

IN THE SUPREME 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.: 108 MM 2020

**APPLICATION TO SUBSTITUTE PROPOSED PRELIMINARY
OBJECTIONS TO THE AMENDED PETITION AS EXHIBIT TO
APPLICATION FOR LEAVE TO INTERVENE**

The Republican National Committee, the National Republican Congressional Conference and the Republican Party of Pennsylvania (collectively, the “Proposed Intervenor-Respondents”), file the following Application to Substitute Proposed Preliminary Objections to the Amended Petition as an Exhibit to the Proposed Intervenor-Respondents’ Application for Leave to Intervene in this matter and state in support:

1. Petitioners filed their Petition for Declaratory and Injunctive Relief (the “Original Petition”) on April 22, 2020, in the Commonwealth Court of Pennsylvania.

2. On May 11, 2020, Proposed Intervenor-Respondents filed an Application for Leave to Intervene and attached as Exhibit A thereto proposed preliminary objections to the Original Petition.

3. Thereafter, Petitioners filed their response in opposition to the Application for Leave to Intervene, and Proposed Intervenor-Respondents filed a reply.

4. On June 17, 2020, Judge Hannah Leavitt of the Commonwealth Court entered an Order which transferred this matter to this Court for adjudication.

5. Proposed Intervenor-Respondents’ Application for Leave to Intervene was pending at the time Judge Leavitt entered her Order. Proposed Intervenor-Respondents’ Application for Leave to Intervene remains pending.

6. On June 24, 2020, Petitioners filed an application for leave to file an amended petition for review.

7. On July 8, 2020, this Court granted Petitioners’ application and granted Petitioners until July 13, 2020 to file an amended petition for review. This Court further ordered that “[r]esponses [to the amended petition] are due in the Prothonotary's office within 14 days of the filing of the Amended Petition.”

8. Petitioners filed their Amended Petition for Declaratory and Injunctive Relief (the “Amended Petition”) on July 13, 2020. Responses to the Amended Petition are due by July 27, 2020.

9. Rule 2328(a) of the Pennsylvania Rules of Civil Procedure provides that a petitioner seeking leave to intervene “shall attach to the petition a copy of any pleading which the petitioner will file in the action if permitted to intervene.” Pa. R.C.P. 2328(a).

10. Petitioners’ filing of the Amended Petition rendered moot Proposed Intervenor-Respondents’ preliminary objections to the Original Petition, *see* Pa. R.C.P. 1028(c)(1), and a new responsive pleading to the Amended Petition is required, *see* Pa. R.C.P. 1028(f).

11. If granted leave to intervene in this action, Proposed Intervenor-Respondents will file preliminary objections to the Amended Petition. A copy of the preliminary objections Proposed Intervenor-Respondents would file are attached hereto as Exhibit A.

12. The grounds under which Proposed Intervenor-Respondents seek to intervene in this action have not changed. Accordingly, no amendment to Proposed Intervenor-Respondents’ Application for Leave to Intervene is necessary.

13. Because Proposed Intervenor-Respondents have not yet been granted leave to intervene in this matter, Proposed Intervenor-Respondents request that the

attached Preliminary Objections to the Amended Petition be substituted for the Preliminary Objections to the Original Petition as Exhibit A to their Application for Leave to Intervene.

WHEREFORE, Proposed Intervenor-Respondents the Republican National Committee, the National Republican Congressional Conference and the Republican Party of Pennsylvania respectfully request that the Court grant this motion and substitute the attached Preliminary Objections to the Amended Petition in place of the Preliminary Objections to the Original Petition as Exhibit A to Proposed Intervenor-Respondents' Application for Leave to Intervene.

Dated: July 27, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

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

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.

/s/ Kathleen A. Gallagher
Counsel for Proposed Intervenor-Respondents
the Republican Party of Pennsylvania,
Republican National Committee, and National
Republican Congressional Committee

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA

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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*

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

The Amended 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, the Republican National Committee, and the National Republican Congressional Committee (collectively,

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

Initially, this Court should dismiss the Amended Petition because Petitioners’ claims are not ripe and thus not justiciable. But even if the Court were to entertain the Amended 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 Amended Petition therefore provides no basis to substitute Petitioners’ preferred policy choices for the choices of the General Assembly. The Court should dismiss the Amended Petition.

PRELIMINARY STATEMENT

Petitioners ask this Court to upset the grand bipartisan compromise struck by the General Assembly and the Governor in Act 77 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, Petitioner’s allegations regarding the future impact—if any—of the constantly evolving COVID-19 pandemic on the November general election approximately three-and-a-half months from now are purely speculative and unripe for adjudication.

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 this 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 Amended 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, the ballot harvesting ban, and the prepaid-postage requirement, 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 Act 77’s received-by deadline exist—Petitioners all but concede that the challenged provisions 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 set forth a claim 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 to show Act 77 is not reasonably and rationally related to the Commonwealth's interest in ensuring honest and fair elections.

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 Amended 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 Amended Petition,¹ Pennsylvania law, as amended by Act 77, now creates two categories of voters who are permitted to vote by means other than in person at a polling location: absentee voters and mail-in voters. Am. Pet. ¶ 24.

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.

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

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”). Am. Pet. ¶ 24 (citing 25 P.S. § 3150.11(a)). These voters are known as “qualified mail-in electors.” 25 P.S. § 3150.11.

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); Am. Pet. ¶ 24.

7. To apply for an absentee or mail-in ballot, a voter must apply (methods of applying include 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).

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 Petitioners do not allege that the USPS failed to deliver any ballot during Pennsylvania’s June 2 primary election due to insufficient postage.

11. 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 Becomes 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

12. Act 77 also contains a non-severability provision. Am. Pet. ¶¶ 8, 58-60.

13. 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

14. Petitioners allege that the received-by deadline, the ballot harvesting ban, and the prepaid-postage requirement violate the Pennsylvania Constitution. Am. Pet. ¶ 8.

15. They request an order requiring Respondents to count ballots received after the received-by deadline, to permit ballot harvesting, and to provide prepaid postage. *Id.* ¶ 83.

II. PRELIMINARY OBJECTIONS

A. Petitioner's Claims Are Not Ripe and Thus Not Justiciable, Pa. R.C.P. 1028(a)(4)

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

17. This action should be dismissed because Petitioners' claims are not ripe.

18. The doctrine of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Dep't of Labor & Indus.*, 8 A.3d 866, 874 (Pa. 2010).

19. "Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013).

20. "Parties may raise questions regarding standing, ripeness, and the political question doctrine by filing preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court." *Id.*

21. A claim is not ripe where it rests on speculation regarding future events. *See, e.g., Disability Rights Pa. v. Boockvar*, 2020 WL 2820467, 2020 Pa.

LEXIS 2751; *id.* (Wecht, J., concurring); *Delisle v. Boockvar*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring).

22. Prior to the June 2 primary election, Commonwealth voters brought two petitions seeking relief from the Election Code’s received-by deadline for absentee and mail-in ballots based on the alleged effect of the COVID-19 pandemic on the Commonwealth’s administration of elections. *See Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970.

23. This Court dismissed those petitions on May 15 and May 29—18 days and 3 days before the primary election, respectively—because the allegations regarding the effect of the COVID-19 pandemic on the primary election were speculative. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751, at *2; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970, at *2; *id.* (Wecht, J., concurring).

24. Petitioners’ allegations regarding the effect—if any—of the COVID-19 pandemic on the November general election approximately three and a half months from now are likewise speculative and unripe and, therefore, should be dismissed. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751 at *2; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970 at *2; *id.* (Wecht, J., concurring).

25. Petitioners’ action is unripe for the additional reason that the gravamen of Petitioners’ action is the consolidation and closure of polling places, which was made possible under Act 12 of 2020. *See* Am. Pet. ¶¶ 34–43.

26. At this time, no polling places have been closed or consolidated for the general election—and no statutory authority to effect such a closure or consolidation exists. Petitioners even acknowledge that Act 12, which provided the authority to close and consolidate polling places, was “emergency legislation” that applied only to the Primary Election held in June. Am. Pet. ¶ 34.

27. Yet Petitioners seek judicial intervention that would require the Respondents to “provid[e] prepaid postage on all absentee and mail-in ballots,” to extend the received-by deadline, and to permit ballot harvesting, Am. Pet. ¶ 83(c), when no statutory authority authorizes the Respondents to do so and where there exists only speculative harm.

28. Indeed, all of Petitioners’ requested relief seeks to address alleged injuries that might—but might not—occur. Petitioners does not allege any facts to show that any of the Petitioners are likely to suffer a constitutional deprivation.

29. That Petitioners can only speculate regarding the possibility of closed or consolidated polling places for the general election or difficulties with mail-in ballot voting does not give rise to a cause of action.

WHEREFORE, Intervenor-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 Amended 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)

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

31. 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.

32. 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.

33. The non-severability provision is squarely implicated in this case. For example, Sections 6, 7, and 8 of Act 77 contain the received-by deadline.

Petitioners’ prayer for relief seeks invalidation of the received-by deadline and requests, among other things, a declaration that “the indiscriminate rejection of mail ballots delivered after Election Day despite delays in mail ballot processing or delivery” is unconstitutional and invalid. Am. Pet. ¶ 83(b). 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.

34. Similarly, Sections 6 and 8 of Act 77 contain the ballot harvesting ban. Petitioners seek invalidation of the ballot harvesting ban and a declaration that “the failure to allow voters to designate third parties to assist them in submitting their sealed ballots” is unconstitutional and unlawful. Am. Pet. ¶ 83(b). 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 ballot harvesting ban 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.

35. Finally, Sections 6 and 8 of Act 77 also contain the requirement that a voter who chooses to return a ballot by mail do so postage prepaid. Petitioners seek

invalidation of that requirement and a declaration that “the failure to provide pre-paid postage for all mail ballots” is unconstitutional and unlawful. Am. Pet. ¶ 83(b). 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 prepaid-postage requirement 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.

36. This 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.

37. *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.*

38. That is what happened with Act 77.

39. 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.

40. *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.

41. 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 v. Moore*, 91 A. 520, 522 (Pa. 1914). 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.

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

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

WHEREFORE, Intervenor-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 Amended Petition for Review with prejudice.

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*.

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

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

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

46. 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).

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

48. 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.” Am. Pet. ¶ 83.

49. Moreover, Petitioners’ prayer for relief requests relief “during the COVID-19 pandemic,” but this language 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 for an indeterminate timeframe, perhaps

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).

50. “[F]acial challenges are generally disfavored.” *Clifton*, 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).

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

52. *First*, the Petition acknowledges that, even under Petitioners’ view, there are circumstances in which the challenged provisions are valid. Petitioners allege disenfranchisement of “a significant portion of its voters,” Am. Pet. ¶ 60, “countless Pennsylvania voters,” *id.* ¶ 61, “a large swath of Pennsylvania’s eligible voters,” *id.* ¶ 65; “[m]ost voters,” *id.* ¶ 66, and “many voters,” *id.* 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’tl. Def. Found.*, 161 A.3d at 938 n.31.

53. *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.”).

54. Petitioners can only reach their conclusion and the basis for an alleged need for extended deadlines, ballot harvesting, and prepaid postage by hypothesizing a last-minute applicant and unspecified mail delays.

55. There is no good reason to override the legitimate interests that this 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).

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

WHEREFORE, Intervenor-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 Amended 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)

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

58. 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).

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

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

60. 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.

61. This 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.

62. 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).

63. 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.

64. Act 77’s received-by deadline, ballot harvesting ban, and prepaid-postage requirement all meet 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).

65. 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.

66. 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.

67. Petitioners do not assert any intentional discrimination by the Commonwealth in the adoption or implementation of the received-by deadline, ballot harvesting ban, or prepaid-postage requirement. *See Am. Pet.* ¶¶ 52–61. Instead,

Petitioners invoke “the *Anderson/Burdick* balancing test” that the United States Supreme Court has adopted for federal Equal Protection claims. Am. Pet. ¶ 80.

68. But this 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).

69. 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.”).

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

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

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

72. Despite insisting their constitutional challenges are motivated by COVID-19, the categorical nature of the constitutional arguments and the requested relief depict a much broader attack.

73. 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, efforts that included the unanimously-passed legislation, signed by the Governor, delaying the primary election until June 2 and amended 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, and the prepaid-postage requirement.

74. 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.*

75. Should the General Assembly and the Governor permit the general election 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, Intervenor-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 Amended Petition for Review with prejudice.

Dated: July 27, 2020

Respectfully submitted,

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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.

/s/ Kathleen A. Gallagher
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Republican Party of Pennsylvania, Republican
National Committee, and National Republican
Congressional Committee*

IN THE SUPREME 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.: 108 MM 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 SUPREME COURT OF PENNSYLVANIA

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

Case No.: 108 MM 2020

ORDER

AND NOW, this ____ day of _____, 2020, upon consideration of the Application to Substitute Proposed Preliminary Objections to the Amended Petition as Exhibit to Application for Leave to Intervene filed by Proposed Intervenor-Respondents the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee and any response thereto, it is hereby ORDERED that the Motion is GRANTED. The Preliminary Objections to the Amended Petition, which are attached to this Application as Exhibit A, are hereby substituted as Exhibit A to Proposed Intervenor-Respondents' Application to Intervene.

BY THE COURT:
