisdiction over the subject matter or a cause of action, it is compelled to dismiss the matter under all circumstances.’” *Id.* (quoting *Hughes v. Pa. State Police*, 619 A.2d 390, 393 (Pa. Cwmlth. 1992)). Our Supreme Court previously set forth the well settled scope and standard of review regarding questions of subject matter jurisdiction as follows:

Jurisdiction over the subject matter is conferred solely by the Constitution and laws of the Commonwealth. The test for whether a court has subject matter jurisdiction inquires into the competency of the court to determine controversies of the general class to which the case presented for consideration belongs. Thus, as a pure question of law, the standard of review in determining whether a court has subject matter jurisdiction is *de novo* and the scope of review is plenary. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*.

Office of Att’y Gen. ex rel. Corbett v. Locust Twp., 968 A.2d 1263, 1268-69 (Pa. 2009).

Relevant here, Section 761(a)(1) of the Judicial Code states that “[t]he Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . (1) Against the Commonwealth government, including any officer

General Assembly with discrete and separate roles to fulfill toward the end of honest elections in Pennsylvania” and that “[b]oth agencies are presumed to act lawfully and reasonably in the exercise of their statutory duties.” *County of Fulton*, 276 A.3d at 861. The case is otherwise irrelevant for purposes of the instant matter, except as indicated below.

thereof, acting in his official capacity” 42 Pa.C.S. § 761(a)(1). Section 102 of the Judicial Code defines the term “Commonwealth government” as follows:

“Commonwealth government.” The government of the Commonwealth, including the courts and other officers or agencies of the unified judicial system, the General Assembly and its officers and agencies, the Governor, and the departments, boards, commissions, authorities and officers and agencies of the Commonwealth, **but the term does not include any political subdivision, municipal or other local authority, or any officer or agency of any such political subdivision or local authority.**

42 Pa.C.S. § 102 (emphasis added). Although the Acting Secretary and Director Mathis are each an “officer” of the Commonwealth, “this alone is not sufficient to establish jurisdiction.” *Stedman*, 221 A.2d at 756 (quoting *Pa. Sch. Bds. Ass’n, Inc. v. Cmwlth. Ass’n of Sch. Admins.*, 696 A.2d 859, 867 (Pa. Cmwlth. 1997), and stating that “[t]he mere naming . . . of the Commonwealth or its officers in an action does not conclusively establish this [C]ourt’s jurisdiction, and [that] the joinder of such parties when they are only tangentially involved is improper”).

Rather, “for this Court to have original jurisdiction over a suit against the Commonwealth and another, non-Commonwealth party, the Commonwealth or one of its officers must be an indispensable party to the action.” *Stedman*, 221 A.3d at 757 (citations omitted). “A party is indispensable when ‘his or her rights are so connected with the claims of the litigants that no decree can be made without impairing those rights.’” *Stedman*, 221 A.3d at 757 (quoting *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlth. 2018)).³¹ “‘Thus, the main inquiry for determining whether a party is indispensable

³¹ Section 7540(a) of the DJA further explains the concept of an indispensable party by providing that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration.” 42 Pa.C.S. § 7540(a).

involves whether justice can be accomplished in the absence of the party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 279). In conducting this inquiry,³² “the nature of the particular claim and the type of relief sought should be considered.” *Rachel Carson Trails*, 201 A.3d at 279. “A Commonwealth party may be declared an indispensable party when meaningful relief cannot conceivably be afforded without the Commonwealth party’s direct involvement in the action.” *Ballroom, LLC v. Cmwlt.*, 984 A.2d 582, 588 (Pa. Cmwlt. 2009). Importantly, “‘where a petitioner ‘seeks absolutely no relief’ from the Commonwealth party, and the Commonwealth party’s involvement is only ‘minimal,’ we have held that it is not an indispensable party.” *Stedman*, 221 A.3d at 758 (quoting *Rachel Carson Trails*, 201 A.3d at 280).

With these principles in mind, the Court will evaluate the alleged indispensability of the Acting Secretary and Director Mathis.

In this case, Petitioners named the Acting Secretary and Director Mathis, in their official capacities, as Respondents, apparently due to their responsibilities under the Election Code. Petitioners identify the Acting Secretary’s responsibilities as including receiving the returns of primaries and elections from the County Boards, the canvassing and computing of the votes cast for candidates, proclaiming the results of such primaries and elections, and issuing certificates of election to the successful candidates at such elections. (Amended. Pet. ¶ 50 (citing Sections 201(f) and 1409 of the Election Code, 25 P.S. §§ 2621(f), 3159).) However, the only

³² This analysis requires an examination of the following four factors: (1) “[d]o absent parties have a right or interest related to the claim?”; (2) “[i]f so, what is the nature of that right or interest?”; (3) “[i]s that right or interest essential to the merits of the issue?”; and (4) “[c]an justice be afforded without violating the due process rights of absent parties?” *Rachel Carson Trails Conservancy, Inc. v. Dep’t of Conserv. & Nat. Res.*, 201 A.3d 273, 279 (Pa. Cmwlt. 2018).

material allegations made against former Acting Secretary Chapman in the Amended Petition relate to the following:

- her position in the *Pennsylvania Democratic Party* litigation from 2020, (Amended Pet. ¶ 58);
- her recent guidance that voters will not have the opportunity to correct their ballots before the election if there is a problem, (Amended Pet. ¶ 68 (quoting the Acting Secretary’s guidance that “if there’s a problem with your mail-in ballot, you won’t have the opportunity to correct it before the election[,]” and citing <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)));
- confusingly, her purported failure to take action to stop the County Boards’ unauthorized notice and cure procedures following her involvement as a party in an unrelated federal case, (Amended Pet. ¶¶ 103-04);
- the notion that in Counties that have not implemented cure procedures, the SURE system, maintained by the Acting Secretary, provides notice via email to voters that their ballots may not be counted, (Amended Pet. ¶ 116);
- the Acting Secretary’s November 3, 2022 guidance, issued in response to *Ball*, directing County Boards to examine all mail-in ballots received to determine if the return envelopes are signed and dated, which according to Petitioners directs the Boards to violate the Election Code, (Amended Pet. ¶¶ 121-24); and
- former Acting Secretary Chapman’s guidance issued prior to *Ball* in apparent response to the *Berks County* case, but before the November 2022 General Election, encouraging Boards to contact voters whose ballots have been cancelled due to defects on the outer envelopes so they can have their votes

count, which constitutes an endorsement of notice and cure, according to Petitioners, (Amended Pet. ¶¶ 125-26).

Based on these averments, Petitioners request that this Court prohibit the Acting Secretary from issuing guidance or other statements directing the County Boards to violate provisions of the Election Code. (*See* Amended Pet. at 34-35 (Count I, Wherefore Clause), 38 (Count II, Wherefore Clause), 41 (Count IV, Wherefore Clause).)

Here, Petitioners have not made any claims implicating the duties and responsibilities of the Acting Secretary under the Election Code identified in the Amended Petition, which duties and responsibilities the Court notes are limited,³³ but rather, Petitioners merely take issue with the various guidance the Acting Secretary has issued over the past three years in response to the developing case law in this area, which does not implicate what is truly at the heart of this case: ***some of the County Boards' development and implementation of notice and opportunity to cure procedures.*** Although the Acting Secretary may have a generalized interest in issues surrounding the administration of elections in the Commonwealth and the enfranchisement of voters, generally, the Acting Secretary's interests in this regard are not essential to a determination of whether some County Boards are unlawfully implementing notice and cure procedures with respect to absentee and mail-in ballots that are defective under the Election Code. Further, the Acting Secretary does not have control over the County Boards' administration of elections, as the General Assembly conferred such authority solely upon the County Boards, as will be discussed *infra*. Compare 25 P.S. § 2642 (outlining County Boards' extensive powers and duties over administration and conduct of elections), with 25 P.S. §§

³³ See 25 P.S. §§ 2621, 3159.

2621 (outlining limited powers and duties of Secretary), 3159 (providing for Secretary’s duties to tabulate, compute, and canvass returns). That the Acting Secretary *may, in the future*, issue guidance or statements on this issue is too “tangential” and “minimal” of an involvement, and speculative even,³⁴ to make him an indispensable party to this matter. Because Petitioners could conceivably obtain meaningful relief with respect to the County Boards’ purportedly unlawful actions without the Acting Secretary’s involvement in this case, the Acting Secretary is not an indispensable party.

As for Director Mathis, Petitioners observe she is responsible for overseeing the Election Services and Voter Registration divisions of the Department, as well as the Bureau of Election Services and Notaries, which is responsible for planning, developing, and coordinating the statewide implementation of the Election Code. (Amended Pet. ¶ 51 (citing <https://www.dos.pa.gov/about-us/Pages/Director-Bureau-of-Elections-and-Notaries.aspx> (last visited Mar. 22, 2023)).) Other than this statement of her duties, Petitioners do not make any claims or request any relief as to Director Mathis in the Amended Petition. Because no relief is sought against Director Mathis, she is not indispensable to this matter. *See Stedman*, 221 A.3d at 758.

³⁴ Petitioners have also not identified any authority whatsoever that would **require** an order from this Court **at this juncture** prohibiting the Acting Secretary from issuing any guidance or statements on this issue later. The Court cannot predict whether the Acting Secretary will again issue guidance or any statements regarding notice and cure procedures, and notes that the former Acting Secretary has most recently issued guidance in response to the Supreme Court’s recent decision in *Ball* essentially **opposing** the implementation of any notice and cure procedures, which does not help Petitioners’ case. (See <https://www.vote.pa.gov/voting-in-pa/pages/mail-and-absentee-ballot.aspx> (last visited Mar. 22, 2023)).) Presumably, if the Acting Secretary was to issue any guidance or statements on this issue in the future, the Court opines that he would do so in accordance with whatever is the controlling case law on the issue at that time.

Having concluded that neither the Acting Secretary nor Director Mathis are indispensable parties to this action, the POs in this regard are sustained, and the Acting Secretary and Director Mathis are dismissed from this action.

The Court must now consider whether it has original jurisdiction over the remaining Respondents, i.e., the 67 County Boards, or whether original jurisdiction lies in the respective courts of common pleas. As the Parties suggest, these questions hinge on whether the County Boards are Commonwealth agencies, as Petitioners contend, or local agencies that are excluded from the definition of “Commonwealth government,” as Respondents contend. This Court agrees with Respondents.

As set forth above, this Court has original jurisdiction over all civil actions brought against the “Commonwealth government.” 42 Pa.C.S. § 761(a)(1). However, that term does not include any political subdivision, municipal, or other local authority, or any officer or agency of any such political subdivision or local authority. 42 Pa.C.S. § 102. The Court must therefore determine whether the County Boards fall into one of these categories.

In *Finan*, this Court considered, in the context of an appeal from a trial court order sustaining a preliminary objection challenging its jurisdiction, whether the Pike County Conversation District created pursuant to the Conservation District Law³⁵ qualified as a local agency or a Commonwealth agency for jurisdictional purposes. 209 A.3d at 1110. In doing so, this Court recognized that

[t]he type of agency dictates the proper court of original jurisdiction; for actions against local agencies, the proper court is the county court of common pleas, whereas actions against Commonwealth agencies are properly filed in the Commonwealth Court. *Blount*[, 965 A.2d 226.] Our analysis for determining the type of agency depends on the purpose for which we review agency status. [*James J. Gory Mech. Contr’g, Inc.*

³⁵ Act of May 15, 1945, P.L. 547, as amended, 3 P.S. §§ 849-864.

v. Phila. Hous. Auth., 855 A.2d 669 (Pa. 2004); *T & R Painting Co., Inc. v. Phila. Hous. Auth.*, 353 A.3d 800 (Pa. 1976); *Quinn v. Se. Pa. Transp. Auth. (SEPTA)*, 659 A.2d 613 (Pa. Cmwlth. 1995).]

Generally, for purposes of jurisdiction, Commonwealth agency status is narrowly construed. *Gory*; see *Dep't of Aging v. Lindberg*, . . . 469 A.2d 1012 (Pa. 1983) (construing this Court's jurisdiction under 42 Pa.C.S. § 761(a)(1) narrowly). When the enabling statute does not specify the court of original jurisdiction, in analyzing the type of agency for jurisdictional purposes, "the pivotal factors are whether the entity [1] operates on a statewide basis and [2] is predominantly controlled by the state." *Gory*, 855 A.2d at 677 (emphasis added). We discern legislative intent to confer jurisdiction on this Court where the entity acts throughout the state and under state control. *Id.* By contrast, where "the entity operates within a single county . . . and is governed in large part by that county . . . the entity must be characterized as a local agency and sued in the courts of common pleas." *Id.* at 678.

Finan, 209 A.3d at 1111-12 (footnote omitted). This Court further observed that *Blount*, cited above, is "[t]he seminal case in determining agency status for jurisdiction purposes[.]" *Id.* at 1114.

In *Blount*, the Supreme Court analyzed whether the Philadelphia Parking Authority (PPA) qualified as a Commonwealth agency such that this Court was the court of original jurisdiction. In so doing, the Supreme Court considered multiple factors, including the PPA's functions, reach of operations, and the degree of state control over finance and governance, and ultimately concluded that the PPA was a Commonwealth agency, and that jurisdiction in this Court was proper, because the PPA undertook both state functions and operated outside Philadelphia. See *Finan*, 209 A.3d at 1114 (discussing *Blount*); see also *Blount*, 965 A.2d at 229-34.

Returning to *Finan*, this Court concluded that the Pike County Conservation District did not meet the *Blount* factors for Commonwealth agency status because the District operates solely within the confines of Pike County, which reach of authority indicated local agency status addressing issues within a single county;

implements statewide policies and initiatives and fees, but only in Pike County; is not controlled by the Commonwealth, as its governing body was not selected by the Governor or any other Commonwealth agent; and there is little state control over the District's budget or finances. *Finan*, 209 A.3d at 1114-15. The Court further noted that although the Department of Environmental Protection (DEP) delegated certain functions to the District through a delegation agreement, such delegation did not confer Commonwealth agency status upon the District. *Id.* Accordingly, absent any state control or exercise of statewide authority, the Court concluded there was no basis for deeming the District to be a Commonwealth agency for jurisdictional purposes. *Id.* at 1115 (citing *Blount*; *T & R Painting*). Moreover, the Court rejected the District's proffered third factor for consideration, i.e., that this Court's jurisdiction should extend to county conservation districts because they share implementation and enforcement authority with two statewide agencies (DEP and the State Conservation Commission created under the Conservation District Law) and thus deal with implementation of statewide laws. *Id.* at 1115.

Considering the *Blount* factors, and *Finan*, as they relate to the instant matter, the Court concludes that the 67 County Boards are local agencies for jurisdictional purposes. Notably, the Judicial Code does not define what constitutes a local agency. However, Section 1991 of the Statutory Construction Act of 1972 defines "political subdivision" as "[a]ny county, city, borough, incorporated town, township, school district, vocational school district and county institution district." 1 Pa.C.S. § 1991; see *Blount*, 965 A.2d at 230 (observing, *inter alia*, the definition of "local authority" under the rules of statutory construction for purposes of determining whether the PPA was a Commonwealth or local agency). Section 102(b) and (c) of the Election Code defines "county" as "any county of this Commonwealth" and

“county board” or “board” as “the county board of elections of any county [t]herein provided for.” 25 P.S. § 102(b), (c).

Importantly, Section 301(a) of the Election Code 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) (emphasis added). Section 301(b) of the Election Code further provides that “[i]n each county of the Commonwealth, the county board of elections shall consist of the county commissioners of such county ex officio, or any officials or board who are performing or may perform the duties of the county commissioners” 25 P.S. § 2641(b). Section 302 of the Election Code outlines the powers and duties of the County Boards, providing that “[t]he 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,” including the 16 powers and duties enumerated in that section. 25 P.S. § 2642 (emphasis added). Included in these powers are those at issue in the instant matter, namely Section 302(f) and (g), which authorize the County Boards:

(f) To make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.

(g) To instruct election officers in their duties, calling them together in meeting whenever deemed advisable, and to inspect systematically and thoroughly the conduct of primaries and elections in the several election districts of the county to the end that primaries and elections may be honestly, efficiently, and uniformly conducted.

25 P.S. §§ 2642(f), (g).

Section 305(a) of the Election Code further provides that “[t]he county commissioners or other appropriating authorities of the county shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county” 25 P.S. § 2645(a); *see also* Section 305(a)1.-4. of the Election Code, 25 P.S. § 2645(a)1.-4. (providing additional expenses related to elections for which the Counties are liable). Conversely, under Section 201 of the Election Code, the Secretary’s powers and duties are limited, and include different powers than those granted solely to the County Boards in Sections 301 and 302. *See* 25 P.S. § 2621.

Because these provisions of the Election Code reflect that the County Boards are local agencies, but do not expressly state the same, the Court must analyze the legislative intent behind the statute. “In discerning legislative intent to confer Commonwealth agency status, courts consider whether conferring jurisdiction on a particular court would lead to an absurd or unreasonable result.” *Finan*, 209 A.3d at 1113 (citing 1 Pa.C.S. § 1921). “When the matter involves a local community, and ‘the issues involved were matters strictly within the concern of a particular locality rather than a concern of the Commonwealth generally,’ then it would be absurd to conduct the litigation in Harrisburg as opposed to the locality.” *Finan*, 209 A.3d at 1113 (citing *T & R Painting*, 353 A.2d at 802 (citation omitted)).

Here, the County Boards do not meet the *Blount* factors, which means they are local agencies. First, the General Assembly granted jurisdiction to administer and conduct primaries and elections solely within the confines of the respective Counties of the Commonwealth to the County Boards under Section 301(a) of the Election Code. The County Boards’ authority indicates local agency status because

it has jurisdiction to administer and conduct elections and primaries **within each respective county**, not statewide. Second, the County Boards are not controlled by the Commonwealth, as the County Boards are governed by the county commissioners under Section 301(b) of the Election Code, and, under Section 302(f) and (g), the County Boards are authorized to make rules, regulations, and instructions necessary for the guidance of, among others, elections officers and electors and to instruct elections officers in their duties. The Court therefore rejects Petitioners' argument that the County Boards are Commonwealth agencies because they were created by statute; rather, under *Blount*, it is the degree of Commonwealth control over them that is dispositive. As the Court observed in *County of Fulton*, the Department does not control the County Boards. *See County of Fulton*, 276 A.3d at 861-62 (stating that "[t]he county boards of elections are not bureaus within the Department of State subject to management by the Secretary of the Commonwealth" and that "[t]hey are separate and stand-alone government agencies").

Further, the County Boards are funded by the county commissioners or other appropriating authorities of the county annually under Section 305 of the Election Code, not by the Department or other Commonwealth entity. Thus, although the subject matter of this litigation implicates elections, both local and statewide,³⁶ which are governed by the Election Code,³⁷ all signs point to the County Boards

³⁶ In *Finan*, this Court declined "to expand this Court's original jurisdiction to include cases challenging local implementation of statewide laws in the interest of uniformity. The potential for conflicting constructions of statewide laws by the county courts of common pleas exists whenever a statewide law is applied differently by different local agencies." *Finan*, 209 A.3d at 1115-16.

³⁷ This Court has exclusive original jurisdiction in the following election-related matters only:

(1) Contested nominations and elections of the second class under the . . . [Election Code.]

falling under the designation of “political subdivision,” suits against which are excluded from this Court’s original jurisdiction under Section 761(a)(1) of the Judicial Code. *See also In re Voter Referendum Pet.*, 981 A.2d at 171 (recognizing that a county board of elections is a local agency). As a result, jurisdiction for an action challenging a County Board’s development and implementation of notice and cure procedures properly lies in the respective County’s court of common pleas. *See* 42 Pa.C.S. § 931 (providing that “[e]xcept where exclusive original jurisdiction of an action or proceeding is by statute or by general rule . . . vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas”). Accordingly, because this Court lacks subject matter jurisdiction over Petitioners’ claims against the 67 County Boards in the absence of the Acting Secretary and Director Mathis, the POs in this regard are sustained,³⁸ and the Amended Petition is dismissed.³⁹



ELLEN CEISLER, Judge

(2) All matters arising in the Office of the Secretary of the Commonwealth relating to Statewide office, except nomination and election contests within the jurisdiction of another tribunal.

42 Pa.C.S. § 764.

³⁸ Given the Court’s disposition, Respondents’ other POs are dismissed as moot.

³⁹ Ordinarily, this Court would transfer the matter to the proper court with original jurisdiction over the matter. *See* 42 Pa.C.S. § 5103(a). However, given the impracticality of doing so in this case and given the fact that some County Boards may have changed their procedures since the November 2022 General Election, the Court will not transfer this matter and, instead, will dismiss the Amended Petition. Should Petitioners wish to file suit in the respective courts of common pleas where notice and cure procedures are challenged, they may do so.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Republican National Committee; :
National Republican Senatorial :
Committee; National Republican :
Congressional Committee; Republican :
Party of Pennsylvania; David Ball; :
James D. Bee; Debra A. Biro; Jesse D. :
Daniel; Gwendolyn Mae Deluca; Ross :
M. Farber; Connor R. Gallagher; Lynn :
Marie Kalcevic; Linda S. Kozlovich; :
William P. Kozlovich; Vallerie :
Siciliano-Biancaniello; S. Michael :
Streib, :

Petitioners :

v. :

Al Schmidt, in his official :
capacity as Acting Secretary of the :
Commonwealth; Jessica Mathis, in :
her official capacity as Director of the :
Pennsylvania Bureau of Election :
Services and Notaries; Adams County :
Board of Elections; Allegheny County :
Board of Elections; Armstrong County :
Board of Elections; Beaver County :
Board of Elections; Bedford County :
Board of Elections; Berks County Board :
of Elections; Blair County Board of :
Elections; Bradford County Board of :
Elections; Bucks County Board of :
Elections; Butler County Board of :
Elections; Cambria County Board of :
Elections; Cameron County Board of :
Elections; Carbon County Board of :
Elections; Centre County Board of :
Elections; Chester County Board of :
Elections; Clarion County Board of :
Elections; Clearfield County Board of :
Elections; Clinton County Board of :
Elections; Columbia County Board of :
Elections; Crawford County Board of :

No. 447 M.D. 2022

Elections; Cumberland County Board :
of Elections; Dauphin County Board of :
Elections; Delaware County Board of :
Elections; Elk County Board of :
Elections; Erie County Board of :
Elections; Fayette County Board of :
Elections; Forest County Board of :
Elections; Franklin County Board of :
Elections; Fulton County Board of :
Elections; Greene County Board of :
Elections; Huntingdon County Board :
of Elections; Indiana County Board of :
Elections; Jefferson County Board of :
Elections; Juniata County Board of :
Elections; Lackawanna County Board :
of Elections; Lancaster County Board :
of Elections; Lawrence County Board :
of Elections; Lebanon County Board :
of Elections; Lehigh County Board of :
Elections; Luzerne County Board of :
Elections; Lycoming County Board of :
Elections; McKean County Board of :
Elections; Mercer County Board of :
Elections; Mifflin County Board of :
Elections; Monroe County Board of :
Elections; Montgomery County Board :
of Elections; Montour County Board of :
Elections; Northampton County Board :
of Elections; Northumberland County :
Board of Elections; Perry County :
Board of Elections; Philadelphia County:
Board of Elections; Pike County Board :
of Elections; Potter County Board of :
Elections; Schuylkill County Board of :
Elections; Snyder County Board of :
Elections; Somerset County Board of :
Elections; Sullivan County Board of :
Elections; Susquehanna County Board :
of Elections; Tioga County Board of :
Elections; Union County Board of :
Elections; Venango County Board of :
Elections; Warren County Board of :
Elections; Wayne County Board of :

Elections; Westmoreland County Board :
of Elections; Wyoming County Board of:
Elections; and York County Board of :
Elections, :
Respondents :

ORDER

AND NOW, this 23rd day of March, 2023, it is hereby **ORDERED** as follows:

1. The first Preliminary objection (PO) of Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth, and Jessica Mathis, in her official capacity as Director of the Pennsylvania Bureau of Election Services and Notaries; the first PO of the Delaware County Board of Elections; the second PO of the Chester County Board of Elections; and the first PO of the Philadelphia County Board of Elections, relating to lack of subject matter jurisdiction, are **SUSTAINED**.
2. All remaining POs are **DISMISSED AS MOOT**.
3. Petitioners' First Amended Petition for Review Directed to Court's Original Jurisdiction Seeking Declaratory and Injunctive Relief is **DISMISSED**.



ELLEN CEISLER, Judge

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Alex Latcham, Senior Deputy Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Response in Opposition to Petitioners' Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

Alex Latcham

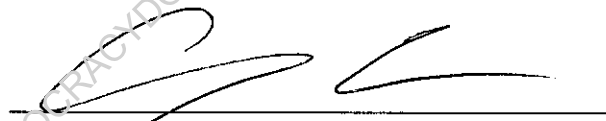
Alex Latcham
Seniority Deputy Political Director
Republican National Committee

Date: 7/08/2024

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Angela Alleman, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Response in Opposition to Petitioners' Application for Summary Relief are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Angela Alleman
Executive Director
Republican Party of Pennsylvania

Date: 7/18/24

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Kathleen A. Gallagher
Counsel for Republican Intervenors

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