
IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS PENNSYLVANIA;
SENIORLAW CENTER; SOUTHEAST ASIAN
MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF
PHILADELPHIA,

Petitioners,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA MATHIS, IN HER
CAPACITY AS DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND NOTARIES OF THE
PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No. 83 MM 2020

**PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' PRELIMINARY OBJECTIONS**

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Pursuant to the Court’s directive of May 5, Petitioners Disability Rights Pennsylvania (Disability Rights), SeniorLAW Center, Southeast Asian Mutual Assistance Associations Coalition (SEAMAAC), Suzanne Erb, and the Barristers’ Association of Philadelphia respectfully submit this memorandum in opposition to Respondents’ Preliminary Objections to Petitioners’ Petition for Review. As set forth below, contrary to Respondents’ assertions, Petitioners’ constitutional claims are concrete and not speculative; Petitioners have standing to bring this action and their claims are ripe; nothing required Petitioners to name the 67 county boards of elections as additional respondents in this action; and Petitioners timely served the Petition for Review on the Attorney General’s office.

BACKGROUND

Petitioners filed their Petition for Review (“Pet.”) on April 27, 2020, asserting that the received-by-election-day deadline for voters to submit absentee and mail-in ballots violates multiple provisions of the Pennsylvania Constitution in the context of the COVID-19 pandemic. On May 4, 2020, Petitioners filed an Application for Special Relief in the Nature of Preliminary Injunction (“PI App.”), seeking to bar enforcement of the received-by deadline in the upcoming June 2 primary election, now less than four weeks away.

On May 5, Respondents filed Preliminary Objections (“P.O.”), asserting that (1) Petitioners’ concerns about the impact of COVID-19 on voting by mail are “too

speculative” to state a viable constitutional claim; (2) Petitioners lack standing to bring their claims and their claims are not ripe; (3) Petitioners failed to join all 67 county boards of elections as additional respondents; and (4) Petitioners supposedly failed to service notice and a copy of the Petition for Review on the Attorney General’s office.¹

ARGUMENT

I. Petitioners’ Constitutional Claims Are Concrete and Not Speculative

Respondents do not dispute that if Petitioners’ allegations concerning the impacts of COVID-19 on voting by mail are accurate, the received-by-election-day deadline violates multiple provisions of the Pennsylvania Constitution. Instead, Respondents’ First Preliminary Objection asserts that Petitioners’ concerns about the pandemic’s impact on voting by mail are “too speculative” to state a viable constitutional claim. P.O. ¶ 22. According to Respondents, Petitioners merely “hypothesize” that “factors related to the COVID-19 crisis” might hinder voters’ ability to timely cast absentee or mail-in ballots under the current received-by-election-day deadline. Those factors are: “[1] increased numbers of absentee and mail-in ballot applications, [2] delayed application processing by county boards of

¹ All of the relevant facts are set forth in the Petition for Review and the Memorandum in Support of Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction.

elections, [3] slow service by the U.S. Postal Service, and [4] voters' health concerns about voting in person.” *Id.* at p. 3; *see id.* ¶¶ 6, 23 (similar).

As an initial matter, “in ruling upon preliminary objections, a court must accept as true all well-pleaded allegations of material fact and all reasonable inferences deducible from those facts,” and “any doubt must be resolved in favor of the non-moving party.” *Commonwealth by Shapiro v. UPMC*, 208 A.3d 898, 904 (Pa. 2019). This point alone is sufficient to dispose of Respondents’ preliminary objections, and they notably fail to address the pleading standard.

But pleading standards aside, the complications with voting amidst the COVID-19 pandemic are not “conjecture.” P.O. ¶ 29. They are real.

First, it is an indisputable fact that applications to vote by absentee and mail-in ballot have massively increased due to the pandemic. Secretary Boockvar testified at a recent Pennsylvania Senate hearing that 880,000 applications for mail-in or absentee ballots had already been submitted as of the morning of April 30, noting: “Just to give you context, that’s 880,000 that have already applied when we still have four weeks to go before the deadline. That’s more than eight times more than the number of voters who have ever voted absentee in a presidential primary before.”² *See also* Pet. ¶ 46. Philadelphia alone has received

² Videotaped Testimony, Public Hr’g on Primary Election Issues Related to the Ongoing COVID-19 Restrictions at 33:45-34:02 (Apr. 30, 2020), <https://tinyurl.com/yaneelqk> (hereinafter Secretary Boockvar Senate Testimony).

over 70,000 applications. PI App., Ex. L. And these numbers will only increase. As election officials from Mercer, Leigh, and Lawrence Counties noted in their recent Senate testimony, “[o]ther states have seen exponential explosions of applications in the weeks leading up to their primaries so ‘we ain’t seen nothing yet.’ Wisconsin’s numbers multiplied 10 times during the three weeks prior to their primary.” PI App., Ex. A; *see also* Pet. ¶ 35.³ This is not unfounded “speculation” by Petitioners, P.O. ¶ 25; it is the studied expectation of seasoned election officials across the Commonwealth based on the enormous number of applications already received and recent experiences in other jurisdictions.

Second, the backlogs in county boards of elections in processing this enormous and unprecedented number of absentee and mail-in ballot applications are also concrete, not hypothesized. As of April 23, Allegheny County had processed only 30,000 of the nearly 90,000 absentee and mail-in ballot applications it had already received, and mailed only between 17,000 and 20,000. PI App., Ex. W; *see also* Pet. ¶ 46. These backlogs will only grow as the primary draws nearer. Pet. ¶¶ 3, 47. Election officials from Mercer, Lehigh, and Lawrence County

³ In the recent Wisconsin primary election, more than 283,000 voters submitted absentee ballot requests in the last four days before the April 3 application deadline. Pet. ¶ 35; *see also* PI App., Exs. M, O. More than 136,000 voters submitted their requests in the final two days before the deadline. Pet. ¶ 35; *see also* PI App., Exs. N, O.

testified on April 30 that counties “are falling behind daily.” PI App., Ex. A at 2. The chairwoman of the Philadelphia City Commissioners testified that the system is simply “not designed to handle” the number of applications being submitted due to the pandemic. PI App., Ex. L at 2; *see also* Pet. ¶ 49. The election officials from Mercer, Lehigh, and Lawrence Counties echoed this concern, testifying:

Pennsylvania and many other states might have miscalculated the fallout from massive scaling up of mail voting because there was one bottle neck we couldn't avoid – processing applications. Counties were not built for this either administratively or through human capital. There aren't enough people and hours in the day in many places to overcome that bottleneck because PA has been built to handle a minimal number of mail applications over decades.

While we expected difficulties and some hiccups related to the roll out of Act 77, we went from expecting perhaps a 15 to 20 percent uptick in applications to seeing currently a 400 to 500 percent increase and growing. Put another way, counties were expecting about 30 inches of snow. What we're getting is the equivalent of 10 feet and it's going to get worse.

PI App., Ex. A at 1-2. Petitioners are not speculating that there will be a lengthy backlog in processing absentee and mail-in ballot applications by county boards of elections; this was the exact testimony by elections officials from three counties who said there is a growing “bottleneck” and that “there aren't enough people and hours in the day in many places to overcome that bottleneck.” *Id.*

Third, delays in USPS mail delivery due to the COVID-19 pandemic are not speculative either. In ordinary times, USPS predicts that First Class Mail delivery will take one to three business days, but the pandemic has caused delays in mail

delivery. Pet. ¶ 32. For instance, on April 17, 2020, USPS extended its service commitments for certain types of mail due to COVID-19. *Id.*; see PI App., Ex. R (USPS industry alert for expected delivery changes). What’s more, as detailed below, it appears that USPS mail delivery was slow *in this very case*; it took fully a week for USPS to deliver the service copy of the Petition for Review that Petitioners mailed to the Attorney General’s office. *See infra* § IV.

Finally, contrary to Respondents’ assertions, there is nothing speculative about Pennsylvanians’ “health concerns about voting in person.” P.O. at 3. Governor Wolf has declared that “COVID-19 constitutes a threat of imminent disaster to the health of the citizens of the Commonwealth,” PI App., Ex. B, and this Court has recognized that “[a]ny location . . . where two or more people can congregate is within [the COVID-19] disaster area,” *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100, at *13 (Pa. Apr. 13, 2020)—a description that undeniably applies to polling places and county election offices. The Department of State’s own actions confirm the legitimacy of people’s fears about voting in person in June; the Department has “procured 6,000 safety kits to provide to counties, which include masks, gloves, and other supplies for safely administering in-person voting.” P.O. ¶ 15. Petitioner Suzanne Erb, a 65-year-old church organist and singer who is also blind, plans to vote by mail in the June 2 primary due to the challenges that the pandemic would present for her for voting in

person. Pet. ¶¶ 8, 69. And at the recent Senate hearing, multiple groups of citizens voiced related concerns about voting during the COVID-19 pandemic. *See* PI App., Exs. S, T, U. This is not about Pennsylvania voters' mere "convenience," as Respondents suggest. P.O. ¶ 20 (quoting *Oughton v. Black*, 61 A. 346, 349 (Pa. 1905)). To the contrary, voters are rightly concerned about their health and lives, and the health and lives of their families and neighbors.

The bottom line is that, given the deadline for absentee and mail-in ballot applications (which is only one week before election day), the unprecedented number of applications being submitted, the growing backlogs in processing applications by county boards of elections, and the slowdowns in mail delivery, it is a simple fact that a substantial number of Pennsylvania voters will not receive their absentee or mail-in ballots until days or less before election day. Pet. ¶ 52. These voters will then face a stark choice between mailing their ballot back and risking it will arrive too late, or risking their lives by voting in person to ensure that their vote is counted. *Id.* Respondents are wrong that the only injury Petitioners allege is that "some votes will not be counted." P.O. ¶ 22. While that is one serious injury that will result from enforcing the received-by deadline, a separate and independent injury is that some voters will be forced to risk their lives to ensure that their votes are counted. Pet. ¶¶ 51, 119. That injury too violates the Pennsylvania Constitution. *See, e.g., id.* ¶¶ 120, 139. Unless the received-by

deadline is enjoined, it is a guarantee that such harm—as well as the harm in tens of thousands of late-arriving ballots being discarded—will occur.

Respondents’ own concessions confirm the concrete nature of the constitutional violations here. Those admissions include the following:

- “The COVID-19 crisis is, as Petitioners allege, presenting severe and unprecedented challenges to the administration of the primary election.” P.O. ¶ 9; *see id.* at p. 3 (“[T]he COVID-19 pandemic is causing real and constantly evolving challenges to every aspect of administrating the primary election.”), ¶ 26 (“Petitioners’ concerns about the election are reasonable.”).
- Respondents “share th[e] concern” that “bottlenecks may occur at one or more points during the balloting process” for the June primary. *Id.* ¶ 33.
- “[E]xtending the deadline for receipt of ballots ... would increase the number of votes that are timely returned.” *Id.* ¶ 27; *see id.* at p. 4 (extending the received-by deadline “may well increase the likelihood that votes will be timely received”).
- “[D]uring an emergency, such as the one that currently presents itself, that may affect the timeframes for mailing ballots ... it may be more practical and reasonable to utilize a postmarked-by date to determine timeliness of a cast ballot, rather than a received-by date.” *Id.* at 4.
- Granting the preliminary relief sought by Petitioners “might well increase voters’ confidence [in the election] in the midst of a crisis.” *Id.* ¶ 27.

It is difficult to reconcile these extensive concessions with Respondents’ “nothing to worry about yet” argument.

The balance of Respondents’ arguments are makeweight. They invoke the general power of the legislature to “regulate elections” and the even more general “presumption of constitutionality” that attaches to all legislation. P.O. ¶¶ 20, 21

(citations omitted). But it is well established that this Court has the power to review the constitutionality of state statutes, *see Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808); *Fillman v. Rendell*, 986 A.2d 63, 75 (Pa. 2009), and the Court has not hesitated to invalidate election laws that violate the constitutional rights of voters. *See, e.g., League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 793 (Pa. 2018).

This Court should reject Respondents’ invitation to wait and see “[i]f the anticipated COVID-19-related complications materialize.” P.O. ¶ 22. The complications have already materialized, and any delay in granting preliminary relief would only compound the problems for the upcoming June 2 primary.

II. Petitioners Have Standing and Their Claims Are Ripe

Respondents’ Second Preliminary Objection largely parrots their first: Respondents contend that Petitioners lack standing and their claims are not ripe because the harms from the received-by deadline in the context of the COVID-19 pandemic are purportedly “speculative.” P.O. ¶ 36. This objection fails for both similar and additional reasons as the first one.

With respect to ripeness, the relevant facts are “sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). As described, there is no dispute that there is a public health emergency that will continue for the foreseeable future, that absentee and

mail-in ballot applications have skyrocketed, and that there are existing and growing backlogs in processing absentee and mail-in ballot applications. For the reasons explained above in response to the First Preliminary Objection, these indisputable facts render Petitioners' injuries concrete and render their claims ripe.

Respondents essentially contend that the case will not become ripe until after the election is over and Petitioners can identify with particularity the number of voters who were disenfranchised in each county and the number of absentee and mail-in ballot applications and completed ballots that arrived too late—at which point it would be too late to remedy the problem. The governing principle in the election-law context is the opposite of what Respondents say: courts should take up election law cases earlier than later, to avoid a risk of “voter confusion” that the U.S. Supreme Court has said “will increase” as “an election draws closer.” *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006). Voters should be told in advance when they need to mail their ballots, including because voters like petitioner Suzanne Erb want to be able to consider late-breaking updates in making choices about candidates. And county election boards should know in advance what rules will apply for accepting ballots. If Petitioners had waited until even closer to the June 2 primary date to bring their challenge, Respondents surely would have argued that it is too late to alter any deadlines. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

In addition, Section 13 of Act 77 requires challenges to the Act to be “commenced within 180 days” of the Act’s effective date of October 31, 2019, which was April 28, 2020. This matter was timely filed, but 180 days have now passed. If this Court were to dismiss this action as unripe, Respondents might argue that any subsequent lawsuit was barred by the statute of limitations. The government cannot on the one hand impose a 180-day statute of limitations and then argue that a lawsuit filed within those 180 days must be dismissed as “unripe.” That would transform Act 77 into a Catch 22.

As for standing, Petitioners—a Pennsylvania voter and four organizations devoted to eliminating barriers to voting and assisting their members with voting—clearly have standing to challenge a Pennsylvania law that will prevent tens or hundreds of thousands of Pennsylvanians from casting effective ballots. Each Petitioner has set forth detailed allegations in the Petition for Review, *see* Pet. ¶¶ 68-104, describing their “substantial, direct, and immediate interest in [this] matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

Respondents do not appear to dispute that Petitioners’ interests are substantial and direct. Nor could they. Voting is the “most sacred privilege of citizenship.” *In re Absentee Ballots Case of 1967 Gen. Election*, 245 A.2d 258, 261 (Pa. 1968). The voter-Petitioner, and the voter-members whom the organizational Petitioners represent, obviously have a substantial interest in having

their ballots counted and in being able to cast an effective ballot without risking their health and lives. That interest is substantial because it is an “interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.” *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989). And the interest is “direct” because it is the received-by deadline that will operate to prevent petitioners (or their members) from safely casting effective ballots. *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *7 (Pa. Commw. Ct. Jan. 17, 2014).

Petitioner Suzanne Erb is a blind voter who has attested that she does not feel safe voting at a polling place due to the virus. Pet. ¶ 69. She attests that the received-by deadline will place added burdens on her and make it difficult for her to complete and return her ballot on time, given all of the steps needed for her to request and then complete a mail ballot. *Id.* ¶¶ 70-72. The received-by deadline will also force her to decide which candidate to support in a contested primary without full information, earlier than she would otherwise. *Id.* ¶ 73. These are all immediate, cognizable injuries.

The organizational Petitioners have standing on their own behalf because they have “diverted valuable resources” because of the received-by deadline. *Applewhite*, 2014 WL 184988, at *7; *see also Disability Rights Pa. v. Pa. Dep’t of Human Servs.*, 2020 WL 1491186, at *5 (M.D. Pa. Mar. 27, 2020) (organizations

have standing where they have “diverted resources [they] might use elsewhere”). All of them are “organizations concerned with protecting the right to vote of Pennsylvanians and maximiz[ing] their opportunities to exercise that right,” and they have standing because they “educate[] [their] clients as to voting criteria and ha[ve] an interest in assisting” disabled and minority clients in casting effective mail ballots. *Applewhite*, 2014 WL 184988, at *7. Several of the Petitioner organizations have *already* diverted valuable resources as a consequence of the received-by deadline, and will continuing doing so if the deadline remains in effect. Pet. ¶¶ 78, 88, 101. This diversion of resources is already occurring; there is nothing contingent about this, and it “is a direct harm sufficient for standing.” *Applewhite*, 2014 WL 184988, at *7; *see also Disability Rights Pa.*, 2020 WL 1491186, at *5 (holding that Disability Rights Pennsylvania had standing based on diversion of resources).

Organizations also have standing to sue on behalf of their members in Pennsylvania, “particularly in lawsuits brought to challenge state laws affecting voters.” *Applewhite*, 2014 WL 184988, at *7. Organizations have standing to sue on behalf of members if at least one member “suffering immediate or threatened injury as a result of the action challenged.” *Robinson Twp.*, 83 A.3d at 922.

Respondents contend that the injuries to Petitioners’ members (and to Ms. Erb) are not “immediate” because Petitioners purportedly do not allege facts that

show that the individual petitioner or specific members of the organizational petitioners are “likely to suffer a constitutional deprivation,” because petitioners do not allege precisely *where* in the state the “bottlenecks” will arise. P.O. ¶¶ 33-34; *see id.* ¶ 25 (objecting to a purported lack of “specifics” on “what exactly will go wrong, where it will go wrong, [or] whom it will affect”). But Petitioners allege that the harm and bottlenecks will occur *throughout* the state. COVID-19, obviously, is a threat throughout the Commonwealth. *Supra* at 6. That is why the Governor has declared a *statewide* stay at home order, and a state of emergency that applies to polling places. *Supra* at 6.

It is a guarantee that disabled, senior, black, and minority voters will be adversely affected by enforcement of the received-by deadline in these circumstances. It is a certainty that at least one of Petitioners’ members or constituents will be among these voters—at least one of Petitioners’ members or constituents will receive their absentee or mail-in ballot too close to election day to be sure it will arrive on time if they mail it back, harming them by putting them to a choice between their vote and their health. That more than suffices to show standing on behalf of Petitioners’ members and constituents. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 270 (2015); *see also Disability Rights Pa.*, 2020 WL 1491186, at *6-7 (holding that Disability Rights Pennsylvania had standing to bring suit on behalf of its constituents).

Moreover, the fact that petitioners cannot predict which particular individual's ballot will take 5 days for delivery (and so will not be counted) and which particular individual's ballot will take 2 days (and will be counted), is a further constitutional harm—not a sign of lack of standing. Pet. ¶ 22 (explaining that disenfranchisement will be “arbitrary”). On Respondents' theory, no one would have standing to challenge a law that gave poll workers the power to arbitrarily tear up ballots cast by random voters who showed up to the polling place, because no particular individual could “have [any] way of knowing” that he or she as an “individual” would be “likely” to be affected. P.O. ¶ 33. It is a certainty that one or more of each of the organizational Petitioners' members will be adversely affected.

III. Petitioners Need Not Join 67 County Boards of Elections to Challenge the Constitutionality of a Uniform Statutory Statewide Deadline

Respondents assert that Pa. R. Civ. P. 1032(b) requires Petitioners to join each and every one of Pennsylvania's 67 county boards of elections in order to bring this action challenging the constitutionality of a provision of the Election Code. Their argument runs counter to precedent, cannot be reconciled with the statutory scheme governing the administration of Pennsylvania elections, and, if adopted, would be so practically burdensome that it would effectively shut down constitutional challenges to election-related restrictions.

Pennsylvania courts routinely resolve election-law challenges like this one without the parties that Respondents now claim are indispensable. In *Applewhite v. Commonwealth*, for example, the Commonwealth Court enjoined enforcement of a photo-identification statute without any counties or county officials as parties, even though counties were responsible for enforcing the photo-identification requirements that were enjoined. 2012 WL 4497211, at *7-8 (Pa. Commw. Ct. Oct. 2, 2012); *see also Banfield v. Cortés*, 922 A.2d 36 (Pa. Commw. Ct. 2007) (overruling preliminary objection seeking dismissal for failure to join 56 counties in action concerning certain voting machines). Respondents do not cite a single Pennsylvania decision holding that county boards of elections are indispensable parties that must be joined in challenges to statutory, statewide election laws, and Petitioners are aware of none.

The dearth of precedent supporting Respondents' position reflects that, in constitutional challenges like this one, counties do not remotely qualify as indispensable under this Court's standard. "In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights." *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 957 (Pa. 1981) (quotation marks omitted). Respondents do not explain what "rights" the county election boards would be seeking to defend in a case involving a uniform, statewide, statutory deadline.

To the contrary, Pennsylvania’s Election Code expressly charges the Secretary of the Commonwealth—a named Respondent in this case—with overseeing and implementing the Election Code and the counting of absentee and mail-in ballots in particular. The Secretary has authority to perform necessary duties under the Election Code, *see* 25 P.S. § 2621, and has authority specifically “to establish, implement and administer the SURE system,” *id.* § 1222(f), which governs how county election boards record absentee and mail-in ballot applications, send such ballots to voters, process voters’ completed ballots, and count the ballots. The Secretary also is delegated the power to “receive from county boards of elections the returns of primaries and elections, to canvass and compute the votes cast for candidates and upon questions as required by the provisions of this act; to proclaim the results of such primaries and elections, and to issue certificates of election to the successful candidates at such elections.” *Id.* § 2621. And the Secretary prescribes the form of the application for absentee and mail-in ballots. *Id.* § 3146.2(i).

Moreover, independent of the Secretary’s authority to direct the county boards of elections, county election boards must exercise their duties “in the manner provided by” the Election Code. 25 P.S. § 2642. Thus, if this Court declares a statewide, statutory deadline in the Election Code unconstitutional as

applied during the pandemic, all county election boards and their officials, like all state officers, must abide by that decree.

Respondents are correct that the inevitable disparity in “application-processing speeds” between counties is one of several reasons why enforcement of the received-by deadline during the pandemic is unconstitutional. P.O. ¶ 42. But Respondents do not explain why Petitioners’ reliance on that disparity means that the counties themselves need to be named as respondents—if the current Respondents dispute the potential for any disparity, they are free to argue as much.

That the requested relief may alter “counties’ behavior and responsibilities” (P.O. ¶ 44) is not nearly enough to make all counties indispensable. Respondents’ argument mirrors one that this Court directly rejected in *Kline*, which involved a dispute over subsidy funding for school districts under Pennsylvania statutes. 431 A.3d at 955-56. The respondents there argued that all Pennsylvania school boards were indispensable because the requested relief could reduce the subsidy payments to which all other school districts were entitled. *Id.* at 958. This Court disagreed; even if the other districts might stand to lose funding, they did not have a right to “benefit from any error that may have been made in the calculation” of subsidies—at least not one so integral that their presence in the case was “essential to a determination on the merits.” *Id.*

If Respondents’ theory were correct, individuals in all future cases challenging statutes or government policy as unconstitutional would systematically need to effectuate service on dozens, if not thousands,⁴ of government officials across Pennsylvania. All of those parties would then have the ability to file separate motions and briefs—which would then require responsive filings—throughout the litigation. In every election law case, plaintiffs would need to name and serve, at minimum, nearly 70 defendants, and the courts would then potentially be subject to 70 different sets of briefs on every contested issue. “To sustain the preliminary objection of failure to join an indispensable party would be inequitable and unjust,” *Kline*, 431 A.2d at 959, not just here but in scores of future civil rights cases fitting this mold. There is nothing to recommend Respondents’ argument that this Court break with precedent and impose such a novel and burdensome requirement. Respondents’ Third Preliminary Objection should be overruled.⁵

⁴ In a suit challenging the constitutionality of the Election Code’s poll-watcher procedures, for example, it would be necessary to name as respondents thousands of election judges across Pennsylvania. 25 P.S. § 2687(b) (“During those intervals when voters are not present in the polling place either voting or waiting to vote, the judge of elections shall permit watchers, upon request, to inspect the voting check list and either of the two numbered lists of voters maintained by the county board: Provided, That the watcher shall not mark upon or alter these official election records. The judge of elections shall supervise or delegate the inspection of any requested documents.”).

⁵ In the event this Court holds that Pennsylvania’s 67 counties are indispensable parties, Petitioners respectfully request that it grant Petitioners leave to amend their Petition for Review, with any new respondents added *nunc pro tunc*.

IV. Respondents' Fourth Preliminary Objection Is Factually Wrong and Underscores the Arbitrary Nature of a Mail Voting System that Depends on USPS Delivery Times

Respondents' Fourth Preliminary Objection asserts that Petitioners did not properly notify the Office of the Attorney General of this lawsuit. Their objection is factually wrong. As detailed in the Declaration of Service filed concurrently with this Memorandum of Law, Petitioners sent the Petition for Review to the Attorney General via USPS certified mail on April 28, 2020. USPS delivered the envelope to the Attorney General's office on May 4, 2020 at 7:53 a.m., more than seven hours before Respondents filed their Preliminary Objections. *See* Decl. of Serv. ¶ 7, Ex. A. Thus, even at the time they filed, Respondents' Fourth Preliminary Objection was inaccurate.

What's more, Respondents' factual misstep underscores the merits of Petitioners' constitutional claims in this case. As detailed in the Declaration of Service and accompanying exhibits, Petitioners sent copies of their Petition to Respondents and to the Attorney General at exactly the same time and from exactly the same place (Washington, D.C.). Decl. of Serv. ¶¶ 5-9, Exs. A-C. Both envelopes were destined for the same city (Harrisburg), and both envelopes arrived there on April 29, 2020. *See id.*, Exs. A, C. Moreover, according to the USPS website, both envelopes were "Available for Pickup" before 8:00 a.m. on April 30, 2020. *See id.* But while USPS promptly delivered Respondents' envelope that

same day, it did not deliver the Attorney General's until May 4, 2020—four days later. *Id.* Thus, Respondents' envelope took two days to arrive, but it was almost a week before the Attorney General received his. *See id.*

Just as Petitioners could not dictate when USPS delivered the service copies of their Petition for Review, Pennsylvania voters are powerless to influence how quickly USPS delivers their absentee and mail-in ballots. To put a finer point on it, if the separate service envelopes for Respondents and the Attorney General had been absentee or mail-in ballots sent by voters to the Dauphin County Board of Elections, one would have arrived in time to be counted, but the other would have arrived too late.

Finally, prompt service by USPS certified mail of the Petition for Review, which on its face alleges Act 77's "received by" deadline is unconstitutional, plainly satisfies the applicable rules. Under Pa.R.A.P. 521(a), which applies in original-jurisdiction matters in appellate courts, service on the Attorney General in a case that draws in question the constitutionality of a statute is required only in a matter "to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party." Here, because the Secretary of Commonwealth is a party in her official capacity, service on the Attorney General went above and beyond the requirements of Rule 521(a). Service by certified mail also satisfied any requirement that may have been imposed by Pa.R.A.P. 1514(c) ("A copy of the

petition for review shall be served by the petitioner in person or by certified mail on the government unit that made the determination sought to be reviewed. In matters involving the Commonwealth, the petitioner shall similarly serve a copy upon the Attorney General of Pennsylvania.”) or Pa.R.C.P. 235 (notice to be sent “by registered mail to the Attorney General of Pennsylvania”).⁶ Under these rules, Petitioners properly and timely served the Attorney General by sending him a copy of the Petition via certified mail. Accordingly, this Court should overrule Respondents’ Fourth Preliminary Objection.

CONCLUSION

For the reasons stated above, Respondents’ Preliminary Objections should be overruled in their entirety.

⁶ Respondents’ citation to Pa.R.C.P. 422 is inapt. *See Buoncuore v. Pa. Game Comm’n*, 830 A.2d 660, 662 (Pa. Commw. Ct. 2003) (holding that the Rules of Appellate Procedure govern service for any petition filed directly in an appellate court). Petitioners filed their Petition for Review directly in this Court, and therefore the Rules of Appellate Procedure govern the applicable service requirements. *See id.* Moreover, even though the Attorney General has the right to intervene, *see* Pa.R.A.P. 521(b), he is not a party to this suit and would not need to be served in accordance with Pa.R.C.P. 422 under any circumstances.

Dated: May 8, 2020

Respectfully submitted,

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Pro hac vice motion to be filed.

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