

*HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER*

Mark A. Aronchick (I.D. No. 20261)
Michele D. Hangle (I.D. No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

TUCKER LAW GROUP

Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH, *et al.*,

Respondents.

No. 266 MD 2020

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

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF JURISDICTION	2
III.	STATEMENT OF THE CASE	2
IV.	STATEMENT OF THE QUESTIONS INVOLVED	5
V.	SUMMARY OF ARGUMENT	6
VI.	ARGUMENT.....	7
	A. Only the Pennsylvania Supreme Court Has Jurisdiction to Hear This Matter	7
	B. Petitioners Failed to Join Indispensable Parties	10
VII.	CONCLUSION	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Columbia Gas Transmission Corp. v. Diamond Fuel Co.</i> , 346 A.2d 788 (Pa. 1975)	10
<i>CRY, Inc. v. Mill Service, Inc.</i> , 640 A.2d 372 (Pa. 1994)	10, 11, 12
<i>DeCoatsworth v. Jones</i> , 639 A.2d 792 (Pa. 1994)	11, 12
<i>Kneller v. Stewart</i> , 112 A.3d 1269 (Pa. Commw. Ct. 2015)	9
<i>Powell v. Shepard</i> , 113 A.2d 261 (Pa. 1955)	10
<i>Torres v. Beard</i> , 997 A.2d 1242 (Pa. Commw. Ct. 2010)	2
Statutes	
25 P.S. § 3146.6	7
25 P.S. § 3146.6(c)	6, 7, 10
25 P.S. § 3150.16(c)	6, 7, 10
25 P.S. § 3150.16	7
42 Pa. C.S.A. § 5103	8
Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West)	1

I. INTRODUCTION

Respondents, Secretary of the Commonwealth Kathy Boockvar and Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, submit the following Memorandum of Law in support of their jurisdictional Preliminary Objections.¹

The Petition for Review contains two jurisdictional defects. First, the Supreme Court has exclusive jurisdiction over Petitioners' constitutional challenges to Act 77²—and more specifically the election day deadline for Commonwealth voters to return absentee and mail-in ballots. Second, Petitioners seek affirmative relief from Pennsylvania's county boards of elections and accuse the boards of delaying vote processing, making the boards of elections—who are not named as Respondents—indispensable to resolution of this litigation. For these reasons, this Court should sustain Respondents' jurisdictional Preliminary Objections.

¹ In accordance with the Court's Order of May 19, 2020, Respondents will brief their remaining Preliminary Objections at such time as the Court directs.

² Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West).

II. STATEMENT OF JURISDICTION

Respondents object to the exercise of this Court’s jurisdiction because Petitioners (i) initiated their constitutional challenges to Act 77 in the wrong court and (ii) failed to join indispensable parties, as detailed *infra* Section VI.

III. STATEMENT OF THE CASE³

Four voters and the Pennsylvania Alliance for Retired Americans filed the Petition for Review—which raises constitutional claims arising from enforcement of various provisions of the Pennsylvania Election Code—in the Commonwealth Court on April 22, 2020. Specifically, Petitioners allege that Pennsylvania law places four potential burdens on voting by mail during the COVID-19 pandemic.

First, Petitioners take issue with the Pennsylvania Election Code’s requirement that, to be counted, a voter’s absentee or mail-in ballot must be received by the appropriate county board of elections “by 8:00 p.m. on Election Day[,]” which Petitioners refer to as the “Election Day Receipt Deadline.” *See* Pet. ¶ 34 (citing 25 P.S. §§ 3146.6(c), 3150.16(c)); *see also* Pet. ¶ 3. Second, Petitioners challenge the provision that “in most cases prohibits third parties from

³ For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition’s well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

assisting voters in delivering mail ballots[.]” *See, e.g.*, Pet. ¶ 42 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Third, Petitioners allege that “most voters who choose to return their ballots by mail must also provide their own postage,” but some individuals cannot afford this expense. *See, e.g.*, Pet. ¶ 48 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Fourth and finally, Petitioners contend that unidentified “counties . . . rely on signature matching to determine whether mail ballots should be counted[.]” leading to ballots being arbitrarily discounted. *See, e.g.*, Pet. ¶ 54 (citing 25 P.S. § 3146.8(g)(3)).

According to Petitioners, because of COVID-19, the above provisions violate voters’ constitutional rights. To support that assertion, Petitioners posit the following is true: (i) individual voters do not want to vote in person; (ii) counties may fall behind on processing ballot applications; (iii) the United States Postal Service may be slow in returning filled-out ballots to county boards of elections; and (iv) there are additional possible barriers to voting by mail, including the (a) inability to use third-party assistance to return ballots; (b) monetary costs for postage; and (c) rejection of votes in unspecified counties using signature verification. Thus, according to Petitioners, voters are at risk of being disenfranchised. *See, e.g.*, Pet. ¶¶ 3–6.

To remedy these purported constitutional violations, Petitioners seek two forms of relief.⁴ First, Petitioners seek a declaration that (i) the failure to provide prepaid postage on absentee and mail-in ballots is unconstitutional; (ii) it is unconstitutional to fail to provide procedures for counting mail ballots returned after 8:00 p.m. on election day; (iii) it is unconstitutional to disallow third party mail ballot collection or assistance; and (iv) it is unconstitutional to fail to “provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch.” Pet. at p. 34.

Second, Petitioners seek an order requiring Respondents to: (i) provide prepaid postage on all absentee and mail-in ballots; (ii) “implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day . . . will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause;” (iii) “[a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots and ensure that all such ballots are counted if otherwise eligible;” and (iv) “[p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice

⁴ Nothing in the Petition for Review states for which specific elections Petitioners are seeking relief.

and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” *Id.* at pp. 34–35.

On May 8, 2020—a little more than two weeks after filing the Petition for Review—Petitioners filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (the “Emergency Application”). The Emergency Application seeks an order instructing Respondents to:

(1) provide emergency write-in ballots to all voters who request a mail ballot, designate all ballots submitted by mail as emergency ballots, and require that all emergency ballots shall be counted if they are postmarked by Election Day and received up to seven days after the election; and (2) permit voters to obtain assistance from third-parties in mailing and delivering their sealed mail ballots to county boards, and require that all such ballots delivered by third parties shall be counted if otherwise eligible.

Emergency Application at pp. 34–35. On Monday, May 18, Respondents filed an Opposition to Petitioners’ Emergency Application.

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioners claim that enforcing the Election Day Receipt Deadline as written violates their constitutional rights, did Petitioners’ claims include “a challenge to or . . . a [request for] declaratory judgment concerning the constitutionality of” the statutory provision establishing the deadline, over which the Pennsylvania Supreme Court has exclusive jurisdiction?

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

Where Petitioners seek relief that would mandate that county boards of elections take affirmative action, based on the allegation that county boards may delay processing of absentee and mail-in ballot applications, does the Court lack

jurisdiction because Petitioners have not named the county boards of election as respondents?

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

V. SUMMARY OF ARGUMENT

The Court lacks jurisdiction for two reasons.

First, the Pennsylvania Supreme Court has exclusive jurisdiction over the Petition. Petitioners' claims challenging the Election Day Receipt Deadline are constitutional challenges to 25 P.S. §§ 3146.6(c) and 3150.16(c). Section 13(2) of Act 77 provides that the "Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality" of certain provisions, including those containing the Election Day Receipt Deadline. Because Petitioners challenge the Election Day Receipt Deadline on constitutional grounds, the Supreme Court has exclusive jurisdiction over the Petition for Review.

Second, Petitioners failed to join indispensable parties. Petitioners do not just seek declarations that the challenged provisions of the Election Code are unconstitutional. Rather, Petitioners also seek an injunction affirmatively requiring Respondents and the county boards of elections to (a) provide prepaid postage on all absentee and mail-in ballots; (b) implement unidentified emergency procedures to ensure that ballots delivered after the Election Day Receipt Deadline will be counted if otherwise eligible; (c) allow voters to designate a third party to assist in

collecting and submitting absentee and mail-in ballots; and (d) provide uniform guidance and training to election officials involved in verifying mail ballots and implement unidentified procedures to ensure that voters receive reasonable notice of and an opportunity to cure signature-related defects on absentee and mail-in ballots. *See* Pet. at pp. 34–35 (Prayer for Relief). Because Petitioners seek to compel action by the county boards of election—and because Petitioners allege that the county boards are violating the Pennsylvania Constitution—the counties are indispensable parties that must be joined in this litigation.

VI. ARGUMENT

A. Only the Pennsylvania Supreme Court Has Jurisdiction to Hear This Matter

The Pennsylvania Supreme Court has exclusive jurisdiction over the Petition for Review. Section 13(2) of Act 77 provides that the “Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality” of certain enumerated provisions, including Section 1306 and all of Article XIII-D of Act 77.

Section 1306 of Act 77 is codified at 25 P.S. § 3146.6. § 3146.6(c) sets forth the Election Day Receipt Deadline for absentee ballots: “[A] completed absentee ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” Article XIII-D of Act 77 contains Section 1306–D, which is codified at 25 P.S. § 3150.16.

§ 3150.16(c) sets forth the Election Day Receipt Deadline for mail-in ballots: “[A] completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.”

Each of the three counts in the Petition includes constitutional challenges to the Election Day Receipt Deadline. *See* Pet. ¶¶ 63, 71, 77. Petitioners do not challenge any individual county’s implementation of the deadline, or argue that the deadline must be extended to remedy other constitutional violations that make the deadline unworkable for a particular set of voters in a particular election; they allege that the Election Day Receipt Deadline *itself* is unconstitutional and cannot be applied anywhere in the Commonwealth in any upcoming election.⁵ Thus, only the Pennsylvania Supreme Court has jurisdiction to hear Petitioners’ claims, and Petitioners’ claims must be transferred there. *See* 42 Pa. C.S.A. § 5103 (stating that if a court does not have jurisdiction over a matter, the court “shall transfer the

⁵ As Respondents discussed in their response to Petitioners’ Application for Special Relief, and will further discuss in a supplemental declaration about the status of the counties’ ballot processing efforts, each of Pennsylvania’s 67 counties is facing a different set of challenges in preparing for the June 2 primary election. It is possible that, in a few counties, obstacles will arise to the timely processing and return of applications and ballots. If this happens, Respondents believe that the proper remedy would be a petition to the Court of Common Pleas of any affected county. *See, e.g.*, Ex. KK to the Memorandum in Support of Petitioners’ Application (2016 Order of Montgomery County Court of Common Pleas). Such actions, unlike this action, would not challenge Act 77 itself and thus would not be subject to the Supreme Court’s exclusive jurisdiction.

record thereof to the proper tribunal”); *see also Kneller v. Stewart*, 112 A.3d 1269 (Pa. Commw. Ct. 2015).

To the extent that Petitioners assert that they are not challenging the *constitutionality* of the Election Day Receipt Deadline and instead are merely trying to *supplement* the deadline with emergency procedures, that argument must fail. The crux of Petitioners’ claims is that enforcement of the Election Day Receipt Deadline *as written*—without any provision authorizing alternative procedures in the event of an emergency—will cause voters to be disenfranchised and thus violate their constitutional rights. Allegations in support of each constitutional count confirm as much:

- “Pennsylvania’s failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county board of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. . . . Thus Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.” Pet. ¶ 63 (Count I);
- “Pennsylvania’s rejection of ballots delayed by mail service disruptions . . . substantially burdens the right to vote and bear heavily on certain groups of voters without sufficient justification.” Pet. ¶ 71 (Count II); and
- “Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to the postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots delivered after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurance that they

will be delivered in time, even when submitted well in advance of Election Day.” Pet. ¶ 77 (Count III).

It is of no moment that Petitioners suggest additional “safeguards” might remedy these alleged constitutional violations. As enacted, the Pennsylvania Election Code and in particular §§ 3146.6(c) and 3150.16(c) do not contain those safeguards. Saying “without these safeguards (which the statute does not provide), the statute is unconstitutional,” is the same as saying “the statute is unconstitutional.”

Because Petitioners raise a challenge “concerning the constitutionality” of §§ 3146.6(c) and 3150.16(c), the Supreme Court has exclusive jurisdiction over Petitioners’ claims under Section 13(2) of Act 77. The Court must therefore transfer the Petition for Review to the Supreme Court.

B. Petitioners Failed to Join Indispensable Parties

The county boards of election are indispensable parties to this action. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *see also CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The absence of indispensable parties goes absolutely to the jurisdiction [of the court], and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations

omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that Petitioners seek an injunction that would write into existence *new law* that compels *affirmative action* by the county boards of election to adopt new standards and procedures in order to count certain ballots that might otherwise be uncounted. *See* Pet. at pp. 34–35 (Prayer for Relief). The injunctive relief that Petitioners purport to seek, including “[p]rovid[ing] prepaid postage on all absentee and mail-in ballots,” “[i]mplement[ing] additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day ... will be counted if otherwise eligible,” and “[p]rovid[ing] uniform guidance and training to election officials involved in verifying mail ballots and implement[ing] procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected,” will require county action and the direct involvement of county election officials. As in *CRY*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order

would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioners’ requested relief will require cooperation and affirmative steps from the county boards of elections.

Additionally, Petitioners’ claims hinge on their expectation that the county boards of elections will actively cause properly cast votes to not be counted: “In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and *their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.*” *See, e.g.,* Pet. ¶ 59 (emphasis added); *see also* Pet. ¶¶ 54–55, 58, 67, 71, 80. Petitioners also allege that counties are “falling behind on processing mail-in ballot requests,” Pet. ¶ 35, placing voters in jeopardy of violating the Election Day Receipt Deadline. Likewise, Petitioners allege that counties, including Beaver County, will unconstitutionally fail to provide prepaid postages for mail ballots. Pet. ¶ 52. Finally, in Count III of the Petition, Petitioners allege that this conduct by the *counties*, not by Respondents, deprives voters of procedural due process. *See* Pet. ¶¶ 78–81. Because Petitioners allege that the county boards of election will be at least partially responsible for violating the Pennsylvania Constitution, “justice [cannot] be afforded without violating the due process rights of’ the counties. *DeCoatsworth*, 639 A.2d at 797; *see also* *CRY*,

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

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

VII. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents’ jurisdictional Preliminary Objections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: May 22, 2020

By: /s/ Michele D. Hangle
Mark A. Aronchick (ID No. 20261)
Michele D. Hangle (ID No. 82779)
Robert A. Wiygul (I.D. No. 310760)
Christina C. Matthias (I.D. No. 326864)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

TUCKER LAW GROUP

Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica Rickabaugh (I.D. No. 200189)
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Respondents

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: May 22, 2020

/s/ Michele D. Hangle
Michele D. Hangle