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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,  
PENNSYLVANIA

FAITH GENSER and FRANK MATIS,

CIVIL DIVISION

Petitioners,

No. 24-40116

v.

BUTLER COUNTY BOARD OF  
ELECTIONS,

**BRIEF IN OPPOSITION TO PETITION  
FOR REVIEW IN THE NATURE OF  
A STATUTORY APPEAL**

Respondent.

Filed on behalf of:  
**Intervenor-Respondents,  
Republican National Committee and  
Republican Party of Pennsylvania**

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Petitioners,	:	No. 24-40116
	:	
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	:	
BUTLER COUNTY BOARD OF ELECTIONS,	:	
	:	
Respondent.	:	

**BRIEF IN OPPOSITION TO PETITION  
FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL**

**INTRODUCTION**

At its core, this matter is nothing more than an attempt by Petitioners to have this Court do what the Pennsylvania Supreme Court has said it cannot do: mandate that a county board of elections permit a voter to cure a mail ballot that the voter failed to place in a secrecy envelope. *See Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 374 (Pa. 2020) (hereinafter “*Pa. Dems.*”).<sup>1</sup> In fact, granting Petitioners’ requested relief would require the Court to disregard *two* controlling holdings of the Pennsylvania Supreme Court.

*First*, the Pennsylvania Supreme Court has held that the secrecy envelope requirement is “mandatory” such that a voter’s failure to comply with it “renders the ballot invalid.” *Id.* at 380. This holding flows from the plain text of the Election Code, which mandates that a voter who votes by mail “shall ... enclose and securely seal the” completed ballot in the secrecy envelope. 25 P.S. §§ 3146.6(a), 3150.16(a). This secrecy envelope requirement implements the Pennsylvania Constitution’s directive that “secrecy in voting be preserved,” Pa. Const. art. VII § 4, and

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<sup>1</sup> This Brief uses “mail ballot” to refer to both absentee ballots, *see* 25 P.S. § 3146.6, and mail-in ballots, *see id.* § 3150.16.

contributes to the integrity of Pennsylvania's elections by guaranteeing that election officials who open mail ballots will not be able to discern "who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted," *Pa. Dems.*, 238 A.3d at 378.

*Second*, the Pennsylvania Supreme Court has also held that a voter has no constitutional, statutory, or legal right to cure a defective mail ballot. *See id.* at 372-74. Indeed, neither the Free and Equal Elections Clause (Pa. Const. art. I, § 5) nor the Election Code confers such a right. *See id.* at 374. To the contrary, the decision whether and in what form to allow curing presents "open policy questions," including "what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots." *Id.* Thus, the Pennsylvania Supreme Court has held that any decision to mandate curing for mail ballot defects is "for the Legislature," not Pennsylvania courts. *Id.* The General Assembly has not mandated curing for mail ballot defects, let alone for secrecy envelope defects, *see id.* at 372-80, so this Court may not either, *see id.* at 374.

Pennsylvania law is therefore clear: Petitioners' ballots are "invalid" because Petitioners failed to place them in secrecy envelopes, and this Court lacks authority to order the Butler County Board of Elections ("the Board") to permit Petitioners to cure that failure. *See id.* at 374, 380. Petitioners' various efforts to avoid this result misconstrue the Election Code, the Pennsylvania Constitution, and—belatedly now as well—the U.S. Constitution. For all of these reasons, and as explained more fully below, the Court should dismiss Petitioners' appeal and enter judgment against Petitioners.

## FACTUAL AND PROCEDURAL BACKGROUND

Following *Pa. Dems.*, many county boards of elections have declined to permit curing for mail ballot defects, while other county boards have decided to permit curing.<sup>2</sup> The Board adopted a curing policy (“the Policy,” attached as **Exhibit A**) for the 2024 primary elections. See Hr’g Tr. 48:24-53:11. The Policy permits voters to cure defects on the “Declaration Envelope”—the outer envelope into which the Election Code directs voters to place the sealed secrecy envelope containing the completed mail ballot. See Exhibit A Part III; see also 25 P.S. §§ 3146.6(a), 3150.16(a). The voter is required to “fill out, date, and sign” the declaration on the Declaration Envelope, 25 P.S. §§ 3146.6(a), 3150.16(a), so it is “deficiencies” in filling out, dating, and signing the Declaration Envelope that the Policy permits voters to cure, see Exhibit A Part III. The Policy does not permit voters to cure secrecy envelope defects, including failure to include a secrecy envelope. See Exhibit A, Part III; Hr’g Tr. 50:13-51:22.

Because Declaration Envelope deficiencies are obvious from the face of the Declaration Envelope, election officials can discover them merely by looking at it; they do not need to open the Declaration Envelope to discover them. See 25 P.S. §§ 3146.6(a), 3150.16(a); Exhibit A, Part III; Hr’g Tr. 50:13-51:22. Thus, there is no risk that election officials reviewing Declaration Envelopes for deficiencies will be able to associate the voter with the voter’s ballot. See 25 P.S. §§ 3146.6(a), 3150.16(a); Exhibit A, Part III; Hr’g Tr. 50:13-51:22. In other words, election officials can review Declaration Envelopes for deficiencies without invading “secrecy in voting,” Pa. Const. art. VII § 4, or discerning “who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted,” *Pa. Dems.*, 238 A.3d at 378.

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<sup>2</sup> Intervenor-Respondents do not concede that county boards of elections have authority to permit voters to cure mail ballot defects. That question is not implicated here given the narrow issues before the Court.

By contrast, secrecy envelope deficiencies can be confirmed only by opening the Declaration Envelope to determine whether the secrecy envelope is present. *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a). *See also* Hr'g Tr., 21:12-22:9, 25:22-26-3, 34:19-36:6, 49:17-51:22. But where a Declaration Envelope is opened and no secrecy envelope is present, election officials have in hand only two documents: a Declaration Envelope displaying the voter's name (and other information) and a ballot (called a "naked ballot" because it was not contained in a secrecy envelope, *see* Pet. ¶ 2 n.2). *See, e.g.*, 25 P.S. §§ 3146.6(a), 3150.16(a). Elections officials therefore can discern "who the [voter] is [and] or for whom the [voter] has voted," *Pa. Dems.*, 238 A.3d at 378, and "secrecy in voting" has not been "preserved," Pa. Const. art. VII § 4; *see* Hr'g Tr. 26:14-20, 36:3-6.

The Election Code prohibits election officials from opening Declaration Envelopes until 7 a.m. on Election Day. *See* 25 P.S. §§ 3146.8(g)(1.1); 3146.8(g)(4)(i)-(iii); *see also id.* § 2602(q.1). Prior to that time, election officials may not even "inspect" mail ballots they have received from voters. *See id.* § 2602(q.1). Instead, they have only one task with respect to such ballots: they "shall safely keep the ballots in sealed or locked containers." *Id.* § 3146.8(a).

Petitioners Faith Genser and Frank Matis ("Petitioners") cast mail ballots for the 2024 primary elections but admit that they did not place them in secrecy envelopes. *See* Pet., ¶ 2. They later attempted to cure this defect by casting provisional ballots in person. *See id.* The Board declined to count those ballots consistent with the Policy. *See id.*

On April 29, 2024, Petitioners filed their Petition for Review in the Nature of a Statutory Appeal in this Court, seeking to overturn the Board's decision not to count their provisional ballots. *See* Pet., ¶¶ 2-3. Petitioners cast their provisional ballots *after* they cast their mail ballots and *after* the Board received those ballots. They were prompted to cast provisional ballots by an automated

email notice from the Pennsylvania Department of State. *See* Pet., Ex. 1 (Genser Dec.), at ¶¶ 8-12; Ex. 2 (Matis Dec.), at ¶¶ 8-11. That automated notice informed them that their mail ballots will not be counted because of the missing secrecy envelope, and—contrary to the Policy—stated that they could cure this defect by casting a provisional ballot. *See* Pet., Ex. 1 (Genser Dec.), at ¶¶ 8-12; Ex. 2 (Matis Dec.), at ¶¶ 8-11; Hr’g Tr. 48:-49:16.

At the time the email was sent, however, the Board had not opened Petitioners’ Declaration Envelopes. Hr’g Tr., 48:24-53:11. Instead, the Board used a machine that analyzes the thickness of returned Declaration Envelopes to predict whether they contained a secrecy envelope. Hr’g Tr., 33:10-36:6. This method thus provided no *actual* confirmation that a secrecy envelope was missing. *See* Hr’g Tr., 21:12-22:9, 25:22-26:3, 34:19-36:6, 48:24-53:11.<sup>3</sup>

The Court granted Intervenor-Respondents the Republican National Committee and the Republican Party of Pennsylvania (collectively, “Republican Committees”) intervention on May 7, 2024. That same day, the Court held a hearing, at which both Petitioners, as well as Chantell McCurdy, the Director of Elections for the Butler County Bureau of Elections, testified. *See* Hr’g Tr., *generally*. Following the hearing, the Court requested cross-briefing from the parties on the Petition for Review.

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<sup>3</sup> Use of a machine (*see* Hr’g Tr. 33:19-34:18) or a window on a Declaration Envelope to predict whether a secrecy envelope may be missing prior to opening the Declaration Envelope is, itself, a violation of the Election Code. Indeed, any action undertaken to predict whether a secrecy envelope is present prior to opening the Declaration Envelope constitutes an unlawful pre-canvass “inspection” of the mail ballot. 25 P.S. § 2602(q.1); *see id.* §§ 3146.8(g)(1.1); 3146.8(g)(4)(i)-(iii). Moreover, disclosure of any prediction that a secrecy envelope is present or missing—including by notice to the voter—is a disclosure of “the result of any portion of any pre-canvass prior to the close of the polls,” which the Election Code expressly prohibits. *Id.* § 3146.8(g)(ii)(1.1); *see also* Hr’g Tr. 50:3-12. The Court need not resolve these issues to decide this case, but Intervenor-Respondents expressly preserve their position on them.

## LEGAL STANDARD

The standard for reversing a decision of a county board of elections is a strict one: the county board may be reversed “only for an abuse of discretion or error of law.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1070 (Pa. 2020) (citing *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952)); *see also* 25 P.S. § 3157(b) (confining Court of Common Pleas’ review of decision of board of elections to matters involving “fraud or error”). In reviewing the decision of a board of elections, “[i]t is not the function of [the trial] court to substitute its judgment for that of the board’s. . . [the trial court is] bound to uphold the decision of the board unless it is in violation of the law.” *Lower Saucon Twp. v. Election Bd. of Northampton Cty.*, 27 Pa. D. & C.3d 387, 393 (Northampton C.P. 1983).

## ARGUMENT

For three critical and independent reasons, Petitioners failed to carry their heavy burden of showing that the Board committed an abuse of discretion or error of law when it enforced the Policy and declined to permit Petitioners to cure their admitted secrecy envelope defects.

*First*, Petitioners’ admitted secrecy envelope defect rendered their mail ballots “invalid,” and Pennsylvania law does not grant them a right to cure that defect. *See Pa. Dems.*, 238 A.3d at 372-80. This Court lacks the authority to order the Board to permit Petitioners to cure their mail ballots. *See id.* at 374.

*Second*, Petitioners’ attempt to read a right to cure via provisional ballot into the Election Code contravenes the Code’s plain text and the authoritative precedents construing it.

*Third*, the Pennsylvania Constitution and the U.S. Constitution foreclose Petitioners’ claim to a right to cure not provided by the General Assembly.

Thus, as explained more fully below, Petitioners' statutory appeal fails and should be dismissed.

**A. The Pennsylvania Supreme Court's Decision In *Pa. Dems.* Forecloses Petitioners' Claim.**

The Pennsylvania Supreme Court's decision in *Pa. Dems.* conclusively forecloses Petitioners' appeal from the Board's action. The petitioner in *Pa. Dems.* asserted both that the Election Code's secrecy envelope rule is not mandatory and that the Pennsylvania Constitution and the Election Code grant voters a right to cure defective mail ballots. *See* 238 A.3d at 372-80. The Pennsylvania Supreme Court rejected both assertions—and, in so doing, clarified that only “the Legislature,” not Pennsylvania courts, may mandate that county boards of elections permit curing of defective mail ballots and the terms of any curing policies. *Id.* at 374.

First, the *Pa. Dems.* petitioner argued that the General Assembly's secrecy envelope rule was not mandatory, but instead that the Pennsylvania Constitution and the Election Code require county boards to “count” rather than “invalidate” naked ballots. *Id.* at 374. The petitioner asserted that because there is no express provision in the Election Code “authorizing [county boards] to discard” a naked ballot, county boards are prohibited from doing so. *Id.* at 375. It further argued that discarding naked ballots violates “the right of electors to have their votes counted under the Free and Equal Elections Clause.” *Id.* at 376.

The Pennsylvania Supreme Court rejected those arguments. *See id.* at 378-80. It determined that the General Assembly's use of the term “shall” in describing the voter's obligation to use a secrecy envelope rendered the secrecy envelope requirement “mandatory.” *Id.* at 378. It also declined to hold that the secrecy envelope requirement violates the Pennsylvania Constitution. *See id.* at 378-80. It therefore confirmed that a failure to comply with the requirement “renders the ballot invalid” such that it may not be counted. *Id.* at 380.



*Second*, the *Pa. Dems.* petitioner sought “to require [county boards] to contact qualified [voters] whose [mail] ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them an opportunity to cure those defects.” *Id.* at 372. The petitioner rested this claim “on its assertion that the multi-stepped process for voting by [mail] ballot inevitably leads to what it describes as minor errors” by voters who fail to comply with all of the requirements. *Id.* The petitioner argued that the Free and Equal Elections Clause confers a right to cure on mail voters. *See id.*

The Secretary of the Commonwealth opposed the petitioner’s claim. *See id.* at 373. The Secretary noted the Pennsylvania Supreme Court’s prior holdings that “the power to regulate elections is legislative,” not judicial, and therefore the Free and Equal Elections Clause “cannot create statutory language that the General Assembly chooses not to provide.” *Id.* The Secretary also explained that “so long as the voter follows the requisite voting procedures, he or she will have an equally effective power to select the representative of his or her choice,” which is all the Clause guarantees. *Id.*

The Pennsylvania Supreme Court again rejected the petitioner’s claim. *See id.* at 373-74. The court pointed out that there is “no constitutional or statutory basis” to require county boards to permit curing of defective mail ballots. *Id.* at 374. It further reasoned that “[w]hile the Pennsylvania Constitution mandates that elections be ‘free and equal,’ it leaves the task of effectuating that mandate to the Legislature.” *Id.* Thus, it was left to the Legislature to decide whether to invalidate mail ballots based on “minor errors made in contravention of th[e] requirements” for completing them or to provide a right to cure such errors. *Id.*

The Pennsylvania Supreme Court thought this holding was “particularly” appropriate “in light of the open policy questions attendant to that decision, including what the precise contours

of the [curing] procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots.” *Id.* Those questions “are best left to the legislative branch of Pennsylvania’s government”—so Pennsylvania courts may not mandate that county boards offer curing or set the parameters of boards’ curing policies. *Id.*; see also Hr’g Tr. 46:17-47:9.

*Pa. Dems.* is dispositive here: Petitioners’ naked ballots are “invalid,” they have no “constitutional or statutory” right to cure those ballots, and the Court lacks authority to order the Board to permit them to cure the ballots. *Id.* at 374, 380. For this reason alone, the Court should dismiss Petitioners’ appeal and enter judgment against them. *See id.*

Petitioners agree that *Pa. Dems.* “means” that the Board “cannot count a naked ballot.” Pet. ¶ 60. However, they attempt to get around *Pa. Dems.* by arguing that it did not hold that “voters who return naked mail[] ballots are forbidden to cure the error.” *Id.* ¶ 59. But even if that were true, it is beside the point: regardless of whether curing is *forbidden*, *Pa. Dems.* makes clear that voters have no *right* to cure and, thus, that Pennsylvania courts cannot *order* county boards to permit them to cure. *See* 238 A.3d at 373-74; *see also* *Republican Nat’l Comm. v. Chapman*, No. 447 M.D. 2022, 2022 WL 16754061, at \*4, 21 (Pa. Commw. Ct. Sept. 29, 2022) (suggesting, in the absence of legislative action mandating curing procedures, county boards, not state courts, have discretion to craft curing policies); Hr’g Tr. 46:17-47:9. Accordingly, the Board committed no “abuse of discretion or error of law” in declining to permit Petitioners to cure their naked ballots. *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1070; *see also* 25 P.S. § 3157(b). That is the end of Petitioners’ appeal.

**B. The Election Code Prohibits Petitioners from Curing by Provisional Ballot.**

This Court may not “ignore the clear mandates of the Election Code.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (Pa. 2004) (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 792 (Pa. 1976)) (“[W]e cannot permit a resort to sophistry in an effort to avoid the clear mandates of the Election Code.”); *see also Ball v. Chapman*, 289 A.3d 1, 26 (Pa. 2023). “When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. § 1921(b).

The Election Code’s “clear mandate,” *In re Canvass of Absentee Ballots of Nov. 4, 2023 Gen. Election*, 843 A.2d at 1231, is that Petitioners have no right to cure their naked ballots *at all*, let alone by provisional ballot, *Pa. Dems.*, 238 A.3d at 374. Petitioners’ various attempts to read a right to cure by provisional ballot into the Election Code all fail.

1. The Election Code Does Not Permit Petitioners to Cure by Provisional Ballot.

When the General Assembly has wanted to authorize use of provisional voting, it has expressly identified the circumstances for such use in the Election Code. But the General Assembly has not authorized the use of provisional voting to cure mail ballot defects, including secrecy envelope defects. *See Pa. Dems.*, 238 A.3d at 373-74. Its silence is dispositive: provisional voting may not be used to cure mail ballot defects. *See id.*; *see also Discovery Charter Sch. v. Sch. Dist. of Phila.*, 166 A.3d 304, 321 (Pa. 2017) (“[W]hen interpreting a statute, we must listen attentively to what the statute says, but also to what it does not say.”) (internal quotes omitted).

The Election Code authorizes the use of provisional voting in only limited circumstances, none of which applies here. *See, e.g.*, 25 P.S. §§ 3050(a.2) (voter cannot produce required identification at the polling place); 3050(a.4)(1) (registration of individual who appears at the

polling place cannot be verified); *Pa. Dems.*, 238 A.3d at 375 n.28. Curing a defect in a mail ballot is *not* one of those circumstances. *See, e.g.*, 25 P.S. §§ 3050(a.2), 3050(a.4)(1). Indeed, “there is no statutory or constitutional” provision authorizing use of provisional voting because the voter committed an “error” that requires the voter’s mail ballot to be “rejected.” *Pa. Dems.*, 238 A.3d at 373-74. Therefore, this Court may not order the Board to count Petitioners’ provisional ballots, and Petitioners’ appeal fails. *See id.*; *see also Discovery Charter Sch.*, 166 A.3d at 321.

Moreover, to the extent the Election Code permits a voter who requested a mail ballot to vote by provisional ballot, that permission is of no help to voters who, like Petitioners, submit naked ballots which are timely received by the county board. The Commonwealth Court so held when it was presented with the precise question raised in this case: whether mail voters may cure secrecy envelope defects via a provisional ballot. *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 241 A.3d 695 (table), 2020 WL 6867946, at \*4 (Pa. Commw. Ct. 2020). In particular, the Election Code provides that a would-be mail voter “may vote by provisional ballot” in the narrow circumstance where the voter “requests a [mail] ballot [but] is not shown on the district register as having voted.” 25 P.S. §§ 3146.6(b)(2), 3150.16(b)(2); *see also id.* §§ 3146.6(b)(1); 3150.16(b)(1) (“The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.”). This could occur, for example, if the voter never received the mail ballot after requesting it or never completed or returned it to election officials. *See, e.g., id.* §§ 3146.6(b)(2), 3150.16(b)(2).

At the same time, the Election Code (in subclause (ii) of § 3050(a.4)(5)) declares that a provisional ballot “shall not be counted” in any circumstance where the voter’s mail ballot “is

timely received by the county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F); Pet. ¶ 62. This language is “unambiguous.” *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at \*4. Thus, the Commonwealth Court held that a provisional ballot submitted by a voter whose naked mail ballot is timely received “shall not be counted.” *Id.*

Like the Commonwealth Court, this Court is “not at liberty to disregard the clear statutory mandate that the provisional ballots to which this language applies must not be counted.” *Id.* Even Petitioners acknowledge that, under subclause (ii) of § 3050(a.4)(5), “the law prohibits counting provisional ballots if ‘the [voter’s] absentee ballot or mail-in ballot is timely received by the county board of elections.’” Pet. ¶ 62 (quoting 25 P.S. § 3050(a.4)(5)(ii)(F)). Petitioners’ own declarations, moreover, confirm that their ballots were timely received by the Board because Petitioners received the Secretary’s automated email notice prior to 8 p.m. on Election Day. *See* Pet., Ex. 1 (Genser Dec.) ¶ 11; Ex. 2 (Matis Dec.) ¶ 9; *see also* 25 P.S. §§ 3146.06(c), 3150.16(c). Petitioners’ provisional ballots, therefore, “shall not be counted.” 25 P.S. § 3050(a.4)(5)(ii). For this reason as well, Petitioners’ appeal fails.

2. Pctitioners’ Proposed Construction of the Election Code is Erroneous.

Pctitioners propose a two-step alternative construction of the Election Code, *see* Pet. ¶¶ 62-66, but it fails at each step. At the first step, *see id.* ¶ 63, Pctitioners point to subclause (i) of 25 P.S. § 3050(a.4)(5), which states:

*Except as provided in subclause (ii), if it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector’s registration form and, if the signatures are determined to be genuine, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.*

25 P.S. § 3050(a.4)(5)(i) (emphasis added). Invoking this subclause, Petitioners argue that *every* voter who has not “cast any other ballot” is entitled to cast a provisional ballot and have that provisional ballot counted. *See* Pet. ¶¶ 63-66.

Petitioners build upon this premise at their second step, where they argue that their mail ballots were not “cast” within the meaning of subclause (i) or “timely received” because, in their view, a naked ballot is “not a ballot that can be tabulated.” Pet. ¶ 64. In other words, Petitioners contend that subclause (i) authorizes every voter who requests a mail ballot to vote by provisional ballot unless the county board of elections previously received a “*valid*” mail ballot from that individual. *Id.* ¶ 66 (emphasis added).

For at least five reasons, Petitioners’ proposed two-step construction fails. *First*, Petitioners ignore the express exception in the first six words of subclause (i). That exception specifies that even in the narrow circumstances subclause (i) addresses, it applies only “[e]xcept as provided in subclause (ii).” 25 P.S. § 3050(a.4)(5)(i). Subclause (ii), in turn, is the provision discussed above declaring that, in all events, “[a] provisional ballot shall not be counted if the elector’s absentee or mail-in ballot is timely received by a county board of elections.” *Id.* § 3050(a.4)(5)(ii)(F) (emphasis added). Petitioners have acknowledged the validity of subclause (ii)’s prohibition on counting provisional ballots. *See* Pet. ¶ 62.

Petitioners are thus entirely correct that subclauses (i) and (ii) are “readily harmonized,” *id.* ¶ 64, but they strike exactly the wrong harmony for the relief that Petitioners seek. By its plain terms, subclause (i) has no application where subclause (ii) applies. *See* 25 P.S. § 3050(a.4)(5)(i). Here, because Petitioners’ mail ballots were “timely received” by the Board, subclause (ii) directs that they “shall not be counted,” regardless of anything in subclause (i). *Id.* § 3050(a.4)(5)(ii); *see*

also, Hr'g Tr. 42:9-43:5. Petitioners may try to run, but they cannot hide from the plain text of the subclause they cite.

*Second*, Petitioners are also incorrect when they suggest that subclause (i) permits every voter who has not “cast any other ballot” to cast a provisional ballot and have that ballot counted. See Pet. ¶¶ 63-66. Section 3050—of which subclause (i) is part—authorizes provisional voting in narrow circumstances that have nothing to do with mail voting at all, let alone with curing mail ballot defects. See 25 P.S. §§ 3050(a.2) (voter cannot produce required identification at the polling place); 3050(a.4)(1) (registration of individual who appears at the polling place cannot be verified). So even if subclause (ii) did not overrule subclause (i), subclause (i) would still be inapplicable to Petitioners, who claim a right to cure their naked ballots through provisional voting not recognized in the Election Code, § 3050, or subclause (i) itself. Indeed, no provision of the Election Code authorizes provisional voting in Petitioners’ circumstances, and this Court may not either. See, e.g., *Pa. Dems.*, 238 A.3d at 374; *In re Allegheny Cty. Provisional Ballots in the 2020 Gen. Election*, 2020 WL 6867946, at \*4; see also *Discovery Charter Sch.*, 166 A.3d at 321.

*Third*, even if Petitioners had offered a defensible reading of subclause (i), they are wrong when they contend that their naked ballots were not “cast” or “timely received” because those ballots were not “valid.” Pet. ¶¶ 64-66. The Election Code makes clear that “casting” the ballot is done *by the voter*, while “receiving” the ballot and then canvassing it to determine whether it is valid are done *by the county board*. The Election Code further establishes that a voter “casting” a ballot occurs separate from—*prior to*—the board “receiving” it, which in turn occurs separate from and prior to the board “canvassing” the ballot to determine whether it is valid.

*An absentee ballot cast by any absentee elector... or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.*

25 P.S. § 3146.8(g)(1)(i)-(ii) (emphases added); *see also id.* § 3146.8(g)(i) (referring to certain absentee ballots being “cast, submitted and received”).

Other provisions of the Election Code confirm this construction. For example, the Election Code mandates that mail ballots “must be received in the office of the county board of elections no later than eight o’clock P.M.” on Election Day. *Id.* §§ 3146.6(c); 3150.16(c). Mail ballots necessarily *must* be cast by voters before that deadline. *See id.* §§ 3146.6(c); 3150.16(c). And the Election Code’s instructions regarding when and how a county board opens and counts mail ballots specify that a board may not determine mail ballots’ validity until the “pre-canvass” or “canvass,” which occur *after* the ballots are “received” by the board. *Id.* §§ 3146.8(g)(ii)(1.1), (2).

Thus, the Election Code establishes a three-step sequence for mail voting: (1) first, the voter casts his or her ballot; (2) next, the county board receives the ballot; and (3) finally, the board canvasses the ballot to determine its validity and whether to count it. *See id.* § 3146.8(g)(1)(i)-(ii); *see also In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1067 (laying out that voters “cast their ballots . . . by absentee or no-excuse mail-in ballots,” the board “receiv[es]” the ballots, and “[t]he pre-canvassing or canvassing of absentee and mail-in ballots then proceeds”). Petitioners’ suggestion that a mail ballot is not “cast” unless and until the board determines it is valid is irreconcilable with the Election Code’s plain text and should be rejected for that reason alone. *See* 1 Pa. C.S. § 1921(a) (“Every statute shall be construed, if possible, to give effect to all its provisions.”); 1 Pa. C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

The Pennsylvania Supreme Court’s decision in *Pa. Dems.* underscores that “casting” a mail ballot is an action a voter takes no later than when the voter relinquishes control over the ballot



and sends it to the county board, and that “receiving” the ballot and determining its validity are distinct actions the board takes sequentially thereafter. As one example, the Pennsylvania Supreme Court noted that “[t]he Act directs that mail-in ballots cast by electors who died prior to Election Day shall be rejected and not counted”—or, in other words, that such a ballot is “cast” before election officials receive it and determine its invalidity (and even before its invalidity existed). *See, e.g.*, 238 A.3d at 375. And when it addressed the secrecy envelope requirement, the Pennsylvania Supreme Court noted that “naked ballots” were “cast by” mail voters *before* county boards “refus[ed] to count and canvass” them. *Id.* at 376 (emphasis added); *see also id.* at 374 (Election Code “provides the procedures for casting *and* counting a vote by mail”) (emphasis added); *Meixell v. Borough Council of Hellertown*, 88 A.2d 594 (Pa. 1952) (illegal votes were still “cast”); *Zicarelli v. Allegheny Cnty. Bd. of Elections*, No. 2:20-CV-1831-NR, 2021 WL 101683, at \*4, fn. 4 (W.D. Pa. Jan. 12, 2021) (“[T]his case concerns ballots *cast* by lawful voters who wished to vote... but simply failed to comply with a technical requirement of the election code.”) (emphasis added); *compare* 52 U.S.C. § 30101(e) (listing “casting a ballot” and “having such ballot counted” as distinct “steps”).

The Election Code’s plain text and other authorities thus make clear that Petitioners “cast” their mail ballots by sending those ballots to the Board, and that the Board timely received their ballots prior to Election Day—*regardless* of whether those ballots were “valid.” Pet. ¶ 66. Petitioners’ appeal therefore fails.

*Fourth*, Petitioners’ lone cited case, *Koehane v. Delaware County Board of Election*, No. CV-2023-004458 (Del. Cnty. Ct. Common Pleas Sept. 21, 2023), *see* Pet. ¶ 70; Pet. Ex. 3, is unpersuasive and inapposite. For one thing, Judge Whelan believed there is “ambiguity” between subclauses (i) and (ii), Pet. Ex. 3 at 3 ¶ 7, but no such ambiguity exists due to subclause (i)’s express

exception, *see supra* p. 13. For another, Judge Whelan concluded that subclause (i) provides a right to cure a mail ballot defect by provisional ballot, *see* Pet. Ex. 3 at 2 ¶ 5, but that, too, is incorrect, *see supra* pp. 10-11. Thus, Judge Whelan’s conclusion that defective mail ballots that were timely received had not been “cast,” Pet. Ex. 3 at 3 ¶ 9, was incorrect and irreconcilable with the plain terms of the Election Code and the authorities noted above, *see supra* pp. 14-15. And Judge Whelan rested his decision at least in part on the fact that the Delaware County Board’s policy allows voters to cure for the defects in the mail ballots at issue in that case, *see* Pet. Ex. 3 at 3-4 ¶¶ 11-13, but here the Board’s Policy does *not* permit *any* curing for secrecy envelope defects, *see* Exhibit A Part III.

Finally, the Secretary’s automated email notice and online guidance stating that voters have a right to cure mail ballot defects, *see* Pet. ¶ 67; May 7 Hr’g, Pet’rs’ Ex. D, are of no moment. “[T]he Secretary has no authority to definitively interpret the provisions of the Election Code.” *In re Canvass of Absentee & Mail-in Ballots of Nov. 3, 2020 Gen. Election*, 241 A.3d at 1078 n.6; Hr’g Tr. 55:12-14. The Secretary obviously has no authority to *change* the law—and, thus, lacks authority to announce a right to cure mail ballot defects when the Pennsylvania Supreme Court has determined that no such “constitutional or statutory” right exists. *Pa. Dems.*, 238 A.3d at 374.

Moreover, the Election Code vests authority to administer elections and to determine whether to count ballots in county boards of elections, not the Secretary. *Compare* 25 P.S. § 2642 (setting out county boards’ expansive powers), *with id.* § 2621 (setting out Secretary’s limited powers). Indeed, the “Secretary does not have control over the County Boards’ administration of elections, as the General Assembly conferred such authority solely on the County Boards.” *Republican Nat’l Comm. v. Schmidt*, No. 447 M.D. 2022, slip op. at 20 (Pa. Commw. Ct. Mar. 23, 2023) (attached as **Exhibit B**).

Accordingly, “under Pennsylvania law, the Secretary’s pre-election guidance is just that—guidance. County boards of election ultimately determine what ballots to count or not count in the first instance.” *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); *see also* *Republican Nat’l Comm.*, Exhibit B at 13-14, 18-22; Hr’g Tr., 53:13–55:14 (establishing that Secretary’s guidance is not binding upon county boards). Indeed, the Secretary has *admitted* to lacking authority to direct county boards in their administration of elections, to direct boards to follow guidance from the Secretary, or even to direct boards to comply with a court order. *See Chapman v. Berks Cnty. Bd. of Elections*, No. 355 M.D. 2022, 2022 WL 4100998, at \*10 (Pa. Commw. Ct. Aug. 19, 2022) (Secretary acknowledging that he “does not have 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 binding), available at <https://tinyurl.com/4wxjvd4c>.

The Secretary’s automated email notice and guidance therefore cannot, and do not, change the law, much less create a right to cure mail ballot defects by provisional ballot where no such right exists under Pennsylvania law. The Board’s decision not to count Petitioners’ provisional ballots was lawful, and Petitioners’ statutory appeal fails.

**C. There is No Proper Pennsylvania or Federal Constitutional Basis for Petitioners’ Statutory Appeal.**

As an apparent failsafe, Petitioners argue that the Policy violates the Free and Equal Elections Clause, *see* Pet. ¶¶ 75-78, and—belatedly at the hearing—the Equal Protection Clause of the U.S. Constitution. *See* Hr’g Tr., 134:10–135:1. Both arguments are unavailing.

1. The Policy Does Not Violate the Free and Equal Elections Clause.

Petitioners' effort to shoehorn their appeal into the Free and Equal Elections Clause, *see* Pet. ¶¶ 75-78, fails. Petitioners have made clear that they "do not challenge the decision of the Board not to count their original naked mail-in ballots, but" instead only "the decision not to count the provisional ballots." Hr'g Tr., 7:11-17. Yet Petitioners never explain *how* they could have a right to cure their secrecy envelope defects through provisional voting in light of *Pa. Dems.* and the General Assembly's decision not to create any such right. *See* Pet. ¶¶ 75-78; *Pa. Dems.*, 238 A.3d at 373-74.

Nor could they, had they tried. *Pa. Dems.* forecloses Petitioners' contention that the Board's decision violates the Free and Equal Elections Clause. After all, the Pennsylvania Supreme Court declined to invalidate the secrecy envelope rule under the Clause, *see* 238 A.3d at 376-80, and expressly held that the Clause does not confer a right to cure mail ballot defects, *see id.* at 372-74; *see also supra* pp. 7-9. And it did not end there: the Pennsylvania Supreme Court made clear that "[w]hile 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. Dems.*, 238 A.3d at 374.

Accordingly, the decision whether, and on what terms, to mandate curing of mail ballot defects is "left to the legislative branch of government." *Id.* This Court, therefore, may not wield the Free and Equal Elections Clause to mandate that the Board provide *any* curing not enacted by the General Assembly, including the curing Petitioners seek here. *See id.* at 373 (The Free and Equal Elections Clause "cannot create statutory language that the General Assembly chose not to provide"); *id.* (Clause "does not enable courts to rewrite the Election Code to align with a litigant's notion of good election policy").

This holding flows from the Clause's plain text and history, as well as the authoritative precedent construing it. The Clause's mandate that "[e]lections shall be free and equal," Pa. Const. art. I § 5, serves an important but cabined role. The Clause guarantees that all Pennsylvania voters "have the same free and equal *opportunity* to select [their] representatives." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (emphasis added). This equal *opportunity* guarantee does not guarantee that all voters will *avail* themselves of the opportunity. It therefore does not *exempt* voters from having to comply with the neutral ballot-casting rules the General Assembly enacts to govern how voters complete and cast their ballots, such as the secrecy envelope requirement, curing rules, or provisional voting rules. *See id.*; *see also Pa. Dems.*, 238 A.3d at 372-80. Instead, it 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. *Pa. Dems.*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809).

The Policy therefore comports with the Free and Equal Elections Clause. It grants *every* Butler County voter "the same free and equal opportunity to select his or her representatives." *League of Women Voters*, 178 A.3d at 814. The Policy allows *all* Butler County voters to cure Declaration Envelope defects, and *no* Butler County voters to cure secrecy envelope defects. *See* Exhibit A Part III. It therefore guarantees all Butler County voters will enjoy "equally effective power to select the representatives of [their] choice" so long as they follow the General Assembly's ballot-casting rules for completing and casting their ballots. *Pa. Dems.*, 238 A.3d at 373 (quoting *League of Women Voters*, 178 A.3d at 809); *Mixon v. Com.*, 759 A.2d 442, 449 (Pa. Commw. Ct. 2000) ("Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself.") (quoting *Winston v. Moore*, 91 A.

520 (Pa. 1914)); *see also Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 133-34 (3d Cir. 2024) (holding that a neutral mail-in ballot requirement did not “den[y] . . . the right to vote”).

Indeed, the Pennsylvania Supreme Court has *never* invalidated any of the General Assembly’s ballot-casting rules under the Free and Equal Elections Clause. And none of the three narrow circumstances in which the Pennsylvania Supreme Court has held that the Clause may operate to invalidate a voting rule is applicable to the Policy.

*First*, the Clause prohibits arbitrary voter-qualification rules that disqualify *classes* of citizens from voting, *League of Women Voters*, 178 A.3d at 807 (Clause achieves “universal suffrage” by “prohibiting exclusion from the election process of those without property or financial means”), but the Policy does not pertain to voter qualifications.

*Second*, the Clause prohibits intentional discrimination against voters based on social or economic status, geography of residence, or religious or political beliefs, *id.* at 807-09, but the Policy does not do that either.

*Third*, the Clause invalidates a rule that “makes it so difficult [to vote] as to amount to a denial” of “the franchise,” *id.* at 810, but the Policy also does not do that. *A fortiori*, because the secrecy envelope rule is mandatory and valid (as Petitioners do not challenge, *see Hr’g Tr.*, 7:11-17 and as held by the Supreme Court in *Pa. Dems.*), then so, too, is the Policy. After all, the secrecy envelope rule itself does not “make[] it so difficult [to vote] as to amount to a denial” of “the franchise,” *League of Women Voters*, 178 A.3d at 810, so the Policy’s enforcement of that rule without an opportunity to cure does not do so either. Indeed, if a ballot-casting rule *itself* does not violate the Free and Equal Elections Clause, then, logically, a failure to permit a cure for not following that rule does not violate the Clause. *See id.*; *see also Pa. Dems.*, 238 A.3d at 373-74.

Petitioners' various suggestions that the Policy violates the Clause are unavailing. For example, they suggest the Policy violates the Clause by "disenfranchis[ing]" them because their ballots will not be counted. Pet. ¶ 76. But a rule does not violate the Free and Equal Elections Clause merely because it results in a ballot not being counted. Otherwise, the Pennsylvania Supreme Court could not have upheld the secrecy envelope rule itself in *Pa. Dems.* See 238 A.3d at 373-74. Moreover, application of mandatory ballot-casting rules to decline to count noncompliant ballots does not "disenfranchise" anyone. See, e.g., *Winston*, 91 A. at 522; ("Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself."); *Mixon*, 759 A.2d at 449 (same); see also *Rosario v. Rockefeller*, 410 U.S. 752, 757-78 (1973) (neutral rules regulating how voters register and cast their ballots do not "disenfranchise[]" anyone, even when they result in ballots not being counted).

Petitioners' own cited cases do not establish otherwise. In one, the Pennsylvania Supreme Court recognized that election officials must decline to count ballots that are "invalid" under state law—and that "disenfranchise[ment]" occurs only when election officials do not count ballots that "have not been shown to be invalid." *Perles v. Cnty. Return Bd. of Northumberland Cnty.*, 202 A.2d 538, 540 (1964) (cited at Pet. ¶ 76). The other is a statutory construction case, not a constitutional case, so it says nothing about application of the Free and Equal Elections Clause to the Policy. See *Shambach v. Bickhart*, 845 A.2d 793, 801-02 (Pa. 2004) (cited at Pet. ¶ 76). And neither says *anything* about a "compelling interest," much less that the Board must demonstrate such an interest here. See Pet. ¶ 76.

Finally, to the extent Petitioners suggest the Policy is "arbitrary" because it permits curing for Declaration Envelope defects but not secrecy envelope defects, see Pet. ¶ 78, that suggestion is of no moment under the Free and Equal Elections Clause. After all, the Policy and its various

rules apply equally to *all* Butler County voters, so it accords all Butler County voters “the same free and equal opportunity to select [their] representatives”—which is all the Clause guarantees. *League of Women Voters*, 178 A.3d at 814. And, as explained below, *see infra* Part C.2, Petitioners are wrong because the Policy is not arbitrary. The Court should deny Petitioners’ appeal.

2. The Policy Does Not Violate Equal Protection Clause of the U.S. Constitution.

Petitioners did not mention the Equal Protection Clause in their Petition, *see* Pet., but they invoked it at the hearing, *see* Hr’g Tr., 134:10–135:1. This invocation fails as well because the Policy complies with the Equal Protection Clause.

“The Equal Protection Clause does not forbid classifications,” but rather “keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike”). Thus, there is no Equal Protection violation if the differential treatment occurs between groups of persons who are not “alike in all relevant aspects.” *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (internal quotation marks and citation omitted). Accordingly, “[t]o prevail on [their] equal protection claim, [Petitioners] must show that the Government has treated it differently from a *similarly* situated party *and* that the Government’s explanation for the differing treatment does *not* satisfy the relevant level of scrutiny.” *Real Alts., Inc. v. Sec’y Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 348 (3d Cir. 2017) (emphasis in original).

The Policy is neutral on its face and applies equally to all Butler County voters. *See* Exhibit A Part III. It permits *all* Butler County voters to correct Declaration Envelope defects, and *no*



Butler County voters to correct secrecy envelope defects. *See id.* It therefore does not treat Butler County voters “differently” from each other. *Nordlinger*, 505 U.S. at 10.

Petitioners’ argument that the neutral, evenhanded Policy somehow violates Equal Protection fails for two main reasons. *First*, Petitioners have failed to show that the Policy “treat[s] differently persons who are in all relevant aspects alike.” *Id.* Voters like Petitioners who fail to include a secrecy envelope are not “similarly situated” to voters who make an error on a Declaration Envelope. *Real Alts., Inc.*, 867 F.3d at 348. Secrecy envelope defects and Declaration Envelope defects are fundamentally different, not similar. Those defects involve different parts of the ballot. A secrecy envelope defect allows election officials to discern “who the [voter] is, with what party he or she affiliates, or for whom the [voter] has voted,” *Pa. Dems.*, 238 A.3d at 378, and therefore infringes “secrecy in voting” in contravention of the Pennsylvania Constitution, Pa. Const. art. VII § 4. By contrast, a Declaration Envelope defect is evident from the face of the Declaration Envelope, does not permit election officials to discern who the voter is and who they voted for, and therefore does not jeopardize secrecy in voting. Voters who commit secrecy envelope errors and voters who commit Declaration Envelope errors therefore are not “alike in all relevant aspects,” and Petitioners’ Equal Protection argument fails. *Startzell*, 533 F.3d at 203.<sup>4</sup>

*Second*, even if Petitioners were correct that voters who commit secrecy envelope errors and voters who commit Declaration Envelope errors are similarly situated, the Policy “satisf[ies]

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<sup>4</sup> Nor are mail voters—including voters who commit secrecy envelope errors—similarly situated to in-person voters who commit “overvote[s]” that can be corrected at the polling place, as Petitioners suggested at the hearing. Hr’g Tr. 136-37. “Absentee voting” and mail voting are “a fundamentally different process from in-person voting, and [are] governed by procedures entirely distinct from in-person voting procedures.” *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted). Indeed, the Policy applies *only* to voters who vote by mail, not to in-person voters. That in-person and mail voters are subject to different rules reflects precisely that they are *not* similarly situated. *See, e.g., id.* Indeed, even federal law draws a distinction between in-person voting and mail voting: the Help America Vote Act (HAVA) directs that in-person voting systems shall “provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted,” but includes no such requirement for absentee or mail voting. 52 U.S.C. § 21081(a)(1)(ii) (emphasis added).

the relevant level of scrutiny.” *Real Alts.*, 867 F.3d at 348. The U.S. Supreme Court has reserved heightened scrutiny (such as strict scrutiny) for laws that draw classifications between two groups of similarly situated persons for two scenarios: the alleged classification “categorizes on the basis of an inherently suspect characteristic” or “jeopardizes exercise of a fundamental right.” *Nordlinger*, 505 U.S. at 10. Neither applies to the Policy, so rational basis scrutiny governs.

In the first place, voters who commit secrecy envelope errors are not a “suspect class.” *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004). Suspect classes involve such factors as “race, alienage, or national origin,” “gender,” or “illegitimacy”—factors that “generally provide[] no sensible ground for differential treatment” or “reflect prejudice and antipathy.” *City of Cleburne*, 437 U.S. at 440-41. Mail voters who commit secrecy envelope errors simply do not fit the bill because the Policy does not treat them differently based upon any suspect factor. Indeed, such voters are not a “‘discrete and insular’ group . . . in need of ‘extraordinary protection from the majoritarian political process,’” *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 1938)), so heightened scrutiny cannot be justified on that basis.

In the second place, regulations on absentee and mail voting, such as the Policy, do not implicate “fundamental rights.” *Biener*, 361 F.3d at 214-15. Of course, the right to vote is fundamental. Pennsylvania law guarantees that fundamental right because it allows all voters to vote in person—and all Butler County voters can vote in person without implicating the Policy. *See, e.g.*, 25 P.S. § 2811. But there is no fundamental right to vote by mail, and no fundamental right to cure a defective mail ballot. *See, e.g., Pa. Dems.*, 238 A.3d at 373-74. If there were, then the Pennsylvania Supreme Court would have been *required* to mandate curing in *Pa. Dems.*, not to leave that issue “for the Legislature.” *Id.* at 374.

Indeed, courts construing the Equal Protection Clause have made clear that “there is no constitutional right to an absentee ballot” or to mail voting. *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). Instead, 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 v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807-08 (1969). After all, if there were a fundamental right to vote by mail, then Pennsylvania was in material breach of the Equal Protection Clause until 2019, when the General Assembly first enacted universal mail voting in Act 77. Merely to state that proposition is to prove the conclusion.

The Policy applies only to mail ballots—and, on Petitioners’ theory, only to mail voters who instead could have chosen to vote in person—and therefore does not implicate a fundamental constitutional right. *See id.*; *Mays*, 951 F.3d at 792; *Tex. Democratic Party*, 961 F.3d at 403-05. And “[t]hat a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny.” *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993) (citing relevant U.S. Supreme Court precedent); *accord Burdick v. Takushi*, 504 U.S. 428, 433-34 (applying rational basis review to Hawaii’s prohibition on right in voting); *In the Matter of Nomination Petition of Berg*, 712 A.2d 340, 342-43 (Pa. Commw. Ct. 1998) (applying rational basis review). Thus, at most, rational basis scrutiny applies to the Policy. *See Nordlinger*, 505 U.S. at 10.

The Policy passes rational basis scrutiny with flying colors. Rational basis review “is [a] highly deferential standard of review” and “the challenged classification must be upheld ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Donatelli*, 2 F.3d at 513 (quoting *FCC v. Beach Communications, Inc.*, 113 S.C. 2101 (1983)). “As the Supreme Court [] has emphasized, rational-basis review under the Equal

Protection Clause 'is not a license for courts to judge the wisdom, fairness or logic of legislative choices.'" *Id.* at 515. "The state decision-makers need not actually articulate the purpose or rationale supporting the classification; nor does the state have any obligation to produce evidence to sustain the rationality of its decision." *Id.*

Rational basis review accords a "strong presumption of validity" to the challenged action. *Id.* A challenger thus "bears the heavy burden of overcoming the presumption that there exists a rational relationship between the statute and a legitimate governmental interest." *Berg*, 712 A.2d at 342.

The ultimate question here, therefore, is whether the Policy's treatment of secrecy envelope defects "rationally further[s] a legitimate state interest." *Nordlinger*, 505 U.S. at 11. It clearly does: as explained, the decision not to allow curing for secrecy envelope defects preserves "secrecy in voting" as required by the Pennsylvania Constitution, Pa. Const. art. VII § 4, because it ensures that election officials do not determine the validity of a ballot with knowledge of "who the [voter] is [and] for whom the [voter] has voted." *Pa. Dems.*, 238 A.3d at 378. Declaration Envelope defects do not present the same risk of election officials making validity determinations with such knowledge and, thus, permitting curing of such defects does not jeopardize "secrecy in voting." Pa. Const. art. VII § 4; *see also* Hr'g Tr. 26:14-20. Petitioners cannot prove that the Policy's differential treatment of secrecy envelope defects and Declaration Envelope defects "is wholly irrational." *Brian B. ex rel. Lois B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000). Their federal Equal Protection argument fails.

**CONCLUSION**

The Court should dismiss Petitioners' appeal and enter judgment against Petitioners.

Dated: June 28, 2024

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH PUBLIC ACCESS POLICY**

I certify that this filing complies with the provisions of the *Public Access Policy of the United 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.

Dated: June 28, 2024

THE GALLAGHER FIRM, LLC



Kathleen A. Gallagher

RETRIEVEDFROMDEMOCRACYDOCKET.COM

# EXHIBIT A

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**BUTLER COUNTY  
BALLOT CURING POLICY**

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**I. Introduction**

This ballot curing policy for Butler County is established to allow registered voters the opportunity to cure immaterial deficiencies on their absentee or mail-in ballot declaration envelopes.

**II. Definitions**

As used herein, the following terms shall have the meanings indicated:

**Attestation:** The form at the Bureau which a Voter can correct information deemed as defective on the Declaration Envelope.

**Ballot:** An absentee or mail-in ballot which a Voter may use to cast a vote in an election.

**Bureau:** The Butler County Bureau of Elections.

**County:** Butler County.

**County Board:** Butler County Board of Elections.

**Deficiency:** A defect on the Declaration Envelope recognized by the Department of State as curable by applicable law, i.e. a lack of signature

**Declaration Envelope:** Pennsylvania law provides that two envelopes shall be mailed to each absentee or mail-in elector; the larger of these envelopes is referred to alternatively as the Declaration Envelope. This envelope contains a declaration which the Voter must sign.

**Designated Agent:** An individual which the Voter has authorized to transport the Attestation and witness the Voter's signature or mark upon said Attestation. The Designated Agent is only allowed to serve as a Designated Agent for **one** Voter, unless the additional voter(s) live in the same household and similarly require a Designated Agent due to a Disability.

**Disability:** A disability as defined in the Americans with Disabilities Act.

**Party Committee:** The Butler County Democratic Committee and the Butler County Republican Committee, as designated by their respective state organizations.

**Voter:** Any person who shall possess all the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth.



### **III. Cure Procedure**

- A. Upon identifying a Deficiency on a Declaration Envelope submitted by a Voter, the Bureau will segregate said Declaration Envelope and place the Voter's name and contact information (including phone number, if one is provided) on a list.
- B. During a Primary Election, the list of Voters who submitted Deficient Declaration Envelopes shall be made available to the Party Committees once a day upon request of the Party Committee.
- C. The Party Committees may contact the Voter who submitted a Declaration Envelope with a Deficiency to advise that there is a Deficiency with their Declaration Envelope and that the Voter is permitted to appear at the Bureau to remedy such Deficiency by means of an Attestation.
- D. During a General Election, in addition to Party Committees, the list of Voters who submitted Declaration Envelopes with Deficiencies will be made available to any duly authorized representative of any recognized political party other than the Party Committees which have a candidate on the Ballot.

It is acknowledged that Voters registered as Independent will not have a duly authorized party representative. The Bureau will publicize through its regular course that any Voter can check the status of their Ballots via the Department of State website and that cure procedures are available.

- E. To effect a cure, a Voter must appear in person at the Bureau before 8:00 P.M. on Election Day and sign an Attestation that includes the Deficiency; which shall be recorded with their Ballot.

In such case as a Voter with a Disability as recognized by the American Disability Act may not be able to appear in person at the Bureau, a Witness Form shall be used to allow a Designated Agent to transport the Attestation to and from the Bureau in order to obtain a signature or mark from the Voter.

- F. The Bureau shall not perform any remedy on behalf of the Voter but will only provide the opportunity for the Voter to remedy the defect.
- G. The Bureau shall not send the Ballot back to the Voter or issue the Voter a new Ballot due to the Deficiency.
- H. This Policy shall not modify any procedures regarding Provisional Ballots with the exception of allowing a Provisional Ballot to be counted for a Voter who cannot come into the Bureau to remedy a Deficiency on the Ballot envelope but is able to go to their polling place on Election Day.

**Adopted by the Butler County Board of Elections on 5/2/2023.**  
Appointed Board of Elections: Michael English (Chairman), Patrick Casey, and Carol  
McCarthy

**Modified by the Butler County Board of Elections on 2/14/24.**  
Board of Elections: Leslie Osche (Chairman), Kimberly Geyer, and Kevin Boozel

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# EXHIBIT B

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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

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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),<sup>1</sup> 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)<sup>2</sup> (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

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<sup>1</sup> 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.

<sup>2</sup> 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,<sup>3</sup> against Al Schmidt, in his official capacity as Acting Secretary of the Commonwealth (Acting Secretary),<sup>4</sup> 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).<sup>5</sup> 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)<sup>6</sup> signature and ballot secrecy requirements. Specifically, Petitioners allege that the County Boards' "practice of conducting these pre-circulass 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

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<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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)<sup>7</sup> & art. VII, § 6 (relating to uniformity with respect to laws regulating elections);<sup>8</sup> and Article I, Section 4, Clause 1 of the United States Constitution, U.S. Const. art. I, § 4, cl. 1 (Elections Clause).<sup>9</sup> (First Amended Petition for Review (Amended Pet.) ¶¶ 2-14, 17-19.) They seek declarations in these regards under the Declaratory Judgments Act (DJA),<sup>10</sup> 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

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<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 42 Pa.C.S. §§ 7531-7541.



DCCC)<sup>11</sup> (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 Code<sup>12</sup> and, further, statewide injunctive relief prohibiting

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

<sup>12</sup> 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.<sup>13</sup>

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*.<sup>14</sup> As noted above, Respondents filed nine sets of POs, and eight

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(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).

<sup>13</sup> 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).

<sup>14</sup> 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,<sup>15</sup> 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.

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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.

<sup>15</sup> 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** procedures<sup>16</sup> 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,<sup>17</sup> and *Pennsylvania State Education*

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

<sup>17</sup> It provides: "All men are born equally free and independent, and have certain inherent and indefeasible 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),<sup>18</sup> 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),<sup>19</sup> and that County Boards are thus prohibited

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

<sup>18</sup> 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).

<sup>19</sup> 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);<sup>20</sup> 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).<sup>21</sup> (*Id.* ¶¶ 81-82.) Third, they argue that the County Boards’ email

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<sup>20</sup> 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).

<sup>21</sup> 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)).)<sup>22</sup> 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

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<sup>22</sup> 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).<sup>23</sup> (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

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<sup>23</sup> 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.<sup>24</sup>

### 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.

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<sup>24</sup> 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 Boards<sup>25</sup> first argue that this Court lacks subject matter jurisdiction<sup>26</sup> 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

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

<sup>26</sup> 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*,<sup>27</sup> 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.)<sup>28</sup> Petitioners therefore claim that

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<sup>27</sup> 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).)

<sup>28</sup> 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),<sup>29</sup> 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”).)<sup>30</sup>

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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).)

<sup>29</sup> 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.

<sup>30</sup> 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

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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)).<sup>31</sup> “Thus, the main inquiry for determining whether a party is indispensable

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<sup>31</sup> 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,<sup>32</sup> “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. Cmwlth.*, 984 A.2d 582, 588 (Pa. Cmwlth. 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

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<sup>32</sup> 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. Cmwlth. 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,<sup>33</sup> 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. §§

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<sup>33</sup> 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,<sup>34</sup> 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.

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<sup>34</sup> 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 Law<sup>35</sup> 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.*

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<sup>35</sup> 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,<sup>36</sup> which are governed by the Election Code,<sup>37</sup> all signs point to the County Boards

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<sup>36</sup> 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.

<sup>37</sup> 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,<sup>38</sup> and the Amended Petition is dismissed.<sup>39</sup>



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ELLEN CEISLER, Judge

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(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.

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

<sup>39</sup> 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

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of Elections; Wyoming County Board of:  
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Elections, :  
Respondents :

**ORDER**

AND NOW, this 23<sup>rd</sup> 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**.



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ELLEN CEISLER, Judge

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the within ***BRIEF IN OPPOSITION TO PETITION FOR REVIEW IN THE NATURE OF A STATUTORY APPEAL*** has been served on all counsel of record listed below via email this 28<sup>th</sup> day of June 2024:

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