

<p>Melinda Delisle; Jacques Delisle; Adam Delisle; Bryan Irvin; Charles Cella; Deborah Cella; Mary Cay Curran; Eliza Hardy Jones; Krista Nelson; Eileen McGovern; Cedric Hardy,</p> <p style="text-align: center;">Petitioners</p> <p>v.</p> <p>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,</p> <p style="text-align: center;">Respondents</p>	<p style="text-align: center;">IN THE SUPREME COURT OF PENNSYLVANIA</p> <p style="text-align: center;">No. 95 MM 2020</p>
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**MOTION TO INTERVENE
BY JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE
AND JAKE CORMAN, MAJORITY LEADER
OF THE PENNSYLVANIA SENATE**

Proposed Intervenors, Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore and Jake Corman, Senate Majority Leader (collectively, “Proposed Intervenors”), by and through the undersigned counsel, respectfully request to intervene as respondents in the above-captioned proceeding, pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

Senators Scarnati and Corman are duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.

In support of this motion, Proposed Intervenors submit the accompanying Memorandum of Law. Additionally, Proposed Intervenors submit their proposed preliminary objections to Petitioner's pleading, attached as Exhibit A, as well as a supporting Memorandum of Law.

WHEREFORE, Proposed Intervenors respectfully requests that the Court GRANT this Motion to Intervene and permit the Proposed Intervenors to intervene as respondents in this proceeding.

Dated: May 28, 2020

Respectfully submitted,
Obermayer Rebmann Maxwell & Hippel LLP

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EXHIBIT A

<p>Melinda Delisle; Jacques Delisle; Adam Delisle; Bryan Irvin; Charles Cella; Deborah Cella; Mary Cay Curran; Eliza Hardy Jones; Krista Nelson; Eileen McGovern; Cedric Hardy, Petitioners</p> <p>v.</p> <p>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, and</p> <p>Senator Joseph B. Scarnati, III, President Pro Tempore; and Senator Jake Corman, Senate Majority Leader, Proposed Intervenor Respondents</p>	<p>IN THE SUPREME COURT OF PENNSYLVANIA</p> <p>No. 95 MM 2020</p>
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**PRELIMINARY OBJECTIONS OF INTERVENOR RESPONDENTS,
JOSEPH B. SCARNATI, III, PRESIDENT PRO TEMPORE OF THE
PENNSYLVANIA SENATE,
AND JAKE CORMAN, MAJORITY LEADER
OF THE PENNSYLVANIA SENATE**

Intervenor Respondents, Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, by and through the undersigned counsel, object preliminarily to Petitioners’ petition for declaratory

and injunctive relief pursuant to Pa.R.C.P. 106 and 1028(a)(1),¹ for the reasons set forth below:

1. Petitioners commenced this case in the Supreme Court as an original jurisdiction matter.
2. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.
3. Pa.R.C.P. 1028(a)(1) authorizes a party to file a preliminary objection for lack of subject matter jurisdiction.
4. Petitioners seek relief from the “received-by” deadline for the delivery of mail-in and absentee ballots on Election Day for the duration of the COVID-19 pandemic. Petitioners allege that the “received-by” deadline burdens their right to vote in violation of the Pennsylvania Constitution’s Free and Equal Elections Clause, Art. 1, §5; the Equal Protection Guarantees, Art. 1, §26 and §1.

Lack of Standing Due to Speculative Nature of Claims

5. Petitioners do not have standing, because the harm they allege is speculative, notwithstanding their predictions based on the affidavit of Deputy Secretary Jonathan Marks.
6. Petitioners do not have standing to seek relief concerning the received-by deadline for absentee ballots, because all of the petitioners applied for mail-in ballots, and none applied for absentee ballots.

¹ Senators Scarnati and Corman are duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.

7. To establish standing, a plaintiff must “have a direct interest in the subject-matter of the particular litigation.” *See Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994 (Pa. 2002) (quoting *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269 (Pa. 1975)).

8. Petitioner Melinda DeLisle (Montgomery County) applied for a mail-in ballot for the Democratic primary but received a mail-in ballot for the Republican primary. She has not been able to speak with anyone at the Montgomery County Board of Elections. She does not aver that she is unwilling or unable to vote a provisional ballot on Election Day, if necessary.

9. Petitioner Jacques DeLisle (Montgomery County) applied for a mail-in ballot, but it has not yet been mailed to him. He does not aver that he is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with his county election officials.

10. Petitioner Adam DeLisle’s (Montgomery County) mail-in ballot was mailed to him on May 15, but it has not been delivered. He does not aver that he is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with his county election officials.

11. Petitioner Bryan Irwin’s (Delaware County) mail-in ballot has not been mailed to him yet. He does not aver that he is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with his county election officials.

12. Petitioner Charles Cella's (Delaware County) mail-in ballot has not been delivered and may not have been mailed to him yet. He does not aver that he is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with his county election officials.

13. Petitioner Deborah Cella's (Delaware County) mail-in ballot has not been mailed to her yet. She does not aver that she is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with her county election officials.

14. Petitioner Mary Curran's (Delaware County) mail in ballot has not been delivered and may not have been mailed to her yet. She does not aver that she is unwilling or unable to cast mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with her county election officials.

15. Petitioner Eliza Jones' (Philadelphia County) application for a mail-in ballot was apparently erroneously denied, and she has not been able to speak with anyone at the Philadelphia County Board of Elections. She avers that she is immunocompromised, but she does not aver that she is unwilling or unable to vote a provisional ballot on Election Day, if necessary.

16. Petitioner Krista Nelson's (Philadelphia County) mail-in ballot has not been delivered to her. She does not aver that she is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with her county election officials.

17. Petitioner Eileen McGovern's (Philadelphia County) has not been delivered to her yet. She does not aver that she is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with her county election officials.

18. Petitioner Cedric Hardy's (Philadelphia County) mail-in ballot has not been delivered to him yet. He does not aver that he is unwilling or unable to cast a mail-in ballot in person or vote a provisional ballot on Election Day, if necessary. Petitioner has not indicated any attempt at follow up contacts with his county election officials.

19. Petitioners assume they will not receive mail-in ballots in time to vote them by mail, because of the backlogs cited in Deputy Secretary Marks' affidavit. However, Deputy Secretary Marks' affidavit does not endorse that conclusion.

20. Assuming, for the sake of argument only, that petitioners prove to be correct, and they will not receive their ballots in time to vote by mail, they offer no reason to believe that the requested one-week extension will provide effective relief.

21. Petitioners all aver that they do not wish to vote in person because of the risk that polling places will be crowded and unhealthy. That fear is speculative and is not supported by Deputy Secretary Marks' affidavit. There is no reason to believe that polling places cannot be made as safe as grocery stores and other places of business that petitioners may visit.

22. Indeed, on May 27, 2020, this Court ended the statewide judicial emergency, effective June 1, 2020 – the day before the June 2, 2020 primary.

23. None of the petitioners aver that they maintain strict self-quarantine and avoid all places of business. None of them state that they positively will not vote in person under any circumstances due to fear of exposure to COVID-19.

24. Finally, petitioners seek statewide relief, but their allegations of harm pertain only to Montgomery County, Delaware County and Philadelphia County. They fail to allege actual, direct harm in any other counties.

25. Because future speculative fear is not a sufficiently “substantial interest” to confer standing to the individual petitioner, *see Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (holding that a party must establish “a substantial interest in the subject matter of the litigation” to be granted standing), the individual petitioner should be dismissed from this lawsuit.

**Lack of Jurisdiction due to Failure to Join Boards of Election
of Montgomery, Delaware, Philadelphia Counties**

26. Additionally, petitioners failed to include indispensable parties in their suit. Petitioners themselves acknowledge that county election boards have authority over the issuance, receipt and counting of mail-in ballots. Pet. ¶¶ 29, 30. A ruling against the Commonwealth of Pennsylvania impacts the statutory duties of county election officials and their presence is thus necessary to grant effective relief. Pa. R. Civ. P. 1032(b); *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955). See also the Memorandum Opinion of Judge Leavitt in *Crossey et al. v. Boockvar et al.*, 266 MD 2020, dated May 28, 2020 (dismissing for failure to join county election boards because they were indispensable parties).

WHEREFORE, Senators Joseph B. Scarnati, III and Jake Corman respectfully request that this Court dismiss Petitioners’ petition for declaratory and injunctive relief.

Dated: _____, 2020

Respectfully castted,

Obermayer Rebmann Maxwell & Hippel LLP

By: _____

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CERTIFICATE OF SERVICE

I, _____, certify that on the date set forth below, I caused a true and correct copy of the Preliminary Objections of Senators Joseph B. Scarnati, III and Jake Corman, to be served on counsel of record via email, as follows:

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<p>Melinda Delisle; Jacques Delisle; Adam Delisle; Bryan Irvin; Charles Cella; Deborah Cella; Mary Cay Curran; Eliza Hardy Jones; Krista Nelson; Eileen McGovern; Cedric Hardy, Petitioners</p> <p>v.</p> <p>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, and</p> <p>Senator Joseph B. Scarnati, III, President Pro Tempore; and Senator Jake Corman, Senate Majority Leader, Proposed Intervenor Respondents</p>	<p>IN THE SUPREME COURT OF PENNSYLVANIA</p> <p>No. 95 MM 2020</p>
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**MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS OF
INTERVENOR RESPONDENTS, JOSEPH B. SCARNATI, III,
PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE,
AND JAKE CORMAN, MAJORITY LEADER
OF THE PENNSYLVANIA SENATE**

Intervenor Respondents, Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader,² by and through the

² Senators Scarnati and Corman are duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.

undersigned counsel, respectfully cast this memorandum of law in support of their preliminary objections to plaintiffs' petition for declaratory and injunctive relief pursuant to Pa.R.C.P. 106 and 1028(a)(1).

This case was commenced in the Supreme Court as an original jurisdiction matter. Pa.R.A.P. 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

Pa.R.C.P. 1028(a)(1) authorizes a party to file a preliminary objection for lack of subject matter jurisdiction.

Petitioners seek relief from the "received-by" deadline for the delivery of mail-in and absentee ballots on Election Day for the duration of the COVID-19 pandemic. Petitioners allege that the "received-by" deadline burdens their right to vote in violation of: Pennsylvania's Free and Equal Elections Clause, Art. I, §5; the Equal Protections Clause and the Due Process Clause of the Pennsylvania Constitution, Art. I, §26 and §1.

Petitioners Lack Standing due the Speculative Nature of their Claims

None of the petitioners alleges harm in connection with the general election, which is more than four months away.

With respect to the primary elections in June, none of the petitioners applied for absentee ballots. They all applied exclusively for mail-in ballots. Accordingly, they lack standing to seek relief concerning the received-by deadline for absentee ballots in the primaries.

As for the deadline for voting mail-in ballots, Petitioners assume they will not receive mail-in ballots in time to vote them by mail, because of the backlogs cited

in Deputy Secretary Marks' affidavit. However, Deputy Secretary Marks does not endorse that conclusion.

Assuming, for the sake of argument only, that petitioners prove correct, and they will not receive their ballots in time to vote by mail, they offer no reason to believe that the requested one-week extension will provide effective relief.

Petitioners all aver that they do not wish to vote in person because of the risk that polling places will be crowded and unsafe. That fear also is not supported by Deputy Secretary Marks' affidavit. There is no reason to believe that polling places cannot be made as safe as grocery stores and other places of business that petitioners may visit.

None of the petitioners aver that they maintain strict self-quarantine and avoid all places of business. None of them state that they positively will not vote in person under any circumstances due to fear of exposure to COVID-19.

Finally, petitioners seek statewide relief, but their allegations of harm pertain only to Montgomery County, Delaware County and Philadelphia County. They fail to allege actual, direct harm in any other counties.

To establish standing, a plaintiff must "have a direct interest in the subject-matter of the particular litigation." *See Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994 (Pa. 2002) (quoting *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269 (Pa. 1975)).

Because future speculative fear is not a sufficiently "substantial interest" to confer standing to the individual petitioner, *see Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (holding that a party must establish "a substantial interest in the subject matter of the litigation" to be granted standing), the individual petitioner should be dismissed from this lawsuit.

**Petitioners Failed To Sue The County Boards of Elections,
Which Are Indispensable Parties.**

Petitioners failed to sue the county boards of elections. As explained below, the county election boards are indispensable. The failure to join indispensable parties is an additional reason this Court must dismiss the Petitioners' claims.

Pennsylvania courts lack jurisdiction when an indispensable party is not joined in the litigation. Pa. R. Civ. P. 1032(b). An indispensable party is one whose "rights are so connected with the claims of the litigants that no decree can be made without impairing those rights." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003); accord *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975). With an indispensable party missing, the court's judgment and decree is rendered null and void because the court lacks jurisdiction to enter the order. *Id.*; see *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) ("The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief."). See also the Memorandum Opinion of Judge Leavitt in *Crossey et al. v. Boockvar et al.*, 266 MD 2020, dated May 28, 2020 (dismissing for failure to join county election boards because they were indispensable parties).

In declaratory judgment actions, public officers charged with enforcing a challenged statute are indispensable. See *City of Philadelphia* at 583 (favorably quoting the Wisconsin's Supreme Court's interpretation of language "identical" to Pennsylvania's Declaratory Judgment Act as to who constitutes an indispensable party). Because the county boards of elections are responsible for enforcing the challenged provisions of Act 77, they are indispensable parties and, therefore, should have been joined in this litigation.

**County Boards of Elections Have a Duty to Enforce the
Received-By Deadline and the Prohibition of Third-
Party Ballot Delivery Assistance.**

County boards of elections are indispensable because Pennsylvania law vests them with jurisdiction over primary and general elections. *See* 25 P.S. § 2641(a). In particular, they have duties concerning absentee and mail-in ballots that would be altered by the relief Petitioners seek.

To begin, county elections boards pay for the primary and general elections. *Id.* § 2645(a). Furthermore, the boards issue, receive, and store absentee and mail-in ballots. *Id.* §§ 3146.2b, 3146.6(c), 3146.8, 3150.12b, 3150.15, 3150.16(c). They also accept or discard the ballots that are delivered by electors in person as well as ballots that come in right at or right after the 8 pm deadline. *Id.* The county elections boards receive, manually review, and process the applications for absentee ballots and mail-in election request forms. *Id.* §§. 3146.2a(a.3), 3150.12b. The county elections boards determine whether an applicant is eligible for an absentee or a mail-in ballot, *id.* § 3146.2a(a.3)(1)-(3); § 3150.12b(a), (a)(1), and if requests for absentee or mail-in ballots were timely received. *Id.* § 3146.2a(a) (vesting local boards of elections with the authority to receive *absentee* ballot requests earlier than 50 days if operationally needed, and stating that the electoral boards must process requests if received by 5 pm one week before Election Day); *id.* § 3150.12b(b-c) (stating that local county boards must process *mail-in* ballot requests if received by 5 pm a week before Election Day, and if the request is rejected, the county board must state its reasons for rejecting it).

County elections boards also issue regulations and instructions to district elections officers. *Id.* § 2642(f)-(g).³ The district election officers, in turn, are authorized to “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.” *Id.* § 3150.16(b)(1).

Importantly, under Pennsylvania election law, the county boards of elections, and not the Secretary, “investigate[] election frauds, irregularities and violations of this act, and [reports] all suspicious circumstances to the district attorney.” *Id.* § 2642(i); *see Marks v. Stinson*, 19 F.3d 873, 877 (3rd Cir. 1994) (stating that the county board of elections rejected approximately 400 absentee ballots because they were cast by unregistered voters).

Pennsylvania statutes also impose duties on the county boards of elections that must be completed *after* Election Day and are tied to specific deadlines. For example, by statute, the county elections boards must begin the computation of the returns no later than three days after the election and must continue until completed no later than the eighth day following Election Day. 25 P.S. § 3416.8(g)(2). The county elections boards must certify the results to the Secretary within 20 days of the election. *Id.* § 2642(k).

If there is a discrepancy in the returns, the county elections board must recanvass and recount, *id.* §3154(e), and provide returns to the Secretary by the

³ 25 P.S. § 2642(g) gives each county board of elections discretion “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.”

seventh day after the election. *Id.* § 31554(f).⁴ In addition, the board must hear and resolve challenges. If a ballot lacks sufficient proof of identification, a voter has until the sixth day after the election to furnish proof to the county elections board, in which case the ballot must be counted. *Id.* §3146.8(h). If ballots are challenged, the county elections board must conduct a hearing on every challenged ballot within 5 days after the challenge, with notice to the voter where possible. *Id.* §3146.8(g). Such hearings can be held as late as the 13th day after the election, leaving only seven days for a disappointed voter or challenger to seek judicial relief, before the returns must be certified.

Petitioners are asking this Court to order relief that affects the entire statutory post-election validation and certification process. Normally, the county elections board must count civilian and military absentee and mail-in ballots received by 8 pm on Election Day. The only absentee ballots they must accept and count after that deadline are military-overseas ballots, *Id.* §3511, and a few other limited exceptions. Petitioners' requested remedy of permitting seven extra days to receive civilian absentee and mail-in ballots, *see* Petitioners' Emergency Application, Prayer for Relief, will put the boards at risk of missing mandatory deadlines imposed by statute.

Based on the duties placed on county boards of elections by Pennsylvania law, the boards have a vested interest related to Petitioners' claims that pertain to board duties to enforce the received-by deadline and the prohibition against ballot delivery assistance. *See Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953,

⁴ This is because, in the case of a "photo-finish," the Secretary must call for a recount within 9 days after an election. 25 P.S. § 3154(g)(2).

956-957 (Pa. 1981) (stating the factors to be considered in determining whether a person is indispensable).

**The Rights And Duties Of County Boards Of Elections
Are Essential To This Case.**

The county boards of elections, whose duties and obligations legally require them to enforce provisions of the Pennsylvania Election Code, are also indispensable because they are “interlocked” with Petitioners’ claims and their requested relief. This is demonstrated by Petitioners’ own pleadings. *See* Petitioners’ Petition for Declaratory and Injunctive Relief, ¶35 (alleging that “[t]he demand for mail ballots is already testing the limits of some counties: in Delaware County, for example, election officials have begun ‘falling behind on processing mail-in ballot requests.’”); ¶37 (alleging that Pennsylvania voters can apply for absentee and mail-in ballots if their applications are received by 5 pm on the Tuesday before Election Day, citing 25 P.S. §§ 3146.2a(a), 3150.12a(a), and that Pennsylvania officials must mail absentee and mail-in ballots to a qualified absentee or mail-in voter “within forty-eight hours after approval of their application,” citing *id.* §§ 3146.5(a), 3150.15.); and ¶38 (alleging that County boards of elections have seven days after Election Day to examine provisional ballots, citing 25 P.S. § 3050(a.4)(4), and that challenges and appeals concerning provisional ballots can last another nine days, citing *id.* § 3050(a.4)(4)(ii), (v), and that Pennsylvania officials have until 20 days after the election to certify the results to the Secretary, citing *id.* § 2642(k)). In each instance, the referenced statutory cite concerns the duties of county elections boards, not the Secretary.

Petitioners’ prayer for relief is also interlocked with the county elections boards. Though it does not expressly refer to county elections boards, the requested relief would impose several new duties and obligations on the county

boards of elections. *City of Philadelphia*, 838 A.2d at 583; *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988). Chief among them would be the duty of distinguishing between late ballots and timely ballots based on postmarks and postal bar codes, as well as canvassing additional ballots and hearing more challenges within the 21-day period for certifying the returns.

Enjoining *only* the Secretary from enforcing Pennsylvania’s statutory received-by deadline for absentee ballots and mail-in ballots will not redress Petitioners’ alleged injuries. *See generally Jacobson v. Fla. Sec’y*, No. 19-14552, 2020 U.S. App. LEXIS 13714, *32-35 (11th Cir. April 29, 2020). This is because a decree against the Secretary would have no effect on the county boards of elections. *See id.* at *33; *see also Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (“Redressability requires that the court be able to afford relief through the exercise of its power, not through the persuasive or even awe-inspiring effect of the opinion explaining the exercise of its power.”) (Scalia, J., concurring in part, concurring in judgment). As explained above, the county boards—not the Secretary—have jurisdiction over primary and general elections. 25 P.S. § 2641(a).

If Petitioners’ request for relief against unnamed “others” is intended to encompass county elections boards, that would further *confirm* the county boards’ indispensability – but that mere reference is insufficient to give this Court jurisdiction to hear Petitioners’ claims. Neither county elections boards nor local election officers are employees of the Secretary. Rather, the counties pay the county election officials. *Id.* § 2645(a). County boards of elections are composed of the county commissioners serving *ex officio* and members of the county body that perform legislative functions, unless the county charter provides for the appointment of electoral board members. *Id.* § 2641(b). The local county board must have minority representation. *Id.* The President Judge of the Court of

Common Pleas appoints members to the county elections board when one of the members is campaigning for public office, or the President Judge will appoint the entire electoral board when there is a ballot question concerning the county's Home Charter. *Id.* § 2641(c). All in all, the county boards of elections are not answerable to the Secretary; rather, they are answerable to the county electors. *Cf. Jacobson*, No. 19-14552, 2020 U.S. App. LEXIS 13714, *31-32 (stating that, for similar reasons, plaintiffs' injuries were not traceable to the Florida Secretary of State but rather to the Florida county electoral boards).

As the above discussion makes abundantly clear, both Petitioners' claims and Petitioners' proposed relief are interlocked with the duties and obligations of the local county boards of elections. Furthermore, the county boards of elections are not agents or employees of the Secretary, such that a judgment against the Secretary would bind them. Therefore, the county boards of elections are indispensable parties to this case. Accordingly, because the county elections boards have not been joined, the Commonwealth Court lacks jurisdiction to hear the Petition, and the case should be dismissed.

CONCLUSION

The plaintiffs' petition for declaratory and injunctive relief should be dismissed for all the reasons set forth above.

Dated: _____, 2020

Respectfully casted,

Obermayer Rebmann Maxwell & Hippel
LLP

By: _____

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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO INTERVENE BY JOSEPH B. SCARNATI III,
PRESIDENT PRO TEMPORE, AND JAKE CORMAN, MAJORITY LEADER OF THE
PENNSYLVANIA SENATE**

Proposed Intervenors, Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader (“Applicants”), by and through the undersigned counsel, respectfully submit this Memorandum of Law in support of their motion to intervene as respondents in the above-captioned proceeding, pursuant to Rule 2327 of the Pennsylvania Rules of Civil Procedure.

Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Pennsylvania Senate as a whole.

In addition to this Memorandum of Law, Applicants submit their proposed Preliminary Objections to Petitioners' pleading, attached as Exhibit A, as well as a supporting Memorandum of Law.

BASES FOR PROPOSED INTERVENORS' APPLICATION

1. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

2. Pennsylvania Rule of Civil Procedure 2327 allows a person not named as a party to seek leave to intervene by filing an application with the court.

3. Proposed Intervenors seek to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(4), which states, in pertinent part, as follows:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . .

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327.

4. Proposed Intervenors meet the requirements for intervention under Pa.R.C.P. 2327(4). They seek to protect the Pennsylvania Senate's exclusive constitutional rights, together with the Pennsylvania House of Representatives, of determining the times, places, and manner of holding elections under Art. 1, §4 of the U.S. Constitution and Art. 2, §1 of the Pennsylvania Constitution; of suspending laws under Art. 1, §12 of the Pennsylvania Constitution which may be adversely affected or usurped by Petitioners' requested relief, as described below.

5. Petitioners seek the suspension of certain provisions of the Election Code concerning deadlines for the delivery, canvassing, and counting of absentee and mail-in ballots for the

duration of the COVID-19 pandemic. Such relief would be contrary to Article I, §12 of the Pennsylvania Constitution, which states that “no power of suspending laws shall be exercised unless by the legislature.”

6. Petitioners further seek an order imposing new timeframes for the delivery, canvassing, and counting of absentee and mail-in ballots for the duration of the COVID-19 pandemic. Such an order would be contrary to Art. 2, §1 of the Pennsylvania Constitution, which vests the legislative power of the Commonwealth in the General Assembly, and Art I, §4 of the United States Constitution (the “Elections Clause”) which reserves to state legislatures and Congress the power of determining the times, places, and manner of holding elections for Senators and Representatives to Congress.

7. The United States District Court for the Middle District of Pennsylvania in *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D. Pa. 2018), recognized that only the General Assembly has standing to assert its prerogatives under the Elections Clause.¹ *See also Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) (granting intervention in a redistricting case to the Minnesota Senate because the district court orders directly impacted the Senate).

8. Petitioners seek a declaration that certain provisions of Act 77 of 2019 that relate to absentee and mail-in ballots burden the right to vote in violation of Art. 1, § 5 of the Pennsylvania Constitution. Proposed Intervenors wish to be heard on the question whether such a declaration would void the entire Act and deprive voters of the ability to vote by absentee or mail-in ballot by operation of the non-severability provision in §11 of the Act.

¹ Upon information and belief, the Speaker of the Pennsylvania House of Representatives is moving to intervene this same or the following day, placing the entire legislative branch before this court.

9. Proposed Intervenors seek to prevent a judicial determination that any provision of Act 77 of 2019 is invalid and also to prevent the disruption of the statutory scheme for voting in Pennsylvania's 2020 primary and general elections.

10. If the requirements for intervention are met, a motion to intervene shall be granted, unless the motion to intervene is unduly delayed, the interest of the proposed intervenor is already adequately represented, or the intervenor does not take the litigation as he finds it. Pa.R.C.P. 2329; *Appeal of the Municipality of Penn Hills*, 519 Pa. 164, 546 A.2d 50, 52 (1988).

11. The Proposed Intervenors have filed a motion to intervene promptly.

12. On information and belief, the named respondents do not take the same position as the Proposed Intervenors and will not adequately represent their interests.

13. Proposed Intervenors seek to intervene as respondents. They will assert defenses to petitioners' claims but will not raise claims against the named respondents that the petitioners have not raised.

14. Petitioners' case rests mainly on the effects of the pandemic on voting behavior. The Proposed Intervenors believe that the alleged burdens on the right to vote are not the result of the laws themselves, but are the result of the voters' and poll workers' reactions to the pandemic.

15. The relief Petitioners seek is not limited to the named petitioners but would affect all voters statewide, whether or not they are similarly situated or similarly burdened.

16. In such a situation, the proper mechanism for adjusting rights is legislative. The General Assembly has already taken steps to give voters more time to apply for, receive, and cast their mail-in ballots by postponing the primary elections to June 2, 2020. See Act 12 of 2020, §1804-B(a).

17. If allowed to intervene, Proposed Intervenors intend to file the attached preliminary objections, objecting to the petitioners' standing and to the failure to join indispensable parties..

ARGUMENT

Because Petitioners suit affects three legal interests that are unique to the General Assembly and, in fact, diminishes the General Assembly's authority to exercise their legislative power, this Court should grant Proposed Intervenors' Application for Intervention. *See, e.g., Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Services*, 225 A.3d 902, 911 (Pa. Commw. 2020) (Leavitt, J.).

A. Legislative Standing Is Established When A Legislator Alleges A Deprivation Or Diminution Of Legislative Authority Or An Action Threatens A Legislator's Right To Vote.

In *Allegheny Reprod. Health Ctr.*, 225 A.3d at 904, 18 members of the Pennsylvania Senate and eight members of the Pennsylvania House of Representatives—hardly a majority—applied to this Court for intervention. This Court found that the House and Senate members satisfied the requirements of Pa.R.C.P. 2327(4) and were granted intervention. *Id.* at 905. There, petitioners requested that the Commonwealth Court declare an appropriations provision of Pennsylvania's Abortion Control Act unconstitutional and enjoin its enforcement. *See id.* at 905-06. The House and Senate members contended that this relief, if granted, would "limit their legislative power to appropriate funds...." *Id.* at 907. A single judge on the Commonwealth Court denied the intervention request, holding that the House and Senate members were not aggrieved because the General Assembly's interest in the statute ended when the statute was enacted. *See id.* The House and Senate members appealed to the full Commonwealth Court.

The Commonwealth Court reversed. In finding that the House and Senate members satisfied the intervention requirements, the Court reviewed the requirements to establish

legislative standing and determined that legislators can establish standing where there is a “discernible and palpable infringement on their authority as legislators ... [or in] actions alleging a diminution or deprivation of the legislator’s ... power or authority.” *Id.* at 909-10 (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 501 (Pa. 2009)). The Court acknowledged the Pennsylvania Supreme Court’s more recent holding that a legislator has standing “when a legislator’s direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, ... or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator....” *Id.* at 910 (quoting *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016)).

The Court then turned to the interest asserted by House and Senate members, which was that the relief sought by petitioners “could narrow [the proposed intervenors’] ability to exercise legislative power, particularly in the matter of appropriation.” *Id.* at 911 (citing Pa. Const. art. III, § 24). The Court agreed, stating that the petitioners’ case “related directly to the legislative power to appropriate.” *Id.* at 911. According to the Court, if the petitioners were to prevail, the effect “could bar the General Assembly from tying legislative strings to its appropriation of funds for the Medical Assistance program.” *Id.* at 912. The petitioners sought to “restrict the substance and form of appropriation bills ... [and] ... eliminate the ability of legislators to add conditional or incidental language to a general appropriation act....” *Id.* Accordingly, the Court held that the House and Senate members sought to “preserve their voting power...and their authority to appropriate Commonwealth funds, a key legislative duty.” *Id.* at 912-13. The House and Senate members, therefore, satisfied Pa.R.C.P. 2327(4) and were granted intervention. *Id.* at 913.

This is consistent with the Supreme Court's and Commonwealth Court's jurisprudence on legislative standing. The very first case in Pennsylvania to address legislative standing involved one legislator seeking to enjoin the Secretary of the Public Welfare and the State Treasurer from using a mental health facility. *Wilt v. Beal*, 363 A.2d 876, 878 (Pa. Commw. 1976). The legislator claimed standing as a taxpayer, and this Court dismissed his lawsuit for lack of standing. *Id.* at 881. The Court found that the plaintiff legislator lacked standing because the Court found "no connection between Wilt's status as a legislator and any constitutional provision alleged to have been breached by the defendants' actions." *Id.* No mention was made that it was necessary for the whole General Assembly to authorize the suit. Instead, when the Court declared the principles for legislators to achieve legislative standing, the Court held that legislators must show that the action they challenge diminishes or interferes with legislative functions under Pennsylvania's Constitution. *See id.*

Next, in *Zemprelli v. Daniels*, 436 A.2d 1165 (Pa. 1981), five members of the Pennsylvania Senate brought a *quo warranto* action seeking to remove a member from the Tax Equalization Board. *Id.* at 1166. The member's appointment to the board required a majority of the Senate to confirm. The objecting Senators said that the majority should be calculated from 50, not from total number of Senators then serving in office. *Id.* The Court held that these five members of the Senate – hardly a majority – had legislative standing because they claimed that their votes had been diluted on the basis that the board member was confirmed by a majority based on 48 Senators serving, not 50. *Id.* at 1167.

In *Fumo v. City of Philadelphia*, 972 A.2d 487 (Pa. 2009), six members of the General Assembly sought review of the issuance of a license to construct a casino on the Delaware River in Philadelphia. *Id.* at 490-91. The Supreme Court held that these six members of the General

Assembly—again, hardly a majority—had standing to challenge the issuance of the license because the General Assembly alone had the authority to issue the license. *Id.* at 491. In holding that the six legislators had standing, the Supreme Court of Pennsylvania ruled that “[t]he standing of a legislator [—singular—] or council member to bring a legal challenge has been recognized in limited instances ... to protect a legislator’s [—again, singular—] right to vote on legislation... [or] in actions alleging a diminution or deprivation of the legislator’s ... power or authority.” *Id.* at 501. Accordingly, the Court held that the six legislators had standing because they sought:

[R]edress for an alleged usurpation of their authority as members of the General Assembly; aim to vindicate a power that only the General Assembly allegedly has; and ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth’s submerged lands.

Id. at 502. Because the legislators’ claim concerned the maintenance of their vote and authority, the legislators had standing. *See id.* The full General Assembly was not required.

Finally, in *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), the Supreme Court of Pennsylvania denied standing to 4 legislators, not because the entire General Assembly did not sue, but because the legislators’ asserted injury did not impact their “ability to propose, vote on or enact legislation.” *Id.* at 137, 145.

The key for obtaining legislative standing in Pennsylvania, therefore, has been (1) to demonstrate that the legislator who is intervening has suffered or will suffer a deprivation or diminution of authority or (2) to protect a legislator’s right to vote. *See Fumo*, 972 A.2d at 501-02; *Markham*, 136 A.2d at 145. In neither the *quo warranto* cases nor the cases alleging a usurpation of authority has the Supreme Court of Pennsylvania or the Commonwealth Court required the presence or the authorization of the entire General Assembly to establish standing.

B. Proposed Intervenors Demonstrate That Petitioners' Requested Relief Will Diminish The Proposed Intervenors' Legislative Authority.

Proposed Intervenors have asserted that the relief sought by Petitioners would usurp or otherwise interfere with the following three legal interests:

- The federal constitution's grant of authority in the Pennsylvania General Assembly to enact laws concerning the times, places, and manner of elections. U.S. Const. art. I, § 4.
- The legislative power of the Pennsylvania General Assembly, a power granted to the General Assembly through Article Two, Section 1 of the Pennsylvania Constitution.
- The Pennsylvania Constitution's exclusive grant of authority to suspend laws in the Pennsylvania General Assembly, which would be usurped if enforcement of Act 77's absentee ballot received-by deadline is suspended. Pa. Const. art. 1, §12. Senate Mem. In Support of App for Intervention at ¶¶ 4-5.

Therefore, because Petitioners' proposed relief will diminish the General Assembly's three legal interests, this Court should grant intervention. *See Allegheny Reprod. Health Ctr.*, 225 A.3d at 911-13.

When evaluating whether the General Assembly's asserted interests satisfy Pa.R.C.P. 2327(4), this Court must not "confus[e] weakness on the merits with the absence of...standing." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015). This is because the analysis here is dependent upon the source and nature of the interest asserted, not on the merits of the claim. *See id.* (quoting and citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Additionally, the threshold to satisfy Pa.R.C.P. 2327(4) is lower than the threshold to establish standing. *See Allegheny Reprod. Health Ctr.*, 225 A.3d at 902.

II. PETITIONERS' LAWSUIT DIMINISHES SEVERAL LEGAL INTERESTS OF THE GENERAL ASSEMBLY.

A. The U.S. Constitution Grants Pennsylvania's General Assembly Wide Authority To Regulate And Administer Elections.

The U.S. Constitution vests Pennsylvania's legislature with the authority to enact laws concerning the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4; *In re Nomination of Driscoll*, 847 A.2d 44, 45 n.1 (Pa. 2004) (stating that a candidate for federal office must "abide by the election procedures in the Pennsylvania Election Code" because, unless altered by Congress, Pennsylvania's General Assembly prescribes the Times, Places and Manner of holding Elections for Senators and Representatives). This federal constitutional grant of authority provides state legislatures with "a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *In re Nomination of Driscoll*, 847 A.2d at 45 n.1 (quoting *U.S. v. Classic*, 313 U.S. 299, 311 (1941)). In interpreting the Elections Clause's Times, Places, and Manner provision, the U.S. Supreme Court has ruled:

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932).

The Pennsylvania legislature is, therefore, empowered to craft legislation regulating the administration of elections, including deadlines. *See In re Nomination of Driscoll*, 847 A.2d at 45 n.1; *see also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (three-judge court)

(“The Elections Clause, therefore, affirmatively grants rights to state legislatures...”) (citing *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015)).

Vesting the political branches of government with authority over elections makes sense because elections are “inherently political.” *In re Guzzardi*, 99 A.3d 381, 385 (Pa. 2014). In advocating for the Elections Clause, the Founders vested the state legislatures with primary authority over elections, which allowed “state legislatures to use their localized knowledge to prescribe election regulations in the first instance.” *See Agre v. Wolf*, 284 F. Supp. 3d 591, 595 (E.D. Pa. 2018) (three-judge court) (Smith, J.) (citing *The Federalist No. 59* (Alexander Hamilton)). “This essential legislative governance fosters orderly, efficient, and fair proceedings.” *In re Guzzardi*, 99 A.3d at 385. Legislatively enacted deadlines “ensure the orderly functioning of the ... election timetable so that those responsible will have sufficient time” to both prepare the ballot before general elections and canvass the returns after the election. *See id.* Legislatively crafted and enacted deadlines, therefore, require stability, uniformity, and clarity. *See id.* Court orders impacting legislatively enacted election deadlines risk ambiguity and inconsistency. *See id.* To avoid injecting instability and ambiguity into Pennsylvania’s elections calendar, this Court should use equity with restraint. *See id.* at 386; *see also Agre*, 284 F. Supp. 3d at 595 (“Notably, Hamilton made no reference to either state or federal courts when he identified only three ways that a discretionary power over elections could be reasonably modified and disposed.”) (internal quotation marks omitted).

Petitioners’ requested relief diminishes and encroaches on this federally granted investment of authority by creating instability in the carefully crafted administration of elections. *See Pet. Prayer for Relief*. In enacting Act 77, the Legislature permitted all Pennsylvania voters to vote by mail, but chose not to disrupt the election-related deadlines by extending the received-

by deadline beyond Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). Seeking to alter Act 77's carefully crafted received-by deadline and asking this Court to rewrite the legislation to compel state officials to accept ballots after 8 pm on Election Day diminishes the General Assembly's authority to enact a comprehensive elections code. *In re Nomination of Driscoll*, 847 A.2d at 45 n.1 (quoting *Classic*, 313 U.S. at 311); *see also Smiley*, 285 U.S. at 366.

B. Petitioners' Requested Relief Encroaches Upon The General Assembly's Authority To Craft Legislation.

Art. 2, §1 of the Pennsylvania Constitution vests the legislative power of the Commonwealth in the General Assembly, which consists of the House and the Senate. Similarly, Pennsylvania's Constitution vests the General Assembly with the exclusive authority to suspend laws. *See* Pa. Const. art. I, § 12.

The legislative power is defined as the power to make, repeal, *and alter* laws. *See Mt. Lebanon v. County Bd. of Elections*, 368 A.2d 648, 649 (Pa. 1977). Courts may not encroach upon the legislature's prerogative. *See id.* This means that although courts have the power to interpret laws, they cannot exercise legislative power by altering laws. *See id.* at 649-50; *see Watson v. Witkin*, 22 A.2d 17, 23 (Pa. 1941) (“[T]he duty of courts is to interpret laws, not to make them.”); *Applewhite v. Commonwealth*, 330 M.D. 2012, 2014 Pa. Commw. Unpub. LEXIS 379, *39 (Pa. Commw. April 28, 2014) (upholding grant of injunctive relief and stating that a trial court does not have the power to rewrite laws). Therefore, “no branch [of the government] should exercise the functions exclusively committed to another branch.” *Council 13 v. Commonwealth*, 986 A.2d 63, 74 (Pa. 2009). Accordingly, absent compelling evidence, the judiciary must exercise restraint from interfering with the rights and duties that are constitutionally vested in the General Assembly. *See Larson v. Pa. Turnpike Comm'n*, 490 A.2d 827, 830 (Pa. 1985) (“The judiciary must restrain itself from interference with the more political

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