

NOTICE TO PLEAD

Petitioner: 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/ Zachary M. Wallen

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Counsel for Proposed-Intervenor
Respondents**

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2020

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

Petitioners,

v.

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION
SERVICES AND NOTARIES OF THE PENNSYLVANIA
DEPARTMENT OF STATE,**

Respondents,

**BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**PROPOSED INTERVENOR-RESPONDENTS SPEAKER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER
AND MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES KERRY BENNINGHOFF AMENDED
PRELIMINARY OBJECTIONS TO AMENDED PETITION**

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Proposed Intervenor-Respondents, Speaker of the Pennsylvania House of Representatives, Bryan Cutler, and Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff (collectively, “the House Leaders”), file these Amended Preliminary Objections to explain that this Court should uphold the House’s policy decisions in the drafting of the Election Code made in conjunction with the Senate and the Executive Branch, and dismiss the Amended Petition.

PRELIMINARY STATEMENT

Despite Respondents’ representations to the contrary, nothing substantively has changed since the House Leaders submitted their prior Preliminary Objections.

While Respondents allege in their Praecipe to Withdraw Certain of Respondents’ Preliminary Objections (the “Praecipe”) that a letter from the United States Postal Services (the “USPS Letter”) in their possession for several weeks before their filing somehow necessitates Respondents’ refusal to continue to defend the law of the Commonwealth, nothing could be further from the truth.

This Petition remains yet another in a cavalcade of cases where petitioners have sought to use Pennsylvania Courts to sidestep the legislative process and to impose policies of the petitioners’ own choosing. Just as this Court wisely chose to dismiss a similar petition in *Disability Rights Pennsylvania v. Boockvar*, it should do likewise here, and allow the political branches to continue triaging in a bipartisan and bicameral fashion the effects of the COVID-19 pandemic.

The COVID-19 pandemic has indeed impacted all facets of American life, including the administration of elections. While the recent June 2, 2020 Primary Election did not occur without some problems, it operated within a well-considered framework that performed admirably given the exigent circumstances.

The General Assembly is now in the process of analyzing the conduct of the Primary Election. They recently enacted Act 35 of 2020, which required the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. From this, the General Assembly is now analyzing the conduct of the 2020 Primary Election so that they are in a position to enact such additional measures as may be required for the 2020 General Election.

Instead of allowing the the political branches to analyze those findings and data and to continue to craft legislation addressing any needed changes, Petitioners, and now the Respondents, desire this Court to redesign an election code of their own choosing, notwithstanding the violence to our constitutional norms.

As an initial matter, Petitioner, the Pennsylvania Alliance for Retired Americans, lacks standing to bring this matter, as it is an association, in contravention of well-established case law that only individuals have standing to bring election-related claims in Pennsylvania.

The remaining Petitioners seemingly structure their claims as an “as-applied challenge,” but do not properly support their allegations. Petitioners make a series of suppositions of future calamitous harms and issues that *may* occur in the future should their scenarios come to pass. Moreover, this relief allegedly needs to occur *now*, rather than to allow the continued bipartisan triaging of COVID-19-related issues.

Similarly, the Respondents by their recent Praecipe now make fundamentally the same argument---that due to a misreading and exaggeration of the text of the USPS Letter---this situation somehow necessitates *emergency* affirmative relief being enacted by this Court---without the involvement of the General Assembly, which has resolutely monitored and modified the Election Code in advance of, and in response to, the COVID-19 pandemic.

The political branches took the proactive step with Act 77 of modernizing Pennsylvania’s voting process to allow for no-excuse voting by mail. When the unforeseen COVID-19 pandemic swept the world, the Commonwealth’s political branches were ready with carefully considered voting procedures that will allow for free and fair elections. Furthermore, the Legislative and Executive Branches took further bipartisan steps to move the Primary Election date and to enact election procedures compatible with social distancing, and they have shown through the enactment of Act 35 that they continue to actively monitor the situation.

But while some lead, others look to take advantage of a situation for their own agendas—which is exactly what is occurring in this case. The Petitioners—who do not possess a cognizable injury other than their own speculation—look to undo these bipartisan reforms and to have this Court set election policy of Petitioners’ own choosing. This request for relief is inapposite to federal and state constitutional principles and this Court’s well-reasoned policy of judicial restraint in election cases, including the recent *Disability Rights Pennsylvania* case.

The challenged policies are all perfectly constitutional election regulations. For the feasibility of election administration, the Commonwealth’s political branches have pondered the relevant policy considerations and made the policy choice that the deadline for a county board of elections to receive a ballot should occur at 8:00 p.m. on Election Day. This is not some nefarious scheme designed to deprive anyone of their constitutional rights, but a constitutional effort to make the Commonwealth’s elections free, fair, and workable.

Similarly, the Pennsylvania Election Code does not permit third-party ballot harvesting because of well-warranted concerns about fraud, including voter intimidation. Even as recently amended, the Election Code rejects ballot harvesting as an election security risk, which is not surprising since ballot harvesting fraud recently led to overturning of an entire congressional election in North Carolina.

Moreover, this Court has already determined that this practice is not permitted by law.

Also ignored by Petitioners is the integral role of Pennsylvania's counties in the election process. Petitioners demand that the Department of State appropriate funds for absentee and mail-in ballots, and centrally direct their tabulation, despite the fact that those functions are statutorily the province of the county election boards.

Not only are all of the challenged policies constitutional, Petitioners have failed to even join the indispensable parties, the county election boards, that would be tasked with implementing Petitioners' requested relief. As such, Petitioners' claims should be dismissed for failure to join a necessary party.

As the Petitioners state no claim on which the Court may grant relief, lack standing to bring this action, request a nonjusticiable remedy, and failed to join necessary parties, this action should be dismissed with prejudice.

I. FACTUAL BACKGROUND

1. Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with the Commonwealth Court on April 22, 2020, seeking for the Court to impose four election policies of their choosing, namely that the Court require the Secretary of the Commonwealth to “a. [p]rovide postage on all absentee and mail-in ballots; b. [i]mplement additional procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail services

delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77's non-severability clause; c. [a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots . . . and d. [p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement 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.” Original Pet. at Pages 34-35.

2. On June 17, 2020, the Hon. Mary Hannah Leavitt, President Judge of the Commonwealth Court, determined that Section 13(2) of Act 77 of 2019 vested exclusive jurisdiction in this Court to hear this matter, and thereby transferred this matter to this Court pursuant to 42 Pa. C.S. 5103(a).

3. On June 24, 2020, Petitioners sought leave to file an amended Petition, which was granted by this Court on July 8, 2020. Petitioners then filed their Amended Petition for Declaratory and Injunctive Relief with this Court on July 13, 2020.

4. The House Leaders filed an Application for Leave to File Amended Preliminary Objections on July 27, 2020.

5. Where the Original Petition sought that its requested relief be perpetual, the Amended Petition asks for the same relief of an altered received-by deadline, the

requirement for pre-paid postage,¹ and the permission of third-party ballot harvesting, only limited to the duration of the COVID-19 pandemic.² Amended Pet.

¶ 83. Petitioners do not state in their Amended Petition why they have since limited their requested relief. *See generally* Amended Pet.

6. While Petitioners do not expressly cite to a single statute that they consider unconstitutional, this suit was brought as the Pennsylvania General

¹ While Respondents have announced that the Department of State will pay for postage for the November election, they have not announced how this program will be implemented or funded. *See* Pennsylvania Pressroom, *Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots* (July 31, 2020), available at <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>. Given the uncertain nature of this administrative policy decision, the House Leaders reiterate their position that the Pennsylvania Constitution does not require the payment of return postage on mail-in ballots.

² In their Amended Petition, the Petitioners seek for this Court to “a) Declare unconstitutional the Commonwealth’s failure to provide adequate safeguards to ensure access to a free and equal election, and to safe and reliable means through which Petitioners and other voters in the Commonwealth may exercise their right to vote during the COVID-19 pandemic. b) Declare unconstitutional the Commonwealth’s failure to remove barriers to voting by mail, to ensure access to a safe and reliable means to vote during the COVID-19 pandemic, including (1) the indiscriminate rejection of mail ballots delivered after Election Day despite delays in mail ballot processing or delivery; (2) the failure to allow voters to designate third parties to assist them in submitting their sealed mail ballots; and (3) the failure to provide pre-paid postage for all mail ballots, only to the extent that such relief for any of the above procedures do not require the Court to apply Act 77’s non-severability clause. c) Issue an order directing Respondents to implement additional safeguards for the November 3, 2020 general election and any other election conducted during the COVID-19 pandemic which may include: i. Providing prepaid postage on all absentee and mail-in ballots; ii. Implementing additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day will be counted if otherwise eligible, only to the extent that such procedures do not require the court to apply Act 77’s non-severability clause; and iii. Allowing 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, only to the extent that such procedures do not require the court to apply Act 77’s non severability clause; d) Maintain jurisdiction over this dispute to ensure that the Respondents comply with their obligations under the Pennsylvania Constitution; e) Provide such other and further relief as the Court may deem just and proper.” Amended Pet. ¶ 83.

Assembly has been passing bipartisan legislation that has greatly *expanded* the ability of Pennsylvania’s voters to vote by mail, starting with Act 77 of 2019.

7. Pennsylvania has traditionally only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee, the voter would have had to provide a permissible reason to do so, and the voter would have been provided with an absentee ballot that would have had to be returned by the voter no later than 5:00 p.m. *on the Friday before the election. Id.*

8. In addition to allocating \$90 million to ensuring that Pennsylvanians could vote safely and securely on modern voting machines, Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).

9. These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.* The traditional voting options remain available—voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

10. The political branches have continued to work diligently to fine-tune these election reforms. Act 94 of 2019 was enacted in November 2019 to streamline operations to ensure that the ballot materials were suitable to allow the ballots to be properly scanned. 2019 Pa. Legis. Serv. Act 2019-94 (H.B. 227) (West).

11. As COVID-19 upended seemingly every facet of American life, once again, the Legislative and Executive Branches worked together to fashion bipartisan legislation to address the problem. Act 12 of 2020 introduced numerous accommodations to ensure that the 2020 Primary Election could be conducted even amidst the COVID-19 pandemic. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).

12. The date of the Primary Election was moved until June to allow more time to take steps to protect the health of Pennsylvania's voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties, to establish polling places without court approval. *Id.*

13. Following the June 2, 2020 Primary Election, the political branches again worked in bipartisan fashion to enact Act 35 of 2020, which required the Secretary of the Commonwealth to publish a report on the 2020 Primary Election,

to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. 2020 Pa. Legis. Serv. Act 2020-35 (H.B. 2502) (West).

14. The General Assembly continues to analyze the Act 35 report and to monitor the COVID-19 situation and stands ready to enact all further measures as may be required to ensure that the Commonwealth continues to have free and fair elections.

II. PRELIMINARY OBJECTIONS

A. **FIRST PRELIMINARY OBJECTION: Petitioner The Pennsylvania Alliance for Retired Americans Lacks Standing to Bring This Action (Pa. R. Civ. P. 1028(a)(4))**

15. House Leaders hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

16. The Pennsylvania Alliance for Retired Americans (the “Alliance”) lacks standing to sue in this case because the right to vote and the right to have one’s vote counted is at issue, and the Organization Petitioner is not authorized to vote in the Commonwealth.

17. To have standing, a party in an action must establish “a substantial, direct and immediate interest in the outcome of the litigation.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

18. In certain contexts, it is true that an association “has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or threatened injury as a result of the action challenged.” *Id.* at 922 (citing *Phila. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012)).

19. But Pennsylvania courts have repeatedly held that an association does not have standing, even on behalf of its members, when the right to vote and the right to have one’s vote counted is the subject of the challenge. Order ¶ 4, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017) (dismissing the League of Women Voters of Pennsylvania because it was not authorized by law to exercise the right to vote in the Commonwealth); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002); *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002).

20. “[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert*, 790 A.2d at 995 (citation omitted). When “the right to vote and the right to have one’s vote counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; *see also Erfer*, 794 A.2d at 330 (dismissing Democratic Committee). “The factor that elevates the general interest of each registered voter to one that is sufficiently substantial to

confer standing to challenge a candidate's nomination petition is that voter's eligibility to participate in the election." *In re Pasquay*, 525 A.2d 13, 14 (Pa. Commw. 1987), *aff'd* 529 A.2d 1076 (Pa. 1987).

21. Accordingly, an entity that does not possess the right to vote in the Commonwealth does not have a direct, substantial, and immediate interest in litigation over the right to vote and the right to have one's vote counted. The operative factor in these standing decisions was that the challenges sought to vindicate "the right to vote and the right to have one's vote counted." *Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

22. By contrast, the Alliance brings suit based on vague allegations that due to Pennsylvania's Election Code and COVID-19, the Alliance "will be forced to divert resources from its ongoing mission. . ." by its not being allowed to engage in ballot harvesting. Amended Pet. ¶ 16; see also Original Pet. ¶ 16 (the Alliance previously made a nearly identical diversion of resources argument in their original Petition concerning the enactment of Act 77 without referencing COVID-19).

23. There is no allegation that the Alliance is authorized by law to vote in the Commonwealth, accordingly, it lacks capacity to sue—either individually or on behalf of its members—due to the nature of the claims in this case and must be dismissed as a party.

WHEREFORE, for the reasons above, the House Leaders respectfully request that this Court sustain their Preliminary Objection for Petitioners' lack of standing and dismiss with prejudice the petition for review.

B. SECOND PRELIMINARY OBJECTION: Petitioners Do Not Allege an Actual Constitutional Violation (Pa. R. Civ. P. 1028(a)(4))

24. House Leaders hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

25. Petitioners' allegations are devoid of a concrete, cognizable legal injury, and are instead improperly premised on a series of suppositions about harms that may befall them in the future, should their scenarios come to pass. Petitioners premise their claim for relief on conjecture as to a future cascade of worst-case scenarios.

26. A key focus of Petitioners' concerns are the procedures previously put into place for the Primary Election pursuant to Act 12. To be sure, the COVID-19 pandemic necessitated unprecedented measures, such as the consolidation of polling places, which were enacted to allow for a safe and workable election even in the pandemic's wake. *See generally* Amended Pet. ¶ 34.

27. Act 12 of 2020 introduced numerous accommodations to ensure the 2020 Primary Election could be conducted safely. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). The date of the Primary Election was moved until June to allow more time to "flatten the curve" and protect the health of Pennsylvania's

voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties to establish polling places without court approval. *Id.*

28. Tellingly, despite Petitioners' references to isolated problems in some counties, the overall success of Act 12 was borne out by the fact that none of Petitioners had any actual problems voting in the Primary Election. *See Amended Pet.* ¶¶ 10, 12, 14, and 15.

29. The extraordinary measures of Act 12 certainly had limitations—which is why they were enacted on a temporary basis to deal with *one particular election* being conducted in the middle of a pandemic. Petitioners seek to use isolated problems that some counties had in implementing new election procedures, and vague references to circumstances in other states, to justify this Court ordering *more* new procedures of Petitioners' own choosing for the Commonwealth to implement before November's General Election.

30. Moreover, the political branches only recently enacted Act 35, through which a thorough the Secretary of the Commonwealth drafted an analysis of the Primary Election. The General Assembly is now in the process of analyzing those findings to deliberately consider what policies may be necessary for the conduct of future elections.

31. In their Amended Petition, Petitioners admit that *none of them* had any issues voting in the Primary Election. Amended Pet. ¶¶ 10, 12, 4, and 15. Instead, the Petitioners complain of issues intrinsically related to voting by mail ahead of Election Day.

32. For example, Petitioner Michael Crossey who “submit[ted] his ballot weeks in advance of Election Day” had “significantly less time to evaluate the candidates and issues, and without an opportunity to consider relevant, late-breaking news or events. . . .” Amended Pet. ¶ 10.

33. On the other end of the spectrum, Petitioner Dwayne Thomas, who also was able to vote without problem in the Primary Election, laments that he “submitted his marked ballot one week before Election Day, without *knowing* whether it would arrive on time.” Amended Pet. ¶ 12 (emphasis added).

34. Not arising to the level of a constitutional violation, Petitioners rather identify the tradeoffs in voting early (that unknown events may occur after they cast their ballot) or in not voting in person on Election Day (not seeing the tangible proof of voting that one would see at the polls). Amended Pet. ¶¶ 10, 12; *see also* Amended Pet. ¶ 14 (Petitioner Irvin Weinreich noting that he was able to vote by mail in the Primary Election); Amended Pet. ¶ 15 (Petitioner Brenda Weinreich stating that she was able to vote by mail in the Primary Election).

35. Fundamentally, these tradeoffs are why the Commonwealth and the county boards of elections continue to offer in-person voting on Election Day, and the *expansion* of options by the addition of no excuse mail-in voting does not amount to a constitutional violation.

36. Instead of actual evidence of a constitutional violation, Petitioners offer attenuated theories and suppositions of possible future harms: that “the country *may* encounter a second, more deadly wave of COVID-19 in the fall” Amended Pet. ¶ 14 (emphasis added); that the U.S. postal system *may* have issues delivering *some* things and therefore *may* delay ballot deliveries; Amended Pet. ¶ 54; and that this outcome *might* disproportionately affect one or another group of voters, Amended Pet. ¶ 65. These conjectures simply do not rise to the level of a cognizable legal injury.

37. Similarly, Respondents mistakenly point to the three weeks old USPS Letter as a supposed exigent circumstance necessitating judicial intervention. The USPS Letter, by its own words, was merely a correspondence meant to “educate voters” and to request “that election officials keep the Postal Service’s delivery standards and recommendations in mind”. *Id.* To dispel any confusion, the Postal Service went on to say, “[t]o be clear, the Postal Service is not purporting to definitively interpret the requirements of your state’s election laws, and also is not

recommending that such laws be changed to accommodate the Postal Service's delivery standards." *Id.*

38. Plainly, the USPS Letter did not recommend changing any laws or rules governing Pennsylvania's elections, but merely indicated suggestions for when ballots should be mailed out to voters and when voters should plan on returning them to their county board of elections. Nothing in the USPS letter even suggests the type of wholesale change to the Election Code that Petitioners and Respondents are advocating.

39. "In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action." *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (Pa. 2007). "An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation." *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). "The interest is direct if there is a causal connection between the asserted violation and the harm complained of; it is immediate if that causal connection is not remote or speculative." *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003).

40. Here Petitioners' alleged injury are very speculative, and they rely on a string of conjectures and theories and fall substantially short of "rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that

the statute violates a constitutional provision.” *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017).

41. Petitioners simply cannot sustain an as-applied challenge without demonstrating an actual, demonstrated injury. Given the legal insufficiency of Petitioners’ claims, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

42. “[R]ipeness overlaps substantially with standing.” *Rendell v. Pa. State Ethics Comm’n*, 983 A.2d 708, 718 (Pa. 2009). This Court “do[es] not have the ability to grant any relief that is merely advisory, one that does not involve any case or controversy. Any action . . . may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Brown v. Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Commw. Ct. 1996).

43. Ripeness “arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. . . . It has been defined as the presence of an actual controversy. . . . It insists on a concrete context, where there is a final . . . action so that the court can properly exercise their function.” *Tex. Keystone Inc. v. Pa. Dept. of Conservation & Nat. Res.*, 851 A.2d 228, 239 (Pa. Commw. Ct. 2004).

44. Here, Petitioners can speculate as to how the COVID-19 pandemic will develop throughout the next few months and how the political branches may respond to those developments, but that is all the Petition amounts to: speculation.

45. The political branches only recently enacted Act 35, through which a thorough analysis of the Primary Election was conducted. The political branches can now use those findings to deliberately consider what policies may be necessary for the conduct of future elections.

46. Moreover, to ignore that review process, Petitioners and Respondents ask this Court to wade into the political question of election policy choices, which are the product of bipartisan and bicameral compromise.

47. The Separation of Powers Doctrine holds “that the executive, legislative, and judicial branches of government are equal and none should exercise powers exclusively committed to another branch.” *Jefferson Cty. Court Appointed Emp. Ass'n v. Pa. Labor Relations Bd.*, 985 A.2d 697, 703 (Pa. 2009).

48. The U.S. and Pennsylvania Constitutions place great emphasis on the role of the Legislative Branch in the setting of election policy. One of the very first provisions of the U.S. Constitution is the Elections Clause, providing that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Constitution Art. I, Section 4, Clause 1.

49. Legislative Branch power as to election procedure is further codified in the Pennsylvania Constitution. *See, e.g.*, Pa. Constitution Art. VII, Section 1 (“Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.”); Pa. Constitution Art. VII, Section 16 (“The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.”).

50. “The presumption that legislative enactments are constitutional is strong.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (*citing Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008)); *see also* 1 Pa.C.S. § 1922(3) (in ascertaining intent of General Assembly in enactment of statute, presumption exists that General Assembly did not intend to violate federal and state constitutions).

51. “All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party*, 209 A.3d at 279 (citations omitted). Moreover, “statutes are to be construed whenever possible to uphold their constitutionality.” *In re William L.*, 383 A.2d 1228, 1231 (Pa. 1978).

52. This is especially true in the election context, where this Court has long recognized that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (Pa. 1869); see also *Abraham v. Shapp*, 400 A.2d 1249 (Pa. 1979) (“It is the responsibility of the legislature by appropriate legislation to provide the procedures for elections to public office.”)).

53. In addressing election policy, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania.” *In re Guzzardi*, 99 A.3d 381 (Pa. 2014).

54. Next, we will address each challenged item of regulation, though the analysis is same throughout: the laws in question are clear, constitutional policy choices that must be upheld.

55. Each provision is consistent with the purpose to secure the “freedom of choice and to prevent fraud and corruption; to obtain a fair election and an honest election return; to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.” *In re Substitute Nomination for Vacancy in the Democratic Nomination for Office of Cty. Com'r of Allegheny Cty.*, 118 A.2d 750, 755 (Pa. 1955) (citations omitted).

1. Received-By Date for Absentee and Mail-in Ballots

56. Petitioners challenge the constitutionality of the Pennsylvania Election Code’s requirement that to be deemed as validly cast, a voter’s absentee or mail-in ballot “must be received by the county board of elections office by 8:00 p.m. on Election Day.” Amended Pet. ¶ 24 (*paraphrasing* 25 P.S. § 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) (ballots must be received by the voter’s county board of elections “on or before eight o’clock P.M. the day of the primary or election.”)).

57. The provision in question is a component of the bipartisan election reform legislation that the Legislative and Executive branches have created over the past year.

58. Pennsylvania has traditionally only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote

absentee, the voter would have had to provide a permissible reason to do so, and the voter would have been provided with an absentee ballot that would have had to be returned by the voter no later than 5:00 p.m. *on the Friday before the election. Id.*

59. Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.*

60. The traditional voting options remain available—voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

61. The “received by” deadline is a clear policy choice made by the Legislature in consultation with the Governor. Petitioners seem to have the mistaken opinion that Election Day is somehow the beginning of the election process, where instead it is the final step in a cycle that began many months before when candidates began circulating nomination petitions. *See* 25 P.S. § 2868. Election Day is the end of the election cycle and Act 77 is reflective of that bipartisan policy choice.

62. “The Code sets forth various time requirements for the completion of balloting, the strict enforcement of which is necessary to ensure the fair and orderly

administration of elections.” *In re Apr. 10, 1984 Election of E. Whiteland Twp., Chester Cty.*, 483 A.2d 1033, 1035 (Pa. Commw. Ct. 1984). For example, nomination petitions must be “filed on or before the tenth Tuesday prior to the primary” and polling places close at 8:00 p.m. on Election Day. 25 P.S. § 2873(d); 25 P.S. § 3045.

63. The provision in question is simply another deadline in the election process. Act 77 emphasizes the need to give poll workers the opportunity to count timely submitted ballots on Election Day, so that the people of the Commonwealth know in fairly short order who won and who lost the election. As such, it should be upheld as a proper election administration regulation.

64. The USPS letter, allegedly relied upon by the Respondents, was merely correspondence meant to “educate voters” and to request “that election officials keep the Postal Service’s delivery standards and recommendations in mind”. *Id.* The USPS Letter made clear that it was “not recommending that [state election] laws be changed to accommodate the Postal Service’s delivery standards.” *Id.*

65. Plainly, the USPS Letter did not recommend changing any laws or rules governing Pennsylvania’s elections, but merely indicated suggestions for when ballots should be mailed out to voters and when voters should plan on returning them to their county board of elections. This is information the Respondents and the county boards of elections can provide to voters in furtherance of the existing laws.

66. Intrinsicly there are going to be deadlines for the return of mail-in ballots—whether on Election Day, three days after Election Day, or seven days after Election Day. There is nothing constitutionally required about which of those deadlines is chosen—they merely represent public policy choices. For any of those dates, some ballots will be cast by the deadline and others will be submitted afterwards.

67. Furthermore, since the Respondents intend to provide prepaid postage on the return of ballots, that policy should be read in conjunction with the application of the received-by deadline. Since pre-paid letters are not postmarked by the USPS, Respondents and Petitioners’ requested relief of validating ballots via postmark is not assured and would lead to chaos at the county boards of elections. *See* Ellie Kaufman, Postmarks Come Under Scrutiny as States Prepare for Mail-in Voting, CNN, August 11, 2020, *available at* <https://www.cnn.com/2020/08/11/politics/postmarks-mail-in-ballots/index.html>.

68. This underscores the challenges in modifying the Election Code, which has been carefully drafted by the political branches via bipartisan and bicameral compromise. This Court should steer clear of making these policy choices unilaterally.

2. Ballot Harvesting

69. Petitioners also request that this Court order the state to allow third parties to collect and submit absentee and mail-in ballots in clear contravention of Pennsylvania law.

70. A touchstone principle of Pennsylvania elections is that “the spirit and intent of our election law . . . requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004).

71. This principle is codified by statute in 25 P.S. § 3058, which states that “[n]o voter shall be permitted to receive any assistance in voting unless . . . he has a physical disability.” This extends to absentee and mail-in balloting where “the elector shall, in secret, proceed to mark the ballot. . .” 25 P.S. § 3146.6(a).

The absentee voter shall:

then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’ This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Id.; see also 25 P.S. 3150.16(a) (providing for the identical procedure for mail-in voters).

72. This Court has already examined and rejected the argument that this statutory language permits third party ballot harvesting. The case in question

considered a challenge to the requirement that “absentee ballots delivered by third persons on behalf of non-disabled voters are invalid under Section 3146.6 of the Election Code. . .” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004).

73. This Court held that “under the statute’s plain meaning, a non-disabled absentee voter has two choices: send the ballot by mail, or deliver it in person. Third-person hand-delivery of absentee ballots is not permitted.” *Id.* at 1231.

74. “Election laws will be strictly enforced to prevent fraud” *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954). A court “cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1234 (Pa. 2004).

75. The fear of fraud in the area of ballot harvesting is borne out by recent, real world events. In 2018, North Carolina had to take the extreme step of re-doing a congressional election when illegal ballot harvesting led to the belief that the entire election was compromised. [Operative in North Carolina Congressional Race Arrested in ‘Ballot Harvesting’ Case](#), Associated Press, Feb. 27, 2019, *available at* <https://www.latimes.com/nation/la-na-nc-election-fraud-charge-20190227->

story.html. The political branches have determined that the fraud concerns pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

76. As the statutory prohibition against ballot-harvesting is well-settled law designed to prevent fraud, it must be upheld in accordance with the Supreme Court's prior decision.

3. Payment of Postage for Mail-In Ballots

77. Pennsylvania law clearly provides that a voter is responsible for paying for the postage for an absentee or mail-in ballot. Such voters "shall send [their ballots] by mail, postage prepaid . . . or deliver it in person to said county board of election." 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a).

78. Mailing in an absentee or mail-in ballot is but one alternative for submitting a ballot, which can be brought to the county board of elections for free. *Id.* Alternatively, the voter may vote in person on Election Day. 25 P.S. § 3031.12.

79. Providing voters with a wide variety of options on voting is not a constitutional violation, but rather a valid policy determination by the political branches to provide for free and fair elections.

80. Just as the Election Code constitutionally does not require government to provide voter transport to the polls, it does not require government to pay for postage for absentee and mail-in ballots. Both questions are policy considerations for the counties, which "shall appropriate annually, and from time to time, to the

county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).³

81. While the Respondents have indicated that they intend to provide return postage to voters for the General Election, that is not a constitutional requirement. Absent that choice by the Respondents, the Pennsylvania Election Code clearly provides for mail-in and absentee voters to pay for their own postage if they choose to vote by those means, rather than an alternative method that does not require postage. 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a). As this provision merely provides voters with more options to vote rather than mandating that anyone mail in their ballots, it is a constitutional provision that should be upheld.

82. Since all the regulations in question are constitutional, this action should be dismissed for Petitioners’ failure to plead a constitutional violation.

³ Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.,* Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots); *see also* Amended Pet. ¶ 68 (noting that Allegheny and Philadelphia Counties elected to provide postage for mail-in ballots for the 2020 Primary Election). Indeed, the Department of State has announced that it intends to provide postage for returned ballots for the General Election. *See* Pennsylvania Pressroom, *Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots* (July 31, 2020), *available at* <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>. Given the uncertain nature of this administrative policy decision, the House Leaders reiterate their position that the Pennsylvania Constitution does not require the payment of return postage on mail-in ballots.

WHEREFORE, for the reasons above, the House Leaders respectfully request that this Court sustain their Preliminary Objection for legal insufficiency of the pleading and dismiss with prejudice the petition for review.

C. THIRD PRELIMINARY OBJECTION: Petitioners Have Not Pleaded a Justiciable Remedy (Pa. R. Civ. P. 1028(a)(2))

83. House Leaders hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

84. Should this Court need to consider the relief sought by Petitioners and Respondents, their requested relief is itself unconstitutional, as violative of the Separation of Powers, and must be struck for its failure to conform to the law.

85. The Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” PA. CONST. art. II, § 1.

86. While this Court may declare a statute unconstitutional upon review, the judiciary’s power is strictly limited. This is because the Pennsylvania General Assembly—not the judiciary or the Secretary of the Commonwealth—holds the sole power to write the laws for the Commonwealth. *Id.* As this Court has noted, the judiciary “may not usurp the province of the legislature by rewriting [statutes]...as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018).

87. Accordingly, where the court determines that a law is unconstitutional, “it is not the role of this Court to design an alternative scheme which may pass constitutional muster.” *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984). The Courts “will not judicially usurp the legislative function and rewrite [the statute]. . . . Rather, we leave it to our sister branch for an appropriate statutory response. . . .” *Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015).

88. As such, when a court invalidates a law, the court must grant the Legislature sufficient time to consider and enact remedial legislation. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (providing timeframe to General Assembly and Governor to enact remedial redistricting plan); *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 582–83 (Pa. 2016) (staying decision for 180 days “in order to allow the General Assembly sufficient time to devise a legislative solution”); *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). The Court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Robinson Twp.*, 147 A.3d at 583; *Cali*, 177 A.2d at 835.

89. Should this Court determine that a statute at issue is unconstitutional, the Court does not have the authority to issue the orders or take any actions requested by the Petitioners, as the requested relief would require legislative action. Such action by the Court would be a clear “excession of the scope of [the Court’s] power

and authority,” *Glancey v. Casey*, 288 A.2d 812, 817 (Pa. 1972), and would amount to prohibited “judicial legislation,” see *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971) (“Conceivably, the statute could be rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature, for additional editing of [the statute] on our part would amount to judicial legislation.”).

90. While the Court has the power to review these provisions of the Pennsylvania Election Code, it cannot direct the Legislature *how* to fix any alleged constitutional defect, let alone fix the alleged defect itself. If any of the regulations questioned by the Petitioners are held to be unconstitutional, it is the sole province of the Legislature to determine how to address that.

WHEREFORE, for the reasons above, the House Leaders respectfully request that this Court sustain their Preliminary Objection for failure to conform their pleading as a matter of law and dismiss with prejudice the petition for review.

D. FOURTH PRELIMINARY OBJECTION: Petitioners Failed to Include All Necessary Parties (Pa. R. Civ. P. 1028(a)(5))

91. House Leaders hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

92. Pennsylvania law establishes that a court must join indispensable parties to an action, or, if not possible, dismiss the action “[w]henver it appears by

suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b).

93. Indispensable parties are those “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).

94. Significantly, “[t]he absence of indispensable parties *goes absolutely to the jurisdiction*, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264-65 (Pa. 1955) (emphasis added); *see also Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (“unless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a party goes absolutely to the court’s jurisdiction.”) (citations omitted); *Fiore v. Oakwood Plaza Shopping Center, Inc.*, 585 A.2d 1012, 1020 (Pa. Super. Ct. 1991) (“In this Commonwealth, the issue of failure to join an indispensable party cannot be waived; if such a party is not joined, a court is without jurisdiction to decide the matter”).

95. A party is indispensable “when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience . . .” *Hartley v. Langkamp & Elder*, 90 A. 402, 403-404 (Pa. 1914).

96. This Court has laid out a series of factors to consider as to whether a party is indispensable, namely: “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).

97. Here, the Commonwealth’s county boards of elections are indispensable parties to this case because the Petition seeks to alter their conduct, requiring them to be parties in the case. It is the *county boards of elections*, not the Secretary of the Commonwealth, who would have to “implemen[t] additional emergency procedures to ensure ballots delivered after 8:00 p.m. on Election Day will be counted. . .” and to “[p]rovid[e] prepaid postage on all absentee and mail-in ballots.” Amended Pet. ¶ 83.

98. In her examination of the original Petition, Judge Leavitt noted that given the claims “against the county boards of elections” and the fact that “this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without [their] being allowed to defend” “presen[t] a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.” Memorandum Opinion, *Crossey v.*

Boockvar, 266 M.D. 2020 (Pa. Commw. Ct. filed May 28, 2020) (unreported opinion).

99. Petitioner mis-applies the Election Code and mistakenly treats the county election boards as though they are the agents of the Secretary of the Commonwealth, but the county boards of elections play a separate and pivotal role in the governance of Pennsylvania elections.

100. To the extent that Petitioner seeks for this Court to direct their administration of elections, they must be joined as a party to this action. Therefore, their interests are essential to the merits of this case and deciding the case without their involvement would violate their due process rights. *See DeCoatsworth*, 639 A.2d at 797.

101. In *Banfield v. Cortes*, petitioners brought a challenge to the use of certain Direct Recording Electronic voting systems (DREs) being used in various counties in the Commonwealth. 922 A.2d 36 (Pa. Commw. Ct. 2007). In response, the Secretary of the Commonwealth submitted preliminary objections, including the objection that the Court lacked jurisdiction due to the petitioners' failure to join the county elections boards who had purchased and were using the voting systems in question. *Id.*

102. In a divided, 4-3 decision, the Court rejected the Secretary of the Commonwealth's preliminary objection that the county elections boards were

indispensable parties to that action, but that denial was based on the fact that the petitioners did “not seek redress from the . . . counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors.” *Id.* at 44.

103. The dissent argued, however, that “the County Boards of Elections are indispensable parties. They made the decision to purchase one of the seven DRE voting systems approved by the Secretary. They will be affected by the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems. Their absence leaves this Court without jurisdiction.” *Id.* at 56 (Leavitt, J. dissenting). “Because Petitioners have failed to name indispensable parties, *i.e.*, the County Boards of Elections, as respondents, I would sustain the Secretary’s demurrer . . . for lack of jurisdiction.” *Id.*

104. The fact pattern of the present case would more than satisfy the standards set forth in both the majority and dissenting opinions in *Banfield*. Here, Petitioners are directly seeking relief from the county boards of elections, and doing so shortly before the 2020 General Elections “without [the boards of elections] being allowed to defend” this Action. Memorandum Opinion, *Crossey v. Boockvar*, 266 M.D. 2020 (Pa. Commw. Ct. filed May 28, 2020) (unreported opinion).

105. Both factors weigh heavily that the county elections boards are indispensable parties, and therefore to grant the requested relief would be

incompatible with Pennsylvania law, as the county boards of elections “ha[ve] such an interest that a final decree cannot be made without affecting [them].” *Hartley*, 90 A. at 403-404.

106. This also differs from a recent case filed in Commonwealth Court, where the Pennsylvania Democratic Party and other petitioners seeking a declaratory judgment concerning Pennsylvania’s Election Code *did join* the 56 county boards of elections from which they were seeking relief. *See Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Commw. Ct. filed July 10, 2020); *see also Donald J. Trump for President, Inc. v. Boockvar*, Civil Action No. 2:20-cv-00966, Verified Complaint for Declaratory and Injunctive Relief (W.D.Pa. filed June 29, 2020) (federal court action seeking Election Code-related relief, where the petitioners also joined the 56 county boards of elections).

WHEREFORE, for the reasons above, the House Leaders respectfully request that this Court sustain their Preliminary Objections for nonjoinder of necessary parties and dismiss with prejudice the petition for review.

Dated: August 25, 2020

Respectfully submitted,

/s/ Jake Evans

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Bryan Cutler and Majority Leader of the
House of the Pennsylvania House of
Representatives Kerry Benninghoff*

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2020

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

Petitioners,

v.

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION
SERVICES AND NOTARIES OF THE PENNSYLVANIA
DEPARTMENT OF STATE,**

Respondents,

**BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

[PROPOSED] ORDER

Now, this ____ day of _____, 2020, upon consideration of the Amended Preliminary Objections to the Amended Petition filed by Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Amended Preliminary

Objections are **SUSTAINED**. The petition for review in the above action is hereby dismissed with prejudice.

SO ORDERED BY THE COURT:

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.

No. 108 MM 2020

**AMENDED PETITION FOR DECLARATORY AND INJUNCTIVE
RELIEF**

1. Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans file this Amended Petition for Declaratory and Injunctive Relief against Respondents Kathy Boockvar in her official capacity as Secretary of the Commonwealth and Jessica Mathis in her official capacity as the Director of the Bureau of Election Services and Notaries, and allege as follows:

NATURE OF ACTION

2. Pennsylvania's June 2, 2020 primary election, set amidst a global pandemic, proved to be a true voting rights debacle. Despite multiple lawsuits seeking emergency extensions of deadlines to avoid disenfranchisement, and

numerous county officials warning of the dangers the June 2 primary would present to public health and safety, the Commonwealth failed to take action to ensure that all those who wanted to vote could do so and have their votes counted. Measures like Act 12 of 2020 and the directives of the Department of State proved to be vastly insufficient and failed to ensure access to the ballot box. Many in-person voters showed up at their usual polling places only to discover they had been shut down, sometimes with not even as little as a sign informing them such. Those who tried to vote by mail in accordance with the Commonwealth's recommendations faced similar woes. Despite Governor Wolf's last-minute emergency order extending mail-in and absentee ballot (collectively, "mail ballot") deadlines by a week in six counties affected by protest activity, thousands of voters who had requested mail ballots were either forced to use provisional ballots at the polls, or worse, disenfranchised altogether after tens of thousands of mail ballots did not even arrive at voters' homes until the week *after* the primary. Things should have gone better, to say the least.

3. Pennsylvania finds itself in the midst of an unprecedented global pandemic. The highly infectious coronavirus ("COVID-19") has rapidly spread throughout the country. As of this filing alone, there are 99,794 confirmed cases of COVID-19 in Pennsylvania, and 6,950 deaths. The federal government has indicated that COVID-19 will persist at least into the fall, if not longer. The Director of the

Centers for Disease Control and Prevention recently cautioned that the country may encounter a second, more deadly wave of COVID-19, which will “be even more difficult than the one we just went through.”¹ This means that the November election will occur, once again, in the middle of a severe public health crisis. The massive volume of applications for mail ballots requested by Pennsylvania voters during the primary, and the ensuing strain it placed on the Commonwealth’s election administration, was only a glimpse of what is likely to unfold come November’s general election—where voter turnout is historically much higher. Pennsylvanians will again be forced to choose between risking their health and safety to vote in person or risk disenfranchisement at the hands of a structurally deficient vote by mail system.

4. Perhaps most troubling, preventative measures could have been taken in advance of the June 2 primary that would have alleviated much of the confusion and disenfranchisement that ultimately resulted. But while the primary has now come and gone, it is not too late for the Commonwealth to correct course in time for the general election. As one desperate and frustrated county elections director put it,

¹ Zack Budryk, *CDC director warns second wave of coronavirus might be ‘more difficult’*, THE HILL (Apr. 21, 2020), <https://thehill.com/policy/healthcare/493973-cdc-director-warns-second-wave-of-coronavirus-might-be-more-difficult>

“We’ve been saying what was going to happen, and nobody was listening to us, and it happened . . . I hope they’ll listen to us now.”²

5. Petitioners, like many election officials, also sounded the alarm on the Commonwealth’s failure to take adequate precautions and implement safeguards to prevent disenfranchisement ahead of the June 2 primary and the November general election, even identifying the likely barriers to the franchise during the COVID-19 pandemic, all of which were borne out in the June 2 primary. All indications are that in-person voting will be severely compromised in the upcoming general election, as it was in the June primary, and the backlogs, processing and mailing delays, and resulting disenfranchisement that plagued the vote by mail system will be magnified exponentially in the fast-approaching general election. But the Commonwealth has yet to implement adequate safeguards to ensure a free and equal election in which all citizens have a meaningful opportunity to vote, as required by the Pennsylvania Constitution, without risking their health and safety.

6. As the Commonwealth turns to the general election in November, little has changed, and its citizens still do not have sufficient access to safe and reliable means to exercise their constitutional right to vote during the COVID-19 pandemic.

² Jonathan Lai, *Tens of thousands of Pennsylvania mail ballots were turned in after the deadline. November could be worse.*, PHILA. INQUIRER (June 10, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-election-20200610.html?fbclid=IwAR1lgxciLknrb75yq2VFjfTJ12wdnJXxBPcycDjyYO1T1bLC11IXiCqdf6A>

The same obstacles to the franchise remain: (a) in-person voting will be severely restricted due to shortages of poll workers, polling locations, and the need to follow social distancing guidelines; (b) as in June, thousands of voters will not be able to meet Pennsylvania’s Election Day ballot receipt deadline because of backlogs in processing record numbers of mail ballot requests and delays or disruptions in mail delivery of said ballots in both directions; (c) voters, including elderly and immunocompromised individuals, cannot seek assistance from third parties—not even immediate family members—to return their mail ballots to avoid mail delivery delays or the risk of exposure to COVID-19; and (d) those who submit their ballots by mail must provide their own postage in most cases, which imposes monetary and transaction costs at a time when many Pennsylvanians are suffering from the devastating economic impact of COVID-19, and requires voters who do not have stamps at home to subject themselves to public health risks in order to visit a post office or return their ballots in-person.

7. Much is left to do in order to guarantee a free and equal election come November. As one county commissioner observed, the need for additional safeguards should have been clear “the day after the election. It was so obvious.”³ The 1.8 million mail ballot applications for the June 2 primary, while unprecedented for the Commonwealth (approximately 84,000 absentee ballots were cast in the 2016

³ *Id.*

primary), will pale in comparison to the ballots requested and submitted for the November election, in part because of recent legislation allowing all eligible voters to cast a ballot by mail, Act 77 of 2019, P.L. 552 (“Act 77”), but also because of the health risks posed by COVID-19 and subsequent guidance by the Commonwealth’s officials encouraging its citizens to vote by mail.

8. Petitioners therefore request that the Court issue an Order requiring Respondents to implement additional safeguards to ensure that all Pennsylvania voters, including the millions who will likely vote by mail, have access to a free and equal election during the COVID-19 pandemic. Such measures should include: (a) emergency procedures to ensure that voters affected by delays in mail ballot processing or delivery will have their ballots counted if postmarked by Election Day and received up to seven days after Election Day; (b) permitting voters to designate third parties to assist them in submitting their sealed mail ballots; and (c) prepaid postage for all mail ballots—but only to the extent that such procedures do not require the Court to apply Act 77’s nonseverability clause. With the lessons learned from the primary election, and the general election fast approaching, now is the time to act to prevent widespread disenfranchisement, ensure that voters have a meaningful opportunity to participate in the electoral process, and provide comprehensive notice to voters about the safe, legal voting options available to them.

JURISDICTION AND VENUE

9. This Court possesses original jurisdiction over this matter pursuant to the order entered on June 17, 2020 by the Hon. Mary Hannah Leavitt, President Judge of the Commonwealth Court, which determined that Section 13(2) of Act 77 of 2019 vested exclusive jurisdiction in this Court to hear this matter, and accordingly transferred it to this Court pursuant to 42 Pa. C.S. § 5103(a).

PARTIES

10. Petitioner Michael Crossey is a duly registered Pennsylvania voter and resident of Allegheny County. Mr. Crossey is 69 years old and is a retired schoolteacher and former president of the Pennsylvania State Education Association. He is currently on the Board of Directors for the Pennsylvania Alliance for Retired Americans. Mr. Crossey has always voted in-person at the polls on election day in Pennsylvania, but due to arthritis in his knees, he will face a hardship if forced to stand in line for extended periods of time. This year, because of the current spread of COVID-19 throughout Pennsylvania, and because he knows that the disease is particularly harmful to voters his age, Mr. Crossey plans to request a mail-in ballot for the general election to avoid voting in person on Election Day and subjecting himself to the attendant health risks. For the June 2 primary election, Mr. Crossey requested a mail-in ballot about five weeks before the deadline, but waited for several weeks to receive his mail-in ballot. To avoid disenfranchisement due to

documented delays in mail delivery, Mr. Crossey was forced to submit his ballot weeks in advance of Election Day, well before he had originally planned, which left him with significantly less time to evaluate the candidates and issues, and without an opportunity to consider relevant, late-breaking news or events before making his final candidate selections.

11. Mr. Crossey is concerned that the delays in mail ballot application processing and U.S. Postal Service delivery will disenfranchise him in the general election, or at the very least, will require him to submit his ballot well before Election Day—once again, with significantly less time to evaluate candidates, issues, and late-breaking news or events—in order to avoid disenfranchisement. And due to the health risks posed by COVID-19 that will last well into the fall, voting in person is not a viable alternative. Mr. Crossey would seek assistance in returning his ballot if a third party were permitted to assist him, but the law currently does not permit Mr. Crossey to enlist another individual whom he trusts—not even a family member or an individual in the same household—to return his ballot. As a result, the Commonwealth’s failure to implement additional safeguards to ensure a free and equal election during the COVID-19 pandemic will force Mr. Crossey to risk either his health or his vote in the upcoming general election.

12. Petitioner Dwayne Thomas is a duly registered Pennsylvania voter and resident of Fayette County. He is 70 years old and is a retired mineworker. Mr.

Thomas is the current president of the Pennsylvania Alliance for Retired Americans. Mr. Thomas usually votes in-person at the polls on election day and often encounters long lines at his polling site. This year, Mr. Thomas requested an absentee ballot for the primary election and intends to do the same for the general election to avoid exposure to the health risks posed by COVID-19. But mail service at Mr. Thomas's residence has been inconsistent at best: his letters and packages rarely arrive on time at their desired locations; he often receives returned mail even when he has correctly addressed envelopes and packages; and he often fails to receive letters and packages sent to him through the postal service. For the June 2 primary election, Mr. Thomas waited nearly two weeks to receive his mail-in ballot and submitted his marked ballot one week before Election Day, without knowing whether it would arrive on time.

13. Mr. Thomas is concerned that the delays in mail ballot application processing and U.S. Postal Service delivery will disenfranchise him in the general election, or at the very least, will require him to submit his ballot well before Election Day—with significantly less time to evaluate candidates, issues, and late-breaking news or events—in order to avoid disenfranchisement. And due to the health risks posed by COVID-19 which are expected to last well into the fall, voting in person is not a viable alternative. Mr. Thomas would seek assistance in returning his ballot if a third party were permitted to assist him, but the law currently does not permit Mr. Thomas to enlist another individual whom he trusts—not even a family member or

an individual in the same household—to return his ballot. As a result, the Commonwealth’s failure to implement additional safeguards to ensure a free and equal election during the COVID-19 pandemic will force Mr. Thomas to risk either his health or his vote in the upcoming general election.

14. Petitioner Irvin Weinreich, a disabled war veteran and retired maintenance worker, is a duly registered Pennsylvania voter and resident of Northampton County. Due to ongoing health issues that affect his mobility and render him especially vulnerable to the health risks posed by COVID-19, Mr. Weinreich requested a mail-in ballot for the June 2 primary election and plans to do the same for the general election. Mr. Weinreich is concerned, however, that delays in mail ballot application processing and U.S. Postal Service delivery will disenfranchise him in the general election. Even if Mr. Weinreich’s ballot request is processed in a timely fashion—which is all but certain as the primary election showed—he will be forced to submit his ballot weeks in advance of Election Day to ensure timely delivery and avoid disenfranchisement, leaving him with significantly less time to evaluate the candidates and issues, and without an opportunity to consider relevant, late-breaking news or events before making his final candidate selections. Mr. Weinreich would seek assistance in returning his ballot if a third party were permitted to assist him, but the law currently does not permit Mr. Weinreich to enlist another individual whom he trusts—not even a family member

or an individual in the same household—to return his ballot. As a result, the Commonwealth’s failure to implement additional safeguards to ensure a free and equal election during the COVID-19 pandemic will force Mr. Weinreich to risk either his health or his vote in the upcoming general election.

15. Petitioner Brenda Weinreich, a retired textile factory worker, is a duly registered Pennsylvania voter and resident of Northampton County. For many years, Ms. Weinreich voted exclusively in-person, but due to ongoing health issues that affect her mobility, along with the fact that her age, 70, places her among the groups of citizens who face a heightened risk of serious illness from COVID-19, Ms. Weinreich voted by mail in the June 2 primary and plans to do so in the general election. Ms. Weinreich is concerned, however, that delays in mail ballot application processing and U.S. Postal Service delivery will disenfranchise her in the general election. Even if Ms. Weinreich’s ballot request is processed in a timely fashion—which is all but certain as the June 2 primary showed—she will be forced to submit her ballot weeks in advance of Election Day to ensure timely delivery and avoid disenfranchisement, leaving her with significantly less time to evaluate the candidates and issues, and without an opportunity to consider relevant, late-breaking news or events before making her final candidate selections. Ms. Weinreich would seek assistance in returning her ballot if a third party were permitted to assist her, but the law currently does not permit Ms. Weinreich to enlist another individual

whom she trusts—not even a family member or an individual in the same household—to return her ballot. As a result, the Commonwealth’s failure to implement additional safeguards to ensure a free and equal election during the COVID-19 pandemic will force Ms. Weinreich to risk either her health or her vote in the upcoming general election.

16. The Pennsylvania Alliance for Retired Americans (“the Alliance”) is incorporated in Pennsylvania as a 501(c)(4) nonprofit social welfare organization under the Internal Revenue Code. The Alliance has 335,389 members composed of retirees from public and private sector unions, community organizations, and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance’s mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The failure to implement adequate safeguards to ensure that eligible citizens, including the Alliance’s members, have sufficient access to reliable voting opportunities and to a free and equal election threatens the electoral prospects of progressive candidates whom the Alliance and its members support to advance their mission. Alliance’s members, most of whom are over the age of 65 and are especially vulnerable to the health risks posed by COVID-19, will also face greater obstacles casting a vote and having their votes counted, making it more difficult for the Alliance and its members to associate and effectively further their shared, common goals through the political process.

Because of the barriers to the franchise that have emerged during the ongoing public health crisis, the Alliance will be forced to divert resources from its ongoing mission and programs to educate voters and assist them to exercise their right to vote safely, including conducting awareness campaigns to ensure voters obtain and submit mail ballots on time and providing stamps for mail ballots so that voters do not have to risk their health to obtain postage. The Alliance would also assist voters in returning their mail ballots if such assistance were permitted by law.

17. Respondent Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity. As Secretary, she is Pennsylvania's Chief Election Official and a member of the Governor's Executive Board. The Secretary is charged with the general supervision and administration of Pennsylvania's elections and election laws. Among her numerous responsibilities in administering elections, including ballots cast by mail, she is charged with tabulating, computing, and canvassing all votes cast as well as certifying and filing the votes' tabulation, 25 P.S. § 3159, and ordering county boards to conduct recounts and recanvasses, *id.* §2621(f.2).

18. Respondent Jessica Mathis is the Director of the Bureau of Election Services and Notaries ("Bureau"). The Bureau is responsible for planning, developing, and coordinating the statewide implementation of the Election Code, voter registration process, and notaries public.

GENERAL ALLEGATIONS

A. The COVID-19 pandemic has upended daily life across the country and in Pennsylvania and will continue into the fall.

19. Virtually all aspects of life in the United States today are affected by the COVID-19 pandemic. Schools and many businesses are closed; people are sheltering in their homes; well over 35 million people have lost their jobs; and approximately 132,000 people have lost their lives. The Commonwealth has not been spared COVID-19's devastation either. To date, the virus has infected 99,794 Pennsylvanians, resulting in 6,950 deaths, and this crisis has no clear end in sight.

20. Though the Commonwealth has been phasing into reopening, officials still recommend social distancing, universal masking, and avoiding public transportation and large gatherings in order to prevent a spike in COVID-19 infections, as recently seen throughout many parts of the country.

21. Public health experts expect the pandemic—worsening already as states have begun to reopen—to extend well into the fall; the federal government is preparing for the COVID-19 crisis to last 18 months and has warned that the pandemic could come in multiple waves. Indeed, the White House's coronavirus advisor and the Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci, has publicly acknowledged that coronavirus will likely strike again in the fall because of its transmissibility.

22. The Director of the Centers for Disease Control and Prevention (“CDC”) has also warned that the country may encounter a second, more deadly wave of COVID-19 in the fall, which will be more difficult than the first wave of the virus. Similarly, the Director of the National Center for Immunization and Respiratory Diseases at the CDC, Dr. Nancy Messonnier, said on March 10, 2020 that she expected the virus to continue spreading in the United States through *next year*.

23. These sentiments are also shared by scientists outside the United States government. The COVID-19 Response Team at the Imperial College of London has estimated that social distancing and other preventative measures will be required until a vaccine is developed and distributed widely, which they predict could take 18 months or more. There is little question that the spread of COVID-19 in Pennsylvania will continue this fall and, in particular, during the November general election.

B. Amid the ongoing pandemic, recent changes to Pennsylvania’s election system will not be enough to guarantee a free and fair election in November.

24. Historically, most Pennsylvanians cast their ballots in person because absentee voting was available only to those who could not appear at their polling location due to illness, physical disability, absence from their home county on Election Day, or observance of a religious holiday. But in October 2019, the General

Assembly enacted legislation, through Act 77, that allowed all eligible Pennsylvanians to vote by mail through the use of mail-in ballots. 25 P.S. § 3150.11(a). The law also extended the deadline for voters to submit their mail ballots: now, in order to be counted, all mail ballots must be received by the county board of elections office by 8:00 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c). Mail ballots, moreover, must be delivered either through the mail, postage prepaid, or in person, by the voter, at a county board of elections office or designated drop box. 25 P.S. §§ 3146.6(a); 3150.16(a).

25. To be sure, the expansion of mail voting to all eligible voters through Act 77 is a positive step in ensuring access to the franchise under normal conditions. But these are not normal times and voters in November will not encounter a normal election. Absent additional safeguards ensuring sufficient access to safe and reliable means to vote during the COVID-19 pandemic, the Commonwealth will fail once again to meet its obligation to conduct a free and equal election, as mandated in the Pennsylvania Constitution, and will unlawfully deny many Pennsylvanians their constitutional right to vote by forcing them into one of two impermissible choices: (a) cast a ballot in-person (or hand-deliver their mail ballot, assuming they receive it in time) to ensure their vote is counted and subject themselves to the health risks of COVID-19; or (b) submit their ballot by mail and risk arbitrary disenfranchisement for reasons outside their control. Both options impose severe burdens on the

franchise and led at least two courts of common pleas, on Election Day, to extend the deadline for the return of mail ballots in the primary election without striking down any other portion of Act 77.⁴

26. The Commonwealth, even in times of emergency, has a constitutional obligation to ensure that all citizens have access to a free and equal election, yet the June 2 primary was anything but that. Before the June 2 primary, Governor Tom Wolf, to his credit, urged residents to stay home, practice social distancing, and, by June 2, to vote by mail. But neither the Governor’s encouragement nor Pennsylvanians’ enthusiasm for mail ballots was enough to protect the right to vote.

27. Pennsylvania’s primary election further illustrates that the Commonwealth’s current procedures will violate voters’ constitutional rights. The Commonwealth, even in times of emergency, has a constitutional obligation to ensure that all citizens have access to a free and equal election.

Problems with mail voting.

28. By May 22, less than two weeks before the primary, nearly 173,000 mail ballot applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. Six days later, and just four days

⁴ *In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-003416 (Court of Common Pleas of Delaware County June 2, 2020) (“Delaware County Order”); *In re: Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (Court of Common Pleas of Bucks County June 2, 2020) (“Bucks County Order”).

before the election, the number of voters who had applied for mail ballots had grown to nearly 1.8 million, 17 times higher than the number of voters who requested absentee ballots during the 2016 presidential primary.

29. With a record number of mail ballots requested for the June 2 primary, many counties experienced delays in processing and in delivering ballots to voters. One county elections department placed blame at the feet of the United States Postal Service (“USPS”), stating: “The source of this slowdown is a combination of systems operating at a slower rate due to the circumstances created by the COVID-19 pandemic and USPS prioritizing official election mail coming from [the County] in a manner that is not consistent with protocols that the County was informed would be in place.”⁵ Some county elections officials went so far as to advise voters to avoid mailing back their ballots altogether and instead to hand deliver them directly to their county Board of Elections, or risk disenfranchisement.

30. While attempting to manage these backlogs, counties also had to prepare for in-person voting. Officials acknowledged in legislative testimony that they “miscalculated the fallout from massive scaling up of mail voting because there

⁵ Harri Leigh, *A record number of mail-in ballot applications, but will they arrive in time?* FOX43 (May 26, 2020), <https://www.fox43.com/article/news/politics/elections/a-record-number-of-mail-in-ballot-applications-but-will-they-arrive-in-time/521-de6f5ff0-38eb-47a5-a935-313e6a6a1ee3>.

was one bottle neck we couldn't avoid—processing applications.”⁶ In Delaware County, for example, election officials began “falling behind on processing mail-in ballot requests” a full month and a half before the primary election.⁷ And roughly 6,000 ballots were not mailed to voters until *the day before* the June primary. Beyond that, another 400 voters in Delaware County were never even sent the ballots which they had timely requested after election officials admitted they would be unable to deliver the ballots until *after the election*. Judicial intervention—through an Order filed on Election Day at 3:03 p.m.—was required to extend the deadline for these voters, but could provide no relief for voters who had already incurred the health risks of attempting to vote in person; the approximately 6,000 voters whose ballots were mailed by Delaware County only the day before the primary and were highly unlikely to have received them in less than 24 hours (much less review, mark and submit them); and those who either did not learn of the 3:03 p.m. Order, or were unable to get to a post office in time to have their ballots postmarked by June 2.

31. Delaware County was not alone. Tens of thousands of mail ballots for which voters had timely applied were not delivered to voters' homes until the week

⁶ Jeff Greenburg, Tim Benyo, Ed Allison, *County Election Official Notes for Senate Hearing* (Apr. 30, 2020), <https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2020/04/tioga-county.pdf>.

⁷ Jonathan Tamari & Jonathan Lai, *Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco*, PHILA. INQUIRER (Apr. 12, 2020), <https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html>.

after the primary. Thousands more could not be returned to county boards after the ballot receipt deadline. Approximately 14,600 ballots in Philadelphia; 9,400 in Allegheny County; 1,600 in Chester County; 5,800 in Montgomery County; 2,500 in Delaware County; and over 1,200 in Bucks County arrived at county board of elections offices after the ballot receipt deadline. Data from the Pennsylvania Department of State suggests that the total number could be over 75,000 late ballots statewide.

32. Acknowledging several barriers to mail voting, Governor Wolf signed an executive order—on the evening before the primary—which extended the ballot receipt deadline in Allegheny, Dauphin, Delaware, Erie, Montgomery, and Philadelphia Counties. The number of late-delivered ballots in Philadelphia in a single day alone that otherwise would not have been counted is visually staggering:

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Source: Jonathan Lai, *Tens of thousands of Pennsylvania mail ballots were turned in after the deadline. November could be worse.*, PHILA. INQUIRER (Jun. 10, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-election-20200610.html?fbclid=IwAR1lgxciLknrb75yq2VFjfTJ12wdnJXxBPcycDjyYO1T1bLC11IXiCqdf6A>.

33. Making matters worse, the mail voting problems in Pennsylvania were not equally distributed—they fell hardest on poor and minority communities.

Problems with in-person voting.

34. Leading up to election day, counties encountered staffing shortages, as poll workers, many of whom are elderly, were less than willing to risk potential exposure to COVID-19. Emergency legislation, Act 12 of 2020, P.L. 41 (“Act 12”) and subsequent guidance from the Department of State attempted to solve this

problem by allowing counties to offer fewer voting sites (by consolidating polling locations), staffed with fewer poll workers than would be expected under normal circumstances. The result was a drastic reduction in the number of polling places available in the June 2 primary: in Philadelphia, for instance, only 190 of the 831 typical polling places were open to voters. Not only did most voters have to travel farther to vote in person, but those sites became even less accessible as public transportation and rideshare services became much less viable options during the pandemic.

35. Operating consolidated sites still required more poll workers than were available, and packing more voters into fewer sites created congestion at the few polling locations that remained open, and confusion among voters who arrived at their normal polling locations only to find facilities shuttered with no information directing them to the new, consolidated location. On top of the loss of poll workers and the confusion over polling place consolidation, many counties were using for the first-time new voting machines, which required in-person training, but many of those trainings were canceled entirely.

36. Sure enough, these lapses translated into congestion and excessive wait times—in the middle of a public health crisis. More than 1,000 calls concerning problems related to voting and polling locations were made to a toll-free Election Protection Hotline. And poll watchers from the advocacy groups assigned to polling

locations reported substantial confusion among voters regarding where they could vote. Those who were able to find their polling location were required to wait in lines when they arrived.



Source: Michaelle Bond, Julia Terruso, Justine McDaniel, *Polling locations in Northwest Philly got the wrong voting machines, causing confusion and long lines: 'It was a mess'* (June 2, 2020), <https://www.inquirer.com/politics/election/northwest-philadelphia-voting-lines-2020-pa-primary-20200602.html>.

37. Amidst the crowded polling locations, some election workers were not provided personal protective equipment. Others refused to wear them. And many voters expressed concerns about the lack of social distancing.

38. These problems, too, fell heaviest on historically disadvantaged communities: the poor, the elderly, and other vulnerable populations. Many of these individuals have historically relied on in-person voting. But polling places in minority communities saw longer lines than in other areas. Voters at some polling

locations in Philadelphia waited in lines for two hours. More than 100 voters remained in line at 8 p.m. at one polling location in the Pittsburgh area.

C. Pennsylvania’s own election officials predicted the problems that the Commonwealth’s voters encountered.

39. Several weeks before the June 2 primary, election officials and voters across the Commonwealth sounded the alarm with increasing urgency in an effort to spur action from the Commonwealth (and its courts) in order to protect the right to vote during the COVID-19 pandemic.

40. County officials repeatedly voiced concerns about fulfilling mail ballot requests in time for the election. In Mercer County, officials explained that they were barely keeping pace with the incoming mail ballot requests, stating “[a]s fast as we can put them out, they’re coming in even faster.”⁸ Delaware County publicly acknowledged that voters would be receiving ballots close to or on Election Day, and the County Commissioner stated that she was “very worried that people [were] going to be disenfranchised.”⁹

41. Officials in Bucks and Montgomery Counties, unable to obtain relief through other means, filed lawsuits asking local courts to give voters more time to

⁸ Eric Poole, *Mail-in ballot requests swamp Mercer County elections office*, THE HERALD (May 13, 2020), https://www.sharonherald.com/news/local_news/mail-in-ballot-requests-swamp-mercercounty-elections-office/article_2275e4c8-b78a-5d87-a710-cf9cd77f3c2e.html.

⁹ Jonathan Lai, *Thousands of Pennsylvania voters might not get their mail ballots in time to actually vote*, PHILA. INQUIRER (May 26, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-20200526.html>.

return their mail ballots. The county officials recognized that the ballot receipt deadline would disenfranchise legions of voters in the face of mail delays and bottlenecks in processing applications to vote by mail caused (or exacerbated) by the global pandemic. As Montgomery County’s chief operating officer and clerk of its elections board, Lee Soltysiak, remarked in the press, “It’s insufficient and unrealistic that anyone could ever apply for a ballot on or, frankly, near the deadline and have any faith that it would be returned by 8 p.m. . . . It’s not realistic. It’s disingenuous to suggest it’s even possible.”¹⁰

42. Weeks before the primary, at least a dozen counties also proposed conducting the election entirely by mail, signaling—or even outright asserting—that they would not be prepared to handle in-person voting. Montgomery County warned that its “polling places [would] be inadequately staffed or not staffed at all” simply because it “[would] not have enough people who are eligible and willing to do it.”¹¹ And the elections director of Fayette County warned that his county, too, was not prepared to host in-person elections in part because the county did not have a sufficient number of commitments from poll workers.

¹⁰ *Supra*, note 2.

¹¹ Letter from Chair of the Montgomery County Board of Commissioners, Dr. Valerie A. Arkoosh, and Vice Chair of the Montgomery County Board of Commissioners, Kenneth E. Lawrence, addressed to Pennsylvania Governor, Tom Wolf, regarding the Pennsylvania 2020 Primary Election. Petitioners’ counsel received a copy of this letter from John Marlatt, Senior Assistant Solicitor for Montgomery County, on May 1, 2020.

43. In response to one county’s consolidation efforts—packing more voters into fewer, more crowded venues—local election officials questioned the wisdom and public health ramifications of that strategy. Montgomery County warned that combining polling locations increased the “potential for confusion” and introduced “greater . . . logistical challenges” in “ensuring that people are being directed to the correct precinct to sign in, are given the proper ballot, and are casting that ballot in the correct scanner.”¹² Six members of the Pennsylvania House of Representatives, including the Speaker of the House, also acknowledged that significantly reducing the number of polling places “threatens the public health” and “artificially concentrates voters” into fewer locations, which “is completely at odds with the recommendation of social distancing,” and “undermines the core of our Republic—free and fair elections.”¹³

¹² *Id.*

¹³ Letter signed by Speaker of the Pennsylvania House of Representatives Mike Turzai, 46th Legislative District Member Jason Ortity, 54th Legislative District Member Bob Brooks, 39th Legislative District Member Michael Puskaric, 40th Legislative District Member Natalie Mihalek, and Lori Mizgorski from the 30th Legislative District and addressed to Secretary of State Kathryn Boockvar on May 21, 2020, available at <http://www.pahousegop.com/Display/SiteFiles/1/2020/allegheypoll.pdf>; Eric Poole, *Mail-in ballot requests swamp Mercer County elections office*, THE HERALD (May 13, 2020), https://www.sharonherald.com/news/local_news/mail-in-ballot-requests-swamp-mercercounty-elections-office/article_2275e4c8-b78a-5d87-a710-

D. The issues that plagued Pennsylvania’s primary election were foreshadowed by and repeated in other states.

44. Voters and local election officials were not the only prognosticators of Pennsylvania’s election woes. Despite the Commonwealth’s failed attempts to distinguish itself from the growing trend of jurisdictions experiencing election administration issues during COVID-19, Pennsylvania was plagued by the same issues that confronted voters in other elections occurring before and after the June 2 primary.

45. In Wisconsin, “the extent of the risk of holding [the] election ha[d] become increasingly clear” well before Election Day. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Election officials there, similar to Pennsylvania, were facing a huge backlog of requests for absentee ballots and concerns about returning the ballots in time to be counted. *Id.*

46. When Wisconsin proceeded to hold an election without sufficiently addressing these issues, chaos and widespread disenfranchisement ensued. The U.S. Postal Service struggled to deliver absentee ballots to voters, and some ballots were delayed while others did not arrive at all. In response, both of Wisconsin’s U.S. Senators wrote to the Inspector General for the U.S. Postal Service seeking an investigation into “absentee ballots not being delivered in a timely manner” and the

Postal Service’s failure to deliver in this regard.¹⁴ There were similar delays in returning voters’ marked ballots to elections officials. In total, approximately 107,871 absentee ballots were received by elections officials after the day of the election. Those who voted in person encountered up to five hour waits at consolidated polling places, and the Wisconsin Department of Health Services reported that 52 people who voted in-person or worked as poll workers during the primary tested positive for COVID-19.¹⁵

47. Shortly after Wisconsin’s primary, Ohio encountered similar issues in its April 28 primary. The Ohio Secretary of State reported that election officials were experiencing “missed mail deliveries” as well as delivery times “in excess of ten days” for first class mail.¹⁶

48. In Georgia’s June 9 primary, tens of thousands of voters never received their mail ballots. Given the poll worker shortage, and the expectation that most of the electorate would vote absentee, cities closed and consolidated polling locations. But when voters did not receive their absentee ballots, they were forced to appear in

¹⁴ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.

¹⁵ Devi Shastri, *In-person voting was likely a 'disaster' for Wisconsin's efforts to flatten coronavirus curve, national experts say*, MILWAUKEE J. SENTINEL (Apr. 8, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/08/coronavirus-wisconsin-election-likely-hurt-effort-flatten-curve/2961718001/>.

¹⁶ Letter from Ohio Secretary of State Frank LaRose to the Ohio Congressional Delegation (Apr. 23, 2020), available at <https://www.dispatch.com/assets/pdf/OH35713424.pdf>.

large numbers at fewer voting sites. On top of that, untrained and understaffed poll workers across the state struggled to operate new voting equipment. In Atlanta, voters waited for up to six hours; some voted after midnight.

49. So too in Nevada. During the June 9 primary, cities consolidated in-person voting locations, and voters waited in lines for up to five hours. The last vote in Las Vegas was cast at 3 a.m.



Source: *Long lines to vote delay Nevada election returns*, LAS VEGAS SUN (June 9, 2020), <https://lasvegassun.com/news/2020/jun/09/no-mailing-it-in-voters-line-up-to-cast-ballots-in/>.

50. If this is all starting to sound repetitive, that is because it is. Election after election, voters have congregated in seemingly never-ending lines at

consolidated polling places, and tens of thousands of delayed ballots—and potentially more by some estimates—were delivered to election officials after Election Day. Thousands more never even made it from the local clerks to the voters who had requested them. Despite this clear pattern of disenfranchisement, the Commonwealth has yet to implement adequate safeguards to address these recurring barriers to vote by mail, which ultimately lead many to brave the long lines in congested polling places, not to mention the accompanying health risks, in order to exercise their right to vote.¹⁷

E. The Commonwealth will encounter the same barriers to voting in November absent the Court’s intervention.

51. There is no reason to believe that county election operations will fare any better in the November general election, especially since *many* more mail ballot applications are expected. The Secretary herself recently acknowledged, in discussing mail ballots, that she expects a lot more applications in the November general election than counties received in the June 2 primary. After the difficulty election officials encountered in handling the much lower turnout primary, there can

¹⁷ See Michelle Ye Hee Lee, “Kentucky braces for possible voting problems in Tuesday’s primary amid signs of high turnout,” WASH. POST (June 19, 2020), https://www.washingtonpost.com/politics/kentucky-braces-for-possible-voting-problems-in-tuesdays-primary-amid-signs-of-high-turnout/2020/06/19/b7b960ce-b199-11ea-8f56-63f38c990077_story.html (“Fewer than 200 polling places will be open for voters in Kentucky’s primary Tuesday, down from 3,700 in a typical election year. Amid a huge influx in requests for mail-in ballots, some voters still had not received theirs days before they must be turned in. And turnout is expected to be higher than in past primaries because of a suddenly competitive fight for the Democratic Senate nomination.”).

be no doubt that the Commonwealth is unprepared to face the challenges to the electoral system posed by COVID-19 during the general election in November.

Ballot receipt deadline

52. The ballot receipt deadline remains in effect and will continue to be enforced indiscriminately, despite well documented delays in processing requests and delivering mail ballots. During the primary, data from the Pennsylvania Department of State suggests that tens of thousands of voted mail ballots were delivered after Election Day, most of which were not counted, thus the voters who cast them were most likely disenfranchised.

53. As detailed above, the ability to process mail ballot applications and deliver ballots on time has been compromised by the ongoing public health crisis and the drastic expansion in demand for mail ballots. If the lower-turnout primary tested the limits of the Commonwealth's electoral apparatus and overwhelmed some counties; the general election, which is expected to dwarf the primary in turnout, will lead to an outright collapse of the mail voting system.

54. There is also no indication that USPS delays are likely to improve. The agency has reported "nationwide issues" integrating election procedures with Postal Service processes.¹⁸ Specifically, the agency has reported a high risk that election-

¹⁸ Office of Inspector General, United States Postal Service, *Management Alert: Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Service Area* (July 7, 2020), <https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf>.

related mail requested less than seven days before a deadline will not be delivered in time. The agency has warned that those issues could impact future elections. Furthermore, as the number of self-quarantined and infected postal workers increase nationally and locally, the more likely it is the USPS will continue to face severe staffing shortages, thereby slowing the delivery and receipt of a rapidly increasing volume of election mail.

55. At this point, it is anyone's guess whether voters who timely request mail ballots will receive them in time to complete the ballot and mail them back to county officials such that they arrive by 8 p.m. on Election Day.

56. Although Pennsylvania may have an interest in the finality of elections, the Commonwealth can continue to enforce its ballot receipt deadline while providing separate, temporary procedures to allow voters to cast an effective mail ballot during COVID-19, given the virus's impact on election administration and mail delivery. And doing so can still serve the Commonwealth's interest. Pennsylvania currently counts military-overseas ballots as long as they are received "by 5 p.m. on the seventh day following the election." 25 Pa C.S. § 3511(a). County boards of elections have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not

certify election results to the Secretary until 20 days after Election Day. 25 P.S. § 2642(k).

57. There is nothing sacrosanct about the receipt deadline as recent judicially-enacted exemptions indicate. Shortly after Hurricane Sandy struck parts of Pennsylvania in 2012, the Governor extended the deadline for absentee ballots returns in Philadelphia, Bucks, Montgomery, and Chester Counties from 5:00 p.m. on the Friday before Election Day to 5:00 p.m. on the Monday before Election Day.¹⁹ In 2016, a Montgomery County Court judge extended the deadline from the Friday before the election to 8:00 p.m. on Election Day after elections officials received unprecedented demand for absentee ballots and voters complained that they had not yet received their ballots with the Friday deadline impending. *In re Extension of time for Absentee Ballots to be Received and Counted in the 2016 General Election*, No. 2016-26326 (Court of Common Pleas of Montgomery County Nov. 3, 2016). And before the June 2 primary, the Courts of Common Pleas in Delaware County and Bucks County granted extensions of time to accept and tabulate mail ballots.²⁰

58. Adopting such emergency procedures, moreover, does not require the Court to apply Act 77's non-severability clause. Ostensibly, Section 11 of Act 77

¹⁹ *Absentee ballot deadline extended in some Pa. counties*, WHYY (Nov. 5, 2012), <https://whyy.org/articles/absentee-ballot-deadline-extended-in-aome-pa-counties/>.

²⁰ See Delaware County Order and Bucks County Order, *supra* note 4.

renders much of its provisions non-severable, and states that “[if] any provision of th[e] act or its application to any person or circumstance is held invalid, the remaining provisions or applications . . . are void.” But just as the Courts of Common Pleas in Delaware County and Bucks County were able to extend deadlines for submitting mail ballots without striking or enjoining any provision of Act 77, Petitioners’ requested relief does not render the ballot receipt deadline invalid, but rather seeks temporary accommodations for voters affected by COVID-19’s disruptions to the electoral process, and can be enforced without applying the non-severability clause.

59. Furthermore, non-severability provisions are not inexorable commands, nor are they controlling in all circumstances, and courts must effectuate their independent judgment in determining whether to apply such provisions.

60. Applying the non-severability clause here would only exacerbate (exponentially) the already-existing constitutional injury by forcing millions of voters who would otherwise cast mail ballots to vote in-person, which, as discussed above, would be all but impossible given the significant barriers to in-person voting. The Commonwealth’s long-held rules of statutory construction counsel against applying a non-severability provision that would disenfranchise a significant portion of its voters.

61. Moreover, indiscriminately rejecting all mail ballots that arrive after 8:00 p.m. on Election Day will disenfranchise countless Pennsylvania voters for reasons entirely outside their control.

Ban on third party ballot delivery

62. A voter who seeks to avoid the risk of arbitrary disenfranchisement due to mail delivery delays, and the health risks of in-person voting or ballot submission, cannot turn to family, friends, or others whom they trust for assistance in delivering their ballots because of an overly broad and unnecessary prohibition on *all* third-party ballot collection or delivery assistance.

63. Voters like Petitioner Dwayne Thomas and other members of the Alliance who have struggled with delayed mail delivery will be forced to deliver their ballots for the general election in-person this year to ensure their votes are counted, or subject themselves to the risk of arbitrary disenfranchisement. If permitted by law, these voters would designate a third party to deliver their ballots on time, and the Alliance would participate in those efforts.

64. The burden caused by the prohibition on third party ballot delivery is particularly pronounced among members of the Alliance—the majority of whom are over the age of 65 and are vulnerable to serious illness from COVID-19—who will be voting by mail for the first time while navigating the public health risks posed by

the pandemic, but have no sufficiently reliable method of submitting their ballots without risking their health.

65. The prohibition on third party ballot collection also disproportionately burdens poor, minority, and rural communities who generally have less access to postal services, live in areas that lack reliable access to public transportation (and especially amid the pandemic), and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person. Voters in rural communities, moreover, face longer travel distances to their county board of elections office and even less reliable mail service. This prohibition thus presents an undue burden on a large swath of Pennsylvania's eligible voters during the pandemic in violation of their constitutional rights.

Cost of postage

66. Most voters who choose to return their ballots by mail must also provide their own postage, which imposes both monetary and transaction costs that bear most heavily on the individuals who are least likely to be able to overcome them. Thus, for many voters who do not regularly keep postage stamps in their homes—including some members of the Alliance—submitting a ballot by mail will require them to either visit a post office or other essential business to obtain the correct postage, or purchase a book of stamps online for approximately \$11—an unnecessary expense that could be cost prohibitive for individuals who are

economically vulnerable, along with those whose employment and source of income were eradicated by the devastating economic impact of COVID-19.

67. A trip to the post office or any other establishment that sells stamps, at a time when individuals have been instructed to maintain social distancing guidelines to stem the spread of COVID-19, forces voters to expose themselves to the risk of severe illness in order to vote. This is especially true for elderly and immunocompromised voters, as well as those who lack access to vehicles and must rely on public transportation.²¹

68. Providing postage to allow citizens to complete important government-related functions is a common practice that has been adopted by federal, state, and county governments in other contexts. For instance, the United States Census Bureau sends census surveys with postage-prepaid return envelopes. Pennsylvania provides, as the National Voter Registration Act requires, a postage-prepaid return envelope when it asks voters to verify their address for the purpose of voter registration. Counties in Pennsylvania send juror questionnaires with postage-prepaid envelopes. And in its coronavirus stimulus package, Congress allocated \$400 million for

²¹ In Southeastern Pennsylvania, public transportation has been radically altered in light of the COVID-19 pandemic. Riders are encouraged to “Stay Home, Stay Safe,” face coverings are required for those who do continue to use the service; bus, train, and trolley routes have been cancelled; many subway stations have been shuttered; and those routes which are operating are doing so on a significantly lessened schedule. See SEPTA, *New Lifeline Service Schedules Effective Thursday, April 9, 2020*, <http://septa.org/covid-19/>, (last visited Jul. 6, 2020).

elections, which can be used to cover the cost of prepaying postage, among other expenses. At least one Pennsylvania county has recognized the importance of paying for mail ballot postage: during the primary election, Allegheny County sent mail-in ballot applications to all registered voters with prepaid postage.²² Philadelphia County sent mail ballots with postage-prepaid return envelopes.²³

69. Studies have shown that sending absentee ballots in postage-prepaid envelopes increases mail voting turnout. When King County, Washington launched prepaid postage pilot programs during the 2017 and 2018 primary elections, the county found that voters returned their absentee ballots via the USPS at higher rates when they received return envelopes with postage prepaid. In the 2016 general election, 48% of the tested group of voters returned their absentee ballots via the USPS. In contrast, in 2017, 81% of those same voters did. Following these pilot programs, King County sent all absentee ballots with postage-prepaid return envelopes.

70. Voting by mail—without additional safeguards or accommodations—will not provide the reliable alternative to in-person voting that Pennsylvanians need

²² Ryan Deto, *Allegheny County is sending all county voters mail-in ballot applications with prepaid postage*, PITTSBURGH CITY PAPER (Apr. 17, 2020), <https://www.pghcitypaper.com/pittsburgh/allegheny-county-is-sending-all-county-voters-mail-in-ballot-applications-with-prepaid-postage/Content?oid=17142631>.

²³ Claire Sasko, *Pennsylvania's Big Mail-In Primary Could Get Messy. What you Need to Know to Make Your Vote Count*, PHILA. MAG. (May 27, 2020), <https://www.phillymag.com/news/2020/05/27/mail-in-pennsylvania-primary/>.

to exercise their constitutional rights to vote and to participate in a free and equal election during the ongoing public health crisis. These barriers to the franchise, moreover, will weigh most heavily on traditionally disadvantaged communities, along with elderly and immunocompromised individuals who are especially vulnerable to the health risks posed by the COVID-19 pandemic.

COUNT I

Violation of Pennsylvania Constitution, Article I, Section 5 Free and Equal Elections Clause

71. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

72. “Elections shall be free and equal” in Pennsylvania. Pa. Const. art. I, § 5. Elections are “free and equal” only 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.” *Winston v. Moore*, 91 A. 520, 523 (1914). The Free and Equal Elections Clause is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 812 (2018), and protects voting rights even if they are denied or impeded “by inadvertence.” *Id.* at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (1929)).

73. Pennsylvania's Constitution thus imposes a clear and unambiguous duty on the Commonwealth to ensure that all elections are free and equal, and this constitutional guarantee applies with equal force during emergencies that threaten to deny its citizens the right to vote.

74. The Commonwealth's failure to provide safe, accessible, and reliable means for its citizens to vote in the upcoming general election denies Petitioners and Pennsylvania voters the rights guaranteed to them under the Free and Equal Elections Clause. As the primary election demonstrated, in-person voting will be severely restricted due to a significant reduction in the number of polling places and the health risks posed by packing more voters and poll workers into fewer, consolidated voting sites. At the same time, voting by mail presents a significant risk of disenfranchisement due to the dramatic expansion of mail voters, backlogs in processing mail ballot requests, and U.S. Postal Service delivery delays, all of which are either caused or exacerbated by the COVID-19 pandemic and will prevent voters from receiving or submitting their mail ballots in time to be counted, subjecting mail voters to an impermissible risk of arbitrary disenfranchisement for reasons outside their control. And for many Pennsylvanians, including some of the Alliance's members, voting by mail will require them to obtain postage, which imposes monetary and transaction costs that significantly burden or deny them the franchise altogether.

75. The failure to provide adequate safeguards to ensure access to the franchise during the COVID-19 pandemic forces Pennsylvania voters to make an impermissible choice: either (a) cast a ballot in-person (or hand-deliver their mail ballot assuming they receive it in time) to ensure their vote is counted and subject themselves to the health risks of COVID-19, or (b) vote by mail and risk arbitrary disenfranchisement for reasons outside their control. Neither option satisfies the Commonwealth's constitutional duty to conduct a free and equal election.

76. Both election officials and Pennsylvania courts have even recognized the need for such safeguards but neither have taken appropriate steps to address the inevitable voting rights debacle that awaits Pennsylvanians who attempt to vote in the November general election. Multiple county boards of elections requested extensions of the ballot receipt deadline because they were powerless to act on their own; two Courts of Common Pleas granted such extensions but claimed they lacked jurisdiction to do so until Election Day, effectively denying relief to the voters who determined (correctly) that mailing their ballots would result in disenfranchisement and opted to either risk their health to vote in person or not vote at all; and one county announced the day before the election that it would permit voters to designate a third party to deliver their ballots. These piecemeal, emergency measures, while a step in the right direction, were made available too late in the voting process, and for too

few voters, to alleviate the burdens on the franchise that deterred countless voters in the primary election and will disenfranchise many more in November.

77. The Free and Equal Elections Clause reaches “all aspects of the electoral process, to the greatest degree possible” and “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *League of Women Voters of Pa.* 178 A.3d, 804, 809. To enforce its protections, this “Court possesses broad authority to craft meaningful remedies.” *Id.* at 822. Where, as here, the Commonwealth’s citizens lack any reasonably accessible options for voting in the upcoming general election, this Court can and should intervene and protect the constitutional right to a free and equal election.

COUNT II

Violation of Pennsylvania Constitution, Article I, Sections 1, 26 Equal Protection

78. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

79. The Pennsylvania Constitution states that “[a]ll 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. It also prohibits the Commonwealth and any other political

subdivision from denying to any person “the enjoyment of any civil right,” and prohibits “discriminat[ion] against any person in the exercise of any civil right.” Pa. Const. art. I, § 26. These equal protection provisions are analyzed “under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (1991) (citing *James v. SEPTA*, 477 A.2d 1302 (1984)).

80. Those standards are best understood under the *Anderson-Burdick* balancing test, which commands courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). “However slight th[e] burden [on voting] may appear, . . . it must be justified by relevant and legitimate

state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

81. Pennsylvania has failed to provide adequate safeguards to ensure access to the franchise during the COVID-19 pandemic, and remove barriers to voting by mail, including: (a) the indiscriminate rejection of mail ballots placed in the mail before, but delivered after, Election Day despite delays in mail ballot processing or delivery; (b) the failure to allow voters to designate third parties to assist them in submitting their sealed mail ballots; and (c) the failure to provide prepaid postage for all mail ballots, as a result of which voters must incur monetary and transaction costs in some instances to vote by mail, or risk their health in order to vote in person—an impermissible choice that imposes a severe burden on the right to vote, particularly for Petitioners and the Alliance’s members, most of whom are over the age of 65, and some of whom have underlying health conditions that place them at higher risk for severe illness from COVID-19.

82. The Commonwealth has no interest of sufficient importance that can outweigh the burdens imposed by its failure to implement additional safeguards or provide accommodations to protect the right to vote and ensure access to a free and equal election during the COVID-19 pandemic.

PRAYER FOR RELIEF

83. Wherefore, Petitioners respectfully request that this Honorable Court enter judgment in their favor against Respondents, and:

- a) Declare unconstitutional the Commonwealth's failure to provide adequate safeguards to ensure access to a free and equal election, and to safe and reliable means through which Petitioners and other voters in the Commonwealth may exercise their right to vote during the COVID-19 pandemic.
- b) Declare unconstitutional the Commonwealth's failure to remove barriers to voting by mail, to ensure access to a safe and reliable means to vote during the COVID-19 pandemic, including: (1) the indiscriminate rejection of mail ballots delivered after Election Day despite delays in mail ballot processing or delivery; (2) the failure to allow voters to designate third parties to assist them in submitting their sealed mail ballots; and (3) the failure to provide pre-paid postage for all mail ballots, only to the extent that such relief for any of the above procedures do not require the Court to apply Act 77's non-severability clause.
- c) Issue an order directing Respondents to implement additional safeguards for the November 3, 2020 general election and any other

election conducted during the COVID-19 pandemic, which may include:

- i. Providing prepaid postage on all absentee and mail-in ballots;
 - ii. Implementing additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day will be counted if otherwise eligible, only to the extent that such procedures do not require the court to apply Act 77's non-severability clause; and
 - iii. Allowing 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, only to the extent that such procedures do not require the court to apply Act 77's non-severability clause;
- d) Maintain jurisdiction over this dispute to ensure that the Respondents comply with their obligations under the Pennsylvania Constitution.
- e) Provide such other and further relief as the Court may deem just and proper.

Dated: July 13, 2020

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2020

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

Petitioners,

v.

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION
SERVICES AND NOTARIES OF THE PENNSYLVANIA
DEPARTMENT OF STATE,**

Respondents,

**BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-
RESPONDENTS SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES BRYAN CUTLER AND MAJORITY LEADER OF
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
KERRY BENNINGHOFF'S
AMENDED PRELIMINARY OBJECTIONS TO AMENDED PETITION**

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Proposed Intervenors Speaker of the House of Representatives, Bryan Cutler, and Majority Leader of the House of Representatives, Kerry Benninghoff (“House Leaders”), hereby file this Memorandum of Law in Support of their Amended Preliminary Objections.

PRELIMINARY STATEMENT

Despite Respondents’ representations to the contrary, nothing substantively has changed since the House Leaders submitted their prior Preliminary Objections,

While Respondents allege in their Praecipe to Withdraw Certain of Respondents’ Preliminary Objections (the “Praecipe”) that a letter from the United States Postal Service (the “USPS Letter”) in their possession for several weeks before their filing somehow necessitates Respondents’ refusal to continue to defend the law of the Commonwealth, nothing could be further from the truth.

This Petition remains yet another in a cavalcade of cases where petitioners have sought to use Pennsylvania Courts to sidestep the legislative process and to impose policies of the petitioners’ own choosing. Just as this Court wisely chose to dismiss a similar petition in *Disability Rights Pennsylvania v. Boockvar*, it should do likewise here, and allow the political branches to continue triaging in a bipartisan and bicameral fashion the effects of the COVID-19 pandemic.

The COVID-19 pandemic has indeed impacted all facets of American life, including the administration of elections. While the recent June 2, 2020 Primary

Election did not occur without some problems, it operated within a well-considered framework that performed admirably given the exigent circumstances.

The General Assembly is now in the process of analyzing the conduct of the Primary Election. They recently enacted Act 35 of 2020, which required the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. From this, the General Assembly is now analyzing the conduct of the 2020 Primary Election so that they are in a position to enact such additional measures as may be required for the 2020 General Election.

Instead of allowing the political branches to analyze those findings and data and to continue to craft legislation addressing any needed changes, Petitioners, and now the Respondents, desire this Court to redesign an election code of their own choosing, notwithstanding the violence to our constitutional norms.

As an initial matter, Petitioner, the Pennsylvania Alliance for Retired Americans, lacks standing to bring this matter, as it is an association, in contravention of well-established case law that only individuals have standing to bring election-related claims in Pennsylvania.

The remaining Petitioners seemingly structure their claims as an “as-applied challenge,” but do not properly support their allegations. Petitioners make a series of suppositions of future calamitous harms and issues that *may* occur in the future

should their scenarios come to pass. Moreover, this relief allegedly needs to occur *now*, rather than to allow the continued bipartisan triaging of COVID-19-related issues.

Similarly, the Respondents by their recent Praecipe now make fundamentally the same argument---that due to a misreading and exaggeration of the text of the USPS Letter---this situation somehow necessitates *emergency* affirmative relief being enacted by this Court---without the involvement of the General Assembly, which has resolutely monitored and modified the Election Code in advance of, and in response to, the COVID-19 pandemic.

The political branches took the proactive step with Act 77 of modernizing Pennsylvania's voting process to allow for no-excuse voting by mail. When the unforeseen COVID-19 pandemic swept the world, the Commonwealth's political branches were ready with carefully considered voting procedures that will allow for free and fair elections. Furthermore, the Legislative and Executive Branches took further bipartisan steps to move the Primary Election date and to enact election procedures compatible with social distancing, and they have shown through the enactment of Act 35 that they continue to actively monitor the situation.

But while some lead, others look to take advantage of a situation for their own agendas---which is exactly what is occurring in this case. The Petitioners---who do not possess a cognizable injury other than their own speculation---look to undo these

bipartisan reforms and to have this Court set election policy of Petitioners' own choosing. This request for relief is inapposite to federal and state constitutional principles and this Court's well-reasoned policy of judicial restraint in election cases, including the recent *Disability Rights Pennsylvania* case.

The challenged policies are all perfectly constitutional election regulations. For the feasibility of election administration, the Commonwealth's political branches have pondered the relevant policy considerations and made the policy choice that the deadline for a county board of elections to receive a ballot should occur at 8:00 p.m. on Election Day. This is not some nefarious scheme designed to deprive anyone of their constitutional rights, but a constitutional effort to make the Commonwealth's elections free, fair, and workable.

Similarly, the Pennsylvania Election Code does not permit third-party ballot harvesting because of well-warranted concerns about fraud, including voter intimidation. Even as recently amended, the Election Code rejects ballot harvesting as an election security risk, which is not surprising since ballot harvesting fraud recently led to overturning of an entire congressional election in North Carolina. Moreover, this Court has already determined that this practice is not permitted by law.

Also ignored by Petitioners is the integral role of Pennsylvania's counties in the election process. Petitioners demand that the Department of State appropriate

funds for absentee and mail-in ballots, and centrally direct their tabulation, despite the fact that those functions are statutorily the province of the county election boards.

Not only are all of the challenged policies constitutional, Petitioners have failed to even join the indispensable parties, the county election boards, that would be tasked with implementing Petitioners' requested relief. As such, Petitioners' claims should be dismissed for failure to join a necessary party.

As the Petitioners state no claim on which the Court may grant relief, lack standing to bring this action, request a nonjusticiable remedy, and failed to join necessary parties, this action should be dismissed with prejudice.

I. FACTUAL BACKGROUND

Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with the Commonwealth Court on April 22, 2020, seeking for the Court to impose four election policies of their choosing, namely that the Court require the Secretary of the Commonwealth to “a. [p]rovide postage on all absentee and mail-in ballots; b. [i]mplement additional procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail services delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause; c. [a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots . . . and d. [p]rovide uniform guidance and training to election officials involved in verifying

mail ballots and implement 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.” Original Pet. at Pages 34-35.

On June 17, 2020, the Hon. Mary Hannah Leavitt, President Judge of the Commonwealth Court, determined that Section 13(2) of Act 77 of 2019 vested exclusive jurisdiction in this Court to hear this matter, and thereby transferred this matter to this Court pursuant to 42 Pa. C.S. 5103(a).

On June 24, 2020, Petitioners sought leave to file an amended Petition, which was granted by this Court on July 8, 2020. Petitioners then filed their Amended Petition for Declaratory and Injunctive Relief with this Court on July 13, 2020. The House Leaders filed an Application for Leave to File Amended Preliminary Objections on July 27, 2020.

Where the Original Petition sought that its requested relief be perpetual, the Amended Petition asks for the same relief of an altered received-by deadline, the requirement for pre-paid postage,¹ and the permission of third-party ballot

¹ While Respondents have announced that the Department of State will pay for postage for the November election, they have not announced how this program will be implemented or funded. See Pennsylvania Pressroom, *Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots* (July 31, 2020), available at <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>. Given the uncertain nature of this administrative policy decision, the House Leaders reiterate their position that the Pennsylvania Constitution does not require the payment of return postage on mail-in ballots.

harvesting, only limited to the duration of the COVID-19 pandemic.² Amended Pet.

¶ 83. Petitioners do not state in their Amended Petition why they have since limited their requested relief. *See generally* Amended Pet.

While Petitioners do not expressly cite to a single statute that they consider unconstitutional, this suit was brought as the Pennsylvania General Assembly has been passing bipartisan legislation that has greatly *expanded* the ability of Pennsylvania’s voters to vote by mail, starting with Act 77 of 2019.

Pennsylvania has traditionally only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee,

² In their Amended Petition, the Petitioners seek for this Court to “a) Declare unconstitutional the Commonwealth’s failure to provide adequate safeguards to ensure access to a free and equal election, and to safe and reliable means through which Petitioners and other voters in the Commonwealth may exercise their right to vote during the COVID-19 pandemic. b) Declare unconstitutional the Commonwealth’s failure to remove barriers to voting by mail, to ensure access to a safe and reliable means to vote during the COVID-19 pandemic, including (1) the indiscriminate rejection of mail ballots delivered after Election Day despite delays in mail ballot processing or delivery; (2) the failure to allow voters to designate third parties to assist them in submitting their sealed mail ballots; and (3) the failure to provide pre-paid postage for all mail ballots, only to the extent that such relief for any of the above procedures do not require the Court to apply Act 77’s non-severability clause. c) Issue an order directing Respondents to implement additional safeguards for the November 3, 2020 general election and any other election conducted during the COVID-19 pandemic which may include: i. Providing prepaid postage on all absentee and mail-in ballots; ii. Implementing additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day will be counted if otherwise eligible, only to the extent that such procedures do not require the court to apply Act 77’s non-severability clause; and iii. Allowing 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, only to the extent that such procedures do not require the court to apply Act 77’s non severability clause; d) Maintain jurisdiction over this dispute to ensure that the Respondents comply with their obligations under the Pennsylvania Constitution; e) Provide such other and further relief as the Court may deem just and proper.” Amended Pet. ¶ 83.

the voter would have had to provide a permissible reason to do so, and the voter would have been provided with an absentee ballot that would have had to be returned by the voter no later than 5:00 p.m. *on the Friday before the election. Id.*

In addition to allocating \$90 million to ensuring that Pennsylvanians could vote safely and securely on modern voting machines, Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.* The traditional voting options remain available—voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

The political branches have continued to work diligently to fine-tune these election reforms. Act 94 of 2019 was enacted in November 2019 to streamline operations to ensure that the ballot materials were suitable to allow the ballots to be properly scanned. 2019 Pa. Legis. Serv. Act 2019-94 (H.B. 227) (West).

In early 2020, two major events occurred that prompted additional action from the Legislative and Executive Branches to ensure that Pennsylvania elections would be conducted freely and fairly. First, in February 2020, the Iowa Presidential

Caucuses disintegrated into chaos. *See* Reid J. Epstein et al., How the Iowa Caucuses Became a Fiasco for Democrats, N.Y. Times, Feb. 9, 2020, *available at* <https://www.nytimes.com/2020/02/09/us/politics/iowa-democratic-caucuses.html>.

When new voting procedures that had not been properly tested and vetted were applied in the Caucuses, the whole system collapsed. *Id.* Workers at Caucus sites were unable to properly tabulate results or to convey them to central tabulators. *Id.* The end result was the breakdown of the entire process. *Id.* No results were released on Caucus night, and no results were able to be released for a significant time following. *Id.* The event was a clear “cautionary tale” of how voter confidence and the process as a whole can disintegrate absent clear deadlines and procedures. Ryan J. Foley, How the Iowa Caucuses Broke Down ‘In Every Way Possible’, Associated Press, Feb. 11, 2020, *available at* <https://apnews.com/ee095683c85f6c97e51b6589b412f674>.

Second, COVID-19 upended seemingly every facet of American life. Schools and businesses were closed, and families sheltered in place in order to reduce the harms of the global pandemic. David Templeton, Wolf: Schools to Remain Closed ‘Until Further Notice,’ 4 More Counties Must Stay Home, Pittsburgh Post-Gazette, Mar. 30, 2020, *available at* <https://www.post-gazette.com/news/state/2020/03/30/Pennsylvania-Wolf-Schools-closed-until-further-notice-business-stay-at-home-order-covid-19/stories/202003300101>.

Once again, the Legislative and Executive Branches worked together to fashion bipartisan legislation to address the problem. Act 12 of 2020 introduced numerous accommodations to ensure that the 2020 Primary Election could be conducted even amidst the COVID-19 pandemic. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). The date of the Primary Election was moved until June to allow more time to take steps to protect the health of Pennsylvania’s voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties, to establish polling places without court approval and even, for the first time, to hold voting in locations that serve alcohol, should those be the venues that best support the community’s needs and promote social distancing. *Id.*

Following the June 2, 2020 Primary Election, the political branches again worked in bipartisan fashion to enact Act 35 of 2020, which required the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. As the Sponsor of Act 35, Representative Natalie Mihalek, reasoned on the House Floor, Act 35 will allow the Commonwealth to “gather data quickly after the election so we are able to ensure a smooth implementation of Act 77. A free and fair election is a basic tenet of our nation and we must ensure the integrity of our election here in

the Commonwealth of Pennsylvania.” 2020 Pa. Legis. Journal-House (June 10, 2020) (Unofficial) (**attached hereto as Exhibit "1"**). Speaker Cutler also noted the importance “that we continue to monitor [Pennsylvania’s election reforms] as we go forward. That is why we have had several subsequent bills and changes to the original bill that we passed. This is simply the next step in that process.” *Id.*

The General Assembly continues to analyze the Act 35 report and to monitor the COVID-19 situation and stands ready to enact all further measures as may be required to ensure that the Commonwealth continues to have free and fair elections.

II. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioner, The Pennsylvania Alliance for Retired Americans, Lacks Standing to Bring This Action

The Pennsylvania Alliance for Retired Americans (the “Alliance”) lacks standing to sue in this case because the right to vote and the right to have one’s vote counted is at issue, and the Alliance is not authorized to vote in the Commonwealth.

To have standing, a party in an action must establish “a substantial, direct and immediate interest in the outcome of the litigation.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

In certain contexts, it is true that an association “has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the

association alleges that at least one of its members is suffering immediate or threatened injury as a result of the action challenged.” *Id.* at 922 (citing *Phila. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012)).

But Pennsylvania courts have repeatedly held that an association does not have standing, even on behalf of its members, when the right to vote and the right to have one’s vote counted is the subject of the challenge. Order ¶ 4, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017) (dismissing the League of Women Voters of Pennsylvania because it was not authorized by law to exercise the right to vote in the Commonwealth); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002); *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002).

“[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert*, 790 A.2d at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). When “the right to vote and the right to have one’s vote counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; *see also Erfer*, 794 A.2d at 330 (dismissing Democratic Committee). “The factor that elevates the general interest of each registered voter to one that is sufficiently substantial to confer standing to challenge a candidate’s

nomination petition is that voter’s eligibility to participate in the election.” *In re Pasquay*, 525 A.2d 13, 14 (Pa. Commw. Ct. 1987), *aff’d* 529 A.2d 1076 (Pa. 1987).

Accordingly, an entity that does not possess the right to vote in the Commonwealth does not have a direct, substantial, and immediate interest in litigation over the right to vote and the right to have one’s vote counted. The operative factor in these standing decisions was that the challenges sought to vindicate “the right to vote and the right to have one’s vote counted.” *Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

By contrast, the Alliance brings suit based on vague allegations that due to Pennsylvania’s Election Code and COVID-19, the Alliance “will be forced to divert resources from its ongoing mission. . .” by its not being allowed to engage in ballot harvesting. Amended Pet. ¶ 16; see also Original Pet. ¶ 16 (the Alliance previously made a nearly identical diversion of resources argument in their original Petition concerning the enactment of Act 77 without referencing COVID-19).

There is no allegation that the Alliance is authorized by law to vote in the Commonwealth. See *Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95. Entities such as a state political party (the Pennsylvania State Democratic Committee), governmental entities (the Board of Commissioners of Radnor Township, the Board of Commissioners of the Township of Lower Merion, the Township of Lower Merion, the Township of Ross, and the North Hills School District), civic groups

(the Lehigh Valley Coalition for Fair Reapportionment, the Neighborhood Club of Bala Cynwyd, and the League of Women Voters of Pennsylvania), and political party committee chairs (Dennis J. Sharkey and Nora Winkelman in their representative capacities as chairs of Republican and Democratic committees)—notwithstanding their own organizational interests in voting rights, as the Alliance alleges in this case—have each been held not to have standing in voting rights cases. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95; *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017).

Accordingly, the Alliance lacks the capacity to sue—either individually or on behalf of its members—due to the nature of the claims in this case and must be dismissed as a party.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Do Not Allege a Constitutional Violation

Petitioners’ allegations are devoid of a concrete, cognizable legal injury, and are instead improperly premised on a series of suppositions about harms that may befall the Commonwealth in the future, should their scenarios come to pass. These claims are simply too speculative to sustain the Petition.

A key focus of Petitioners’ concerns are the procedures previously put into place for the Primary Election pursuant to Act 12. To be sure, the COVID-19 pandemic necessitated unprecedented measures, such as the consolidation of polling

places, which were enacted to allow for a safe and workable election even in the pandemic's wake. *See generally* Amended Pet. ¶ 34.

Act 12 of 2020 introduced numerous accommodations to ensure the 2020 Primary Election could be conducted safely. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). The date of the Primary Election was moved until June to allow more time to “flatten the curve” and protect the health of Pennsylvania’s voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties to establish polling places without court approval. *Id.* Tellingly, despite Petitioners’ references to isolated problems in some counties, the overall success of Act 12 was borne out by the fact that none of Petitioners had any actual problems voting in the Primary Election. *See* Amended Pet. ¶¶ 10, 12, 14, and 15.

The extraordinary measures of Act 12 certainly had limitations—which is why they were enacted on a temporary basis to deal with *one particular election* being conducted in the middle of a pandemic. Petitioners seek to use isolated problems that some counties had in implementing new election procedures, and vague references to circumstances in other states, to justify this Court ordering *more* new procedures of Petitioners’ own choosing for the Commonwealth to implement before November’s General Election.

Petitioners' allegations are devoid of a concrete, cognizable legal injury, and are instead improperly premised on a series of suppositions about harms that may befall them in the future, should their scenarios come to pass. Petitioners premise their claim for relief on conjecture as to a future cascade of worst-case scenarios.

Moreover, the political branches only recently enacted Act 35, through which the Secretary of the Commonwealth drafted an analysis of the Primary Election. The General Assembly is now in the process of analyzing those findings to deliberately consider what policies may be necessary for the conduct of future elections.

In their Amended Petition, Petitioners admit that *none of them* had any issues voting in the Primary Election. Amended Pet. ¶¶ 10, 12, 4, and 15. Instead, Petitioners complain of issues intrinsically related to voting by mail ahead of Election Day. For example, Petitioner Michael Crossey who “submit[ted] his ballot weeks in advance of Election Day” had “significantly less time to evaluate the candidates and issues, and without an opportunity to consider relevant, late-breaking news or events. . . .” Amended Pet. ¶ 10. On the other end of the spectrum, Petitioner Dwayne Thomas, who also was able to vote without problem in the Primary Election, laments that he “submitted his marked ballot one week before Election Day, without *knowing* whether it would arrive on time.” Amended Pet. ¶ 12 (emphasis added).

Rather than identifying any constitutional violation, Petitioners rather identify the tradeoffs in voting early (that unknown events may occur after they cast their ballot) or in not voting in person on Election Day (not seeing the tangible proof of voting that one would see at the polls). Amended Pet. ¶¶ 10, 12; *see also* Amended Pet. ¶ 14 (Petitioner Irvin Weinreich noting that he was able to vote by mail in the Primary Election); Amended Pet. ¶ 15 (Petitioner Brenda Weinreich stating that she was able to vote by mail in the Primary Election).

Fundamentally, these tradeoffs are why the Commonwealth and the county boards of elections continue to offer in-person voting on Election Day, and the *expansion* of options by the addition of no excuse mail-in voting does not amount to a constitutional violation.

Instead of actual evidence of a constitutional violation, Petitioners offer attenuated theories and suppositions of possible future harms: that “the country *may* encounter a second, more deadly wave of COVID-19 in the fall,” Amended Pet. ¶ 14 (emphasis added); that the U.S. postal system *may* have issues delivering *some* things and therefore *may* delay ballot deliveries; Amended Pet. ¶ 54; and that this outcome *might* disproportionately affect one or another group of voters, Amended Pet. ¶ 65. These conjectures simply do not rise to the level of a cognizable legal injury.

Similarly, Respondents mistakenly point to the three weeks old USPS Letter as a supposed exigent circumstance necessitating judicial intervention. The USPS Letter, by its own words, was merely a correspondence meant to “educate voters” and to request “that election officials keep the Postal Service’s delivery standards and recommendations in mind”. *Id.* To dispel any confusion, the Postal Service went on to say, “[t]o be clear, the Postal Service is not purporting to definitively interpret the requirements of your state’s election laws, and also is not recommending that such laws be changed to accommodate the Postal Service’s delivery standards.” *Id.*

Plainly, the USPS Letter did not recommend changing any laws or rules governing Pennsylvania’s elections, but merely indicated suggestions for when ballots should be mailed out to voters and when voters should plan on returning them to their county board of elections. Nothing in the USPS letter even suggests the type of wholesale change to the Election Code that Petitioners and Respondents are advocating.

“In seeking judicial resolution of a controversy, a party must establish as a threshold matter that he has standing to maintain the action.” *Stilp v. Commonwealth*, 940 A.2d 1227, 1233 (Pa. 2007). “An individual can demonstrate that he has been aggrieved if he can establish that he has a substantial, direct and immediate interest in the outcome of the litigation.” *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009). “The interest is direct if there is a causal connection between the asserted

violation and the harm complained of; it is immediate if that causal connection is not remote or speculative.” *City of Philadelphia v. Commonwealth*, 838 A.2d 566, 577 (Pa. 2003).

Here Petitioners’ alleged injury is very speculative, and they rely on a string of conjectures and theories and fall substantially short of “rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017). Petitioners simply cannot sustain an as-applied challenge without demonstrating an actual injury. Given the legal insufficiency of Petitioners’ claims, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

“[R]ipeness overlaps substantially with standing.” *Rendell v. Pa. State Ethics Comm’n*, 983 A.2d 708, 718 (Pa. 2009). This Court “do[es] not have the ability to grant any relief that is merely advisory, one that does not involve any case or controversy. Any action . . . may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.” *Brown v. Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Commw. Ct. 1996). Ripeness “arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. . . . It has been defined as the presence of an actual

controversy. . . . It insists on a concrete context, where there is a final . . . action so that the court can properly exercise their function.” *Tex. Keystone Inc. v. Pa. Dept. of Conservation & Nat. Res.*, 851 A.2d 228, 239 (Pa. Commw. Ct. 2004).

Here, Petitioners can speculate as to how the COVID-19 pandemic will develop throughout the next few months and how the political branches may respond to those developments, but that is all the Petition amounts to: speculation. The political branches only recently enacted Act 35, through which a thorough analysis of the Primary Election was conducted. The political branches can now use those findings to deliberately consider what policies may be necessary for the conduct of future elections.

Notwithstanding this review process, Petitioners and Respondents ask this Court to wade into the political question of election policy choices, which are the product of bipartisan and bicameral compromise. The Separation of Powers Doctrine holds “that the executive, legislative, and judicial branches of government are equal and none should exercise powers exclusively committed to another branch.” *Jefferson Cty. Court Appointed Emp. Ass’n v. Pa. Labor Relations Bd.*, 985 A.2d 697, 703 (Pa. 2009). It “is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands.” *O’Donoghue v. United States*, 289 U.S. 516, 530, 53 S.Ct. 740, 77 L.Ed. 1356 (1933).

The U.S. and Pennsylvania Constitutions place great emphasis on the role of the Legislative Branch in the setting of election policy. One of the very first provisions of the U.S. Constitution is the Elections Clause, providing that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Constitution Art. I, Section 4, Clause 1. Legislative Branch power as to election procedure is further codified in the Pennsylvania Constitution. *See, e.g.*, Pa. Constitution Art. VII, Section 1 (“Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.”; Pa. Constitution Art. VII, Section 16 (“The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.”)).

“The presumption that legislative enactments are constitutional is strong.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (citing *Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008)); see also 1 Pa.C.S. § 1922(3) (in ascertaining intent of General Assembly in enactment of statute, presumption exists that General Assembly did not intend to violate federal and state constitutions). “[A]ny 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.” *Konidaris v. Portnoff Law Associates, Ltd.*, 953 A.2d 1231, 1239 (Pa. 2008) (citation omitted).

“All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party*, 209 A.3d at 279 (citations omitted). Moreover, “statutes are to be construed whenever possible to uphold their constitutionality.” *In re William L.*, 383 A.2d 1228, 1231 (Pa. 1978).

This is especially true in the election context, where this Court has long recognized that “[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (Pa. 1869); see also *Abraham v. Shapp*, 400 A.2d 1249 (Pa. 1979) (“It is the

responsibility of the legislature by appropriate legislation to provide the procedures for elections to public office.”).

In addressing election policy, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania.” *In re Guzzardi*, 99 A.3d 381 (Pa. 2014).

Next, we will address each challenged item of regulation, though the analysis is same throughout: the laws in question are clear, constitutional policy choices that must be upheld. Each provision is consistent with the purpose to secure the “freedom of choice and to prevent fraud and corruption; to obtain a fair election and an honest election return; to insure fair elections, or an equal chance and opportunity for everyone to express his choice at the polls; and to secure the rights of duly qualified electors and not to defeat them.” *In re Substitute Nomination for Vacancy in the Democratic Nomination for Office of Cty. Com'r of Allegheny Cty.*, 118 A.2d 750, 755 (Pa. 1955) (citations omitted).

1. Received-By Date for Absentee and Mail-in Ballots

Petitioners challenge the constitutionality of the Pennsylvania Election Code’s requirement that to be deemed as validly cast, a voter’s absentee or mail-in ballot “must be received by the county board of elections office by 8:00 p.m. on

Election Day.” Amended Pet. ¶ 24 (*paraphrasing* 25 P.S. § 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) (ballots must be received by the voter’s county board of elections “on or before eight o’clock P.M. the day of the primary or election.”)).

The provision in question is a component of the bipartisan election reform legislation that the Legislative and Executive branches have created over the past year. *See* 2019 Pa. Legis. Journal-House 1741 (Oct. 29, 2019) (documenting the 138-61 vote on SB 421 (Act 77)); *see also* Pennsylvania House of Representatives, Members of the House, https://www.legis.state.pa.us/cfdocs/legis/home/member_information/mbrList.cfm?body=H&sort=alpha (the composition of the Pennsylvania House of Representatives at the time of enactment was 110 Republicans and 93 Democrats).

Pennsylvania has traditionally only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee, the voter would have had to provide a permissible reason to do so, and the voter would have been provided with an absentee ballot that would have had to be returned by the voter no later than 5:00 p.m. *on the Friday before the election. Id.*

Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots

later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.* The traditional voting options remain available—voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

The “received by” deadline is a clear policy choice made by the Legislature in consultation with the Governor. Petitioners seem to have the mistaken opinion that Election Day is somehow the beginning of the election process, where instead it is the final step in a cycle that began many months before when candidates began circulating nomination petitions. *See* 25 P.S. § 2868. Election Day is the end of the election cycle and Act 77 is reflective of that bipartisan policy choice.

“The Code sets forth various time requirements for the completion of balloting, the strict enforcement of which is necessary to ensure the fair and orderly administration of elections.” *In re Apr. 10, 1984 Election of E. Whiteland Twp., Chester Cty.*, 483 A.2d 1033, 1035 (Pa. Commw. Ct. 1984). For example, nomination petitions must be “filed on or before the tenth Tuesday prior to the primary” and polling places close at 8:00 p.m. on Election Day. 25 P.S. § 2873(d); 25 P.S. § 3045. The provision in question is simply another deadline in the election process. Act 77 emphasizes the need to give poll workers the opportunity to count timely submitted ballots on Election Day, so that the people of the Commonwealth

know in fairly short order who won and who lost the election. As such, it should be upheld as a proper election administration regulation.

The USPS letter, allegedly relied upon by the Respondents, was merely correspondence meant to “educate voters” and to request “that election officials keep the Postal Service’s delivery standards and recommendations in mind”. *Id.* The USPS Letter made clear that it was “not recommending that [state election] laws be changed to accommodate the Postal Service’s delivery standards.” *Id.*

Plainly, the USPS Letter did not recommend changing any laws or rules governing Pennsylvania’s elections, but merely indicated suggestions for when ballots should be mailed out to voters and when voters should plan on returning them to their county board of elections. This is information the Respondents and the county boards of elections can provide to voters in furtherance of the existing laws.

Intrinsically there are going to be deadlines for the return of mail-in ballots—whether on Election Day, three days after Election Day, or seven days after Election Day. There is nothing constitutionally required about which of those deadlines is chosen—they merely represent public policy choices. For any of those dates, some ballots will be cast by the deadline and others will be submitted afterwards.

Furthermore, since the Respondents intend to provide prepaid postage on the return of ballots, that policy should be read in conjunction with the application of the received-by deadline. Since pre-paid letters are not postmarked by the USPS,

Respondents and Petitioners’ requested relief of validating ballots via postmark is not assured and would lead to chaos at the county boards of elections. See Ellie Kaufman, Postmarks Come Under Scrutiny as States Prepare for Mail-in Voting, CNN, August 11, 2020, *available at* <https://www.cnn.com/2020/08/11/politics/postmarks-mail-in-ballots/index.html>.

This underscores the challenges in modifying the Election Code, which has been carefully drafted by the political branches via bipartisan and bicameral compromise. This Court should steer clear of making these policy choices unilaterally.

2. Ballot Harvesting

Petitioners also request that this Court order the state to allow third parties to collect and submit absentee and mail-in ballots in clear contravention of Pennsylvania law.

A touchstone principle of Pennsylvania elections is that “the spirit and intent of our election law . . . requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004). This principle is codified by statute in 25 P.S. § 3058, which states that “[n]o voter shall be permitted to receive any assistance in voting unless . . . he has a physical disability.” This extends to absentee

and mail-in balloting where “the elector shall, in secret, proceed to mark the ballot. . .” 25 P.S. § 3146.6(a).

The absentee voter shall:

then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot.’ This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

Id.; *see also* 25 P.S. § 3150.16(a) (providing for the identical procedure for mail-in voters).

This Court has already examined and rejected the argument that this statutory language permits third party ballot harvesting. The case in question considered a challenge to the requirement that “absentee ballots delivered by third persons on behalf of non-disabled voters are invalid under Section 3146.6 of the Election Code. . .” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004). This Court held that “under the statute’s plain meaning, a non-disabled absentee voter has two choices: send the ballot by mail, or deliver it in person. Third-person hand-delivery of absentee ballots is not permitted.” *Id.* at 1231.

“Election laws will be strictly enforced to prevent fraud” *Appeal of James*, 105 A.2d 64, 65 (Pa. 1954). A court “cannot simply ignore substantive provisions of the Election Code. . . . [S]o-called technicalities of the Election Code

are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed—particularly where, as here, they are designed to reduce fraud.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1234 (Pa. 2004).

The fear of fraud via ballot harvesting is borne out by recent, real world events. In 2019, North Carolina had to take the extreme step of re-doing a congressional election when illegal ballot harvesting led to the belief that the entire election was compromised. [Operative in North Carolina Congressional Race Arrested in ‘Ballot Harvesting’ Case](https://www.latimes.com/nation/la-na-nc-election-fraud-charge-20190227-story.html), Associated Press, Feb. 27. 2019, *available at* <https://www.latimes.com/nation/la-na-nc-election-fraud-charge-20190227-story.html>. Here, the political branches have determined that the fraud concerns pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

As the statutory prohibition against ballot-harvesting is well-settled law designed to prevent fraud, it must be upheld in accordance with the Supreme Court’s prior decision.

3. Payment of Postage for Mail-In Ballots

Pennsylvania law clearly provides that a voter is presumed responsible for paying for the postage for an absentee or mail-in ballot. Such voters “shall send [their

ballots] by mail, postage prepaid, except when franked, or deliver it in person to said county board of election.” 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a).

Mailing in an absentee or mail-in ballot is but one alternative for submitting a ballot, which can be brought to the county board of elections for free. *Id.* Alternatively, the voter may vote in person on Election Day. 25 P.S. § 3031.12.

Providing voters with a wide variety of options on voting is not a constitutional violation, but rather a valid policy determination by the political branches to provide for free and fair elections. Just as the Election Code constitutionally does not require government to provide voter transport to the polls, it does not require government to pay for postage for absentee and mail-in ballots. Both questions are policy considerations for the counties, which “shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).³

³ Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.,* Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots); *see also* Amended Pet. ¶ 68 (noting that Allegheny and Philadelphia Counties elected to provide postage for mail-in ballots for the 2020 Primary Election). Indeed, the Department of State has announced that it intends to provide postage for returned ballots for the General Election. *See* Pennsylvania Pressroom, *Pennsylvania Will Provide Postage-Paid Return Envelopes with Mail and Absentee Ballots* (July 31, 2020), *available at* <https://www.media.pa.gov/Pages/State-Details.aspx?newsid=391>. Given the uncertain nature of this administrative policy decision, the House Leaders reiterate their position that the Pennsylvania Constitution does not require the payment of return postage on mail-in ballots.

While the Respondents have indicated that they intend to provide return postage to voters for the General Election, that is not a constitutional requirement. Absent that choice by the Respondents, the Pennsylvania Election Code clearly provides for mail-in and absentee voters to pay for their own postage if they choose to vote by those means, rather than by an alternative method that does not require postage. 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a). As this provision merely provides voters with more options to vote rather than mandating that anyone mail in their ballots, it is a constitutional provision that should be upheld.

Since all the regulations in question are constitutional, this action should be dismissed for Petitioners' failure to plead a constitutional violation.

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(2): Petitioners Have Not Pleaded a Justiciable Remedy

Should this Court need to consider the relief sought by Petitioners and Respondents, their requested relief is itself unconstitutional, as violative of the Separation of Powers, and must be struck for its failure to conform to the law.

The Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” Pa. Constitution Art. II, Section 1.

While this Court may declare a statute unconstitutional upon review, the judiciary's power is strictly limited. This is because the Pennsylvania General Assembly—not the judiciary or the Secretary of the Commonwealth—holds the sole

power to write the laws for the Commonwealth. *Id.* As the Pennsylvania Supreme Court has noted, the judiciary “may not usurp the province of the legislature by rewriting [statutes] . . . as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018).

Accordingly, where the court determines that a law is unconstitutional, “it is not the role of this Court to design an alternative scheme which may pass constitutional muster.” *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984). The Courts “will not judicially usurp the legislative function and rewrite [the statute]. . . . Rather, we leave it to our sister branch for an appropriate statutory response. . . .” *Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015).

As such, when a court invalidates a law, the court must grant the Legislature sufficient time to consider and enact remedial legislation. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (providing timeframe for General Assembly and Governor to enact remedial redistricting plan); *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 582–83 (Pa. 2016) (staying decision for 180 days “in order to allow the General Assembly sufficient time to devise a legislative solution”); *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). The Court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Robinson Twp.*, 147 A.3d at 583; *Cali*, 177 A.2d at 835.

Should this Court determine that a statute at issue is unconstitutional, the Court does not have the authority to issue the orders or take any actions requested by Petitioners, as the requested relief would require legislative action. Such action by the Court would be a clear “excession of the scope of [the Court’s] power and authority,” *Glancey v. Casey*, 288 A.2d 812, 817 (Pa. 1972), and would amount to prohibited “judicial legislation,” see *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971) (“Conceivably, the statute could be rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature, for additional editing of [the statute] on our part would amount to judicial legislation.”).

While the Court has the power to review the Pennsylvania Election Code, it cannot direct the Legislature *how* to fix any alleged constitutional defect, let alone fix the alleged defect itself. If any of the regulations questioned by Petitioners are held to be unconstitutional, it is the sole province of the Legislature to determine how to address that. Accordingly, because the Court cannot grant the requested relief contained in the Petitioners’ Prayer for Relief as a matter of law, the offending requests must be struck pursuant to Pa. R. Civ. P. 1028(a)(2).

D. Fourth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(5): Petitioners Have Failed to Include Necessary Parties

Pennsylvania law establishes that a court must join indispensable parties to an action, or, if not possible, dismiss the action “[w]henver it appears by suggestion

of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b). Indispensable parties are those “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).

Significantly, “[t]he absence of indispensable parties *goes absolutely to the jurisdiction*, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264-65 (Pa. 1955) (emphasis added); *see also Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (“unless all indispensable parties are made parties to an action, a court is powerless to grant relief. Thus, the absence of such a party goes absolutely to the court’s jurisdiction.”) (citations omitted); *Fiore v. Oakwood Plaza Shopping Center, Inc.*, 585 A.2d 1012, 1020 (Pa. Super. Ct. 1991) (“In this Commonwealth, the issue of failure to join an indispensable party cannot be waived; if such a party is not joined, a court is without jurisdiction to decide the matter”).

A party is indispensable “when he has such an interest that a final decree cannot be made without affecting it, or leaving the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience . . .” *Hartley v. Langkamp & Elder*, 90 A. 402, 403-404 (Pa. 1914).

This Court has laid out a series of factors to consider as to whether a party is indispensable, namely: “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).

Here, the Commonwealth’s county boards of elections are indispensable parties to this case because the Petition seeks to alter their conduct, requiring them to be parties in the case. It is the *county boards of elections*, not the Secretary of the Commonwealth, who would have to “implemen[t] additional emergency procedures to ensure ballots delivered after 8:00 p.m. on Election Day will be counted. . .” and to “[p]rovid[e] prepaid postage on all absentee and mail-in ballots.” Amended Pet. ¶ 83.

In her examination of the original Petition, Judge Leavitt noted that given the claims “against the county boards of elections” and the fact that “this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without [their] being allowed to defend” “presen[t] a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.” Memorandum Opinion, *Crossey v. Boockvar*, 266 M.D. 2020 (Pa. Commw. Ct. filed May 28, 2020) (unreported opinion).

The Petitioner mis-applies the Election Code and mistakenly treats the county election boards as though they are the agents of the Secretary of the Commonwealth. The county boards of elections are a longstanding institution, as they were established by 25 P.S. § 2625, enacted on June 3, 1937.

The Election Code mandates the existence of such boards in and for each county of the Commonwealth, with jurisdiction over the conduct and form of primary and general elections in each county. Section 302 of the Election Code delineates the ‘powers and duties of county boards’ seriatim, in paragraphs (a) through (o). With the exception of paragraph (o), these deal with the mechanics of specific election procedures; paragraph (o) is a catch-all authorization to county boards to ‘perform such other duties as may be prescribed by law.’ 25 P.S. § 2642(o) (1963).

Deer Creek Drainage Basin Auth. v. Cty. Bd. of Elections of Allegheny Cty., 381 A.2d 103, 109 (Pa. 1977).

“[T]he Election Code delegates extensive powers and authority to county election boards, including rulemaking authority to guide voting machine custodians, elections officers and electors and power to investigate election frauds, irregularities and violations of the law. . . .” *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Commw. Ct. 2007), *aff’d*, 938 A.2d 401 (Pa. 2007). As noted in *Boord v. Maurer*, 22 A.2d 902, 904 (Pa. 1941):

The Election Code makes the County Board of Election more than a mere ministerial body. It clothes it with quasi-judicial functions, for Section 304 of the Code provides that: ‘Each county board of elections may make regulations, not inconsistent with this act or the laws of this Commonwealth, to govern its public sessions, and may issue subpoenas, summon witnesses, compel production of books, papers,

records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections in the county under the provisions of this act.

In sum, the county boards of elections play a separate and pivotal role in the governance of Pennsylvania elections. To the extent that Petitioners seek for this Court to direct their administration of elections, the county boards of elections must be joined as parties to this action. Therefore, their interests are essential to the merits of this case and deciding the case without their involvement would violate their due process rights. *See DeCoatsworth*, 639 A.2d at 797.

In *Banfield v. Cortes*, petitioners brought a challenge to the use of certain Direct Recording Electronic voting systems (DREs) being used in various counties in the Commonwealth. 922 A.2d 36 (Pa. Commw. Ct. 2007). In response, the Secretary of the Commonwealth submitted preliminary objections, including the objection that the Court lacked jurisdiction due to the petitioners' failure to join the county elections boards who had purchased and were using the voting systems in question. *Id.* In a divided, 4-3 decision, the Court rejected the Secretary of the Commonwealth's preliminary objection that the county elections boards were indispensable parties to that action, but that denial was based on the fact that the petitioners did "not seek redress from the . . . counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors." *Id.* at 44.

The dissent argued, however, that “the County Boards of Elections are indispensable parties. They made the decision to purchase one of the seven DRE voting systems approved by the Secretary. They will be affected by the decision of this Court, should it decide to order the Secretary to decertify the seven DRE voting systems. Their absence leaves this Court without jurisdiction.” *Id.* at 56 (Leavitt, J. dissenting). “Because Petitioners have failed to name indispensable parties, *i.e.*, the County Boards of Elections, as respondents, I would sustain the Secretary’s demurrer . . . for lack of jurisdiction.” *Id.*

The fact pattern of the present case would more than satisfy the standards set forth in both the majority and dissenting opinions in *Banfield*. Here, Petitioners are directly seeking relief from the county boards of elections, and doing so shortly before the 2020 General Election “without [the boards of elections] being allowed to defend” this Action. Memorandum Opinion, *Crossey v. Boockvar*, 266 M.D. 2020 (Pa. Commw. Ct. filed May 28, 2020) (unreported opinion).

Both factors weigh heavily that the county elections boards are indispensable parties, and therefore to grant the requested relief would be incompatible with Pennsylvania law, as the county boards of elections “ha[ve] such an interest that a final decree cannot be made without affecting [them].” *Hartley*, 90 A. at 403-404.

This also differs from a recent case filed in Commonwealth Court, where the Pennsylvania Democratic Party and other petitioners seeking a declaratory judgment

concerning Pennsylvania's Election Code *did join* the 56 county boards of elections from which they were seeking relief. *See Pennsylvania Democratic Party v. Boockvar*, No. 407 MD 2020 (Pa. Commw. Ct. filed July 10, 2020); *see also Donald J. Trump for President, Inc. v. Boockvar*, Civil Action No. 2:20-cv-00966, Verified Complaint for Declaratory and Injunctive Relief (W.D.Pa. filed June 29, 2020) (federal court action seeking Election Code-related relief, where the petitioners also joined the 56 county boards of elections).

Therefore, as “Petitioners have failed to name indispensable parties, *i.e.*, the County Boards of Elections, as respondents,” this case should be dismissed “for lack of jurisdiction.” *Banfield*, 922 A.2d at 56 (Leavitt, J. dissenting).

As the county boards of elections could not be more connected or indispensable to this action based on the nature of the action and the relief sought, this action should be dismissed for Petitioners' failure to join indispensable parties.

III. CONCLUSION

For the foregoing reasons, Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

Dated: August 25, 2020

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 9,718 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

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Dated: August 25, 2020

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/ Zachary M. Wallen

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Representatives Kerry Benninghoff*

Dated: August 25, 2020

EXHIBIT 1

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[ASUPPLEMENTAL CALENDAR A

BILLS ON THIRD CONSIDERATION!]A

The House proceeded to third consideration of **HB 2502, PN 3774**, entitled:

On the question,
Will the House agree to the bill on third consideration?
Bill was agreed to.

(Bill analysis was read.)

The SPEAKER. This bill has been considered on three different days and agreed to and is now on final passage.

The question is, shall the bill pass finally?

Representative Mihalek, on the bill? Come right up front. You can right up front, Representative Mihalek. Ms. MIHALEK. Thank you, Mr. Speaker.

In 2019 this chamber passed historic and sweeping changes to Pennsylvania's elections laws. On the heels of the June 2 primary I offer HB 2502 in order to gather data quickly after the election so we are able to ensure a smooth implementation of Act 77. A free and fair election is a basic tenant of our nation and we must ensure the integrity of our election here in the Commonwealth of Pennsylvania. This bill helps us to do so and I urge my colleagues for an affirmative vote today. Thank you.

The SPEAKER. All those in favor will be voting "aye"; those opposed, "nay." Oh, I sorry. Leader, I apologize. My apologies.

The majority leader on HB 2502, PN 3774.

Mr. CUTLER. Thank you, Mr. Speaker.

I too want to urge an affirmative vote on this bill. After nearly 80 years we had significant updates to our voter laws. And I think it is equally important that we continue to monitor them as we go forward. That is why we have had several subsequent bills and changes to the original bill that we passed. This is simply the next step in that process and I urge support.

Thank you, Mr. Speaker.

On the question recurring,
Shall the bill pass finally?

The SPEAKER. Agreeable to the provisions of the Constitution, the yeas and nays will now be taken.

(Members proceeded to vote.)

The SPEAKER. Majority Whip.

Mr. BENNINGHOFF. Thank you, Mr. Speaker.

The electronic voting board is accurate for the majority party.

The SPEAKER. And the minority whip.

Mr. HARRIS. Thank you, Mr. Speaker.

The electronic board is accurate.

The following roll call was recorded:

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