

IN THE SUPREME COURT OF PENNSYLVANIA

No. 149 MM 2020

IN RE: NOVEMBER 3, 2020 GENERAL ELECTION

**PETITION OF KATHY BOOCKVAR,
SECRETARY OF THE COMMONWEALTH,**

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

Amici Curiae.

**BRIEF OF AMICI CURIAE SPEAKER OF THE PENNSYLVANIA HOUSE
OF REPRESENTATIVES BRYAN CUTLER AND
MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES KERRY BENNINGHOFF**

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STATEMENT OF INTERESTS OF AMICI CURIAE¹

Amici Curiae, Speaker of the Pennsylvania House of Representatives Bryan Cutler (“Speaker Cutler”) and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (“Leader Benninghoff”; collectively the “House Leaders”) hereby file this Brief in opposition to the Petition of Kathy Boockvar, Secretary of the Commonwealth.²

Given the unprecedented relief sought by Petitioner, who asks this Court to uphold Petitioner’s guidance in clear contravention of the Election Code, the House Leaders possess a strong legal interest in protecting their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”), to legislate and appropriate for elections in Pennsylvania, and to suspend any laws relating to elections, which Petitioner’s requested relief would usurp.

In addition, as this Petition centers around the statutory interpretation of provisions of the Election Code and the associated legislative intent behind those provisions, the House Leaders have an interest in providing their perspective on that legislative intent, and in seeing it acknowledged and effectuated by this Court.

¹ No one other than *Amici Curiae*, its members, or its counsel paid in whole or in part for the preparation of this brief or authored in whole or in part this brief.

² The House Leaders filed an Application for Intervention in this matter on October 7, 2020 (the “Application”). Despite the fact the House Leaders’ Application set forth a strong case for intervention, given that their interest as legislators is completely unrepresented in this case and that their Application was unopposed, this Court summarily rejected the Application on October 14, 2020. Pursuant to the Court’s Order dated October 14, 2020, the House Leaders were authorized to file this Amicus Curiae Brief.

QUESTION PRESENTED

Whether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature variances.

PRELIMINARY STATEMENT

The clearest way to examine the issue of signature verification with absentee and mail-in ballots is from the following scenario:

A county board of elections receives one (of many thousands) mail-in ballot. As is statutorily required, the board examines the verification on the outside of the security envelope. In this instance, instead of seeing the signature of the registered voter whose information is listed on the right side of the envelope—the board sees “Mickey Mouse” or “Fraudulent Signature” written in the signature box.

Is the board statutorily obligated to ignore that clear and obvious discrepancy? The House Leaders strongly argue that the answer is a resounding no.

While the House Leaders believe that a plain reading of the Election Code requires the county boards of elections to examine the signatures of putative mail-in voters at the time of application and again at the time of ballot receipt, the Court is being invited to consider the opposite. Specifically, Petitioner presses the Court to pick apart the Election Code and opine that its text somehow *requires* a county board

of elections to examine the voter's declaration on the mail-in security envelope—the date, the name, and the voter's address—but then to *ignore* the large box above that information containing the voter's signature (which the board has on file with the other information that they are examining), no matter how clearly erroneous the signature is.

Moreover, based on how the declaration was crafted by the Secretary, the voter's signature is the only non-publicly available information on the declaration—as the voter's name and address are pre-printed on the other side of the security envelope. The voter's signature is literally the only safeguard for the election board to confirm that a ballot was cast by the person who requested, and was mailed, the mail-in ballot.

This is greater relief than was sought even by the Secretary, who acknowledges in footnote 15 of her Petition that “[t]o be clear, Secretary Boockvar is not advocating that signatures on applications and ballots must be ignored. If, based on examination of a voter's signed declaration, a county elections official in good faith believes the ballot was voted by someone other than the qualified elector who applied for the ballot or is fraudulent, the ballot should be set aside and investigated.”

As such, the House Leaders request that this Court remain cognizant of the two separate questions before the Court—1) whether the Election Code *requires* signature matching; and 2) whether the Election Code *permits* signature matching.

Again, while the Election Code requires county boards to conduct signature matching, the House Leaders request that the Court also consider the implications of not permitting county boards to reject clearly erroneous ballots based on the signature in the verification. Thus, the House Leaders alternatively request that this Court preserve the right of the county boards, in their sole judgment, to use signatures in the mail-in and absentee voter verification process.

FACTUAL BACKGROUND

Petitioner filed a petition with this Court on Sunday, October 4, 2020, seeking King’s Bench jurisdiction and a judicial declaration from this Court that “(1) county election officials may not reject absentee or mail-in applications or refuse to count voted absentee or mail-in ballots based on a subjective perception of signature variation; and (2) absentee and mail-in ballots and the applications for those ballots may not be challenged by third-parties at any time based on signature comparison.” *Petition* at p. 25.

The Petitioner noted that this Petition was based on issues she was litigating in a lawsuit then pending in the District Court for the Western District of Pennsylvania. *Petition* at p. 4; *Donald J. Trump for President, Inc. v. Boockvar*, Civil Action No. 2:20-cv-00966 (W.D. Pa. filed June 29, 2020) (**attached hereto as Exhibit “1”**).

On October 10, 2020, as the Secretary’s Petition was pending before this Court, Judge Ranjan dismissed the federal court action, including the portion of that suit concerning signature verification. *Donald J. Trump for President, Inc. v. Boockvar*, ___ F.Supp. 3d ____, 2020 WL 5997680 (W.D. Pa. 2020).

On October 14, 2020, this Court granted King’s Bench jurisdiction to Petitioner, limited to the issue of “[w]hether the Election Code authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing based on signature analysis where there are alleged or perceived signature variances.”

This Petition was brought in the face of the General Assembly passing bipartisan legislation greatly *expanding* the ability of Pennsylvania’s voters to vote by mail, starting with Act 77 of 2019.

The Legislative and Executive branches have worked hard over the past year to create a series of bipartisan election reforms, starting with Act 77 of 2019. *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 the enactment of Act 77 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 one's municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee, the voter had to provide a permissible reason to do so. Once this showing was made, the voter then was provided an absentee ballot that had to be returned by the voter no later than 5:00 p.m. on the Friday before the election.

In addition to allocating \$90 million to ensuring that Pennsylvanians could vote 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 General Assembly stands ready to enact further measures as may be required to ensure that the Commonwealth continues to have free and fair elections.

ARGUMENT

I. The Pennsylvania Election Code Provides for Signature Matching as a Part of the Application and Ballot Verification Process

This Court has established that the duties and responsibilities of a county board of elections “are not limited to those of a humanized adding machine . . . the Board is charged with discretionary responsibilities” *Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952).

“[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 the context of absentee and mail-in ballots, the county boards of elections are charged with maintaining the integrity of the process and evaluating the integrity of applications and submitted ballots through their “quasi-judicial” functions. *Id.*

A touchstone principle of Pennsylvania election policy 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 or mail-in 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. (emphasis added); *see also* 25 P.S. § 3150.16(a) (providing for the identical procedure for mail-in voters).

When the ballots are returned, the county board of elections must “**examine the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and**

Emergency Civilians Absentee Voters File.” 25 P.S. § 3146.8(g)(3) (emphasis added). The declaration includes a signature as provided by 1306 and 1306-D of the Election Code.

“All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4).

The Statutory Construction Act of 1972, Pa.C.S. § 1501 *et seq.*, directs that the object of all interpretation and construction of statutes is to ascertain and effectuate the Legislature’s intent. 1 Pa.C.S. § 1921(a); *Chanceford Aviation Properties, LLP v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1104 (Pa. 2007). Generally, the best indicator of legislative intent is the plain language of the statute. *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004). In construing statutory language, “[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]” 1 Pa.C.S. § 1903(a).

When the words of a statute are clear and unambiguous, there is no need to look beyond the plain meaning of the statute “under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b); *Commonwealth v. Conklin*, 897 A.2d 1168, 1175 (Pa. 2006). Only “[w]hen the words of the statute are not explicit” may a court resort to the rules of statutory construction including those provided in 1 Pa.C.S. §

1921(c); *Chanceford*, 923 A.2d at 1104. The statute must “be construed, if possible, to give effect to all its provisions,” so that no provision is reduced to mere surplusage. 1 Pa.C.S. § 1921(a); *Walker*, 842 A.2d at 400. Finally, it is presumed “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.” 1 Pa.C.S. § 1922(1).

Here, the Secretary is asking this Court to contradict the plain meaning of the statutory provisions, ignoring the Commonwealth’s long history of using voters’ signatures in the voting process. Should this Court adopt the Secretary’s interpretation of these procedures, the county board of elections would be required to ignore obvious discrepancies in declarations and count ballots that should not otherwise be counted, in clear contravention of the language contained in the Election Code.

25 P.S. § 3146.8(g)(3) requires that the county board of elections must “examine the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.’” No language in the statute suggest that the county boards should only verify *part of* the declaration—but rather they are required to “examine the declaration . . . and . . . [to] compare the information thereon with that contained in the [applicable county voting file].” *Id.*

The only piece of non-publicly available information on the current declaration, as crafted by the Secretary, is the voter's signature. Mikyhial Clarke, *Beware the 'Naked Ballot': Follow These Steps to Make Sure Your PA Mail Vote Counts*, Billy Penn, Oct. 4, 2020, available at <https://billypenn.com/2020/10/04/pennsylvania-naked-ballot-mail-voting-guide-secrecy-envelope-deadline-signature-philadelphia/> (showing a picture of the current security envelope).

Driver's License/Social Security Number information is not shown on the current security envelope, and the voter's name and address are pre-printed on the right side of the envelope. *See id.* As such, confirming the voter's signature matches the voter file is the *only* safeguard to confirm that the person who mailed in the absentee or mail-in ballot was the person the ballot was sent to. To disregard the sole safeguard available for election integrity would invite election fraud on both the small (someone receiving and voting a mis-delivered mail-in ballot) and large-scale levels (someone actively seeking out unvoted mail-in ballots).

Even assuming, *arguendo*, that there is any lack of clarity in the statutory language, “[w]hen the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering . . . other statutes upon the same or similar subjects.” 1 Pa. C.S. § 1921(c)(5). Here, the Election Code

consistently uses signature-matching by the county boards of elections and the Department of State as a key component of its efforts to identify voters.

This Court “must assess [the statutory provision] in the context of the overall statutory scheme, construing all sections with reference to each other, not simply examining language in isolation.” *Whitmoyer v. Workers' Comp. Appeal Bd. (Mountain Country Meats)*, 186 A.3d 947, 954 (Pa 2018). “Statutes that are in pari materia – meaning that “they relate to the same person or things or to the same class of persons or things” – must be construed as one statute to the extent possible.” *Commonwealth v. Foster*, 214 A.3d 1240, 1248 (Pa. 2019) (citing 1 Pa.C.S. § 1932).

In fact, signature-matching is a key component throughout the Election Code of identifying qualified electors.³ For in-person voters, 25 P.S. § 3050(a.3) provides that:

(1) All electors, including any elector that shows proof of identification pursuant to subsection (a), shall subsequently sign a voter’s certificate in blue, black or blue-black ink with a fountain pen or ball point pen, and, unless he is a State or Federal employe [*sic*] who has registered under any registration act without declaring his residence by street and number, he shall insert his address therein, and hand the same to the election officer in charge of the district register.

(2) Such election officer shall thereupon announce the elector’s name so that it may be heard by all members of the election board and by all watchers present in the polling place and shall compare the elector’s signature on his voter’s certificate with his signature in the district

³ County Boards also use signature-matching in other election contexts to verify identities. For example, signature-matching is one of the key components of vetting signatures on nomination petitions and papers. 25 P.S. § 2868; 25 P.S. § 2937.

register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote[.]

“The cardinal rule of all statutory construction is to ascertain the intent of the Legislature. To accomplish that goal, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.” *O’Rourke v. Commonwealth*, 778 A.2d 1194, 1201 (Pa. 2001). To exclude signature matching from the verification of mail-in and absentee ballots, while requiring it for in-person voters, creates an absurd result and would create avoidable Equal Protection claims—by subjecting in-person and mail-in voters to different voting standards. *See* U.S. Const. amend. XIV; *see also Erfer v. Commonwealth*, 794 A.2d 325, 332 (Pa. 2002) (stating that Pennsylvania’s equal protection provisions are co-extensive with the Fourteenth Amendment’s Equal Protection Clause). This unequal application of the Election Code would also be completely inconsistent with legislative intent.

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).

“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).

Here, to set aside the signature component of the verification, the Secretary is asking this Court “to ignore substantive provisions of the Election Code . . . [which] 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.” *Id.* This is inapposite to this Court’s obligation to enforce the Election Code and allow for free and fair elections in the Commonwealth.

Just last month, this Court upheld the importance of strictly enforcing the technical requirements concerning voting by mail-in ballot. *Pennsylvania Democratic Party v. Boockvar*, ___ A.3d ___, 2020 WL 5554644 (Pa. 2020). In Count III of its petition, the petitioners in that case sought “to require that the Boards contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for

voting by mail, and provide them with an opportunity to cure those defects.” *Id.* at *19.

Interestingly, “the Secretary oppose[d] Petitioner’s request for relief in this regard. She counters that there is no statutory or constitutional basis for requiring the Boards to contact voters when faced with a defective ballot and afford them an opportunity to cure defects.” *Id.* “The Secretary further notes that . . . the Free and Equal Elections Clause . . . cannot create statutory language that the General Assembly chose not to provide.” *Id.*

This Court concluded that “the Boards are not required to implement a ‘notice and opportunity to cure’ procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly Petitioner has cited no constitutional or statutory basis that would countenance imposing the procedure Petitioner seeks to require (*i.e.*, having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including ‘minor’ or ‘facial’ defects—and for whom the Boards have contact information— and then afford those individuals the opportunity to cure defects until the UOCAVA deadline).” *Id.* at *20.

In his concurrence, Justice Wecht indicated he was opposed to the *policy* of signature-matching, but he acknowledged that as the operative law, adding that because the *Pennsylvania Democratic Party* “case offers no challenge to such

inherently subjective bases for disqualifying ballots, I do not view today’s Opinion as foreclosing the possibility of relief in a future case seeking the opportunity to address circumstances in which a subjective, lay assessment of voter requirements as to which reasonable minds might differ stands between the elector and the tabulating machine.” *Pennsylvania Democratic Party v. Boockvar*, ___ A.3d ___, 2020 WL 5554644 *34 (Pa. 2020) (J. Wecht concurring).

Indeed, Justice Wecht noted a series of cases where courts had addressed constitutional challenges to signature-matching, and his “hope that the General Assembly would revisit the issue and consider furnishing such a procedure on its own initiative, [otherwise] this Court has the prerogative to address this problem if it proves worthy upon closer examination.” *Id.* *35.

Again, no constitutional claim is before the Court—only one of statutory interpretation. Curiously, the Secretary (along with the House Leaders) recently opposed a constitutional challenge to mail-in and absentee ballot signature verification procedures in the *NAACP-PSC* case. *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct. 2020).

In the *NAACP-PSC* case, the petitioner sought a multitude of election relief, including that the Court direct the Secretary to “provid[e] adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch. . .”

NAACP Pennsylvania State Conference v. Boockvar, No. 364 MD 2020, Petition for Review (Pa. Commw. Ct. filed June 18, 2020).

After a thorough evidentiary hearing, Judge Brobson denied the petitioner's application for a preliminary injunction, and subsequently sustained the preliminary objections of the Respondents, including Secretary Boockvar, in the form of a demurrer. *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020, Memorandum Opinion (Pa. Commw. Ct. filed September 11, 2020) (**attached hereto as Exhibit "2"**); *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020, Order (Pa. Commw. Ct. filed September 11, 2020) (**attached hereto as Exhibit "3"**).

As the Secretary herself noted in her Memorandum of Law in support of her preliminary objections in the *NAACP-PSC* case, "the question presented by Petitioner's lawsuit is not whether the reforms would be good public policy; it is whether the Court can require their implementation, in derogation of the Election Code As a matter of law, the answer is no. Accordingly, the Court should sustain Respondents' Preliminary Objections and dismiss the Petition." *NAACP Pennsylvania State Conference v. Boockvar*, No. 364 MD 2020, Respondents' Brief in Support of Preliminary Objections to Petitioner's Petition for Review (Pa. Commw. Ct. filed August 13, 2020) (**Attached hereto as Exhibit "4"**).

Here, the question before this Court is neither a question of public policy nor constitutional law, but solely a matter of statutory interpretation of a straightforward statute.

As the Pennsylvania Election Code has always placed a heavy emphasis on signature verification to confirm identity, and clearly does so here with absentee and mail-in ballots, that policy should be upheld by this Court in order to effectuate legislative intent.

II. District Judge Ranjan’s Misapplication of the Election Code is Not Binding Precedent.

As noted in supplemental filings made to this Court, Judge Ranjan in *Donald J. Trump for President, Inc. v. Boockvar* (the “Trump Litigation”), the litigation prompting the Secretary to file this Petition, recently examined this signature verification issue.

For the reasons set forth herein, however, Judge Ranjan’s opinion misapplies the Election Code and the Commonwealth’s law on statutory interpretation. Furthermore, this decision is not binding precedent. *See Stilp v. Commonwealth*, 905 A.2d 918, 977 n.44 (Pa. 2006) (“decisions of the lower Federal courts do not bind this Court, and particularly where the question is one of state law.”).

In the Trump Litigation, Donald J. Trump for President, Inc., the campaign committee of President Donald Trump, along with political committees, elected officials, and registered voters, brought suit in federal court in order to seek

clarification on various provisions of the Pennsylvania Election Code. *Donald J. Trump for President, Inc. v. Boockvar*, Civil Action No. 2:20-cv-00966, (W.D. Pa. filed June 29, 2020). While the original action did not seek relief or a judicial determination concerning signature verification, Plaintiffs amended their complaint to include signature verification on October 1, 2020. *See Id.*

On October 10, 2020, Judge Ranjan granted summary judgment in favor of the defendants. *Donald J. Trump for President, Inc. v. Boockvar*, ___ F.Supp. 3d ___, 2020 WL 5997680 (W.D. Pa. 2020).

In granting summary judgment, Judge Ranjan analyzed the Pennsylvania Election Code provisions addressing the counting of absentee and mail-in ballots, holding that “the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.” *Id.* at *53.

Judge Ranjan based his statutory interpretation on the fact that the text of the statutory provisions concerning signature verification for in-person voters was more explicit than that concerning mail-in and absentee ballots. “In addressing in-person voting, the General Assembly explicitly instructs that the election official shall, after receiving the in-person elector’s voter certificate, immediately “*compare the elector’s signature* on his voter’s certificate with his signature in the district register.” *Id.* at *55 (emphasis in original).

On that basis, Judge Ranjan concluded that since “[t]he General Assembly mandated signature comparison for in-person voting elsewhere in the Election Code . . . [that] evidenc[ed] its intention not to require such comparison for mail-in ballots.” *Id.* (citing *Fonner v. Shandon, Inc.* 724 A.2d 903, 907 (Pa. 1999)).

Mistakenly here, the court latched onto a technical point of phrasing (the detailed description of signature matching for in-person voters versus the more general “examine the declaration on the envelope of each ballot . . . and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.’” 25 P.S. § 3146.8(g)(3)). Judge Ranjan errantly isolated slight differences in statutory language, rather than applying the Election Code’s provisions in concert—thereby unnecessarily creating different verification procedures for different types of ballots in contravention of the requirements of the Election Code.

This Court has consistently held that “[i]n determining whether language is clear and unambiguous, we must assess it in the context of the overall statutory scheme, construing all sections with reference to each other, not simply examining language in isolation.” *Whitmoyer v. Workers’ Comp. Appeal Bd. (Mountain Country Meats)*, 186 A.3d 947, 954 (Pa 2018). “Statutes that are in *pari materia* – meaning that “they relate to the same person or things or to the same class of persons

or things” – must be construed as one statute to the extent possible.” *Commonwealth v. Foster*, 214 A.3d 1240, 1248 (Pa. 2019) (citing 1 Pa.C.S. § 1932).

To properly apply these interrelated statutes, the correct interpretation is to interpret the provisions in concert to apply “the context of the overall statutory scheme.” *Whitmoyer*, 186 A.3d at 954. Here, that would be similarly requiring the county boards of elections to inspect the voter’s signatures—whether that voter is voting in-person or by mail—as a part of the identification verification process.

To ignore the text of the Election Code duly enacted by the General Assembly would be violative of the Elections Clause of the U.S. Constitution. U.S. Constitution Art. I, Section 4, Clause 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”; *see also* 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 14 (“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.”). To ignore the plain text of the Election Code in violation of the Elections Clause would be ignoring the canon of statutory presumption “[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.” 1 Pa. C.S. § 1922(3).

As Judge Ranjan’s decision fails to properly read the Election Code provisions in concert, as is provided by Pennsylvania law, that court’s decision should not persuade this Court to ignore the statutory requirements pertaining to signature verification.

CONCLUSION

For the foregoing reasons, Amici Curiae 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 declare that the Pennsylvania Election Code requires signature verification as a part of the tabulation of absentee and mail-in ballots. Should the Court disagree with this interpretation, the House Leaders alternatively request that this Court preserve the right of the county boards, in their sole judgment, to use signatures in the mail-in and absentee voter verification process.

Dated: October 16, 2020

Respectfully submitted,

/s/ Zachary M. Wallen

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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 5,221 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

Counsel for Amici Curiae Speaker of the
Pennsylvania House of Representatives
Bryan Cutler and Majority Leader of the
Pennsylvania House of Representatives
Kerry Benninghoff

Dated: October 16, 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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Pennsylvania House of Representatives
Kerry Benninghoff*

Dated: October 16, 2020

EXHIBIT “1”

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT,) CIVIL ACTION
INC.; GLENN THOMPSON; MIKE KELLY;)
JOHN JOYCE; GUY RESCHENTHALER;)
REPUBLICAN NATIONAL COMMITTEE;)
MELANIE STRINGHILL PATTERSON; and)
CLAYTON DAVID SHOW,)

Plaintiffs,)

v.)

No. _____

KATHY BOOCKVAR, in her capacity as)
Secretary of the Commonwealth of)
Pennsylvania; ADAMS COUNTY BOARD)
OF ELECTIONS; ALLEGHENY COUNTY)
BOARD OF ELECTIONS; ARMSTRONG)
COUNTY BOARD OF ELECTIONS;)
BEAVER COUNTY BOARD OF)
ELECTIONS; BEDFORD COUNTY BOARD)
OF ELECTIONS; BERKS COUNTY BOARD)
OF ELECTIONS; BLAIR COUNTY BOARD)
OF ELECTIONS; BRADFORD COUNTY)
BOARD OF ELECTIONS; BUCKS COUNTY)
BOARD OF ELECTIONS; BUTLER)
COUNTY BOARD OF ELECTIONS;)
CAMBRIA COUNTY BOARD OF)
ELECTIONS; CAMERON COUNTY)
BOARD OF ELECTIONS; CARBON)
COUNTY BOARD OF ELECTIONS;)
CENTRE COUNTY BOARD OF)
ELECTIONS; CHESTER COUNTY BOARD)
OF ELECTIONS; CLARION COUNTY)
BOARD OF ELECTIONS; CLEARFIELD)
COUNTY BOARD OF ELECTIONS;)
CLINTON COUNTY BOARD OF)
ELECTIONS; COLUMBIA COUNTY)
BOARD OF ELECTIONS; CRAWFORD)
COUNTY BOARD OF ELECTIONS;)
CUMBERLAND COUNTY BOARD OF)
ELECTIONS; DAUPHIN COUNTY BOARD)
OF ELECTIONS; DELAWARE COUNTY)
BOARD OF ELECTIONS; ELK COUNTY)
BOARD OF ELECTIONS; ERIE COUNTY)

BOARD OF ELECTIONS; FAYETTE)
COUNTY BOARD OF ELECTIONS;)
FOREST COUNTY BOARD OF)
ELECTIONS; FRANKLIN COUNTY)
BOARD OF ELECTIONS; FULTON)
COUNTY BOARD OF ELECTIONS;)
GREENE COUNTY BOARD OF)
ELECTIONS; HUNTINGDON COUNTY)
BOARD OF ELECTIONS; INDIANA)
COUNTY BOARD OF ELECTIONS;)
JEFFERSON COUNTY BOARD OF)
ELECTIONS; JUNIATA COUNTY BOARD)
OF ELECTIONS; LACKAWANNA)
COUNTY BOARD OF ELECTIONS;)
LANCASTER COUNTY BOARD OF)
ELECTIONS; LAWRENCE COUNTY)
BOARD OF ELECTIONS; LEBANON)
COUNTY BOARD OF ELECTIONS;)
LEHIGH COUNTY BOARD OF)
ELECTIONS; LUZERNE COUNTY BOARD)
OF ELECTIONS; LYCOMING COUNTY)
BOARD OF ELECTIONS; MCKEAN)
COUNTY BOARD OF ELECTIONS;)
MERCER COUNTY BOARD OF)
ELECTIONS; MIFFLIN COUNTY BOARD)
OF ELECTIONS; MONROE COUNTY)
BOARD OF ELECTIONS; MONTGOMERY)
COUNTY BOARD OF ELECTIONS;)
MONTOUR COUNTY BOARD OF)
ELECTIONS; NORTHAMPTON COUNTY)
BOARD OF ELECTIONS;)
NORTHUMBERLAND COUNTY BOARD)
OF ELECTIONS; PERRY COUNTY BOARD)
OF ELECTIONS; PHILADELPHIA)
COUNTY BOARD OF ELECTIONS; PIKE)
COUNTY 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 BOARD)
 OF ELECTIONS; WASHINGTON COUNTY)
 BOARD OF ELECTIONS; WAYNE)
 COUNTY BOARD OF ELECTIONS;)
 WESTMORELAND COUNTY BOARD OF)
 ELECTIONS; WYOMING COUNTY)
 BOARD OF ELECTIONS; and YORK)
 COUNTY BOARD OF ELECTIONS,)
)
 Defendants.)

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their undersigned counsel, hereby complain of Defendants as follows:

INTRODUCTION

1. Free and fair elections are essential to the right of Americans to choose through their vote whom they elect to represent them. Upending our entire election process and undermining ballot security through unmonitored by-mail voting is the single greatest threat to free and fair elections. To be free and fair, elections must be transparent and verifiable. Yet, Defendants have inexplicably chosen a path that jeopardizes election security and will lead - and has already led - to the disenfranchisement of voters, questions about the accuracy of election results, and ultimately chaos heading into the upcoming November 3, 2020 General Election. This is all a direct result of Defendants' hazardous, hurried, and illegal implementation of unmonitored mail-in voting which provides fraudsters an easy opportunity to engage in ballot harvesting, manipulate or destroy ballots, manufacture duplicitous votes, and sow chaos. Contrary to the direction of Pennsylvania's General Assembly, Defendants have sacrificed the sanctity of in-person voting at the altar of unmonitored mail-in voting and have exponentially enhanced the threat that fraudulent or otherwise ineligible ballots will be cast and counted in the upcoming General Election.

2. All of this was on full display in Pennsylvania's June 2, 2020 Primary Election. That election proved that Defendants are unwilling to properly administer the Pennsylvania General Assembly's new mail-in voting law, Act 77, that made significant changes to Pennsylvania's elections, and instead have opted to promote unlimited use of unmonitored mail-in voting. Defendants' failure is the direct result of their election administration decisions, many of which exceed the legal power or authority of the decision makers. For example, despite the Pennsylvania General Assembly's clear and unambiguous mandate that absentee and mail-in¹ ballots by non-disabled electors are to be mailed or personally delivered to the county boards of elections, approximately twenty (20) counties in this Commonwealth, with the knowledge, consent and/or approval of the Secretary of the Commonwealth, allowed absentee and mail-in ballots to be returned to other locations, such as shopping centers, parking lots, fairgrounds, parks, retirement homes, college campuses, fire halls, municipal government buildings, and elected officials' offices. Also, the Governor of the Commonwealth issued an Executive Order the *day before* the June 2, 2020 Primary Election changing the rules of mail-in balloting, but only for some counties and not all. Further, Allegheny County not only issued duplicate mail-in and absentee ballots to voters because of a glitch in the state's Statewide Uniform Registry of Electors (SURE) system,

¹ Article VII, Section 14 of the Constitution of the Commonwealth of Pennsylvania provides that absentee voting shall be permitted for those "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[.]" Pa. Const. art. VII, § 14. Act 77 (as hereinafter defined, and codified, in part, at 25 P.S. § 2602) makes a distinction between a "qualified mail-in elector" and a "qualified absentee elector." See 25 P.S. § 2602(w) & (z.6). In general use, however, the terms "mail-in" and "absentee" are used interchangeably to discuss the use of the United States Postal Service to deliver ballots to and from electors. For the purposes of this complaint, the terms "mail-in" and "absentee" refer to the general usage unless the specific is indicated.

but also instituted severe polling place consolidations that caused long lines and confusion among voters, candidates, and political parties. Moreover, Philadelphia County could not sustain its vote counting process and, without warning, stopped counting ballots on June 4, 2020, and then, without formal notice, started counting again on June 9, 2020.

3. Defendants, through their haphazard administration of Act 77, have burdened voters, candidates, and political committees with the arbitrary and illegal preclusion of poll watchers from being present in all locations where votes are being cast because (a) the locations where mail-in or absentee ballots are being returned do not constitute a “polling place” within the meaning of Sections 102(q) and 417(b) of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, as amended (“Election Code”), 25 P.S. §§ 2602(q) and 2687(b); and (b) the poll watchers may only serve in the county of their residence under Election Code Section 417(b), 25 P.S. § 2687 (b). The result is that a significant portion of votes for elections in Pennsylvania are being cast in a fashion that denies any procedural visibility to candidates, political parties, and the public in general, thereby jeopardizing the free and fair public elections guaranteed by the United States and Pennsylvania Constitutions. The most recent election conducted in this Commonwealth and the public reaction to it demonstrate the harm caused by Defendants’ unconstitutional infringements of Plaintiffs’ rights. The continued enforcement of arbitrary and disparate policies and procedures regarding poll watcher access and ballot return and counting poses a severe threat to the credibility and integrity of, and public confidence in, Pennsylvania’s elections, so long as absentee or mail-in voting is continued to be extensively used.

4. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is validly cast. An individual’s right to vote is infringed if his or her vote is cancelled by a fraudulent vote or diluted by a single person voting multiple times. The United

States Supreme Court has made this clear in case after case. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be “protected from the diluting effect of illegal ballots.”); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”); *accord Reynolds v. Sims*, 77 U.S. 533, 554-55 & n.29 (1964).

5. Accordingly, along with equitable and other relief, Plaintiffs seek an order, declaration, and/or injunction that prohibits Defendants from permitting the return of absentee and mail-in ballots to locations other than the respective offices of the county boards of elections as prescribed by the Pennsylvania Election Code, particularly with regard to mobile ballot collection centers and other inadequately noticed and unmonitored ad hoc drop boxes. Further, Plaintiffs seek an order, declaration, and/or injunction that bars county election boards from counting absentee and mail-in ballots that lack a secrecy envelope or contain on that envelope any text, mark, or symbol which reveals the elector’s identity, political affiliation, or candidate preference. Finally, Plaintiffs seek an order, declaration, and/or injunction that permits poll watchers, regardless of their county of residence, to be present in all locations where votes are cast, including without limitation all locations where absentee or mail-in ballots are being returned.

JURISDICTION AND VENUE

6. Under 28 U.S.C. §§ 1331 & 1343, this Court has subject matter jurisdiction because this action arises under the Constitution and laws of the United States and involves a federal election. Also, this Court has supplemental jurisdiction over any state law claims under 28 U.S.C. § 1367.

7. Venue is proper because a substantial part of the events giving rise to the claims occurred in this District, and several of the Defendants reside in this District and all of the

Defendants are residents of the Commonwealth of Pennsylvania in which this District is located.
28 U.S.C. § 1391.

PARTIES

8. Plaintiff Donald J. Trump for President, Inc. (hereinafter, the “Trump Campaign”), is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, “President Trump”). President Trump is the presumptive Republican nominee for the office of the President of the United States of America in the upcoming November 3, 2020 General Election. The Trump Campaign brings this action for itself and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101-2 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States).

9. Plaintiff Glenn Thompson (hereinafter, “Representative Thompson”) is an adult individual who is a qualified registered elector residing in Centre County, a member of the Republican Party, and the United States Representative for the 15th Congressional District of Pennsylvania. Representative Thompson is currently running for reelection in the 15th Congressional District which includes all of Warren, McKean, Forest, Venango, Elk, Cameron, Clarion, Jefferson, Armstrong, Clearfield, and Indiana counties, most of Cambria and Centre counties, and parts of Butler county. Representative Thompson constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Thompson brings this suit in his capacity as a candidate for federal office and a private citizen.

10. Plaintiff Mike Kelly (hereinafter, “Representative Kelly”) is an adult individual who is a qualified registered elector residing in Butler County, a member of the Republican Party, and the United States Representative for the 16th Congressional District of Pennsylvania. Representative Kelly is currently running for reelection in the 16th Congressional District which includes all of Erie, Crawford, Mercer, and Lawrence counties, as well as part of Butler County. Representative Kelly constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Kelly brings this suit in his capacity as a candidate for federal office and a private citizen.

11. Plaintiff John Joyce (hereinafter, “Representative Joyce”) is an adult individual who is a qualified registered elector residing in Blair County, a member of the Republican Party, and the United States Representative for the 13th Congressional District of Pennsylvania. Representative Joyce is currently running for reelection in the 13th Congressional District which includes all of Blair, Huntingdon, Bedford, Fulton, Franklin, and Adams counties, most of Somerset County, and parts of Westmoreland, Cambria, and Cumberland counties. Representative Joyce constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Joyce brings this suit in his capacity as a candidate for federal office and a private citizen.

12. Plaintiff Guy Reschenthaler (hereinafter, “Representative Reschenthaler”) is an adult individual who is a qualified registered elector residing in Washington County, a member of the Republican Party, and the United States Representative for the 14th Congressional District of Pennsylvania. Representative Reschenthaler is currently running for reelection in the 14th Congressional District which includes all of Fayette, Greene, and Washington counties, as well as the western part of Westmoreland County. Representative Reschenthaler constitutes both a

“candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Reschenthaler brings this suit in his capacity as a candidate for federal office and a private citizen.

13. Plaintiff Republican National Committee (hereinafter, the “RNC”) is a national political committee that leads the Republican Party of the United States (hereinafter, the “Republican Party”). The RNC works to elect Republican candidates to state and federal offices throughout the United States, including in the Commonwealth of Pennsylvania, and it organizes and operates the Republican National Convention through which its members nominate their candidates for President and Vice President of the United States. The Republican Party includes over thirty million (30,000,000) registered Republicans in all fifty (50) states, the District of Columbia, and the U.S. territories, and constitutes a “political party” as that term is defined in Election Code Section 801, 25 P.S. § 2831. The RNC brings this action for itself, the Republican Party, all of its members, all registered Republican voters, and all nominated Republican candidates in the November 3, 2020 General Election in the Commonwealth of Pennsylvania.

14. Plaintiff Melanie Stringhill Patterson (hereinafter, “Ms. Patterson”) is an adult individual who is a qualified registered elector residing in Belle Vernon, Fayette County, Pennsylvania. Ms. Patterson resides in the 14th Congressional District and desires to engage in poll watching for the re-election campaigns of both President Trump and Representative Reschenthaler in counties other than Fayette County. Ms. Patterson constitutes a “qualified elector” as that term is defined in Election Code Section 102(t), 25 P.S. § 2602(t). Ms. Patterson brings this suit in her capacity as a private citizen.

15. Plaintiff Clayton David Show (hereinafter, “Mr. Show”) is an adult individual who is a qualified registered elector residing in Hopwood, Fayette County, Pennsylvania. Mr. Show

resides in the 14th Congressional District and desires to engage in poll watching for the re-election campaigns of both President Trump and Representative Reschenthaler in counties other than Fayette County. Mr. Show constitutes a “qualified elector” as that term is defined in Election Code Section 102(t), 25 P.S. § 2602(t). Mr. Show brings this suit in his capacity as a private citizen.

16. Defendant Kathy Boockvar (hereinafter, “Secretary Boockvar”) is the Secretary of the Commonwealth. In this role, Secretary Boockvar leads the Pennsylvania Department of State. As Secretary, she is Pennsylvania’s Chief Elections Officer and a member of the Governor’s Executive Board. The Pennsylvania Constitution vests no powers or duties in Secretary Boockvar. *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005). Instead, her general powers and duties concerning elections are set forth in Election Code Section 201, 25 P.S. § 2621. Under the Election Code, Secretary Boockvar acts primarily in a ministerial capacity and has no power or authority to intrude upon the province of the Pennsylvania General Assembly. *Perzel*, 870 A.2d at 875; *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). Secretary Boockvar is sued in her official capacity.

17. Defendants Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Beaver County Board of Elections, Bedford County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bradford County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Cameron County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clearfield County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Crawford County Board of Elections, Cumberland County Board of Elections, Dauphin County Board of Elections, Delaware County

Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Forest County Board of Elections, Franklin County Board of Elections, Fulton County Board of Elections, Greene County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Jefferson County Board of Elections, Juniata County Board of Elections, Lackawanna County Board of Elections, Lancaster County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Lehigh County Board of Elections, Luzerne County Board of Elections, Lycoming County Board of Elections, McKean County Board of Elections, Mercer County Board of Elections, Mifflin County Board of Elections, Monroe County Board of Elections, Montgomery County Board of Elections, Montour County Board of Elections, Northampton County Board of Elections, Northumberland County Board of Elections, Perry County Board of Elections, Philadelphia County Board of Elections, Pike County 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 Board of Elections, Washington County Board of Elections, Wayne County Board of Elections, Westmoreland County Board of Elections, Wyoming County Board of Elections, and York County Board of Elections (collectively hereinafter, the “County Election Boards”), are the county boards of elections in and for each county of the Commonwealth of Pennsylvania as provided by Election Code Section 301, 25 P.S. § 2641. The County Election Boards “have jurisdiction over the conduct of primaries and elections in such count[ies], in accordance with the provision of [the Election Code.]” *Id.* at § 2641(a). The County Election Boards’ general powers and duties are set forth in Election Code Section 302, 25 P.S. § 2642. The County Election Boards

are executive agencies that carry out legislative mandates, and their duties concerning the conduct of elections are purely ministerial with no exercise of discretion. *Shroyer v. Thomas*, 81 A.2d 435, 437 (Pa. 1951); *Perles v. Hoffman*, 213 A.2d 781, 786 (Pa. 1965) (Cohen, J., concurring). *See also Deer Creek Drainage Basin Authority v. County Bd. of Elections*, 381 A.2d 103, 109 (Pa. 1977) (Pomeroy, J., dissenting) (“A board of elections, it has been well said, “does not sit as a quasi-judicial body adjudicating contending forces as it wishes, but rather as an executive agency to carry out legislative mandates. Its duties are ministerial only.”); *In re Municipal Reapportionment of Township of Haverford*, 873 A.2d 821, 833, n.18 (Pa. Commw. Ct. 2005) (“The duties of a board of elections under the Election Code are ministerial and allow for no exercise of discretion.”), *appeal denied* 897 A.2d 462 (Pa. 2006).

FACTUAL ALLEGATIONS

I. Federal Constitutional Protections for Free and Fair Public Elections.

18. Free, fair and transparent public elections are crucial to democracy – a government of the people, by the people, and for the people.

19. The most fundamental principle defining credible elections in a democracy is that they must reflect the free expression of the will of the people.

A. *The Right to Vote in Federal Elections.*

20. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). *See also Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the “the right of all qualified citizens to vote, in state as well as in federal elections.”).

21. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it “is preservative of other basic civil and political rights.” *Reynolds*, 377 U.S. at 562.

22. “Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted” if they are validly cast. *United States v. Classic*, 313 U.S. 299, 315 (1941). “[T]he right to have the vote counted” means counted “at full value without dilution or discount.” *Reynolds*, 377 U.S. at 555, n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

23. “Every voter in a federal ... election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974); see also *Baker v. Carr*, 369 U.S. 186, 208 (1962).

24. Fraudulent votes “debase[]” and “dilute” the weight of each validly cast vote. See *Anderson*, 417 U.S. at 227.

25. “The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.” *Anderson*, 417 U.S. at 226 (quoting *Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff’d due to absence of quorum*, 339 U.S. 974 (1950)).

26. Practices that promote fraud or fail to contain basic minimum guarantees against fraud can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. See

Reynolds, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

B. *The Equal Protection Clause of the Fourteenth Amendment.*

27. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” *Bush v. Gore*, 531 U.S. 98, 104-5 (2000). *See also Harper*, 383 U.S. at 665 (“Once the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).

28. The Equal Protection Clause of the Fourteenth Amendment proscribes that “one person’s vote must be counted equally with those of all other voters in a State.” *Reynolds*, 377 U.S. at 560. In other words, “whenever a state or local government decides to select persons by popular election to perform governmental functions, [equal protection] requires that each qualified voter must be given an equal opportunity to participate in that election” *Hadley, v. Junior College District*, 397 U.S. 50, 56 (1968).

29. Accordingly, the Equal Protection Clause requires states to “avoid arbitrary and disparate treatment of the members of its electorate.” *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (quoting *Bush*, 531 U.S. at 105); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Gray*, 372 U.S. at 380 (“The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court’s] decisions.”).

30. “[T]reating voters differently” thus “violate[s] the Equal Protection Clause” when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros*, 249 F.3d at 954. Indeed, a “minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote].” *Bush*, 531 U.S. at 105.

31. The use of “standardless” procedures can violate the Equal Protection Clause. *Bush*, 531 U.S. at 103. “The problem inheres in the absence of specific standards to ensure ... equal application” of even otherwise unobjectionable principles. *Id.* at 106. Any voting system that involves discretion by decision makers about how or where voters will vote must be “confined by specific rules designed to ensure uniform treatment.” *Id.* at 106.

32. Allowing a patchwork of different rules from county to county in a statewide election involving federal and state candidates implicates equal protection concerns. *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 698-699 (W.D. Pa. 2003). *See also Gray*, 372 U.S. at 379-381 (a county unit system which weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties violates the Equal Protection Clause and its one person, one vote jurisprudence).

C. *Constitutional Commitment of Federal Election Regulation to the State Legislature.*

33. In statewide elections involving federal candidates, “a State's regulatory authority springs directly from the United States Constitution.” *Project Vote v. Kelly*, 805 F. Supp. 2d 152, 174 (W.D. Pa. 2011) (citing *Cook v. Gralike*, 531 U.S. 510, 522-523 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)).

34. The Elections Clause of the United States Constitution states 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. Const. Art. I, § 4, cl. 1 (emphasis added). Likewise,

the Electors Clause of the United States Constitution states that “[e]ach State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors” for President.” U.S. Const. Art. II, § 1, cl. 2 (emphasis added).

35. The Legislature is “the representative body which ma[kes] the laws of the people.” *Smiley v. Holm*, 285 U.S. 355, 365 (1932). Regulations of congressional and presidential elections, thus, “must be in accordance with the method which the state has prescribed for legislative enactments.” *Id.* at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2668 (U.S. 2015).

36. Because the United States Constitution reserves for state legislatures the power to set the time, place, and manner of holding elections for Congress and the President, state executive officers have no authority to unilaterally exercise that power, much less flout existing legislation.

37. Nor can the authority to ignore existing legislation be delegated to an executive officer. While the Elections Clause “was not adopted to diminish a State’s authority to determine its own lawmaking processes,” *Ariz. State Legislature*, 135 S. Ct. at 2677, it does hold states accountable to their chosen processes when it comes to regulating federal elections. *Id.* at 2668.

38. “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question” *Bush*, 531 U.S. at 113 (Rehnquist, J., concurring); *Smiley*, 285 U.S. at 365.

II. Pennsylvania Constitutional Protections for Free and Fair Public Elections.

39. The Pennsylvania Constitution also bestows the right to vote upon qualified citizens and guarantees them equal protection in the enjoyment of that right. *See* Pa. Const. art. VII, § 1 & art. I, § 28.

40. Further, Article I, Section 5 of the Pennsylvania Constitution, entitled “Elections” and commonly referred to as the “Free and Equal Elections Clause,” provides:

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.

41. The Free and Equal Elections Clause “is contained within the Pennsylvania Constitution’s ‘Declaration of Rights,’ which ... is an enumeration of the fundamental individual human rights possessed by the people of the Commonwealth that are specifically exempted from the powers of the Commonwealth government to diminish.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018).

42. “[E]lections are free and equal within the meaning of the [Pennsylvania] Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; **when each voter under the law has the right to cast his ballot and have it honestly counted**; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914) (emphasis added).

43. *Winston*’s mandate set forth in the preceding paragraph represents “the minimum requirements for ‘free and fair’ elections” in this Commonwealth. *League of Women Voters*, 178 A.3d at 810.

44. The rights protected by the Free and Equal Elections Clause of the Pennsylvania Constitution, including without limitation the right to free and fair public elections, may not be taken away by an act of the Commonwealth’s legislative or executive branches, and both branches are prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence. *League of Women Voters*, 178 A.3d at 810.

45. The rights protected by the Free and Equal Elections Clause of the Pennsylvania Constitution, including without limitation the right to free and fair public elections, apply to the election of both federal and state candidates. *League of Women Voters*, 178 A.3d at 811.

III. Poll Watching Ensures Free and Fair Public Elections.

46. The Pennsylvania Constitution gives the Commonwealth's General Assembly the authority to enact legislation governing the conduct of elections. *See* Pa. Const. art. VII, § 6; *Winston*, 91 A. at 522.

47. “Pennsylvania’s election laws apply equally to federal and state elections.” *Project Vote*, 805 F. Supp. 2d at 174 (citing *Kuznik v. Westmoreland County Board of Elections*, 902 A.2d 476, 490-493 (Pa. 2006)).

48. Elections in Pennsylvania are governed and regulated by the Election Code.

49. “Although the [Commonwealth] is ultimately responsible for the conduct and organization of elections, the statutory scheme [promulgated by the Election Code] delegates aspects of that responsibility to the political parties. This delegation is a legislative recognition of ‘the critical role played by political parties in the process of selecting and electing candidates for state and national office.’” *Tiryak v. Jordan*, 472 F. Supp. 822, 823-24 (E.D. Pa. 1979 (quoting *Marchioro v. Chaney*, 442 U.S. 191, 195 (1979))).

50. Election Code Section 417, 25 P.S. § 2687, creates the position of poll-watcher and entrusts to each candidate for nomination or election at any election, and each political party and each political body which has nominated candidates for such elections, the power to appoint poll watchers to serve in each election district in the Commonwealth. *See* 25 P.S. § 2687(a).

51. Under the Election Code, “poll watcher[s] perform[] a dual function on Election Day. On the one hand, because [poll watchers] are designated and paid by [candidates, political parties, and/or political bodies], [their] job is to guard the interests of [their] candidates [or political

parties or bodies]. On the other hand, because the exercise of [their] authority promotes a free and fair election, poll watcher[s] serve to guard the integrity of the vote. Protecting the purity of the electoral process is a state responsibility and [poll watchers'] statutory role in providing that protection involves [them] in a public activity, regardless of [their] private political motives.” *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979).

52. Election Code Section 417 dictates the number of poll watchers allowed, the qualifications and manner of their appointment, their provision of a watcher’s certificates from the County Election Boards, their location within the polling place², the activities permitted by poll watchers, and the maximum amount of compensation to be paid to poll watchers. 25 P.S. § 2687(a)-(c).

53. Under Election Code Section 417(b), poll watchers may observe the election process from the time the first polling place official appears in the morning to open the polling place until the time the polls are closed and the election returns are counted and posted at the polling place entrance. 25 P.S. § 2687(b). However, until the polls close, only one poll watcher representing each political party and its candidates at a general, municipal, or special election can be present in the polling place outside the enclosed space from the time that the election officers meet to open the polls and until the counting of the votes is complete. *Id.* See also Election Code Section 1220, 25 P.S. § 3060(a) & (d). Once the polls close and while the ballots are being counted, then all the poll watchers for candidates and political parties or bodies are permitted to be in the polling place outside the enclosed space. 25 P.S. § 2687(b).

² “Polling place” is a defined term under the Election Code which means “the room provided in each election district for voting at a primary or election.” Election Code Section 102(q), 25 P.S. § 2602(q).

54. Under Election Code Section 417(b), poll watchers are permitted to keep a list of voters, and during times when voters are not present or voting, watchers can ask the Judge of Elections to inspect the voting check list and either of the two numbered lists of voters, but cannot mark or alter those lists. 25 P.S. § 2687(b).

55. In addition to the activities authorized by Election Code Section 417(b), poll watchers are among those who are authorized under Election Code Section 1210(d), 25 P.S. § 3050(d), to challenge any person who presents himself or herself to vote at a polling place on Election Day concerning the voter's identity, continued residence in the election district, or registration status. *See* 25 P.S. § 3050(d) ("any person, although personally registered as an elector, may be challenged by any qualified elector, election officer, overseer, or *watcher* at any primary or election as to his identity, as to his continued residence in the election district or as to any alleged violation of the provisions of section 1210 of this act, ...") (emphasis added).

56. Also, prior to October 31, 2019, poll watchers were authorized under Election Code Section 1308(e), 25 P.S. § 3146.8(e) (repealed), to be present at the polling place on Election Day when absentee ballots were examined by local election boards and to assert challenges to the mail-in ballots' validity.

57. Moreover, poll watchers' functions go beyond the activities authorized under Election Code Sections 417(b) and 1210(d) on Election Day.

58. For example, under Election Code Section 310, 25 P.S. § 2650, poll watchers appointed by parties, political bodies, or bodies of citizens may appear at any public session of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines, in which case such poll watchers may exercise the same rights as watchers at polling places and may raise objections to any ballots

or machines for subsequent resolution by the county board of elections and appeal to the courts. 25 P.S. § 2650(a) & (c).

59. Without poll watchers, the integrity of the vote in elections is threatened and the constitutional right to free and fair public elections under the United States and Pennsylvania Constitutions is denied.

60. Poll watchers serve as an important check to ensure transparency and guard against wrongdoing by election officials. The need for poll watchers was demonstrated by the case of *United States v. DeMuro*, Criminal No. 20-112 (E.D. Pa. unsealed May 21, 2020). In that case, a former Judge of Elections in South Philadelphia pled guilty to adding fraudulent votes to the voting machines during Election Day -- also known as “ringing up” votes -- and then falsely certifying that the voting machine results were accurate for specific federal, state, and local Democratic candidates in the 2014, 2015, and 2016 primary elections. The scheme involved a political consultant who purportedly solicited monetary payments from the candidates as “consulting fees,” and then used portions of those funds to pay election board officials, including DeMuro, in return for ringing up votes. DeMuro was able to commit the fraud because there were no poll watchers at his precinct. *See United States v. DeMuro*, Criminal No. 20-112, Information (Doc. #1) (E.D. Pa Mar. 03, 2020); M. Cavacini, “U.S. Attorney William M. McSwain Announces Charges and Guilty Plea of Former Philadelphia Judge of Elections Who Committed Election Fraud,” U.S. Attys. Office – Pa., Eastern (May 21, 2020) (available at <https://www.justice.gov/usao-edpa/pr/us-attorney-william-m-mcswain-announces-charges-and-guilty-plea-former-philadelphia>).

61. Poll watchers also serve a “get out the vote” function. Traditionally, poll watchers have a list of all registered voters and keep track of those who voted to aid their respective candidates, campaign committees, and political parties in encouraging reliable supporters to vote

on election day. If polling locations fail to open or are relocated and changed, then poll watchers serve to help redirect voters to proper locations in the absence of state guidance. Poll watchers also aid candidates, parties, and the state by quickly identifying issues with polling locations or rogue election officials, thus facilitating the rapid resolution of those issues before voters are disenfranchised.

IV. The Perils of Hastily Moving to an Unmonitored Mail-In Voting System.

62. “States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 50 (1959).

63. However, failing to enact even basic transparency measures or safeguards against fraud creates an obvious opportunity for ineligible voters to cast ballots, invites fraud, and undermines the public’s confidence in the integrity of elections — all of which violate the fundamental right to vote, the guarantee of equal protection, and the right to participate in free, fair, and transparent elections as guaranteed by the United States and Pennsylvania Constitutions.

64. If a state fails to enact even basic integrity and transparency measures it violates the right to free, fair, and transparent public elections because its elections are no longer meaningfully public and the state has functionally denied its voters a fair election.

65. “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195-96 (2008) (plurality op. of Stevens, J.). As the Commission on Federal Election Reform - a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, and cited extensively by the United States Supreme Court - observed, “the ‘electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.’” *Building Confidence*

in *U.S. Election*, Report of the Commission on Federal Election Reform, p. 46 (Sept. 2005) (available at <https://bit.ly/3dXH7rU>, and referred to and incorporated herein by reference) (hereinafter, the “Carter-Baker Report”).

66. According to the Carter-Baker Report, mail-in voting is “the largest source of potential voter fraud.” Carter-Baker Report, p. 46. Many well-regarded commissions and groups of diverse political affiliation agree that “when election fraud occurs, it usually arises from absentee ballots.” Michael T. Morley, *Election Emergency Redlines*, p. 2 (Mar. 31, 2020) (available at <https://ssrn.com/abstract=3564829> or <http://dx.doi.org/10.2139/ssrn.3564829>, and referred to and incorporated herein by reference) (hereinafter, “Morley, Redlines”). Such fraud is easier to commit and harder to detect. As one federal court put it, “absentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). *See also id.* at 1130-31 (voting fraud is a “serious problem” and is “facilitated by absentee voting.”).

67. Courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. As Justice Stevens has noted, “flagrant examples of [voter] fraud ... have been documented throughout this Nation’s history by respected historians and journalists,” and “the risk of voter fraud” is “real” and “could affect the outcome of a close election.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195-196 (2008) (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-in voting is “less reliable” than in-person voting. *Crawford*, 553 U.S. at 212, n.4 (Souter, J., dissenting) (“election officials routinely reject absentee ballots on suspicion of forgery”); *id.* at 225 (“absentee-ballot fraud ... is a documented problem in Indiana”). *See also Veasey v. Abbott*, 830 F.3d 216, 239, 256 (5th Cir. 2016) (en banc) (“mail-in ballot fraud is a significant threat” — so much so that “the potential and reality of fraud is much

greater in the mail-in ballot context than with in-person voting.”). *See also id.* at 263 (“[M]ail-in voting ... is far more vulnerable to fraud.”); *id.* (recognizing “the far more prevalent issue of fraudulent absentee ballots”).

68. Pennsylvania is not immune from mail-in ballot fraud. For example, in 1999, former Representative Austin J. Murphy was indicted by a Fayette County grand jury and then convicted of absentee ballot fraud for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge. *See* B. Heltzel, “Six of seven charges against Austin Murphy dismissed,” *Pittsburgh Post-Gazette* (June 22, 1999) (available at <http://old.post-gazette.com/regionstate/19990622murphy6.asp>, and referred to and incorporated herein by reference). Similarly, in 2014, Richard Allen Toney, the former police chief of Harmar Township in Allegheny County pleaded guilty to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council. *See* T. Ove, “Ex-Harmar police chief pleads guilty to ballot tampering,” *Pittsburgh Post-Gazette* (Sept. 26, 2014) (available at <https://www.post-gazette.com/local/north/2014/09/26/Ex-Harmar-police-chief-pleads-guilty-to-ballot-tampering-Toney/stories/201409260172>, and referred to and incorporated herein by reference). Further, in 2015, Eugene Gallagher pled guilty to unlawfully persuading residents and non-residents of Taylor in Lackawanna County to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election. *See* J. Kohut, “Gallagher resigns from Taylor council, pleads guilty to three charges,” *The Times-Tribune* (Apr. 3, 2015) (available at https://www.thetimes-tribune.com/news/gallagher-resigns-from-taylor-council-pleads-guilty-to-three-charges/article_e3d45edb-fe99-525c-b3f9-a0fc2d86c92f.html, and referred to and incorporated herein by reference). *See also Commonwealth v. Bailey*, 775 A.2d 881, 886 (Pa. Commw. Ct. 2001) (upholding defendant’s conviction for absentee ballot violations,

holding that a county district attorney has jurisdiction to prosecute such claims even in the absence of an investigation and referral by the Bucks County elections board); *In re Center Township Democratic Party Supervisor Primary Election*, 4 Pa . D. & C.4th 555, 557-563 (Pa. Ct. Com. Pl. Beaver 1989) (court ordered a run-off election after evidence proved that fifteen absentee ballots were applied for and cast by non-existent individuals whose applications and ballots were handled by a political ally of the purported winner).

69. Mail-in voting is vulnerable to abuse in several ways. For one, mail-in ballots are sometimes “mailed to the wrong address or to large residential buildings” and “might get intercepted.” Carter-Baker Report, p. 46. For another, absentee or mail-in voters “who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” *Id.* And “[v]ote buying schemes are far more difficult to detect when citizens vote by mail.” *Id.* For example, “[i]ndividuals can sign and sell their absentee ballot,” or “[o]ne spouse can coerce the other to sign the ballot and hand it over to them to vote fraudulently.” *Id.*

70. This risk of abuse by absentee or mail-in voting is magnified by the fact that “many states’ voter registration databases are outdated or inaccurate.” Morley, Redlines, p. 2. A 2012 study from the Pew Center on the States - which the U.S. Supreme Court cited in a recent case - found that “[a]pproximately 24 million - one of every eight - voter registrations in the United States are no longer valid or are significantly inaccurate”; “[m]ore than 1.8 million deceased individuals are listed as voters”; and “[a]pproximately 2.75 million people have registrations in more than one state.” See Pew Center on the States, *Election Initiatives Issue Brief*, “Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade,” (Feb. 2012) (available at <https://www.issuelab.org/resources/13005/13005.pdf>, and referred to and

incorporated herein by reference) (cited in *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (U.S. 2018)).

71. Similarly, a 2010 study by the Caltech/MIT Voting Technology Project found that roughly 9% of “listed registration records in the United States ... are estimated to be invalid.” See Ansolabehere, S., Hersh, E., Report, Caltech/MIT Voting Technology Project, *The quality of voter registration records: A state-by-state analysis*, “Summary,” (Jul 14, 2010) (available at https://elections.wi.gov/sites/default/files/publication/65/the_quality_of_voter_registration_records_harvard__10685.pdf, and referred to and incorporated herein by reference). On top of those invalid records, “in the typical state 1 in 65 records is duplicative, meaning that the same registrant is listed multiple times.” *Id.* The same study found that “[i]n the typical state, 1 in 40 counted votes in the 2008 general election cannot be matched to a registrant listed as having voted” and that “1 in 100 listed registrants is likely to be deceased.” *Id.*

72. The risks of abuse by mail-in voting are compounded by the practice of ballot harvesting: *i.e.*, coordinated efforts to have third parties collect mail-in ballots from voters and drop them off at polling places or elections centers.

73. Ballot harvesters are usually third parties (*i.e.*, campaign workers, union members, political activists, paid personnel, volunteers, or others). They go door-to-door and offer to collect and turn in ballots for voters. “In some documented cases, the workers collecting the ballots have entered into voters’ homes to help them retrieve and fill out their ballots.” S. Crabtree, “Amid Covid Mail-In Push, CA Officials Mum on Ballot Harvesting,” RealClear Politics (Apr. 24, 2020) (available at https://www.realclearpolitics.com/articles/2020/04/24/amid_covid_mail-in_push_ca_officials_mum_on_ballot_harvesting__143036.html, and referred to and incorporated herein by reference).

74. “Ballot harvesting gives third parties who may be completely unknown to both the voter and election officials the opportunity to potentially tamper with absentee ballots” in a number of ways. Morley, *Redlines*, p. 5. For instance, “[h]arvesters may pressure voters into giving them blank ballots or casting their votes a certain way,” or, “[w]hen a voter has voted for the ‘wrong’ candidate, the harvester may surreptitiously change the vote, include additional votes to void the ballot, or simply dispose of the ballot rather than returning it.” *Id.*

75. These forms of misconduct are incredibly difficult to detect. The practice is “especially concerning when third parties who are not related to the voter -- and who may not even be known to the voter -- are permitted to harvest unlimited numbers of ballots, frequently without having to identify themselves to election officials or note their identity on the ballots’ envelopes.” Morley, *Redlines*, p. 4.

76. Ballot harvesting can have a substantial negative impact on elections. For example, in 1993, the Honorable Clarence C. Newcomer of the United States District Court for the Eastern District of Pennsylvania enjoined the Philadelphia County Board of Elections from counting over a thousand voted absentee ballots that had been delivered by Democratic committee members and several campaign workers of William Stinson who was the Democratic candidate for the 2nd senatorial district for the Pennsylvania Senate. *See Marks v. Stinson*, C.A. No. 93-6157, 1994 WL 1461135, 1994 U.S. Dist. LEXIS 5273, at *83 & *96-*99 (E.D. Pa. April 26, 1994). Judge Newcomer found that approximately six hundred (600) of the illegally delivered ballots involved unregistered voters who could not have voted in person at the polls. *Id.*, 1994 U.S. Dist. LEXIS 5273, at *44-*45. Accordingly, because the ballot harvesting violated the Pennsylvania Election Code and the fundamental right to vote protected by the Fourteenth Amendment, Judge Newcomer declared Bruce Marks, the Republican candidate, the winner of that election. *Id.* at *77-*92.

77. To be sure, absentee or mail-in voting can be a legitimate feature of a state's election process when coupled with adequate procedural safeguards to deter fraud. But given the many risks discussed above, in most states, it is an *alternative* implemented carefully and slowly and *only with* such safeguards in place.

78. One procedural safeguard is prohibiting a third party's ability to collect and return another person's absentee or mail-in ballot. As the Carter-Baker Report explains: "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." Carter-Baker Report, p. 46.

79. Another procedural safeguard is specifying the location where absentee or mail-in ballots can be returned and providing for state officials or poll watchers to monitor the return or delivery of ballots to those location.

80. Federal law also recognizes the risks of unmonitored absentee or mail-in voting and thus requires certain first-time voters to present identification. *See* 52 U.S.C. § 21083(b).

V. **Pennsylvania Enacts All-Voter Mail-in Voting.**

81. The Pennsylvania General Assembly may enact laws governing the conduct of elections. *Winston v. Moore*, 91 A. 520 (Pa. 1914). However, "no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions." *Shankey v. Staisey*, 257 A. 2d 897, 898 (Pa. 1970), *cert. denied*, 396 U.S. 1038 (1970).

82. "Prior to the year 1957, the Pennsylvania Constitution permitted absentee voting only by individuals engaged in actual military service (Art. 8, § 6 of the Pennsylvania Constitution (1874)), and by bedridden or hospitalized veterans (Art. 8, § 18 added to the Pennsylvania Constitution (1949))." *Absentee Ballots Case*, 224 A.2d 197, 199 (Pa. 1966).

83. In 1957, the Pennsylvania Constitution was further amended to permit absentee voting for those “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[.]” Pa. Const. art. VII, § 14.

84. In 1960, the Election Code was amended to implement the 1957 amendment to the Pennsylvania Constitution. *Absentee Ballots Case*, 224 A.2d at 200. See also The Act of January 8, 1960, entitled “An Act amending the Act of June 3, 1937,” P.L. 2135, 25 P.S. §§ 3149.1-3149.9 (Supp. 1960).

85. “Absentee voting has consistently been regarded by the Pennsylvania courts as an extraordinary procedure in which the safeguards of the ordinary election process are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d 419, 420 (Pa. Ct. Com. Pl. Phila. 1964).

86. Specifically, “in the casting of an absentee ballot, the ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d at 420.

87. Because “it is fraught with evils and frequently results in void votes,” Pennsylvania’s laws regarding absentee voting are “strictly construed and the rights created thereunder not extended beyond the plain and obvious intention of the act.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d at 420-21 (citing *Decision of County*

Board of Elections, 29 D.&C.2d 499, 506-7 (Pa. Ct. Com. Pl. 1962)). *See also Marks*, 1994 U.S. Dist. LEXIS 5273, at *78.

88. On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. *See Act 2019-77* (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019.

89. Act 77 made significant changes to Pennsylvania’s elections, including the adoption of no excuse mail-in voting for all qualified electors. *See, e.g.*, 25 P.S. §§ 3150.11-3150.17.

90. For both absentee and mail-in voting, Act 77 retains the requirement that to ensure the ballot’s secrecy and to prevent fraud, “the [non-disabled] elector shall send [his or her absentee or mail-in ballot] by mail, postage, except where franked, or deliver it in person to [the] county board of elections,” in order for the ballot to be properly cast under Act 77. *See* 25 P.S. §§ 3146.6(a) & 3150.16(a). Accordingly, as it did prior to the enactment of Act 77, the Election Code bars ballot harvesting of absentee and mail-in ballots cast by non-disabled voters. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1225 (Pa. 2004); *Marks*, 1994 U.S. Dist. LEXIS 5273, at *83.

91. Also, for both absentee and mail-in voting, Act 77 retains the requirement that in order for such ballot to be properly cast:

[T]he [non-disabled] elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and 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.

See 25 P.S. §§ 3146.6(a) & 3150.16(a). Moreover, as it did prior to the enactment of Act 77, the Election Code bars the counting of an absentee or mail-in ballot that either lacks an “Official Election Ballot” or contains on that envelope “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” *See* Election Code Section 1308(g)(i)-(iv), 25 P.S. § 3146.8(g)(4)(i)-(iv). These provisions serve to ensure the secrecy of absentee and mail-in ballots and to prevent fraud.

92. However, in contrast to prior provisions of the Election Code, all absentee and mail-in ballots are no longer sent to polling places on Election Day and are no longer inspected by the local election boards or subject to challenge by poll watchers at the polling places. Instead, Act 77 mandates that all properly cast absentee and mail-in ballots are to remain with the county boards of elections until they are to be canvassed by them. *See* Election Code Section 1308(a), 25 P.S. § 3146.8(a).

93. Additionally, contrary to the prior provisions of the Election Code, Act 77 requires the county boards of elections to conduct a pre-canvass of all absentee and mail-in ballots received to that point before 7:00 a.m. on Election Day. Poll watchers are not permitted to attend this pre-canvass meeting; rather, only one “representative” for each candidate and political party can be present. *See* Election Code Section 1308(g)(2), 25 P.S. § 3146.8(g)(2).

94. Further, contrary to prior provisions of the Election Code, Act 77 mandates that the county boards of elections meet no earlier than the close of polls on Election Day and no later than the third day following the election to begin canvassing absentee and mail-in ballots. But, like prior provisions of the Election Code, poll watchers are permitted to be present when the envelopes containing official absentee and mail-in ballots are opened and when such ballots are counted and recorded. *See* Election Code Section 1308(g)(2) & (b), 25 P.S. § 3146.8(g)(2) & (b).

95. Similar to prior provisions of the Election Code, Act 77 specifies the county board of elections as the location for where voters must mail or personally deliver all cast absentee and mail-in ballots. See Election Code Section 1306(a), 25 P.S. § 3146.6(a); 25 P.S. § 3150.16. Accordingly, other locations, including without limitation mobile locations and polling places, are not authorized for the return or delivery of absentee or mail-in ballots under Act 77. *Id.*

96. Act 77 prohibits an elector from casting both a mail-in ballot and in-person ballot. Specifically, Act 77 provides:

Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.

25 P.S. § 3150.16(b)(1).

97. Further, Act 77 provides that an elector who requests a mail-in or absentee ballot and who is not shown on the district register as having voted may vote only by provisional ballot at the polling place on Election Day, unless the elector remits the unvoted mail-in or absentee ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement under penalties of perjury that he or she has not voted the absentee or mail-in ballot. 25 P.S. § 3150.16(b)(2) & (3).

VI. Defendants' Administration of Pennsylvania's 2020 Primary Election Resulted in Violations of the Election Code and Infringement of Constitutional Rights to Free, Fair and Transparent Public Elections.

98. On June 2, 2020, Pennsylvania held its Primary Election which was the first election that followed the enactment of Act 77 and its unmonitored all voter mail-in voting alternative.

99. Prior to the Primary Election, Pennsylvania election officials estimated that as many as two million (2,000,000) voters would apply to vote by mail. *See Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. May 18, 2020), “Decl. of Jonathan Marks, the Deputy Secretary for Elections and Commissions for Pennsylvania,” ¶ 32 (hereinafter, “Marks Decl.” and referred to and incorporated herein by reference). “Ultimately, more than 1.8 million voters applied for a mail-in or absentee ballot.” *See* “Trump, Biden win Pennsylvania primary contests amid unrest, pandemic,” TRIBLive–Associated Press (June 2, 2020) (available at <https://triblive.com/news/pennsylvania/pennsylvania-primary-begins-amid-unrest-pandemic/>, and referred to and incorporated herein by reference).

100. According to Secretary Boockvar, “nearly 1.5 million voters cast their vote by mail-in or absentee ballot [in the June 2, 2020 Primary Election.]” *See* K. Boockvar, “FixGov: Historic primary paves way for successful general election in Pennsylvania,” The Brookings Institution (June 22, 2020) (available at <https://www.brookings.edu/blog/fixgov/2020/06/22/historic-primary-paves-way-for-successful-general-election-in-pennsylvania/>, and referred to and incorporated herein by reference).

101. Despite the record number of requested and voted absentee or mail-in ballots, Defendants failed to take adequate measures to ensure that the provisions of the Election Code concerning absentee or mail-in ballots, including without limitation the newly enacted Act 77, were followed.

102. For example, on May 14, 2020, Allegheny County reported that an issue with the State’s SURE system was causing the printing and mailing of duplicate mail-in and absentee ballots to voters within its county. *See* A. Downs, “Elections Division Statement on State SURE System Issue Impacting County,” Allegheny County Dept. of Adm. Servs. – Div. of Elections

(May 14, 2020) (available at [file:///H:/Downloads/Elections%20Division%20Statement%20on%20State%20SURE%20System%20Issue%20Impacting%20County%20\(2\).pdf](file:///H:/Downloads/Elections%20Division%20Statement%20on%20State%20SURE%20System%20Issue%20Impacting%20County%20(2).pdf), and referred to and incorporated herein by reference). Further, several Allegheny County residents reported that they never received their mail-in or absentee ballots, and of the more than 280,000 mail-in ballots requested, only 75% of the ballots were received back, as of June 4, 2020. See “Allegheny County voters identify 5 issues to address before November presidential election,” PublicSource (Jun. 4, 2020) (available at <https://www.publicsource.org/allegheny-county-voters-identify-5-issues-to-address-before-november-presidential-election/>, and referred to and incorporated herein by reference).

103. Despite the Election Code’s clear and unambiguous mandate that absentee and mail-in ballots by non-disabled electors were to be mailed or personally delivered to only the county boards of elections, approximately twenty (20) County Election Boards, with Secretary Boockvar’s knowledge and consent, allowed absentee and mail-in ballots to be returned to other locations, such as shopping centers, parking lots, fairgrounds, parks, retirement homes, college campuses, fire halls, municipal government buildings, and elected officials’ offices. See “Voting by Absentee or Mail-In Ballot: County drop boxes and drop-off locations,” Pa. Dept. of State (2020) (available at <https://www.votespa.com/Voting-in-PA/Documents/2020Primary-County-DropLocations.pdf>, and referred to and incorporated herein by reference). See also Joe Brandt and Deanna Durante, “Can You Drop Off a Pa. Mail-In Ballot? It Depends Where You Live,” Channel 10 Philadelphia (May 26, 2020) (available at <https://www.nbcphiladelphia.com/news/local/can-you-drop-off-a-pa-mail-in-ballot-it-depends-where-you-live/2408168/>, and referred to and incorporated herein by reference); Shaunice Ajiwe, “Here Are All the Places You Can Drop Off Your Mail-In Ballot,” Philadelphia Magazine (May 29, 2020) (available at

<https://www.phillymag.com/news/2020/05/29/drop-off-mail-in-ballot/>, and referred to and incorporated herein by reference).

104. Additionally, the Philadelphia County Board of Elections partnered with the Committee of Seventy, a Philadelphia based, self-proclaimed non-partisan group, to implement a mobile mail-in ballot drop-off initiative to collect voted absentee and mail-in ballots from non-disabled voters. The mobile collection occurred between May 30, 2020 and June 1, 2020 at certain schools and shopping centers within Philadelphia County, and was in addition to the Commissioner's "24/7 mail-in ballot drop-off locations" at "[Philadelphia] City Hall (south portal) and [the Philadelphia County] Board of Elections Office at 520 N. Columbus Blvd (Spring Garden entrance)." See Office of the Philadelphia City Commissioners, "Mobile Drop Off Location for Mail-In-Ballot" (available at https://www.philadelphiavotes.com/en/home/item/1814-mobile_drop_off_location_for_mail_in_ballot, and referred to and incorporated herein by reference).

105. Most of the other locations that were used to collect mail-in or absentee ballots for the Primary Election involved the use of unmonitored and/or unsecured "drop-off boxes" and/or other similar means.

106. Moreover, the amount of notice and the fashion in which notice was given concerning the existence, use, and location of the drop boxes and the mobile voting sites varied among the twenty counties that implemented such measures, and many of the notices failed to comply with the Election Code's notice publication requirements. See, e.g., Election Code Sections 106 and 526(c), 25 P.S. §§ 2606 & 2726(c).

107. Under Act 77, the other locations that were used to collect mail-in or absentee ballots for the Primary Election do not constitute a “polling place” as defined in Election Code Section 102(q), 25 P.S. § 2602(q).

108. Moreover, Election Code Sections 526 through 530, 25 P.S. §§ 2726-2729.1, set forth the requirements that must be met for a location to be selected and used as a “polling place.” Notably, Election Code Section 529.1, 25 P.S. § 2729.1, mandates that “[n]o election shall be held in any of the following: ... (5) A vacant lot[; or] ... (7) An office, building or private residence of an elected official.” Accordingly, many of the other locations that were used to collect mail-in or absentee ballots for the Primary Election violated Election Code Section 529.1, 25 P.S. § 2729.1.

109. The other locations that were used to collect mail-in or absentee ballots for the Primary Election were used in violation of the Election Code’s mandatory provisions, including without limitation the clear and unambiguous mandate that absentee and mail-in ballots were to be mailed or personally delivered by the electors to only the county boards of elections, *see* Election Code Section 1306(a), 25 P.S. § 3146.6(a); 25 P.S. § 3150.16, and that no election shall be held in a vacant lot or an office or building of an elected official, *see* Election Code Section 529.1, 25 P.S. § 2729.1.

110. The use of illegal and inadequately noticed drop boxes or mobile drop-off facilities eviscerates the procedural protections that currently accompany Pennsylvania’s vote by mail procedures by creating a gap in the ability of both the Commonwealth and political parties to observe the delivery process and ensure that Pennsylvania’s election laws are being followed.

111. Equally concerning is that, according to a recent report from the Philadelphia County Board of Elections, double voting (*i.e.*, voting by mail and in-person by the same elector)

occurred in the Primary Election. See Jonathan Lai, “Philly elections officials caught 40 cases of double voting. It’s not fraud, but it’s still a problem,” The Philadelphia Inquirer (June 16, 2020) (available at <https://www.inquirer.com/politics/election/pa-primary-election-mail-ballots-double-voting-20200616.html>, and referred to and incorporated herein by reference).

112. The double-voting occurred in Philadelphia despite Act 77’s clear and unambiguous mandate that an elector cannot cast both a mail-in or absentee ballot and an in-person or machine ballot. 25 P.S. § 3150.16(b)(1)-(3).

113. Moreover, not all counties followed the Election Code’s mandate to not count absentee and mail-in ballots that either lacked an “Official Election Ballot” or contained on that envelope “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” For example, upon information and belief, Philadelphia County Board of Election counted such absentee and mail-in ballots, whereas Allegheny County Board of Elections did not.

114. The casting of votes in violation of the Election Code’s mandatory provisions renders them void. *Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1234.

115. Further, for statewide elections involving federal candidates, Defendants’ allowance, by act or omission, of the collection and counting of absentee and mail-in ballots in a manner and at locations that are contrary to the Election Code’s mandatory provisions constitutes legislative action by the Executive Branch in violation of the Elections and Electors Clauses of the United States Constitution.

116. Finally, the lack of statewide standards governing the location of drop boxes and the subsequent use of a patchwork of ad-hoc rules that vary from county to county in a statewide

election involving federal and state-wide candidates violates the equal protection clause of the Fourteenth Amendment. *Pierce*, 324 F. Supp. 2d at 698-699.

VII. Pennsylvania's Poll Watching is Unconstitutionally Restrictive.

117. When initially enacted, Election Code Section 417 restricted a poll watcher's geographical territory to a single appointed election district within the county in which the person was a qualified registered elector. *See* 25 P.S. § 2687 (1947).

118. In 2004, Election Code Section 417 was amended to expand the poll watcher's geographical territory from a single election district to all election districts in the county in which the watcher is a qualified registered elector. 25 P.S. § 2687(b) (2004).

119. In 2019, when Act 77 was enacted, no changes were made to Election Code Section 417 or the county residency requirement of poll watchers.

120. Consequently, as currently written, Election Code Section 417 does not permit a candidate or political party or any other body to appoint a poll watcher to serve in an election district in a county in which the watcher is not a qualified registered elector. *See* Election Code Section 417, 25 P.S. § 2687(b).

121. In this upcoming November 3, 2020 General Election, there are both federal and state-wide candidates, including President Trump and Representatives Thompson, Kelly, Joyce, and Reschenthaler, whose election will be impacted by the manner in which the voting in all sixty-seven (67) counties of the Commonwealth is conducted.

122. Moreover, the Election Code sets forth the uniform standards that all sixty-seven (67) counties must follow in order to conduct any election in this Commonwealth and to cast and count votes, and the provisions of the Election Code do not create different standards for one or more classes of counties. Rather, the standards apply equally to all 67 counties.

123. Accordingly, the manner in which the November 3, 2020 General Election is conducted and in which votes are cast and counted should be uniform across the counties of the Commonwealth.

124. The Equal Protection Clause mandates that the Commonwealth provide and use the same statewide uniform standards and regulations when conducting statewide or multi-county elections involving federal candidates, including without limitation the standards and regulations providing for the casting and counting of votes. *Pierce*, 324 F. Supp. 2d at 698-699. In other words, the Equal Protection Clause requires every county in the Commonwealth to enforce and apply the same standards and procedures for an election, and it does not allow a select few counties to either decline to enforce or employ those standards or develop their own contradicting standards that benefit their voters to the detriment of voters outside their counties. *Id.*

125. Because the standards in the conduct of statewide elections involving federal and state candidates, including without the without limitation the casting and counting of votes, are to be uniform, all Pennsylvania registered voters, regardless of location, have a vested interest in ensuring that the electoral process is properly administered in every election district.

126. The Commonwealth has not, and cannot, articulate a constitutionally-recognized basis to restrict poll watchers from serving in counties other than their county of residence.

127. The Commonwealth's arbitrary rule against voters serving as poll watchers in counties other than their county of residence has real, demonstrable impacts on all Plaintiffs to this action.

128. In Pennsylvania, all Congressional electoral districts contain portions of multiple counties, and President Trump will appear on every ballot that will be cast in the November 3, 2020 General Election in all 67 counties of the Commonwealth. Consequently, all Plaintiffs have

an interest in having their poll watchers monitor the polls in multiple counties to ensure the integrity of the vote on behalf of themselves and the other federal and state electoral candidates and to protect the integrity of the vote on behalf of its registered electors who are voting for federal and statewide Republican candidates.

129. According to statistics collected and disseminated by the Pennsylvania Department of State, there is a significant gap between the number of voters registered as Democrats and the number of registered Republicans in some Pennsylvania counties. *See* “2019 Voter Registration Statistics – Official,” Pa. Dept. of State (Nov. 5, 2019) (available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2019%20Election%20VR%20Stats%20%20final.pdf>, and referred to and incorporated herein by reference) (hereinafter, the “2019 Voter Registration Statistics”).

130. For example, in Philadelphia County, there exist 66 voting wards which are divided into 1,686 divisions (hereinafter, the “Philadelphia Divisions”). *See* Political Maps, Office of the Phila. City Commissioners (2020) (available at <http://www.philadelphiavotes.com/en/resources-a-data/political-maps>, and referred to and incorporated herein by reference). Republicans are not a majority of registered voters in any ward in Philadelphia County. *See* Department Reports and Data, “Historical Citywide Voter Registration Data,” Office of the Phila. City Commissioners (1940-2019) (available at https://files7.philadelphiavotes.com/department-reports/Historical_Registration_1940-2019G.pdf#_ga=2.206750996.604579856.1592778750-1031414694.1591725640, and referred to and incorporated herein by reference).

131. In some contiguous geographic areas of the Commonwealth, such as in Fulton, Franklin, Bedford, Huntingdon and Perry counties, Republicans account for almost 70% of the

voters, thereby placing Democrats at a disadvantage in staffing polling places with Democratic poll watchers. *See* 2019 Voter Registration Statistics.

132. As a result of the Commonwealth's arbitrary restriction on poll watchers, candidates, political parties, and political bodies are unjustifiably burdened in their attempts to locate available, qualified registered electors who can serve as poll watchers.

133. Additionally, Pennsylvania law does not speak to the ability of poll watchers to be present at the other locations that were used to collect mail-in and absentee ballots for the Primary Election to ensure that no third-party delivery or other ballot-harvesting has occurred. *See* Election Code Sections 417 & 102(q), 25 P.S. §§ 2687(b) & 2602(q).

134. Nor are poll watchers permitted to be present during the pre-canvass meetings held on Election Day by the county boards of elections of the absentee and mail-in ballots. *See* Election Code Section 1308(g)(2), 25 P.S. § 3146.8(g)(2).

135. In the June 2, 2020 Primary Election, approximately half of the cast votes were by absentee and mail-in ballots.

136. For the upcoming November 3, 2020 General Election, the predictions are that the same or greater percentage of absentee and mail-in ballots will be cast.

137. Plaintiffs have a substantial interest to ensure that the upcoming November 3, 2020 General Election is conducted in a free, open, and honest manner and that the votes cast are legitimate.

138. The Commonwealth has not articulated and cannot articulate a constitutionally-recognized basis to restrict poll watchers from being present at locations that are used to collect mail-in and absentee ballots prior to or on Election Day (to the extent such collections at locations beyond the County Election Boards' offices or through inadequately noticed and unmonitored ad

hoc drop boxes are authorized by the Election Code, which Plaintiffs assert they are not), or the pre-canvass meeting of such voted absentee and mail-in ballots.

139. The Commonwealth's arbitrary exclusion of poll watchers from being present at locations that are used to collect mail-in and absentee ballots prior to Election Day (to the extent such collections at locations beyond the County Election Boards' offices or through inadequately noticed and unmonitored ad hoc drop boxes are authorized by the Election Code, which Plaintiffs assert they are not), or the pre-canvass meeting of such ballots has real, demonstrable impacts on all Plaintiffs to this action.

140. Poll watchers serve the important purpose of assuring voters, candidates, political parties, and political bodies, who may question the fairness of the election process, that the same is conducted in compliance with the law, and is done in a correct manner which protects the integrity and validity of the vote and ensures that all elections are free, open, fair, and honest.

141. Arbitrarily restricting a registered voter from serving outside of the county of his or her residence and/or limiting his or her activities to only those which occur at a polling place on Election Day results in an unconstitutional infringement on the fundamental right to vote, the guarantee of equal protection, and the right to participate in free and fair public elections as guaranteed by the United States and Pennsylvania Constitutions.

VIII. Need for Judicial Intervention.

142. The current voting regime as employed by Defendants has needlessly resulted in the denial of free and fair elections and other fundamental rights during the Pennsylvania Primary Election. Absent judicial intervention, there is no reason to believe things will be different during the November 3, 2020 General Election.

143. This Court should act now to prevent a recurrence of the problems that manifested in the Pennsylvania Primary Election. Although the November General Election is still months

away, presenting these issues to the Court now allows this Court and the parties sufficient time to develop a record and adequately consider the legal merits of Plaintiffs' claims.

144. Plaintiffs respectfully request that this Court prevent Defendants from making the same mistake twice. In addition to any other affirmative relief that the Court may deem necessary and proper, Plaintiffs seek an order, declaration, and/or injunction that prohibits Defendants from permitting the return of absentee and mail-in ballots to locations other than the respective office of the county boards of elections as prescribed by the Pennsylvania Election Code. In the alternative, if the challenged conduct is not found to be illegal, Plaintiffs seek an order, declaration, and/or injunction instructing Defendants to publish uniform state-wide guidance on absentee ballot drop boxes explaining that the locations for absentee ballot drop boxes are subject to the same notice and determination requirements that Pennsylvania law currently provides for polling places. Further, Plaintiffs seek an order, declaration, and/or injunction that bars County Election Boards from counting absentee and mail-in ballots that lack an "Official Election Ballot" secrecy envelope or contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference. Finally, Plaintiffs seek an order, declaration, and/or injunction that permits poll watchers, regardless of their county of residence, to be present in all locations where votes are cast, including without limitation where absentee or mail-in ballots are being returned before and on Election Day and at any pre-canvass meetings.

COUNT I

First and Fourteenth Amendments

U.S. Const. Art. I § 4, cl. 1; Art. II, § 1, cl. 2; Amend. I and XIV, 42 U.S.C. § 1983 Infringement of the Right to Vote Through Invalid Enactment of Regulations Affecting the Time, Place and Manner of Election by Pennsylvania's Executive Branch

145. Plaintiffs refer to and incorporate Paragraphs 1 through 144 of this Complaint as though the same were repeated at length herein.

146. Voting is a fundamental right protected by the Fourteenth Amendment to the United States Constitution.

147. The Fourteenth Amendment protects the right to vote from conduct by state officials which seriously undermines the fundamental fairness of the electoral process. *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994); *Griffin v. Burns*, 570 F.2d 1065, 1077-78 (1st Cir. 1978).

148. The United States Constitution entrusts state legislatures to set the time, place, and manner of congressional elections and to determine how the state chooses electors for the presidency. *See* U.S. Const. Art. I, § 4, cl. 1 & Art. II, § 1, cl. 2.

149. In Pennsylvania, “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representative.” Pa. Const. Art. II, § 1. *See also* *Winston*, 91 A. at 522 (“The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government.”); *Patterson v. Barlow*, 60 Pa. 54, 75 (1869) (“It is admitted that the Constitution cannot execute itself, and that the power to regulate elections is a legislative one, which has always been exercised by the General Assembly since the foundation of the government.”).

150. Defendants, as a member of the Governor’s Executive Board and county executive agencies, are not part of the General Assembly and cannot exercise legislative power. Rather, Defendants’ power is limited to “tak[ing] care that the laws be faithfully executed.” Pa. Const. Art. IV, § 2.

151. Although the Pennsylvania General Assembly may enact laws governing the conduct of elections, “no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions.” *Shankey v. Staisey*, 257 A. 2d 897, 898 (Pa. 1970), *cert. denied*, 396 U.S. 1038 (1970).

152. The Pennsylvania Election Code mandates that all absentee and mail-in ballots by non-disabled electors “shall” be enclosed in the “Official Election Ballot” secrecy envelope with no text, mark, or symbol which reveals the elector’s identity, political affiliation or candidate preference, and then “shall” be mailed or personally delivered to only the county boards of elections to ensure that the ballots are properly cast, kept secret, and not subject to fraud. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) & 3146.8(g)(4)(i)-(iv).

153. Rather than heeding this mandate, Defendants have knowingly authorized, allowed, and/or permitted some, but not all, of the County Election Boards to collect absentee and mail-in ballots at locations other than their offices, including without limitations mobile sites and locations that the Election Code has mandated shall not serve as polling places, and/or to utilize “drop boxes” and other unmonitored and/or unsecured means. Also, some, but not all, of the County Election Boards count absentee and mail-in ballots that lack the “Official Election Ballot” secrecy envelope or contain a text, mark, or symbol thereon despite the Election Code’s contrary mandate.

154. Permitting absentee and mail-in ballots of non-disabled electors to be collected at locations other than the offices of the county boards of elections and/or through “drop boxes” and other unmonitored and/or unsecured means and to be counted when not cast in the manner mandated by the Election Code allows illegal absent and mail-in voting, ballot harvesting, and other fraud to occur and/or go undetected, and will result in dilution of validly cast ballots.

155. By unilaterally establishing drop boxes and other locations for the return of absentee and mail-in ballots and by counting improperly cast absentee and mail-in ballots, both in contradiction of Pennsylvania’s statutory law, Defendants have increased the potential for ballot fraud or tampering, thus infringing the right to vote as secured to Plaintiffs and their members by

the First and Fourteenth Amendments to the United States Constitution, without any authority to do so.

156. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

157. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT II

Fourteenth Amendment U.S. Const. Amend. XIV, 42 U.S.C. § 1983 Denial of Equal Protection

Disparate Treatment of Nondisabled Absentee/Mail-In Voters Among Different Counties

158. Plaintiffs refer to and incorporate Paragraphs 1 through 157 of this Complaint as though the same were repeated at length herein.

159. The equal enforcement of election laws is necessary to preserve our most basic and fundamental rights.

160. The Equal Protection Clause prevents the government from treating similarly situated voters differently without a compelling justification for doing so. *Bush*, 531 U.S. at 104-05 (“[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”)

161. The requirement of equal treatment is particularly stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

162. The Pennsylvania Election Code mandates that all absentee and mail-in ballots by non-disabled electors “shall” be enclosed in the “Official Election Ballot” secrecy envelope with

no text, mark, or symbol which reveals the elector's identity, political affiliation or candidate preference, and then "shall" be mailed or personally delivered to only the county boards of elections to ensure that the ballots are properly cast, kept secret, and not subject to fraud. *See* 25 P.S. §§ 3146.6(a), 3150.16(a) & 3146.8(g)(4)(i)-(iv).

163. Rather than heeding this mandate, Defendants have knowingly authorized, allowed, and/or permitted some, but not all, of the County Election Boards to collect absentee and mail-in ballots at locations other than their offices, including without limitations mobile sites and locations that the Election Code has mandated shall not serve as polling places, and/or to utilize "drop boxes" and other unmonitored and/or unsecured means. Also, some, but not all, of the County Election Boards count absentee and mail-in ballots that lack the "Official Election Ballot" secrecy envelope or contain a text, mark, or symbol thereon despite the Election Code's contrary mandate.

164. Permitting absentee and mail-in ballots of non-disabled electors to be collected at locations other than the offices of the county boards of elections and/or through "drop boxes" and other unmonitored and/or unsecured means and to be counted when not cast in the manner mandated by the Election Code allows illegal absent and mail-in voting, ballot harvesting, and other fraud to occur and/or go undetected, and will result in dilution of validly cast ballots.

165. Defendants, through their intentional, negligent, or reckless acts or omissions, have violated the Elections and Electors Clauses of the United States Constitution and infringed upon the equal protection rights of Plaintiffs, their members, and all qualified Pennsylvania voters.

166. Defendants have acted and will continue to act under color of state law to violate the Equal Protection Clause of the United States Constitution.

167. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT III

**Pennsylvania Equal Protection and Free and Equal Elections
Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5
Infringement of the Right to Vote Through Invalid Enactment of Regulations
Affecting the Time, Place and Manner of Election by Pennsylvania's Executive Branch
and Denial of Equal Protection via Disparate Treatment of Absentee/Mail-In Voters
Amongst Different Counties**

168. Plaintiffs refer to and incorporate Paragraphs 1 through 167 of this Complaint as though the same were repeated at length herein.

169. The Pennsylvania Constitution also bestows the right to vote upon qualified citizens and to equal protection in the enjoyment of that right. *See* Pa. Const. art. VII, § 1 & art. I, § 28.

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

171. A free and fair election requires ballot security.

172. For the same reasons Defendants have violated the United States Constitution's Elections and Electors Clauses and its First and Fourteenth Amendments and Equal Protection Clause by their intentional, negligent, or reckless failure or refusal to enforce the Election Code's mandated concerning the collection of absentee and mail-in ballots (as stated more fully in Paragraphs 143 through 165 of this Complaint), Defendants have violated the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and have infringed upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

173. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

174. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT IV

**First and Fourteenth Amendments
U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983
Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against
Dilution of Vote by Fraud or Tampering: Poll Watcher Residency Restriction &
Polling Place Restriction**

175. Plaintiffs refer to and incorporate Paragraphs 1 through 174 of this Complaint as though the same were repeated at length herein.

176. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Plaintiffs and all qualified voters in the Commonwealth of Pennsylvania, regardless of their location or residence, have a vested interest in ensuring that the electoral process is properly administered in every election district.

177. Defendants have a duty to establish basic minimum safeguards to guard against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering.

178. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Election Code Section 417, 25 P.S. § 2687, arbitrarily and unreasonably distinguishes between qualified voters within the Commonwealth of Pennsylvania by limiting their service as a poll watcher to only the county of their

residence and by limiting their service as a poll watcher to monitoring only in-person voting at the polling place on Election Day.

179. The Commonwealth has no legitimate interest in arbitrarily restricting the right of any of its qualified voters from serving as a poll watcher to monitor the drop off of absentee and mail-in ballots before Election Day, regardless in what county those ballots may be cast.

180. By failing to allow Pennsylvania voters to serve as poll watchers in counties other than their county of residence or monitor the drop off of absentee and mail-in ballots, Election Code Section 417, 25 P.S. § 2687 makes it extremely difficult or functionally impracticable for candidates and parties to ensure that they have poll watchers at all locations that ballots are being cast in connection with the November 2020 General Election – including remote drop boxes (which Plaintiffs contend are not permitted under the Election Code) – thus fostering an environment that encourages ballot fraud or tampering, and preventing the Commonwealth, candidates, and political parties from ensuring that the General Election is free, fair, and transparent.

181. By failing to take basic precautions to protect against ballot fraud or tampering, Defendants have infringed the right to vote as secured to Plaintiffs and their members by the First and Fourteenth Amendments to the United States Constitution without any compelling reason to do so.

182. On its face and as applied to the 2020 General Election, Election Code Section 417's residency requirement and its "polling place" requirement deny qualified voters in the Commonwealth of Pennsylvania of their fundamental right to a free, fair, and transparent public election process.

183. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

184. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT V

**Pennsylvania Equal Protection and Free and Equal Elections
Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5
Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against
Dilution of Vote by Fraud or Tampering: Poll Watcher Residency Restriction &
Polling Place Restriction**

185. Plaintiffs refer to and incorporate Paragraphs 1 through 184 of this Complaint as though the same were repeated at length herein.

186. For the same reasons Election Code Section 417's county residency requirement and polling place restriction violate the United States Constitution's First and Fourteenth Amendments and its Equal Protection Clause (as stated more fully in Paragraphs 173 through 182 of this Complaint), Election Code Section 417's county residency requirement and polling place restriction violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and infringe upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

187. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

188. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT VI

First and Fourteenth Amendments U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983 Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against Dilution of Vote by Fraud or Tampering: Failure to Notice Drop Box Location

189. Plaintiffs refer to and incorporate Paragraphs 1 through 188 of this Complaint as though the same were repeated at length herein.

190. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Plaintiffs and all qualified voters in the Commonwealth of Pennsylvania, regardless of their location or residence, have a vested interest in ensuring that the electoral process is properly administered in every election district.

191. In the June 2, 2020 Primary Election, some of the County Election Boards, with Secretary Boockvar's knowledge and consent, established drop box and mobile drop box drop off locations for absentee and mail-in ballots in contradiction of state law while providing insufficient public notice regarding the location of these drop boxes or mobile locations.

192. The Election Code requires the County Election Boards to provide not less than twenty (20) days' public notice of the location of all polling places where an election is to be held, and not less than five (5) days' public notice before closing or opening a new polling place. *See* Election Code Section 526(a) & (c), 25 P.S. § 2726(a) & (c); *see also* Election Code Section 106, 25 P.S. § 2606.

193. Moreover, the Election Code provides certain criteria that govern the selectin of sites for polling places. *See* Election Code Sections 527-529.1, 25 P.S. §§ 2727-2729.1.

194. Defendants failed to comply with either the Election Code's notice requirements or these site selection requirements when establishing drop boxes and mobile drop boxes for absentee and mail-in ballots in connection with the June 2, 2020 primary election.

195. In doing so, Defendants increased the likelihood that they would confuse voters and prevent candidates or political parties from notifying voters about the availability and location of the drop boxes or adequately monitoring the drop boxes, thus fostering an environment that encourages ballot fraud or tampering, and preventing the Commonwealth, candidates, and political parties from ensuring that the General Election is free, fair, and transparent.

196. On information and belief, Plaintiffs believe that Defendants intend to repeat this practice in the upcoming November 3, 2020 General Election.

197. Defendants have a duty to establish basic minimum safeguards to guard against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering.

198. By failing to comply with Pennsylvania's statutory notice, Defendants have failed to enact minimal safeguards against dilution of the right to vote by fraudulent ballots or tampering and thus infringe the right of qualified voters in the Commonwealth of Pennsylvania to a free, fair, and transparent public election process.

199. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

200. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

COUNT VII

**Pennsylvania Equal Protection and Free and Equal Elections
Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5
Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against
Dilution of Vote by Fraud or Tampering: Failure to Notice Drop Box Location**

201. Plaintiffs refer to and incorporate Paragraphs 1 through 200 of this Complaint as though the same were repeated at length herein.

202. For the same reasons Defendants' failure to provide the statutory or otherwise adequate notice of drop box locations violates the United States Constitution's First and Fourteenth Amendments and its Equal Protection Clause (as stated more fully in Paragraphs 187 through 198 of this Complaint), Defendants' failure to provide the statutory or otherwise adequate notice of drop box locations violates the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and infringes upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

203. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

204. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

WHEREFORE, Plaintiffs ask this Court to enter judgment in their favor and provide the following relief:

A. An order or declaration that the return of absentee and mail-in ballots by non-disabled electors to locations other than the respective office of the County Election Boards violates the Pennsylvania Election Code and the United States and Pennsylvania Constitutions;

B. In the alternative to the relief requested in Subparagraph (A), an order or declaration that Defendants must comply with Pennsylvania laws governing notice of changes to polling locations and site criteria for polling locations when establishing locations other than their respective offices to which voters may return absentee and mail-in ballots, and ensure that all counties utilize that option;

C. An order or declaration that the counting of absentee and mail-in ballots that lack an “Official Election Ballot” secrecy envelope or contain on that envelope any text, mark, or symbol which reveals the elector’s identity, political affiliation, or candidate preference violates the Pennsylvania Election Code and the United States and Pennsylvania Constitutions;

D. An order or declaration enjoining the enforcement of Election Code Section 417’s residency and “polling place” requirements for poll watchers as a violation of the rights secured by the United States and Pennsylvania Constitutions;

E. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from collecting absentee and mail-in ballots in locations other than in the office of each of the County Election Boards and/or through unsecured and unmonitored drop boxes and other similar means;

F. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from counting absentee and mail-in ballots that lack an “Official Election Ballot” secrecy envelope or contain on that envelope any text, mark, or symbol which reveals the elector’s identity, political affiliation, or candidate preference;

G. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from restricting poll watchers, regardless of their county of residence, to be present in all locations where votes are cast, including without limitation where

absentee or mail-in ballots are being returned before and on Election Day and at any pre-canvass meetings;

H. Plaintiffs' reasonable costs and expenses, including attorneys' fees; and

I. All other relief that Plaintiffs are entitled to and that the Court deems just and proper.

Date: June 29, 2020

Respectfully submitted,

PORTER WRIGHT MORRIS & ARTHUR LLP

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VERIFICATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that I have reviewed the foregoing Complaint and that the factual allegations are true and correct.

Date: June 29, 2020

/s/ James J. Fitzpatrick
James J. Fitzpatrick, PA EDO Director
Donald J. Trump for President

EXHIBIT “2”

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State :
Conference, :
Petitioner :
v. : No. 364 M.D. 2020
: Heard: September 8-9, 2020
Kathy Boockvar, Secretary of the :
Commonwealth, and Jessica Mathis, :
Director of the Bureau of Election :
Services and Notaries, :
Respondents :

BEFORE: HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: September 11, 2020

Presently before the Court for disposition in this original jurisdiction action is the “Application for Special Relief in the Nature of a Preliminary Injunction; and Application for Expedited Hearing Schedule” (Preliminary Injunction Application),¹ which Petitioner the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP) filed on August 6, 2020.² The Court conducted a remote video hearing on the Preliminary Injunction Application on September 8 and 9, 2020, by Cisco WebEx®. The following parties, represented by counsel, participated in the hearing: (1) the NAACP; (2) named 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

¹ The Court granted the “Application for Expedited Hearing Schedule” portion of the Preliminary Injunction Application by Order dated August 11, 2020.

² The NAACP commenced this action by filing a Petition for Review on June 18, 2020.

Services and Notaries (collectively, Respondents); (3) President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate Majority Leader Jake Corman (Senate Leader Intervenors); (4) Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors); and (5) Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (collectively, Republican Committee Intervenors).³

³ As the NAACP's claims and relief in this matter, as set forth in its Petition for Review and Preliminary Injunction Application, bear directly on the November 3, 2020 General Election, which is less than two months away, in the interest of time the Court resolved the pending applications for intervention in an expedited fashion, erring on the side of overinclusion for purposes of creating a fulsome record on the Preliminary Injunction Application. The Court, nonetheless, consulted case precedent on the related, but separate questions of standing and intervention in lawsuits that involve the right to vote and the right to have one's vote counted. *See, e.g., Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 995 (Pa. 2002) (holding that because right to vote is personal, "entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan"); *Erfer v. Cmwltth.*, 794 A.2d 325, 330 (Pa. 2002) (applying *Albert* and confirming holding that Pennsylvania State Democratic Committee lacks standing to bring reapportionment challenge), *abrogated on other grounds by League of Women Voters v. Cmwltth.*, 178 A.3d 737 (Pa. 2018); Order, *League of Women Voters v. Cmwltth.* (Pa. Cmwltth., No. 261 M.D. 2017, filed Nov. 13, 2017) (sustaining preliminary objections challenging standing and, applying *Erfer*, dismissing League of Women Voters as a party petitioner for lack of standing). The Court has also looked to recent orders from the Pennsylvania Supreme Court relating to standing and intervention in similar election-related matters. *See* Order, *Disability Rights Pa. v. Boockvar* (Pa., No. 83 MM 2020, filed May 15, 2020) (denying as moot motions to intervene filed by Senate leaders, House leaders, and Republican political committees); *see also id.* (Wecht, J., concurring) (noting "skepticism that a single chamber of the legislature would have standing to intervene in an action of this nature" based on purported authorization by a majority of the members of each respective chamber); Order, *Crossey v. Boockvar* (Pa., No. 108 MM 2020, filed Aug. 21, 2020) (denying intervention to Republican political committees); *see also id.* (Saylor, C.J., concurring in part & dissenting in part) (noting similar interests between Republican political committees denied intervention and entity named as petitioner); Order, *Pa. Democratic Party v. Boockvar* (Pa., No. 133 MM 2020, filed Sept. 3, 2020) (granting intervention to Senate leaders representing Republican Senate Caucus and to the Republican Party of Pennsylvania, but denying intervention to Republican political committees, other political organizations, and individual electors); *see also id.* (Wecht, J., concurring in part & dissenting in part) (opining that "Republican Party of Pennsylvania can claim only the *prospect* of injury to its political interests, which does not constitute a cognizable basis upon which to intervene in" the case). In light of the foregoing, and in the interest of clarifying

Following the presentation of the NAACP's case in support of its Preliminary Injunction Application, Respondents, Senate Leader Intervenors, House Leader Intervenors, and Republican Committee Intervenors jointly applied for the suspension of the hearing and an order denying the Preliminary Injunction Application. They contended that the NAACP failed to meet its evidentiary burden on the necessary elements for preliminary injunctive relief. The Court heard oral argument from the parties and, thereafter, on the record, granted the application for suspension of the hearing, noting that it was inclined to deny the NAACP's Preliminary Injunction Application. The Court provided reasons for its tentative decision on the record but informed the parties that its decision was not final until it issued a written order. This Memorandum Opinion and the accompany Order represent the Court's final disposition of the NAACP's Preliminary Injunction Application.

The Petition for Review

Generally speaking, the Petition for Review in this matter sets forth the NAACP's concern that the current COVID-19 pandemic will cause various disruptions to the November 3, 2020 General Election (General Election), as were apparent in the June 2, 2020 Primary Election (Primary Election), and that the occurrence of such disruptions will result in the disenfranchisement of large numbers of Pennsylvania voters, particularly African Americans and Latinos, and, concomitantly, violations of rights protected under the United States and Pennsylvania Constitutions. More specifically,⁴ the NAACP raises general

the area of the law, the Court would welcome guidance from the Pennsylvania Supreme Court on the question of organizational standing to sue and/or intervene in matters involving "the right to vote and the right to have one's vote counted." *Erfer*, 794 A.2d at 330.

⁴ In Count I of the Petition, the NAACP alleges generally that the provisions of the Election Code relating to absentee and mail-in voting, the use of electronic voting machines, and the consolidation of polling places severely burden many Pennsylvanians' right to vote in violation of

constitutional claims challenging the “election scheme,” as set forth in the Pennsylvania Election Code⁵ (Election Code), as it relates to absentee and mail-in voting, a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552 (Act 77); in-person voting and the use of electronic voting machines, which Act 77 mandated; and the consolidation of polling places, which the General Assembly and the Governor authorized through the Act of March 27, 2020, P.L. 41 (Act 12) (expired).⁶ Specifically, as it relates to the General Election, the NAACP contends that Pennsylvania has failed to take appropriate steps to protect voters during the pandemic and has otherwise prevented voters from casting their ballots either in person or by mail. The NAACP claims that voters in

the free and equal elections clause of article I, section 5 of the Pennsylvania Constitution. Pa. Const. art. I, § 5 (“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.”). Count II similarly alleges that the Commonwealth’s current election scheme will disproportionately and/or more severely burden many Pennsylvanians’ right to vote in violation of article I, section 5 of the Pennsylvania Constitution, including, in particular, African-American and Latino voters who have been disproportionately affected by COVID-19 in Pennsylvania generally and, on that basis, are more likely to be disproportionately burdened by the current voting scheme in the upcoming General Election. Finally, in Count III, the NAACP alleges that the current election scheme will, again, disproportionately and/or more severely burden Pennsylvania voters in violation of article I, sections 1 and 26 of the Pennsylvania Constitution. Pa. Const. art. I, §§ 1 (“All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”), 26 (“Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”).

⁵ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2600-3591.

⁶ Act 12 amended various provisions of Act 77 and added emergency provisions to the Election Code for the Primary Election only, including provisions postponing the Primary Election to June 2, 2020, permitting the consolidation of polling places, and mandating other steps to ease administration of the Primary Election in light of the unprecedented series of challenges faced by election officials not only due to the COVID-19 pandemic but also because Act 77’s major revisions to the Election Code would be applied to an election for the first time, during a pandemic. Although Act 12 has since expired, which the NAACP acknowledges in its Petition for Review, the NAACP nevertheless argues that there is a “real threat that substantially similar legislation” to Act 12 will be passed for the General Election. (Petition ¶ 73.)

the Primary Election experienced long lines and overcrowding due to the consolidation of polling places, making social distancing nearly impossible (Petition ¶¶ 8-9); inadequate notice of relocated or consolidated polling places (Petition ¶ 10); “an increased risk of transmission of the coronavirus” caused by counties requiring all voters to vote on electronic voting machines and failing to make hand-marked paper ballots available to voters (Petition ¶ 11); and absentee and mail-in ballots that arrived late due to either the county boards of elections’ delay in processing applications and/or sending ballots to voters or delays experienced by the United States Postal Service (USPS), forcing voters to decide either to mail in their ballots and risk that they would arrive late and not be counted or vote in person at great risk to their health (Petition ¶¶ 13, 17). It further claims that African-American and Latino voters, who have been disproportionately affected by the COVID-19 pandemic generally, are more likely to experience these issues compared to other voters. (Petition ¶¶ 18-19.) The NAACP contends that these same issues are likely to repeat themselves in the upcoming General Election without judicial intervention. (Petition ¶¶ 20-21.)

As relief, the NAACP seeks a comprehensive order directing the Secretary to: (1) ensure that each county board of elections maintains a sufficient number of polling places so each resident can exercise his or her right to vote; (2) require that each county board of elections gives adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, and posts such notice at old polling places; (3) require increased access to mail-in voting across the Commonwealth by (a) automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences, (b) ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another

person, (c) requiring each county to provide ballot drop boxes and to accept ballots returned to a drop box by the close of the polls on Election Day, and (d) providing adequate guidance to election officials when verifying mail-in ballots through signature matching and requiring notice and an opportunity to cure a mail-in ballot with facial defects, such as a mismatched signature; and (4) require that all polling places in the Commonwealth use hand-marked paper ballots for the General Election, while retaining at least one electronic voting machine for those voters who request to use same and as required by Federal law. (See Petition at ¶¶ 66-67 (Wherefore Clause).)

Preliminary Injunction Application

The NAACP's Preliminary Injunction Application seeks even more comprehensive relief pertaining to the General Election than that requested in the Petition for Review, including an order directing the Secretary to: (1) ensure that each county board of elections maintains a sufficient number of polling places *to ensure that no voter must wait more than 30 minutes to vote*; (2) require that each county board of elections mails notice to voters of any change in polling place *at least three weeks in advance of the General Election*, as well as posting at old polling places; (3) *ensure that the Secretary provides for the accessibility of polling locations when reviewing county boards of elections' applications to consolidate any polling locations and disapproves any proposed consolidation that would require any voter to travel more than 0.5 miles farther than the distance to their normal polling place*; (4) require *at least two weeks of early in-person absentee and mail-in voting for the General Election in advance of Election Day and instruct county boards of elections offices to establish satellite or mobile locations where voters can request, complete, and submit their mail-in ballots, in a range of easily accessible locations, and during weekends and evenings*; (5) require increased

access to vote by mail across the Commonwealth, by among other things, (a) directing county boards of elections to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences, (b) requiring each county to provide ballot drop boxes, and (c) accepting ballots returned to a drop box by close of the polls on Election Day, (6) *instruct county boards of elections to expand number of ballot drop boxes where voters can return their voted ballots by the close of polls on Election Day*; (7) require the use of *low-touch* hand-marked paper ballots *as the primary voting methods*, while retaining at least one accessible voting machine per polling place for those who request one and as required by Federal law; and (8) *require all persons to wear a mask at all times while in polling places or in lines outside polling places and ensure that all polling places allow six-foot separation at all stages.* (See Preliminary Injunction Application ¶ 8 (additional relief sought in Preliminary Injunction Application indicated by italicized text).)

Preliminary Injunction Standard

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made[;] it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hr’g Bd. of Little Brittain Twp., Lancaster Cty., Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994), *appeal denied*, 663 A.2d 696 (Pa. 1995). Thus, a preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* The party seeking a preliminary injunction bears a heavy burden and must establish the following:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;

(3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.

Brayman Constr. Corp. v. Dep't of Transp., 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Patriot-News Co. v. The Empowerment Team of the Harrisburg Sch. Dist. Members*, 763 A.2d 539, 546 (Pa. Cmwlth. 2000).

Here, the NAACP seeks a *mandatory* preliminary injunction against the Secretary, requiring her to direct each of the 67 Pennsylvania county boards of elections “to put in place temporary and common-sense procedures to ensure that the constitutional rights of millions of Pennsylvania voters are protected during an unprecedented public health crisis.” (Preliminary Injunction Application at 1.) According to the NAACP, the failure of the Court to grant the mandatory injunctive relief it seeks will result in the unconstitutional disenfranchisement and denial of thousands of Pennsylvania voters’ fundamental right to vote in a free, fair, and equal election. This Court has stated that a mandatory preliminary injunction

is one which goes beyond a mere restraint and commands acts to be done or undone. As such, mandatory preliminary injunctions should be more sparingly issued than those prohibitory in nature. In order to obtain a preliminary mandatory injunction, the moving party must demonstrate that he is legally entitled to immediate relief and that he will suffer irreparable injury if the relief is not granted.

Lewistown Police Ass'n v. Mifflin Cty. Reg'l Police Dep't, 661 A.2d 508, 510 n.11 (Pa. Cmwlth. 1995); see *Mazzie v. Cmwlth.*, 432 A.2d 985, 988 (Pa. 1981); *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972). Furthermore, “courts will grant a mandatory injunction only upon a *strong showing* that the plaintiff has

a clear right to relief.” *Medico v. Makowski*, 793 A.2d 167, 169 (Pa. Cmwlth. 2002) (emphasis added).

Analysis

The Court has considered the record testimonial and documentary evidence offered by the NAACP in support of its Preliminary Injunction Application. The Court finds the testimony of the NAACP’s witnesses credible. Nonetheless, the Court concludes that the NAACP’s evidentiary presentation fell well short of the high burden that must be satisfied before this Court can grant the requested mandatory preliminary injunctive relief.

The NAACP failed to prove that, absent the requested mandatory injunctive relief, the NAACP and/or its members are likely to suffer immediate and irreparable harm. Much of the NAACP’s evidentiary presentation related to the difficulties its members encountered during the Primary Election under Act 77 and Act 12. The NAACP failed to prove that these difficulties, related almost exclusively to the consolidation of polling places in certain counties authorized by Act 12, are likely to recur during the General Election.

Reverend Kenneth L. Huston, Dr. Joan Duvall-Flynn, Ed.D., and Springfield Township Commissioner Eddie Graham, all of whom serve the NAACP in some capacity, honestly and credibly testified about their negative experiences while voting in the Primary Election, their fear of contracting COVID-19, and how deeply they care about their fundamental right to vote. The Court was so moved by their testimony that it is convinced that *nothing*, including a global pandemic, could prevent these three witnesses from voting in the upcoming General Election. Under the Election Code, they, and all Pennsylvanians, will be able to choose to vote in person at a polling place, by mailing in their ballot, or by hand-delivering a mail-in ballot to the county boards of elections.

In fact, Reverend Huston⁷ adamantly testified that despite voting in person in the Primary Election, he will vote by mail-in ballot in the General Election so as not to expose himself to the crowded conditions he experienced while voting in person in the Primary Election. Dr. Duvall-Flynn⁸ testified that she was also able to vote in the Primary Election and did so by mail-in ballot; she plans to use a mail-in ballot for the General Election as well. Commissioner Graham⁹ testified that he, too, voted in the Primary Election; however, he did not receive the mail-in ballot he applied for until the day of the Primary Election, despite having requested it in April 2020. He, therefore, travelled to his consolidated polling place on Election Day with a mask and gloves in order to vote, which he did. Commissioner Graham also testified that he plans to vote in person in the General Election because he does not trust the mail.

What this testimony shows is that these three witnesses are deeply committed to exercising their fundamental right to vote no matter the current, or future, circumstances. It shows that they have elected the option to cast their vote that best fits their personal circumstances and concerns in relation to the COVID-19 pandemic. The NAACP did not show that these voters, or any other voters, will suffer some cognizable harm to their right to vote in the absence of the requested relief in the Preliminary Injunction Application.

⁷ Reverend Huston testified that he lives in Monroeville in Allegheny County, Pennsylvania, serves as President of the NAACP Pennsylvania State Conference, and has been a member thereof for approximately 20 years.

⁸ Dr. Duvall-Flynn testified that she resides in Glen Mills in Delaware County, Pennsylvania, has a doctorate degree in education as well as other degrees, is a lifelong member of the NAACP, and has served the NAACP in a multitude of capacities during her lifetime.

⁹ Commissioner Graham testified that he lives in Oreland in Montgomery County, Pennsylvania, is a retired corporate attorney, is now serving his second term on the Springfield County Board of Commissioners, and has served the NAACP in numerous capacities.

Dr. Marc Meredith,¹⁰ testifying as an expert witness on behalf of the NAACP, opined that the “cost of voting”¹¹ in person increases when potential voters’ polling places are moved; that increased costs of voting may cause potential voters to vote by mail rather than in person or to abstain from voting altogether; and that racial and ethnic minorities are more likely to be disenfranchised due to the increased costs of voting in person. The Court finds the testimony of Dr. Meredith credible from a political science perspective. The Court accepts Dr. Meredith’s expert opinion that lower voting costs tend to increase voter turnout—*i.e.*, the higher the cost to vote, the less likely someone will vote. The Court, however, does not find Dr. Meredith’s opinion sufficient to establish immediate and irreparable harm. Dr. Meredith acknowledged in his testimony that the cost to vote is driven by many factors and that there is no such thing as a “cost-free” election. To the extent this cost-to-vote principle has any value in the context of the Preliminary Injunction Application, the NAACP would have had to show by evidence that, without the requested mandatory preliminary injunctive relief, the cost to vote in the upcoming General Election is likely to be so high that it would infringe upon the constitutional right to vote and to have one’s vote counted. The NAACP failed to establish such a connection.

¹⁰ Dr. Meredith testified that he is an associate professor of political science at the University of Pennsylvania and holds both a master’s degree in political science and a Ph.D. in political economics, as well as other commendable degrees. He explained that his focus is on American politics and elections. The Court accepted Dr. Meredith as an expert in political science and voter behavior, without objection.

¹¹ In this context, “cost to vote” is broadly understood as encompassing both monetary—*e.g.*, the costs of postage, gas, etc., and opportunity—*e.g.*, the value of time spent traveling to a polling place and in line waiting to cast an in-person ballot—costs incidental to exercising one’s right to vote.

Dr. David Weber's testimony¹² was certainly helpful in terms of understanding issues generally relating to the spread of COVID-19 and effective methods to limit the spread of the disease. Like Dr. Meredith's testimony, however, not much weight can be given to Dr. Weber's testimony in terms of proving the NAACP's entitlement to a mandatory preliminary injunction in this case. For example, while Dr. Meredith offered his opinions relating to the risk of transmission of COVID-19 through the use of common touch services, he also opined on how those risks can be mitigated. He certainly did not offer any opinion in support of the view that common touch services must be avoided entirely during the pandemic.

The NAACP failed to present any evidence that the Secretary or the county boards of elections are ignoring the risks of COVID-19 transmission and recommended mitigation efforts when planning for the upcoming General Election. Indeed, both Jonathan Marks, who serves as Deputy Secretary for Elections and Commissions at the Department of State, and Seth Bluestein, who serves as Chief Deputy Commissioner for Philadelphia City Commissioner Al Schmidt and oversees elections in Philadelphia, testified about ongoing efforts to mitigate the risk of spread of the virus during in-person voting. And, of course, voters who remain concerned about contracting the virus at a polling place may exercise the option of voting by mail. Nothing in Dr. Weber's testimony, or in the testimony of Mr. Marks or Mr. Bluestein, convinces the Court that voters will be, or are likely to be, disenfranchised in the upcoming General Election absent the requested mandatory injunctive relief.

¹² Dr. Weber is a medical doctor and professor of medicine, pediatrics, and epidemiology at the University of North Carolina School of Medicine. After sustaining various objections regarding the scope of Dr. Weber's testimony, the Court accepted Dr. Weber as an expert in epidemiology.

In reaching this conclusion, the Court does not pass on the question of whether the relief that the NAACP seeks in this case and in its Preliminary Injunction Application reflects good policy with respect to the administration of elections, during times of a pandemic or otherwise. That is not the question before the Court. The question is whether the requested relief is a constitutional imperative—*i.e.*, whether the requested relief *is necessary* to prevent immediate and irreparable constitutional injury. On this question, we find that the NAACP has not met its burden.

Given that we are not convinced that the NAACP has made the necessary showing of irreparable harm, the Court cannot fully engage in the balancing of harms contemplated by the second criteria for a preliminary injunction. Nonetheless, based on the requested relief and the testimony of both Mr. Marks and Mr. Bluestein, the Court finds that ordering the requested mandatory preliminary injunctive relief will impose costs and burdens on all 67 counties of the Commonwealth. While those costs are not easily quantifiable, the Court does not believe they would be insignificant or *de minimis*. Similarly, the testimony of Mr. Marks and Mr. Bluestein shows that the Department of State and the City of Philadelphia are actively preparing for the upcoming General Election. The testimony also shows that the NAACP is currently engaged in voter education efforts relating to mail-in voting. The mandatory preliminary injunctive relief that the NAACP seeks would certainly disrupt those efforts and likely the efforts of county boards of elections across the state to plan for the upcoming General Election. The Court is concerned that issuing the type of relief the NAACP seeks could also confuse the public as to how, where, and when they may cast their vote. For these reasons, the second and sixth criteria counsel against issuance of the requested mandatory preliminary injunctive relief.

With regard to whether the NAACP established a very strong showing that it has a clear right to the relief it seeks, the Court is not persuaded. The Petition for Review in this matter does not allege that any specific provision of the Election Code is unconstitutional on its face or even as-applied. Rather, the NAACP alleges that the Election Code, as a whole, is inadequate to address the unique circumstances of voting during a global pandemic and that this inadequacy is particularly acute for African-American and Latino voters. The bulk of the NAACP's concerns, however, stem from events during the Primary Election that were confined to a handful of the more populous counties in the Commonwealth, particularly in and around Philadelphia and Allegheny Counties, and in response to Act 12, which is no longer in effect. The Election Code expressly contemplates that issues may arise during an election and provides that such issues are to be addressed by the court of common pleas of each county.¹³ Accordingly, the Court is not convinced that the Petition for Review presents a strong case for the prophylactic *statewide* mandatory preliminary injunctive relief that the NAACP seeks. Even if the NAACP could meet the burden of rebutting the presumption of constitutionality attached to the Election Code,¹⁴ the Court doubts it has the authority to grant the remedy that the NAACP seeks in its

¹³ Section 1206 of the Election Code, 25 P.S. § 3046 (providing that each county court of common pleas “shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act”); see *In re General Election in City & Cty. of Phila. on November 8, 1938*, 2 A.2d 301 (Pa. 1938) (holding that, where a voter’s registration card is not produced by election commission at the voting place at the time of an election, as required by statute, such voter may apply to any judge of the court of common pleas for relief pursuant to Section 1206 of the Election Code); see also *In re General Election—1985*, 531 A.2d 836 (Pa. Cmwlth. 1987) (affirming decision of court of common pleas to suspend general election in eleven election districts for two weeks due to severe flooding, loss of electricity, and heat and water because of extreme weather, and rejecting request to hold new, county-wide election).

¹⁴ *Pa. Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017).

Petition for Review. *See, e.g., In re Fortieth Statewide Investigative Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (“In responding to the present constitutional challenge, our Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself, as that is not our proper role under our constitutionally established tripartite form of governance.”).

With respect to the final criteria, the NAACP’s requested relief would create a new paradigm for the upcoming General Election. It neither preserves the status quo nor restores the parties to any prior status. Moreover, the requested mandatory injunctive relief is overbroad when compared to the alleged constitutional injury. What the NAACP seeks ventures into policymaking territory in the conduct of elections reserved to the General Assembly under the United States Constitution.¹⁵ Indeed, the relief that the NAACP seeks in its Preliminary Injunction Application is, in the Court’s view, incompatible with the policy choices made by the General Assembly, as reflected in the Election Code.

For the above reasons, the NAACP has failed to meet its burden of establishing all of the criteria for entitlement to the mandatory preliminary injunction that it seeks in its Preliminary Injunction Application. The Preliminary Injunction Application is, therefore, denied.


P. KEVIN BROBSON, Judge

¹⁵ U.S. Const. art. I, § 4, cl.1.

EXHIBIT “3”

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State	:	
Conference,	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	
Kathy Boockvar, Secretary of the	:	
Commonwealth, and Jessica Mathis,	:	
Director of the Bureau of Election	:	
Services and Notaries,	:	
Respondents	:	

ORDER

AND NOW, this 11th day of September, 2020, upon consideration of the preliminary objections to the Petition for Review Addressed to this Court’s Original Jurisdiction (Petition) of the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP), it is hereby **ORDERED** as follows:

1. The first and second preliminary objections of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (Respondents), based on demurrer and ripeness, respectively, are **SUSTAINED**. The third preliminary objection of Intervenor Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenor), based on demurrer, is **SUSTAINED**. The first preliminary objection of Intervenor President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate

Majority Leader Jake Corman (Senate Leader Intervenors), based on ripeness, is **SUSTAINED**. The second and sixth preliminary objections of Intervenors Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (Republican Committee Intervenors), based on ripeness and demurrer, respectively, are **SUSTAINED**. The NAACP has failed to allege adequate facts demonstrating a constitutional violation/injury, beyond mere speculation, that would warrant the grant of the statewide relief requested in the Petition.

2. In light of our decision sustaining preliminary objections challenging the legal sufficiency of the NAACP's Petition (on the basis of demurrer and ripeness), the Court does not address the remaining preliminary objections. The Court notes, however, that the preliminary objection asserted by Respondents, House Leader Intervenors, Senate Leader Intervenors, and Republican Committee Intervenors raising the failure to join indispensable parties, those being the 67 Pennsylvania county boards of elections, has merit in light of the relief the NAACP seeks in its Petition. Nonetheless, if the Court were to grant this preliminary objection, the Court would not have dismissed the Petition without first providing the NAACP with the opportunity to amend its pleading to add the indispensable parties.

3. The Petition is **DISMISSED**.



P. KEVIN BROBSON, Judge

EXHIBIT “4”

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Mark A. Aronchick (ID No. 20261)
Michele D. Hangle (ID No. 82779)
Robert A. Wiygul (ID No. 310760)
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One Logan Square, 27th Floor
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(215) 568-6200

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA, et al.

Respondents.

No. 364 MD 2020

**RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
TO PETITIONER'S PETITION FOR REVIEW**

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I. PRELIMINARY STATEMENT

Respondents neither discount the very real threat of COVID-19 nor deny the effects that the pandemic is having on Pennsylvanians' lives. But even in the face of an unprecedented health crisis, rules of pleading, justiciability, jurisdiction, and sovereign immunity retain their importance. For four reasons, these rules require dismissal of the Petition for Review (the "Petition").

First, Petitioner falls short of carrying the heavy burden required to make out constitutional claims supporting the extremely broad relief sought. Petitioner requests judicial imposition of its preferred reforms to election law, based on a combination of alleged constitutional violations that purportedly *may* arise from some combination of factors related to the current COVID-19 crisis. But, as shown below, Petitioner does not allege facts sufficient to support (a) many of the injuries alleged or (b) a concrete need for the extensive relief sought. Second, for many of the same reasons, much of what Petitioner claims is too speculative to be justiciable. Third, Petitioner seeks affirmative relief from Pennsylvania's county boards of elections, who are not named as Respondents—relief that squarely implicates the jurisdiction vested in the boards of elections by the Election Code. Moreover, Petitioner accuses these nonparties of violating the Pennsylvania Constitution, making them indispensable to resolution of this litigation. And fourth, the Petition is barred by sovereign immunity, as the requested relief takes

the form of mandatory injunctions that would require Respondents, who are both state officials, to issue various directives or implement various judicially imposed policies.

In short, Respondents do not dispute that at least some of the reforms sought by Petitioner might be beneficial and facilitate Pennsylvanians' exercise of the franchise. But the question presented by Petitioner's lawsuit is not whether the reforms would be good public policy; it is whether the Court can require their implementation, in derogation of the Election Code and *as a matter of constitutional law*, based on the facts alleged in the Petition. As a matter of law, the answer is no. Accordingly, the Court should sustain Respondents' Preliminary Objections and dismiss the Petition.

II. STATEMENT OF JURISDICTION

Respondent objects to the exercise of this Court's jurisdiction because Petitioner has failed to join indispensable parties, as detailed *infra* Section VI.C.

III. STATEMENT OF THE CASE¹

No one disputes that the 2020 Pennsylvania primary election was

¹ For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition's well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but "need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

unprecedented. This is true for at least four reasons. First, the recent primary was the first election in which any registered voter in Pennsylvania could vote by “no excuse” mail-in ballot, even if that voter was otherwise ineligible for an absentee ballot. *See* Pet. ¶ 114. Second, most Pennsylvania counties launched new, modernized voting technology during the primary election. Third, the primary election marked the first time in recent memory that the Commonwealth administered an election during a pandemic. *See id.* ¶ 45. The COVID-19 crisis is, as Petitioner alleges, presenting significant and unique challenges to the administration of elections. Fourth, on the eve of the election, several parts of the Commonwealth experienced widespread protests that impeded transportation, closed some election offices, and triggered states of emergency in six counties.

The Petition purports to identify issues that arose from these unique challenges and allegedly affected some voters who cast ballots in person and by mail during the June primary election. Petitioner alleges some voters encountered (i) long lines and overcrowding at consolidated polling places, *id.* ¶ 9; (ii) insufficient notice of relocated polling places, *id.* ¶ 10; (iii) an “increased risk of transmission of coronavirus” allegedly caused by some counties’ use of electronic voting machines, *id.* ¶ 11; and (iv) late-arriving absentee and mail-in ballots, forcing voters to run the risk of mailing votes that might arrive after the election day ballot-return deadline, *id.* ¶ 17.

The Petition assumes that the Department, the Commonwealth, and the county boards of election have learned nothing from the June primary. Instead, Petitioner posits that if all parties responsible for elections follow the *same exact procedures* in November—even after administering the June primary election (which was (i) Pennsylvania’s first time using no excuse mail-in voting and (ii) the first election to coincide with a pandemic in a century) and seeing the issues that voters encountered—the same alleged issues will affect the general election. *See id.* ¶¶ 131–37 (“The experiences of Pennsylvania voters in the Primary Election detailed throughout this Petition is just a preview of what is going to happen during the November General Election[.]”).²

First, Petitioner forecasts that, because of COVID-19, voting *in person* in November will be unsafe because (i) *if* counties consolidate polling places, it will result in crowding and long lines, which will in turn make social distancing difficult, *id.* ¶¶ 8–9; and (ii) *if* counties exclusively use electronic voting machines in the same ways, either voters will have to interact with contaminated surfaces or crowding will increase, *id.* ¶ 11. Additionally, Petitioner asserts that *if* polling places are relocated again, voters who wish to vote in person may not receive

² *See also* Pet. ¶ 73 (“Although the emergency election procedures in Act 12 by its terms applied only to the Primary Election, there is a real threat that substantially similar legislation will be passed that will be applied to the November 2020 election[.]”)

adequate notice of changed or consolidated polling places. *Id.* ¶ 10.

Second, Petitioner identifies difficulties with *voting by mail* that may arise in November, because (i) individual voters might be afraid to vote in person, *id.*; (ii) the processing of applications for absentee and mail-in ballots, and mail delivery of applications and the ballots themselves, may be delayed, *id.* ¶¶ 13–15.

To redress these alleged future injuries, Petitioner seeks an extraordinarily broad array of relief regarding the November general election, including an Order directing Respondents to:

- (i) “require each county board of election to maintain a sufficient number of polling places such that each resident can exercise his or her right to vote”;
- (ii) “provide that each county board of election give adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, as well as posting at old polling places”;
- (iii) “[p]ermit”—and, as recent filings by Petitioner make clear, *require* “early voting for the General Election in advance of election day”;
- (iv) “[r]equire increased access to vote by mail across the Commonwealth”
 - (a) “automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences”;
 - (b) “ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another person”;
 - (c) “requiring each county to provide ballot dropboxes, and accepting ballots returned to a drop-box by close of polls on Election Day”; and
 - (d) “providing adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch”; and

(v) “[r]equire that all polling places in the Commonwealth use handmarked paper ballots for the 2020 General Election, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law.”

See id. at pp. 66–67.³

As Petitioner’s recently filed application for a preliminary injunction makes clear the phrasing of the Petition’s prayer for relief actually *understates* both the breadth and depth of the relief Petitioner seeks. As Petitioner has now clarified, it seeks a mandatory injunction:

1. Directing Respondents to ensure that there are a sufficient number of polling places to ensure that no voter must wait more than 30 minutes to vote;
2. Directing Respondents to require county boards of elections to mail notice to voters of any change in polling place at least three weeks in advance of the General Election, as well as posting at old polling places;
3. Directing Respondents to ensure that Respondents [sic] provide for the accessibility of polling locations when reviewing county board of elections applications to consolidate any polling locations and ensure that no voter needs to travel more than 0.5 miles further [sic] from their normal polling place;
4. Directing Respondents to require at least two weeks of early in-person absentee and mail-in voting for the November general election in advance of election day and instruct county boards

³ The Petition for Review appears to be limited to relief for the November 2020 General Election. *See* Pet. ¶ 4. For some of the requested relief, Petitioner explicitly limits its request to the 2020 General Election, scheduled for November 3, 2020. Additionally, each “Count” is specifically limited to alleged constitutional violations occurring “during this pandemic[.]” *See* Pet. at pp. 58, 61, 63 (capitalization omitted).

of elections to establish satellite or mobile locations where voters can request, complete, and submit their mail-ballots, in a range of easily accessible locations, and during weekends and evenings;

5. Directing Respondents to require increased access to vote by mail across the Commonwealth, by among other things, directing county boards to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences; requiring each county to provide expanded access to ballot drop boxes, and accepting ballots returned to a drop-box by the close of polls on Election Day;
6. Directing Respondents to instruct county boards of elections to expand the number of ballot drop boxes where voters can returned [sic] their voted ballots by the close of polls on Election Day;
7. Directing Respondents to require that all polling places in the Commonwealth use low-touch hand-marked paper ballots as the primary voting method, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law; and
8. Directing Respondents to require all persons in polling places or in lines outside polling places to wear a mask and ensure that all polling places allow six-foot separation at all stages.

Memorandum of Law in Support of Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction 11-12 (Aug. 6, 2020).⁴

⁴ Notably, unlike other petitions currently pending before Pennsylvania courts, *see, e.g.*, Amended Petition (filed July 13, 2020), *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sup. Ct.), the Petition here does *not* seek to extend the deadline by which county boards must receive voters’ completed absentee and mail-in ballots. As Respondents have recently noted, judicial extension of the received-by deadline is—unlike the sweeping structural injunctions sought by Petitioner here—appropriately tailored to redress the burdens on the right to vote caused by recent

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioner speculates about a combination of injuries that may occur and seeks relief that is not tailored to those future constitutional injuries, should the Court dismiss Petitioner's claims because the injuries do not rise to a constitutional level?

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

Where Petitioner speculates about a combination of constitutional injuries that may occur and seeks relief that is not tailored to those future constitutional injuries, should the Court dismiss Petitioner's claims because speculation (i) is too remote to satisfy the immediacy requirement for standing and (ii) provides insufficient factual development to render a claim ripe?

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

Where Petitioner seeks relief that would mandate that county boards of elections take affirmative action, based on the allegation that the county boards of elections are unconstitutionally disenfranchising voters by burdening the right to cast in person and mailed votes, does the Court lack jurisdiction because Petitioner has not named the county boards of election as respondents?

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

Where Petitioner seeks relief that would compel Respondents to implement broad, structural reforms to the administration of Pennsylvania elections, including affirmatively directing action by the county boards, is that relief barred by the doctrine of sovereign immunity?

delays in mail delivery that are expected to continue through the November 2020 general election. *See* Praecipe to Withdraw Certain of Respondents' Preliminary Objections Based on United States Postal Service's Announcement of Statewide Mail Delays Affecting General Election (Aug. 13, 2020), *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sup. Ct.). Such relief is far more discrete, and far more amenable to implementation by judicial decree, than the panoply of structural reforms sought in the Petition, which would require wide-ranging, ongoing judicial superintendence of county-board-level administrative procedures in every county across the Commonwealth.

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

V. SUMMARY OF ARGUMENT

The Petition should be dismissed for four reasons.

First, Petitioner’s claims are legally insufficient because the Petition fails to state a constitutional claim that could warrant the requested relief. Constitutional challenges to election statutes are cognizable only where an injury is concrete. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden 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) (citation and quotation omitted). Moreover, “nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Here, the Petition asserts constitutional violations across all of Pennsylvania, but Petitioner has alleged primarily conjectural—rather than clear, palpable and plain—constitutional injuries. Perhaps even more significantly, Petitioner only speculates that the proper way to address its future injuries is the expansive relief identified in the Petition. As the Supreme Court recently said of a

similar challenge, “the instant request ... is predicated upon mere speculation While circumstances may change, the possibility that votes may be suppressed ... as presently alleged, is too remote at this time to constitute a cognizable injury.” *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467, at *1 (Pa. May 15, 2020) (Wecht, J., concurring statement). Because the Petition is speculative with respect to the specific relief requested, the Court should dismiss the claims as legally insufficient.

Second, Petitioner’s claims are not justiciable and are unripe. To have standing to sue, a claimant must have “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). If the claimant’s interest in the litigation is too “remote or speculative,” however, she lacks standing to bring her claims. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). Likewise, for Petitioner’s claims to be ripe, there must be an “actual controversy,” and Petitioner must allege facts “sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Just as Petitioner has not alleged adequate facts to demonstrate a constitutional injury legally sufficient to warrant the relief sought, Petitioner lacks standing to seek that relief.

Third, Petitioner failed to join indispensable parties. Petitioner not only accuses the Department of State of violating the Pennsylvania Constitution,

Petitioner also faults the conduct of the county boards of elections. Petitioner’s requested relief also reaches far beyond a declaration that certain election procedures are unconstitutional during the COVID-19 pandemic; Petitioner also requests an injunction affirmatively requiring Respondents *and the county boards of elections* to adopt new criteria and procedures for administering the November election. *See* Pet. at pp. 66–67. But much of the relief sought by Petitioner would, as a matter of statute, have to be implemented by the boards of election. Because Petitioner seeks to compel action by the county boards of election—and because Petitioner alleges that the county boards are violating the Pennsylvania Constitution—the boards of election are indispensable parties that must be joined in this litigation.

Fourth and finally, each request for relief in the Petition is barred by sovereign immunity. Sovereign immunity⁵ prohibits suits that “seek to compel affirmative action on the part of state officials.” *See Fawber v. Cohen*, 532 A.2d 429, 433–34 (Pa. 1987) (emphasis in original) (citation omitted). Here, Petitioner does not merely seek a declaration that certain laws or practices are unlawful. Instead, Petitioner requests that the Court order Respondents to implement various reforms, including by ordering the county boards enact various new procedures.

⁵ Although sovereign immunity is an affirmative defense, it may be raised in preliminary objections where a delayed ruling would serve no purpose. *See Faust v. Dep’t of Revenue*, 592 A.2d 835, 838 n.3 (Pa. Commw. Ct. 1991).

Petitioner’s requests, that the Court compel action by Respondents, violate well-established principles of sovereign immunity.

For all of these reasons, and as shown below, the Court should sustain Respondents’ Preliminary Objections and dismiss the Petition.

VI. ARGUMENT

A. The Court Should Dismiss the Petition as Legally Insufficient Because It Does Not Allege a Constitutional Violation

The Petition is legally insufficient because Petitioner only speculates about remedying potential constitutional injuries on a statewide basis. But Petitioner must make a “clear, palpable and plain demonstration” of unconstitutionality to overcome the “presumption that lawfully enacted legislation is constitutional.” *Yocum*, 161 A.3d at 238. “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.’ The presumption that legislative enactments are constitutional is strong. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 278–79 (Pa. 2019) (internal citations omitted).⁶

⁶ Although Petitioner seeks to add new requirements to existing election law rather than expressly challenging the validity of any particular statutory provision currently in effect, the premise from *Yocum* applies with equal force. Each Count of the Petition, for example, demonstrates that Petitioner is challenging “the

Petitioner cannot carry its heavy burden. Petitioner only speculates about potential burdens on in person voting during the General Election. Petitioner alleges, for example, that across Pennsylvania, county boards will consolidate polling places, which will in turn cause confusion about where voters go to vote and will cause in person voters to experience overcrowding and lines. *See* Pet. ¶¶ 54–74. But according to Petitioner, during the June primary election, these issues arose directly from the passage of Act 12 of 2020,⁷ which Petitioner recognizes *only applied to the June 2020 Primary Election*. *See id.* ¶¶ 55–59, 73. Nonetheless, according to Petitioner, “[a]lthough the emergency election procedures in Act 12 by its terms applied only to the Primary Election, there is a *real threat* that substantially similar legislation *will be passed* that will be applied to the November 2020 election to reduce the number of polling places, without adequate notice to voters.” *Id.* ¶ 73 (emphasis added). Because the constitutional injuries that Petitioner attributes to consolidated polling places will allegedly arise only *if* the legislature enacts legislation similar to Act 12, *without making any material revisions*, the allegations lack the palpability required of constitutional injuries. *See Yocum*, 161 A.3d at 238.

Commonwealth’s Election Laws and Practices.” *See* Pet. at p. 58 (Count I); p. 61 (Count II); p. 63 (Count III).

⁷ Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12.

It is equally conjectural whether Petitioner’s other allegations regarding potential future issues associated with in person voting will rise to a constitutional level. Petitioner predicts that voters across the Commonwealth may face potential technical difficulties and heightened risk of exposure to COVID-19 on unsanitary surfaces and because of overcrowding and lines caused by attempts to clean electronic voting machines. *See, e.g.*, Pet. ¶¶ 76–78; 90–92. But Petitioner identifies scant evidence of *any* such issue arising during the June primary election: an observation by an unidentified county *in Georgia* that electronic voting machines were “slower than before due to distancing and sanitation requirements” and required additional measures, *id.* ¶ 93 (an observation that is hardly surprising and furnishes no basis for comparison with the performance during the pandemic of other voting systems), and Northampton County’s request that voters “bring their own gloves” to polling places, *id.* ¶ 94. The Petition is silent as to the remaining 65 counties in the Commonwealth.

The alleged injuries are thus contingent on Petitioner’s speculation that certain events may occur and, if those future events do arise, that they will be so severe as to rise to the level of unconstitutionality. Petitioner does not allege any concrete, historical facts supporting its supposition that using electronic voting systems carries particularly high risks of infection or undue delays, compared to the hand-marked paper ballots preferred by Petitioner. Nor does Petitioner assert

how two discrete issues that allegedly arose in the past—one showing that pandemic-related precautions caused delays in one county in Georgia, and another requesting voters elsewhere provide their own gloves—are so severe as to be unconstitutional or are representative of a larger, statewide trend. Because the alleged injury turns on what counties *might* do and requires significant extrapolation to all of Pennsylvania’s 67 counties, Petitioner’s claims do not rise to a constitutional level. *See Yocum*, 161 A.3d at 238.

Petitioner also relies on conjecture in asserting a need for sweeping reforms to absentee and mail-in balloting. Petitioner points to issues with mail-in and absentee ballot application processing that allegedly occurred in June and suggests those same alleged problems will recur: Counties received a late surge of applications to vote by mail, Pet. ¶ 124; Counties could fall behind on processing applications, *see id.* ¶ 125; and thus voters will be “precluded from voting” because they will not have “sufficient time to receive and return the ballot to the board of elections by Election Day,” *id.* ¶ 129; *see also id.* ¶ 137. Even assuming some or all of those events recur, however, Petitioner does not offer anything linking those specific harms to its requested relief, such as automatically sending ballot applications to all registered voters. Pet. at pp. 66–67. That is not to say that Respondents disagree with Petitioner’s requested relief as a matter of *policy*. Nonetheless, to claim entitlement to its requested relief, Petitioner must show that

said relief is actually needed to remedy a clear, palpable and plain constitutional violation. Because Petitioner’s requested relief is not “tailored to the [alleged] injury,” it should be denied. *Ucheomumu v. Cty. of Allegheny*, 729 A.2d 132, 135 (Pa. Commw. Ct. 1999).

On the whole, the Petition is based on speculation, both about certain injuries and the redress sought. On the whole, the allegations in the Petition do not rise to the level of “clear, palpable and plain” constitutional violations, *Yocum*, 161 A.3d at 238,⁸ and, in any event the requested relief is not palpably tied to the violations alleged. Accordingly, because Petitioner’s constitutional claims are legally insufficient, its claims should be dismissed.

B. The Court Should Dismiss the Petition Because Petitioner’s Claims Are Not Justiciable

Petitioner’s claims are not justiciable for two reasons: Petitioner lacks standing and its claims are unripe. First, Petitioner does not have standing to bring its claims. To establish standing to seek relief from this Court, Petitioner must demonstrate that it is “aggrieved,” *i.e.*, that Petitioner has “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). “[A]n individual can demonstrate that he is aggrieved if he can establish

⁸ By contrast, an extension of the received-by deadline for completed absentee and mail-in ballots is relief narrowly tailored to address the Postal Service’s recent announcement of statewide delays that will affect the delivery of ballots in the period leading up to the general election. *See supra* note 4.

that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). “[A]n interest is ‘immediate’ if the causal connection is not remote or speculative.” *Id.* (citation omitted).

Here, Petitioner’s interest is not “immediate” for the same reasons that it has not alleged a constitutional injury: Petitioner relies on speculation to support its assertion that (a) overcrowding and unclean voting surfaces will be so widespread—exacerbated by electronic voting machines in particular—that the attendant issues will rise to an *unconstitutional* level *across the Commonwealth*, and (b) absent the sweeping relief requested by the Petition, voters will have an insufficient opportunity to vote by mail (and, faced with that reality, some voters will be forced to vote in-person). Whether these “possible harm[s]” will come to bear is “wholly contingent on future events”—among other things, the actions taken by election officials (as well as legislators). *Id.* at 660. Because the Petition does not show that the predicted issues with in person voting “ha[ve] harmed [Petitioner] or will harm [Petitioner] in any way that is not remote or speculative, [Petitioner] fail[s] to demonstrate that [it] ha[s] an immediate interest,” as is required for standing. *Id.* Likewise, Petitioner’s speculation about its need for extensive reforms related to mail-in and absentee balloting are not adequately

tethered to Petitioner’s identified harms.

Second, Petitioner’s claims are not justiciable on ripeness grounds. Like standing, the principle of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010). Unlike standing, however, ripeness “also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Respondents *do not* contend that the case cannot possibly become ripe until after the election is over. Instead, Respondents note only that Petitioner must offer facts about the *November* election in support of its claims – and, in particular, in support of Petitioner’s assertion that (a) the alleged difficulties with in person voting that arose in June will recur, and (b) the proposed relief is needed to remedy the alleged injuries regarding absentee and mail-in voting.

Accordingly, because Petitioner has not satisfied the requirements for standing and because its claims are not ripe, Respondents respectfully request that this Court sustain their second Preliminary Objection and dismiss the Petition.

C. The Court Should Dismiss the Petition for Nonjoinder of Indispensable Parties

Petitioner failed to join the county boards of election, who are indispensable parties to this action. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a

party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *see also CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The 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) (quotations and citations omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that, at least for the upcoming election, Petitioner seeks relief that would write into existence *new law* and compel *affirmative action* by the county boards of election, including requiring, either directly or indirectly, (a) “each *county board of election* to maintain a [certain] number of polling places” in accordance with metrics prescribed by Petitioner⁹; (b) “each *county board of election* [to] give adequate notice to voters of any change in polling place

⁹ *See* Memorandum of Law in Support of Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction 11-12 (Aug. 6, 2020) (seeking an order “[d]irecting Respondents to ensure that there are a sufficient number of polling places to ensure that no voter must wait more than 30 minutes to vote”).

by mailing notice to voters sufficiently in advance of the General Election,” (c) the boards to permit early voting; (d) “each *county* to provide ballot dropboxes”; and (e) all counties in the Commonwealth to use hand-marked paper ballots for the 2020 General Election. *See* Pet. at pp. 66–67 (emphasis added). As in *CRY, Inc.*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioner’s requested relief will require extensive cooperation and affirmative steps from the county boards of elections.

Moreover, much of Petitioner’s requested relief is uniquely within the purview of the boards of election. The Election Code vests the board of each county with “jurisdiction over the conduct of ... elections in such county.” 25 P.S. § 2641(a). Under the Election Code, the boards are responsible for, among other things, “select[ing] and equip[ping] polling places”; “purchas[ing], preserv[ing], stor[ing] and maintain[ing] primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and ... procur[ing] ballots and all other supplies for elections”; and “prepar[ing] and publish[ing] ... all notices and advertisements in connection with the conduct of primaries and elections[.]” 25 P.S. § 2642. Although Petitioners seek to assert judicial control over nearly every aspect of the November election, they have not joined the county boards that

would be responsible for implementing the changes they seek.

Additionally, Petitioner's claims hinge largely on its expectation that county boards of elections, or their employees, will engage in conduct violating voters' constitutional rights. *See* Pet. ¶¶ 90–92. Because Petitioner alleges that the county boards of election will be at least partially responsible for the violations of the Pennsylvania Constitution predicted by the Petition, “justice [cannot] be afforded without violating the due process rights of” the boards. *DeCoatsworth*, 639 A.2d at 797; *see also CRY*, 640 A.2d at 376 (party was indispensable where it was accused of “misfeasance and malfeasance”).

Petitioner was required to join the county boards of election. As this Court recently observed in a similar case, *Crossey v. Boockvar*, the presence of accusations “against the county boards of elections” and the fact that “this Court cannot order the court boards of elections to provide [relief] . . . without being allowed to defend” “present[] a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.”

Memorandum Opinion at 9, *Michael Crossey, et al. v. Kathy Boockvar, et al.*, No. 266 M.D. 2020 (Pa. Commw. Ct. May 28, 2020) (Leavitt, J.) (unreported opinion).

Petitioner accuses the county boards of wrongdoing and seeks relief specifically from the county boards. The counties are entitled to defend themselves from the allegations against them and, if the Court decides that a Constitutional violation is

taking place, to have a say in the fashioning of a remedy. Indeed, without the presence of the boards as respondents, the relief sought by Petitioner—even if it could otherwise be granted—would be impossible to implement or enforce. Thus, the county boards of elections are necessary parties to this litigation.

D. Sovereign Immunity Bars the Petition Because the Requested Relief Amounts to a Sweeping Mandatory Injunction

Petitioner requests relief that would require affirmative action by Respondents, running afoul of sovereign immunity. Sovereign immunity prohibits suits that “seek to compel *affirmative action on the part of state officials.*” *Fawber*, 532 A.2d at 433–34 (emphasis in original) (citation omitted); *accord Stackhouse v. Commonwealth*, 892 A.2d 54, 61 (Pa. Commw. Ct. 2006) (“sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials”); *see also Snelling v. Dept. of Transp.*, 366 A.2d 1298, 1304 (Pa. Commw. Ct. 1976) (holding sovereign immunity bars portion of suit seeking to compel the Secretary of the Department of Transportation “to revoke previously issued high-way occupancy permits”).

The relief sought by Petitioner violates sovereign immunity because it includes multiple requests for a mandatory injunction requiring Respondents to issue directives to the county boards of election. For example: “Petitioner requests that this Court . . . a. Direct Respondents to require each county board of elections to maintain a sufficient [] number of polling places such that each resident can

exercise his or her right to vote; b. Direct Respondents to provide that each county board of election give adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, as well as posting at old polling places[.]” Pet. at p. 66. Petitioner also asks the Court to order Respondents to institute “early voting for the General Election in advance of election day.”¹⁰ *Id.* at p. 67. The doctrine of sovereign immunity prevents Petitioner from obtaining an order requiring Respondents to issue particular directives to the county boards of elections or otherwise compelling Respondents to engage in affirmative acts. Indeed, for that very reason, this Court denied a preliminary injunction against the former Secretary in an election-related case where the petitioner sought relief “ordering Respondents to immediately cease running any broadcast, print, electronic, Internet or other advertisements or displays that still tell voters they must have photo ID to vote.” *Applewhite v. Com.*, No. 330 M.D. 2012, 2012 WL 5374328, at *1 (Pa. Commw. Ct. Nov. 1, 2012).

The Court said:

Of particular importance is the strong possibility that Respondents are immune from mandatory injunctive relief. Although sovereign immunity does not bar a declaratory judgment action or injunction seeking to prohibit state parties, *i.e.*, state agencies or employees,

¹⁰ To the extent Petitioner also seeks, through this request for relief, to have the Court direct the actions of the counties—who would, of necessity, also need to be intimately involved in the implementation of any early-voting regime—this request for relief further underscores that the county boards of election are indispensable parties.

from acting, sovereign immunity does apply to an action seeking to compel state parties to act. ... Here, it is very doubtful that I can legally compel Respondents to take most of the steps Petitioners seek.

Id. at *3 (alterations, citations, and quotations omitted). The same is true here.

The Court should dismiss all of Petitioner's requested relief as a matter of law, on the grounds that it seeks to compel extensive affirmative action by Respondents and thus violates principles of sovereign immunity.

VII. CONCLUSION

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

Respectfully submitted,

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Dated: August 13, 2020

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: August 13, 2020

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