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**Pro hac vice application forthcoming*

*Counsel for Proposed Intervenor-Respondents
Republican Party of Pennsylvania,
Republican National Committee, and
National Republican Congressional Committee*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired
Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis,
Director of the Bureau of Election
Services and Notaries,

Respondents.

No. 266 MD 2020

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents, the Republican Party of Pennsylvania,
Republican National Committee, and National Republican Congressional
Committee (collectively, “Republican Committees”), by and through undersigned

counsel, respectfully submit the following Application for Leave to Intervene as Respondents in this original jurisdiction matter under Pennsylvania Rules of Appellate Procedure 106, 123, and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, and aver the following in support thereof:

PRELIMINARY STATEMENT

The Republican Committees support and seek to uphold orderly free and fair elections for all Pennsylvanians and for all voters across the country.

For this reason, the Republican Committees, on behalf of themselves, their candidates, and their member voters, seek to intervene in this action. This case challenges the legality of several Pennsylvania laws that the General Assembly enacted to ensure the structure and integrity of the State's elections. Were the Court to declare these laws unconstitutional and enjoin their enforcement as Petitioners request, it would dramatically alter the rules governing Pennsylvania's upcoming primary and general elections in which the Republican Committees' supported candidates and member voters participate.

Under Pennsylvania's liberal intervention standard, the Republican Committees have a right to intervene in this case. Indeed, political parties have a recognized interest to assert and protect the rights of their members in upcoming elections and to protect their own agendas and resources from changes to validly enacted and commonsense election laws. Moreover, the Republican Committees

have made significant investments in support of Republican candidates up and down the ballot and on voter mobilization and education efforts in Pennsylvania for many past election cycles, and intend to do so again in 2020. They thus have a substantial and particularized interest in defending this action to preserve the structure of the competitive environment in which their supported candidates participate and to ensure that Pennsylvania carries out free and fair elections. No other party to this action represents these private interests, and therefore this timely application for intervention should be granted.

The Republican Committees, therefore, respectfully request that the Court grant their application to intervene as Respondents, and permit them to file the Preliminary Objections attached hereto.

I. BACKGROUND

A. The Republican Committees.

1. The Republican Party of Pennsylvania is a major political party, 25 P.S. § 2831(a), and the State committee for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The Republican Party of Pennsylvania on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works to accomplish this purpose by, among other things, devoting

substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania. The Republican Party of Pennsylvania has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2020. The Republican Party of Pennsylvania has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections in accordance with its validly enacted election laws.

2. The Republican National Committee (“RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters. The RNC has made significant contributions and expenditures in support of Republican candidates up and down the ballot and on mobilizing and educating voters in Pennsylvania in many past election cycles and intends to do so again in 2020. The RNC has a substantial and

particularized interest in ensuring that Pennsylvania carries out free and fair elections in accordance with its validly enacted election laws.

3. The National Republican Congressional Committee (“NRCC”) is the national congressional committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRCC’s mission is to elect Republican candidates to the U.S. House of Representatives from across the United States, including from Pennsylvania’s eighteen congressional districts. The NRCC works to accomplish its mission in Pennsylvania by, among other things, providing direct and indirect financial contributions and support to candidates and other Republican Party organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRCC has made significant contributions and expenditures in support of Republican House candidate and on mobilizing and educating voters in Pennsylvania in many past election cycles and intends to do so again in 2020. The NRCC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections in accordance with its validly enacted election laws.

B. Procedural history.

4. On April 22, Petitioners filed their Petition for Declaratory and Injunctive Relief (the “Petition”) addressed to this Court’s original jurisdiction

against Kathy Boockvar, the Secretary of the Commonwealth, and Jessica Mathis, the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, in their official capacities. Petition ¶¶ 11, 17–18.

5. The Petition challenges the constitutionality of several commonsense rules that the General Assembly has adopted to guarantee orderly free and fair elections for all voters in Pennsylvania—particularly in light of the State now allowing mail-in and absentee voting by all Pennsylvania voters as part of the General Assembly’s October 2019 overhaul of Pennsylvania’s election procedures in Act 77. *See* 25 P.S. § 3150.11. Act 77 represented a grand bipartisan compromise among the members of the General Assembly and the Governor, and it passed the General Assembly by an overwhelming and bipartisan majority.

6. Now, mere months after Governor Wolf signed Act 77 into law, Petitioners seek to use the COVID-19 pandemic to change the rules and protections that the General Assembly has put in place to safeguard mail-in and absentee voting, including prophylactic measures designed to prevent voter fraud and ballot tampering, prevent undue influence in voting, and safeguard voter confidence in Pennsylvania’s elections.

7. Petitioners ask this Court to declare Pennsylvania’s practical requirements that mail-in and absentee ballots be returned to county election offices “on or before eight o’clock P.M. the day of the primary or election” unconstitutional.

25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c). Petitioners further challenge Pennsylvania’s laws that functionally require most mail-in and absentee voters to pay for their own postage to return their ballots, 25 P.S. §§ 3146.6(a); 3150.16(a). *See* Petition at 34. Petitioners also request that the Court declare the Commonwealth’s ballot verification procedures, 25 P.S. § 3146.8(g)(3), and its ban on third-party ballot harvesting, 25 P.S. §§ 3146.6(a), 3150.16(a); *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1231 (2004), unconstitutional. *See id.*

8. Finally, Petitioners ask this Court to ignore the policy decisions of the General Assembly and Governor and issue an injunction: (i) allowing for third-party ballot harvesting and enjoining enforcement of the ban on third-party ballot harvesting; (ii) requiring Respondents to count mail-in and absentee ballots delivered after 8:00 p.m. on Election Day; (iii) ordering the Commonwealth to pay for the postage of all absentee and mail-in voters; and (iv) amending the Commonwealth’s ballot signature verification procedures. *See* Petition at 34–35.

9. This case is in its infancy. The Petition was filed late last month and Respondents have not filed a responsive pleading, and the Court has not entered any substantive ruling in this case. On May 8, Petitioners filed an Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review.

II. THE GOVERNING INTERVENTION STANDARD

10. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa.R.A.P. 1531(b).

11. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

12. The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 to 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

13. Pennsylvania Rule of Civil Procedure 2327(4) is permissive and provides in pertinent part:

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 . . . *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. No. 2327(4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep’t of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020

WL 424866, at *5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect any legally enforceable interest*’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

14. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

15. Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

16. The Court should grant the Republican Committees’ application to intervene because the Court’s determination of this action may affect the Republican Committees’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Republican Committees’ participation will aid the Court.

III. BASIS FOR THE REPUBLICAN COMMITTEES' INTERVENTION

A. The Republican Committees have substantial interest in this action.

17. The Republican Committees, on behalf of their supported candidates, voters, and own institutional interests, have a substantial and particularized interest in preserving the state election laws challenged in this action, which the General Assembly has enacted to ensure the structure and integrity of Pennsylvania's elections.

18. There can be no question that the Republican Committees have direct and significant interests in the continued enforcement of Pennsylvania's validly enacted laws governing mail-in and absentee ballots, which are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Committees invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018); *see* ¶ 13, *supra*.

19. Courts routinely recognize that political parties have interests supporting intervention in litigation concerning elections and election procedures.

See, e.g., Siegel v. LePore, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at *2 (D. Colo. Sept. 15, 2014); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, *1 (N.D. Ill. Nov. 22, 2011); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991). Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the . . . Republican Party.” *See Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005).

20. The Republican Committees’ interests here are at least the same as—if not greater than—those that Petitioner the Pennsylvania Alliance for Retired Americans claims gives it standing to sue. *See* Petition ¶ 16.

21. If Petitioners’ action succeeds, then the rules and safeguards put in place by the General Assembly to ensure the integrity and orderly administration of

Pennsylvania’s elections will be upended just weeks before Pennsylvania’s June 2 primary election, and in the run-up to a critical general election.

22. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Republican Committees’ members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), it would change the “structur[e] of [the] competitive environment” in Pennsylvania’s elections and “fundamentally alter the environment in which [the Republican Committees] defend their concrete interests (e.g. their interest in . . . winning [elections]),” *Shays v. Fed. Elec. Comm’n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

23. Such late changes also risk confusing voters and undermine confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). And the Republican Committees will be forced to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation as a result of such a change.

24. Such interference with Pennsylvania’s election scheme—and with the Republican Committees’ electoral activities—would impair the Republican

Committees' interests on behalf of their candidates, members, and themselves, and thus warrants intervention.

B. There is no basis to refuse the Republican Committees' application for intervention.

25. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the petitioner's interest is already adequately represented; or (3) "the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties."

26. None of these factors applies to the Republican Committees.¹

27. First, the Republican Committees' defense in this action is in subordination to and in recognition of the action's propriety.

28. Second, no existing party adequately represents the Republican Committees' particularized interests. *See* Pa. R.C.P. No. 2329(2). Petitioners clearly do not represent the Republican Committees' interests in this case, and Respondents do not adequately represent them either.

¹ As explained above, the Court retains discretion to allow the Republican Committees to intervene even if it concludes that an exception under Rule 2329 applies. Pa. R.C.P. 2329; 7 Goodrich Amram 2d § 2329:7.

29. Although the Republican Committees and Respondents putatively share the same overall goal of upholding the challenged election laws, their interests are not identical.

30. Respondents, as Commonwealth officials, do not represent the private interests of the Republican Committees at stake in this litigation, which are fundamentally different from, and far narrower than, the broad public interests represented by Respondents. Indeed, “the government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture in the litigation.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 321 (D.C. Cir. 2015) (“[W]e look skeptically on government entities serving as adequate advocates for private parties.” (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003))).

31. Whereas the Republican Committees have particularized interests in maintaining the competitive electoral environment adopted by the General Assembly, Respondents have no interest in the election of particular candidates. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government’s representation of the general public interest did not adequately represent the intervenor’s narrower private interests, despite the similarity in their

goals). Instead, in acting on behalf of all Pennsylvania citizens and the Commonwealth, Respondents must consider “a range of interests likely to diverge from those of the intervenors.” *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). In other words, “[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor.” *Utah Ass’n of Ctys.*, 255 F.3d at 1256. These considerations may include “the expense of defending the current [laws] out of [state] coffers,” *Clark v. Putnam Cty.*, 168 F.3d 458, 461–62 (11th Cir. 1999), “the social and political divisiveness of the election issue,” *Meek*, 985 F.2d at 1478, “their own desires to remain politically popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). Given that Respondents may take these other interests into account, their interests may diverge with the Republican Committee’s interests throughout this litigation.

32. Third, the Republican Committees have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. The Petition was filed a little over a week ago, and Respondents filed Preliminary Objections this week, on May 5. The Republican Committees’ Intervention will not cause any undue delay, embarrassment, or prejudice to any party, but it will aid the Court in resolving the important legal and factual questions before it.

IV. CONCLUSION

33. For the reasons set forth above, the Republican Committees have a clear right to intervene in this case challenging important state laws governing the administration of Pennsylvania's elections.

34. Pursuant to Pennsylvania Rule of Civil Procedure 2328, the Republican Committees attach a copy of the pleading, in the form of Preliminary Objections and Brief in Support (attached as Exhibit A), they will file in the action if permitted to intervene.

WHEREFORE, for the foregoing reasons, Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee, respectfully request that this Honorable Court GRANT this Application for Leave to Intervene, and DIRECT the Prothonotary to enter the names of Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee, on the docket in this matter as Intervenor Respondents, and DOCKET the Intervenor Respondents' Preliminary Objections and Brief in Support, attached as Exhibit A.

Dated: May 11, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

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*Counsel for Proposed Intervenor-
Respondents Pennsylvania Republican
Party, Republican National Committee, and
National Republican Congressional
Committee*

**Pro hac vice application forthcoming*

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Vonne Andring, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

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



Vonne Andring
Executive Director
Republican Party of Pennsylvania

Date: May 11, 2020

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Jon Black, Regional Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

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



Jon Black
Regional Political Director
Republican National Committee

Date: 05/11/2020

**VERIFICATION OF NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE**

I, Sarah Clamp, Regional Political Director at the National Republican Congressional Committee, am authorized to make this verification on behalf of the National Republican Congressional Committee. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

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

Sarah Clamp

Sarah Clamp
Regional Political Director
National Republican Congressional
Committee

Date: 5/11/2020

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.

/s/ Kathleen A. Gallagher

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired
Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis,
Director of the Bureau of Election
Services and Notaries,

Respondents.

No. 266 MD 2020

PROPOSED ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the Application for Leave to Intervene filed by the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee, it is hereby ORDERED, ADJUDGED, AND DECREED that the Petition is GRANTED. The Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee are permitted to intervene in the above-captioned matter. The Court hereby DIRECTS the Prothonotary to enter the names of Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee, on

the docket in this matter as Intervenor Respondents, and DOCKET the Intervenor Respondents' Preliminary Objections.

BY THE COURT:

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE
THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE
PENNSYLVANIA ALLIANCE FOR
RETIRED AMERICANS,

Petitioners,

v.

KATHY BOOCKVAR,
SECRETARY OF THE
COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No.: 266 MD 2020

NOTICE TO PLEAD

To Petitioners:

You are hereby notified to file a written response to the enclosed preliminary objections within thirty (30) days from service hereof or a judgment may be entered against you.

/s/ Kathleen A. Gallagher
COUNSEL FOR INTERVENOR-
RESPONDENTS THE REPUBLICAN
PARTY OF PENNSYLVANIA,
REPUBLICAN NATIONAL COMMITTEE,
AND NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE
THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE
PENNSYLVANIA ALLIANCE FOR
RETIRED AMERICANS,

Petitioners,

v.

KATHY BOOCKVAR,
SECRETARY OF THE
COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No.: 266 MD 2020

**PRELIMINARY OBJECTIONS OF INTERVENOR-RESPONDENTS
THE REPUBLICAN PARTY OF PENNSYLVANIA,
REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE**

The Petition for Declaratory and Injunctive Relief asks the Court to undo the grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections during the COVID-19 pandemic and beyond. Seeking to uphold free and fair elections on behalf of all Pennsylvanians, Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican

Committee Respondents”) file these Preliminary Objections seeking to dismiss the Petition.

As an initial matter, this Court should dismiss the Petition because the General Assembly has vested exclusive jurisdiction over Petitioners’ claims in the Pennsylvania Supreme Court. But even if the Court were to entertain the Petition, the Court still should dismiss it. The Petition contravenes Act 77’s non-severability clause; fails to carry Petitioners’ heavy burden to plead a cognizable facial challenge; and fails to state any claim upon which relief may be granted. The Petition therefore provides no basis to substitute Petitioners’ preferred policy choices for the choices of the General Assembly. The Court should dismiss the Petition.

PRELIMINARY STATEMENT

Petitioners ask this Court to upset the grand bipartisan compromise struck by the General Assembly and the Governor in Act 77—and to second-guess the General Assembly’s and the Governor’s policy decisions to address the COVID-19 pandemic—by invalidating Act 77’s extended “received-by” deadline as a violation of the Pennsylvania Constitution. Petitioners are wrong on the merits, but there are two even more basic problems. First, Petitioners have sued in the wrong court; their claims belong, by statute, in the Supreme Court.

Second, if Petitioners were correct, invalidation of the received-by deadline would void nearly all of Act 77—including the new universal no-excuse mail-in

voting scheme. This is so because the General Assembly and the Governor preserved their delicate compromise by including a non-severability provision in Act 77. Non-severability, therefore, is the threshold issue. It is also a straightforward issue, as our Supreme Court has recognized that non-severability provisions are binding where, as here, they preserve political compromises between the co-equal branches of government. The Court should give full effect to the non-severability provision and dismiss the Petition.

Even if the Court chooses to reach the merits, it may efficiently dispose of this case by holding that, although Petitioners seek broad relief against the received-by deadline, they have failed to sufficiently allege a facial constitutional challenge. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). In order to succeed on their facial challenge, Petitioners must show that no constitutional applications of Act 77’s challenged provisions exist—Petitioners all but concede that all of the challenged measures are constitutional as applied to the vast majority of Pennsylvania voters. Beyond that cross-cutting failure, Petitioners’ constitutional claims all fail on their own terms.

First, Petitioners have failed to allege facts sufficient to demonstrate that enforcement of Act 77 as written would violate the Free and Equal Elections Clause. Petitioners have the burden to plead and ultimately prove the unconstitutionality of Act 77, but even under the facts as pleaded, Petitioners have failed to establish that

Act 77 would deny any qualified elector the right to vote, fails to treat all voters alike, fails to ensure primaries are open and public to those who take the trouble to exercise their right to vote, or applies differently to similarly situated voters. Second, Petitioners' Equal Protection claim fails as they have not alleged intentional discrimination or facts which would demonstrate that Act 77 is not reasonably and rationally related to the Commonwealth's interest in ensuring honest and fair elections. Third, Petitioners' Due Process claim fails as Act 77 is a legislative, not adjudicative, action.

Petitioners seek to induce this Court to counter the unfolding policy judgments in the other two branches of government. But this Court's "role is distinctly *not* to second-guess the policy choices of the General Assembly." *Ins. Fed. of Pa., Inc. v. Com., Ins. Dep't*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (emphasis in original). This principle applies with particular force to questions of election administration because "ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914). This Court should dismiss the Petition.

I. FACTUAL BACKGROUND

A. As Amended By Act 77, Pennsylvania Law Permits All Pennsylvania Voters To Vote by Mail

1. The Pennsylvania House of Representatives passed Act 77 on a bipartisan majority vote, 138-61. The Pennsylvania Senate passed Act 77 on a bipartisan majority

vote, 35-14. Governor Wolf signed Act 77 into law on October 31, 2019. *See* Pennsylvania General Assembly, Senate Bill 421; Regular Session 2019-2020, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2019&sind=0&body=S&type=B&bn=421.

2. According to the facts alleged in the Petition,¹ Pennsylvania law, as amended by Act 77, now creates two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters. Pet. ¶ 3.

3. “Qualified absentee electors” include, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on Election Day due to work, and people who cannot vote in person because of observance of a religious holiday. 25 P.S. § 3146.1.

4. With the passage of Act 77, any registered voter who does not qualify as an absentee voter may apply to submit their ballot by mail-in voting, without providing a justification (*i.e.*, “no-excuse voting”). *Id.* ¶ 34 (citing 25 P.S. §§ 3146.6, 3150.16(c)). These voters are known as “qualified mail-in electors.” 25 P.S. § 3150.11.

¹ The Republican Committee Respondents accept the factual allegations of the Petition as true only for purposes of these Preliminary Objections.

5. Voters can begin applying for an absentee or mail-in ballot 50 days before Election Day, *see* 25 P.S. §§ 3146.2a(a), 3150.12a(a), the longest vote-by-mail period in the country, *see Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*, <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

6. The same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. *See* 25 P.S. §§ 3146.2a(a), 3150.12a(a); Pet. ¶ 37.

7. To apply for an absentee or mail-in ballot, a voter must apply (via one of a number of approved methods including via the internet) to the voter’s county board of elections by five o’clock P.M. on the first Tuesday prior to the day of any primary or election. 25 P.S. §§ 3146.2a(a), 3150.12a(a).

8. To be counted, the voter’s absentee or mail-in ballot must be received by the county board of elections “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c). This is the “received-by” deadline.

9. To avoid “ballot harvesting,” only the voter herself may “mail” or “deliver” the completed ballot to an election official. 25 P.S. §§ 3146.6(a), 3150.16(a). Petitioners allege that a “voter [who] is disabled” is exempt from this rule. Pet. ¶ 4.

10. To return an absentee or mail-in ballot by mail, the voter must do so “postage prepaid.” 25 P.S. §§ 3146.6(a), 3150.16(a). But the United States Postal Service has a longstanding policy of delivering completed ballots without sufficient postage, and charging the cost of postage, to election officials rather than returning them to the voter.²

11. After receiving the ballot, the county board “shall examine the declaration on the envelope” and “compare the information thereon with that contained in” the voter’s registration file to “verif[y] the proof of identification.” 25 P.S. § 3146.8(g)(3). This is the provision from which Petitioners glean the vaguely described “signature-matching” they challenge. *E.g.*, Pet. ¶ 54.

12. If the voter changes her mind after requesting an absentee or mail-in ballot, she may cast a regular ballot at a polling place so long as the voter brings the ballot and accompanying envelope, remits it, and submits a sworn statement

² See Susie Armitage, *Mail-In Ballot Postage Because a Surprising (and Unnecessary) Cause of Voter Anxiety*, ProPublica (Nov. 1, 2018), <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety> (Postal Service: “In cases where postage on returning Absentee or Vote-By-Mail ballots has not been affixed or is insufficient, it is the U.S. Postal Service’s policy to not delay returning ballots to the appropriate Board of Election as addressed on the return ballot envelope. . . . We will not deny a voter their right to vote by delaying a time-sensitive ballot because of insufficient postage.”); accord *Official Election Mail Q&A*, https://about.usps.com/postal-bulletin/2014/pb22391/html/cover_003.htm (Answer to Question 24: “Short-paid and unpaid absentee balloting materials must never be returned to the voter for additional postage. . . . Do not delay delivery of balloting materials.”).

declaring that she has not cast her absentee or mail-in ballot. 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3). But if the voter neglects to bring the ballot and accompanying envelope to the polling place, she may cast a provisional ballot. 25 P.S. §§ 3146.3(e), 3150.16(b)(2)).

B. Act 77 Has a Non-Severability Provision

13. Act 77 also contains a non-severability provision. Pet. ¶¶ 3, 10.

14. In particular, Section 11 provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

C. Petitioners Challenge Numerous Provisions of Act 77

15. Petitioners allege that the received-by deadline, the ballot harvesting ban, the prepaid-postage requirement, and an alleged practice of signature-matching violate the Pennsylvania Constitution. Pet. at 34.

16. They request an order requiring Respondents to count ballots received after the received-by deadline; to permit ballot harvesting; to provide prepaid postage; and to provide training to election officials on signature-matching and an opportunity to cure potential defects in ballots. *Id.* at 34–35.

II. PRELIMINARY OBJECTIONS

A. This Court Lacks Jurisdiction to Hear This Case, Pa. R. Civ. P. 1028(a)(1)

17. Republican Committee Respondents hereby incorporate all preceding paragraphs as if they were fully set forth herein.

18. Section 13(2) of Act 77 provides that “[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1).” Act 77, § 13(2).

19. This includes Sections 1306 and 1306-D (establishing the received-by deadline for absentee and mail-in ballots and requiring absentee and mail-in voters to send the ballots “by mail, postage prepaid,” or “deliver [them] in person to said county board of election”), Section 1308(a) (providing that absentee and mail-in ballots “shall be canvassed in accordance with subsection (g),” and Section 1308(g)(3) (providing that the county board of election must “compare the information” contained in a voter’s file against “the declaration” on an absentee or mail-in ballot to “verif[y] the proof of identification”). *See* Act 77, § 13(1)(xix), (xx), (xxi).

20. All of these provisions are targets of Petitioners’ constitutional challenge.

21. Yet, despite the Supreme Court of Pennsylvania’s exclusive jurisdiction to hear such challenges under Section 13 of Act 77, Petitioners ask this Court to “[d]eclare unconstitutional” these allegedly deficient provisions. Pet. at 34.

22. Provisions like Section 13 are familiar in, and enforceable under, Pennsylvania case law. *See DeNaples v. Pennsylvania Gaming Control Bd.*, 150 A.3d 1034 (Pa. Commw. Ct. 2016) (enforcing a nearly identical provision in the Gaming Act, 4 Pa. C.S. § 1904).

23. Petitioners’ constitutional challenge “falls squarely within the Supreme Court’s exclusive jurisdiction,” and thus, this Court “has no jurisdiction” to consider the challenge. *Id.* at 1039.

24. Therefore, the Court should dismiss the Petition for lack of jurisdiction.

WHEREFORE, Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

B. Act 77’s Non-Severability Provision Is Enforceable, and the Petition Should Be Dismissed, Pa. R. Civ. P. 1028(a)(4)

25. Republican Committee Respondents hereby incorporate all preceding paragraphs as if they were fully set forth herein.

26. This Court also need not reach the merits of this case because Act 77's non-severability provision is binding and enforceable. Petitioners' suggestion that their claims do not trigger Act 77's non-severability provision fails.

1. **Act 77's non-severability provision is squarely implicated.**

27. As previously noted, Act 77 contains a non-severability provision, which provides: "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void." Act 77, § 11.

28. The non-severability provision is squarely implicated in this case. Sections 6, 7, and 8 of Act 77 contain the received-by deadline. In addition, Petitioners' prayer for relief requests, among other things, a declaration that "the Commonwealth's failure to . . . provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted" is unconstitutional and invalid. Pet. at 34. In other words, Petitioners have asked that "[a] provision of this act or its application to any person or circumstance [be] held invalid." Act 77, § 11. As a result, if the received-by deadline is deemed invalid, then the remaining Sections listed in Section 11—including Section 8, which creates Pennsylvania's universal no-excuse mail-in voting scheme—are likewise invalid.

2. **Act 77's non-severability provision is enforceable.**

29. Our Supreme Court has “assume[d] that, as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). That is particularly true here for two reasons.

30. *First*, this Court has recognized that non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* “In an instance involving such compromise, the General Assembly may determine, the court’s application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.*

31. That is what happened with Act 77.

32. Because Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process,” *Stilp*, 905 A.2d at 978, it is enforceable as an expression of the General Assembly’s desire that the critical compromise provisions of Act 77 rise and fall together.

33. *Second*, Act 77’s non-severability provision avoids the defect that this Court identified in *Stilp*. The defect in the provision the Court declined to enforce in *Stilp* was that it had been “employed as a sword against the Judiciary” and appeared “to be aimed at securing a coercive effect upon the Judiciary” (by

threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–80. Such provisions are “ineffective and cannot be permitted to dictate [the Court’s] analysis.” *Id.* at 980.

34. Act 77’s non-severability provision is nothing of the sort. It was permissibly employed by the Legislature “as a shield to ensure preservation of a legislative scheme or compromise,” *id.*, in an area “regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522. Not only is there no evidence or basis to believe that the non-severability provision in a law concerning election administration was intended to coerce the Court, but it is also clear that the provision was intended to preserve the compromise struck in Act 77.

35. Moreover, Act 77’s non-severability provision is partial and targeted. It omits from the list of non-severable Act 77 provisions Sections 3.1, 10, 11, 13, 14, and 15. Act 77, § 11.³ These omissions illustrate that the General Assembly carefully thought about which provisions of Act 77 necessarily must rise and fall

³ The first sentence of Section 11 of Act 77 states that only the listed provisions are non-severable, while the second sentence implies that invalidation of any provision in Act 77 would render the remaining provisions void. The best reading of Section 11 is that the second sentence describes the consequence of the first sentence—that invalidation of any of the *listed* provisions would render the remaining listed provisions void. Indeed, this is precisely how Chairman Everett described Section 11: “Yes; that would be just in those sections that have been designated as nonseverable.” 2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). But even without the first sentence in Section 11, Act 77’s non-severability provision would be enforceable consistent with the presumption of enforceability of such provisions under *Stilp*.

together, and deliberately included those Sections in Section 11's non-severability provision.

36. For all of these reasons, Act 77's non-severability provision is valid, enforceable, and dispositive in this case.

WHEREFORE, Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

C. Petitioners Fail to Sufficiently Allege a Facial Challenge, Pa. R. Civ. P. 1028(a)(3), (a)(4)

37. Republican Committee Respondents hereby incorporate all preceding paragraphs as if they were fully set forth herein.

38. On the merits, the Petition is deficient because it fails to sufficiently allege a facial challenge.

39. Although Petitioners claim they are bringing an "as applied" challenge, invoking the current situation surrounding COVID-19, "the question of whether a particular constitutional challenge is 'facial' or 'as applied' should not be dictated by the label a litigant attaches to it." *Nextel Commcns. of Mid-Atlantic, Inc. v. Commonwealth, Dep't of Revenue*, 171 A.3d 682, 706 (Pa. 2017) (Baer, J., concurring).

40. This is an attempted facial challenge, not an as-applied challenge.

41. Here, Petitioners seek facial relief on behalf of all voters in Pennsylvania, not a particular person—that is, a declaration that the challenged provisions in Act 77 are “unconstitutional.” Pet. at 34.

42. Moreover, Petitioners’ prayer for relief drops any pretense of reliance on COVID-19, as it does not mention COVID-19 and offers no limiting principle or deadline on which the requested relief would expire. *See id.* Instead, if Petitioners’ requested relief were granted as-is, it would continue in perpetuity as to all Pennsylvanians. This is a quintessential facial challenge to the law “as written.” *Nigro v. City of Phila.*, 174 A.3d 693, 699 (Pa. Commw. 2017) (quotation marks and citation omitted).

43. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d at 1223 n.37. “A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.” *Pa. Env. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017). “A facial challenge must fail where the statute has a plainly legitimate sweep.” *Id.* (quotation marks and citation omitted).

44. This facial challenge must fail for two primary reasons.

45. *First*, the Petition acknowledges that, even under Petitioners’ view, there are circumstances in which the challenged provisions are valid. Petitioners allege disenfranchisement of “voters in some counties,” Pet. ¶ 6; “thousands of

voters,” *id.* ¶ 63; “many Pennsylvanians who vote by mail,” *id.*; “many voters,” *id.* ¶ 64; “some voters,” *id.* ¶¶ 52, 67, 77; and “certain groups of voters,” *id.* ¶ 71. Because Petitioners concede that at least some applications of the challenged provisions are constitutional, they have failed to sufficiently plead a facial challenge as a matter of law. *See Pa. Env. Def. Found.*, 161 A.3d at 938 n.31.

46. *Second*, in the same vein, the received-by deadline has “a plainly legitimate sweep.” *See id.* (quotation marks and citation omitted). Myriad cases recognize a State’s substantial interest fair and orderly elections. *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) (“The state’s interest in a timely and orderly election is strong.”).

47. Petitioners can only reach their conclusion and the basis for an alleged need for ballot-harvesting by hypothesizing a last-minute applicant and unspecified mail delays.

48. There is no good reason to override the legitimate interests that the Supreme Court has recognized in enforcing an earlier version of Pennsylvania’s ban on ballot-harvesting: “The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that

the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it, or even to destroy it.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004).

49. The challenged provisions have “a plainly legitimate sweep,” and the facial challenge must fail.

WHEREFORE, Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

D. Petitioners Fail to State a Claim for Relief Under the Pennsylvania Constitution, Pa. R. Civ. P. 1028(a)(3), (a)(4)

50. Republican Committee Respondents hereby incorporate all preceding paragraphs as if they were fully set forth herein.

51. Pennsylvania law has a “strong” presumption its statutes are constitutional; “any party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” *DePaul v. Commonwealth*, 969 A.2d 536, 545 (Pa. 2009) (citation omitted).

52. Petitioners cannot carry their heavy burden to prove that Act 77’s extended received-by deadline, ballot harvesting ban, postage-prepaid requirement, or verification provision violates the Pennsylvania Constitution.

1. **Petitioners fail to state a claim for relief under the Free and Equal Elections Clause.**

53. The Free and Equal Elections Clause provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

54. Our Supreme Court has instructed that the legislature, particularly, has the power to regulate elections and its legislation thereof should not be struck down “unless in plain violation of the fundamental law.” *Winston*, 91 A. at 522. In conducting its review of such legislation, a court “cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy.” *Id.* at 525.

55. Thus, election laws should be invalidated only when there is a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors.” *Patterson v. Barlow*, 60 Pa. 54, 75 (1869).

56. Courts must uphold an election-administration measure against a Free and Equal Elections Clause challenge where: (1) “[i]t denies no qualified elector the right to vote”; (2) “it treats all voters alike”; (3) “the primaries held under it are open and public to all those who are entitled to vote and take the trouble to exercise the

right of franchise”; and (4) “the inconveniences if any bear upon all in the same way under similar circumstances.” *Winston*, 91 A. at 523.

Act 77 meets the *Winston* test and Petitioners have not pleaded facts sufficient to demonstrate otherwise. *See Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015) (“[T]he state may enact substantial regulation containing reasonable, nondiscriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”) (citation and quotation marks omitted).

57. None of the challenged provisions violates the Free and Equal Elections Clause and the claim otherwise should be dismissed.

2. Petitioners fail to state a claim for relief under the Equal Protection Guarantees.

58. Article I, Section 1 provides: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Article I, Section 26 provides: “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right.” Pa. Const. art. I, § 26.

59. Petitioners do not assert any intentional discrimination by the Commonwealth in the adoption or implementation of the received-by deadline. *See* Pet. ¶¶ 68–71. Instead, Petitioners invoke “the *Anderson/Burdick* balancing test”

that the United States Supreme Court has adopted for federal Equal Protection claims. Pet. ¶ 70.

60. But our Supreme Court has determined that the legislature “may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176–77. So long as the law is “reasonable and rationally related to the interest of the Commonwealth in ensuring honest and fair elections,” it is constitutional even if it places some burden on a voter’s rights. *In re Nader*, 905 A.2d 450, 459 (Pa. 2006).

61. There can be no dispute that the Commonwealth has strong and imperative interests “in ensuring fair elections that are free from the taint of fraud,” *id.* at 465, safeguarding “public confidence” in its elections and “in the integrity and legitimacy of representative government,” *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 197 (2008), and guaranteeing finality of election results, *see, e.g., Banfield*, 110 A.3d at 176–77. *See also Ohio Democratic Party v. Husted*, 834 F.3d 620, 634 n.8 (6th Cir. 2016) (“Fiscal responsibility, even if only incrementally served, is undeniably a legitimate and reasonable legislative purpose.”).

62. None of Petitioners’ alleged deficiencies in the challenged provisions overcomes these interests.

63. Petitioners thus have failed to allege any Equal Protection Guarantees violations.

3. **Petitioners fail to state a claim for relief under the Due Process Clause.**

64. “All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1.

65. Procedural due process—which is the genre of claim Petitioners advance—is “implicated only by adjudications, not by state actions that are legislative in character.” *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (citation and quotation marks omitted).

66. A procedural due process claim under the Pennsylvania Constitution requires the court to consider three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of the interest through the procedures established; and (3) the value of the government’s interest, if any, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Commonwealth v. Batts*, 163 A.3d 410, 454 (Pa. 2017). “Due process

is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).⁴

67. Petitioners raise procedural due process objections only as to the received-by deadline and the alleged signature-matching, Pet. ¶¶ 77–82, but neither objection succeeds.

68. The received-by deadline is “legislative in character,” *Sutton*, 220 A.3d at 1032, and Petitioners fail to allege facts necessary to meet the *Mathews* factors.

69. Petitioners’ argument about the nebulously described signature-matching procedures is unavailing and fails to address the Commonwealth’s interests and the likely fiscal and administrative burdens of granting Petitioners’ requested relief. *Batts*, 163 A.3d at 454.

70. This Court should decline Petitioners’ invitation to usurp the Legislature’s role based on nothing more than speculation about unknown voters being disenfranchised by unknown county boards.

⁴ The standards under this provision are identical to those under the Due Process Clause of the Fourteenth Amendment. *See Pa. Game Comm’n v. Marich*, 666 A.2d 253, 255 n.4, 6 (Pa. 1995).

4. Petitioners impermissibly ask this Court to override political policy decisions.

71. Despite insisting their constitutional challenges are motivated by COVID-19, the categorical nature of the constitutional arguments and the requested relief indicate a much broader attempt to impose partisan policy preferences.

72. Petitioners effectively ask this Court to override the policy judgments of the political branches—the General Assembly and the Governor—regarding efforts to address COVID-19. These efforts include the unanimously-passed legislation, signed by the Governor, delaying the primary election until June 2 and amending Act 77. The political branches were aware of Act 77 when they amended it, but they opted to leave in place the received-by deadline, the ballot harvesting ban, the postage-prepaid requirement, and the verification requirement.

73. This Court’s “role is distinctly not to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa., Inc.*, 970 A.2d at 1122 n.15 (emphasis in original). Indeed, “[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.” *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). And “[i]f, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider

expedient and desirable, such action would be nothing short of judicial legislation[.]”

Id.

74. Should the General Assembly and the Governor permit the primary and general elections to proceed in line with ongoing preparations, this Court’s intervention would constitute a determination that their political policy judgment concerning the current circumstances is incorrect. The Court should decline Petitioners’ invitation.

WHEREFORE, Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

Respectfully submitted,

Dated: May 11, 2020

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**Pro hac vice application forthcoming*

CERTIFICATE OF COMPLIANCE

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

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Pennsylvania, Republican National
Committee, and National Republican
Congressional Committee*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE
THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE
PENNSYLVANIA ALLIANCE FOR
RETIRED AMERICANS,

Petitioners,

v.

KATHY BOOCKVAR,
SECRETARY OF THE
COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No.: 266 MD 2020

ORDER

AND NOW, this ____ day of _____, 2020, upon consideration of the Preliminary Objections filed by Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee and any response thereto, it is hereby ORDERED that the Preliminary Objections are SUSTAINED. The Petition for Review in the above action is dismissed with prejudice.

BY THE COURT:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, DWAYNE
THOMAS, IRVIN WEINREICH,
BRENDA WEINREICH, AND THE
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Respondents.

Case No.: 266 MD 2020

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF
INTERVENOR-RESPONDENTS THE REPUBLICAN PARTY OF
PENNSYLVANIA, REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE**

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The Petition for Declaratory and Injunctive Relief asks the Court to undo the grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections during the COVID-19 pandemic and beyond. Seeking to uphold free and fair elections, Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican Committee Respondents”) file this Brief in Support of Preliminary Objections to explain that the Court should defer to the policy decisions of the two co-equal political branches of government and dismiss the Petition.

Initially, the Court should dismiss the Petition because the General Assembly has vested exclusive jurisdiction over Petitioners’ claims in the Pennsylvania Supreme Court. But even if the Court were to entertain the Petition, the Court still should dismiss it. The Petition contravenes Act 77’s non-severability clause; fails to discharge Petitioners’ heavy burden to plead a cognizable facial challenge; and fails to state any claim upon which relief may be granted. The Petition therefore provides no basis to substitute Petitioners’ preferred policy choices for the choices of the General Assembly. The Court should dismiss the Petition.

PRELIMINARY STATEMENT

The Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa., Inc. v. Commonwealth, Ins. Dep’t*, 970 A.2d

1108, 1122 n.15 (Pa. 2009) (emphasis in original). This principle applies with particular force to questions of election administration because “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914).

The General Assembly is hard at work to address the COVID-19 pandemic and to decide the best manner in which to administer Pennsylvania’s primary and general elections this year. Recognizing the unique challenges presented by COVID-19, a month ago the General Assembly unanimously passed, and the Governor signed, legislation that amended the Election Code and delayed the primary election until June 2, 2020. In addition, since the Petition was filed, the General Assembly has held a hearing with election officials and experts to discuss ongoing preparations for the primary and general elections. Moreover, the Governor’s stay-at-home order permits elections to proceed even in counties where it remains in force.

Unsatisfied with these ongoing efforts, Petitioners now ask this Court to impose a policy change to Pennsylvania’s Election Code that the General Assembly so far has declined to adopt—and, in the process, to hastily rewrite one of the most transformative legislative enactments in Pennsylvania history. In 2019, the General Assembly and the Governor struck a grand bipartisan compromise to reform Pennsylvania’s Election Code through the Act of Oct. 31, 2019, P.L. 552, No. 77

(“Act 77”). The base bill that became Act 77 was a one-subject proposal to end straight-ticket voting. Through a series of give-and-take negotiations, the General Assembly and the Governor expanded Act 77 into an overhaul of the Commonwealth’s elections system. Among other things, Act 77 as enacted not only eliminated straight-ticket voting, but also provided funding to counties for voting machines and extended voter registration deadlines. One central component of the grand compromise struck in Act 77 was a comprehensive new scheme to permit all Pennsylvanians to vote by mail.

The General Assembly took two important actions to preserve the compromise embodied in Act 77. The first was to vest “exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of” Act 77’s “amendments or additions” to several provisions of the Election Code in “[t]he Pennsylvania Supreme Court.” Act 77 § 13(1), 13(2). That exclusive-jurisdiction mandate covers all four challenges Petitioners bring in this case. Petitioners, therefore, have filed their suit in the wrong court, and the Court need take no further action than to dismiss the Petition.

But even if the Court were to entertain the Petition, the Court still should dismiss it because of the second action the General Assembly took to protect the grand compromise in Act 77. Act 77 contains a non-severability provision which provides that if one of several listed provisions is deemed invalid, then the remaining

listed provisions are void. Realizing as much, Petitioners briefly claim that they do not “seek any relief that would trigger Act 77’s non-severability clause.” Pet. ¶ 3. Yet their requested relief is a declaration that the challenged provisions—*all* of which are listed in Act 77’s non-severability provision—are unconstitutional. Non-severability, therefore, is a threshold issue. It is also a straightforward issue, as the Supreme Court has recognized that non-severability provisions are binding where, as here, they preserve political compromises between the co-equal branches of government. The Court should give full effect to the non-severability provision and dismiss the Petition.

If the Court chooses to reach the merits, however, it may efficiently dispose of this case by holding that, although Petitioners seek broad relief, they have failed to sufficiently allege a facial constitutional challenge. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). Petitioners’ facial challenge here fails because—while they bear the burden to show that no constitutional applications of the challenged Act 77 provisions exist—Petitioners all but concede that the provisions are constitutional as applied to vast numbers of Pennsylvania voters.

Beyond that cross-cutting failure, Petitioners’ constitutional claims all fail on their own terms. Pennsylvania’s universal no-excuse vote-by-mail period of 50 days is *the longest vote-by-mail period in the country*. The challenged rules are all

“reasonable and rationally related to the interest of the Commonwealth in ensuring honest and fair elections” under this new vote-by-mail scheme. *In re Nader*, 905 A.2d 450, 459 (Pa. 2006). That is particularly true given the Commonwealth’s documented history of past instances of “massive absentee ballot fraud.” *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994); *see also* Pittsburgh Post-Gazette, “Murphy arraigned on vote-fraud charges” (May 25, 1999), <http://old.post-gazette.com/regionstate/19990525murphy6.asp> (documenting arraignment of former U.S. Congressman for absentee voter fraud in a nursing home). Against that backdrop, Petitioners have failed to identify even a single voter who will be unable to vote because of the challenged provisions—and their own pleading demonstrates that even the individual Petitioners are able to vote in the June 2 primary and beyond. Petitioners have simply failed to plead any claim upon which relief may be granted, and dismissal is required.

Petitioners invite this Court to counter the unfolding policy judgments in the other two branches of government—and to do so in the face of an “imminen[t]” primary election. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). That invitation to abridge the separation of powers is a bridge too far, especially given the day-to-day oversight that the political branches are exercising with an eye toward the 2020 elections and the need to reinforce “[c]onfidence in the integrity of [the Commonwealth’s] electoral process.” *Id.* The Court should dismiss the Petition.

I. FACTUAL BACKGROUND

A. As Amended by Act 77, Pennsylvania Law Permits All Pennsylvania Voters to Vote by Mail And Protects The Integrity Of The Commonwealth's Elections

Prior to enactment of Act 77, Pennsylvania law permitted only qualified absentee electors to vote by mail and required all other Pennsylvania voters to vote in person. 25 P.S. § 3146.1. Absentee ballots had to be received by the county board of elections in the voter's jurisdiction no later than five o'clock P.M. on the Friday before the primary or general election in order to be counted.

The Pennsylvania House of Representatives passed Act 77 on bipartisan majority vote, 138-61. The Pennsylvania Senate passed Act 77 on a bipartisan majority vote, 35-14. Governor Wolf signed Act 77 into law on October 31, 2019. *See* Pennsylvania General Assembly, Senate Bill 421; Regular Session 2019-2020, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2019&sind=0&body=S&type=B&bn=421.

Pennsylvania law, as amended by Act 77, now creates two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters. "Qualified absentee electors" include, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on Election Day due to work, and people who cannot vote in person because of observance of a

religious holiday. 25 P.S. § 3146.1.¹ With the passage of Act 77, any registered voter who does not qualify as an absentee voter may apply to submit her ballot by mail-in voting, without providing a justification (*i.e.*, “no-excuse voting”). *Id.* §§ 3150.11–3150.12b. These voters are known as “qualified mail-in electors.” *Id.* § 3150.11.

Voters can begin applying for an absentee or mail-in ballot 50 days before Election Day. 25 P.S. §§ 3146.2a(a), 3150.12a(a). This 50-day period is the longest vote-by-mail period in the country. *See Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*, <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

The same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. To apply for an absentee or mail-in ballot, a voter must apply to the voter’s county board of elections by five o’clock P.M. on the first Tuesday prior to the day of any primary or election. 25 P.S. §§ 3146.2a(a), 3150.12a(a). Among the various application methods, voters may apply online at [VotesPA.com/ApplyMailBallot](https://www.votespa.com/ApplyMailBallot) or [VotesPA.com/ApplyAbsentee](https://www.votespa.com/ApplyAbsentee).

¹ As the Petition notes, military and overseas voters may also vote by absentee ballot, but Petitioners do not challenge the deadline for military and overseas voters in this case. Pet. ¶ 38.

Once a voter submits her application, the county board of elections determines whether the voter meets the statutory requirements and, if so, mails the absentee or mail-in ballot to the voter. 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)). To be counted, the voter’s absentee or mail-in ballot must be received by the county board of elections “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c). This is the “received-by” deadline.

Only the voter herself, and not some other person, may “mail” or “deliver” her completed ballot to an election official. 25 P.S. §§ 3146.6(a), 3150.16(a). This rule is the “ballot harvesting ban.” Petitioners allege that a “voter [who] is disabled” is exempt from this rule. Pet. ¶ 4.

An absentee or mail-in voter who elects to return her ballot by mail must do so “postage prepaid.” 25 P.S. §§ 3146.6(a), 3150.16(a). The United States Postal Service, however, has a longstanding policy of delivering completed ballots without sufficient postage, and charging the cost of postage to election officials rather than returning them to the voter.²

² See Susie Armitage, *Mail-In Ballot Postage Because a Surprising (and Unnecessary) Cause of Voter Anxiety*, ProPublica (Nov. 1, 2018), <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety> (Postal Service: “In cases where postage on returning Absentee or Vote-By-Mail ballots has not been affixed or is insufficient, it is the U.S. Postal Service’s policy to not delay returning ballots to the appropriate Board of Election as addressed on the return ballot envelope. . . . We will not deny

Finally, upon receipt of the ballot, the county board “shall examine the declaration on the envelope” and “compare the information thereon with that contained in” the voter’s registration file to “verif[y] the proof of identification.” 25 P.S. § 3146.8(g)(3). This is the provision that establishes what Petitioners call the “signature-matching” practice. *E.g.*, Pet. ¶ 54.

Once a voter requests an absentee or mail-in ballot, the voter ordinarily may not vote by regular ballot in person on Election Day. 25 P.S. §§ 3146.3(e), 3150.13(e)). If the voter changes her mind after requesting a ballot, however, she may cast a regular ballot at a polling place so long as the voter brings the ballot and accompanying envelope, remits it, and submits a sworn statement declaring that she has not cast her absentee or mail-in ballot. 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3). Even if the voter neglects to bring the ballot and accompanying envelope to the polling place, she may cast a provisional ballot. 25 P.S. §§ 3146.3(e), 3150.16(b)(2)).

Act 77 also contains a non-severability provision. In particular, Section 11 provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable.

a voter their right to vote by delaying a time-sensitive ballot because of insufficient postage.”); *accord Official Election Mail Q&A*, https://about.usps.com/postal-bulletin/2014/pb22391/html/cover_003.htm (Answer to Question 24: “Short-paid and unpaid absentee balloting materials must never be returned to the voter for additional postage. . . . Do not delay delivery of balloting materials.”).

If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

B. Petitioners Challenge Act 77’s Provisions

“[T]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of” Act 77’s “amendment[s] or addition[s]” in several portions of the Act, including “Section 1306,” “Section 1308,” and “Article XIII-D.” Act 77 § 13(1), 13(2). Act 77 implemented the received-by deadline, ballot harvesting ban, postage-prepaid requirement, and ballot-verification requirements as “amendment[s] or addition[s]” in “Section 1306,” “Section 1308,” and “Article XIII-D.” Act 77 § 13(1).

Nonetheless, Petitioners, four individuals and the Pennsylvania Alliance for Retired Americans, Pet. ¶¶ 12–16, filed suit in this Court alleging that the received-by deadline, the ballot-harvesting ban, the prepaid-postage requirement, and an alleged practice of signature-matching violate the Pennsylvania Constitution, *id.* at 34. They request an order requiring Respondents to count ballots received after the received-by deadline; to permit ballot harvesting; to provide prepaid postage; and to provide training to election officials on signature-matching and an opportunity to cure potential defects in ballots. *Id.* at 34–35.

II. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS

“Preliminary objections may be filed by any party to any pleading” based upon grounds including “lack of jurisdiction over the subject matter of the action,” “insufficient specificity in a pleading,” and “legal insufficiency of a pleading (demurrer).” Pa. R.C.P. 1028(a)(1), (3), (4). Preliminary objections “shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading.” Pa. R.C.P. 1028(b).

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(1): This Court Lacks Jurisdiction to Hear This Case

This Court need do no more than dismiss the Petition for lack of jurisdiction. Section 13(2) of Act 77 provides that “[t]he Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1).” Act 77, § 13(2). Paragraph (1) states “[t]his section applies to the amendment or addition of the following provisions of the act,” and lists, as relevant here, “Section 1306,” “Section 1308,” and “Article XIII-D.” *Id.* § 13(1)(xix), (xx), (xxi).

This exclusive-jurisdiction mandate covers all four challenges Petitioners have brought in this case. *First*, Act 77 ushered in a sea change in Pennsylvania elections: it permits *all Pennsylvania voters* who are not qualified absentee voters to vote by mail without providing a reason. 25 P.S. § 3150.11. Act 77 further increased the convenience of absentee and mail-in voting by extending the deadline for

submission of absentee ballots to eight o'clock P.M. on the day of the primary or general election and creating a matching deadline for mail-in ballots. 25 P.S. §§ 3146.6; 3150.16. These deadlines create a 50-day universal no-excuse vote-by-mail period for Pennsylvania voters—which is *the longest vote-by-mail period in the nation*. The General Assembly unanimously extended that period by five weeks when it postponed the primary election from April 28 to June 2.

Petitioners nonetheless argue that this period is constitutionally inadequate and that the received-by deadline is “unconstitutional.” Pet. at 34. But the “amendment” of the received-by deadline for absentee ballots was contained in “Section 1306” of Act 77, and the “addition” of the received-by deadline for mail-in ballots was enacted as part of “Article XIII-D” of the Act. *See* Act 77 § 13(1). Accordingly, “[t]he Pennsylvania Supreme Court has exclusive jurisdiction” to hear Petitioners’ “challenge[s]” to the received-by deadline. *Id.* § 13(2).

Second, Act 77 requires that only the voter herself, and not any other person, may “mail” or “deliver” her completed ballot to an election official. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). As the Supreme Court recognized in enforcing an earlier version of Pennsylvania’s ban on ballot harvesting, this provision “limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in

secret, no other person has the opportunity to tamper with it, or even to destroy it.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1232 (Pa. 2004). The Commonwealth’s interest here is particularly weighty because of its documented history of instances of “massive absentee ballot fraud.” *Marks*, 19 F.3d at 887 (overturning results of state senate election because of absentee ballot fraud).

Without mentioning this case law, Petitioners try to sidestep it by alleging in this Court that Pennsylvania’s ballot harvesting ban is “unconstitutional.” Pet. at 34. Act 77, however, enacted the requirement that absentee voters mail or deliver their own ballots as an “addition” in “Section 1306.” Act 77, § 13(1). And it enacted the requirement that mail-in voters mail or deliver their own ballots as an “addition” in “Article XIII-D” of the Act. *Id.* Exclusive jurisdiction over Petitioners’ challenges to those provisions therefore resides in the Pennsylvania Supreme Court. *See id.* § 13(2).

Third, Petitioners argue that it is “unconstitutional” to require an absentee or mail-in voter returning her completed ballot by mail to do so “postage prepaid.” Pet. at 34. But once again, Act 77 implemented this requirement in “Section 1306” for absentee voters and “Article VIII-D” for mail-in voters. Act 77, § 13(1). Thus, the Supreme Court has exclusive jurisdiction to hear any challenge to its constitutionality. *See id.* § 13(2).

Fourth, Petitioners assert that vaguely alleged signature-matching conducted by unknown election officials in unknown counties as part of Section 3146.8(g)(3)'s requirements for verification of a ballot, *see* Pet. ¶ 54, is “unconstitutional,” Pet. at 34. But Section 3146.8(g)(3) was amended by “Section 1308” of Act 77, and any constitutional challenges must be brought in the Supreme Court. Act 77, § 13(1), 13(2).

Exclusive-jurisdiction provisions like Section 13 of Act 77 are enforceable under Pennsylvania law. Indeed, this Court enforced a virtually identical provision in *DeNaples v. Pennsylvania Gaming Control Bd.*, 150 A.3d 1034 (Pa. Commw. Ct. 2016). Section 1904 of the Gaming Act provides that “[t]he Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this part.” *Id.* at 1039 (quoting 4 Pa. C.S. § 1904) (emphases omitted). One provision of that part contains the so-called “qualified majority vote rule,” which the petitioner in *DeNaples* challenged as unconstitutional. *Id.* This Court “agree[d]” that it did “not have jurisdiction to hear [the] constitutional challenge to the qualified majority vote rule.” *Id.* That challenge fell “squarely within the Supreme Court’s exclusive jurisdiction,” and this Court “accordingly ha[d] no jurisdiction to consider that claim.” *Id.*

So, too, here. Petitioners’ constitutional challenge “falls squarely within the Supreme Court’s exclusive jurisdiction,” and thus, this Court “has no jurisdiction”

to consider the challenge. *Id.* Indeed, petitioners in a parallel case realized as much and filed their challenge to the received-by deadline in the Supreme Court. *See* Petition for Review, *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020 (Pa. Apr. 27, 2020). The Court, therefore, need go no further in this case. It should dismiss the Petition for lack of jurisdiction.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Act 77’s Non-Severability Provision Is Enforceable, and the Petition Should Be Dismissed

This Court also need not reach the merits of this case because Act 77’s non-severability provision is binding and enforceable. Petitioners’ suggestion that their claims do not seek “any relief that would trigger Act 77’s non-severability clause” fails. Pet. at 34. The Court therefore should dismiss the Petition.

1. Act 77’s non-severability provision is squarely implicated.

Act 77 contains a non-severability provision, which provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

The non-severability provision is squarely implicated. Section 1306, Section 1308, and Article XIII-D of Act 77—which contain the provisions Petitioners challenge in this case—are located within Sections 6, 7, and 8 of Act 77. Petitioners request that the Court “[d]eclare unconstitutional” these provisions as they currently

exist. Pet. at 34. As a result, if any of these provisions is deemed invalid, then the remaining provisions under the Sections listed in Section 11—including Section 8, which creates Pennsylvania’s universal no-excuse mail-in voting scheme—are likewise invalid. The Court should dismiss the Petition in order to avoid granting “any relief that would trigger Act 77’s non-severability clause.” *Id.*

2. Act 77’s non-severability provision is enforceable.

The Supreme Court has “assume[d] that, as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). And that is particularly true here for two reasons.

First, the Supreme Court has recognized that non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* “In an instance involving such compromise, the General Assembly may determine, the court’s application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.*

That is what happened with Act 77. It is widely known that Act 77 began as a one-subject bill introduced by Senator Boscola to target straight-ticket voting. Paul Muschick, *How Pennsylvania’s biggest elections reforms in 80 years started in Lehigh Valley*, *The Morning Call* (Dec. 6, 2019),

<https://www.mcall.com/opinion/mc-opi-pa-elections-reform-legislation-compromise-muschick-20191206-euuesozlw5dnpcuunu3lhl2tga-story.html>. Over time, Senator Boscola’s bill was amended to authorize payments to counties for voting machines, extend deadlines, and so on. *Id.* And after the Governor vetoed an earlier iteration of the bill, the General Assembly and the Governor went back to the drawing board and, through difficult and protracted negotiations, ultimately reached a compromise. *Id.*

It is no secret that Act 77 was the result of a tough compromise. On the House floor, Senator Boscola (a Democrat), who introduced the bill, expressed “disappoint[ment] that the bill would not go as far as I would like” and did “not include every reform I would like to see.” 2019 Pa. Legislative Journal—*Senate* 1000 (Oct. 29, 2019). But she pushed forward nonetheless because “modernizing our elections and providing greater voter access are key.” *Id.* On the Senate floor, Republican Senate Majority Leader Corman described a similar experience:

All negotiations add some things and, unfortunately, lose some things. But to get to a point where there is bipartisan support to get agreement--we have a divided government in Pennsylvania, we have a Democratic Governor and a Republican legislature--there is always give and take. You have to be able to give to get. I think this bill is a product of that. The Governor led a difficult negotiation. It received 130 votes in the House, it was bipartisan, almost two-thirds of the Chamber, and we come here today. Again, every bill we can pick some pieces that we do not like about it, but I think, ultimately, this is the most significant modernization of our Election Code in decades.

Id. at 1002. The Governor likewise described Act 77 as “bipartisan compromise legislation.” *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*, <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

It is also no secret that the non-severability provision was a key part of that compromise. This precise issue arose on the House floor in a colloquy involving State Government Committee Chair Garth Everett:

Mrs. DAVIDSON. Thank you.

My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to elimination of straight-party voting, absentee voting, and mail-in voting. Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?

Mr. EVERETT. Thank you, Mr. Speaker.

There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.

Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.

Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

Mrs. DAVIDSON. All right. Thank you.

2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). It was thus eminently clear that the non-severability provision would serve to keep the relevant provisions of Act 77 “together,” such that they would rise and fall as one.

Because Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process,” *Stilp*, 905 A.2d at 978, it is enforceable as an expression of the General Assembly’s desire that the critical compromise provisions of Act 77 rise and fall together.

Second, Act 77’s non-severability provision avoids the defect that the Supreme Court identified in *Stilp*. The defect in the provision the Supreme Court declined to enforce in *Stilp* was that it had been “employed as a sword against the Judiciary” and appeared “to be aimed at securing a coercive effect upon the Judiciary” (by threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–80. Such provisions are “ineffective and cannot be permitted to dictate [the Court’s] analysis.” *Id.* at 980.

Act 77’s non-severability provision is nothing of the sort. It was permissibly employed by the Legislature “as a shield to ensure preservation of a legislative scheme or compromise,” *id.* at 978, in an area “regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522. Not only

is there no evidence or basis to believe that the non-severability provision in a law concerning election administration was intended to coerce the courts, but it is also clear that the provision was intended to preserve the compromise struck in Act 77.

Moreover, Act 77's non-severability provision is partial and targeted. *Cf. Stilp*, 905 A.2d at 980 n.48 (emphasizing that the provision at issue was “a global and boilerplate nonseverability provision, and not a partial, targeted, or specific one”). It omits from the list of non-severable Act 77 provisions Sections 3.1, 10, 11, 13, 14, and 15. Act 77, § 11.³ These omissions illustrate that the General Assembly carefully thought about which provisions of Act 77 necessarily must rise and fall together, and deliberately included those Sections in the non-severability provision.

The omission of Section 3.1 is particularly notable: Section 3.1 constitutes a significant portion of Act 77 and addresses “Voting Apparatus Bonds” to fund new voting machines in Pennsylvania. The General Assembly would have had good reasons to omit Section 3.1 from the non-severability clause. For example, the

³ The first sentence of Section 11 of Act 77 states that only the listed provisions are non-severable, while the second sentence implies that invalidation of any provision in Act 77 would render the remaining provisions void. The best reading of Section 11 is that the second sentence describes the consequence of the first sentence—that invalidation of any of the *listed* provisions would render the remaining listed provisions void. Indeed, this is precisely how Chairman Everett described Section 11: “Yes; that would be just in those sections that have been designated as nonseverable.” 2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). But even without the first sentence in Section 11, Act 77's non-severability provision would be enforceable consistent with the presumption of enforceability of such provisions under *Stilp*.

General Assembly may have wanted to fund new voting machines independent of the other provisions of Act 77, and may have wanted to preserve the rights and obligations of the Commonwealth and bondholders who transact in Voting Apparatus Bonds even if some other provision of Act 77 is invalidated during the term of such bonds.

For all of these reasons, Act 77's non-severability provision is valid, enforceable, and dispositive in this case. The Court, therefore, should dismiss the Petition in light of Petitioners' allegation that they do not seek "any relief that would trigger Act 77's non-severability clause." Pet. at 34.

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(3), (4): Petitioners Fail to Sufficiently Allege a Facial Challenge

On the merits, the Petition is deficient because it fails to sufficiently allege a facial challenge. Although Petitioners claim they are bringing an "as applied" challenge, invoking the current situation surrounding COVID-19, "the question of whether a particular constitutional challenge is 'facial' or 'as applied' should not be dictated by the label a litigant attaches to it." *Nextel Commcns. of Mid-Atlantic, Inc. v. Commonwealth, Dep't of Revenue*, 171 A.3d 682, 706 (Pa. 2017) (Baer, J., concurring).

This is an attempted facial challenge, not an as-applied challenge. The hallmark of an as-applied challenge is a complaint about a law's application "to a particular person under particular circumstances." *Nigro v. City of Phila.*, 174 A.3d

693, 699 (Pa. Commw. 2017) (quotation marks and citation omitted). In addition, “an as-applied challenge will not necessarily invalidate a law[.]” *Id.* at 700.

Petitioners, however, seek facial relief on behalf of all voters in Pennsylvania, not a particular person—that is, a declaration that the challenged provisions in Act 77 are “unconstitutional.” Pet. at 34. Moreover, Petitioners’ prayer for relief drops any pretense of reliance on COVID-19, as it never mentions COVID-19 and offers no limiting principle or deadline on which the requested relief would expire. *See id.* Instead, if Petitioners’ requested relief were granted as-is, it would continue in perpetuity as to all Pennsylvanians. This is a quintessential facial challenge to the law “as written.” *Nigro*, 174 A.3d at 699 (quotation marks and citation omitted).

“[F]acial challenges are generally disfavored.” *Clifton*, 969 A.2d at 1223 n.37. For that reason, a statute is facially invalid only “when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary.” *Id.* More recently, the Supreme Court has emphasized that “[a] statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.” *Pa. Env. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017). “A facial challenge must fail where the statute has a plainly legitimate sweep.” *Id.* (quotation marks and citation omitted). This facial challenge must fail for two primary reasons.

First, the Petition acknowledges that, even under Petitioners’ view, there are circumstances in which the challenged provisions are valid. Petitioners allege disenfranchisement of “voters in some counties,” Pet. ¶ 6; “thousands of voters,” *id.* ¶ 63; “many Pennsylvanians who vote by mail,” *id.*; “many voters,” *id.* ¶ 64; “some voters,” *id.* ¶¶ 52, 67, 77; and “certain groups of voters,” *id.* ¶ 71. These carefully limited references implicitly concede that there are circumstances in which the challenged provisions are constitutional, such as when voters timely receive and return their ballots or choose to vote in person. Because Petitioners concede that at least some applications of the challenged provisions are constitutional, they have failed to sufficiently plead a facial challenge as a matter of law. After all, “[i]n determining whether a law is facially valid, a court must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” *Pa. Env. Def. Found.*, 161 A.3d at 938 n.31.

In fact, Petitioners’ pleading fails to identify *any* voter who is unable to vote due to the challenged rules—so it cannot serve as the basis for invalidating those rules as to *all* voters. Petitioners do not even plead sufficient facts to demonstrate that any of the individual Petitioners will be unable to vote in the June 2 primary or any other election due to the challenged rules. All four individual Petitioners already have requested an absentee or mail-in ballot. *See* Pet. ¶ 12 (Petitioner Crossey “requested a mail-in ballot this year”); *id.* ¶ 13 (Petitioner Thomas “requested an

absentee ballot”); *id.* ¶ 14 (Petitioner Irvin Weinreich “requested a mail-in ballot”); *id.* ¶ 15 (Petitioner Brenda Weinreich “is voting by mail this year”). And while they plead that they have unspecified “concerns” about the timely arrival of their ballots, none of the Petitioners alleges that they will be unable to complete and submit their ballots in accordance with the challenged rules. *See id.* ¶¶ 12–15. Moreover, Petitioner Crossey resides in “Allegheny County,” which Petitioners allege is engaged in “efforts to provide prepaid postage.” *Id.* ¶¶ 12, 52.

Second, in the same vein, the challenged provisions have “a plainly legitimate sweep.” Petitioners concede that the Commonwealth has “an interest in the finality of elections.” *Id.* ¶ 38. And myriad cases recognize a State’s substantial interest fair and orderly elections. *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) (“The state’s interest in a timely and orderly election is strong.”).

Against these weighty interests, Petitioners offer a case study in wild speculation. As to the prepaid-postage requirement, for example, Petitioners hypothesize that a voter who wishes to vote by mail *may not* have a stamp. Pet. ¶ 49. From there, Petitioners hypothesize that this voter *may be* overly burdened by having to pay \$11 online for a book of 20 stamps. *Id.* From there, Petitioners hypothesize

that this voter *may* decide to purchase a single stamp in person or else vote in person. *Id.* ¶¶ 49, 52. It is only on these assumptions that Petitioners can conclude that “some voters” without the benefit of prepaid postage “will be forced to put their health at risk—to obtain postage or stand in line at potentially crowded, consolidated polling places—or incur additional expense in order to exercise their right to vote.” *Id.* ¶ 52. Of course, Petitioners can have no constitutional complaint with the prepaid-postage requirement as applied to any voters to whom these assumptions do not apply. And even setting that aside, Petitioners’ speculation is all for naught as the Postal Service has a longstanding policy of delivering completed ballots even if they have insufficient or no postage. *See supra* n.2.

Petitioners’ speculation as to signature-matching is even more remarkable. Under their own rendition of Pennsylvania law, the law says nothing about signature-matching. Pet. ¶ 54. Petitioners are remarkably vague when it comes to the particulars of the signature matching process that they claim is unconstitutional: “some counties, *on information and belief*, rely on signature matching to determine whether mail ballot should be counted.” *Id.* (emphasis added); *see also id.* ¶ 53 (“county election officials must then engage in an opaque verification process, which in *some counties* involves signature matching”) (emphasis added). From there, Petitioners offer unsubstantiated speculation that voters in some counties “may” receive notice of a potential signature mismatch, “while others may not.” *Id.* ¶ 58.

From here, Petitioners make the quantum leap to their conclusory allegation that “this signature matching procedure will be applied to *hundreds of thousands of mail ballots (and perhaps more)*.” *Id.* ¶ 59 (emphasis added). This highly suspect conclusion would not necessarily follow even if all of the vague hypotheticals upon which Petitioners premise it were accurate.

The same is true for Petitioners’ complaint about the received-by deadline and the ballot-harvesting ban. The heart of their argument is that it is “entirely unclear” how far in advance of the date of the primary or general election a voter should mail her ballot to ensure that it arrives by the received-by deadline. *Id.* ¶ 36. To bolster this argument, Petitioners describe a hypothetical voter who waits until the last minute to apply for an absentee or mail-in ballot: “Even assuming the ballot arrives before Election Day, the voter may not have time to fill it out and mail it back to ensure timely delivery.” *Id.* ¶ 37. To avoid all this uncertainty, Petitioners continue, “voters will be forced to submit their ballots in person”—which bleeds into Petitioners’ argument for permitting ballot-harvesting, that is, allowing third parties to cull and deliver voters’ ballots. *Id.* ¶¶ 42, 43.

But this chain of speculation overlooks that potential absentee and mail-in electors may request their ballots *up to 50 days* before the date of the election—the longest vote-by-mail period in the country, *see* 25 P.S. §§ 3146.2a(a), 3150.12a(a), and that any voter who already requested an absentee or mail-in ballot for the

primary as originally scheduled on April 28 “do[es] NOT need to reapply” for such a ballot for the June 2 primary, VOTESPA, An Official Pennsylvania Government Website, <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>. It also overlooks that voters may apply online for their ballots, thereby shortening the relevant timeline.

As a result, Petitioners can only reach their conclusion and the basis for an alleged need for ballot-harvesting by hypothesizing a last-minute applicant and unspecified mail delays. For all other voters, Petitioners’ chain of speculation breaks down—Act 77’s received-by deadline and ballot-harvesting ban are indisputably valid as to those voters. There is no good reason to override the legitimate fraud-prevention interests that the Supreme Court has recognized in enforcing an earlier version of Pennsylvania’s ban on ballot-harvesting: “The provision at issue limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it, or even to destroy it.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1232. This is particularly important in light of Pennsylvania’s unfortunate history of “massive” fraud in ballots submitted by mail, *Marks*, 19 F.3d

at 887. The challenged provisions have “a plainly legitimate sweep,” and Petitioners’ facial challenges must fail.

D. Fourth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(3), (4): Petitioners Fail to State a Claim for Relief Under the Pennsylvania Constitution

If the Court chooses to reach the substantive merits of the case, the Petition must still be dismissed. Pennsylvania law has a “strong” presumption its statutes are constitutional; “any party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” *DePaul v. Commonwealth*, 969 A.2d 536, 545 (Pa. 2009) (citation omitted).

Petitioners cannot carry their heavy burden to prove that Act 77’s extended received-by deadline, ballot-harvesting ban, postage-prepaid requirement, or verification provision violates the Pennsylvania Constitution.

1. Petitioners fail to state a claim for relief under the Free and Equal Elections Clause.

The Free and Equal Elections Clause provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

The Supreme Court has long held that “[t]he power to regulate elections is legislative.” *Winston*, 91 A. at 522. Indeed, “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of

government.” *Id.* For that reason, such laws “should never be stricken down by the courts unless in plain violation of the fundamental law.” *Id.* In conducting its review of such legislation, a court “cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy.” *Id.* at 525. Those questions are “for the Legislature and not for the courts,” and if some restrictions are “onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to amend.” *Id.* Thus, election laws should be invalidated only when there is a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors.” *Patterson v. Barlow*, 60 Pa. 54, 75 (1869); *see also In re Nomination Papers of Rogers*, 908 A.2d 948, 954 (Pa. Commw. Ct. 2006) (“[O]ur Supreme Court has applied a ‘gross abuse’ standard to determine whether election statutes violate the ‘free and equal’ clause, thereby giving substantial deference to the judgment of the legislature.”).

Against that backdrop, the Supreme Court has interpreted the Free and Equal Elections Clause to mean that elections are free and equal

when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

Id. at 523.

Courts must uphold an election-administration measure under that definition where: (1) “[i]t denies no qualified elector the right to vote”; (2) “it treats all voters alike”; (3) “the primaries held under it are open and public to all those who are entitled to vote and take the trouble to exercise the right of franchise”; and (4) “the inconveniences if any bear upon all in the same way under similar circumstances.”

Id.

The Supreme Court recently reaffirmed *Winston*—albeit in a vote-dilution case—as setting out “the minimum requirements for ‘free and fair’ elections.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018). This, of course, is not a vote-dilution case, and the Supreme Court’s focus on vote dilution in *League of Women Voters* is inapposite here. But *League of Women Voters* illustrates that the central tenets outlined in *Winston* remain controlling.

Petitioners’ Free and Equal Elections Clause claim fails under *Winston*. This is because the challenged provisions do not deny a qualified elector the right to vote. *Winston*, 91 A. at 523. They treat all voters alike. *Id.* Primaries held with the provisions in effect are open and public to all those who are entitled to vote and “take the trouble to exercise the right of franchise.” *Id.* And “the inconveniences if any bear upon all in the same way under similar circumstances.” *Id.* Petitioners’ arguments otherwise are misplaced.

First, Petitioners generally argue that the 2020 elections will not be free and equal because the challenged provisions portend “widespread disenfranchisement.” Pet. ¶ 10. Petitioners additionally forecast that the circumstances surrounding COVID-19 will compound the alleged disenfranchisement. *E.g., id.* ¶ 7. Petitioners claim that mail delays will especially compound the alleged disenfranchisement. *E.g., id.* ¶ 64. And Petitioners claim that this potential disenfranchisement illustrates the need for ballot-harvesting. *Id.* ¶ 65.

At the outset, it is important to appreciate the extent of Petitioners’ speculation. In addition, it is important to recall that many of the assumptions underlying this argument are easily overcome. *See supra* Section II.C. Notwithstanding these issues, Petitioners’ argument would still fail the standard described in *Winston*. Petitioners’ complaint that some voters may be hindered by mail delays or COVID-19 describes “the inconveniences [that] bear upon all in the same way under similar circumstances.” *Winston*, 91 A. at 523. All of America is laboring under the present circumstances. And whether a Pennsylvania voter “take[s] the trouble to exercise the right of franchise” in person or by mail, that voter is in substantially the same position as every other voter. *Id.* None of these voters has been denied the right to vote.

Second, to the extent that Petitioners argue that the received-by deadline and ballot-harvesting ban do not give voters “an equal chance to vote” because of

unspecified mail delays, Pet. ¶ 7, Petitioners are mistaken. To begin with, any such injury would be caused by mail-delivery mechanisms that Petitioners have not challenged in this case. Petitioners cannot prove a constitutional violation based on a hypothetical injury that—if it were to occur—would be traceable to unchallenged, unforeseeable, and undescribed phenomena, not the received-by deadline or ballot-harvesting ban. *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (“[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”).

Further, the alleged variations in mail delivery are not different in kind than the myriad differences among Pennsylvania citizens that are out of their control—and that may exist even outside of the COVID-19 pandemic. Some are old; some are young. Some are in good health; some are in poor health. Some live downtown by a polling place; some live far away in a rural area. Some have reliable means of transportation; some have no transportation. So, too, some may happen to live in counties with more efficient mail service and ballot processing than others. That the burden of exercising the right to vote varies from voter to voter because of these differences does not render the election laws discriminatory. It demonstrates only that voters are not shaped by a cookie cutter.

Third, for the reasons explained above, Petitioners’ prepaid-postage argument depends on layers of questionable assumptions and is ultimately irrelevant. *See supra* Section II.C. The vast majority of voters have a stamp to spare for a ballot; the vast majority of those who do not can afford to buy a book of stamps online; even those few voters who can only afford a single stamp that they must purchase in person or those who cannot afford or purchase a stamp will still have their ballots delivered by the Postal Service; and all voters remain eligible to vote in person as a procedural backstop. *See supra* n.2. It beggars logic that Act 77—which was intended to ease the existing burdens of voting by mail; burdens which were that Petitioners do not challenge—actually rendered Pennsylvania election law unconstitutional for want of a stamp. But that is all neither here nor there because the Postal Service will deliver ballots that have insufficient or no postage. That is enough to moot any arguments as to prepaid postage.

Finally, Petitioners’ complaint concerning signature-matching is plainly deficient. Although Petitioners refer to “Pennsylvania’s signature-matching process for absentee ballots,” Pet. ¶ 67, the truth is that Petitioners have not identified by well-pleaded allegation *any* specific procedures to which they object or *any* county board of elections that uses those procedures. Nor have they identified by well-pleaded allegation *any* potential voter who will be disenfranchised by a signature-matching process. What they *have* alleged is what the law says: the county boards

must “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s] right to vote.” *Id.* (quoting 25 P.S. § 3146.8(g)(3)). The requirement is certainly reasonable. There is no good-faith argument that the Commonwealth may not ensure the accuracy and legitimacy of the ballots it receives. Act 77 meets the *Winston* test and Petitioners have not pleaded facts sufficient to demonstrate otherwise. *See Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015) (“[T]he state may enact substantial regulation containing reasonable, nondiscriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”) (citation and quotation marks omitted).

None of the challenged provisions violates the Free and Equal Elections Clause and the claim otherwise should be dismissed.

2. Petitioners fail to state a claim for relief under the Equal Protection Guarantees.

Petitioners’ claim based upon the Equal Protection Guarantees fares no better. Article I, Section 1 provides: “All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Article I, Section 26 provides: “Neither the Commonwealth nor any political subdivision

thereof shall deny to any person the enjoyment of any civil right.” Pa. Const. art. I, § 26.

Petitioners do not assert any intentional discrimination by the Commonwealth in the adoption or implementation of the received-by deadline. *See* Pet. ¶¶ 68–71. Instead, Petitioners invoke “the *Anderson/Burdick* balancing test” that the United States Supreme Court has adopted for federal Equal Protection claims. Pet. ¶ 70. Consistent with that framework, the Pennsylvania Supreme Court has made clear that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176–77. Thus, “when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* at 177 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). In other words, so long as the law is “reasonable and rationally related to the interest of the Commonwealth in ensuring honest and fair elections,” it is constitutional even if it places some burden on a voter’s rights. *In re Nader*, 905 A.2d at 459.

Here, there can be no dispute that the Commonwealth has strong and imperative interests “in ensuring fair elections that are free from the taint of fraud,” *id.* at 465, safeguarding “public confidence” in its elections and “in the integrity and

legitimacy of representative government,” *Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 197 (2008), and guaranteeing finality of election results, *see, e.g., Banfield*, 110 A.3d at 176–77. In addition, “[f]iscal responsibility, even if only incrementally served, is undeniably a legitimate and reasonable legislative purpose.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016). None of the alleged deficiencies in the challenged provisions overcomes these interests.

First, the received-by deadline directly advances these interests. It prevents fraud by ensuring that mail-in and absentee ballots are received by election officials before any ballot is counted; promotes public confidence by ensuring that all ballots are cast by a single deadline before any results may become publicly known; and establishes an end date and time for voters to vote and election officials to tabulate ballots. The received-by deadline “does not disenfranchise a class of voters,” because all voters “are still able to cast a ballot” as long as they “return their . . . ballots in sufficient time so that the votes are received by the . . . deadline or they must vote in person.” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (citing *Rosario v. Rockefeller*, 410 U.S. 752 (1973)). It is a “generally-applicable and evenhanded restriction[] that protect[s] the integrity and reliability of the electoral process itself.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). And by promoting these important interests, the received-by deadline “encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197.

In fact, the Pennsylvania Supreme Court has effectively sanctioned the received-by deadline. In *In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968), the appellant argued that, under Article VII, Section 14(a), of the Pennsylvania Constitution, *district* elections boards rather than *county* election boards must count absentee ballots. Rejecting that argument, the Supreme Court explained that district election boards were ill-suited to do so because they are “one-day operation[s]” and absentee ballots “might well not arrive at the place where the district election board sits until days after the board has completed its labors and has disbanded.” *Id.* at 266. The Supreme Court then endorsed what is effectively the received-by deadline:

Perhaps the Legislature should amend the Election Code to provide that absentee ballots must be mailed at such a time to insure their arriving at the district election board the day before the date of the election, on penalty of invalidation of such ballots that arrive later. With machinery of this kind, the District Election Boards could efficiently, speedily and properly handle all absentee ballots on election day so that when the computation would have been completed, it would include the counting of the ballots of those who voted by mail, as well as those who voted in person.

Id. The Court’s recognition confirms that the received-by deadline is constitutional.

For their part, Petitioners implicitly acknowledge that the received-by deadline, as a general matter, does not impose an unconstitutional burden on the right to vote. As indeed they must: the received-by deadline is a “reasonable, nondiscriminatory” rule applicable to all Pennsylvania voters that advances

“important regulatory interests.” *Banfield*, 110 A.3d at 176–77. Moreover, the burden imposed by the received-by deadline is no greater than—and, in fact, is *lesser* than—“the usual burdens of voting.” *Crawford*, 553 U.S. at 198. After all, prior to enactment of Act 77, all non-absentee Pennsylvania voters were required to vote in person. Act 77 alleviates that burden and replaces it with a less-demanding burden by permitting *all* Pennsylvania voters to vote by mail by the received-by deadline.

Instead, Petitioners discuss at length the COVID-19 pandemic, but as explained above, nothing in their argument or requested relief hinges on the COVID-19 pandemic. Indeed, the “vagaries” of mail service, Pet. ¶ 63, and the “unclear” “shadow pre-election cutoff date” for mailing a completed ballot, *id.* ¶ 37, exist even outside the context of the COVID-19 pandemic. In all events, any burdens that Petitioners might ascribe to the pandemic flow from COVID-19, not the received-by deadline or any other action by the Commonwealth. They therefore are not attributable to the Commonwealth and provide no basis for striking down the received-by deadline. *See Banfield*, 110 A.3d at 176–77; *In re Nader*, 905 A.2d at 465. What Petitioners seek to do is to leverage the COVID-19 pandemic—which the Commonwealth did not create—into a ruling from this Court invalidating the grand legislative bargain captured in Act 77 based on conditions like disuniform mail service and voters’ decision-making delays that may repeat in future elections. The Court should decline to grant Petitioners their preferred rule of election

administration that the General Assembly and the Governor have declined to grant as both a general matter in Act 77 and as a specific matter in the context of the COVID-19 pandemic.

Second, Petitioners' related complaint concerning the ballot-harvesting ban suffers the same flaws. The Pennsylvania Supreme Court has previously recognized that an earlier version of the ban was amply justified by the Commonwealth's compelling interest in preventing fraud. Indeed, the ban "limits the number of third persons who unnecessarily come in contact with the ballot and thus provides some safeguard that the ballot was filled out by the actual voter" and "that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it, or even to destroy it." *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1232.

The Supreme Court's recognition tracks the recommendations in the landmark bipartisan Carter-Baker Report. As the Report stated, it is widely known that absentee voting is "the largest source of potential voter fraud" and is uniquely "vulnerable to abuse in several ways." Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005). The authors of the Report recommended that, with narrow exceptions, states "prohibit [third parties] from handling absentee ballots." *Id.* at 46–47. In particular, "[t]he practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots

should be eliminated.” *Id.* at 47. And in fact, “massive absentee ballot fraud” has previously plagued Pennsylvania elections. *Marks*, 19 F.3d at 887.

In an attempt to overcome the strong, commonsense interests that undergird the ballot-harvesting ban, Petitioners contend that ballot-harvesting is necessary “to avoid the uncertainty of mail delivery.” Pet. ¶ 42. Of course, that concern—to the extent it exists at all—exists outside the context of COVID-19 and represents nothing more than the “usual burdens of voting.” *Crawford*, 553 U.S. at 198. It would be traceable to the Postal Service, not the Commonwealth. And the Commonwealth’s compelling and well-established interest in preventing fraud more than adequately justifies any inconvenience resulting from the ban.

Third, Petitioners’ prepaid-postage argument and signature-matching arguments fail for the same reasons they fail under the Free and Equal Elections Clause claim. As to prepaid postage, none of the individual Petitioners allege that they lack a stamp or that obtaining a stamp would be unduly burdensome for them. Pet. ¶¶ 12–15. And the final Petitioner, a nonprofit organization, does not specifically plead that at least one of its members lacks a stamp or that obtaining a stamp would be unduly burdensome for them. *Id.* ¶ 16.

Regardless, as explained above, Petitioners’ prepaid-postage argument depends on layers of questionable assumptions and is ultimately irrelevant. *See supra* Section II.C. Indeed, the vast majority of voters have a stamp to spare for a

ballot. The vast majority of those who do not can afford to buy a book of stamps online. For those who can only afford a single stamp that they must purchase in person, they are in the same position as any non-absentee voter would have been in the absence of Act 77. And in any event, the Postal Service will deliver ballots that have insufficient or no postage. *See supra* n.2. There is nothing to this argument.

So, too, with signature-matching. *See supra* Section II.C. Petitioners have not identified by well-pleaded allegation *any* county board of elections that does so. Nor have they identified by well-pleaded allegation *any* potential voter who might run into a signature-matching process. They have only alleged that county boards must verify individuals' right to vote. There is no good-faith argument that the State may not ensure the accuracy and legitimacy of the ballots it receives. *See Banfield*, 110 A.3d at 176–77 (“[T]he state may enact substantial regulation containing reasonable, nondiscriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”) (citation and quotation marks omitted). Petitioners thus have failed to allege any Equal Protection Guarantees violations.

3. Petitioners fail to state a claim for relief under the Due Process Clause.

Petitioners also fail to state a due process claim. “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing

and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1.

Procedural due process—which is the claim Petitioners advance—is “implicated only by adjudications, not by state actions that are legislative in character.” *Sutton v. Bickell*, 220 A.3d 1027, 1032 (Pa. 2019) (citation and quotation marks omitted). A procedural due process claim under the Pennsylvania Constitution requires the court to consider three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation of the interest through the procedures established; and (3) the value of the government’s interest, if any, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Commonwealth v. Batts*, 163 A.3d 410, 454 (Pa. 2017). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).⁴ Due process does not require additional procedures where “the administrative burden of the additional process . . . outweighs any marginal benefit.” *Lemons v. Bradbury*, 538 F.3d 1098, 1105 (9th Cir. 2008). Petitioners raise procedural due process objections only as to the received-by deadline and the alleged signature-matching, Pet. ¶¶ 77–82, but neither objection succeeds.

⁴ The standards under this provision are identical to those under the Due Process Clause of the Fourteenth Amendment. *See Pa. Game Comm’n v. Marich*, 666 A.2d 253, 229 nn.4, 6 (Pa. 1995).

First, as to the received-by deadline, nothing about the deadline looks like an adjudication; it is a state action that is “legislative in character.” *Sutton*, 220 A.3d at 1032 (citation and quotation marks omitted). Under binding Supreme Court precedent, therefore, a procedural due process claim cannot lie against the received-by deadline. *See id.*

In addition, Petitioners cannot satisfy the *Mathews* factors. To be sure, the right to vote is fundamental, but Petitioners have not identified a cognizable risk of an erroneous deprivation of the right to vote through the procedures established by the Commonwealth. *Batts*, 163 A.3d at 454. The risk that a piece of mail will not reach its intended destination by a certain time is present every time a piece of mail enters the mail stream. Any alleged erroneous deprivation would be caused by either a voter’s last-minute actions or mail delays (or both), *not* the Commonwealth. And this entire argument is based on the speculation heaped upon speculation highlighted many times above.

Petitioners also overlook the Commonwealth’s interests, including the fiscal and administrative burdens that the Commonwealth would incur. *Id.* They forecast “minimal” burdens incurred by extending the received-by deadline to seven days after the date of the primary or general election. Pet. ¶¶ 78–79. Yet they also allege the disenfranchisement of “thousands” and perhaps even “hundreds of thousands” of voters. *Id.* ¶¶ 59, 63. Requiring the Commonwealth to count thousands, or

hundreds of thousands, more ballots received *after* the date of the primary or general election would radically undermine the Commonwealth’s interests in fair, orderly, and final elections. *See supra* Section II.D.2. This is nothing like the limited exception to the deadline for military and overseas voters. *Cf.* Pet. ¶ 79. It would also impose striking fiscal and administrative burdens on the Commonwealth, as it would require election officials to rework the Commonwealth’s election apparatus to process election results weeks after election day, while Pennsylvania voters (and America) wait for days on end under the shadow of doubt. That is no way to conduct elections, and due process certainly does not require it.

Second, as to the alleged signature-matching, this is a hollow argument supported by nothing more than speculation highlighted above. That is why Petitioners have not established a cognizable risk of an erroneous deprivation. *Batts*, 163 A.3d at 454. In addition, Petitioners do not truly wrestle with the Commonwealth’s interests and likely fiscal and administrative burdens. *Id.* They again claim “a minimal burden” that would be incurred by requiring the Commonwealth to provide guidance and training to election officials and to establish a cure procedure. Pet. ¶ 81. But outlining and implementing that requested relief statewide would be a herculean task, especially so on the eve of a primary election. This is the sort of task that is traditionally left to the Legislature—as Petitioners effectively admit. *See id.* ¶ 55 (“Indeed, the General Assembly failed to act on

proposed legislation in 2019 which would have required election boards to provide notice of signature mismatches and set forth procedures for curing rejected ballots.”). For these reasons, this Court should decline Petitioners’ invitation to usurp the Legislature’s role based on nothing more than speculation about unknown voters being disenfranchised by unknown county boards.

4. Petitioners impermissibly ask this Court to override political policy decisions.

Finally, despite insisting their constitutional challenges are motivated by COVID-19, while ignoring that nothing in their arguments actually turns on the existence of COVID-19, the categorical nature of Petitioners’ constitutional arguments and the requested relief depict a much broader attack.

Nonetheless, taking Petitioners’ representation on its own terms, Petitioners effectively ask this Court to override the policy judgments of the political branches—the General Assembly and the Governor—regarding efforts to address COVID-19. These efforts produced legislation—unanimously passed by the General Assembly and signed by the Governor—which delayed the primary election until June 2 and amended Act 77. At the time that the General Assembly and the Governor unanimously agreed to amend Act 77 and postpone the primary election to June 2, they were aware of Act 77, the received-by deadline, the ballot harvesting ban, the postage-prepaid requirement, and the verification requirement. The General Assembly and the Governor, however, opted to leave those rules in place.

Moreover, on April 30, the Senate State Government Committee held a public hearing with election officials and experts to discuss preparations for the primary and general elections. Chelsea Koerbler, *State lawmakers weigh options on how to proceed with June 2nd primary*, Fox43 (April 30, 2020), <https://www.fox43.com/article/news/local/state-lawmakers-weigh-options-on-how-to-proceed-with-june-2nd-primary/521-a3949c23-5935-4354-a69f-bce08fde1aca>. The Governor has lifted the stay-at-home order in 24 Pennsylvania counties. See May 7, 2020 Yellow Phase Order, <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-Yellow-Phase-Order.pdf>. And even in those counties where the stay-at-home mandate remains in effect, it permits government activities, including elections, to proceed. See May 7, 2020 Stay-At-Home Order, <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-Stay-at-Home-Order-Amendment.pdf>.

By pressing this constitutional challenge, Petitioners are asking this Court to weigh in on the political policy judgments regarding ongoing preparations for voting and the best path forward in light of COVID-19. But this Court’s “role is distinctly not to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa.*, 970 A.2d at 1122 n.15 (emphasis in original). Indeed, “[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself

the voice of the community in so declaring.” *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). And “[i]f, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation[.]” *Id.* Should the General Assembly and the Governor permit the primary and general elections to proceed in line with ongoing preparations, this Court’s intervention would constitute a determination that their political policy judgment concerning the current circumstances is incorrect. The Court should decline Petitioners’ invitation.

III. CONCLUSION

For the foregoing reasons, the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Declaratory and Injunctive Relief and dismiss the Petition with prejudice.

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Respectfully submitted,

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**Pro hac vice application forthcoming*

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 11,288 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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