

IN THE SUPREME COURT OF PENNSYLVANIA

**Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired
Americans,**

Petitioners,

v.

No. 108 MM 2020

**Kathy Boockvar, Secretary of the
Commonwealth of Pennsylvania, and Jessica
Mathis, Director of the Bureau of Election
Services and Notaries of the Pennsylvania
Department of State,**

Respondents,

**BRYAN CUTLER, Speaker of the
Pennsylvania House of Representatives,
KERRY BENNINGHOFF, Majority Leader
of the Pennsylvania House of
Representatives,**

**Proposed-Intervenor
Respondents.**

**APPLICATION FOR LEAVE TO FILE
AMENDED PRELIMINARY OBJECTIONS**

Proposed-Intervenors, Speaker of the Pennsylvania House of Representatives
Bryan Cutler,¹ and Majority Leader of the Pennsylvania House of Representatives

¹ Proposed-Intervenors notify the Court of the newly appointed House Leaders. After the May 14th Petition to Intervene, Mike Turzai resigned his office, and Bryan Cutler became the House Speaker. Consequently, due to the Majority Leader vacancy

Kerry Benninghoff (collectively, “House Leaders”), respectfully request leave to file Amended Preliminary Objections upon their admission into this case. In support of this request, the House Leaders state the following:

On May 14, 2020, the House Leaders, by and through their undersigned counsel, moved to intervene as respondents in the above-captioned proceeding under Rule 2328 of the Pennsylvania Rules of Civil Procedure. Subsequently, on June 24, 2020, Petitioners sought leave to file an Amended Petition. The parties and the proposed intervenors did not oppose Petitioners’ request to amend their Petition. The Court granted Petitioners’ request to amend on July 8, 2020, and provided Petitioners until July 13, 2020 to file an Amended Petition. The Court further established that “[r]esponses are due . . . within 14 days of the filing of the Amended Petition.” July 8, 2020 Order.

Petitioners filed their Amended Petition for Declaratory and Injunctive Relief (“Amended Petition”) on July 13, 2020 to “clarify the claims and issues . . . as they

created, Kerry Benninghoff is now the House Majority Leader. *See* Pa.R.A.P. 502(c) (“When a public officer is a party to an appeal or other matter in an Appellate Court in his official capacity and . . . resigns or otherwise ceases to hold office, the matter does not abate and his *successor is automatically* substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.”) (emphasis added). The newly appointed House Leaders are named in the caption of this Application and the Proposed Order. However, if the Court prefers, official titles may also be used. *See* Pa. R.A.P. 503. (“When a public officer is a party to an appeal or other matter in his official capacity he may be described as a party by his official title”).

pertain to the November general election,” and to present new factual allegations “including events that occurred during the June 2 primary.” Petitioners’ Consent Application for Leave to File an Amended Petition by July 13, 2020, at 5. The Amended Petition pleads additional facts, many of which relate to the June primary and had not occurred when the House Leaders submitted their Proposed Preliminary Objections, as well as new legal theories and arguments. *See, e.g.*, Amended Petition at ¶¶ 36-38.

Pennsylvania law establishes that respondents can, as a matter of right, amend preliminary objections in response to a petitioner’s amendment of their petition. 231 Pa. Code § 1028 (c) (“If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot”); 231 Pa. Code § 1028 (f) (“Objections to any amended pleading shall be made by filing new preliminary objections.”). Consistent with this legal right, the Court, here, allowed and required responses to Petitioner’s Amended Petition to be filed by July 27, 2020. Notwithstanding this right, which was triggered by Petitioners’ amendment of their Petition, the House Leaders submit this application for leave to file their Amended Preliminary Objections out of an abundance of caution because the House Leaders have not yet been formally admitted as respondents in this case and the July 27, 2020 response deadline will have expired upon the House Leaders’ admission into this case. The Amended Preliminary Objections allow the House Leaders to file a

complete response to the broadened scope of the Amended Petition, and to protect their rights that are implicated by the Amended Petition.

In support of this Application, the House Leaders submit: (1) the proposed Amended Preliminary Objections and supporting Memorandum of Law, which are attached as **Exhibit “A”**; and (2) a proposed Order is attached as **Exhibit “B”**.

WHEREFORE, House Leaders respectfully request that this Court grant their application for leave to file Amended Preliminary Objections, thereby allowing them to file the Amended Preliminary Objections attached as **Exhibit “A”** upon the Court’s granting of the House Leaders’ pending Petition to Intervene.

/s/ Jake Evans

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*House of the Pennsylvania House of
Representatives Kerry Benninghoff*

Dated: July 27, 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

*Counsel for Proposed-Intervenors Speaker of
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Representatives Kerry Benninghoff*

IN THE SUPREME COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

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v.

Kathy Boockvar, Secretary of the
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Department of State,

Respondents,

BRYAN CUTLER, Speaker of the
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KERRY BENNINGHOFF, Majority Leader of
the Pennsylvania House of Representatives,

Proposed-Intervenor Respondents.

No. 108 MM 2020

**ORDER GRANTING APPLICATION FOR LEAVE
TO FILE AMENDED PETITION**

AND NOW this _____ day of _____ 2020, upon consideration of Proposed Intervenor Bryan Cutler, as Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff's, Majority Leader of the Pennsylvania House of Representatives, Application for Leave to File Amended Preliminary Objections, it is hereby **ORDERED** that said Application is **GRANTED**.

It is further ORDERED that Petitioners may file their Amended Preliminary Objections upon, if ever, Bryan Cutler, as Speaker of the Pennsylvania House of Representatives and Kerry Benninghoff's, Majority Leader of the Pennsylvania House of Representatives, admission into this case.

BY THE COURT:

EXHIBIT A

NOTICE TO PLEAD

Petitioner: You are hereby notified to file a written response to the enclosed Preliminary Objections within thirty (30) days from service hereof, or a judgment may be entered against you.

/s/ Zachary M. Wallen

Zachary M. Wallen

**Counsel for Proposed-Intervenor
Respondents**

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2020

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

Petitioners,

v.

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

Respondents,

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

Proposed-Intervenor Respondents.

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

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Pennsylvania House of Representatives
Kerry Benninghoff*

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

PRELIMINARY STATEMENT

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

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

3. The political branches of government are now in the process of analyzing the conduct of the Primary Election. They recently enacted Act 35 of 2020, which will require the Secretary of the Commonwealth to publish a report on the

2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. From this, the political branches will be able to analyze the conduct of the 2020 Primary Election so that they are in a position to enact such additional measures as may be required for the 2020 General Election.

4. Instead of allowing the Secretary of the Commonwealth to draft the report required by Act 35, and permitting the political branches to analyze those findings and data and to continue to craft legislation addressing any needed changes, Petitioners desire this Court to redesign an election code of their own choosing, notwithstanding the violence to our constitutional norms.

5. As an initial matter, Petitioners lack the standing necessary to even bring this action. Petitioner, the Pennsylvania Alliance for Retired Americans, is an association, in contravention of well-established case law that only individuals have standing to bring election-related claims in Pennsylvania.

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

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

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

9. The challenged policies are all perfectly constitutional election regulations. For the feasibility of election administration, the Commonwealth’s political branches have pondered the relevant policy considerations and made the

policy choice that the deadline for a county board of elections to receive a ballot should occur at 8:00 p.m. on Election Day. This is not some nefarious scheme designed to deprive anyone of their constitutional rights, but a constitutional effort to make the Commonwealth's elections free, fair, and workable.

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

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

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

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

I. FACTUAL BACKGROUND

14. Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with the Commonwealth Court on April 22, 2020, seeking for the Court to impose four election policies of their choosing, namely that the Court require the Secretary of the Commonwealth to “a. [p]rovide postage on all absentee and mail-in ballots; b. [i]mplement additional procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail services delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause; c. [a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots . . . and d. [p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” Original Pet. at Pages 34-35.

15. On June 17, 2020, the Hon. Mary Hannah Leavitt, President Judge of the Commonwealth Court, determined that Section 13(2) of Act 77 of 2019 vested

exclusive jurisdiction in this Court to hear this matter, and thereby transferred this matter to this Court pursuant to 42 Pa. C.S. 5103(a).

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

17. Where the Original Petition sought that its requested relief be perpetual, the Amended Petition asks for the same relief of an altered received-by deadline, the requirement for pre-paid postage, and the permission of third-party ballot harvesting, only limited to the duration of the COVID-19 pandemic.¹ Amended Pet. ¶ 83.

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

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

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

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

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

21. 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.

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

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

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

25. Following the June 2, 2020 Primary Election, the political branches again worked in bipartisan fashion to enact Act 35 of 2020, which will require the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. 2020 Pa. Legis. Serv. Act 2020-35 (H.B. 2502) (West).

26. From the Act 35 report, the Legislative and Executive Branches will be able to analyze the 2020 Primary Election and use those findings to enact all further measures as may be required to ensure that the Commonwealth continues to have free and fair elections.

II. PRELIMINARY OBJECTIONS

A. FIRST PRELIMINARY OBJECTION: Petitioners Lack Standing to Bring This Action (Pa. R. Civ. P. 1028(a)(4))

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

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

29. To have standing, a party in an action must establish “a substantial, direct and immediate interest in the outcome of the litigation.” *Robinson Twp. v.*

Commonwealth, 83 A.3d 901, 917 (Pa. 2013) (quoting *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

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

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

32. “[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert*, 790 A.2d at 995 (citation omitted). When “the right to vote and the right to have one’s vote counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; *see also Erfer*,

794 A.2d at 330 (dismissing Democratic Committee). “The factor that elevates the general interest of each registered voter to one that is sufficiently substantial to confer standing to challenge a candidate’s nomination petition is that voter’s eligibility to participate in the election.” *In re Pasquay*, 525 A.2d 13, 14 (Pa. Commw. 1987), *aff’d* 529 A.2d 1076 (Pa. 1987).

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

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

35. There is no allegation that the Alliance is authorized by law to vote in the Commonwealth; accordingly, it lacks capacity to sue—either individually or on

behalf of its members—due to the nature of the claims in this case and must be dismissed as a party.

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

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

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

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

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

39. Act 12 of 2020 introduced numerous accommodations to ensure the 2020 Primary Election could be conducted safely. 2020 Pa. Legis. Serv. Act 2020-

12 (S.B. 422) (West). The date of the Primary Election was moved until June to allow more time to “flatten the curve” and protect the health of Pennsylvania’s voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties to establish polling places without court approval. *Id.*

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

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

42. Moreover, the political branches only recently enacted Act 35, through which a thorough analysis of the Primary Election will be conducted. The political

branches will then use those findings to deliberately consider what policies may be necessary for the conduct of future elections.

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

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

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

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

Primary Election); Amended Pet. ¶ 15 (Petitioner Brenda Weinreich stating that she was able to vote by mail in the Primary Election).

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

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

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

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

50. Here, Petitioners’ alleged injury is very speculative, and they rely on a string of conjectures and theories and fall substantially short of “rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017).

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

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

53. Ripeness “arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. . . . It has been defined as the

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

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

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

56. Notwithstanding this review process, Petitioners ask this Court to wade into the political question of election policy choices, which are the product of bipartisan and bicameral compromise.

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

58. The U.S. and Pennsylvania Constitutions place great emphasis on the role of the Legislative Branch in the setting of election policy. One of the very first

provisions of the U.S. Constitution is the Elections Clause, which provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.” U.S. Constitution Art. I, Section 4, Clause 1.

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

60. “The presumption that legislative enactments are constitutional is strong.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019)

(citing *Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008)); see also 1 Pa.C.S. § 1922(3) (in ascertaining intent of General Assembly in enactment of statute, presumption exists that General Assembly did not intend to violate federal and state constitutions).

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

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

63. 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).

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

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

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

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

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

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

69. 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.*

70. 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.

71. The “received by” deadline is a clear policy choice made by the Legislature in consultation with the Governor. Petitioners seem to have the mistaken

opinion that Election Day is somehow the beginning of the election process, where instead it is the final step in a cycle that began many months before, when candidates began circulating nomination petitions. *See* 25 P.S. § 2868. Election Day is the end of the election cycle and Act 77 is reflective of that bipartisan policy choice.

72. “The Code sets forth various time requirements for the completion of balloting, the strict enforcement of which is necessary to ensure the fair and orderly administration of elections.” *In re Apr. 10, 1984 Election of E. Whiteland Twp., Chester Cty.*, 483 A.2d 1033, 1035 (Pa. Commw. Ct. 1984). For example, nomination petitions must be “filed on or before the tenth Tuesday prior to the primary” and polling places close at 8:00 p.m. on Election Day. 25 P.S. § 2873(d); 25 P.S. § 3045.

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

2. Ballot Harvesting

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

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

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

The absentee voter shall:

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

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

77. This Court has already examined and rejected the argument that this statutory language permits third party ballot harvesting. The case in question considered a challenge to the requirement that “absentee ballots delivered by third persons on behalf of non-disabled voters are invalid under Section 3146.6 of the

Election Code. . .” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004).

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

79. “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).

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

pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

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

3. Payment of Postage for Mail-In Ballots

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

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

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

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

county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).²

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

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

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

² Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.*, Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots); see also Amended Pet. ¶ 68 (noting that Allegheny and Philadelphia Counties elected to provide postage for mail-in ballots for the 2020 Primary Election).

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

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

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

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

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

92. Accordingly, where the court determines that a law is unconstitutional, “it is not the role of this Court to design an alternative scheme which may pass constitutional muster.” *Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984). The Courts “will not judicially usurp the legislative function and rewrite [the statute]. . .

. Rather, we leave it to our sister branch for an appropriate statutory response”
Commonwealth v. Hopkins, 117 A.3d 247, 262 (Pa. 2015).

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

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

with the Legislature, for additional editing of [the statute] on our part would amount to judicial legislation.”).

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

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

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

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

97. Pennsylvania law establishes that a court must join indispensable parties to an action, or, if not possible, dismiss the action “[w]henever it appears by suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b).

98. Indispensable parties are those “whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect

such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975).

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

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

101. This Court has laid out a series of factors to consider as to whether a party is indispensable, namely: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without

violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994).

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

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

104. Petitioners mis-apply the Election Code and mistakenly treat the county election boards as though they are the agents of the Secretary of the Commonwealth,

but the county boards of elections play a separate and pivotal role in the governance of Pennsylvania elections.

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

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

107. In a divided, 4-3 decision, the Court rejected the Secretary of the Commonwealth's preliminary objection that the county elections boards were indispensable parties to that action, but that denial was based on the fact that the petitioners did "not seek redress from the . . . counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors." *Id.* at 44.

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

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

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

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

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

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 266 MD 2020

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

Petitioners,

v.

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

Respondents,

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

Proposed-Intervenor Respondents.

[PROPOSED] ORDER

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

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

SO ORDERED BY THE COURT:

IN THE SUPREME COURT OF PENNSYLVANIA

No. 108 MM 2020

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

Petitioners,

v.

**KATHY BOOCKVAR, IN HER CAPACITY AS SECRETARY OF THE
COMMONWEALTH OF PENNSYLVANIA; AND JESSICA MATHIS, IN
HER CAPACITY AS DIRECTOR OF THE BUREAU OF ELECTION
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REPRESENTATIVES, KERRY BENNINGHOFF, MAJORITY LEADER
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

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

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

PRELIMINARY STATEMENT

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

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

The political branches of government are now in the process of analyzing the conduct of the Primary Election. They recently enacted Act 35 of 2020, which will require the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. From this, the political branches will be able to analyze the conduct of

the 2020 Primary Election so that they are in a position to enact such additional measures as may be required for the 2020 General Election.

Instead of allowing the Secretary of the Commonwealth to draft the report required by Act 35, and permitting the political branches to analyze those findings and data and to continue to craft legislation addressing any needed changes, Petitioners ask this Court to redesign an election code of their own choosing, notwithstanding the violence to our constitutional norms.

As an initial matter, Petitioners lack standing to bring this action. Petitioner, the Pennsylvania Alliance for Retired Americans, is an association, and well-established case law provides that only individuals have standing to bring election-related claims in Pennsylvania.

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

The Legislative and Executive Branches took the proactive step with Act 77 of modernizing Pennsylvania’s voting process to allow for no-excuse voting by mail. When the unforeseen COVID-19 pandemic swept the world, the Commonwealth’s

political branches were ready with carefully considered voting procedures that will allow for free and fair elections. Furthermore, the Legislative and Executive Branches took further bipartisan steps to move the Primary Election date and to enact election procedures compatible with social distancing, and they have shown through the enactment of Act 35 that they continue to actively monitor the situation.

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

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

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

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

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

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

I. FACTUAL BACKGROUND

Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with the Commonwealth Court on April 22, 2020, asking the Court to impose four election policies of their choosing, namely that the Court require the Secretary of the Commonwealth to “a. [p]rovide postage on all absentee and mail-in ballots; b. [i]mplement additional procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail services delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause; c. [a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots . . . and d. [p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” Original Pet. at Pages 34-35.

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

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

Where the Original Petition sought that its requested relief be perpetual, the Amended Petition asks for the same relief of an altered received-by deadline, the requirement for pre-paid postage, and the permission of third-party ballot harvesting, only limited to the duration of the COVID-19 pandemic.¹ Amended Pet. ¶ 83. Petitioners do not state in their Amended Petition why they have since limited their requested relief. *See generally* Amended Pet.

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

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

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

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

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

In early 2020, two major events occurred that prompted additional action from the Legislative and Executive Branches to ensure that Pennsylvania elections would be conducted freely and fairly. First, in February 2020, the Iowa Presidential Caucuses disintegrated into chaos. *See* Reid J. Epstein et al., How the Iowa Caucuses Became a Fiasco for Democrats, N.Y. Times, Feb. 9, 2020, *available at* <https://www.nytimes.com/2020/02/09/us/politics/iowa-democratic-caucuses.html>.

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

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

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

Following the June 2, 2020 Primary Election, the political branches again worked in bipartisan fashion to enact Act 35 of 2020, which will require the Secretary of the Commonwealth to publish a report on the 2020 Primary Election, to include a data analysis of the recent reforms of Act 77 of 2019 and Act 12 of 2020. 2020 Pa. Legis. Serv. Act 2020-35 (H.B. 2502) (West). As the Sponsor of Act 35, Representative Natalie Mihalek, reasoned on the House Floor, Act 35 will allow the Commonwealth to “gather data quickly after the election so we are able to ensure a smooth implementation of Act 77. A free and fair election is a basic tenet of our nation and we must ensure the integrity of our election here in the Commonwealth of Pennsylvania.” 2020 Pa. Legis. Journal-House (June 10, 2020) (Unofficial) (attached hereto as Exhibit 1). Speaker Cutler also noted the importance “that we continue to monitor [Pennsylvania’s election reforms] as we go forward. That is why we have had several subsequent bills and changes to the original bill that we passed. This is simply the next step in that process.” *Id.*

The Legislative and Executive Branches continue to monitor the COVID-19 situation and stand ready to enact all further measures as may be required to ensure that the Commonwealth continues to have free and fair elections.

II. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS

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

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

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

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

But Pennsylvania courts have repeatedly held that an association does not have standing, even on behalf of its members, when the right to vote and the right to have one’s vote counted is the subject of the challenge. Order ¶ 4, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017) (dismissing the League of Women Voters of Pennsylvania because it was

not authorized by law to exercise the right to vote in the Commonwealth); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002); *Albert v. 2001 Legis. Reapportionment Comm’n*, 790 A.2d 989, 994–95 (Pa. 2002).

“[T]he right to vote is personal” and the rights sought to be vindicated in a challenge are “personal and individual.” *Albert*, 790 A.2d at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)). When “the right to vote and the right to have one’s vote counted is the subject matter of a . . . challenge,” then “any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing.” *Id.* at 994–95; *see also Erfer*, 794 A.2d at 330 (dismissing Democratic Committee). “The factor that elevates the general interest of each registered voter to one that is sufficiently substantial to confer standing to challenge a candidate’s nomination petition is that voter’s eligibility to participate in the election.” *In re Pasquay*, 525 A.2d 13, 14 (Pa. Commw. Ct. 1987), *aff’d* 529 A.2d 1076 (Pa. 1987).

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

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

There is no allegation that the Alliance is authorized by law to vote in the Commonwealth. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95. Entities such as a state political party (the Pennsylvania State Democratic Committee), governmental entities (the Board of Commissioners of Radnor Township, the Board of Commissioners of the Township of Lower Merion, the Township of Lower Merion, the Township of Ross, and the North Hills School District), civic groups (the Lehigh Valley Coalition for Fair Reapportionment, the Neighborhood Club of Bala Cynwyd, and the League of Women Voters of Pennsylvania), and political party committee chairs (Dennis J. Sharkey and Nora Winkelman in their representative capacities as chairs of Republican and Democratic committees)—notwithstanding their own organizational interests in voting rights, as the Alliance alleges in this case—have each been held not to have standing in voting rights cases. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95; *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017).

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

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

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

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

Act 12 of 2020 introduced numerous accommodations to ensure the 2020 Primary Election could be conducted safely. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). The date of the Primary Election was moved until June to allow more time to “flatten the curve” and protect the health of Pennsylvania’s voters. *Id.* In that same spirit, polling places were consolidated so that voters could vote in readily accessible locations that were large enough to maintain social distancing. *Id.* Act 12 also gave more flexibility to the counties to establish polling places without court

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

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

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

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

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

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

Fundamentally, these tradeoffs are why the Commonwealth and the county boards of elections continue to offer in-person voting on Election Day, and the

expansion of options by the addition of no excuse mail-in voting does not amount to a constitutional violation.

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

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

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

"[R]ipeness overlaps substantially with standing." *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 718 (Pa. 2009). This Court "do[es] not have the ability to grant any relief that is merely advisory, one that does not involve any case or controversy. Any action . . . may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic." *Brown v. Liquor Control Bd.*, 673 A.2d 21, 23 (Pa. Commw. Ct. 1996). Ripeness "arises out of a judicial concern not to become involved in abstract disagreements of administrative policies. . . . It has been defined as the presence of an actual controversy. . . . It insists on a concrete context, where there is a final . . . action so that the court can properly exercise their function." *Tex. Keystone Inc. v. Pa. Dept. of Conservation & Nat. Res.*, 851 A.2d 228, 239 (Pa. Commw. Ct. 2004).

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

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

The U.S. and Pennsylvania Constitutions place great emphasis on the role of the Legislative Branch in the setting of election policy. One of the very first provisions of the U.S. Constitution is the Elections Clause, providing that “[t]he

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

“The presumption that legislative enactments are constitutional is strong.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) (*citing Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008)); *see also* 1 Pa.C.S. § 1922(3) (in ascertaining intent of General Assembly in enactment of statute,

presumption exists that General Assembly did not intend to violate federal and state constitutions). “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” *Konidaris v. Portnoff Law Associates, Ltd.*, 953 A.2d 1231, 1239 (Pa. 2008) (citation omitted).

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

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

In addressing election policy, “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and

procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania.” *In re Guzzardi*, 99 A.3d 381 (Pa. 2014).

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

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

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

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

year. *See* 2019 Pa. Legis. Journal-House 1741 (Oct. 29, 2019) (documenting the 138-61 vote on SB 421 (Act 77)); *see also* Pennsylvania House of Representatives, Members of the House, https://www.legis.state.pa.us/cfdocs/legis/home/member_information/mbrList.cfm?body=H&sort=alpha (the composition of the Pennsylvania House of Representatives at the time of enactment was 110 Republicans and 93 Democrats).

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

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

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

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

2. Ballot Harvesting

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

A touchstone principle of Pennsylvania elections is that “the spirit and intent of our election law . . . requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004). This principle is codified by statute in 25 P.S. § 3058, which states that “[n]o voter shall be permitted to receive any assistance in voting unless . . . he has a physical disability.” This extends to absentee and mail-in balloting where “the elector shall, in secret, proceed to mark the ballot. . .” 25 P.S. § 3146.6(a). The Rule provides that the absentee voter shall:

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

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

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

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

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

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

pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

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

3. Payment of Postage for Mail-In Ballots

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

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

Providing voters with a wide variety of options on voting is not a constitutional violation, but rather a valid policy determination by the political branches to provide for free and fair elections. Just as the Election Code constitutionally does not require government to provide voter transport to the polls, it does not require government to pay for postage for absentee and mail-in ballots. Both questions are policy considerations for the counties, which “shall appropriate annually, and from time to time, to the county board of elections of such county, the

funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).²

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

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

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

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

² Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.*, Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots); *see also* Amended Pet. ¶ 68 (noting that Allegheny and Philadelphia Counties elected to provide postage for mail-in ballots for the 2020 Primary Election).

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

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

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

As such, when a court invalidates a law, the court must grant the Legislature sufficient time to consider and enact remedial legislation. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (providing

timeframe for General Assembly and Governor to enact remedial redistricting plan); *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 582–83 (Pa. 2016) (staying decision for 180 days “in order to allow the General Assembly sufficient time to devise a legislative solution”); *Cali v. Philadelphia*, 177 A.2d 824, 835 (Pa. 1962). The Court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Robinson Twp.*, 147 A.3d at 583; *Cali*, 177 A.2d at 835.

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

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

how to address that. Accordingly, because the Court cannot grant the requested relief contained in the Petitioners' Prayer for Relief as a matter of law, the offending requests must be struck pursuant to Pa. R. Civ. P. 1028(a)(2).

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

Pennsylvania law establishes that a court must join indispensable parties to an action, or, if not possible, dismiss the action “[w]henver it appears by suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b). Indispensable parties are those “whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975).

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

be waived; if such a party is not joined, a court is without jurisdiction to decide the matter”).

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

This Court has laid out a series of factors to consider as to whether a party is indispensable, namely: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994).

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

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

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

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

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

“[T]he Election Code delegates extensive powers and authority to county election boards, including rulemaking authority to guide voting machine custodians,

elections officers and electors and power to investigate election frauds, irregularities and violations of the law. . . .” *Nutter v. Dougherty*, 921 A.2d 44, 60 (Pa. Commw. Ct. 2007), *aff’d*, 938 A.2d 401 (Pa. 2007). As noted in *Boord v. Maurer*, 22 A.2d 902, 904 (Pa. 1941):

The Election Code makes the County Board of Election more than a mere ministerial body. It clothes it with quasi-judicial functions, for Section 304 of the Code provides that: ‘Each county board of elections may make regulations, not inconsistent with this act or the laws of this Commonwealth, to govern its public sessions, and may issue subpoenas, summon witnesses, compel production of books, papers, records and other evidence, and fix the time and place for hearing any matters relating to the administration and conduct of primaries and elections in the county under the provisions of this act.

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

In *Banfield v. Cortes*, petitioners brought a challenge to the use of certain Direct Recording Electronic voting systems (DREs) being used in various counties in the Commonwealth. 922 A.2d 36 (Pa. Commw. Ct. 2007). In response, the Secretary of the Commonwealth submitted preliminary objections, including the objection that the Court lacked jurisdiction due to the petitioners’ failure to join the

county elections boards who had purchased and were using the voting systems in question. *Id.* In a divided, 4-3 decision, the Court rejected the Secretary of the Commonwealth's preliminary objection that the county elections boards were indispensable parties to that action, but that denial was based on the fact that the petitioners did "not seek redress from the . . . counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors." *Id.* at 44.

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

The fact pattern of the present case would more than satisfy the standards set forth in both the majority and dissenting opinions in *Banfield*. Here, Petitioners are directly seeking relief from the county boards of elections, and doing so shortly before the 2020 General Election "without [the boards of elections] being allowed

to defend” this Action. Memorandum Opinion, *Crossey v. Boockvar*, 266 M.D. 2020 (Pa. Commw. Ct. filed May 28, 2020) (unreported opinion).

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

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

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

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

III. CONCLUSION

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

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 8,938 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

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CERTIFICATE OF COMPLIANCE

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

/s/ Zachary M. Wallen

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EXHIBIT 1

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[ASUPPLEMENTAL CALENDAR A

BILLS ON THIRD CONSIDERATION!]A

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

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

(Bill analysis was read.)

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

The question is, shall the bill pass finally?

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

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

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

The majority leader on HB 2502, PN 3774.

Mr. CUTLER. Thank you, Mr. Speaker.

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

Thank you, Mr. Speaker.

On the question recurring,
Shall the bill pass finally?

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

(Members proceeded to vote.)

The SPEAKER. Majority Whip.

Mr. BENNINGHOFF. Thank you, Mr. Speaker.

The electronic voting board is accurate for the majority party.

The SPEAKER. And the minority whip.

Mr. HARRIS. Thank you, Mr. Speaker.

The electronic board is accurate.

The following roll call was recorded:

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