

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

Docket No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

**KATHY BOOCKVAR, in her capacity as Secretary of Commonwealth of
Pennsylvania, *et al.***

Respondents.

**APPLICATION OF AMICI CURIAE PENNSYLVANIA AFL-CIO AND
OTHER PENNSYLVANIA UNIONS FOR LEAVE TO FILE A
SUPPLEMENTAL BRIEF THAT EXCEEDS THE WORD COUNT
IN PA.R.A.P. 531**

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COMES NOW, Pennsylvania AFL-CIO and other Pennsylvania Unions (“Amici Curiae,”)¹ by and through the undersigned attorneys, and seeks leave from this Court, pursuant to Pa. R.A.P. 531(b)(1)(iii), to file a supplemental brief slightly less than 10,000 words, and in support thereof sets forth as follows:

1. The Amici Curiae are ten (10) Pennsylvania labor organizations representing hundreds of thousands of public and private sector Pennsylvania workers.
2. Among the Amici Curiae’s goals are the protection, assurance and advancement of the cause of social and economic justice for the residents and citizens of our Commonwealth at the workplace, in civic affairs, in their Pennsylvania communities, and in political participation through free and fair elections.
3. The Amici Curiae are particularly concerned that the dual ravages of COVID-19 and anticipated delays in mail processing and delivery services of the

¹ The Amici Curiae are as follows: (1) Pennsylvania AFL-CIO, (2) the American Federation of State, County and Municipal Employees, Council 13, AFL-CIO, (3) the American Federation of State, County and Municipal Employees, District Council 47, (4) the Association of Pennsylvania State College and University Faculties, (5) the Communications Workers of America (“CWA”) District 2-13, (6) the International Association of Machinists and Aerospace Workers of America District 98, (7) the International Longshoremen’s Association, Local 1291, (8) the Pennsylvania State Building & Construction Trades Council, (9) the Philadelphia Federation of Teachers, Local 3 of the American Federation of Teachers, AFL-CIO, and (10) the United Food and Commercial Workers, Local 1776.

United States Postal Service (“Postal Service”) will deleteriously impact the ability of eligible Pennsylvanians to vote during the General Election this November.

4. For these reasons, the Amici Curiae have a direct and substantial interest in protecting the voting rights of eligible voters across the Commonwealth.

5. On July 10, 2020, Petitioners commenced this action in the Commonwealth Court of Pennsylvania by filing a Petition for Declaratory and Injunctive Relief (“Petition”) to ensure that as many Pennsylvanians qualified to vote have an opportunity to cast a ballot this November despite the ravages of COVID-19.

6. On August 16, 2020, Respondent Pennsylvania Secretary of State, Kathy Boockvar (“Secretary Boockvar”) filed an Application for the Court to Exercise Extraordinary Jurisdiction Over the Commonwealth Court Case Docketed at 407 MD 2020 (hereinafter “Emergency Application”).

7. On September 1, 2020, this Court granted the Emergency Application. In its Order, this Court stated in pertinent part: “The parties and intervenors in this matter are permitted to file supplemental briefing and/or affidavits to support their respective positions on the claims raised in this case on or before Tuesday, September 8, 2020 at 5:00 p.m.” Counsel for the Amici Curiae understood that Order to mean that any amicus curiae interested in filing a brief in support of or opposition to the Petition must file such brief by September 8, 2020.

8. Yesterday, on September 8, 2020, Amici Curiae, through their counsel, filed a brief slightly less than 7,000 words (in compliance with Pa.R.A.P. 531(b)(1)(i)) in support of the relief sought by Petitioners and supported by Secretary Boockvar. This morning, this Court announced via PACFile that the amici curiae brief was accepted.

9. The accepted amici curiae brief was far shorter than counsel deemed necessary given the gravity of the issues raised in the Petition and the importance that the Amici Curiae place in the ability of their members and the general public to be able to exercise their fundamental right to vote.

10. Therefore, Amici Curiae now file this Application, requesting, pursuant to Pa.R.A.P. 531(b)(1)(iii), leave to file a supplemental brief that is lengthier and more substantive than the one previously filed and addresses in more depth the important statutory and constitutional issues raised by the Petition. This brief is slightly less than 10,000 words and is attached to this Application as “Exhibit A.”

11. Amici Curiae strongly believe that this Court, the parties to this matter, and the intervenors, will benefit from the thorough statutory and constitutional analysis contained in the brief attached as Exhibit A.

12. For the foregoing reasons, the Court should grant Amici Curiae’s Application for Leave to File a Supplemental Amici Brief.

WHEREFORE, Amici Curiae, Pennsylvania AFL-CIO and the other Pennsylvania Unions, respectfully request that this Court grant its application and permit them to file the attached supplemental brief.

Respectfully submitted,

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Dated: September 9, 2020

**IN THE SUPREME COURT OF PENNSYLVANIA
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Docket No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

v.

**KATHY BOOCKVAR, in her capacity as Secretary of Commonwealth of
Pennsylvania, *et al.***

Respondents.

ORDER

AND NOW, this ___ day of September, 2020, Amici Curiae Pennsylvania AFL-CIO and Other Pennsylvanian Union's Application for Leave to File a Supplemental Brief that Exceeds the Word Count in Pa.R.A.P. 531 is GRANTED. Counsel for the Amici Curiae shall file the supplemental brief attached to their Application within two (2) days of the issuance of this Order.

, J.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Pennsylvania Rule of Appellate Procedure 531, the following Amici Curiae submit this brief in support of Petitioners:¹ The Pennsylvania AFL-CIO is a federation of labor organizations whose affiliated local unions, district councils, regional councils, central labor councils and area labor federations represent over 700,000 working men and women across the Commonwealth of Pennsylvania (“Commonwealth”). The American Federation of State, County and Municipal Employees, Council 13, AFL-CIO and its affiliates represent more than 60,000 employees of the Commonwealth and hundreds of public and private sector employers across Pennsylvania. The American Federation of State, County and Municipal Employees, District Council 47 represents approximately 5,000 employees of the City of Philadelphia. The Association of Pennsylvania State College and University Faculties represents more than 5,000 faculty and coaches employed by Pennsylvania’s State System of Higher Education. The Communications Workers of America (“CWA”) District 2-13 services CWA Local Unions in five states and the District of Columbia, including 15,000 employees in Pennsylvania. The International Association of Machinists and Aerospace Workers of America District 98 is an intermediate level labor organization, servicing 4,500

¹ No person or entity other than these Amici Curiae or their counsel has paid for the preparation of this brief or authored the brief, in whole or in part.

bargaining unit members in locations throughout the Commonwealth. The International Longshoremen's Association, Local 1291 represents approximately 700 members who perform longshore work predominantly at the Port of Philadelphia. The Pennsylvania State Building & Construction Trades Council is composed of sixteen regional councils and more than 115 local unions affiliated with fifteen national and international building and construction trades unions operating in every community in Pennsylvania, representing 130,000 journey persons and apprentices employed by approximately 3,500 private sector employers in every aspect of commercial, medical, industrial and residential construction. Philadelphia Federation of Teachers, Local 3 of the American Federation of Teachers, AFL-CIO represents approximately 14,000 employees of the Philadelphia School District, including teachers, librarians, and nurses. The United Food and Commercial Workers, Local 1776, represents bargaining unit members who are employees of the Commonwealth, as well as other public and private sector employees across the Commonwealth, totaling 21,000 workers.

Together, the Amici Curiae represent hundreds of thousands of public and private sector Pennsylvania workers who, along with voting age members of their families, comprise a substantial portion of the 8.5 million registered voters in Pennsylvania. Among their goals are the protection, assurance and advancement of the cause of social and economic justice for the residents and citizens of our

Commonwealth at the workplace, in civic affairs, in their Pennsylvania communities, and in political participation through free and fair elections that are critical to our representative form of government. The Amici Curiae are particularly concerned that the dual ravages of COVID-19 and anticipated delays in mail processing and delivery services of the United States Postal Service (“Postal Service”) will deleteriously impact the ability of eligible Pennsylvanians to vote during the General Election.

Therefore, the Amici Curiae have a direct and substantial interest in protecting the voting rights of eligible voters across the Commonwealth, as sought by Petitioners in their Petition for Declaratory and Injunctive Relief. Further, Amici Curiae have an interest in ensuring that otherwise eligible voters are not illegitimately disenfranchised by an improper interpretation of Act 77 of 2019 (“Act 77”).² In this Brief, Amici Curiae demonstrate that the Election Code as recently amended and the Pennsylvania Constitution authorize and support the creation of satellite offices by county boards of elections, the establishment of secure drop boxes for receipt of mail-in ballots at locations determined by those boards, the counting of mail-in ballots submitted without the interior envelope provided by the county boards of election, and a reasonable extension of the deadline for physical receipt of mail-in ballots by the boards, as sought by Petitioners and supported by Respondent

² Act of Oct. 31, 2019, P.L. 552, No. 77.

Pennsylvania Secretary of State Kathy Boockvar. Such relief is particularly justified considering the COVID-19 pandemic and the expected and reported delays in mail service. The relief enumerated above, if granted, will ensure that as many eligible Pennsylvanians as possible who wish to do so will be able to exercise their fundamental right to vote during the General Election on November 3, 2020.

Finally, Amici Curiae strongly believe this Court's guidance in this matter is particularly needed now. For the first time in our history, our Commonwealth (and the nation) are attempting to conduct a national General Election, including for the Office of the Presidency of the United States, through largely mail-in ballots while we are in the midst of a pandemic, an anticipated slowdown of mail service, civil protests, and public unrest. At the same time, there currently are five other state and federal lawsuits filed in this Commonwealth and awaiting decisions, challenging various aspects on how our sixty-seven (67) county boards of elections will conduct this General Election. The parties, intervenors, amici, and the general public need this Court to provide its guidance to ensure consistent rules are in place and our fundamental right to vote is protected—a task uniquely suitable for the Commonwealth's highest court.

II. STATEMENT OF JURISDICTION

On September 1, 2020, pursuant to 42 P.S. § 726 and Pa.R.A.P. 3309, this Court granted the Application for the Court to Exercise Extraordinary Jurisdiction Over the Commonwealth Court Case Docketed at 407 M.D. 2020 filed by Respondent Pennsylvania Secretary of State, Kathy Boockvar.

III. ORDER IN QUESTION

PER CURIAM

AND NOW, this 1st day of September, 2020, Secretary Boockvar's Application for the Court to Exercise Extraordinary Jurisdiction over the Commonwealth Court Case Docketed at 407 MD 2020 is GRANTED. The parties and intervenors in this matter are permitted to file supplemental briefing and/or affidavits to support their respective positions on the claims raised in this case on or before Tuesday, September 8, 2020 at 5:00 p.m. Chief Justice Saylor and Justice Mundy note their dissent.

IV. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Ultimately, final determination by this Court of the Petition for Declaratory and Injunctive Relief filed by Petitioners, the Pennsylvania Democratic Party and other named individuals, and the requested relief sought therein involves (1) a statutory interpretation of the Pennsylvania Election Code,³ including its recent amendment by Act 77, (2) an examination of that Code against the mandates of the Pennsylvania Constitution, in particular Article I, Section 5, and, finally, (3) consideration of this Court's inherent power to ensure that Pennsylvanian's fundamental right to vote is not hindered by an overly narrow interpretation of the Election Code when the Commonwealth (and the rest of the nation) face the dual hazards of the still-raging COVID-19 pandemic and the anticipated slowdown of mail service by the Postal Service.

It is long established and well recognized that statutory interpretation begins with the language of the statute. As this Court recently explained: "The Statutory Construction Act, 1 Pa. C.S. §§ 1901-1991, sets forth the governing principles for our analysis. It provides that the goal of interpreting a statute is to discern and implement the intent of the General Assembly." *Commonwealth v. Foster*, 214 A.3d 1240, 1247 (Pa. 2019) (citing 1 Pa. § 1921(a) and *Cagey v. Commonwealth*, 179 A.3d 458, 462-63 (Pa. 2018)). In *Cagey*, this Court

³ Act 320 of 1937 (Act of Jun. 3, 1937, P.L. 1333, No. 320), *as amended*, 25 P.S. § 2601 *et. seq.*

reiterated that “when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, we must give the statute this plain and obvious meaning.” 179 A.3d at 462-63.

“Only where the words of a statute are not explicit,” this Court has declared, “will we resort to other considerations to discern legislative intent....” *Bd. of Revision of Taxes v. City of Phila.*, 4 A.3d 610, 622 (Pa. 2010). The Statutory Construction Act lists a series of methods for Pennsylvania courts to utilize when interpreting the meaning of a statute when the words are ambiguous: “the occasion and necessity of the statute,” “the circumstances under which it was enacted,” “the mischief to be remedied,” “the object to be obtained,” “the former law, if any, including other statutes upon the same or similar subjects,” “the consequences of a particular interpretation,” “the contemporaneous legislative history,” and “legislative and administrative interpretations of such statute.” 1 Pa. C.S. § 1921(c)(1)-(8). When employing these interpretive tools, the “[g]overning presumptions are that the General Assembly intended the entire statute at issue to be effective and certain, and that the General Assembly does not intend an absurd result or one that is impossible of execution.” *Bd. of Revision of Taxes*, 4 A.3d at 622.

There is another, critical factor this Court applies when interpreting the Election Code or any other statute that affects Pennsylvanians’ fundamental

right to vote: “the longstanding and overriding policy in this Commonwealth [is] to protect the elective franchise.” *In re Cioppa*, 626 A.2d 146, 148 (Pa. 1991) (citations omitted). Thus, this Court commands that the Election Code or any other statute involving the right to vote be “liberally construed.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004) (citing *In re Nomination Petition of Gallagher*, 359 A.2d 791, 192 (Pa. 1976) (“[A]ll things being equal, the law will be construed liberally in favor of the right to vote but, at the same time, we cannot ignore the clear mandates of the Election Code.”); *Shamback v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004) (“[A]lthough election laws must be strictly construed to prevent fraud, they ‘ordinarily will be construed liberally in favor of the right to vote.’”) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)); *In re Cioppa*, 625 A.2d at 148 ([O]ur Election Code should be liberally construed so as not to deprive a candidate of the right to run for office or the voters their right to elect a candidate of their choice.)

Finally, when interpreting the Election Code, this Court must consider Article I, Section 5 of the Pennsylvania Constitution, commonly referred to as the “Free and Equal Elections Clause,” which states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. Art. I, § 5. This Court has

recognized that the Free and Equal Elections Clause guarantees Pennsylvanians a fundamental right to vote. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (2018) (recognizing that the Free and Equal Elections Clause guarantees the fundamental right to vote for Pennsylvanians); *Banfield v. Cortés*, 110 A.3d 155, 176 (2015) (declaring “this Court has acknowledged that the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (citing and quoting *Bergdall v. Kane*, 731 A.2d 1261 (Pa. 1999)). Relying upon this provision, our courts have struck down statutes of the General Assembly that violate the Free and Equal Elections Clause and enforced the Election Code beyond what the explicit language allowed. *See, e.g., League of Women Voters*, 178 A.3d at 814 (holding that the 2010 reapportionment of Pennsylvania’s congressional districts violated the Free and Equal Elections Clause); *Applewhite v. Commonwealth*, 2014 Pa. Commw. Unpub. LEXIS 756, *74-*75 (Pa. Cmwlth) (enjoining Pennsylvania’s voter identification statute on the grounds it violated the Pennsylvania constitution); *General Election-1985*, 531 A.2d 836, 839 (Pa. Cmwlth. 1985) (acknowledging “the court[’s] authority to suspend voting [and rescheduling the election on a later date] when there is a natural disaster or emergency”).

V. STATEMENT OF THE QUESTIONS PRESENTED

- I. Does the Election Code, as amended by Act 77, authorize and permit county boards of elections to create satellite offices and place drop boxes in their counties at locations other than at the address(es) of their official office or satellite office(s) for receipt of mail-in⁴ ballots?

Suggested answer: Yes.

- II. Does Act 77 permit elections officials to count mail-in ballots delivered to the county election boards without the interior envelope (*i.e.* “naked ballots”)?

Suggested answer: Yes.

- III. Given the current COVID-19 pandemic and the Postal Service’s warning that it cannot guarantee timely delivery of mail-in ballots by Act 77’s current deadline, does this Court have the authority to require county boards of election to count all returned ballots postmarked by 8:00 p.m. on Election Day if those ballots are received within a reasonable time, but no later than November 10, 2020?

Suggested answer: Yes.

⁴ Pennsylvania’s Election Code provides procedures and rules for voting by mail both with an excuse, via absentee ballot, and without an excuse. Both voting methods are subject to the same basic procedures and rules for requesting such ballots, returning them, and canvassing and counting them. Thus, both are referred to herein collectively as “mail-in” ballots.

VI. STATEMENT OF THE CASE

A. Introduction

On July 10, 2020, Petitioners, the Pennsylvania Democratic Party and fifteen (15) individuals who are either serving in federal or state elected office and/or running for a state elected office (collectively “Petitioners”), commenced this action by filing a Petition for Declaratory and Injunctive Relief (“Petition”). The Petition alleges that COVID-19 presents unique and significant obstacles to conducting the scheduled November 3, 2020 General Election, in which Pennsylvania voters will select candidates for federal and state office, including the Office of the President. These obstacles, Petitioners argue, exceed the capacity of the procedures established in Act 77, the recently-enacted amendment to the Election Code. That amendment, for the first time, granted Pennsylvania voters the ability to cast their votes through mail-in ballots for any registered voter who requested to do so.

To ensure that all Pennsylvanians qualified to vote have an opportunity to cast a ballot despite the ravages of COVID-19, Petitioners seek five types of declaratory or injunctive relief. Specifically, Petitioners request (1) a declaration that the Election Code allows county boards of elections to create satellite offices at which voters may request and submit mail-in ballots as well as employing drop boxes to submit mail-in ballots (Count I); (2) an injunction requiring ballots postmarked by 8 p.m. on Election Day to be counted if they are delivered to the county board of

elections by Tuesday, November 10, 2020 (Count II); (3) an injunction requiring county boards of elections to contact voters to cure facial defects in their mail-in or absentee ballots (Count III); (4) a declaration that the Election Code requires the county boards of elections to count “naked ballots”—those ballots that do not arrive in the secrecy envelope provided to the voter (Count IV); and (5) a declaration that the county residency requirement for poll watchers is constitutional under both the federal and state constitutions.

In response to the Petition, on August 13, 2020, Secretary Boockvar filed with the Commonwealth Court an Answer and New Matter, while some county boards of elections filed Preliminary Objections. Subsequently, on August 16, 2020, Secretary Boockvar filed her Emergency Application with this Court. In her Emergency Application, Secretary Boockvar argued that competing litigation in federal and state court⁵ regarding Act 77 and the procedures for conducting the upcoming General Election necessitate this Court’s assumption of original jurisdiction over this matter.

⁵ There are currently five other federal and state lawsuits challenging Pennsylvania’s voting procedures for the upcoming General Election and seeking various forms of relief: *Crossey et al. v. Boockvar*, 108 MM 2020 (Pa) (awaiting final decision by this Court after recent submission of special master’s recommended findings of fact and conclusions of law); *NAACP Pennsylvania State Council v. Boockvar et al.*, 364 M.D. 2020 (Pa. Cmwlth.) (court to issue decision after a hearing scheduled to begin September 8, 2020); *Cramer v. Boockvar, et al.*, 493 M.D. 2020 (Pa. Cmwlth.) (complaint filed September 1, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 U.S. Dist. LEXIS 152599, *74 (W.D. Pa. Aug. 23, 2020) (“abstain[ing] under *Pullman* and stay[ing] this case until the Pennsylvania state courts provide clarity on the unsettled state-law issues that underly Plaintiffs’ central claims); *League of Women Voters of Pennsylvania, et al. v. Boockvar et al.* 2:20-cv-03850 (E.D.Pa. 2020) (complaint filed August 7, 2020).

Additionally, she reveals that she received a letter from the General Counsel of the Postal Service suggesting delays in mail service at the time of the General Election will create a risk that ballots requested at the deadline of October 27, 2020 will not arrive in time for the voter to return by mail by Election Day. This letter, she argues, further supports this Court taking jurisdiction over the Petition.

Significantly, in her Emergency Application, Secretary Boockvar makes clear her support for four of the five types of relief sought by the Petitioners. The only remedy she opposes is Petitioners' request that the Commonwealth issue a policy requiring county boards of elections contact mail-in voters whose ballots contain minor defects. Additionally, while she argues in favor of an extension of the deadline for mail-in ballots to arrive at the county boards of elections, as sought in the Petition, she seeks only a three-day extension, whereas Petitioners request one week.

On August 24, 2020, Secretary Boockvar filed a letter with this Court, pursuant to Pa.A.R.P. 2501(b), about three "changes materially affecting authorities referenced in [the] Secretary's [Emergency Application]." These included a recent decision by a federal court to abstain from considering constitutional challenges to the Election Code filed on behalf of the campaign of President Donald J. Trump. It also included two guidance memoranda issued by Secretary Boockvar to county boards of election. One concerned guidance on receipt of mail-in ballots and the other concerned guidance on naked ballots.

On September 1, 2020, Petitioners answered Secretary Boockvar's Emergency Application, indicating their support. The same day, this Court granted the Emergency Application and ordered all parties to file any supplemental briefs or affidavits by 5 p.m. on Tuesday, September 8, 2020.

A decision regarding the relief sought in the Petition can only occur through an examination of the Election Code, and most particularly Act 77; the Free and Equal Elections Clause of the Pennsylvania Constitution; the effect COVID-19 is having on Pennsylvanians and its potential hazard for the General Election; the recent communication of the General Counsel of the Postal Service to Secretary Boockvar; and Secretary Bookvar's own recent guidance memoranda on election matters.

B. Act 77 of 2019

On October 31, 2019, Governor Tom Wolf signed Act 77 into law—a statute that represents the most significant change in how Pennsylvanians exercise the franchise since the passage of the Election Code in 1937. Under the amendment, all qualified Pennsylvania voters may request and cast their ballots by mail. 25 P.S. § 3150.11.⁶ To do so, by October 27, 2020, voters must request, either online or via mail, a mail-in by October 27, 2020 in order to cast the mail-in ballot in the

⁶ Prior to Act 77, Pennsylvanian electors could only vote by mail if they requested an absentee ballot and met one of the criteria for voting through that method.

November 3, 2020 General Election. 25 P.S. § 3150.12a(a). The deadline for returning those ballots to the county board of elections office is 8 p.m. on Election Day. 25 P.S. § 3150.16.

Once the county board of elections approves a voter's request for a mail-in ballot, it sends the voter a ballot in an envelope marked "Official Election Ballot" (hereinafter "interior envelope"), and a second larger envelope containing "the form of declaration of the elector, and the address of the elector's county board of elections and the local election district of the elector" (hereinafter "exterior envelope"). 25 P.S. §§ 3150.14, 3150.16. The voter must make his or her selections on the ballot, enclose the ballot in the interior envelope, and then place that envelope in the larger exterior envelope for mailing. 25 P.S. § 3150.16(a). "The elector shall then fill out, date and sign the declaration printed on [the exterior] envelope." *Id.*

To return the mail-in ballot, the voter may either mail it or deliver it "in person to the county board of election[s]." *Id.* The Election Code permits county boards of elections to open multiple other offices (hereinafter "satellite offices") other than the one generally used for this purpose—so voters may deliver their ballots in person to the satellite offices. 25 P.S. § 2645(b). The Election Code also permits county boards of elections to receive mail-in ballots at ballot boxes (hereinafter "drop boxes") at places other than the county board of elections office, "as ha[ve] been designated by the board." 25 P.S. § 3151. In fact, during the Primary Election, some county boards

of elections collected ballots at secure drop boxes and mobile collection points, while others required all mail-in ballots to be sent to a central office.⁷

Each county board of elections conducts a pre-canvassing of the mail-in and absentee ballots. The Election Code defines “pre-canvassing as the “inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” 25 P.S. § 2602(q.1). Act 12 of 2020,⁸ signed by the Governor on March 27, 2020, amended the Election Code to allow the pre-canvassing of the ballots to occur no earlier than 7 a.m. on election day. 25 P.S. § 3146.8(g)(1.1).

During the canvassing, the county board of elections verifies that each elector is qualified to vote and that each voter’s declaration on the exterior envelope is proper. 25 P.S. § 3146.8(g)(4); 25 P.S. § 3150.12b(a)(2). For those ballots that are verified, the county boards of election opens the exterior envelope and determines if the internal envelope has “any text, mark, or symbol which reveals the identity of

⁷ See *June 1 Update on the Primary Election in Delaware County*, Delaware County Press Release, June 1, 2020, https://www.delcopa.gov/publicrelations/releases/2020/primaryupdate_june_1.html; See *2020 Primary Election Secure Ballot Box Drop-Off Locations*, Montgomery County Board of Elections, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/5177>; See *Mobile Drop Off Location For Mail-In-Ballot*, Philadelphia Commissioners, https://www.philadelphiavotes.com/en/home/item/1814-mobile_drop_off_location_for_mail_in_ballot.

⁸ Act of Mar. 27, 2020, P.L. 41, No. 12.

the elector, the elector's political affiliation, or the elector's candidate preference[.] 25 P.S. § 3146.8(g)(4). Any interior envelopes that contain such marks are set aside and declared void. 25 P.S. § 3146.8(g)(4)(ii). The county board of elections then open those envelopes without any marks and counts those ballots. 25 P.S. § 3146.8(g)(4)(iii).

C. Voting Rights Under the Pennsylvania Constitution

Pennsylvania has a long and distinguished history of being among the first States to create meaningful popular sovereignty whereby the people select their elected officials. Ken Gormley, *et al.* *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 216 (2004); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 *Temp. L. Rev.* 575, 588-592 (1993); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 *Temp. L. Rev.* 541, 548-561 (1989). This history began with the drafting and adoption of the Commonwealth's first state constitution in 1776 ("1776 Constitution") after our nation declared its independence from Great Britain.

Among the primary means by which the 1776 Constitution achieved this goal was to extend the franchise to an entire class of individuals who had otherwise been barred from voting. Gormley, *supra*, at 216; Herrington, *supra*, at 580; Williams, *The State Constitutions of the Founding Decade, supra*, at 557. In a remarkable

break from the Commonwealth's past as well as that of other fledgling States in the Americas, Pennsylvania, in its 1776 Constitution, was among the first of the then-colonies to extend the franchise to the non-propertied. Gormley, *supra*, at 216. Rather than limit the franchise to those who owned property, the 1776 Constitution allowed all freemen to vote, regardless of race, as long as they had paid taxes within the last year prior to the election. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, 329 (2000).

The 1776 Constitution also achieved greater participatory democracy through a provision that remains, although slightly modified, in our Commonwealth's constitution to this day in Article I, Section 5, the Free and Equal Elections Clause. Gormley, *supra*, at 216-17. That provision originally stated: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office." *Id.* at 217 (citing Pa. Const. of 1776, Ch. I, VII). This provision "was drastically strengthened in the 1790 Pennsylvania Constitution ["1790 Constitution"], when much of the modifying language was removed and the present equality language was added as a requirement for elections." *Id.* at 217. The 1790 Constitution declared "[t]hat elections shall be free and equal." *Id.* at 217 (citing Pa. Const. of 1790, Art. IX, § V). All subsequent versions of the Pennsylvania Constitution not only contained this requirement of "free and equal" elections, but

included other provisions ensuring that Pennsylvanian’s right to vote would be protected. *Id.* at 217-219. The current version of this provision states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. Art. I, § 5.

This Court has recognized that our Constitution’s Free and Equal Elections Clause protects the fundamental right to vote. *League of Women Voters*, 178 A.3d at 814 (holding that the 2010 reapportionment of Pennsylvania’s congressional districts violated the Free and Equal Elections Clause); *Banfield v. Cortés*, 110 A.3d at 176 (declaring “this Court has acknowledged that the right to vote is fundamental and ‘pervasive of other basic civil and political rights’”) (citing and quoting *Bergdall v. Kane*, 731 A.2d 1261 (Pa. 1999)). Recognizing the grave importance of the right to vote in a constitutional democracy, this Court has declared that there is a “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *In re Cioppa*, 626 A.2d at 148; *see also In re Wieskerger Appeal*, 290 A.2d 108, 109 (Pa. 1972) (“Our goal must be to enfranchise and not to disenfranchise.”).

In the most recent and powerful articulation of the constitutional significance and importance of the Free and Equal Elections Clause, this Court announced:

[Our] analysis of the Free and Equal Elections Clause — its plain language, its history, the occasion for the provision and the

circumstances in which it was adopted, the case law interpreting this clause, and consideration of the consequences of our interpretation — leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.

League of Women Voters, 178 A.3d at 814. Ultimately, the Free and Equal Elections Clause guarantees the fundamental right to vote and Act 77 represents the latest and most expansive statutory articulation of that right. In tandem, they work to move our Commonwealth towards a vision of participatory democracy imagined by the recently-departed Congressman John Lewis:

To make it hard, to make it difficult almost impossible for people to cast a vote is not in keeping with the democratic process. Someone once said, “Man is not made for the law; law is made for man.” Customs, traditions, laws should be flexible, within good reason, if that is what it takes to make our democracy work. We should be creative, and we should accommodate the needs of every community to open up the democratic process. We should make it easy and accessible for every citizen to participate.⁹

D. COVID-19 and the General Election

Not since 1918 has the world experienced a pandemic with the combined lethality and ease of transmission of COVID-19. At this writing, the virus has taken the lives of 188,513 in the United States, and the total number of cases stands at over

⁹ Andrew Cohen, “Rep. John Lewis: ‘Make Some Noise’ on New Voting Restrictions,” *The Atlantic* (Aug. 26, 2012), <https://www.theatlantic.com/politics/archive/2012/08/rep-john-lewis-make-some-noise-on-new-voting-restrictions/261549/>.

6.1 million individuals.¹⁰ The pandemic has struck particularly hard in Pennsylvania with 136,862 cases, another 4,001 probable cases, and 7,780 deaths.¹¹ Pennsylvania ranks in the top thirteen states in the number of COVID-19 cases and in the top nine in the number of deaths due to the virus.¹²

At the beginning of its deadly trek across the United States, the Center for Disease Control and Prevention (“CDC”) informed the public that those most vulnerable to COVID-19 were people aged sixty-five (65) years and older, and those living in nursing homes and long-term care facilities.¹³ Consistent with that assessment, as of May 2020, one third of all COVID-19 cases in the United States were residents of or employees at nursing homes and long-term care facilities, accounting for 153,000 COVID-19 cases at 7,700 facilities and 28,100 deaths nationwide.¹⁴ As the New York Times reported at the time, “[w]hile just 11 percent

¹⁰ “Cases in the U.S.,” Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited September 7, 2020); “Coronavirus in the U.S.: Latest Map and Case Count,” New York Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states> (last visited September 7, 2020).

¹¹ “COVID-19 Data for Pennsylvania,” Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited September 7, 2020).

¹² “United States COVID-19 Cases and Deaths by State,” Centers for Disease Control and Prevention, <https://www.cdc.gov/covid-data-tracker/#cases> (last visited September 7, 2020).

¹³ “People Who Are at Higher Risk for Severe Illness,” Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

¹⁴ Karen Yourish, *et al.*, “One-Third of All Coronavirus Deaths Are Nursing Home Residents or Workers,” New York Times, <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html>, New York Times (May 9, 2020, updated May 11, 2020).

of the country's cases have occurred in long-term care facilities, deaths related to Covid-19 in these facilities account for more than a third of the country's pandemic fatalities."¹⁵

Pennsylvania, a state that has the eighth highest percentage of elderly population in the nation has seen a disproportionate share of cases and deaths among those residing in nursing homes and long-term care facilities. Of the 136,862 cases and 7,780 deaths due to COVID-19 in Pennsylvania, 21,346 cases and 5,238 deaths have been among residents of nursing homes and long-term care facilities.¹⁶ Thus, this segment of the population accounts for approximately 16% of all cases and two-thirds of all deaths in Pennsylvania.

Undeniably, COVID-19 had a dramatic impact on the conduct of the Primary Election in the Commonwealth. First, and foremost, the General Assembly, as did many other states, moved the date of the election from April 28, 2020 to June 2, 2020. In the interim, the Governor ordered emergency closures of multiple counties, and ultimately shuttered the entire Commonwealth temporarily except for emergency personnel. As we grew closer to the day of the Primary Election, several counties remained partially closed and the election proceeded with an overwhelming

¹⁵ *Id.*

¹⁶ "COVID-19 Long-Term Care Facilities Data for Pennsylvania," Pa. Dept. of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/LTCF-Data.aspx> (last visited September 7, 2020).

number of voters choosing to cast ballots using the mail-in voting option provided in Act 77. One-half of the 2.8 million votes cast in the Primary Election were mail-in ballots.¹⁷ This surge of mail-in ballots caused unprecedented delays in counting votes and, in some instances, led to voters being unable to participate as they did not receive their mail-in ballots in sufficient time to cast their votes.¹⁸ Election officials expect similar problems for the General Election as the number of electors utilizing mail-in voting will dramatically increase due to the combined fears of COVID-19 and the potential delays in mail service by the USPS.¹⁹

E. Letter from the Postal Service Warning of Delays

On July 29, 2020, General Counsel for the Postal Service, Thomas J. Marshall, sent a letter to Secretary Boockvar warning about expected delays in mail delivery for the upcoming General Election. *See* Exhibit A, Emergency Application. The letter stated that, based on the Postal Service’s expected delivery times for mail

¹⁷ Pennsylvania Department of State, “The Administration of Voter Registration in Pennsylvania: 2019 Report to the General Assembly,” June 2020, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/Annual%20Reports%20on%20Voter%20Registration/2019%20Annual%20Report.pdf>.

¹⁸ Pennsylvania Department of State, “Pennsylvania 2020 Primary Election Act 35 of 2020 Report” August 1, 2020, <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf>; NPR, “Signed, Sealed, Undelivered: Thousands of Mail-in Ballots Rejected for Tardiness, July 13, 2020, <https://www.npr.org/2020/07/13/889751095/signed-sealed-undelivered-thousands-of-mail-in-ballots-rejected-for-tardiness> (reporting that of the nearly 1.5 million mail-in ballots requested, 1.07% were rejected for arriving late to county boards of elections).

¹⁹ Elaine S. Povich, “Fearing Delays and Chaos, Swing States Weigh Early Counting of Mail-in Ballots,” PEW, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/28/fearing-delays-and-chaos-swing-states-weigh-early-counting-of-mail-in-ballots>.

service at the time of the General Election, “there is a significant risk” that certain voters who timely request an absentee or mail-in ballot “will not have sufficient time to complete and mail the completed ballot[s] back to election officials in time for it to arrive by [Pennsylvania’s] return deadline.” The letter further advised that, to ensure timely delivery of mail-in ballots, voters should mail their completed ballots “no later than Tuesday, October 27.” *Id.* at 2. Under Act 77, however, voters have until October 27, 2020, to request a mail-in ballot. 25 P.S. §§ 3146.2a(a), 3150.12a(a). As a result, Mr. Marshall warned that “there is a significant risk that... ballots may be requested in a manner that is consistent with [Pennsylvania’s] election rules and returned promptly, and yet not be returned in time to be counted.” *See Exhibit A, Emergency Application.* At the same time, the media was informing the public about significant delays in mail delivery and the shuttering of mail sorting equipment and mailboxes in various parts of the country.²⁰

F. Secretary Boockvar’s Guidance Memoranda

On August 19, 2020, Secretary Boockvar issued two guidance memoranda to county boards of elections regarding the upcoming General Election. One memorandum, entitled “Pennsylvania Absentee and Mail-in Ballot Return Guidance,” recommends that each county board of elections within forty-five (45)

²⁰ Adam Clark Estes, “What’s Wrong With the Mail,” VOX, August 18, 2020, <https://www.vox.com/recode/2020/8/7/21358946/postal-service-mail-delays-election-trump-mail-in-ballots>.

days prior to the General Election “establish a plan and adopt procedures for how voters in their county may return their own voted absentee and mail-in ballots to the county board of elections.”²¹ *Id.* at 3. Guidance 1 further states “[c]ounty boards of elections may establish multiple ballot return locations where voters may return their own voted ballot.” *Id.* at 5. The guidance makes clear these return locations “should have a secure receptacle that permits voters to return their own voted ballot.” *Id.* Guidance 1 refers to these “secure receptables” as “drop-boxes.” *Id.*

The other memorandum, entitled “Pennsylvania Guidance for Missing Official Election Ballot Envelopes (‘Naked Ballots’),” (hereinafter “Guidance 2”) defines the term “Naked Ballot” and announces those ballots should be counted.²² *Id.* at 2. Guidance 2 states that “‘Naked Ballot’ is the term used when a voter fails to insert their ballot in the inner secrecy envelope before casting their mail-in or absentee ballot.” *Id.* Next, it declares that “[i]t is the Department’s position that naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitution.”

²¹ Pennsylvania Department of State, “Pennsylvania Absentee and Mail-in Ballot Return Guidance,” August 19, 2020, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf (last visited September 7, 2020) (hereinafter “Guidance 1”).

²² Pennsylvania Department of State, “Pennsylvania Guidance for Missing Official Election Ballot Envelopes (‘Naked Ballots’),” August 19, 2020, https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf (last visited September 7, 2020) (hereinafter “Guidance 2.”)

Id. Finally, this guidance advises that “[i]n order to promote consistency across the 67 counties, the county board of elections should develop a process for counting naked ballots that are discovered during the pre-canvass or canvass.” *Id.*

VII. SUMMARY OF ARGUMENT

Pennsylvania's Election Code, as recently amended by Act 77, reflects the legislative judgment that by making voting easier, though mail-in voting, our democracy will be strengthened by greater voter participation. The relief urged by amici curiae in this brief is authorized by the statute, and by this Court's important role in ensuring that the promise of our constitution's Free and Equal Elections Clause is realized.

The Election Code explicitly authorizes county boards of elections to establish satellite or "branch" offices to perform their public functions, which include receipt of mail-in ballots delivered in person by the voter. It follows, that boards of elections may accept mail-in ballots at both their the central and satellite offices and may establish secure drop boxes as effective satellite offices to perform this particular public function. This conclusion is supported by the language of the Election Code, evidence of the legislature's intent in passing the bill that became Act 77, and the Department of State's interpretive guidance, which is entitled to deference in this case.

The Election Code likewise requires boards of elections to accept "naked ballots." Unlike other provisions of the statute, the Legislature in Act 77 declined to prohibit counting of ballots returned without an interior "secrecy

envelope.” Thus, such ballots cannot be discarded without improperly disenfranchising the voter.

Finally, this Court’s authority to protect Pennsylvanians’ fundamental right to vote includes the power to require county boards of elections to count all ballots postmarked by 8 p.m. on election day and received in a reasonable period of time – one week after election day. The unique circumstances of this election, which will be conducted during a public health crisis that threatens the safety of in-person voting, and a public service crisis at the Postal Service that threatens the effectiveness of mail-in voting, necessitate this Court’s action to protect Pennsylvania voters against disenfranchisement.

For these reasons, Amici Curiae urge the Court to grant Petitioners’ requests for a declaration that Act 77 authorizes and/or permits county boards of elections to establish satellite offices and use drop boxes for the receipt of mail-in ballots, and to accept and count “naked ballots.” Further, the Court should grant Petitioners’ request for an injunction requiring all county boards of elections to count mail-in ballots received by their offices within a reasonable time after the General Election, but in no case later than November 10, 2020.

VIII. ARGUMENT

A. The Election Code Authorizes County Boards of Elections to Create Satellite Offices and Designate Locations for Drop Boxes for the Return of Ballots.

1. Satellite offices are expressly allowed under Act 77.

Act 77 expressly permits county boards of elections to create satellite offices to perform the important election work delegated to them by the General Assembly through the Election Code. The Election Code states:

The county commissioners or other appropriating authorities of the county shall provide the county board with suitable and adequate offices at the county seat, property furnished for keeping its records, holding its public sessions and otherwise performing its public duties, and *shall also provide, such branch offices for the board in cities other than the county seat, as may necessary.*

25 P.S. § 2645 (emphasis added). Thus, the plain language of the statute contemplates and permits the creation of satellite offices, and this Court should so recognize. 1 Pa. C.S. § 1921(a); *Cagey*, 179 A.3d at 462-63.

2. Drop boxes are permitted under Act 77.

For the same reason that satellite offices may be established, the Election Code expressly allows county boards of election to place drop boxes at both their main office and any satellite office created by them. 25 P.S. § 2645 (allowing county boards of election to create satellite offices for the purpose of “performing its public duties,” which include receipt of mail-in and absentee

ballots). Furthermore, given the fact that a drop box operates to perform one of the functions of the county board of elections—the receipt of mail-in and absentee ballots—they effectively act as satellite offices with a specific function and, therefore, are authorized under the Election Code.

To the extent that this Court may determine that this provision of the Election Code does not expressly allow drop boxes outside the principle office or satellite offices of a county board of elections, there are other indicia that demonstrate that the General Assembly’s intent was to allow them.

First, in the event voters choose to hand deliver their mail-in ballots, the Election Code states they must “deliver [the mail-in ballot] in person to said county board of election.” 25 P.S. § 3150.16(a). It is significant that the statute does not state “the office of the county board of elections.” As defined by the Election Code, “county board” or “board” means “the county board of elections of any county[.]” 25 P.S. § 2602 (definitions). Under this definition, the county board of elections refers to the governmental entity, rather than a specific building or official office address. Given that the Election Code expressly authorizes the county boards of elections to perform their functions at locations other than their main office, it naturally follows that the board may establish drop boxes at various secure sites in the county to receive mail-in ballots—regardless of whether those drop boxes are located at one of their offices or not.

Second, language in other sections of the Election Code supports this interpretation. The Election Code states in pertinent part:

Each county board of elections shall cause its office to remain open, in charge of one or more members of the board, during the entire duration of each primary and election, and after the close of the polls, until *all the ballot boxes and returns have been received in the office of the county elections board, or received in such other place as has been designated by the board.*

25 P.S. § 3151 (emphasis added). Clearly, this provision contemplates that county boards of election may accept ballots from ballot boxes from whatever location the board determines.

Third, establishment of drop boxes by county boards of election effectuate the purpose of Act 77—an appropriate consideration when courts are interpreting the meaning of a statute that they find ambiguous. 1 Pa. C.S. § 1921(c)(1)-(3)

(stating courts may consider “the occasion and necessity for the statute,” “the mischief to be remedied,” and “the object to be attained”). In this case, the purpose of Act 77 was to make it easier for Pennsylvanians to vote by allowing them to cast mail-in ballots. Allowing those voters to cast mail-in ballots simply advances this legislative goal.

Fourth, the legislative history of Act 77—another means of deriving legislative intent under the Statutory Construction Act—supports the conclusion that making voting easier was a principal goal of the legislation. *See* 1 Pa. C.S. § 1921(c)(7) (stating courts may glean the intention of legislature through “the

contemporaneous legislative history). During her floor speech on the merits of the bill that ultimately became Act 77,²³ the bill's prime sponsor, Senator Lisa Boscola, stated, in pertinent part:

Mr. President, in my opinion, passing this omnibus Election Code bill will improve our democracy here in Pennsylvania.... So this bill makes it easier for people to vote by allowing a no-excuse mail-in option. By any objective measure, passing this bill is in the best interest of all Pennsylvania voters....

...While I am disappointed that the bill would not go as far as I would like, modernizing our elections and providing greater voter access are key. Making voting easier for people cannot be bad for our democracy....

...People expect more convenience, and this bill delivers. Creating a non-excuse mail-in option takes voting to voters instead of making voters come to us. In a society where convenience is emphasized, where you can shop in your living room and within 24 hours a box shows up at your doorstep, our voting process is finally catching up. I am hopeful that the permanent list for mail-in ballots may increase participation in our off-year elections because voting will be so much more convenient than it is today.

...I do believe our democracy will be stronger if more votes are counted. Our democracy will be stronger if our elections are more secure, and our democracy will be more successful if more people participate. Senate Bill No. 421 hits that mark...

Which is why I am proud to support this bill today.

Pa. Sen. Jour., 219th Leg. Reg. Sess., No. 46, at 1000. Clearly, Senator Boscola believed the bill made voting easier, more convenient, and would increase

²³ S.B. 421, 219th Leg. Reg. Sess. (Pa. 2019).

participation. *Id.* Drop boxes increase the ease and convenience for voters who desire to cast a ballot but are forced to do so during the COVID-19 pandemic and anticipated mail delivery delays.

Finally, this Court in interpreting legislation may grant deference to the agency, in this case the Pennsylvania Secretary of State, charged with the administration of the statute. *See* 1 Pa. C.S. § 1921(c)(7). “[A]n administrative agency’s interpretation of a governing statute is to be given controlling weight, unless that interpretation is clearly erroneous. *Dep’t of Env’tl. Prot. v. Cumberland Coal Res., LP*, 628 Pa. 17, 102 A.3d 962 (2014) (citing *Whitaker Borough v. PLRB*, 556 Pa. 559, 729 A.2d 1109, 1110 (Pa. 1999); *Borough of Ellwood City v. PLRB*, 606 Pa. 356, 365, 998 A.2d 589, 594 (2010) (same).

In this case, Secretary Boockvar has provided her own gloss of Act 77 through Guidance 1, concerning drop boxes. She states that county boards of election “may establish multiple ballot return locations where voters may return their own voted ballots.” Guidance 1 at 3. She further explains that “[e]ach ballot return site should have a secure receptable that permits voters to return their own voted ballot,” and refers to these secure receptables as “Drop-Boxes.” *Id.* at 5. Given that courts may consider the administrative interpretations of a statute, 1 Pa. C.S. § 1921(c)(8)—such as the one provided by Secretary Boockvar—this Court should reach a similar conclusion. Such a result is further compelled given the fact that the Commonwealth

and the nation are still in the midst of a pandemic, while simultaneously facing potential mail delivery delays, making voters reluctant to cast in person ballots (whether at polling stations or county board of elections offices) or to send their mail-in or absentee ballots through the Postal Service. This Court should defer to the Secretary's interpretation.

For all these reasons, this Court should grant Petitioners' request for a declaration that Act 77 and the Election Code permit county boards of election to create satellite offices and designate locations for secure drop boxes to receive mail-in and absentee ballots.

B. Act 77 Requires Local Election Officials to Count “Naked Ballots” Delivered to the County Boards of Election Without the Interior Envelope.

While there is no express provision in Act 77 that unambiguously states that county boards of elections must count “naked ballots,” the rules of statutory construction command such a conclusion. Beyond the provisions of the Statutory Construction Act, our courts have recognized rules that guide the analysis. First, “when the legislature includes specific designations in an act, omissions from the list of items or things mentioned should be regarded as exclusions.” *City Council of the City of Hazelton v. City of Hazleton*, 578 A.2d 580, 583 (Pa. Cmwlth. 1990) (hereinafter “*City of Hazelton*”) (citing *Samilo v. Pennsylvania Insurance Department*, 510 A.2d 412 (Pa. 1986)). Second, this Court has stated:

[W]here the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded. ... [W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.

Fletcher v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n, 985 A.2d 678, 684 (Pa. 2009) (internal citations omitted).

Applying these rules to Act 77, county boards of elections are required to count “naked ballots.” The Election Code enumerates extensive processes by which ballots are reviewed, and, in some cases, set aside or permissibly challenged. The grounds for setting aside or voiding a ballot include when (1) the voter has died before election day, 25 P.S. § 3146.8(d); (2) the county board of elections cannot verify the voter’s right to vote or his signature on the exterior envelope of his mail-in ballot, 25 P.S. § 3146.8(g)(3); (3) the ballot is the subject of a challenge on the grounds the voter is not a qualified elector, 25 P.S. §§ 3146.2b, 3150.12b; (4) the interior envelope of the ballot contains inappropriate marks as enumerated in the Election Code, 25 P.S. § 3146.8(g)(4). After this review of the ballots, the remaining ballots “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4). Nowhere in the statute does it indicate that returning a ballot without an interior envelope is a reason to set aside, void, or challenge a ballot. Under the rules of statutory construction, this omission constitutes strong evidence that county boards of election must count “naked ballots.” *See City*

of Hazelton, 578 A.2d at 583.

Furthermore, a separate provision of the Election Code expressly bars counting a provisional ballot if “a provisional ballot envelope does not contain a secrecy envelope.” 25 P.S. § 3050(a)(5)(ii)(C). The General Assembly declined to include a similar provision regarding the failure of a voter to use an interior envelope for his or her mail-in ballot. Such an omission for “naked ballots,” when the General Assembly provided one for the “secrecy envelopes” of provisional ballots significantly strengthens the argument that the General Assembly intended to require that county boards of elections count mail-in ballots submitted without an interior envelope. *See Fletcher*, 985 A.2d at 684.

Finally, this interpretation of the Election Code is bolstered by the fact that Secretary Boockvar has issued a guidance memorandum on “naked ballots.” Guidance 2. In Guidance 2, she states unequivocally: “It is the Department’s position that naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitutions.” Given her administrative position as the chief elections officer of the Commonwealth, this Court should give her interpretation of the Election Code great weight. 1 Pa. C.S. § 1921(c)(8). *See also Dep’t. of Env’tl Protection*, 102 A.3d

at 975; *Borough of Ellwood City*, 998 A.2d at 594.²⁴

For all these reasons, this Court should grant Petitioners' request for a declaration that Act 77 and the Election Code require county boards of election to count mail-in ballots that are submitted without the interior envelope ("naked ballots").

C. Given the Dual Threat of the COVID-19 Pandemic and Mail Delivery Delays, This Court Has the Authority to Require County Boards of Elections to Count All Returned Ballots Postmarked by 8 p.m. on Election Day if Those Ballots Are Received Within a Reasonable Time.

The Election Code expressly states that all mail-in ballots must be returned to the voter's respective county board of election by 8 p.m. on the day of the election—which, for the General Election, is November 3, 2020. 25 P.S. § 3150.16(a). Under Act 77, a Pennsylvania voter has until October 27, 2020 to request from his county board of elections a mail-in ballot—thereby providing a one-week window for the requested mail-in ballot to be delivered to the voter and returned by him or her before the deadline. 25 P.S. § 3150.12a(a). However, given the current COVID-19 pandemic and the expectation of the General Counsel of the Postal Service that mail delivery will not allow a one-week

²⁴Senator Boscola's speech before the State Senate in support of the bill that became Act 77 further supports this position, as she argued that it would make voting easier for Pennsylvanians and lead to greater participation. Providing ease in voting, but then not counting ballots cast for failure to include the interior envelope frustrates the goals as understood by the State Senator. Pa. Sen. Jour., 219th Leg. Reg. Sess., No. 46, at 1000.

turnaround time, some Pennsylvania voters will likely lose their fundamental right to vote in the General Election.

The Commonwealth Court has recognized that when a natural disaster impedes the ability to conduct an election in the manner proscribed by the Election Code, the judiciary has the inherent authority to provide relief to ensure that each elector does not lose his or her right to vote, even if the relief runs counter to express provisions of the statute. *See General Election-1985*, 531 A.2d at 839.

The facts in *General Election-1985* are unusual, but relevant to our current situation. On November 5, 1985, the Commonwealth held its general election for state offices. *Id.* at 838. A storm that day caused flooding on the Monongahela River in Washington County, resulting in a state of emergency in several election precincts in the county and a declaration of an emergency by then-Governor Richard Thornburgh. *Id.* The county board of elections filed a civil action in the court of common pleas seeking closure of the affected precincts, which was granted without a hearing. *Id.* Ultimately, voters in the eleven precincts cast their ballots two weeks later, on November 19, 1985, after the danger subsided. *Id.* at 839.

On appeal, the Commonwealth Court rejected a claim that the court of common pleas lacked authority to close the precincts under the Election Code. *Id.* The Commonwealth Court acknowledged that “neither the Pennsylvania

Constitution nor the Election Code ... expressly provides any procedure to follow when a natural disaster creates an emergency situation that interferes with an election.” *Id.* As the court noted, however, the Election Code states that “the court of common pleas of each county or a judge thereof shall on election day be in continuous session from 7 a.m. to 10 p.m. and during such period ‘decide . . . matters pertaining to the election as may be necessary to carry out the intent of this act....’” *Id.* (citing 25 P.S. § 3046).

In considering the appellants’ claims, the Commonwealth Court declared: “The purpose of the election laws is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process.” *Id.* (citing *In re Mayor, City of Altoona, Blair County*, 196 A.2d 371 (Pa. 1964)). Recognizing Pennsylvanians’ fundamental right to vote, the Commonwealth Court held:

[W]e conclude that the language of 25 P.S. § 3046 implicitly grants the court authority to suspend voting when there is a natural disaster or emergency such as that which confronted voters in Washington County on the election date here involved. *To permit an election to be conducted where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.*

Id. (emphasis added).

The same reasoning applies to the facts of this case. In the days leading to the upcoming election, the COVID-19 pandemic will still be raging throughout the

Commonwealth and the nation. Increasing numbers of voters otherwise inclined to vote in person on November 3, 2020 will likely request mail-in ballots as it becomes clear to them that the virus continues to infect and kill Pennsylvanians and these voters worry about their own safety if they attempt to go to the polls and stand in line with others waiting to cast their ballot. At the same time, United States mail service in Pennsylvania will likely be overwhelmed due to the number of mail-in ballots and other delays caused by the Postal Service. Combined, these two events will act as a perfect storm—like the flooding of the Monongahela River in 1985—undermining the ability of some voters to cast their ballots.

For the same reasons that the Commonwealth Court affirmed the decision of the court of common pleas in *General Election-1985*, this Court should exercise its inherent authority to provide relief from this two-fold disaster in the form of a reasonable extension of the deadline for voters to return their mail-in ballots—either the three-day extension requested by Secretary Boockvar, or the one-week extension, to November 10, 2020, recommended by the Pennsylvania Democratic Party and the other individual Petitioners.²⁵

Not only does *General Election-1985* support the relief sought by Petitioners, the Free and Equal Elections Clause and this Court’s interpretation of it commands

²⁵ The latter date is the deadline under the Uniformed Citizens and Absentee Voting Act, 52 U.S.C. § 20301, *et seq.*, for military personnel and civilians living abroad to return their absentee ballots.

such a result. Pa. Const., art I, § 5; *League of Women Voters*, 178 A.3d at 814; *Banfield*, 110 A.3d at 176. In granting the requested relief, this Court will protect Pennsylvanians' fundamental right to vote as guaranteed by our state constitution. In doing so, this Court will also continue our Commonwealth's "longstanding and overriding policy ... to protect the elective franchise." *In re Cioppa*, 626 A.2d at 148.

For all these reasons, this Court should grant Petitioners' request for injunctive relief, enjoin Respondents from enforcing the deadline for returning mail-in ballots and provide a reasonable extension to ensure that any Pennsylvanian who wishes to cast a ballot may do so, and have it counted.

IX. CONCLUSION

For the reasons set forth above, Amici Curiae have demonstrated that Petitioners are entitled to a declaration that Act 77 authorizes and/or permits county boards of elections to create satellite offices and utilize drop boxes in such locations as they see fit. Additionally, Petitioners are entitled to a declaration that Act 77 authorizes county boards of elections to count ballots without an interior envelope (“naked ballots”). Finally, Petitioners have demonstrated that they are entitled to an injunction requiring all county boards of elections to count mail-in ballots received by their offices within a reasonable time after the General Election, but in no case later than November 10, 2020. Therefore, this Court should grant such relief.

[Signature Line Follows]

Respectfully submitted,

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Dated: September 9, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 9,868 words within the meaning of PA.R.A.P. 531(b)(3). In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

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

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BOARD OF ELECTIONS; POTTER COUNTY BOARD OF ELECTIONS;
SCHUYLKILL COUNTY BOARD OF ELECTIONS; SNYDER COUNTY
BOARD OF ELECTIONS; SOMERSET COUNTY BOARD OF
ELECTIONS; SULLIVAN COUNTY BOARD OF ELECTIONS;
SUSQUEHANNA COUNTY BOARD OF ELECTIONS; TIOGA COUNTY
BOARD OF ELECTIONS; UNION COUNTY BOARD OF ELECTIONS;
VENANGO COUNTY BOARD OF ELECTIONS; WARREN COUNTY
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WESTMORELAND COUNTY BOARD OF ELECTIONS; WYOMING
COUNTY BOARD OF ELECTIONS; and YORK COUNTY BOARD OF
ELECTIONS