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IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS	:	
PENNSYLVANIA, <i>et al.</i> ,	:	
Petitioners,	:	
v.	:	No. 83 MM 2020
KATHY BOOCKVAR, in her capacity	:	
as Secretary of the Commonwealth of	:	
Pennsylvania, <i>et al.</i> ,	:	
Respondents.	:	

**RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
TO PETITIONERS' PETITION FOR REVIEW**

¹ Not admitted to practice in Pennsylvania. Motion for Pro Hac Vice admission to be filed.

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I. INTRODUCTION

Respondents neither discount the very real threat of COVID-19 nor deny the effects that the pandemic is having on Pennsylvanians' lives. But even in the face of an unprecedented health crisis, rules of pleading, justiciability, and jurisdiction retain their importance. For three reasons, these rules require dismissal of the Petition for Review (the "Petition").

First, Petitioners fall far short of carrying the substantial burden required to make out constitutional claims against election laws. Petitioners posit that a constitutional violation *may* arise from some combination of factors related to the current COVID-19 crisis. But, as shown below, Petitioners do not allege facts sufficient to support a concrete injury of constitutional significance. Second, for many of the same reasons, Petitioners' claims are too speculative to be justiciable. And third, Petitioners seek affirmative relief from Pennsylvania's county boards of elections and accuse the counties of violating the Pennsylvania Constitution, making the boards of elections—who are not named as Respondents—indispensable to resolution of this litigation. For these reasons, this Court should sustain Respondents' Preliminary Objections and dismiss the Petition.

II. STATEMENT OF JURISDICTION

Respondent objects to the exercise of this Court’s jurisdiction because Petitioners have failed to join indispensable parties, as detailed *infra* Section VI.C.

III. STATEMENT OF THE CASE²

In the Petition, an individual voter and several organizations challenge the Pennsylvania Election Code’s requirement that, to be counted, a voter’s absentee or mail-in ballot must be received by the appropriate county board of elections “on or before eight o’clock P.M. the day of the primary or election.” *See* Pet., ¶ 26 (quoting 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)). Petitioners refer to this as the “received-by” deadline. *See, e.g.*, Pet., ¶ 27.

According to Petitioners, enforcing the received-by deadline in the context of the COVID-19 pandemic will lead to the disenfranchisement of thousands of voters, violating various provisions of the Pennsylvania Constitution. To support that theory, Petitioners predict that (i) county boards of elections may be delayed in processing applications for absentee and mail-in ballots; and (ii) the United States Postal Service may be slow in transporting blank ballots to voters and returning

² For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition’s well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

filled-out ballots to county boards of elections. As a result, Petitioners allege, voters will have to either endanger their health by voting in-person or risk that their mailed votes will go uncounted, because processing and transit delays will cause otherwise timely ballots to arrive past the received-by deadline. *See, e.g.*, Pet., ¶¶ 2–4.³

To redress their purported constitutional injuries, Petitioners seek, *inter alia*, (i) a declaration that, during the COVID-19 pandemic, the received-by deadline is unconstitutional and invalid; (ii) a declaration that the non-severability provision in the enacting statute for the received-by deadline is unenforceable; and (iii) injunctions prohibiting enforcement of the received-by deadline and requiring all county boards of elections to count certain mailed ballots received up to a week after election day. Although Petitioners seek relief that will require the county boards of elections to adopt new procedures to affirmatively enforce what will essentially be a new election law, Petitioners did not name the county boards of election as Respondents.

One week after filing the Petition, Petitioners filed an Application for Special Relief in the Nature of a Preliminary Injunction. The next day,

³ As set forth in the Preliminary Objections, Petitioners' claims are speculative as to both the primary and general elections, but doubly so for the general election, which is still six months away. *See, e.g.*, Preliminary Objections ¶ 25.

Respondents filed Preliminary Objections seeking dismissal of the Petition because (i) Petitioners' claims are too speculative to state a constitutional claim, (ii) Petitioners' claims are not justiciable under the doctrines of standing and ripeness, (iii) Petitioners failed to join the county boards of election, which are indispensable parties to this litigation, and (iv) Petitioners failed to provide notice and a copy of the Petition to the Attorney General's Office. On May 8, Petitioners filed their Opposition to the Preliminary Objections and provided proof of service on the Attorney General's Office.⁴ On Monday, May 11, Respondents filed an Opposition to Petitioners' Application for Special Relief.⁵

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioners claim only that they may, in the future, suffer constitutional injuries, should the Court dismiss Petitioners' claims because they have not alleged facts that, if true, would clearly, palpably, and plainly demonstrate a constitutional violation?

Suggested Answer: Yes. *See infra* Section VI.A.

Where Petitioners rely entirely on speculation that they may, in the future, suffer constitutional injuries, should the Court dismiss their claims because speculation (i) is too remote to satisfy the immediacy requirement for standing and (ii) provides insufficient factual development to render a claim ripe?

Suggested Answer: Yes. *See infra* Section VI.B.

⁴ Because Petitioners have now established their compliance with the service requirement, Respondents are no longer pursuing their fourth preliminary objection.

⁵ In their Preliminary Objections, Respondents seek dismissal of all of Petitioners' claims. A grant of the Preliminary Objections will therefore moot the Application for Special Relief.

Where Petitioners seek relief that would mandate that county boards of elections take affirmative action, based on the allegation that the county boards of election are unconstitutionally disenfranchising voters by delaying processing of absentee and mail-in ballot applications, does the Court lack jurisdiction because Petitioners have not named the county boards of election as respondents?

Suggested Answer: Yes. *See infra* Section VI.C.

V. SUMMARY OF ARGUMENT

The Petition should be dismissed for three reasons.

First, Petitioners’ claims are legally insufficient. Constitutional challenges to election statutes are cognizable only where an injury is concrete. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017) (citation and quotation omitted). Moreover, “nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Here, the Petition asserts constitutional violations, but Petitioners have alleged only hypothetical—rather than clear, palpable and plain—constitutional injury. The allegations are a parade of what-ifs: increases in absentee ballot and

mail-in ballot applications *could* lead to overwhelming processing backlogs in unspecified counties (citing weeks-old application numbers from just two of Pennsylvania’s 67 counties), Pet. ¶¶ 46–47; the U.S. postal system *may* fall behind (citing experiences from “other parts of the country”) and therefore may delay ballot deliveries, Pet. ¶ 50; there is a “*possibility* that local post offices will need to shut down,” Pet. ¶ 50 n.19 (emphasis added); because of these “myriad” delays, some voters’ ballots *might* not arrive on time; and this outcome might disproportionately affect one or another group of voters, *id.* ¶¶ 52–55. Petitioners have not given any specifics about which counties may fall behind, and by how much; which mail routes may slow, and when and for how long; which post offices could close, and what effect that could have; and how all of this would affect any specific group of Pennsylvania voters. Because Petitioners’ alleged constitutional injuries are entirely speculative, the Court should dismiss them as legally insufficient.

Second, Petitioners’ claims are not justiciable. To have standing to sue, a claimant must have “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). If the claimant’s interest in the litigation is too “remote or speculative,” however, she lacks standing to bring her claims. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). Likewise, for Petitioners’ claims to be ripe, there must be an

“actual controversy” and Petitioners must allege facts “sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Just as Petitioners have not alleged adequate facts to demonstrate a legally sufficient constitutional injury, Petitioners lack standing to bring their unripe claims.

Third and finally, Petitioners failed to join indispensable parties.

Petitioners do not just seek a declaration that the received-by deadline is unconstitutional during the COVID-19 pandemic; they also seek an injunction affirmatively requiring Respondents *and the county boards of elections* to adopt new criteria for determining whether mail-in and absentee ballots are properly submitted and to count some ballots received up to a week after the June 2 primary date. *See* Pet. at p. 62 (Prayer for Relief d.1–4.) Because Petitioners seek to compel action by the county boards of election—and because Petitioners allege that the county boards are violating the Pennsylvania Constitution—the counties are indispensable parties that must be joined in this litigation.

VI. ARGUMENT

A. The Court Should Dismiss the Petition as Legally Insufficient Because Petitioners Do Not Adequately Allege a Constitutional Violation

Petitioners describe the pleading standard in this case as “makeweight,” *Opp.* at 8, but they have a heavy burden to make a “clear, palpable and plain

demonstration” of unconstitutionality to overcome the “presumption that lawfully enacted legislation is constitutional.” *Yocum*, 161 A.3d at 238.⁶ “Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.” *Winston*, 91 A. at 522. Election laws “invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); see also *In re Zulick*, 832 A.2d 572, 578 (Pa. Commw. Ct.), as amended (Sept. 26, 2003), *aff’d*, 575 Pa. 140, 834 A.2d 1126 (Pa. 2003) (stating same). Recognizing that these incidental burdens are not typically matters of constitutional dimension, this Court has held that “the state may enact substantial regulation containing reasonable, non-discriminatory

⁶ See also *Working Families Party v. Commonwealth*, 209 A.3d 270, 278–79 (Pa. 2019) (“[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.’ The presumption that legislative enactments are constitutional is strong. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.”) (internal citations omitted).

restrictions to ensure honest and fair elections that proceed in an orderly and efficient matter.” *Banfield v. Cortes*, 110 A.3d 155, 177 (Pa. 2015) (citing *In re Nader*, 905 A.2d 450, 459 (Pa. 2006)).

As courts have repeatedly recognized, electoral deadlines directly promote “the public interest in the maintenance of order in the election process.” *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) (rejecting challenge to registration deadline); *accord, e.g., Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373-78 (S.D. Fla. 2004) (rejecting challenge to deadline for receipt of absentee ballots by Supervisors of Election); *Mays v. LaRose*, 951 F.3d 775, 791–93 (6th Cir. 2020) (rejecting challenge to deadline for requesting absentee ballot); *Texas Independent Party v. Kirk*, 84 F.3d 178, 184-87 (5th Cir. 1996) (rejecting challenges to deadlines for a candidate to declare intent to run for office, for holding nominating conventions, and for filing petitions by minor-party and independent candidates).

Petitioners do not dispute that deadlines play an essential role in ensuring that “some sort of order, rather than chaos, is to accompany the democratic processes,” *Burdick*, 504 U.S. at 434; indeed, they do not contend that the received-by deadline is unconstitutional under ordinary circumstances. Instead, they allege that the particular circumstances created by the COVID-19 crisis make the received-by deadline unconstitutional as applied to those circumstances. But

the Petition does not allege facts about the current situation that, even if true, would meet the significant burden required to show that a statutory election deadline is unconstitutional.

Many of the allegations in the Petition involve difficulties that any deadline, in any election, can cause for voters. For example, Petitioners allege that voters who want to wait until the last minute to fill out their ballots might wait too long to get their ballots in on time, Pet. ¶¶ 56–57; that because of differences in mail processing speeds, some voters’ ballots might reach their destinations more quickly than other voters’ ballots, Pet. ¶ 55; and that voters who apply for their ballots on the last possible day, and choose to return their completed ballots by mail rather than in person, run the risk that their ballots will not arrive on time, Pet. ¶ 52. Petitioners do not contend that any of these realities present unconstitutional barriers to voting under ordinary circumstances. To successfully plead an as-applied challenge to the received-by deadline in this case, Petitioners must plead facts that, if true, would show that something about the COVID-19 crisis has turned a constitutional deadline into an unconstitutional one. Petitioners have failed to do so.

In their Opposition to the Preliminary Objections, Petitioners contend that four sets of allegations in their Petition establish that the received-by deadline violates the Pennsylvania Constitution in the particular circumstances of COVID-

19. But upon closer examination, these allegations are nothing more than theories.⁷ First, Petitioners argue that “[i]t is an indisputable fact that applications to vote by absentee and mail-in ballot have massively increased due to the pandemic.” Opp. at 3. The Petition alleges that “[a]s of April 23 . . . more than 600,000 Pennsylvanians had requested an absentee or mail-in ballot for the June 2 primary election[.]” Pet. ¶ 46. In their Opposition to the Preliminary Objections, Petitioners offer a new statistic: 880,000 Pennsylvanians have applied for absentee or mail-in ballots as of April 30. Opp. at 3. What Petitioners do not allege, however, is (i) what these numbers suggest, if anything, about how many more applications will follow, and (ii) how these facts support Petitioners’ contention that Pennsylvanians will be deprived of the right to vote.

To support their assertion that the number of absentee and mail-in applications will lead to disenfranchisement, Petitioners make an inapt comparison to the last-second spike in absentee ballot applications in Wisconsin, where “numbers multiplied 10 times during the three weeks prior to their primary.” *Id.* at 4; *see also* Pet. ¶¶ 59–67. But just because another state, under very different circumstances, had difficulties in processing ballot applications, Pet. ¶ 62, it does

⁷ In their Opposition, Petitioners repeatedly cite to facts that were included only in their Application for Special Relief and not in the Petition. In ruling on the Preliminary Objections, however, the Court must consider only the allegations of the Petition. *See Torres*, 997 A.2d at 1245.

not follow that the same thing will happen—or is even likely to happen—in Pennsylvania. The Petition contains no allegations that show that the problems that plagued the Wisconsin primary exist in Pennsylvania.⁸

Second, the Petition forecasts that the “unprecedented increase in absentee and mail-in ballot applications *will* predictably result in backlogs in the processing and approval of such applications by county boards of elections.” Pet. ¶ 47 (emphasis added). In their Opposition, Petitioners claim that their allegations about backlogs are “concrete, not hypothesized.” But there is nothing “concrete” about Petitioners’ predictions of backlogs; Petitioners simply ask the Court to accept that they will occur.⁹

⁸ In fact, other than the fact that they were primary elections taking place during the COVID-19 pandemic, the two elections have little in common. The Wisconsin election was scheduled to occur just after the pandemic began to take hold in mid-March, and was not postponed; the Pennsylvania election was to take place three weeks after Wisconsin’s, and was then postponed for another five weeks. In Wisconsin, a surge of ballot applications rolled in immediately before the election; in Pennsylvania, a surge has occurred with weeks to spare. In Wisconsin, election officials asked to postpone the ballot receipt deadline; in this case, at this point, no county has asked a court for such relief. *See* Opp. to Mot. for Preliminary Injunction at 24–25.

⁹ The sources Petitioners cite in their Petition and Opposition do not predict backlogs and do not support Petitioners’ assertions. Two of them, a newspaper article about Allegheny County and a press release by the Chair of Philadelphia’s Board of Elections, explain what two large counties are doing to ensure that applications will be processed quickly. *See* Jamie Martines, *Allegheny County Votes to Consolidate Primary Polling Locations*, Tribune-Review, Apr. 23, 2020, <https://triblive.com/local/pittsburgh-allegheny/allegheny-county-votes-to-consolidate-primary-polling-locations/> (cited by Petitioners at Pet. ¶ 53, fn. 20) (explaining increase in staff enabling Allegheny County to process 10,000

Third, in another speculative allegation, Petitioners claim that United States Postal Service mail delivery is going to be delayed. But again, Petitioners allege no facts supporting the allegation that that postal service delays in Pennsylvania exist now or will affect the primary three weeks from now. The USPS advisory that Petitioners cite to in their Opposition to the Preliminary Objections is nearly a month old and involves packages, not election mail; the unsupported allegation that “*residents in other parts of the country* ‘are experiencing delays in their mail delivery service’” because of COVID-19 similarly supports no conclusions about what first class mail delivery times in Pennsylvania will be during the last week of May. Pet. ¶ 50 (emphasis added).¹⁰

applications a day); Press Release, Philadelphia City Commissioners’ Chairwoman Lisa Deeley Calls on Governor Wolf and the Legislature to Extend Voted Ballot Return Deadline for the June 2nd Primary, <https://twitter.com/Elaijuh/status/1252298585808535552> (cited by Petitioners at Pet. ¶ 48, fn. 16) (“Staff of the Philadelphia Board of Election are being reassigned and a greater number of staff are being brought back to work to process the increased number of absentee and mail-in ballot applications.”). A third source, Senate testimony by three election officials, describes election management challenges in broad terms, but does not predict backlogs in any particular county and does not mention the ballot return deadline at all.

¹⁰ Petitioners argue that a certified mail envelope was made “available for pickup” at a Harrisburg post office and that this is relevant to ballot delivery times. Opp. at 20. They subsequently provided evidence that the envelope may not have been held at the post office after all. Supp. Decl. of K. Glick. Even if USPS held a certified mail envelope – presumably because no one was available at the delivery location to sign for it – this anecdote has no relevance to ballots, which should not be delivered by certified mail.

Finally, Petitioners state that “contrary to Respondents’ assertions, there is nothing speculative about Pennsylvanians’ ‘health concerns about voting in person.’” Opp. at 6. Respondents did not, of course, suggest that Pennsylvanians’ health concerns are speculative. Instead, Respondents stated that Petitioners did not properly allege that those concerns created a constitutional injury.¹¹ Petitioners have not shown that that statement is incorrect.

Petitioners have not carried their “heavy burden” to overcome the “strong” “presumption that legislative enactments are constitutional,” *Working Families Party*, 209 A.3d at 279, nor do their allegations rise to the level of “clear, palpable and plain” constitutional violations. *Yocum*, 161 A.3d at 238; *see also Working Families Party*, 209 A.3d at 279. Accordingly, because Petitioners’ constitutional claims are legally insufficient, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

B. The Court Should Dismiss the Petition Because Petitioners’ Claims Are Not Justiciable

Petitioners’ claims present two justiciability issues: standing and ripeness. First, Petitioners lack standing to bring their claims. To establish standing to seek

¹¹ *See* Preliminary Objections at 3 (“Petitioners hypothesize that an ‘as applied’ constitutional violation will arise from some combination of factors related to the current COVID-19 crisis, such as increased numbers of absentee and mail-in ballot applications, delayed application processing by county boards of elections, slow service by the U.S. Postal Service, and voters’ health concerns about voting in person.”).

relief from this Court, Petitioners must demonstrate that they are “aggrieved,” *i.e.*, that they have “a substantial, direct, and immediate interest in the matter.”

Markham v. Wolf, 136 A.3d 134, 140 (Pa. 2016). “[A]n individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). “[A]n interest is ‘immediate’ if the causal connection is not remote or speculative.” *Id.* (citation omitted).

Here, Petitioners’ interest is not “immediate” for the same reasons that they have not alleged a constitutional injury: Petitioners rely solely on speculation to support their assertion that otherwise timely votes will not arrive at county boards of elections by the received-by deadline (and that, faced with that reality, some voters will be forced to vote in-person). It is not, as Petitioners assert in their Opposition, a “guarantee” that the individual petitioner or members of the organizational petitioners will be adversely and unconstitutionally affected by the received-by deadline. Opp. at 12–14. Rather, “any possible harm to Petitioners is wholly contingent on future events,” namely whether county boards of election or mail carriers cause delays in the delivery of otherwise timely ballots. *Pittsburgh Palisades Park*, 888 A.2d at 660.

Petitioners contend that Respondents’ standing argument would require Petitioners to “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)[.]” Opp. at 15. Not so. Petitioners simply must demonstrate *concretely* that the COVID-19 emergency is going to cause a breakdown in the delivery of ballots. But here, three weeks before the primary election and two weeks before the deadline for absentee and mail-in ballot applications, Petitioners have done nothing more than speculate about what the future might hold. “[A]s Petitioners do not offer that [the received-by requirement] has harmed them or will harm them in any way that is not remote or speculative, they fail to demonstrate that they have an immediate interest,” as is required for standing. *Pittsburgh Palisades Park*, 888 A.2d at 660 (citation omitted).

Second, Petitioners’ claims are not justiciable on ripeness grounds. Like standing, the principle of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010). Unlike standing, however, ripeness “also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). As discussed above, Petitioners allege only that the COVID-19 crisis has created an environment where bottlenecks *may* occur at one or more

points during the balloting process. But Petitioners do not allege facts sufficient to show that the individual petitioner or any of the organizational petitioners' members are likely to suffer a constitutional deprivation as a result of these yet-to-be-identified future bottlenecks.

Beyond the speculative nature of Petitioners' claims, at this juncture the "relevant facts are not sufficiently developed to permit judicial resolution of the dispute," making Petitioners' claims unripe. *Id.* Respondents **do not** contend, as Petitioners assert, 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." Opp. at 10. Instead, Respondents suggest only that Petitioners must offer facts in support of their claims, not just speculation about potential mail delays and prospective backlogs of ballot applications.¹²

Accordingly, because Petitioners have not satisfied the requirements for standing and because their claims are not ripe, Respondents respectfully request that this Court sustain their second Preliminary Objection and dismiss the Petition.

¹² The mere existence of a statute of limitations cannot, as Petitioners contend, make Petitioners' claims justiciable. Opp. at 11. Ripeness is contingent on an actual controversy and reasonably developed facts, not the presence or absence of potential procedural hurdles.

C. The Court Should Dismiss the Petition for Nonjoinder of an Indispensable Party

The county boards of election are indispensable parties to this action. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *see also CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that Petitioners seek an injunction that would write into existence *new law* and compel *affirmative action* by the county boards of election, by requiring the boards to adopt new standards and procedures in order to count certain ballots received up to a week after the June 2 primary. *See* Pet. at p. 62 (Prayer for Relief d.1–4). Indeed, at least a portion of the requested injunction

would require county boards of election to make *subjective determinations* about “indicia that [a] ballot was mailed by the voter on or before the day of the primary or general election.” See Pet. at p. 62 (Prayer for Relief d.4). As in *CRY, Inc. v. Mill Serv., Inc.*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioners’ requested relief will require cooperation and affirmative steps from the county boards of elections.

Additionally, Petitioners’ claims hinge largely on their expectation that the county boards of elections will not be able to timely process absentee and mail-in ballots because of COVID-19: “[E]lections are not ‘equal’ when similarly situated citizens who timely request absentee and mail-in ballots may or may not have their votes counted based on factors outside their control, such as variation in mail-delivery schedules across the Commonwealth or *application-processing speeds at different county elections boards.*” Pet., ¶ 5 (emphasis added); see also, e.g., Pet., ¶¶ 3; 19; 25–27; 33; 31; 36; 47; 55, 83, 118, 153. Because Petitioners allege that the county boards of election will be at least partially responsible for violating the Pennsylvania Constitution, “justice [cannot] be afforded without violating the due process rights of’ the counties. *DeCoatsworth*, 639 A.2d at 797; see also *CRY*,

640 A.2d at 376 (party was indispensable where it was accused of “misfeasance and malfeasance”).

Petitioners contend that *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953 (Pa. 1981), establishes that not all affected parties are indispensable parties. In *Kline*, the plaintiff school district sought to compel various state officials to calculate the income valuation of that district in accordance with state funding statutes; at issue was whether all the other school districts of the Commonwealth were indispensable parties to the action—given that the recalculation of one school district’s valuation might affect the calculation of the other districts’ valuation. *Id.* at 955–56. The Court held that the other school districts were not indispensable because their “right of a correct computation . . . [wa]s not interlocked with appellant [school district]’s right to a correct computation[.]” *Id.* at 958. Thus, the Court held that any “ripple effect” that might affect the other school districts was not sufficient to make them indispensable. *Id.*; *see also id.* (“Inasmuch as there is no such averment, there can be no assumption that a recalculation of Mechanicsburg’s subsidy will affect that which is received by any other unit.”).

Here, however, the rights of the county boards of election *are* interlocked with the rights of Respondents. If the Petitioners’ relief is granted, the county boards of elections’ responsibilities will change immediately, and they will have to take affirmative action over the next few weeks in accordance with those

responsibilities. Granting Petitioners' relief would *directly* require action by the county boards of election, rather than doing so by "ripple effect." *Id.*

Petitioners' reliance on *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. Ct. 2007), is similarly misplaced. There, the court held that the county boards of elections were not indispensable in a challenge to the Commonwealth's use of Direct Recording Electronic voting systems because Petitioners "d[id] not seek redress from the fifty-six counties and, because the November 2006 election ha[d] passed[.]" *Id.* at 44. Additionally, the Court emphasized that "the counties must be prepared for [the] possibility" that the at-issue voting systems could be decertified by the Department of State. *Id.* Here, however, the election is still forthcoming and Petitioners explicitly seek relief from the county boards of election. Moreover, there is no reason that the county boards of election should expect that, notwithstanding the requirements of Act 77, they will have to create new procedures to implement new statutory deadlines for absentee and mail-in balloting weeks before the primary.

Lastly, Petitioners suggest that requiring joinder of the county boards of elections here would open Pandora's box, resulting in a *de facto* requirement that "individuals in all future cases challenging statutes or government policy as unconstitutional would systematically need to effectuate service on dozens, if not thousands, of government officials across Pennsylvania." *Opp.* at 19. This

exaggeration is a red herring. Here, Petitioners must join the county boards of election because they both seek affirmative relief from all of the counties and accuse all of the boards—without distinguishing amongst them—of unconstitutional conduct. The counties are entitled to defend themselves from this allegation and, if the Court decides that a Constitutional violation is taking place, to have a say in the fashioning of relief. Thus, the county boards of elections referenced by the Petitioners are necessary parties to this litigation.

VII. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court sustain the Preliminary Objections and enter an order dismissing the Petition for Review.

Respectfully submitted,

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Dated: May 12, 2020

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: May 12, 2020

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