

IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MM 2020

**DISABILITY RIGHTS PENNSYLVANIA; SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF PHILADELPHIA,**

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,

**MIKE TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, BRYAN CUTLER, MAJORITY LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF PETITION TO INTERVENE
BY SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, MIKE TURZAI AND MAJORITY LEADER OF
THE PENNSYLVANIA HOUSE OF REPRESENTATIVES,
BRYAN CUTLER**

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Mike Turzai and Majority Leader of the
House of the Pennsylvania House of
Representatives Bryan Cutler*

Speaker of the Pennsylvania House of Representatives, Mike Turzai (“Speaker Turzai”) and Majority Leader of the Pennsylvania House of Representatives, Bryan Cutler (“Leader Cutler”); collectively the “House Leaders”) hereby file this Memorandum of Law supporting their Petition to Intervene under Pa. R.C.P. 2328 in the above-captioned *Petition for Review* (the “Petition”) filed by Disability Rights Pennsylvania, SeniorLaw Center, Southeast Asian Mutual Assistance Associations Coalition, Inc., Suzanne Erb, and The Barristers’ Association of Philadelphia (“Petitioners”).

As set forth in detail below, the House Leaders meet the requirements for intervention under Pa. R.C.P. 2327 and seek to protect their exclusive authority, as legislators in the Pennsylvania General Assembly (the “General Assembly”), of legislating and appropriating for elections in Pennsylvania, which Petitioners’ requested relief would usurp. The House Leaders show as follows:

I. BACKGROUND

1. On October 29, 2019, the Pennsylvania House of Representatives (“Pennsylvania House”) and the Pennsylvania Senate passed a bill—Act 77 (“Act 77”)—that updated Pennsylvania’s election code, which had not been significantly revisited and reformed for more than 80 years. Two days later, on October 31, 2019, Pennsylvania Governor Tom Wolf signed Act 77 into law.

2. The consideration and passage of Act 77 involved comprehensive and collective drafting, negotiation, and effort by the Pennsylvania House. The Pennsylvania House carefully considered, and debated, the contents of Act 77. Among other changes, Act 77 modified laws relating to mail-in voting and election deadlines.

3. Despite Act 77 having addressed countless alleged deficiencies of Pennsylvania's prior election code, on April 27, 2020, Petitioners filed the Petition, which seeks to declare provisions of Act 77 invalid.

4. Neither the Pennsylvania House nor the Pennsylvania Senate, the two legislative bodies that passed Act 77, nor any of their members, were named as a parties in the Petition. (*See* Petition.)

5. Five days before the Petition was filed, on April 22, 2020, a lawsuit was filed in the Commonwealth Court of Pennsylvania that seeks to change the same election law that is challenged in this case. (*See Michael Crossey, et al. v. Kathy Boockvar*, Action No. 266 M.D. 2020 (“*Crossey Case*”), a copy of the Petition in the *Crossey Case* is attached as **Exhibit “A”**.)

6. Again, neither the Pennsylvania House nor the Pennsylvania Senate, nor any of their members, were named as respondents in the *Crossey Case*. (*Id.*)

7. A majority¹ of the Pennsylvania House members (the “Members”) signed an Authorization under which they “authorize the Speaker and/or the Majority leader of the Pennsylvania House of Representatives to represent the entire body in [this case] . . . to defend the constitutionality of Pennsylvania election laws and election processes authorized by law, such action including but not limited to filing suit, or joining or intervening in any suit, in state or federal court.” Thus, Speaker Turzai and Leader Cutler have been duly authorized to act in this matter by a majority of the Members of the Pennsylvania House.

8. On May 6, 2020, the Pennsylvania Senate filed a petition to intervene into this action. (*See* Docket.)

9. With this Petition, the House Leaders submit Preliminary Objections, which they seek to file in this case, as **Exhibit “B”**.

10. The House Leaders are imminently filing a petition to intervene in the *Crossey* Case.

II. THE PENNSYLVANIA HOUSE HAS A RIGHT TO INTERVENE

11. A nonparty may file an application for leave to intervene in an original jurisdiction petition for review in this Court. Pa.R.A.P. 1531(b).

¹ To date, 109 members of the Pennsylvania House have signed the Authorization. The Pennsylvania House has 203 members, so 102 or more is a majority.

12. Under Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.

13. Under the Pennsylvania Rules of Civil Procedure, a party has an absolute right to intervene in a legal proceeding if it satisfies any one of the categories enumerated in Pa. R.C.P. No. 2327. *See id.*, 2329; *see also Larock v. Sugarloaf Township Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999).

14. Pa. R.C.P. No. 2327 states that intervention *shall* be permitted if a person not a party to the underlying case “(3) . . . could have joined as an original party in the action or could have been joined therein; or (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” *Id.*

15. Intervention rests with the discretion of the trial court and, in the absence of manifest abuse of discretion, the trial court’s determination will not be disturbed on appeal. *Harrington v. Philadelphia City Employees Fed. Credit Union*, 243 Pa. Super. 33 (1976).

16. The grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Pa. R. Civ. P. 2327. *Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999) (“if the petitioner is

a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

17. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth 2019); *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep't of Human Servs.*, 225 A.3d 902, 909 (Pa. Commw. Ct. 2020) (“There is a difference between personal standing and legislative standing”).

18. Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an “interest of such nature that participation . . . may be in the public interest.” *Id.* at 909.

19. While the test for standing to initiate litigation is more strict than it is to intervene, the principles of legislative standing are relevant to whether a legally enforceable interest exists. *Allegheny Reproductive Health Center*, 225 A.3d at 902.

20. Because the House Leaders have enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa. R.C.P. No. 2327 (3) and (4).

A. **Determination of This Action Will Affect the House Leaders’ Legally Enforceable Interest to Legislate Both Laws Involving Elections & the Appropriation of Funds to Effectuate Those Laws.**

21. The House Leaders have an enforceable interest to legislate laws governing elections in Pennsylvania and to appropriate funds to effectuate those election laws. Because the House Leaders are seeking to intervene into an existing case and are not filing an independent case, merely showing an enforceable interest is sufficient to intervene. Pennsylvania law affirms that the House Leaders’ exclusive authority to legislate and appropriate for election laws not only rises to an enforceable interest to intervene, it also rises to a level to warrant independent standing to bring suit. Intervention is therefore mandatory here.

- i. *The House Leaders have an enforceable and exclusive interest in legislating election laws, which this action seeks to usurp.*

22. Legislators both have an enforceable interest warranting intervention, and can “initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reproductive Health Center, et al.*, 225 A.3d at 909 (citing *Sunoco Pipeline L.P.*, 217 A.3d 1283).

23. In *Fumo v. City of Philadelphia*, this Court found that a Pennsylvania city’s issuance of a license for the construction of a casino on a Pennsylvania river invaded the Pennsylvania legislature’s exclusive authority to regulate riverbeds. 972 A.2d 487, 501-3 (Pa. 2009).

24. The *Fumo* court stated:

[w]e conclude that the state legislators have legislative standing . . . The state legislators seek redress for an alleged usurpation of their authority as members of the General Assembly; *aim to vindicate a power that only the General Assembly allegedly has*; and ask that this Court uphold their right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth’s submerged lands.

Id. (emphasis added).

25. Like regulating riverbeds, regulating elections in Pennsylvania is an exclusive legislative function that is left to the Pennsylvania House and Senate.² *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.”).

26. Numerous provisions in the Pennsylvania and United States Constitutions affirm that legislating laws affecting elections rests solely with the Pennsylvania General Assembly. Article VII, § 1 of the Pennsylvania Constitution states that the “laws requiring and regulating the registration of electors” are only to be enacted by the General Assembly. Article VII, § 14 takes it further, stating “[t]he **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 . . . may vote” (emphasis added). And Art. I, § 4 of the United States Constitution affirms that “[t]he times, places and manner

² Senators Joseph B. Scarnati and Jake Corman, acting with authorization from a majority of the members of the Pennsylvania Senate, filed a petition to intervene into this case on May 6, 2020. With the Pennsylvania House’s intervention into this case, the entire Pennsylvania General Assembly will be before the Court.

of holding elections for Senators and Representatives, shall be prescribed *in each state by the legislature thereof*” (emphasis added).

27. This Court acknowledged “[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 (1869); *In re Guzzardi*, 99 A.3d 381 (Pa. 2014) (“[s]ubject 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”).

28. Affirming the Pennsylvania General Assembly’s sole authority to regulate elections, this Court went so far as to say that the “the judiciary should act with restraint, in the election arena, subordinate to express statutory directives.” *In re Guzzardi*, 99 A.3d 381 (Pa. 2014).

29. Moreover, Art. I, § 12 of the Pennsylvania Constitution establishes that only the Pennsylvania General Assembly has the power to suspend laws in Pennsylvania.

30. This lawsuit seeks to suspend and rewrite a law considered and passed by the General Assembly, including the Pennsylvania House. (*See generally* Petition.) State law can solely be created, suspended, or modified by the General Assembly. *In re Guzzardi*, 99 A.3d at 381; PA. CONST. art. I, § 12 (“No power of

suspending laws shall be exercised unless by the Legislature or by its authority.”); PA. CONST. art. VII, § 1; PA. CONST. art. VII, § 14. If the relief sought by Petitioners is granted, then the House Leaders’ authority in legislating election laws will be directly usurped.

31. Petitioners seek a declaration prohibiting Pennsylvania election officials from enforcing the “received-by” deadline for mail-in and absentee ballots, and requiring election officials to count mail-in and absentee ballots if received by 8:00 p.m. on a respective election day. These requests usurp the House Leaders exclusive authority to determine the times, places, and manner of holding elections under the Pennsylvania and United States Constitutions. PA. CONST. art. VII, § 14; U.S. Const. Art. I, § 4.

32. Petitioners further seek to void as unconstitutional the non-severability provision in Act 77. Legislating laws on elections is reserved to the General Assembly, including the House Leaders, and the relief sought in this lawsuit seeks to impinge upon the House Leaders’ authority to regulate elections. *Abraham*, 400 A.2d at 1249.

33. The circumstances here are not one “akin to a general grievance about the correctness of governmental conduct, resulting the standing requirement being unsatisfied”. *Markham v. Wolf*, 136 A.3d 134, 145 (Pa. 2016). The House Leaders do not seek “to offer evidence and argument with respect to the intent of the General

Assembly in enacting [the law] [or] to the procedure by which [it] was adopted”. *Robinson Twp. v. Com.*, 84 A.3d 1054, 1055 (2014). Instead, the intervention is sought to protect against usurpation of the exclusive authority of the legislature to enact laws and regulate voting in Pennsylvania.

34. Thus, determination of this action affects the House Leaders’ legally enforceable interests to pass election laws in Pennsylvania, showing they *shall* be permitted to intervene into this case as a matter of right and that they have standing to do so. *Fumo*, 972 A.2d at 502 (“the claim reflects the state legislators’ interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.”).

- ii. *The House Leaders have an enforceable interest in appropriating state funds, which this action seeks to infringe upon.*

35. The Pennsylvania Constitution gives “to the General Assembly the exclusive power to pay money out of the state treasury without regard to the source of the funds.” *Shapp v. Sloan*, 480 Pa. 449, 465 (Pa. 1978). Conversely, “nowhere in our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose.” *Id.*

36. The Commonwealth Court recently examined an intervention petition filed by the Pennsylvania House under almost identical circumstances to those here.

37. In *Allegheny Reproductive Health Center, et al. v. Pennsylvania Dept. of Human Services*, eight members of the Pennsylvania House, including the House Leaders, sought to intervene into the case because it alleged that parts of legislation passed by the General Assembly—the Abortion Control Act—were unconstitutional and sought to change these laws. 225 A.3d 902 (Pa. Cmwlth. 2020).

38. Just four months ago, on January 28, 2020, the Commonwealth Court found that the eight Pennsylvania House members “established grounds to intervene pursuant to Rule No. 237(4)”, reasoning that:

“[t]he constitutional authority of the members of the General Assembly to control the Commonwealth’s finances constitutes a legally enforceable interest that entitles them to intervene and be heard before the Court rules in this matter.”

Id. at 913.

39. Notably, the Commonwealth Court found that the *Allegheny* petitioners sought to both “restrict the substance and form of appropriation bills” and “to eliminate the General Assembly’s power to decide the circumstances under which abortion services will be funded by the treasury.” *Id.* at 912.

40. The Petition seeks multiple acts that directly require funds that can only be appropriated by the General Assembly. Namely the Petition seeks a declaration that:

(1) the received-by deadline is unconstitutional and invalid, requiring funding for voter education on updated deadlines and election rules, and updating election infrastructure and technology; and

(2) Respondents and their agents, officers, and employees be required to accept absentee ballots under new criterion, requiring additional funding for voter education on changes in absentee ballot eligibility and the processes for counting these ballots and the implicated expenditures for updates in elections infrastructure and technology.

(See Petition, Prayer for Relief, pp. 61-3.)

41. Each of these acts require state funding, and that funding can only be appropriated by the General Assembly. PA. CONST. art. III, § 24. Indeed, Pennsylvania law establishes that the Commonwealth of Pennsylvania pays for efforts needed for voter education, and updating of infrastructure and technology. 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).

42. Indeed, Pennsylvania courts have affirmed that “the executive branch must abide by ‘the requirements and restrictions of the relevant legislation, and within the amount appropriated by the legislature.’” *Allegheny Reproductive Health Center*, 225 A.3d at 902.

43. Like the eight Pennsylvania House members in *Allegheny* (including the House Leaders), the House Leaders here seek to intervene into this case to

preserve their exclusive authority to propose and vote on funding relating to election laws.

44. Further, like the Commonwealth Court held just four months ago in *Allegheny*, the House Leaders have a legally enforceable interest to control Pennsylvania's finances, including to appropriate state funds, and therefore must be allowed to intervene in this case.

B. The House Leaders Could Have Joined as an Original Party in the Action or Could Have Been Joined Therein.

45. Pennsylvania courts routinely find that persons with special interests implicated in an action could have joined as original parties. *Appeal of Denny Bldg. Corp.*, 387 Pa. 311 (1956) (finding “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”).

46. Further, 42 P.S. 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

47. As is shown above, the House Leaders have a special interest in this action. *Harrington v. Philadelphia City Employees Federal Credit Union*, 243 Pa.Super. 33, 45 (1976) (holding that candidate “could have been an original party

or could have been joined in the action . . . [because] had interests which would be drastically affected by the outcome of the equity action”).

48. Moreover, the House Leaders could have joined as original parties in this action, and, in fact, have been sued as original respondents in numerous cases questioning the constitutionality of laws, including those relating to elections, that the General Assembly passed.

49. For example, in both *League of Women Voters et al. v. The Commonwealth of Pennsylvania* and *Jones, et al. v. Boockvar et al.*, Speaker Turzai was named as an original respondent. 645 Pa. 1 (2018); No. 717 MD 2018. The *League of Women Voters* case questioned the constitutionality of a redistricting plan passed by the General Assembly, and the *Jones* case questioned the constitutionality of election laws passed by the General Assembly and sought to change those laws. *Id.*

50. *Erfer v. Commonwealth* is another case wherein Speaker Turzai’s predecessor, Matthew J. Ryan as Speaker of the Pennsylvania House, was named as an original respondent in a case questioning the constitutionality of a federal congressional district map. 568 Pa. 128 (2002).

51. The House Leaders could have joined as original parties in this action, and, as these cases show, typically are joined. The instant action seeks a declaratory judgment imposing improper restraints on appropriation powers and usurping the

exclusive domain of the legislature. If granted, the relief sought will directly affect the House Leaders' interest as legislators. Therefore, the House Leaders must be allowed to intervene here as a matter of right.

C. **None of the Reasons Allowing for Refusal of the Petition to Intervene Exist.**

52. The House Leaders have established they are permitted to intervene in this case. Given this showing, Rule 2329 provides for only three reasons that could allow refusal of the House Leaders' right to intervene into this case and none of them are implicated here. Pa. R.C.P. No. 2329.

53. First, the House Leaders' defense is not in subordination to and in recognition of the propriety of the action because it only seeks to defend the constitutionality of Pennsylvania's Election Code as questioned by the Petition and does not support the averments in the Petition.

54. Second, the House Leaders' interests are not already adequately represented by any Respondent or proposed-intervenor in the case because the House Leaders' interests in legislating and appropriating funds for elections are only possessed by and given to the Pennsylvania House and no party can adequately represent these interests other than the House Leaders. *Shapp*, 480 Pa. at 474 (allowing intervention based partly on finding that "the General Assembly cannot delegate its legislative powers" and thus has the unique authority to defend them).

55. Paralleling *Allegheny Reproductive Health*, the House Leaders’ interest as legislators are not adequately represented by the Respondents, who are in the executive branch. 225 A.3d at 913. Indeed, “[a]n executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Id.* A direct challenge to exclusive legislative functions implicates an interest unique to legislators.

56. Finally, the House Leaders have not unduly delayed in filing this intervention petition, and it will not unduly delay, embarrass or prejudice the trial or adjudication of the rights of the parties because the House Leaders are filing this intervention petition in the earliest stages of the case. The House Leaders’ presence in this case will simplify this action and is necessary as they will bring before the Court arguments and law that otherwise would not be present.

57. There is no basis allowing for refusal of the House Leaders’ right to intervene into this case.

WHEREFORE, for the foregoing reasons the House Leaders respectfully request that the Court grant their Petition to intervene and enter the proposed order attached as **Exhibit “B”** to the accompanying application, granting the House Leaders’ request to intervene in this action, and grant such other relief as this Court deems just and proper.

Respectfully submitted,

/s/ James E. DelBello

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Dated: May 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2020, I caused a MEMORANDUM OF LAW IN SUPPORT OF PETITION TO INTERVENE BY SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, MIKE TURZAI AND MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, BRYAN CUTLER to be served *via* email upon all parties as follows:

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/s/ James E. DelBello
James E. DelBello

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. _____

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

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

NATURE OF ACTION

1. The United States is in the midst of an unprecedented pandemic. The highly infectious coronavirus (“COVID-19”) is rapidly spreading throughout the country. As of April 22, 2020, there are 34,528 confirmed cases of COVID-19 in Pennsylvania, and 1,564 deaths. These numbers are rapidly increasing and projections from the federal government indicate that the virus will persist at least into the fall, if not longer. Indeed, the Director of the Centers for Disease Control and Prevention recently cautioned that the country may encounter a second, more deadly

wave of COVID-19, which will “be even more difficult than the one we just went through.”¹ This means that Pennsylvania’s upcoming elections will occur in the middle or immediate aftermath of a severe public health crisis. If the recent primary election in Wisconsin is any guide, it illustrates that advance planning and proactive measures to ensure that voters have sufficient access to vote by mail are essential to protect the right to vote and prevent large-scale disenfranchisement.²

2. Petitioners bring this lawsuit because the primary and general elections are fast approaching, yet the Commonwealth has failed to implement adequate safeguards to ensure a free and fair election, in which all citizens have a meaningful opportunity to vote as required by the Pennsylvania Constitution. County election officials have already indicated that in-person voting will be severely compromised in upcoming elections and have encountered some of the same election administration challenges that plagued the Wisconsin primary: some institutions, including retirement communities and nursing homes, are refusing to serve as polling locations and others will likely follow suit, which has led to the consolidation of polling places; poll workers, many of whom are elderly, are already refusing to report to duty; elections staff responsible for processing voter registration and absentee ballot applications were sent home; and county officials have expressed concern that the existing infrastructure is ill-suited to conduct in-person voting while complying with social distancing guidelines. At the same time, Pennsylvania voters are already requesting absentee and mail-in ballots (collectively, “mail ballots”) at record rates, even though the June primary election is still several weeks away.

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

² Peter Baker & Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html>.

3. As Pennsylvanians are increasingly forced to turn to absentee or mail-in voting—made possible by new legislation that expanded vote by mail to all eligible voters (“Act 77”)—they will encounter numerous obstacles that, unless enjoined, will disenfranchise significant numbers of voters and violate state law, including the constitutional guarantee to a free and fair election. For instance, Pennsylvania law requires that all mail ballots must be *delivered* to election officials by 8:00 p.m. on Election Day (“Election Day Receipt Deadline”). While Petitioners do not currently challenge this rule’s validity as a general matter—nor do they seek any relief that would trigger Act 77’s non-severability clause—the challenges faced by the U.S. Postal Service during this pandemic, and the resulting disruptions in mail delivery, require additional protections for voters whose ballots are delayed through no fault of their own. At the very least, Pennsylvania should be required to count ballots received for up to seven days following Election Day, on an emergency basis during the current pandemic, in order to account for the delivery of delayed mail ballots. This would ensure that all Pennsylvania voters have an equal chance to vote by mail during this difficult and unprecedented crisis, aligning the receipt deadline for everyone with the current deadline imposed for overseas and military voters to submit their ballots.

4. Making matters worse, Pennsylvania law prohibits voters from obtaining assistance from third parties in mailing or submitting ballots in person, and requires that ballots be returned by mail or delivered *by the voter*, unless the voter is disabled. 25 P.S. §§ 3146.6(a); 3150.16(a). This restriction burdens the franchise for countless Pennsylvanians who lack access to reliable mail service and cannot safely deliver their ballots in person, and denies historically disadvantaged communities—along with those attempting to navigate the mail-in voting process for the first time—the necessary assistance required to ensure timely delivery of their ballots.

5. Voting by mail further requires payment of postage, which creates an unnecessary burden that threatens to disenfranchise the most vulnerable members of the electorate. It imposes a monetary cost on the voting process at a time when many Pennsylvanians are suffering from the devastating economic impact of COVID-19, and it requires voters who do not have ready access to postage to subject themselves to public health risks in order to visit a post office or return their ballots in-person.

6. Removing these barriers is only the first step to ensuring a meaningful opportunity to vote; the Pennsylvania Constitution also guarantees voters the right to have their properly submitted ballots counted. But in addition to the obstacles posed above, outdated and highly error-prone signature verification procedures threaten to disenfranchise eligible voters. It is unclear what, if any, standards election officials follow in verifying signatures on mail ballots; election officials are not required by law to engage in signature verification training, nor are they required to provide voters any prior notice or an opportunity to cure a perceived signature defect. The current mail ballot system thus subjects voters in some counties to an impermissible risk of arbitrary disenfranchisement.

7. To be sure, the Commonwealth's officials have recognized the disrupting effect of the COVID-19 pandemic and have taken some action, but much is left to do in order to guarantee a free and fair election. On March 27, Governor Tom Wolf signed Senate Bill 422 (Act 12 of 2020), which, among other provisions, moved the 2020 primary election from April 28 to June 2. But the Commonwealth is currently under a stay-at-home order, which requires residents "to stay at home except as needed to access, support, or provide life-sustaining business, emergency, or government services." The order also requires residents to practice social distancing and prohibits gatherings of individuals outside of the home except to access, support, or provide life-sustaining

services. While the order as it is currently written expires on May 8, the Governor has not indicated that he is ready to ease safety restrictions.³

8. Even assuming the Governor's order is lifted, the number of confirmed COVID-19 cases will rise, and efforts to minimize the spread of the virus or the risk of infection will continue to disrupt day-to-day life. As Governor Wolf has cautioned, Pennsylvanians will not return to business as usual with the snap of a finger. Election officials will continue to encounter difficulty in securing and staffing polling places, and voters will be deterred by the public health risks created by packing more precincts or divisions—and, by extension, more people—into fewer, crowded polling locations. That is why Commonwealth officials have been actively promoting voting by mail, according to a Department of State spokesperson.

9. By all accounts, Pennsylvanians have heeded this warning and are applying to vote by mail in record numbers for the upcoming June and November elections. As of this week, Pennsylvania counties have received approximately 600,000 applications for mail ballots for the June 2 election, a contest still several weeks away. In comparison, approximately 84,000 absentee ballots were cast in the 2016 primary election.⁴ To protect the right to vote and ensure a meaningful, free, and fair election in the midst of the current pandemic, as required by the Pennsylvania Constitution, the Commonwealth must implement safeguards to ensure that all voters have an opportunity to submit mail ballots and to have those ballots counted.

10. Petitioners therefore request that the Court issue an Order requiring Defendants to: adopt additional procedures to ensure that ballots delivered after the Election Day Receipt

³ See Governor's Remarks of April 17, 2020, <https://www.governor.pa.gov/newsroom/governor-tom-wolf-covid-19-remarks-april-17-2020/> ("Unfortunately, we cannot flip a switch and reopen the commonwealth. There won't be one big day. We need to make smart, data driven decisions.").

⁴ Mark Scolforo & Michael Rubinkam, *Mail-in, absentee ballot applications surge for June primary*, Pittsburgh Post-Gazette (Apr. 15, 2020), <https://www.post-gazette.com/news/politics-state/2020/04/15/Mail-in-absentee-ballot-applications-surge-for-June-primary-pennsylvania/stories/202004150076>.

Deadline due to mail delivery delays or disruptions are counted if received within seven days of Election Day—to the extent that such procedures do not trigger Act 77’s non-severability clause; permit third parties to assist voters in submitting their sealed mail ballots; provide pre-paid postage for all mail ballots; and impose uniform guidelines for mail ballot verification that mandates training for election officials engaged in signature matching, and requires officials to provide voters with notice and a reasonable opportunity to cure before rejecting mail ballots for any signature-related defect. With the primary and general elections fast approaching, the time to act is now, to prevent widespread disenfranchisement and ensure that voters have a meaningful opportunity to participate in the electoral process.

JURISDICTION AND VENUE

11. This Court possesses original and exclusive jurisdiction over Petitioners’ claims against the Secretary and Director, statewide officers of the “Commonwealth government.” 42 Pa. C.S. § 761(a)(1), (b).

PARTIES

12. Petitioner Michael Crossey is a duly registered Pennsylvania voter and resident of Allegheny County. Mr. Crossey is 69 years old and is a retired schoolteacher and former president of the Pennsylvania State Education Association. He is currently the treasurer for the Pennsylvania Alliance for Retired Americans. Mr. Crossey has always voted in-person at the polls on election day in Pennsylvania but due to arthritis in his knees, he will face a hardship if forced to stand in line for extended periods of time. Because of the current spread of COVID-19 throughout Pennsylvania, and because he knows that the disease is particularly harmful to voters his age, Mr. Crossey requested a mail-in ballot this year so that he would not need to vote in public on election day. Mr. Crossey is concerned that, because of mail delivery delays, he may need to personally deliver his ballot to ensure it arrives on time. Not only does this present health concerns—due to

COVID-19's effect on the 65 and older population—but Mr. Crossey is also concerned that he will need to stand in line for long periods of time to submit his mail ballot, exacerbating his injuries. Mr. Crossey would seek assistance in returning his ballot if a third party were permitted to assist him. Finally, Mr. Crossey is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

13. Petitioner Dwayne Thomas is a duly registered Pennsylvania voter and resident of Fayette County. He is 70 years old and is a retired mineworker. Mr. Thomas is the current president of the Pennsylvania Alliance for Retired Americans. Mr. Thomas usually votes in-person at the polls on election day and often encounters long lines at his polling site. This year, Mr. Thomas requested an absentee ballot as a precautionary measure to avoid high-trafficked public places in light of the spread of COVID-19 across the state. Mr. Thomas has consistently had issues sending and receiving mail through the U.S. Postal Service: his letters and packages rarely arrive on time at their desired locations; he often receives returned mail even when he has correctly addressed envelopes and packages; and he often fails to receive letters and packages sent to him through the postal service. Knowing this, Mr. Thomas is concerned that he will need to personally deliver his absentee ballot but is also concerned that this will expose him to COVID-19. He would seek assistance in returning his ballot if a third party were permitted to assist to him. Mr. Thomas is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

14. Petitioner Irvin Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Mr. Weinreich is a disabled war veteran and retired maintenance worker. He has never missed an opportunity to vote in person on election day. Mr. Weinreich frequently has trouble navigating his polling site because it is difficult for him to ascend steps or steep ramps at

his polling site, and he struggles to walk the distance from the street and through the building to reach the voting area. Mr. Weinreich has heart issues and diabetes; even before the spread of COVID-19, Mr. Weinreich was afforded limited public interactions because the common cold could render him incapacitated. For the first time in his life, Mr. Weinreich requested a mail-in ballot this year due to the hardships he faces when voting in-person at his polling site. But he is concerned that his ballot may not arrive in time for the Election Day Receipt Deadline and therefore he may be forced to personally deliver his mail ballot. If permitted, Mr. Weinreich would rely on a third party to assist him in delivering his ballot to the proper location. Because this is his first time voting by mail, Mr. Weinreich is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

15. Petitioner Brenda Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Ms. Weinreich is a retired textile factory worker. She has never missed an opportunity to vote in person on election day. Ms. Weinreich frequently has trouble navigating her polling site because, due to a knee replacement, it is difficult for her to ascend steps or steep ramps at the polling site, and she struggles to walk the distance from the street and through the building to reach the voting area. Ms. Weinreich is a caretaker for her husband and would be unable to push him up the steep ramp at the polling site if he needed to be in a wheelchair or scooter. Because she is his caretaker, Ms. Weinreich is frequently required to do tasks that require public exposure, such as grocery shopping. But at 70, Ms. Weinreich is within the age group of people who are vulnerable to the more dire consequences of COVID-19. Therefore, limiting her exposure to the public is both necessary for her own health and her ability to care for her husband. Ms. Weinreich is voting by mail this year but is concerned that her ballot may not arrive to the proper polling location in time to meet the Election Day Receipt Deadline, and therefore she is concerned that she will need to

risk both the public exposure and the physical hardships of delivering her ballot in person. If permitted, Ms. Weinreich would rely on a third party to assist her in delivering her ballot. Finally, Ms. Weinreich is concerned about the risk that her ballot may not be counted due to the mail ballot verification procedures and potential variations in her signature.

16. The Pennsylvania Alliance for Retired Americans (“the Alliance”) is incorporated in Pennsylvania as a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. The Alliance has 335,389 members, composed of retirees from public and private sector unions, community organizations and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance’s mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Election Day Receipt Deadline, the prohibition on third party mail ballot collection assistance, the lack of pre-paid postage for mail ballots, and the mail ballot verification process which allows election officials to engage in an arbitrary signature matching and erroneously reject mail ballots frustrates the Alliance’s mission because it deprives individual members of the right to vote and to have their votes counted, threatens the electoral prospects of progressive candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. The Alliance and its individual members intend to engage in voter assistance programs. These programs would, but do not currently, include voter education and awareness campaigns and returning mail ballots for those electors who require assistance. The Alliance cannot further these activities because of Pennsylvania’s prohibitions.

17. Defendant Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity. As Secretary, she is Pennsylvania’s Chief Election Official and a member of

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

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

GENERAL ALLEGATIONS

A. The COVID-19 pandemic has upended Pennsylvania's electoral processes.

19. Virtually all aspects of life in our country today are affected by the unprecedented Covid-19 pandemic. Schools and businesses are closed; a majority of people in the country are sheltering in their homes; more than 20 million people have lost their jobs; and approximately 45,000 people have lost their lives. The dangerous virus that has already infected 34,528 Pennsylvanians and resulted in 1,564 deaths has begun to wreak havoc on Pennsylvania's voting systems. And the crisis has no clear end in sight.

20. On April 1, Governor Wolf issued a state-wide stay-at-home order and urged residents to maintain social distancing guidelines in order to combat the virus's spread. Counties across the state have reported difficulty recruiting and retaining poll workers, and venues that have typically served as polling locations—i.e., senior centers, schools, and churches—are unwilling to do so in upcoming elections because of the attendant public health risks. For the limited group of poll workers who agree to staff polling places on Election Day, and the few locations that agree to

open their doors to the public, county election officials have struggled to provide sufficient sanitary supplies and protective equipment to keep voters and election workers safe during in-person voting. This may prove especially problematic for those counties employing touchscreen voting machines, which may require sanitizing after every voter.

21. At the same time, some counties are still in the early stages of the rollout for Pennsylvania’s new voting machines, which will require in-person training before Election Day. Because of the current state of the public health emergency, some of those trainings either have been canceled or have not been scheduled at all, sparking concerns of Election Day confusion, and prompting some local officials to question the Commonwealth’s Election Day readiness.⁵

22. The Commonwealth is also likely to see a significant reduction in the number of polling places offered for voting. Not only has the public health emergency restricted available sites, the Pennsylvania General Assembly passed emergency legislation earlier this month to postpone the primary election to June 2, and to loosen restrictions on polling place consolidation, among other last-minute changes. As a result, counties may now consolidate polling locations without a court order in the June primary, and if this policy is extended to the November general election, it will allow counties to pack more voters into fewer polling places, which could spell disaster both from a public health and an election administration standpoint.

23. Because of the pandemic, mail ballots—without additional assurances—will not provide an adequate alternative means for Pennsylvanians to vote. The U.S. Postal Service is

⁵ See Jonathan Lai, “Officials in three Southeastern Pa. counties cast doubt on primary voting methods.” PHILA. INQUIRER (April 10, 2020), <https://www.inquirer.com/politics/election/coronavirus-covid19-election-pennsylvania-20200410.html>.

experiencing difficulties, delays, and budget shortfalls.⁶ These pressures threaten to shutter the entire agency by this summer.⁷

24. As the pandemic continues to spread, postal workers have increasingly been infected. As of mid-April, nearly 500 postal workers across the country have tested positive for the coronavirus, 19 have died, and more than 6,000 are in self-quarantine because of exposure.⁸ Postal workers in Pennsylvania are no different. Reports of the virus infecting and, unfortunately, killing Postal Service employees throughout the state abound.⁹

25. And as it attempts to deliver an unprecedented number of absentee ballots across the country—both from county elections officials to voters, and then back again—the system will be under increasing pressure, causing delays and, ultimately, some number of ballots that are not received by voters in time.

26. The Postal Service’s budget and personnel struggles have harsh implications for Pennsylvanians’ voting rights. In the past, when the U.S. Postal Service has faced a budget crisis, it has responded by closing hundreds of processing centers.¹⁰ Moving forward, it is likely that the

⁶ The Postal Service is experiencing dramatic decreases in mail volume compared to last year and, as a result, is projecting a \$13 billion revenue shortfall this fiscal year because of the pandemic and another \$54 billion in losses over 10 years.” Nicholas Fandos & Jim Tankersley, *Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html>.

⁷ Kyle Cheney, *House panel warns coronavirus could destroy Postal Service by June*, POLITICO (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>.

⁸ Jacob Bogage, *White House rejects bailout for U.S. Postal Service battered by coronavirus*, WASH. POST (Apr. 11, 2020), <https://www.washingtonpost.com/business/2020/04/11/post-office-bailout-trump/>.

⁹ See, e.g., *Two United States Postal Service employees test positive for COVID-19 in Harrisburg*, CBS 21 News (Apr. 15, 2020), <https://local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg>; Bill Rettew, *Exton postal employee dies from coronavirus complications*, DAILY LOCAL NEWS (Apr. 12, 2020), https://www.dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html; CBS3 Staff, *Northeast Philadelphia Postal Worker Tests Positive For COVID-19*, CBS 3 PHILLY (Mar. 30, 2020), <https://philadelphia.cbslocal.com/2020/03/30/coronavirus-bustleton-station-postal-worker-positive-covid-19/>; John Luciew, *U.S. Postal Service employee in Pa. has coronavirus: ‘Risk is low’*, PA. PATRIOT-NEWS (Mar. 24, 2020), <https://www.pennlive.com/coronavirus/2020/03/us-postal-service-employee-in-pa-has-coronavirus-risk-is-low.html>.

¹⁰ See U.S. Postal Service Office of Inspector General, *Area Mail Processing Consolidations* (June 5, 2015), <https://www.uspsoig.gov/sites/default/files/document-library-files/2015/no-ar-15-007.pdf>.

USPS will need to make cuts to routes, processing centers, or staff—any of which is likely to increase mail processing delays. Pennsylvania voters casting mail ballots and facing the Election Day Receipt Deadline will bear the brunt of these cuts because of the recent introduction of no-excuse mail-in ballots—already surging in demand for a primary election weeks away—and safety measures needed to slow the spread of COVID-19, such as Governor Wolf’s stay-at-home order.

27. The recent primary election in Wisconsin should serve as a cautionary tale because election officials there encountered many of the same issues leading up to election day. Like here, “the extent of the risk of holding [the] election ha[d] become increasingly clear” well before Election Day. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Election officials were facing a huge backlog of requests for absentee ballots and questions about voting absentee, including how to satisfy certain registration requirements, how to properly request an absentee ballot, and how to return it in time to be considered. *Id.* Election officials were also dealing with the loss of poll workers due to age, fears of illness, or actual illness. *Id.* The likely consequences of holding an election in that context were clear:

(1) a dramatic shortfall in the number of voters on election day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19.

Id.

28. When Wisconsin proceeded to hold an election without sufficiently addressing these issues, chaos and widespread disenfranchisement ensued. The Postal Service struggled to deliver absentee ballots to voters. Some ballots were delayed, but others did not arrive at all. In

response, both of Wisconsin's U.S. Senators wrote to the Inspector General for the U.S. Postal Service seeking an investigation into "absentee ballots not being delivered in a timely manner" and the Postal Service's failure to deliver in this regard.¹¹ There were similar delays returning ballots to elections officials. In total, approximately 107,871 absentee ballots were received by elections officials after the day of the election.

29. Additionally, cities in Wisconsin were forced to close polling locations. In Milwaukee, a city with twice the population of Pittsburgh, 18,803 voters cast their ballots in person at only five polling locations. The result was crowds, long lines, and excessive wait times—in the middle of a global pandemic:



Source: David D. Haynes, Haynes: *Wisconsin's Election May Have Been 'Ridiculous' but Those Who Braved Coronavirus to Vote Were Anything but*, MILWAUKEE J. SENTINEL (Apr. 8, 2020), <http://www.jsonline.com/story/news/solutions/2020/04/08/wisconsin-election-ridiculous-voters-who-braved-coronavirus-lines-inspiring->

¹¹ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.



Source: Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election->

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Source: *Coronavirus Wisconsin: Scenes from Election Day, April 7*, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.



Source: *Coronavirus Wisconsin: Scenes from Election Day, April 7*, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.

30. Reports of COVID-19 cases resulting from voters who turned out to vote in Wisconsin's election have already emerged.¹²

31. Without adequate safeguards to ensure access to vote by mail options, Pennsylvania could suffer the same fate. To their credit, Commonwealth and local officials have been encouraging voters to cast ballots by mail, and early indications from mail ballot applications suggest that voters will do so in record numbers. As of today, still six weeks away from the June 2 election, Pennsylvania counties have received approximately 600,000 applications for mail-in and absentee ballots. By contrast, only around 84,000 absentee ballots were cast in the 2016 primary election.

32. But the current mail voting process in Pennsylvania is not equally accessible to all eligible citizens—particularly those in disadvantaged communities, the poor, the elderly, and other vulnerable populations. Many of these individuals have historically relied on in-person voting, which will be severely restricted (and may pose significant health risks) in upcoming elections. In order to ensure that all citizens have reasonable and equal access to the electoral process, the Commonwealth must remove unnecessary restrictions on mail voting that will otherwise deny its citizens the free and equal election guaranteed by the Pennsylvania Constitution.

B. Election Day Receipt Deadline

33. In the 2018 general election, according to data from the Election Administration and Voting Survey, approximately, 8,162 absentee ballots—3.7% of all absentee ballots cast—were rejected because they were delivered to election officials after 5:00 p.m. on the Friday before Election Day.

¹² Alison Dirr, *At least 7 new coronavirus cases appear to be related to Wisconsin's election, Milwaukee health commissioner says*, MILWAUKEE J. SENTINEL (April 20, 2020), <https://www.jsonline.com/story/news/local/milwaukee/2020/04/20/coronavirus-milwaukee-7-new-cases-may-tied-april-7-election/5168669002/>.

34. Since then, the Pennsylvania General Assembly enacted legislation to allow all eligible voters to vote by mail and extended the deadline for election officials to receive mail ballots: now, to be counted, all absentee and mail-in ballots must be received by 8:00 p.m. on Election Day in the county board of elections office. 25 P.S. §§ 3146.6(c), 3150.16(c). Petitioners do not challenge the validity of this law, nor do they seek any relief that would trigger Act 77's non-severability clause. However, the disruptions in the voting process caused by the COVID-19 pandemic require the Commonwealth to implement additional voting procedures that would allow election officials to count mail ballots that arrive after 8:00 p.m. on Election Day due to mail service delays or disruptions.

35. As detailed above, the ability to process mail ballot applications and deliver ballots on time has been compromised by the public health crisis. The demand for mail ballots is already testing the limits of some counties: in Delaware County, for example, election officials have begun “falling behind on processing mail-in ballot requests.”¹³ And as the number of self-quarantined and infected postal workers increase nationally and locally, the more likely it is the U.S. Postal Service will continue to face severe staffing shortages, thereby slowing the delivery and receipt of a rapidly increasing volume of election mail.

36. Because mail ballots must be received by 8:00 p.m. on Election Day, voters must mail them several days before Election Day to ensure timely delivery. This date operates as a shadow pre-election cutoff date. But in a post-COVID-19 world, where the Postal Service's regular mail functions have been disrupted, the pre-election cutoff date by which voters should mail their

¹³ Jonathan Tamari & Jonathan Lai, *Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco*, PHILA. INQUIRER (Apr. 12, 2020), <https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html>.

ballots to ensure timely delivery is entirely unclear, subjecting voters to arbitrary disenfranchisement.

37. For instance, Pennsylvania voters can apply for absentee and mail-in ballots if their applications are received by 5:00 p.m. on the Tuesday before Election Day. *See* 25 P.S. §§ 3146.2a(a), 3150.12a(a). But it is anyone's guess whether voters who request absentee ballots on this day will receive their ballots in time to submit them before the Election Day Receipt Deadline. Pennsylvania officials must mail absentee and mail-in ballots to a qualified absentee or mail-in voter "within forty-eight hours after approval of their application." 25 P.S. §§ 3146.5(a), 3150.15. It is even less predictable now when that ballot will arrive. Even assuming the ballot arrives before Election Day, the voter may not have time to fill it out and mail it back to ensure timely delivery.

38. Although Pennsylvania may have an interest in the finality of elections, the Commonwealth can continue to enforce its Election Day Receipt Deadline while providing separate, temporary procedures to allow voters who submit their mail ballots well in advance of Election Day, but are affected by mail service disruptions, to cast an effective ballot. And doing so can still serve the Commonwealth's interest. Pennsylvania currently counts military-overseas ballots so long as they are received "by 5 p.m. on the seventh day following the election." *Id.* at § 3511(a). County boards of elections have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not certify election results to the Secretary until 20 days after Election Day. 25 P.S. § 2642(k).

39. There is nothing sacrosanct about the receipt deadline as past (and current) exemptions indicate. Shortly after Hurricane Sandy struck parts of Pennsylvania in 2012, the Governor extended the deadline for absentee ballots returns in Philadelphia, Bucks, Montgomery,

and Chester Counties from 5:00 p.m. on the Friday before Election Day to 5:00 p.m. on the Monday before Election Day.¹⁴ In 2016, a Montgomery County Court judge extended the Deadline from the Friday before the election to 8:00 p.m. on Election Day after elections officials received “unprecedented demand” for absentee ballots and voters “complain[ed] that they had not yet received their ballots” with the Friday deadline impending.¹⁵

40. Adopting such emergency procedures, moreover, does not trigger the non-severability clause added to recent legislation, Act 77, that expanded mail voting to all eligible voters and moved the mail ballot receipt deadline to 8:00 p.m. on Election Day. Petitioners’ requested relief does not render the Election Day Receipt Deadline invalid. Rather, it would implement additional, emergency procedures to count mail ballots delayed by postal service disruptions in light of the COVID-19 pandemic.

41. Rejecting all mail ballots that arrive after 8:00 p.m. on Election Day, notwithstanding the current public health emergency, the unprecedented increase in requests for absentee ballots, and the budgetary crisis at the U.S. Postal Service, disenfranchises Pennsylvania voters—many of whom already lack reasonable access to safe, in-person voting options—for reasons entirely out of their control.

C. Third-Party Ballot Collection Assistance

42. Pennsylvania’s failure to safeguard the rights of voters affected by mail service disruptions is compounded by the fact that Pennsylvania law in most cases prohibits third parties from assisting voters in delivering mail ballots. Thus, to avoid the uncertainty of mail delivery,

¹⁴ *Absentee ballot deadline extended in some Pa. counties*, WHYY (Nov. 5, 2012), <https://whyy.org/articles/absentee-ballot-deadline-extended-in-aome-pa-counties/>.

¹⁵ Laura McCrystal, *Montco judge extends deadline for absentee ballots*, PHILA. INQUIRER (Nov. 3, 2016), https://www.inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html.

voters will be forced to submit their ballots in person, potentially subjecting themselves to health risks.

43. For example, Petitioner Dwayne Thomas usually votes in-person on election day but has applied to vote absentee this year as a precautionary measure due to the current health crisis. Relatedly, Mr. Thomas has struggled for years with having his mail arrive promptly—or at all—using his local postal service. Because the current pandemic exacerbates postal service delays and creates further uncertainty in the timing of mail delivery, Mr. Thomas will be forced to deliver his ballot in-person this year to ensure his vote is counted, or subject himself to the risk of arbitrary disenfranchisement. The benefits he gains from voting by mail—avoiding crowded polling locations or waiting in line to vote—are lost if he must nevertheless wait in crowded lines for prolonged periods just to deliver his ballot on time. If the state permitted, Mr. Thomas would designate a third party to safely deliver his ballot on time.

44. The burden caused by the prohibition on third party ballot collection is particularly pronounced this year because many Pennsylvanians, like Mr. Thomas, will be voting by mail for the first time—in light of Act 77’s recent expansion of mail voting—and will have to navigate the public health risks posed by the COVID-19 pandemic.

45. Mr. Thomas’s predicament, moreover, is far from an isolated incident. Pennsylvania has an aging population, ranking fifth among the 50 states by the size of its population over the age of 65 in 2017. Seniors, especially those living in community homes or nursing homes, are particularly vulnerable to the current health risks and have expressed concern that they have no reliable way to deliver their ballots to the proper polling site; they cannot trust that the ballot will be delivered on time through the postal service and they cannot personally deliver the ballot due to health concerns.

46. The prohibition on third party ballot collection also disproportionately burdens poor, minority, and rural communities who generally have less access to postal services, live in areas that lack reliable access to public transportation, and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person. Voters in rural communities, moreover, face longer travel distances to their county board of elections office and even less reliable mail service.

47. Absentee and mail-in ballots are a positive step for Pennsylvania. But, as shown above, voters who opt for these ballots still require assistance in returning their ballots to the appropriate election officials. Pennsylvania allows third party ballot collection in very limited circumstances where someone is disabled or hospitalized but prohibits third party ballot collection in every other instance. This prohibition presents an undue burden on voters generally and will operate to disenfranchise a large swath of Pennsylvania's eligible voters during the current pandemic.

D. Pre-Paid Postage

48. In Pennsylvania, most voters who choose to return their ballots by mail must also provide their own postage. 25 P. S. §§ 3146.6(a); 3150.16(a). This requirement imposes both monetary and transaction costs that bear most heavily on individuals who are least likely to be able to overcome them.

49. In this digital era, many voters do not regularly keep postage stamps in their homes, and therefore must visit a post office or other essential business to obtain the correct postage. Purchasing a book of 20 stamps online will cost voters \$11—an unnecessary expense that could be cost prohibitive for individuals with lower incomes, along with those whose employment and source of income were eradicated due to the devastating economic impact of COVID-19 and the Governor's ensuing stay-at-home order. A trip to the post office or any other establishment that

sells stamps, during a public health crisis in which individuals have been instructed to maintain social distancing guidelines, forces voters to expose themselves to health risks in order to vote. This is especially true for elderly voters, as well as voters who lack access to vehicles and must rely on public transportation.¹⁶

50. Providing postage to allow citizens to complete important government-related functions is a common practice that has been adopted by federal, state, and county governments in other contexts. For instance, the United States Census Bureau sends census surveys with postage-prepaid return envelopes. Pennsylvania provides, as the National Voter Registration Act requires, a postage-prepaid return envelope when it asks voters to verify their address for the purpose of voter registration. Counties in Pennsylvania send juror questionnaires with postage-prepaid envelopes. Recently, Allegheny County Executive Rich Fitzgerald announced that the county will send mail-in ballot applications to all registered voters with prepaid postage.¹⁷ And in its coronavirus stimulus package, Congress allocated \$400 million for elections, which can be used to cover the cost of prepaying postage, among other expenses.

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

¹⁶ In Southeastern Pennsylvania, public transportation has been radically reduced in light of the COVID-19 pandemic. Dozens of bus, train, and trolley routes have been cancelled; many subway stations have been shuttered; and those routes which are operating are doing so on a significantly lessened schedule. See Se. Pa. Trans. Auth., *New Lifeline Service Schedules Effective Thursday, April 9, 2020*, <http://septa.org/covid-19/>, (last visited Apr. 22, 2020).

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

ballots via USPS. In 2017, 81% of those same voters did. Voters were not only more likely to return their ballots by mail, they were also more likely to *vote*. In the 2017 primary, turnout rose 10%. In the 2018 primary, it rose 6%. Following these pilot programs, King County sent all absentee ballots with postage-prepaid return envelopes. And shortly after that, the Governor and Secretary of State of Washington funded prepaid postage for every county in the state.

52. While Allegheny County’s efforts to provide prepaid postage are laudable, such safeguards should be extended to all voters and not left to the counties’ discretion. Beaver County, for instance, had provided postage-prepaid envelope in its absentee ballot mailing in prior elections, but county officials announced in January of this year that they will no longer cover the cost of postage.¹⁸ Thus some voters in Beaver County and other parts of the state that do not have access to mail ballots with prepaid postage will be forced to put their health at risk—either to obtain postage or stand in line at potentially crowded, consolidated polling places—or incur additional expense in order to exercise their right to vote.

E. Signature Matching

53. Submitting a ballot by mail is only part of the battle; once the ballot is delivered, county election officials must then engage in an opaque verification process, which in some counties involves signature matching, conducted without any identifiable standards or guidelines, by officials who are untrained in signature or handwriting examination.

54. Under Pennsylvania law, county boards, as part of the canvassing process, must “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s]

¹⁸ Daveen Rae Kurutz, *No stamp: Beaver County to cease providing postage for absentee ballots*, ELDWOOD CITY LEDGER (Jan. 20, 2020), <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots>.

right to vote.” 25 Pa. Stat. Ann. § 3146.8(g)(3). And some counties, on information and belief, rely on signature matching to determine whether mail ballots should be counted.

55. The statute does not set forth any guidelines for conducting this comparison, nor does Pennsylvania law require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process.¹⁹ Indeed, the General Assembly failed to act on proposed legislation in 2019 which would have required election boards to provide notice of signature mismatches and set forth procedures for curing rejected ballots. Thus, counties are left to their own devices in determining whether the information on a voter’s declaration and the applicable voter file verifies their right to vote, or whether the signature on the declaration is sufficiently similar to the information on file to allow the mail ballot to be counted.

56. This lack of guidance or identifiable standards is problematic because signature matching, as one federal court put it, is inherently “a questionable practice” and “may lead to unconstitutional disenfranchisement.” *Democratic Exec. Comm. of Fla. v. Lee*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018). Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification conducted without adequate standards and training is unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries.

57. Even when conducted by experts, signature matching can lead to erroneous results in the ballot verification context because handwriting can change quickly for a variety of reasons entirely unrelated to fraud, including the signer’s age, medical condition, psychological state of mind, pen type, writing surface, or writing position. It is, thus, inevitable that election officials will

¹⁹ Pennsylvania law requires election officials to provide notice to the voter and a formal hearing only when a ballot or application has been challenged, and sets forth procedures for conducting hearings and adjudicating challenges, none of which are at issue here. *See* 25 Pa. Stat. Ann. § 3146.8 (5), (6).

erroneously reject legitimate ballots due to misperceived signature mismatches, which, without notice and a reasonable opportunity to cure, will result in the disenfranchisement of eligible voters.

58. Furthermore, the absence of any clear guidance in the statute—and the Department of State’s willingness to allow counties to adopt their own verification procedures—means that voters will encounter varying and conflicting signature matching practices depending on the county in which they reside. Voters in some counties may receive notice of a potential signature mismatch and an opportunity to cure before the ballots are canvassed, while others may not. Indeed, voters in some counties may avoid signature matching entirely while others will have their ballots rejected. These diverging procedures all but ensure that voters across all counties will not have an equal opportunity to cast an effective mail ballot.

59. In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.

COUNT I

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

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

61. “Elections shall be free and equal” in Pennsylvania. Pa. Const. art. I, § 5. Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (1914). The Free and Equal Elections Clause is “specifically intended to equalize the power of voters in

our Commonwealth's election process," *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 812 (2018), and protects voting rights even if they are denied or impeded "by inadvertence." *Id.* at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (1929)).

62. The Commonwealth's failure to implement adequate safeguards to protect the right to vote and ensure access to vote by mail, in the midst of a public health emergency, severely burdens the right to vote and violates the Free and Equal Elections Clause in several ways.

63. Pennsylvania's failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county board of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. In the 2018 general election alone, 3.7% of all absentee ballots were not counted because they arrived after the deadline and, as a result, 8,162 voters were denied the franchise. "The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted); *see also Stein v. Cortes*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016) ("The right to vote necessarily includes the right to have the vote fairly counted."). In light of Act 77's expansion of mail voting, and the barriers to in-person voting posed by COVID-19, the number of Pennsylvanians voting by mail will increase dramatically in upcoming elections; but their ballots will be subject to the vagaries of the U.S. Postal Service, an agency facing grave difficulties because of the ongoing global pandemic. Thus Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.

64. Pennsylvania's prohibition on third party ballot collection assistance further denies voters their right to a free and fair election. Many Pennsylvanians will vote by mail for the first time in upcoming elections, in part because the health risks posed by COVID-19 has limited access

to polling places and precludes in-person voting for vulnerable individuals. The U.S. Postal service is facing increased demands from the spike in absentee and mail-in ballots while simultaneously confronting a devastating budgetary and resource crisis. Therefore, many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.

65. The prohibition also presents an undue burden on poor, rural, and other disadvantaged communities that do not have access to reliable mail service, lack of access to reliable transportation, and will be forced to incur significant burdens and health risks to submit their ballots in person. Voters in these groups are less likely to vote without third party assistance to safely collect and deliver their ballots on time to the appropriate county board office. Pennsylvania's prohibition on this practice denies voters access to the electoral process.

66. Pennsylvania's failure to provide pre-paid postage for mail ballots imposes monetary costs on the only safe alternative to voting for individuals who would otherwise have to subject themselves to the health risks of waiting to vote at the few consolidated and potentially crowded polling locations available. These costs bear most heavily on those who are affected by the devastating economic impact of the ongoing public health emergency. Even for voters able to withstand the economic costs, the postage requirement imposes practical burdens—i.e., traveling to a post office to purchase stamps—that will dissuade voters in light of the attendant health risks. Thus, Pennsylvania's failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Elections Clause.

67. Finally, Pennsylvania's signature-matching process for absentee ballots subjects Pennsylvanians who vote by mail to an arbitrary and error-prone verification process that can result in the rejection of their ballots without notice or an opportunity to cure. By empowering county

boards to “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s] right to vote,” 25 P.S. § 3146.8(g)(3), and conduct signature matching without any guidelines, Pennsylvania law ensures that some voters will have their ballots rejected erroneously, which violates their right to have their ballots counted, and fails to “equalize the power of voters in [the] Commonwealth’s election process.” *League of Women Voters of Pa.*, 645 Pa. at 113.

COUNT II

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

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

69. The Pennsylvania Constitution states that “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. It also prohibits the Commonwealth and any other political subdivision from denying to any person “the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. art. I, § 26. These equal protection provisions are analyzed “under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (1984)).

70. Those standards are best understood under the *Anderson-Burdick* balancing test, which commands courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as

justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “‘the regulation must be narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Reed*, 502 U.S. at 289). “‘However slight th[e] burden [on voting] may appear, ... it must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

71. Pennsylvania’s rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide pre-paid postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear heavily on certain groups of voters without sufficient justification. This includes voters who are over the age of 65 or who have underlying health conditions that make them vulnerable to COVID-19, minority voters, individuals with limited financial means, and voters who live in rural areas, among others. Pennsylvania has no interest of sufficient importance that outweighs the burdens on otherwise eligible members of the electorate, who will also be denied the opportunity participate in the electoral process on an equal basis with other voters.

COUNT III

Violation of Pennsylvania Constitution, Article I, Section 1 Due Process

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

73. “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Due process rights “emanate” from this section of Pennsylvania’s Constitution. *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 229 n.4 (1995). The requirements of Article I, Section I “are not distinguishable from those of the 14th Amendment . . . [and courts] may apply the same analysis to both claims.” *Id.* at 229 n.6. Pennsylvania courts have adopted the U.S. Supreme Court’s methodology in reviewing procedural due process claims. *R. v. Dep’t of Public Welfare*, 636 A.2d 142, 153 (1994) (adopting the federal procedural due process analysis expressed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for assessing due process claims under Article I, Section 1). The Commonwealth, having created processes for voting with absentee or mail-in ballots, “must administer it in accordance with the Constitution,” including with “adequate due process protection.” *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018).

74. What process is due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *Mathews*, 424 U.S. at 334–35. Courts must first consider the nature of the interest that will be affected by the government’s actions as well as the “degree of potential deprivation that may be created” by existing procedures. *Id.* at 341. Second, courts consider the “fairness and reliability” of the existing procedures “and the probable value, if any, of additional procedural safeguards.” *Id.* at 343. Finally, courts consider the public interest, which

“includes the administrative burden and other societal costs that would be associated with” additional or substitute safeguards. *Id.* at 347. Overall, due process is a “flexible notion which calls for such protections as demanded by the individual situation.” *Dep’t of Transp., Bureau of Licensing v. Clayton*, 546 Pa. 342, 351 (1996).

75. “Having induced voters to vote by absentee ballot,” the Due Process Clause requires the Commonwealth to “provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.” *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

76. The nature of interest at stake in this case—the right to vote and to have that vote count—is “the most treasured prerogative of citizenship in this nation and this Commonwealth.” *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303, 308 (1974).

77. Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to the postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots delivered after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurance that they will be delivered in time, even when submitted well in advance of Election Day.

78. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania’s absentee and mail-in voters are both meaningfully cast and actually counted is readily apparent. For instance, accepting absentee and mail-in ballots that arrive within seven days after Election Day, if they contain any indicia, such as a postmark or barcode, made by the U.S. Postal Service to track or record the time that a ballot entered the postal system on or before

Election Day alleviates the risk of arbitrary deprivation that Pennsylvania’s Election Day Receipt Deadline currently inflicts on voters affected by mail delivery disruptions.

79. Further, Pennsylvania officials do not need to certify election results to the Secretary until 20 days after Election Day, and the Commonwealth currently accepts mail ballots from overseas and military voters that arrive up to seven days after Election Day. Extending this allowance to voters affected by mail service disruptions would place minimal administrative burden on the state, if any.

80. Pennsylvania’s signature-matching process also violates the Due Process Clause. During the canvassing process, county boards must “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s] right to vote.” 25 P.S. § 3146.8(g)(3). The statute does not set forth any guidelines for conducting this comparison, and some counties engage in signature matching as part of the verification process. Signature matching, however, is highly error-prone, and Pennsylvania law does not require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process for a signature mismatch. Thus, Pennsylvania’s ballot verification process allows for the erroneous rejection of mail ballots and arbitrary disenfranchisement of Pennsylvania voters.

81. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania’s absentee and mail-in voters are not rejected for a mismatched signature is clear. Providing an opportunity to contest or cure signature mismatch determinations will reduce the risk of erroneous deprivation of the right to vote. Moreover, providing these adequate safeguards to will impose a minimal burden on the Commonwealth and advances the public’s interest in counting validly-cast ballots.

82. Having induced voters to cast mail ballots—made all the more necessary and urgent in light of the ongoing public health crisis—Pennsylvania must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to submit their mail ballots and to have those ballots counted. Pennsylvania’s failure to provide safeguards to voters whose ballots are delayed due to mail service disruptions, or voters whose ballots may be rejected under an error-prone signature-matching process, violates Petitioners’ and other Pennsylvania voters’ procedural due process rights.

PRAYER FOR RELIEF

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

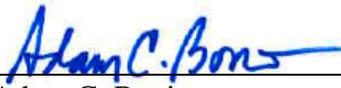
a) Declare unconstitutional the Commonwealth’s failure to: (i) provide prepaid postage on absentee and mail-in ballots; (ii) provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted—to the extent such declaration does not trigger Act 77’s non-severability provision; (iii) allow third party mail ballot collection assistance; and (iv) provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch.

b) Issue an order requiring that Defendants:

- a. Provide prepaid postage on all absentee and mail-in ballots;
- b. Implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail service 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. Allow 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; and
 - d. Provide 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.
- c) Maintain jurisdiction over this dispute to ensure that the Defendants comply with their obligations under the Pennsylvania Constitution.
- d) Provide such other and further relief as the Court may deem just and proper.

Dated: April 22, 2020

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Counsel for Petitioners

*Not admitted in Pennsylvania. Pro hac vice motion to be filed.

EXHIBIT B

NOTICE TO PLEAD

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

/s/ James E. DelBello

**James E. DelBello
Counsel for Proposed-Intervenor
Respondents**

IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MM 2020

**DISABILITY RIGHTS PENNSYLVANIA; SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF PHILADELPHIA,**

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,

**MIKE TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, BRYAN CUTLER, MAJORITY LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**INTERVENOR-RESPONDENTS SPEAKER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES MIKE TURZAI AND
MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES BRYAN CUTLER'S
PRELIMINARY OBJECTIONS**

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*Attorneys for Proposed-Intervenors Speaker
of the Pennsylvania House of Representatives
Mike Turzai and Majority Leader of the
House of the Pennsylvania House of
Representatives Bryan Cutler*

Intervenor-Respondents, Speaker of the Pennsylvania House of Representatives, Mike Turzai, and Majority Leader of the Pennsylvania House of Representatives, Bryan Cutler (collectively, “the House Leaders”) file these Preliminary Objections to explain that this Court should uphold the House’s policy decisions in the bipartisan enactment of Act 77 of 2019 made in conjunction with the Senate and the Executive Branch, and dismiss the Petition.

PRELIMINARY STATEMENT

1. Act 77 of 2019 is an example of bipartisan legislation where the political branches of government worked together, modernizing Pennsylvania’s election system and providing more options to voters and greater resources to the counties that administer those elections. Petitioners seek to undo this grand compromise by attacking a valid, nondiscriminatory election regulation, and asking this Court to replace it with a regulation of their own choosing, notwithstanding the violence to our constitutional norms.

2. As a threshold matter, this Court should issue a determination on the validity of the non-severability clause of Act 77. Petitioners have indicated that they do not wish to proceed with this matter should this Court uphold the non-severability clause. As this clause is a direct result of legislative compromise integral to the passage of Act 77, this Court should uphold the non-severability cause and dismiss

this action, as the Petitioners have failed to state a claim upon which relief can be granted.

3. Moreover, Petitioners lack the standing necessary to bring this action. Four of the five Petitioners are associations, in contravention of well-established case law that only individuals have standing to bring election-related claims in Pennsylvania.

4. The remaining Petitioner structures her claim as an “as-applied challenge,” but does not properly support her allegations. Petitioners make a series of suppositions of future calamitous harms—many extremely far-fetched—that would allegedly necessitate this Court taking the extreme step of invalidating a validly enacted election law – supported across party lines – and, even more extremely, this Court replacing it with one of Petitioners’ own choosing. Moreover, this relief allegedly needs to occur *now*, rather than to allow the continued bipartisan triaging of COVID-19-related issues.

5. The Legislative and Executive Branches took the proactive step in 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 was 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 procedures compatible with social distancing.

6. 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—four of whom are not voters with standing to even challenge the provision in question, and none of whom possess a cognizable injury other than their own speculation—look to undo these bipartisan reforms and to have this Court set election policy of the 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.

7. The challenged provision is a perfectly constitutional election regulation. For the feasibility of election administration, the Commonwealth has considered 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.

8. Finally, Petitioners have failed to join indispensable parties, the county election boards, as they would be the parties tasked with implementing the

Petitioners' requested relief. As such, Petitioners' claims should be dismissed for failure to join a necessary party.

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

I. FACTUAL BACKGROUND

10. Petitioners—four organizations and one individual—filed their Petition for Review with this Court on April 27, 2020, challenging 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 voter’s county board of elections “on or before eight o’clock P.M. the day of the primary or election.” Pet. ¶¶ 26 (quoting 25 P.S. § 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)).

11. The provision in question is a component of the bipartisan election reform legislation that the Legislative and Executive branches have worked to create 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 current composition of the Pennsylvania House of Representatives is 110 Republicans and 93 Democrats).

12. 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.*

13. In addition to allocating \$90 million to ensuring that Pennsylvanians could vote securely on modern voting machines, Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally been allowed—8:00 p.m. on Election Day. *Id.*

14. 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.

15. 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 are suitable to allow the ballots to be properly scanned. 2019 Pa. Legis. Serv. Act 2019-94 (H.B. 227) (West).

16. In the wake of the COVID-19 pandemic, the Legislative and Executive Branches worked together to fashion bipartisan legislation to address the issues associated with voting and health concerns.

17. Act 12 of 2020 introduced numerous accommodations to ensure that free and fair elections could be held in the Commonwealth. 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 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.*

18. 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. PRELIMINARY OBJECTIONS

A. **FIRST PRELIMINARY OBJECTION: Act 77’s Non-Severability Provision is Enforceable and This Action Should be Dismissed For Legal Insufficiency (Pa. R. Civ. P. 1028(a)(4))**

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

20. In their Petition for Relief, Petitioners state that they are “not seek[ing] any ruling or relief that would trigger Act 77’s non-severability provision.” Pet. ¶ 108.

21. Accordingly, the consideration of the non-severability provision is a threshold matter in this action. As the provision renders Petitioners’ requested relief impossible, the Petition should be dismissed for legal insufficiency. *See* Pa. R. Civ. P. 1028(a)(4).

22. In their Petition, Petitioners make clear that the enforceability of the non-severability provision is a threshold matter for their petition, as “Petitioners would withdraw their claims without seeking any relief if the non-severability provision were going to apply.” Pet. ¶ 108. As such, the validity of the non-severability provision should be considered at the outset.

23. Section 11 of Act 77 provides that “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). Section 6, 7, and 8 of Act 77 contain the received-by deadline language being challenged by the Petitioners. *Id.*; *see also* Pet. ¶ 61.

24. By seeking for this Court to hold “[a] provision of this act or its application to any person or circumstance held invalid,” Petitioners’ claims

necessarily would result in the remaining Sections of Act 77, listed in Section 11, being invalid. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).

25. “As a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). “There may be reasons why the provisions of a particular statute essentially inter-relate. . . In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.” *Id.* “Or, there may be purely political reasons for such an interpretive directive, arising from the concerns and compromises which animate the legislative process.” *Id.*

26. “[I]nseverability clauses serve a key function of preserving legislative compromise;’ they ‘bind[] the benefits and concessions that constitute the deal into an interdependent whole.’ In an instance involving such compromise, the General Assembly may determine [that] a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.* (citations omitted).

27. That is exactly the situation that led to the passage of Act 77. The differing politics of the Democratic and Republican camps led to a piece of bipartisan legislation that accomplished a wide variety of policy objectives—the combination of which made the compromise tenable to all. Removing one of the core provisions of Act 77—those listed in Section 11—would have led to the

disintegration of that bipartisan compromise. As the non-severability provision in Act 77 was “essential to securing the support necessary to enact the legislation,” the non-severability provision must be upheld as constitutional. *Id.*

28. The Petitioners mistakenly point to *Stilp* to support their contention that the non-severability provision in Act 77 is invalid. The fact pattern in *Stilp* was very particularized and centered around the interpretation of the 2006 governmental pay raise, and its subsequent attempted repeal. 905 A.2d at 925. The key issue pertaining to the legislation considered in *Stilp* was that it affected salaries across the Commonwealth’s government, including those of the judicial branch. *Id.*

29. Given that interplay, this Court viewed the *Stilp* non-severability provision “as a sword against the Judiciary,” since “there was some question as to the constitutionality of having legislators increase their own expense allowance [and that] the legislature foresaw that a constitutional challenge was possible; and the inseverability clause ensured that if a court struck down the increase in legislators’ expense allowances, the increase in judicial salaries would be sacrificed as well.” *Stilp*, 905 A.2d at 978, 979. “[G]iven the separation of powers concerns that arise from inclusion of the clause in a statute . . . which includes compensation provisions for the Judiciary, we hold that the clause is ineffective and cannot be permitted to dictate our analysis.” *Id.* at 980.

30. The particularized fact pattern in *Stilp* concerning the setting of judicial compensation differs markedly from the instant case, which concerns the regulation of election procedures—a traditional legislative prerogative. *See, e.g., 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.”).

31. Furthermore, the Act 77 non-severability clause is not only distinguishable from the invalidated clause in *Stilp*, it fits squarely within this Court’s reasoning in that case—noting the constitutionality of legislation where the non-severability provision was the product of compromise, and narrowly tailored to “secur[e] the support necessary to enact the legislation.” *Id.* at 978.

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.

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

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

33. Disability Rights Pennsylvania, The Barristers’ Association of Philadelphia, Inc., SeniorLAW Center, and Southeast Asian Mutual Assistance Coalitions, Inc. (collectively, the “Organization Petitioners”) all lack 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 Petitioners are not entities authorized to vote in the Commonwealth.

34. 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)).

35. 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)).

36. 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).

37. “[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).

38. 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.

39. By contrast, each of the Organization Petitioners brings suit based on factors better attributed to changed programming *due to the creation of mail-in balloting* (“For instance, Disability Rights has conducted additional outreach to disability support and advocacy groups and service providers to educate them about

the timelines for receipt of absentee and mail-in ballots. . .” Pet. ¶ 78), or to COVID-19, than the statutory provision in question in this case. *See, e.g.*, Pet. ¶ 95 (“Without in-person services and door-to-door canvassing, it is more time-consuming for SEAMAAC to gain the trust of the people it seeks to activate as voters. . .”)

40. Organization Petitioners attempt to claim standing via the diversion of their resources necessitated by the changing of the law, but at best that is due to the law’s expansion of mail-in voting, as opposed to the current received-by deadline *that was extended by the law*—and indeed was extended *yet again* when Act 12 moved the Primary Election to a later date, accommodating voters even further. This diversion of resources argument is wholly insufficient, and inconsistent with the standing requirements that this Court has imposed in past voting rights cases.

41. There is no allegation that any of the Organization Petitioners are entities authorized by law to vote in the Commonwealth, accordingly, Disability Rights Pennsylvania, The Barristers’ Association of Philadelphia, Inc., SeniorLAW Center, and Southeast Asian Mutual Assistance Association Coalition, Inc. all lack capacity to sue—either individually or on behalf of their members—due to the nature of the claims in this case and must be dismissed as parties.

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.

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

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

43. 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.

44. As the Respondents well summarize, Petitioners' "allegations set forth a string of theories and what-ifs: That increases in absentee ballot and mail-in ballot applications could lead to processing backlogs in unspecified counties (citing weeks-old applications numbers from just two of Pennsylvania's 67 counties), Pet ¶¶ 46-47; that the U.S. postal system may need more time to deliver some things (citing experiences from 'other parts of the country') and therefore may delay ballot deliveries, Pet. ¶ 50; that there is a 'possibility that local post offices will need to shut down,' Pet. ¶ 50 n. 19; that because of these 'myriad' delays, some voters' ballots might not arrive on time; and that this outcome might disproportionately affect one or another group of voters, Pet. ¶ 52-55." Respondent's Preliminary

Objections ¶ 23. These conjectures simply do not rise to the level of a cognizable legal injury.

45. Assuming, *arguendo*, that the United States Postal Service suddenly collapses after centuries of operations, the General Assembly has repeatedly demonstrated during the COVID-19 crisis, through its recent amendments to the Election Code, that it stands fully ready to address such a situation—as far-fetched as it may be.

46. “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).

47. Here Petitioners’ alleged injury could not be more speculative. It relies 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, demonstrated injury. Given the legal insufficiency of Petitioners' claims, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

48. Furthermore, Petitioners ask this Court to wade into the political question of election policy choices, which are the product of bipartisan and bicameral compromise.

49. 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).

50. 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.

51. 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.”).

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

53. “[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).

54. “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).

55. 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.”).

56. 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).

57. Here, the law in question is a clear bipartisan 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.

58. There are many deadlines in the election process. Nomination petitions must be “filed on or before the tenth Tuesday prior to the primary.” 25 P.S. § 2873(d). Polling places close at 8:00 p.m. on Election Day. 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 who won and who lost the election. As such, it should be upheld as a proper election administration regulation.

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.

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

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

60. Should this Court need to consider the relief sought by the 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.

61. 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.

62. 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).

63. 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).

64. 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.

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

statute could be rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature, for additional editing of [the statute] on our part would amount to judicial legislation.”).

66. This is especially true in the present context where Act 77 has a non-severability provision. While Petitioners seek to declare that provision itself unconstitutional, as a product of political compromise, that provision is an integral part of the Act and must be upheld. *See* discussion *supra* at Section A.

67. As such, granting the requested relief would overturn not just the received-by-date regulation, but would invalidate the entirety of the Act 77 reforms—including the very concept of mail-in voting—and send the Legislative and Executive Branches unnecessarily back to the political drawing board.

68. While the Court has the power to review Act 77, it cannot direct the Legislature *how* to fix any alleged constitutional defect. If the received-by deadline is held to be unconstitutional, it is the sole province of the Legislature to determine how to address it. 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).

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.

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

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

70. 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).

71. 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).

72. 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). 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).

73. Here, the Commonwealth of Pennsylvania’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. As examples, the Petition seeks a declaration that county election officials extend the times that they consider absentee and mail-in ballots by seven days, and alter their absentee ballot verification procedures. *See* Pet. ¶ 62.

WHEREFORE, for the reasons above, the House Leaders respectfully request that this Court sustain their Preliminary Objection for failure to plead a justiciable remedy and dismiss with prejudice the petition for review.

Respectfully submitted,

/s/ James E. DelBello

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Mike Turzai and Majority Leader of the
House of the Pennsylvania House of
Representatives Bryan Cutler*

Dated: May 12, 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
the Pennsylvania House of Representatives
Mike Turzai and Majority Leader of the
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Dated: May 12, 2020

EXHIBIT 1

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IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS PENNSYLVANIA; THE
BARRISTERS' ASSOCIATION OF PHILADELPHIA,
INC.; SENIORLAW CENTER; SOUTHEAST ASIAN
MUTUAL ASSISTANCE ASSOCIATION
COALITION, INC. (SEAMAAC); SUZANNE ERB,

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.

No.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perer dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir alstencia legal.

Colegio de Abogados de
Condado de Dauphin
Abogado Servicio de Referencia
213 North Front Street
Harrisburg, PA 17101
(717) 232-75

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Pro hac vice motion to be filed.

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IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS PENNSYLVANIA; THE
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ELECTION SERVICES AND NOTARIES OF THE
PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No.

TO:

Secretary Kathy Boockvar

Pennsylvania Department of State
Office of the Secretary
302 North Office Building, 401 North Street
Harrisburg, PA 17120

Director Jessica Mathis

Pennsylvania Department of State
Bureau of Election Services and Notaries
210 North Office Building, 401 North Street
Harrisburg, PA 17120

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

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IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS PENNSYLVANIA;
SENIORLAW CENTER; SOUTHEAST ASIAN
MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF
PHILADELPHIA,

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.

No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

1. The COVID-19 crisis has changed every aspect of American life. It has changed the way we work. It has changed the way we walk. And it has changed the way we vote.

2. Because voting in person will pose grave risks to people's health and lives throughout 2020, Americans will turn in unprecedented numbers to voting by mail instead. Already in Pennsylvania, applications to vote by mail in the upcoming June primary have skyrocketed across the Commonwealth. But the rules for mail voting in Pennsylvania—and in particular, the deadline by which county boards of elections must receive completed absentee and mail-in ballots—were written for a pre-pandemic world. Absent judicial intervention, the requirement that absentee and mail-in ballots must be received by the county boards of elections by election day will result in the disenfranchisement of large numbers of Pennsylvanians this year.

3. The deadline for Pennsylvania voters to *apply* for an absentee or mail-in ballot is just one week before election day. For the many voters who apply for a ballot on or near this deadline, a number of things need to happen in the short span of a week for these voters to have their votes counted. First, the county board of elections must process the application, review and approve it, and send the voter a ballot via the U.S. Postal Service (“USPS”). The surge in absentee and mail-in

ballot applications has already begun to overwhelm county boards of elections, many of which are experiencing staff shortages as a result of the pandemic, and the backlogs in processing applications will only increase as election day draws near. On top of these backlogs at the county level, USPS is experiencing its own delays due to the pandemic. As a result, tens or even hundreds of thousands of Pennsylvanians who timely request an absentee or mail-in ballot will receive the ballot only days (or less) before election day. At that point, the voter cannot be sure that if she mails the ballot it will be received by the board of elections by election day.

4. These voters will then face a choice: either mail the absentee or mail-in ballot and risk that it will arrive too late and will not be counted, or vote in person and risk not only their own health and lives, but the health and lives of their families and neighbors. Making matters worse, Pennsylvania law requires anyone who requested an absentee or mail-in ballot and wishes to vote in person to bring that ballot with them to the polling place and spoil it there. Voters who risk their lives to vote in person may still be denied the franchise if they are not aware of this requirement.

5. In these extraordinary, once-in-a-century circumstances, enforcement of the deadline that absentee and mail-in ballots must be received by election day violates the Pennsylvania Constitution. The deadline violates Pennsylvania's Free

and Equal Elections Clause. Elections are not “free” when voters must risk their health and lives to ensure their votes will be counted. And elections are not “equal” when similarly situated citizens who timely request absentee and mail-in ballots may or may not have their votes counted based on factors outside their control, such as variation in mail-delivery schedules across the Commonwealth or application-processing speeds at different county elections boards. The deadline for receipt of absentee and mail-in ballots violates Pennsylvania’s Equal Protection Clause for similar reasons. The deadline also violates Pennsylvania’s Free Expression and Association Clauses by burdening or outright preventing voters from casting a ballot, a form of core political expression for which the Pennsylvania Constitution provides broader protection than its federal counterpart. And the deadline violates Pennsylvania’s Absentee Voting Clause, which requires the legislature to provide voters with physical disabilities and illnesses who cannot appear in person on election day a full opportunity to vote by absentee ballot.

6. This Court can and should prevent these constitutional harms by enjoining enforcement of the received-by-election-day deadline for the 2020 primary and general elections, and ordering that any absentee or mail-in ballot must be counted so long as the voter sends it by election day and the county board of elections receives it within seven days of election day.

PARTIES

A. Petitioners

7. Petitioner Disability Rights Pennsylvania (“Disability Rights”) is a 501(c)(3) Pennsylvania nonprofit organization whose members include the over 1.7 million Pennsylvanians with disabilities. For more than 40 years, Disability Rights has engaged in advocacy, legislation, and litigation on behalf of hundreds of thousands of Pennsylvanians with disabilities “so that they may live the lives they choose, free from abuse, neglect, discrimination, and segregation.” Disability Rights is designated by the Commonwealth as the “protection and advocacy system” under various federal laws that empower Disability Rights to protect the rights of and advocate for Pennsylvanians with disabilities. Among other issues, Disability Rights protects and advances the rights of individuals with disabilities with respect to housing, employment, education, public access, and voting.

8. Petitioner Suzanne Erb is a church organist and singer who resides in Philadelphia, Pennsylvania. She also works part-time as a disability rights advocate. Ms. Erb is 64 years old and is blind. She is a longtime board member of Disability Rights and has been Chair of the Board since September 2019. Ms. Erb is a registered Pennsylvania voter who regularly votes in primary and general elections.

9. Petitioner SeniorLAW Center (SeniorLAW) is a nonpartisan, nonprofit organization that seeks justice for older people using the power of the law, community education, and advocacy at the local, state, and national levels. Founded in 1978, SeniorLAW Center has served more than 400,000 older Pennsylvanians through its many diverse programs, including its statewide SeniorLAW HelpLine, which serves seniors in all 67 Pennsylvania counties. SeniorLAW Center addresses critical legal issues affecting the lives of seniors, including elder abuse, family violence and financial exploitation, housing and shelter, grandparents raising grandchildren, consumer protection, health care, advance planning, and civil and voting rights.

10. Petitioner Southeast Asian Mutual Assistance Associations Coalition, Inc. (SEAMAAC) is a nonpartisan, nonprofit organization headquartered in Philadelphia. SEAMAAC's mission is to support and serve immigrants, refugees and other politically, socially, and economically marginalized communities as they seek to advance the condition of their lives in the United States.

11. Petitioner The Barristers' Association of Philadelphia, Inc. (Barristers) is a nonpartisan, nonprofit membership-based organization headquartered in Philadelphia. Members of Barristers encompass lawyers and legal professionals who serve society at the highest positions in both the private and public sectors of the legal profession, and the organization has a

communications reach of approximately 3,000 community stakeholders, in addition to its members. Barristers' mission is to serve the Black legal profession and the Black community by promoting and fostering (i) professional and practice development and excellence; (ii) economic and political empowerment; (iii) charitable and community service; and (iv) justice and equal opportunity. Founded in 1950, as an affiliate of the National Bar Association, Barristers increases citizens' awareness of their rights under the law through community town halls and clinics; provides scholarships to area minority law students; prepares wills and powers of attorney for low-income senior citizens; promotes youth awareness and career opportunities for Black and other minorities in the legal profession; and annually distributes several hundred turkey dinners to needy Philadelphia families for Thanksgiving.

B. Respondents

12. Respondent Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity only. In that capacity, she supervises and administers Pennsylvania's elections and election law.

13. Respondent Jessica Mathis is the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State and is sued in her official capacity only. In that capacity, she supervises and administers Pennsylvania's elections and electoral process.

JURISDICTION

14. The Court has original jurisdiction over this Verified Petition for Review pursuant to Section 13 of the Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”), which provides: “The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of,” *inter alia*, sections 1302, 1302.1, 1302.2, and 1308 of the 2019 Omnibus Amendments to the Pennsylvania Election Code.

FACTUAL ALLEGATIONS

A. Voting by Mail in Pennsylvania

15. Pennsylvania law provides for two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters.

16. “Qualified absentee electors” include, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on election day due to work, and people who cannot vote in person because of observance of a religious holiday. 25 P.S. § 3146.1.¹

¹ Military and overseas voters may also vote by absentee ballot. The deadline for such voters to return their ballots is different from all other absentee voters, *see* 25 Pa.C.S. § 3511 (deadline for military and overseas voters), and Petitioners do not challenge the deadline for military and overseas voters in this case. All references

17. Any registered voter who does not qualify as an absentee voter may apply to submit their ballot by mail-in voting, without providing a justification. 25 P.S. §§ 3150.11–3150.12b; *see* Act. of Oct. 31, 2019, P.L. 552, No. 77. Such voters are known as “qualified mail-in electors.” 25 P.S. § 3150.11.

18. As relevant to this case, the same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters.

19. Voting by absentee ballot or mail-in ballot in Pennsylvania is a multi-step process. A voter must apply for the ballot from the voter’s county board of elections, receive the ballot, and then complete and return it. Each of these steps takes time, often presents logistical challenges for voters in the current COVID-19 crisis, and will involve one to three mailings through USPS.

20. The deadline for voters to apply for an absentee ballot or a mail-in ballot is “five o’clock P.M. [on] the first Tuesday prior to the day of any primary or election.” 25 P.S. §§ 3146.2a(a), 3150.12a(a).

21. To apply for an absentee or mail-in ballot, Pennsylvania voters have several options.²

to absentee and mail-in voters throughout this Petition refer to non-military and overseas voters who currently must return their ballots by election day.

² <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>.

22. Voters can apply online at [VotesPA.com/ApplyMailBallot](https://www.votespa.com/ApplyMailBallot) or [VotesPA.com/ApplyAbsentee](https://www.votespa.com/ApplyAbsentee). But the online option is available only to applicants who have a Pennsylvania driver's license or non-driver photo identification from the Pennsylvania Department of Transportation (PennDOT). Many registered Pennsylvania voters who vote regularly do not have a PennDOT-issued driver's license or non-driver photo identification and thus cannot apply for a ballot online.³

23. Voters who do not have a PennDOT identification card can download and print an absentee or mail-in ballot application, complete it on paper, and mail it to their county board of elections. But many registered voters do not have access to a printer, especially during the COVID-19 crisis.

24. Voters who do not have a PennDOT identification or access to a printer must call, email, or write a letter to the Department of State or their county board of elections to request an application, and then wait for the application to be mailed and delivered to them.⁴

³ See *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 Pa. Commw. Unpub. LEXIS 756, at *94-96 (Pa. Commw. Ct. Jan. 17, 2014).

⁴ Ordinarily, such voters could also go in person and pick up and return a ballot application at their county board of elections, but the relevant offices are not currently open to public walk-ins.

25. If a voter submits an application and the county board of elections determines that the voter meets the statutory requirements for an absentee ballot or a mail-in ballot, the board sends the absentee or mail-in ballot to the voter. *See* 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a)(1).

26. To be counted, the voter's absentee or mail-in ballot must be received by the county board of elections "on or before eight o'clock P.M. the day of the primary or election." 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

27. This "received-by" deadline applies irrespective of when a voter applied for her absentee or mail-in ballot, when the county board of elections approved the voter's application and sent the ballot to the voter, when the voter received the ballot, or when the voter mailed the completed ballot.

28. Voters who timely request an absentee or mail-in ballot but do not receive the ballot with sufficient time before election day face significant hurdles in exercising their right to vote.⁵ As a default rule, voters who request an absentee or mail-in ballot may not vote by regular ballot in person on election day, even if

⁵ Under normal circumstances, voters can hand deliver their absentee or mail-in ballots to their county board of elections by 8:00 p.m. on election day. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But those offices are currently not open for public walk-ins because of the pandemic. Even if they were, voting by hand-delivering a ballot to a county board of elections would similarly require a voter to choose between voting and their safety. Finally, hand-delivering a ballot in person is likely not an option for absentee voters who are outside their county of residence or have a disability that prevents them from traveling to their county board of elections. *See* 25 P.S. §§ 3146.1(j), (l).

they have not cast the absentee or mail-in ballot. 25 P.S. §§ 3146.3(e), 3150.13(e).

If a voter requested an absentee or mail-in ballot but wishes to vote in person on election day, the voter may cast a regular ballot at a polling place only if the voter brings the absentee or mail-in ballot to the polling place (along with the envelope that came with it), “remits” (or “spoil[s]”) the absentee or mail-in ballot, and submits a sworn statement in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3).

29. If the voter does not bring the absentee or mail-in ballot and the accompanying envelope to the polling place, the voter may cast only a provisional ballot. 25 P.S. §§ 3146.3(e), 3150.16(b)(2).

30. Thus, a voter who timely requested an absentee or mail-in ballot a week before election day, received the ballot too close to election day to be sure it would be received by election day if mailed, and does not have the wherewithal to bring the absentee or mail-in ballot and accompanying envelope to her polling place will be precluded from voting by regular ballot at a polling place.

B. The Received-By Deadline Makes the Franchise Dependent on the Actions of Third Parties

31. Because of the deadline requiring absentee and mail-in ballots to be received on or before election day, a voter's ability to cast a ballot by mail depends in multiple respects on the actions of third parties:

- a. First, if the voter mails her application for an absentee or mail-in ballot, USPS must deliver the voter's application to the county board of elections.
- b. Second, the county board of elections must process and approve the application, and mail the voter an absentee or mail-in ballot.
- c. Third, USPS must deliver the ballot to the voter.
- d. Fourth, after the voter fills out and mails the ballot, USPS must deliver the completed ballot to the county board of elections by 8 P.M. on election day for it to be counted.

32. Although USPS estimates that standard First Class mail delivery takes one to three business days, USPS does not guarantee its delivery times, and it often takes longer than three days to deliver First Class mail, particularly in times of high volume or shortages of USPS staffing, or for mail sent from a distant location.

Thus, a voter does not know with any degree of certainty the date by which they must mail their absentee or mail-in ballot to be assured it will be counted.

33. In addition, the time it takes for a county board of elections to process applications and send approved voters an absentee or mail-in ballot will vary based on numerous factors, including the number of applications received in that county and the county's staffing and IT resources.

34. Accordingly, the received-by deadline will inevitably result in a substantial number of absentee and mail-in ballots not being counted, even though voters timely requested them.

35. That is especially true given that a substantial percentage of voters submit their vote-by-mail applications close to the relevant deadline. For instance, in the recent Wisconsin primary election, more than 283,000 voters submitted absentee ballot requests in the last four days before the April 3 application deadline. More than 136,000 voters submitted their request in just the last two days before the deadline.⁶

36. A typical example is a Pennsylvania voter who, like many other voters, submits her application for an absentee or mail-in ballot the day before the application deadline (the Tuesday before the election). If the county board of elections takes three days to process the application and send the voter a ballot, and it then takes another two days for the ballot to arrive at the voter's residence via

⁶ See Wisconsin Election Commission, Absentee Voting Statistics, <https://elections.wi.gov/publications/statistics/absentee>.

mail, the voter will not receive the ballot until the Saturday before the election. Even if the voter completes the ballot and sends it back that same day, the voter has no assurance that it will be received by 8:00 P.M. on election day, two business days later. The voter's ballot may not be received by the deadline and accordingly may not be counted. As described below, the time required is multiplied substantially for disabled voters, who may need assistance requesting, receiving, filling out, and submitting their absentee or mail-in ballots.

37. Moreover, as a result of unpredictable variation in USPS's delivery times, two voters who are otherwise identically situated could mail their absentee or mail-in ballots on the exact same day and time and have different outcomes—the voter whose local USPS branch delivers mail faster could have her vote counted while the voter who lives in an area with slower delivery times could have her ballot discarded as too late.

38. In other words, Pennsylvania's received-by deadline treats identically situated voters differently—enfranchising some and disenfranchising others—based on events entirely outside the voters' control, including the time it takes USPS to deliver the mail.

D. The COVID-19 Pandemic

39. The disenfranchisement caused by the received-by deadline for absentee and mail-in ballots will be magnified enormously in the context of the current public health crisis resulting from the COVID-19 pandemic.

40. As of April 27, 2020, the Pennsylvania Department of Health has reported 41,165 confirmed cases of COVID-19 in Pennsylvania.⁷ It has reported 1,550 deaths resulting from those cases.⁸ Nationwide, the Centers for Disease Control and Prevention (“CDC”) has reported 928,619 total cases of COVID-19, resulting in 52,459 deaths.⁹

41. Governor Tom Wolf has issued a statewide “stay-at-home” order to protect the health and safety of the Pennsylvania’s citizens.

42. Dr. Robert Redfield, the Director of the CDC, has stated that “most likely” there will be a second wave of mass infection in the fall, as the November general election draws near. Dr. Redfield explained that a second wave will

⁷ See <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

⁸ *Id.*

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

require states to “aggressively re-embrace some of the mitigation strategies that we have determined had impact, particularly social distancing.”¹⁰

43. COVID-19 disproportionately afflicts and kills minorities, people with disabilities, and people over age 60.¹¹ In Pennsylvania, African Americans comprise 31% of the persons who have contracted COVID-19 (for whom racial data is available), even though African Americans comprise just 12% of the total population.¹²

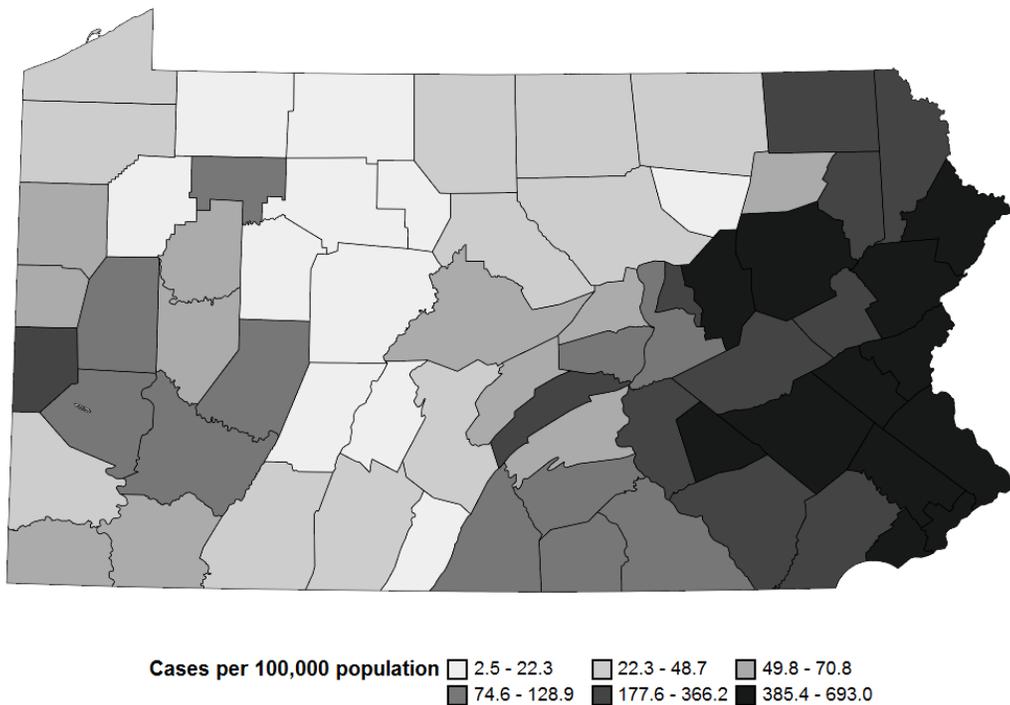
¹⁰ Kashmira Gander, *CDC Director Says There May be Another Coronavirus Wave in Late Fall and a ‘Substantial Portion of Americans’ Will be Susceptible*, Newsweek (Apr. 1, 2020), <https://www.newsweek.com/cdc-director-coronavirus-wave-late-fall-substantial-portion-americans-will-susceptible-1495401>.

¹¹ See, e.g., Kat Stafford et al., *Racial Toll of Virus Grows Even Starker as More Data Emerge*, AP (Apr. 18, 2020), <https://apnews.com/8a3430dd37e7c44290c7621f5af96d6b> (reporting that, of the 196 COVID-19 related deaths in Philadelphia, 126 of them were African Americans); CDC, *People Who Need Extra Precautions: People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>; CDC, *Severe Outcomes Among Patients with Coronavirus Disease 2019* (Mar. 17, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>; Ron Southwick, *In coronavirus crisis, Pa. should be prepared ‘to be in this for the long haul’: Gov. Tom Wolf*, Patriot News (Mar. 26, 2020), <https://www.pennlive.com/coronavirus/2020/03/gov-wolf-health-secretary-provide-update-on-coronavirus-in-pa-watch-live.html> (detailing virus’s effects on elderly population and noting that “[a]mong those who have been hospitalized, 46 percent are over 65”).

¹² <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

44. The virus has also disproportionately affected communities in eastern Pennsylvania. The following map produced by the Pennsylvania Department of Health shows that counties in the eastern part of the Commonwealth have by far the highest number of known cases per capita.¹³

INCIDENCE BY COUNTY



45. Polling places are the type of crowded environments that, according to public-health officials, promote the transmission of COVID-19. Indeed, the CDC

¹³ *Id.*

has encouraged the adoption of “voting methods that minimize direct contact with other people and reduce crowd size,” including mail-in voting and early voting.¹⁴

46. Given the risks posed by the COVID-19 pandemic, many more Pennsylvania citizens than usual will seek to vote by mail—rather than in person at a polling place—in the upcoming primary and general elections. As of April 23, 2020, the Pennsylvania Department of State reported that more than 600,000 Pennsylvanians had requested an absentee or mail-in ballot for the June 2 primary election, with the primary still six weeks away. By comparison, in the 2016 primary election, officials reported a grand total of 84,000 absentee votes cast.

47. The unprecedented increase in absentee and mail-in ballot applications will predictably result in backlogs in the processing and approval of such applications by county boards of elections. Those backlogs will result in delays in the time between when a voter submits a ballot application and when the county elections board actually sends the ballot to the voter.

48. For example, as of April 17, Allegheny County had processed only 20,000 of the more than 71,000 absentee and mail-in ballot applications it had

¹⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

already received.¹⁵ As of April 20, the City of Philadelphia alone already had a backlog of more than 10,000 ballot requests that needed to be processed.¹⁶

49. For this and other reasons, the Philadelphia City Commissioners' Chairwoman has advocated changing the deadline for absentee and mail-in ballots to the date that the voter *sends* the ballot, rather than the date that the ballot is *received*, stating that the current system is simply “not designed to handle” the number of absentee and mail-in ballot requests being made due to the pandemic.¹⁷

50. The COVID-19 pandemic is also taxing the mail system, creating further potential for delay. As of April 17, 2020, USPS reported that Priority Mail and First Class packages may temporarily require more time to be delivered due to transportation availability as a result of the pandemic.¹⁸ In addition, residents in

¹⁵ Julian Routh, *Allegheny County will send mail-in ballot applications to all registered voters*, Pittsburgh Post-Gazette, Apr. 17, 2020, <https://www.post-gazette.com/news/politics-local/2020/04/17/Allegheny-County-will-send-mail-in-ballot-applications-to-all-registered-voters/stories/202004170118>.

¹⁶ Press Release, Philadelphia City Commissioners' Chairwoman Lisa Deeley Calls on Governor Wolf and the Legislature to Extend Voted Ballot Return Deadline for the June 2nd Primary, <https://twitter.com/Elaijuh/status/1252298585808535552>.

¹⁷ *Id.*

¹⁸ <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes>

other parts of the country “are experiencing delays in their mail delivery service as [USPS] employees have been directly affected by the coronavirus pandemic.”¹⁹

51. Enforcing the received-by deadline for absentee and mail-in ballots during the pandemic will disenfranchise tens of thousands of Pennsylvanians, and will force a substantial number of others to risk their health and lives, and the health and lives of their families and neighbors, to vote in the upcoming 2020 primary and general elections.

52. First, due to the myriad delays caused by the pandemic, a large number of Pennsylvanians will timely request an absentee or mail-in ballot, and will send their ballot on or before election day, but their ballot will not be counted because it was not received by the election day deadline.

53. Second, some voters who timely request an absentee or mail-in ballot will receive the ballot too close to election day to know whether there is enough time to send the ballot back and have it timely received by election day in order to be counted. The only way these voters can ensure their votes are counted is to vote

¹⁹ Justin P. Hicks, *Mail Service Slows in Michigan as Coronavirus hits Postal Workers*, Gov’t Tech. (Apr. 7, 2020), <https://www.govtech.com/em/safety/Mail-Service-Slows-in-Michigan-as-Coronavirus-hits-Postal-Workers-.html>. And of course there is always the possibility that local post offices will need to shut down temporarily due to COVID-19 causing further mail delays, as happened earlier this month in Chester County, Pennsylvania. https://www.dailylocal.com/news/coronavirus/exton-post-office-temporarily-closed/article_c118f97c-751c-11ea-ab92-2fe3f7f922c5.html

in person. These voters will face a choice between losing their right to vote and risking their lives and the lives of their families and neighbors by voting in person. For those parents without access to child care, they would have to risk their children's health by bringing them to the polls. And the risks of voting in person will be heightened because many polling locations will close due to staffing shortages, resulting in longer lines at the few polling locations that remain open. For instance, Allegheny County is seeking to close more than 85% of its polling locations for the June primary.²⁰

54. Third, even for those voters who choose to risk their health and lives to vote, many will not know that they must bring their absentee or mail-in ballot and accompanying envelope to their polling place and spoil it there in order to vote in person. Voters who are not aware of this requirement and are informed of it at their polling place will only be able to cast a provisional ballot, and many voters will leave rather than casting a provisional ballot.

55. The disenfranchisement resulting from the received-by deadline will not only be enormous in magnitude, but it will also be arbitrary. As explained, enforcement of the received-by deadline inevitably subjects similarly situated voters who request absentee or mail-in ballots on the same day to differential

²⁰ Jamie Martines, *Allegheny County votes to consolidate primary polling locations*, TribLive (Apr. 23, 2020), <https://triblive.com/local/pittsburgh-alleggheny/alleggheny-county-votes-to-consolidate-primary-polling-locations/>.

treatment—some of their votes will be counted and others not—based on factors outside of their control. Those factors, which include the speed of mail delivery by USPS and application processing by county boards of elections, will become more unpredictable and uncontrollable when voters are attempting to vote by mail in record numbers during the pandemic.

56. Further, because of the received-by deadline for absentee and mail-in voting and the health risks of in-person voting, the significant percentage of voters who remain undecided until election day will be forced to vote earlier than they otherwise would, depriving them of any late-developing information that might affect their vote.²¹ Elections regularly feature late-breaking developments that may cause voters to change their minds on the eve of the election or on election day itself. For instance, in the 2016 Presidential election, 15% of Pennsylvanians made their decision in the final week of the election, and those voters swung

²¹ Bob Fredericks, *Super Tuesday Voters Made Last-Minute decisions in fluid 2020 Presidential Race*, N.Y. Post (Mar. 3, 2020), <https://nypost.com/2020/03/03/super-tuesday-voters-made-last-minute-decisions-in-fluid-2020-presidential-race/>; Nate Silver, *The Invisible Undecided Voter*, FiveThirtyEight (Jan. 23, 2017), <https://fivethirtyeight.com/features/the-invisible-undecided-voter/> (reporting 13 percent of voters were undecided on election day in 2016); Brian Brox et al., *Late Deciders in U.S. Presidential Elections*, 20 Am. Rev. of Politics 333 (2009), <http://www.tulane.edu/~bbrox/Brox%26Giammo.pdf> (explaining behavior of late-deciding voters).

decidedly toward President Trump.²² And in 2012, President Obama’s handling of Hurricane Sandy at the end of October raised his poll rating in what had been a close race.²³ Although the Democratic and Republican primaries for President hold little suspense this year, Pennsylvania’s June 2, 2020 primary will decide hotly contested races for both parties, including for seats in the U.S. House, State Senate, and State House. In addition, Democrats statewide will be voting in a contested primary for Pennsylvania Auditor General.

57. In an ordinary election, voters who want to ensure that they have the benefit of all available information before casting their ballot may do so by going to the polls on election day, or by delivering their absentee or mail-in ballot in person on election day to the county board of elections, without concern of getting sick, dying, or infecting their neighbors or families as a result. But the received-by deadline for absentee and mail-in ballots—combined with the COVID-19 pandemic—forces voters to choose between risking their health by going to the

²² Aaron Blake, *How America decided, at the last moment, to elect Donald Trump*, Wash. Post (Nov. 17, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/how-america-decided-at-the-very-last-moment-to-elect-donald-trump/>; see also Nate Silver, *The Comey Letter Probably Cost Clinton The Election*, FiveThirtyEight (May 3, 2017), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election>.

²³ John Cassidy, *How Much Did Hurricane Sandy Help Obama?*, New Yorkers (Nov. 4, 2012), <https://www.newyorker.com/news/john-cassidy/how-much-did-hurricane-sandy-help-obama>.

polls on election day or voting with less than complete information before election day.

58. The received-by deadline will also disproportionately burden and disenfranchise certain groups of Pennsylvanians. For instance, studies in other states have shown that received-by deadlines disproportionately disenfranchise young voters and minority voters.²⁴

E. Lessons Learned from Wisconsin's April 7, 2020 Election

59. Wisconsin's recent primary election illustrates that a substantial number of people will be disenfranchised due to the received-by-election-day deadline for voting by mail in the context of the COVID-19 pandemic.

60. Similar to Pennsylvania's statutes, Wisconsin law requires that absentee ballots must be received by election day in order to be counted.

61. In Wisconsin, the COVID-19 pandemic caused a dramatic uptick in requests for absentee ballots for its April 7, 2020 primary election. On April 13,

²⁴ See, e.g., Expert Report of Stephen Ansolabehere, *Voto Latino v. Hobbs*, No 2:19-cv-05685-DWL, ECF No. 23-1 (D. Ariz.); *Disparities in California's Uncounted Vote-by-Mail Ballots: Youth, Language Preference and Military Status*, Cal. Civic Engagement Project (Oct. 2014); Dr. Daniel A. Smith, *Vote-by-Mail Ballots Cast in Florida* (2018), <https://electionsmith.files.wordpress.com/2016/10/smith-coie-jenner-report-dnc-fdp.pdf>.

2020, the Wisconsin Elections Commission reported that 1,296,071 voters requested absentee ballots—five times more than in the 2016 primary.²⁵

62. “In light of these unprecedented numbers, at least some clerks [had] trouble processing the applications for absentee ballots.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *5 (W.D. Wis. Apr. 2, 2020). For instance, “[a]s of March 27, Madison had a backlog of more than 12,000 absentee ballots requests to process, and as a result it was experiencing at least a week-long delay in sending out absentee ballots.” *Id.*

63. On April 2, 2020, a federal district court entered an injunction extending the deadline for absentee ballots, such that they would be counted if received by April 13, 2020, six days after the primary. *Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1638374, at *3.

64. On April 6, 2020, the U.S. Supreme Court modified the injunction, providing that ballots were to be counted if they were postmarked on or before

²⁵ Compare *Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary*, Wisc. Election Comm’n, <https://elections.wi.gov/node/6833> (reporting over 1.28 million absentee ballots requested for April 7, 2020 primary), with Riley Vetterkind, *Absentee Ballot Requests in Wisconsin Already Exceed Number in Recent Spring Elections*, Wisc. State J. (Mar. 18, 2020), https://madison.com/wsj/news/local/govt-andpolitics/absentee-ballot-requests-in-wisconsin-already-exceed-number-in-recent-spring-elections/article_dfb34fc5-6aa8-5428-90c3-26c3f82a1d70.html (noting that just under 250,000 absentee ballots were requested for spring 2016 Wisconsin primary).

election day. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 206 L. Ed. 2d 452, 455 (2020) (per curiam).

65. The injunction as modified by the U.S. Supreme Court—changing the deadline for absentee ballots such that they had to be sent by, rather than received by, election day—permitted more than 100,000 people to vote by mail whose absentee ballots otherwise would have been received too late or who would have been forced to risk their lives by voting in person. According to data released by the Wisconsin Election Commission, nearly 114,000 absentee ballots were recorded as received *after* election date, but by the new April 13 deadline for receipt of ballots.²⁶ These ballots were counted if they were postmarked by election day, but would not have been counted if the received-by-election-day deadline had remained in effect. In the City of Milwaukee alone, roughly 10,000 absentee ballots were counted that were received after election day and would not have been counted if the original received-by deadline had remained in effect.

66. Wisconsin's primary also demonstrates the grave risk of forcing people to vote in person during the pandemic. Milwaukee health officials have

²⁶ *Wisconsin Election Commission, Absentee Voting Statistics*, <https://elections.wi.gov/publications/statistics/absentee> (compare statistics as of the morning of April 8, 2020 to statistics as of the morning of April 21, 2020).

reported that at least 40 people may have contracted COVID-19 from participating in the April 7, 2020 primary.²⁷

67. Enforcement of the received-by deadline will pose the substantially same problems for Pennsylvania's upcoming primary and general elections as existed in Wisconsin.

F. Harm to Petitioners from the Received-By Deadline

Petitioner Suzanne Erb

68. The received-by deadline will injure Petitioner Suzanne Erb by making it difficult for her to ensure that her ballot will be counted for the primary and general elections.

69. Ms. Erb usually votes in person on election day, but in the upcoming June primary and November general elections, Ms. Erb will vote for the first time by mail-in ballot. Ms. Erb will vote by mail-in ballot because (1) she does not feel safe being in a crowd at a polling place in the midst of the COVID-19 pandemic; (2) as a blind person, she has difficulty practicing six-foot social distancing; and

²⁷ Nick Corasaniti, *At Least 7 in Wisconsin Got Coronavirus During Voting, Officials Say*, N.Y. Times (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/wisconsin-election-coronavirus-cases.html>; Teran Powel, *40 Coronavirus Cases In Milwaukee County Linked To Wisconsin Election, Health Official Says*, WUWM 89.7 (Apr. 24, 2020), <https://www.wuwm.com/post/40-coronavirus-cases-milwaukee-county-linked-wisconsin-election-health-official-says#stream/0>.

(3) her regular polling place may not be open and a new polling place may not be accessible for her (as is not uncommon with Philadelphia polling places).

70. Each step in voting by mail will be challenging and time-consuming for Ms. Erb, and enforcement of the received-by deadline will leave Ms. Erb with no way to ensure that her mail-in ballot will be counted. Although she has a passport, Ms. Erb does not have a PennDOT-issued driver's license or non-driver photo identification, and thus she cannot apply for her mail-in ballot online. Ms. Erb will have to download the ballot application from the Department of State website and print it. She does not have a printer and is working on obtaining access to a printer as her usual options are unavailable during the state-wide "stay-at-home" order. Ms. Erb could call or email the Philadelphia County Board of Elections and ask that they mail her an application, but she would need someone to come by her home regularly and read her mail to see if the ballot application had arrived. Because of COVID-19, it will be harder to find someone willing to come to her home. Once Ms. Erb has the paper ballot application form, she will also need to ask someone to help her complete the form and sign it.

71. After Ms. Erb completes and mails back her ballot application, she will again need someone to come to her home periodically and read her mail to see if the ballot has arrived. When the ballot arrives, Ms. Erb will have to ask

someone she trusts to help her complete and sign the ballot. She will then need to mail her ballot back to the Board of Elections.

72. Each of the steps in applying for and completing a mail-in ballot takes time, particularly in the current health crisis. A return deadline of “postmarked by election day” would provide certainty as to when Ms. Erb must mail back her ballot to ensure that her vote will be counted.

73. Moreover, in previous elections, Ms. Erb has often made up her mind about down-ballot races on or slightly before election day, on the basis of information that became available to her very late in the election cycle. This year, Ms. Erb will be voting in a contested Democratic primary for Pennsylvania Auditor General on June 2. She has not yet decided how she will vote in this race. To decide which candidate to support, Ms. Erb will try to learn more information about the candidates. However, campaigns for down-ballot races typically garner little media coverage until close to election day, especially this year as the pandemic dominates the news. Ms. Erb expects that there will be little media coverage of the race until shortly before June 2. Ms. Erb also can have difficulty finding information on down-ballot candidates because not every media source is accessible to her as a blind person.

74. For these reasons, Ms. Erb will have difficulty deciding which candidate to vote for in the Pennsylvania Auditor General race until near or on

election day. But because neither in-person voting nor traveling to Philadelphia City Hall to personally drop off her mail-in ballot on June 2 is a viable option for Ms. Erb, she will have to mark and mail her ballot at least one week before election day to be sure it will arrive on time to be counted, unless the Court grants the requested relief.

Petitioner Disability Rights Pennsylvania

75. Enforcement of the received-by deadline will cause significant harm to Petitioner Disability Rights as an organization and will also cause significant harm to its members, who include all 1.7 million Pennsylvanians with a disability. Many of those Pennsylvanians are registered voters.

76. Disability Rights works to eliminate the many barriers to voting for people with disabilities that impede participation in the voting process. But many barriers to voting remain. For example, while registered voters can apply for absentee and mail-in ballots online, the application requires a voter to have a PennDOT-issued driver's license or non-driver photo identification, which many of Disability Rights' members and clients do not have. Moreover, the process for absentee and mail-in ballots is not accessible to voters who are blind. And similarly, many polling places remain inaccessible to voters with mobility impairments and other disabilities.

77. Congress in the Help American Vote Act of 2002 (HAVA) authorized protection and advocacy systems, including Disability Rights, “to ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote, and accessible polling places.” 42 U.S.C. § 21061(a). Pursuant to HAVA, Disability Rights engages in extensive efforts to maximize voter participation by its members and clients. Among other things, Disability Rights (1) educates Pennsylvanians with disabilities about the importance of voter participation, how to register to vote, and how to cast ballots; (2) advocates with state and county election officials to assure that in-person polling places are accessible to voters with mobility disabilities and that voting machines are accessible to voters with mobility and visual disabilities; (3) advocates for fully accessible voting processes to assure that people with disabilities have equal access to voting; (4) advocates to assure people with disabilities are not required to use a discriminatory absentee ballot process that imposes additional burdens and potential penalties on them and, instead supports the availability of a vote-by-mail option equally available to voters with and without disabilities; (5) issues alerts to the disability community before election days to advise members of the community about their right to vote and how to address issues that they encounter; and (6) operates hotlines on election days to

handle concerns and complaints by individuals with disabilities about issues they encounter while voting.

78. The COVID-19 pandemic increases voting burdens on people with disabilities. And as a consequence of the pandemic, the mail-in ballot received-by deadline harms Disability Rights because it has caused and will continue to cause Disability Rights to divert resources to ensure that Pennsylvania voters with disabilities are able to cast absentee and mail-in ballots that will actually be counted. Disability Rights has had to divert, and will continue to have to divert, substantial time, money, and resources from its other work to additional voter education to assure that people with disabilities are not disenfranchised. For instance, Disability Rights has conducted additional outreach to disability support and advocacy groups and service providers to educate them about the timelines for receipt of absentee and mail-in ballots, and Disability Rights has published and disseminated materials on these issues to remind voters of the importance of meeting the deadlines and the risk of disenfranchisement if they do not.

79. As a consequence of the pandemic, the received-by deadline for absentee and mail-in ballots will also injure Disability Rights' members, including by preventing many of them from casting a ballot that counts. Some Disability Rights members will face the choice between having their ballot not counted or risking their lives by voting in person. Others, who are unable to vote in person

because the pandemic will render in-person voting impossible for people with certain disabilities, will simply be unable to cast a ballot at all.

80. Individuals with certain disabilities, including those in nursing homes and other institutional settings, are at higher risk of serious illness. Those who are ill may not be able to apply early for absentee and mail-in ballots and certainly will be unable to safely vote in person. All people—but particularly those at high risk of serious infection—are understandably hesitant to even go to the Post Office or the mailbox to submit an absentee or mail-in ballot. Some will delay mailing their ballots as long as possible in the hope that the infection risk will decline with time.

81. In the upcoming elections, many counties will consolidate polling places and eliminate neighborhood polling places due to shortages in staff and protective equipment. This will require most people to travel farther to reach a polling place. For many people with disabilities who do not have transportation or reliable public transit, reaching a polling place may be impossible.

82. Even if people could reach the polling place, they will encounter long lines and lengthy delays that risk exposure to COVID-19. For people with disabilities who are at high risk of serious infection, waiting in such lines is a health risk. In addition, people with disabilities who have difficulty walking or standing will not be able to remain in those lines to vote even if they are willing to risk contracting the virus. Even people with other disabilities—like autism or

anxiety—may find it challenging to vote in those circumstances that are likely to exacerbate the symptoms of their disabilities.

83. The challenges raised by the COVID-19 pandemic mean that voting by absentee and mail-in ballot will be the only real option for many people with disabilities. But voting by absentee ballot or mail-in ballot is a multistep process, each step of which can take substantial time for those with a disability. The requirement that absentee and mail-in ballots must be received by the county boards of elections by election day will result in the disenfranchisement of some of Disability Rights’.

Petitioner SeniorLAW Center

84. Enforcement of the received-by deadline will cause harm to petitioner SeniorLAW as an organization and will also cause significant harm to its constituents, who include all 3 million Pennsylvanians over the age of 60.

85. SeniorLAW Center works to protect the right to vote of older Pennsylvanians, regardless of party, race, culture, or orientation, as a fundamental right and one which older people particularly value. SeniorLAW Center has provided education, outreach, and legal assistance to older Pennsylvanians throughout the Commonwealth to help protect their right of suffrage. It has organized and held pro bono clinics to help older voters and has authored numerous articles and media pieces on the challenges facing Pennsylvania seniors

in voting and the need to remove obstacles. At the invitation of leaders of the Pennsylvania House State Government Committee, SeniorLAW Center testified in legislative hearings on Voter ID legislation, and led the amicus coalition of aging and family advocates in challenging components of the Voter ID law that followed.

86. The over-60 population sits at the unfortunate confluence of voting rights and the COVID-19 pandemic. While older citizens have historically represented one of the largest voting demographics, they also have been the hardest hit by the novel coronavirus.²⁸ Eighty percent of COVID-19 deaths in the U.S. have been Americans aged 65 and older.

87. Older people are particularly at risk during the pandemic if they cannot use the mail-in ballot process to vote in the upcoming elections. To leave their homes to vote at the polls—or even to go to the post office—puts these individuals at great risk. Older Pennsylvanians will need to use the mail-in ballot option in the upcoming elections to exercise their right to vote. Many will face challenges in obtaining mail-in ballots, in posting them, and in meeting the current deadline of receipt by election day. Moreover, because mail-in voting is new for most voters, these older individuals will need assistance in simply understanding

²⁸ Natasha Lindstrom, *Pennsylvania's covid-19 cases crest 40K; 60% of deaths in nursing homes, senior living facilities*, eTrib (Apr. 24, 2020), <https://triblive.com/local/pittsburgh-alleggheny/pennsylvanias-covid-19-cases-crest-40k-statewide-60-of-deaths-in-nursing-homes-senior-living-facilities/>.

the process. The current return-by-election-day deadline injures SeniorLAW Center's constituents, who face unconstitutional burdens on their right to vote.

88. The current return by election day deadline also injures SeniorLAW Center itself because it is already expending resources—including staff and leadership resources—in order to work with aging services and other partners to educate older voters on the mail-in voting process and deadlines. If the deadline for returning mail-in ballots were eased so that ballots were counted so long as they were mailed by election day, SeniorLAW Center would redirect some of these resources toward its other work.

Petitioner SEAMAAC

89. Enforcement of the received-by deadline will cause significant harm to Petitioner SEAMACC as an organization, and will also cause significant harm to its members and constituents, who include at least 10,000 clients every year in Philadelphia, Chester, Delaware, Bucks, and Montgomery Counties, which are among the counties that have been hardest hit by the pandemic.

90. SEAMAAC provides services in areas such as education, health, and community development. It also works on civic engagement, including naturalization, voter registration, and get-out-the-vote activities.

91. In a non-pandemic election cycle, SEAMAAC's civic engagement work in the weeks preceding an election primarily involves outreach to voters in

the communities where SEAMAAC's constituents are concentrated. This work includes phone-banking and door-to-door canvassing. In 2019, SEAMAAC's civic engagement effort reached more than 6,500 people, including face-to-face interactions with more than 1,900 people, and almost 900 completed voter registrations.

92. In non-pandemic election cycles, canvassers carry voter registration forms and applications for absentee ballots. Because many of SEAMAAC's constituents are naturalized United States citizens with limited English proficiency (LEP), SEAMAAC sends bilingual canvassers who can help residents understand the forms. SEAMAAC's clients and canvassers speak a wide variety of languages, ranging from Cantonese to Khmer.

93. Because of the pandemic, SEAMAAC is currently unable to send canvassers to speak face-to-face with residents. Its civic engagement work is thus restricted to making phone calls and sending information via text messages, email, or regular mail.

94. In addition, the pandemic has forced SEAMAAC to temporarily suspend most of its other in-person work, including educational and health programming. SEAMAAC continues to operate programs such as hunger relief, including leaving grocery packages at residents' doors.

95. Face-to-face interactions are crucial for building trust with the communities SEAMAAC serves. Without in-person services and door-to-door canvassing, it is more time-consuming for SEAMAAC to gain the trust of the people it seeks to activate as voters, particularly in the cases of elderly, LEP, or first-time voters.

96. Because SEAMAAC's interactions with voters are now restricted to phone calls and text or email messages, it also takes longer for SEAMAAC to help voters understand and correctly return paperwork, including voter-registration forms and mail-in ballot applications, particularly in the cases of elderly, LEP, or first-time voters.

97. Because SEAMAAC is not currently interacting face-to-face with constituents, its staffers and volunteers cannot hand paper forms directly to voters, and often must rely on the mail, which adds days to the process.

98. Many of the citizens SEAMAAC serves lack access to or the know-how to use web-based applications for voter registration or mail-in ballots.

99. As a result of these changes and delays, some of SEAMAAC's clients will not be able to return absentee or mail-in ballots to their county boards of elections by 8 p.m. on Election Day for the June 2, 2020 primary election.

100. If the pandemic and associated restrictions persist into the summer or resume in the fall, some of SEAMAAC's clients will not be able to return absentee

or mail-in ballots to their county boards of elections by 8 p.m. on Election Day for the November 3, 2020 general election.

101. Because of these pandemic-related challenges and delays, SEAMAAC is currently heavily concentrating its human resources on get-out-the-vote work. It expects to do likewise in the weeks preceding this year's general election. If the deadline for returning absentee and mail-in ballots were eased so that ballots were counted if mailed by election day, SEAMAAC could redirect some of these resources toward its other project areas, including hunger relief, phone-based services for people facing hardships stemming from the pandemic, and assistance for Asian Americans who have experienced discrimination in connection with the pandemic.

Petitioner Barristers

102. Enforcement of the received-by deadline will cause significant harm to petitioner Barristers, whose members include approximately 1,000 lawyers and jurists, many of whom are registered voters.

103. Barristers has been committed throughout its history to protecting the hard-earned right of Black citizens to vote and to fighting electoral devices which unduly burden, deny, dilute or suppress their right to vote. For example, in 1978, Barristers joined other concerned groups in filing an action against the Philadelphia Registration Commission, which resulted in the addition of 50,000 Philadelphians

to the voter registration pools. In 2016, Barristers participated in non-partisan election protection in conjunction with the Octavius V. Catto Initiative, the ACLU, and the Lawyers Committee for Civil Rights Under the Law. In 2018, in addition to hosting a forum on voting rights and registering voters, Barristers participated in the National Bar Association's 2018 Election Protection Initiative and co-sponsored a get-out-the-vote rally in conjunction with clergy and civic leaders. Most recently, in November 2019, Barristers participated in and provided voter education at a non-partisan pre-election prayer breakfast.

104. COVID-19 has disproportionately impacted members of the Black community in Philadelphia. Many members of Barristers as well as the broader Black community in Philadelphia will need to vote by mail in the upcoming June primary and November election to protect their health and the health of their families and communities. The current received-by deadline for absentee and mail-in ballots injures Barristers' members, who face unconstitutional burdens on their right to vote.

G. Act 77's Non-Severability Provision

105. Act 77 contains a non-severability provision that purports to require the invalidation of all of its provisions, including by purporting to withdraw the availability of no-excuse mail-in voting across the entire Commonwealth, if any portion of the Act is held unconstitutional.

106. Act 77’s non-severability provision does not bind the Court and is unenforceable and unconstitutional in the context of this case. Even in the absence of COVID-19, Act 77’s non-severability provision—which contains boilerplate language that “sets forth no standard for measuring nonseverability” and “simply purports to dictate to the courts how they must decide severability—would not be an “inexorable command” that binds this Court. *Stilp v. Commonwealth*, 905 A.2d 918, 972-74 (Pa. 2006) (declining to apply identically worded non-severability provision). The ultimate question for the Court, regardless of the non-severability provision, is whether the valid provisions of the statute are “essentially and inseparably connected with” and “depend upon” the invalid received-by deadline. *Id.* at 973 (quoting 1 Pa.C.S. § 1925). Nothing in Act 77 “depends upon” the received-by deadline; the remainder of Act 77, including its provision for mail voting, is “easily capable of being executed” under a regime that requires voters to mail their ballots by election day. *Id.* And enforcement of the non-severability provision would “intrude upon the independence of the judiciary and impair the judicial function,” because the provision’s effect would be to prevent judicial review and coerce this Court to permit the General Assembly to impose an unconstitutional condition on the exercise of the franchise. *Id.* at 980.

107. Moreover, in the context of the COVID-19 pandemic, applying the non-severability provision would itself be unconstitutional. Invalidating Act 77’s

no-excuse mail-in voting scheme and its expanded absentee voting provisions in the middle of the pandemic would disenfranchise a massive number of Pennsylvanians, and would disproportionately burden voters of certain ages, African-American voters, and voters with disabilities. It would force nearly every Pennsylvanian—millions of citizens—to choose between voting and risking their lives, including the hundreds of thousands of Pennsylvania voters who have already submitted mail-in ballot applications for the June primary. Invalidating all of Act 77’s provisions therefore would violate Pennsylvania’s Free and Equal Elections Clause, Free Expression and Association Clauses, Equal Protection Clause, and Absentee Voting Clause in its own right. Put differently, if Petitioners are correct that the received-by deadline for absentee and mail-in ballots violates the Pennsylvania Constitution by abridging Pennsylvanians’ ability to vote during the pandemic, then eliminating all no-excuse mail voting in a pandemic necessarily would violate the Pennsylvania Constitution as well. A non-severability clause cannot be applied to produce an unconstitutional result, particularly one that compounds the unconstitutionality of the substantive provision that was challenged in the first place.

108. To be clear, Petitioners do not seek any ruling or relief that would trigger Act 77’s non-severability provision, and Petitioners would withdraw their claims without seeking any relief if the non-severability provision were going to

apply. But this Court can and should hold that Act 77's received-by deadline for absentee and mail-in ballots is unconstitutional in the context of the COVID-19 pandemic and sever the provision from the remainder of the Act as applied in these circumstances.

COUNT I
Violation of the Pennsylvania Constitution's
Free and Equal Elections Clause, Art. I, § 5

109. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

110. Article I, Section 5 of the Pennsylvania Constitution provides:
“Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

111. The federal Constitution contains no corresponding provision that expressly guarantees free and equal elections.

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

113. The Free and Equal Elections Clause dates back to the Commonwealth's "first organic charter of governance adopted in 1776, 11 years before the United States Constitution was adopted." *League of Women Voters*, 178 A.3d at 803. The original provision urged that elections "ought to be free," Pa. Const. of 1776, art. I, § VII, but contained "qualifying language" that ostensibly limited that right only to certain Pennsylvanians. *League of Women Voters*, 178 A.3d at 808. The current provision, enacted in 1790 and unchanged since, eliminated "all prior ambiguous qualifying language," stating, "simply and plainly, that 'elections shall be free and equal.'" *Id.* at 808-09. The goal of the provision was "to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived." *Id.* at 808.

114. Consistent with this text and history, this Court has long interpreted Article I, Section 5 broadly. It explained in 1914 that "elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, *or make it so difficult as to amount to a denial*; and when no

constitutional right of the qualified elector is subverted or denied him.” *League of Women Voters*, 178 A.3d at 810 (emphasis added) (quoting *Winston v. Moore*, 91 A. 520, 523 (1914)).

115. More recently, this Court held that “the plain and expansive sweep of the words ‘free and equal,’” in Article I, Section 5 reflects “the framers’ intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *League of Women Voters*, 178 A.3d at 804. Thus, “Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives”—it “mandates that all voters have an equal opportunity to translate their votes into representation.” *Id.*

116. Consistent with the Clause’s broad, protective text, this Court will invalidate laws that hinder the exercise of the right to vote or differentiate between voters, regardless of whether the legislature *intended* to impose that burden or discrimination. As this Court has said, the legislature “is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence.” *League of Women Voters*, 178 A.3d at 810.

117. Enforcing the received-by deadline will violate the Free and Equal Elections Clause by inflicting both of the constitutional injuries that the Clause was designed to prevent. The deadline will ensure that the upcoming primary and general elections are not “free”; the elections will not be “open and unrestricted, . . . to the greatest extent possible” and voting for many citizens will be “so difficult as to amount to a denial.” *League of Women Voters*, 178 A.3d at 804, 810. Moreover, the deadline will necessarily prevent these elections from being “equal”; voters will not “have an equal opportunity to translate their votes into representation.” *Id.* at 804.

118. *First*, as a direct result of enforcing the received-by deadline, a significant number of Pennsylvanians will not have their votes counted through no fault of their own. The received-by deadline would disenfranchise an inordinate number of people in any election, but the numbers will be staggering amid the COVID-19 crisis. Because of the unprecedented number of mail-in ballot requests, the ensuing backlogs for county boards of elections in processing and distributing ballots, and the slowdowns in postal delivery times, tens of thousands of Pennsylvanians (if not more) who timely request a mail-in ballot will receive their ballot only days before election day. Many of these voters will mail their ballots back but have them arrive after election day, and their votes will not be counted.

119. Other voters will conclude upon receiving their ballot that there is not enough time to realistically return it by election day, and that the only way to ensure their votes are counted will be to risk their health and safety by instead voting in person. Many cannot reasonably run that risk and thus will not vote.

120. Elections are not “free” when voters must risk their lives to vote. Nor are elections free when scores of voters are disenfranchised, even though they followed all of the rules, because ballots they cast before election day missed the deadline to arrive due to the consequences of a global pandemic. In short, in the context of the COVID-19 crisis, Pennsylvania’s current received-by deadline will deny some Pennsylvanians “the right to cast [their] ballot and have it honestly counted,” and for others will make voting “so difficult as to amount to a denial” of the right to vote. *League of Women Voters*, 178 A.3d at 810.

121. If mail-in ballots were instead considered timely if sent by election day, this widespread abridgement of the right to vote would not occur.

122. *Second*, enforcing the received-by deadline violates the Free and Equal Elections Clause because it gives Pennsylvania voters an unequal opportunity to have their votes counted.

123. Two similarly situated individuals could timely request mail-in ballots on the same day, and yet inherent variation in mail-delivery schedules or

application-processing speed could result in one individual having her vote counted, while the other does not.

124. This sort of arbitrary, differential treatment of similarly situated voters is precisely what the Free and Equal Elections Clause was written to “end, once and for all.” *League of Women Voters*, 178 A.3d at 808. Indeed, one of the very reasons for the Clause’s adoption was the history of disparate treatment of voters based on their location within the Commonwealth. *Id.*

125. Even if enforcement of the received-by deadline were constitutionally permissible in regular election environments, the deadline’s arbitrary, differential effects are certainly unconstitutional when enforced in the midst of a severe public-health pandemic like the COVID-19 crisis. For example, counties that have been hit particularly hard by the COVID-19 crisis may experience greater delays in processing mail-in applications, and certain areas of the Commonwealth may experience disproportionately long delays in mail delivery.

126. Likewise, because the risks of voting in person during a pandemic vary across the population—along axes like age, race, and disability status—the ability of two similarly situated individuals who have requested mail-in ballots to vote in person if necessary will differ significantly. Of two voters who timely requested mail-in ballots but who fear that their vote will not be counted if they

vote by mail, a younger, healthier voter will be more realistically able to remedy the situation by voting in person.

127. The framers of Pennsylvania’s Constitution sought to eradicate “laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs.” *League of Women Voters*, 178 A.3d at 808. It is unfathomable to think that these same framers would have countenanced disfavoring a voter based on his ability to withstand—or risk exposure to—a deadly virus. That is especially true because those at greatest risk from COVID-19 include Pennsylvania’s most socially and economically disadvantaged citizens.

128. In short, enforcing the received-by deadline during the COVID-19 pandemic guarantees that the election will treat similarly situated voters unequally, violating the Pennsylvania Constitution’s guarantee that “every voter has the same right as every other voter.” *League of Women Voters*, 178 A.3d at 810.

129. If ballots were instead considered timely when sent by election day, a substantially greater number of voters would have their ballots counted, and similarly situated voters would not experience this differential treatment.

COUNT II
Violation of the Pennsylvania Constitution's
Free Expression and Association Clauses, Art. I, §§ 7, 20

130. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

131. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: “The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”

132. Article I, Section 20 provides: “The citizens have a right in a peaceable manner to assemble together for their common good”

133. Pennsylvania’s Constitution “provides protection for freedom of expression that is broader than the federal constitutional guarantee.” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). And this “broader protection[] of expression than the related First Amendment guarantee” applies “in a number of different contexts,” including “political” contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

134. The rights of free expression and free association were a vital part of Pennsylvania’s political identity long before the enactment of the federal Bill of Rights in 1791. Pennsylvania’s Constitution, enacted in 1776, was in fact the first

to explicitly protect rights “to freedom of speech” and “to assemble together.”

Seth F. Kreimer, *The Pennsylvania Constitution’s Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 15 & n.7 (2002). Pennsylvania’s Constitutional Convention of 1790 consolidated the free expression provisions into “the lineal ancestors” of their current form. *Id.* at 17-18.

135. Pennsylvania’s Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote. This Court has recognized that “[t]he act of voting is a personal expression of favor or disfavor for particular policies, personalities, or laws.” *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973). “Each individual voter as he enters the booth is given an opportunity to freely express his will.” *Oughton v. Black*, 61 A. 346, 348 (1905).

136. Voting, moreover, merits special protection because the “expression . . . is political.” *DePaul*, 969 A.2d at 548. “No right is more precious in a free country than that of having a voice in the election of those who make the laws.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, “political belief and association constitute the core of those activities protected by” the freedoms of speech and association. *Elrod v. Burns*, 427 U.S. 347, 356 (1976). “[A]n individual’s right to participate in the public debate through political expression and political association” safeguards the most “basic [right] in our democracy”—

namely “the right to participate in electing our political leaders.” *McCutcheon v. FEC*, 572 U.S. 185, 191, 203 (2014) (plurality opinion). Where, as here, political expression is at stake, the “guarantee of free speech has its fullest and most urgent application.” *Commonwealth v. Wadzinski*, 422 A.2d 124, 129 (Pa. 1980) (quotations omitted).

137. In the context of the COVID-19 pandemic, enforcement of the received-by deadline will significantly burden the political expression of voters in Pennsylvania, and will outright deny many voters the ability to engage in political expression.

138. Many voters who timely request mail-in ballots in compliance with Pennsylvania law and who send their ballots before election day will, by no fault of their own, have their votes discarded. These voters will be denied the ability to express their views through their ballots, and thus will be denied the right to engage in core political speech.

139. In addition, the received-by deadline imposes an unconstitutional condition on the exercise of the right to political expression. Voters who timely request a ballot but who fear that their ballot will not be received by the deadline will face the grave choice between, on one hand, risking their safety to vote in person, and, on the other, placing their ballot in the mail and risking it not counting. For these voters, risking their lives by voting in person will be a

condition of ensuring that they can engage in constitutionally protected expression. The State may not impose this sort of penalty on the exercise of a constitutional right. *See, e.g., Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (“the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit” (quotation marks omitted)); *Commonwealth v. Bethea*, 379 A.2d 102, 105 (Pa. 1977) (it is “constitutionally impermissible” to punish a defendant for exercising the right to a jury trial).

140. The received-by deadline also burdens the speech of undecided and late-deciding voters. Many voters are undecided about who they wish to vote for and will not decide until very close to election day. In an effort to ensure that their votes are counted, these undecided voters may be forced to commit to voting for a candidate or ballot measure that they otherwise would not have voted for—in other words, to commit to the content of their political expression without all the information that they need to make an informed decision. That harm, too, renders enforcement of the received-by deadline unconstitutional.

141. Enforcement of the received-by deadline during the pandemic violates the Pennsylvania Constitution’s guarantees of political expression under any standard of scrutiny.

142. Even if evaluated as a content neutral “time, place, and manner” restriction, the received-by deadline is unconstitutional as applied during the COVID-19 crisis because it is not “narrowly tailored to serve a significant or substantial government interest” and does not “leave open ample alternative channels of communication.” *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 981 (Pa. Commw. Ct. 1997). The Commonwealth has no compelling interest in effectively silencing the political expression of a large, arbitrarily chosen set of eligible voters who have complied with the statutory deadline for requesting mail-in ballots. Even if it did, any interest in orderly election administration could readily be served through a significantly less restrictive means—namely, imposing a uniform requirement that mail-in ballots be mailed (rather than received) by election day.

COUNT III
Violation of the Pennsylvania Constitution’s
Equal Protection Guarantees, Art. I, §§ 1 and 26

143. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

144. Article I, Section 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and

liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

145. Article I, Section 26 provides: “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right.”

146. These equal protection guarantees are not coterminous with those of the federal Equal Protection Clause. *See League of Women Voters*, 178 A.3d at 784 n.54.

147. This Court applies three standards of scrutiny depending on the type of government classification at issue. *See William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 457-58 (Pa. 2017). Enforcement of the received-by deadline violates equal protection under any of this Court’s standards.

148. When “a fundamental right has been burdened,” this Court applies “strict scrutiny.” *William Penn Sch. Dist.*, 170 A.3d at 458. And the “right to vote” is a “fundamental” right. *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (“[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated.”); *Smith v. City of Phila.*, 516 A.2d 306, 311 (Pa. 1986) (“The most protected rights, fundamental rights, are those which have their source, explicitly or implicitly, in the Constitution.”).

149. The received-by deadline is subject to strict scrutiny because it differentiates between and classifies individuals with respect to their fundamental right to vote. Enforcement of the received-by deadline will necessarily result in differential treatment of similarly situated voters—some disenfranchised and some not—based on inherent, unpredictable variation in delivery and application-processing times. And enforcement of the deadline amid the COVID-19 pandemic necessarily will give rise to another, more pernicious form of differential treatment: The ability of citizens to cast their votes will depend on their capacity and willingness to risk their health and safety by voting in person as an alternative to submitting a timely requested mail-in ballot that otherwise would not be counted.

150. The Commonwealth has no legitimate interest, let alone a compelling one, in imposing a deadline that will inevitably cause this arbitrary disenfranchisement. The abstract goals of ensuring that elections are orderly and administered uniformly is not sufficient to support widespread, arbitrary disenfranchisement in the face of a public-health crisis. And even if it were, the enforcement of a strict received-by date is not necessary to further that interest. Counting all ballots sent by election day achieves the same goal of uniformity and orderliness, and there is no evidence that enforcing a send-by deadline, rather than a received-by deadline, imposes any additional administrative burden.

151. Even if strict scrutiny did not apply, the challenged provisions would be subject to an “intermediate” (or “heightened”) standard of review because they unquestionably involve an “important” right. *William Penn Sch. Dist.*, 170 A.3d at 458. For a law to pass intermediate scrutiny, it must be true “that the government interest be an ‘important’ one” and “that the classification be drawn so as to be closely related to the objectives of the legislation.” *James v. SEPTA*, 477 A.2d 1302, 1307 (Pa. 1984). Enforcing the received-by deadline amid the COVID-19 pandemic fails intermediate scrutiny as well.

152. Finally, even absent heightened scrutiny, enforcing the challenged provisions during the COVID-19 crisis violates equal protection under this Court’s rational-basis test. “[T]reating people differently under the law” must further a legitimate state interest and must be reasonably related to that interest. *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995). In other words, government classifications must be “reasonable rather than arbitrary.” *Id.*

153. Enforcement of the received-by deadline will arbitrarily disenfranchise voters and thus does not pass the rational-basis test. Mail-in applications will skyrocket in the 2020 election cycle, and counties’ current systems are not equipped to handle the flood of requests. Atop the administrative delays at the county levels, USPS has already delayed certain of its services because of the pandemic, and the delays are likely to grow as election day nears.

There is “no rational reason” to disenfranchise certain, arbitrarily selected voters based on these inevitable delays that are entirely outside their control, and to offer, as the only potential recourse, that those voters risk their lives to vote in person. *Curtis*, 666 A.2d at 260.

COUNT IV
Violation of Article VII, Section 14(a) of the Pennsylvania Constitution

154. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

155. Article VII, § 14(a) of the Pennsylvania Constitution provides: “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.”

156. Application of a received-by deadline of 8 p.m. on Election Day during the COVID-19 pandemic fails to comply with the requirements of Article VII, § 14(a).

157. Even if enforcement of the received-by deadline is constitutionally permissible in regular election environments, the deadline’s arbitrary, differential effects are certainly unconstitutional when enforced in the midst of a severe public-health pandemic like the COVID-19 crisis. For example, counties that have been hit particularly hard by the COVID-19 crisis may experience greater delays in processing applications for absentee ballots, and certain areas of the Commonwealth may experience disproportionately long delays in mail delivery.

158. Enforcement of the statutory received-by deadline during the COVID-19 pandemic will ensure that many voters who timely request absentee ballots in compliance with the Election Code, and who place their ballots into the mail on or before Election Day will, by no fault of their own, have their votes discarded.

159. Because the COVID-19 pandemic has led to the closure of county boards of elections to walk-in visitors, and because even if these offices were open, many voters would be unable to safely travel to them, the in-person options contemplated by Act 77 for applying for, receiving, and returning absentee ballots are not meaningfully available for many or all qualified electors during the COVID-19 pandemic.

160. The received-by deadline imposed by Act 77 thus fails “to provide a manner in which qualified electors . . . may vote” during the COVID-19 pandemic. Instead, the Election Code, as amended by Act 77, permits widespread

disenfranchisement of qualified electors by imposing an unreasonable deadline by which the qualified electors must submit their absentee ballots during the COVID-19 pandemic.

PRAYER FOR RELIEF

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

- a. Declare that enforcement of the received-by deadline is unconstitutional and invalid, as applied during the duration of the public health emergency related to COVID-19, because it violates the rights of Petitioners and all voters in Pennsylvania under the Pennsylvania Constitution's Free and Equal Elections Clause, Art. I, § 5; Free Expression and Association Clauses, Art. I, §§ 7, 20; Equal Protection Guarantees, Art. I, §§ 1 and 26; and Absentee Voting Guarantee, Art. VII, § 14.
- b. Declare that Act 77's non-severability clause is unenforceable, in the context of the public health emergency related to COVID-19, and that the invalidated received-by deadline is severed from the remainder of Act 77, which remains in full force and effect.

- c. Enjoin Respondents, their agents, officers, and employees from enforcing the received-by deadline in the 2020 primary or general elections, based on the public health emergency related to COVID-19.
- d. Enjoin Respondents, their agents, officers, and employees, for the 2020 primary or general elections, to consider timely any absentee or mail-in ballot if:
 - 1. The ballot is received in the office of the county board of elections by 8 p.m. on the day of the primary or general election;
 - 2. The ballot is postmarked on or before the day of the primary or general election, and is received in the office of the county board of elections no later than seven days after the day of the primary or general election;
 - 3. If the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is delivered by the United States Postal Service to the office of the county board of elections no later than the day after the primary or general election.
 - 4. The ballot contains any other indicia that the Court deems to be reliable indicia that the ballot was mailed by the voter on or before the day of the primary or general election.

Dated: April 27, 2020

Respectfully submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MM 2020

**DISABILITY RIGHTS PENNSYLVANIA; SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF PHILADELPHIA,**

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,

**MIKE TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, BRYAN CUTLER, 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 MIKE TURZAI AND MAJORITY LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES BRYAN CUTLER'S
PRELIMINARY OBJECTIONS**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
PRELIMINARY STATEMENT	1
I. FACTUAL BACKGROUND.....	4
II. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS.....	8
A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Act 77’s Non-Severability Provision is Enforceable and This Action Should be Dismissed For Legal Insufficiency	8
B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Lack Standing to Bring This Action	13
C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Do Not Allege a Constitutional Violation	17
D. Fourth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(2): Petitioners Have Not Plead a Justiciable Remedy	22
E. Fifth Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(5): Petitioners Have Failed to Include Necessary Parties.....	25
III. CONCLUSION.....	27

TABLE OF AUTHORITIES

Cases

<i>Abraham v. Shapp</i> , 400 A.2d 1249 (Pa. 1979)	14, 27
<i>Albert v. 2001 Legis. Reapportionment Comm’n</i> , 790 A.2d 989 (Pa. 2002)	18, 19, 20, 21
<i>Cali v. Philadelphia</i> , 177 A.2d 824 (Pa. 1962)	30
<i>City of Philadelphia v. Commonwealth</i> , 838 A.2d 566 (Pa. 2003)	23
<i>Columbia Gas Transmission Corp. v. Diamond Fuel Co.</i> , 346 A.2d 788 (Pa. 1975)	32
<i>Commonwealth v. Hopkins</i> , 117 A.3d 247 (Pa. 2015)	29
<i>Commonwealth v. McMullen</i> , 961 A.2d 842 (Pa. 2008)	26
<i>Erfer v. Commonwealth</i> , 794 A.2d 325 (Pa. 2002)	18, 19, 20, 21
<i>Fumo v. City of Philadelphia</i> , 972 A.2d 487 (Pa. 2009)	17, 23
<i>Glancey v. Casey</i> , 288 A.2d 812 (Pa. 1972)	31
<i>Hartley v. Langkamp & Elder</i> , 90 A. 402 (Pa. 1914)	33
<i>Heller v. Frankston</i> , 475 A.2d 1291 (Pa. 1984)	29
<i>In re Guzzardi</i> , 99 A.3d 381 (Pa. 2014)	27
<i>In re Pasquay</i> , 525 A.2d 13 (Pa. Commw. 1987), <i>aff’d</i> 529 A.2d 1076 (Pa. 1987)	19
<i>In re William L.</i> , 477 Pa. 322, 383 A.2d 1228 (1978)	27
<i>In re: Fortieth Statewide Investigating Grand Jury</i> , 197 A.3d 712 (Pa. 2018)	29
<i>Jefferson Cty. Court Appointed Emp. Ass’n v. Pa. Labor Relations Bd.</i> , 985 A.2d 697 (Pa. 2009)	24
<i>Konidaris v. Portnoff Law Associates, Ltd.</i> , 953 A.2d 1231 (Pa. 2008)	26
<i>League of Women Voters of Pa. v. Commonwealth</i> , No. 261 M.D. 2017 (Pa. Commw. Ct. filed Nov. 13, 2017)	18
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	30
<i>O’Donoghue v. United States</i> , 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933)	24
<i>Patterson v. Barlow</i> , 60 Pa. 54 (Pa. 1869)	27
<i>Phila. Med. Soc’y v. Dep’t of Pub. Welfare</i> , 39 A.3d 267 (Pa. 2012)	17
<i>Powell v. Shepard</i> , 113 A.2d 261 (Pa. 1955)	33
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	18
<i>Robinson Twp. v. Commonwealth</i> , 147 A.3d 536 (Pa. 2016)	30

<i>Robinson Twp. v. Commonwealth</i> , 83 A.3d 901 (Pa. 2013).....	17
<i>State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.</i> , 272 A.2d 478 (Pa. 1971).....	31
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006).....	passim
<i>Stilp v. Commonwealth</i> , 940 A.2d 1227 (Pa. 2007).....	23
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914)	27
<i>Working Families Party v. Commonwealth</i> , 209 A.3d 270 (Pa. 2019)	26
<i>Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.</i> , 161 A.3d 228 (Pa. 2017).....	23

Constitutional and Statutory Authorities

1 Pa.C.S. § 1922(3)	26
1 Pa.C.S. § 1925	14
25 P.S. § 2868	28
25 P.S. § 2873(d).....	28
25 P.S. § 3031.12	6
25 P.S. § 3045	28
25 P.S. § 3146.1	5, 6
25 P.S. § 3146.6(c).....	4
25 P.S. § 3146.8(g)(1)(ii).....	4
25 P.S. § 3150.16(c).....	4
Pa. Constitution Art. II, Section 1	29
Pa. Constitution Art. VII, Section 1	25
Pa. Constitution Art. VII, Section 16.....	25
U.S. Constitution Art. I, Section 4, Clause 1	25

Other Authorities

2019 Pa. Legis. Journal-House 1740-41 (Oct. 29, 2019)	4, 12
2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).....	passim
2019 Pa. Legis. Serv. Act 2019-94 (H.B. 227) (West).....	6
2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West).....	8, 9
David Templeton, <u>Wolf: Schools to Remain Closed ‘Until Further Notice,’ 4 More Counties Must Stay Home</u> , Pittsburgh Post-Gazette, Mar. 30, 2020, <i>available at</i> 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	8
Pa. R. Civ. P. 1028(a)(2).....	32

Pa. R. Civ. P. 1028(a)(4)..... 10, 24

Pa. R. Civ. P. 1032(b)32

Pennsylvania House of Representatives, Members of the House,
https://www.legis.state.pa.us/cfdocs/legis/home/member_information/mbrList.cfm?body=H&sort=alpha5

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>.6

Ryan J. Foley, How the Iowa Caucuses Broke Down ‘In Every Way Possible’,
 Associated Press, Feb. 11, 2020, *available at*
<https://apnews.com/ee095683c85f6c97e51b6589b412f674>.7

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

PRELIMINARY STATEMENT

Act 77 of 2019 is an example of bipartisan legislation where the political branches of government worked together, modernizing Pennsylvania’s election system and providing more options to voters and greater resources to the counties that administer those elections. Petitioners seek to undo this grand compromise by attacking a valid, nondiscriminatory election regulation, and asking this Court to replace it with a regulation of their own choosing, notwithstanding the violence such an outcome would do to our constitutional norms.

As a threshold matter, this Court should issue a determination on the validity of the non-severability clause of Act 77. Petitioners have indicated that they do not wish to proceed with this matter should this Court uphold the non-severability clause. As this clause is a direct result of legislative compromise integral to the passage of Act 77, this Court should uphold the non-severability cause and dismiss this action, as the Petitioners have failed to state a claim upon which relief can be granted.

Moreover, Petitioners lack the standing necessary to bring this action. Four of the five Petitioners are associations, in contravention of well-established case law holding that only individuals have standing to bring election-related claims in Pennsylvania.

The remaining Petitioner structures her claim as an “as-applied challenge,” but does not properly support her allegations. Petitioners make a series of suppositions of future calamitous harms—many extremely far-fetched—that would allegedly necessitate this Court taking the extreme step of invalidating a validly enacted election law – supported across party lines – and, even more extremely, this Court replacing it with one of Petitioners’ own choosing. 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 in 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 was 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 procedures compatible with social distancing.

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—four of whom are not voters with standing to even challenge the provision in question, and none of whom possess a cognizable injury other than their own speculation—look to undo these bipartisan reforms and to have this Court set election policy of the 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.

The challenged provision is a perfectly constitutional election regulation. For the feasibility of election administration, the Commonwealth has considered 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.

Finally, Petitioners have failed to join the indispensable parties, the county election boards, as they would be the parties tasked with implementing the Petitioners’ requested relief. As such, Petitioners’ claims should be dismissed for failure to join a necessary party.

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

I. FACTUAL BACKGROUND

Petitioners—four organizations and one individual—filed their Petition for Review with this Court on April 27, 2020, challenging 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 voter’s county board of elections “on or before eight o’clock P.M. the day of the primary or election.” Pet. ¶¶ 26 (quoting 25 P.S. § 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)).

The provision in question is a component of the bipartisan election reform legislation that the Legislative and Executive branches have worked to create 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 current composition of the Pennsylvania House of Representatives is 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.*

In addition to allocating \$90 million to ensuring that Pennsylvanians could vote securely on modern voting machines, Act 77 of 2019 created a new category of “no excuse” mail-in voting. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). These no excuse mail-in voters now do not have to provide the traditional reason to vote by mail, can request those ballots later in the process than was previously possible, and are able to return their ballots several days later than had been traditionally 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 are 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 free and fair elections could be held in the Commonwealth. 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 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.*

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): Act 77's Non-Severability Provision is Enforceable and This Action Should be Dismissed For Legal Insufficiency**

Given the constitutionality of Act 77's non-severability provision and Petitioners "not seek[ing] any ruling or relief that would trigger Act 77's non-severability provision", the non-severability consideration must be upheld, and Petitioners' claims dismissed as a threshold matter. Pet. ¶ 108. As the constitutionality of the non-severability provision renders Petitioners' requested relief impossible, the Petition should be dismissed for legal insufficiency. *See* Pa. R. Civ. P. 1028(a)(4).

In their Petition, Petitioners make clear that the enforceability of the non-severability provision is a threshold matter for their petition, as "Petitioners would withdraw their claims without seeking any relief if the non-severability provision were going to apply." Pet. ¶ 108. As such, the validity of the non-severability provision should be considered at the outset.

Section 11 of Act 77 provides that "Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are non-severable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void." 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). Section

6, 7, and 8 of Act 77 contain the received-by deadline language being challenged by the Petitioners. *Id.*; *see also* Pet. ¶ 61.

By seeking for this Court to hold “[a] provision of this act or its application to any person or circumstance . . . invalid,” Petitioners’ claims necessarily would result in the remaining Sections of Act 77, listed in Section 11, being invalid. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).

As this Court has held, “as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). “There may be reasons why the provisions of a particular statute essentially inter-relate. . . In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.” *Id.* “Or, there may be purely political reasons for such an interpretive directive, arising from the concerns and compromises which animate the legislative process.” *Id.*

“‘[I]nseverability clauses serve a key function of preserving legislative compromise;’ they ‘bind[] the benefits and concessions that constitute the deal into an interdependent whole.’ In an instance involving such compromise, the General Assembly may determine [that] a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.* (citations omitted).

That is exactly the situation that led to the passage of Act 77. The differing politics of the Democratic and Republican camps led to a piece of bipartisan legislation that accomplished a wide variety of policy objectives—the combination of which made the compromise tenable to all. Removing one of the core provisions of Act 77—those listed in Section 11—would have led to the disintegration of that bipartisan compromise. As the non-severability provision in Act 77 was “essential to securing the support necessary to enact the legislation,” the non-severability provision must be upheld as constitutional. *Id*; see also 2019 Pa. Legis. Journal-House 1740-41 (Oct. 29, 2019) (House legislators discuss the impact of the non-severability provision).

The Petitioners mistakenly point to *Stilp* to support their contention that the non-severability provision in Act 77 is invalid. The fact pattern in *Stilp* was very particularized and centered around the interpretation of the 2006 governmental pay raise, and its subsequent attempted repeal. 905 A.2d at 925. The key issue pertaining to the legislation considered in *Stilp* was that it affected salaries across the Commonwealth’s government, including those of the judicial branch. *Id*. Given that interplay, this Court viewed the *Stilp* non-severability provision “as a sword against the Judiciary,” since “there was some question as to the constitutionality of having legislators increase their own expense allowance [and that] the legislature foresaw that a constitutional challenge was possible; and the inseverability clause ensured

that if a court struck down the increase in legislators’ expense allowances, the increase in judicial salaries would be sacrificed as well.” *Stilp*, 905 A.2d at 978, 979. “[G]iven the separation of powers concerns that arise from inclusion of the clause in a statute . . . which includes compensation provisions for the Judiciary, we hold that the clause is ineffective and cannot be permitted to dictate our analysis.” *Id.* at 980.

The particularized fact pattern in *Stilp* concerning the setting of judicial compensation differs markedly from the instant case, which concerns the regulation of election procedures—a traditional legislative prerogative. *See, e.g., 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.”). Furthermore, the Act 77 non-severability clause is not only distinguishable from the invalidated clause in *Stilp*, it fits squarely within this Court’s reasoning in that case— noting the constitutionality of legislation where the non-severability provision was the product of compromise, and narrowly tailored to “secur[e] the support necessary to enact the legislation.” *Id.* at 978.

Petitioners make two other critical errors in their analysis of the non-severability clause. First, they mistakenly ask this Court to apply the default statutory test for *severability*¹, which is inapplicable when there is a non-severability clause.

¹ The default provision for determining severability absent a non-severability clause is provided in 1 Pa.C.S. § 1925:

Pet. ¶ 104 (asking this Court to apply the generalized test as to “whether the valid provisions of the statute are essentially and inseparably connected.”). This Court has held that test inapplicable to statutory *non-severability* clauses, as “the General Assembly may determine [that] the court’s application of the logical standard of essential interconnection . . . might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Stilp*, 905 A.2d at 978. In *Stilp*, this Court noted this distinction and analyzed the non-severability clause by that separate standard. *Id.*

Finally, Petitioners incorrectly characterize Act 77’s non-severability clause as boilerplate. Pet. ¶ 104. Far from being a boilerplate provision, the non-severability clause is a carefully crafted provision resulting from the bipartisan drafting of this Act. As we have noted, Section 11 only indicates that certain provisions of Act 77 are non-severable. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West) (“Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable.”). Other provisions,

The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

such as the appropriation of \$90 million for new voting machines, were not included in the non-severability provision. *Id.*; *see also id.* at Section 3.1 (providing for the funding for the Commonwealth’s new voting machines). This is demonstrative of a carefully crafted non-severability clause that only included certain provisions that the political branches desired to be read together, and not merely a “boilerplate” non-severability clause pertaining to the entirety of Act 77.

Given the clear constitutionality of the non-severability provision of Act 77, and Petitioners’ unwillingness to proceed with this action if the non-severability provision would be applied, this action should be dismissed accordingly.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Lack Standing to Bring This Action

Disability Rights Pennsylvania, The Barristers’ Association of Philadelphia, Inc., SeniorLAW Center, and Southeast Asian Mutual Assistance Coalitions, Inc. (collectively, the “Organization Petitioners”) all lack 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 Petitioners are not entities 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. 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, each of the Organization Petitioners brings suit based on factors better attributed to changed programming *due to the creation of mail-in balloting* ("For instance, Disability Rights has conducted additional outreach to disability support and advocacy groups and service providers to educate them about the timelines for receipt of absentee and mail-in ballots. . ." Pet. ¶ 78), or to COVID-19, than the statutory provision in question in this case. *See, e.g.*, Pet. ¶ 95 ("Without in-person services and door-to-door canvassing, it is more time-consuming for SEAMAAC to gain the trust of the people it seeks to activate as voters. . .").

Organization Petitioners attempt to claim standing via the diversion of their resources necessitated by the changing of the law, but at best that is due to the law's expansion of mail-in voting, as opposed to the current received-by deadline *that was*

extended by the law – and indeed was extended *yet again* when Act 12 moved the Primary Election to a later date, accommodating voters even further. This diversion-of-resources argument is wholly insufficient, and inconsistent with the standing requirements that this Court has imposed in past voting rights cases.

There is no allegation that any of the Organization Petitioners are entities 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 Organization Plaintiffs allege 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.

Accordingly, Disability Rights Pennsylvania, The Barristers’ Association of Philadelphia, Inc., SeniorLAW Center, and Southeast Asian Mutual Assistance

Association Coalition, Inc. all lack capacity to sue—either individually or on behalf of their members—due to the nature of the claims in this case and must be dismissed as parties.

**C. Third 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 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.

As the Respondents well summarize, Petitioners’ “allegations set forth a string of theories and what-ifs: That increases in absentee ballot and mail-in ballot applications could lead to processing backlogs in unspecified counties (citing weeks-old applications numbers from just two of Pennsylvania’s 67 counties), Pet ¶¶ 46-47; that the U.S. postal system may need more time to deliver some things (citing experiences from ‘other parts of the country’) and therefore may delay ballot deliveries, Pet. ¶ 50; that there is a ‘possibility that local post offices will need to shut down,’ Pet. ¶ 50 n. 19; that because of these ‘myriad’ delays, some voters’ ballots might not arrive on time; and that this outcome might disproportionately affect one or another group of voters, Pet. ¶ 52-55.” Respondent’s Preliminary Objections ¶ 23. These conjectures simply do not rise to the level of a cognizable legal injury.

Assuming, *arguendo*, that the United States Postal Service suddenly collapses after centuries of operations, the General Assembly has repeatedly demonstrated during the COVID-19 crisis, through its recent amendments to the Election Code, that it stands fully ready to address such a situation—as far-fetched as it may be.

“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 could not be more speculative. It relies 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,

demonstrated injury. Given the legal insufficiency of Petitioners' claims, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

Furthermore, 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).

Here, the law in question is a clear bipartisan 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.

There are many deadlines in the election process. Nomination petitions must be “filed on or before the tenth Tuesday prior to the primary.” 25 P.S. § 2873(d). Polling places close at 8:00 p.m. on Election Day. 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 who won and who lost the election. As such, it should be upheld as a proper election administration regulation.

D. Fourth 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 the 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.

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 limitation is necessary 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).

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

This is especially true in the present context where Act 77 has a non-severability provision. While Petitioners seek to declare that provision itself unconstitutional, as a product of political compromise, that provision is an integral part of the Act and must be upheld. See discussion *supra* at Section A. As such, granting the requested relief would overturn not just the received-by-date regulation, but would invalidate the entirety of the Act 77 reforms—including the very concept

of mail-in voting—and sending the Legislative and Executive Branches unnecessarily back to the political drawing board.

While the Court has the power to review Act 77, it cannot direct the Legislature *how* to fix any alleged constitutional defect. If the received-by deadline is held to be unconstitutional, it is within the sole province of the Legislature to determine how to address it. 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).

**E. Fifth 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). 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).

Here, the Commonwealth of Pennsylvania’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. As examples, the Petition seeks a declaration that county election officials extend the times that they consider absentee and mail-in ballots by seven days, and alter their absentee ballot verification procedures. *See* Pet. ¶ 62.

Accordingly, this action should be dismissed for the Petitioners’ failure to join indispensable parties.

III. CONCLUSION

For the foregoing reasons, Speaker of the Pennsylvania House of Representatives Mike Turzai and Majority Leader of the Pennsylvania House of Representatives Bryan Cutler 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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Dated: May 12, 2020

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 6,118 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

/s/ Zachary M. Wallen

*Counsel for Proposed-Intervenors Speaker of
the Pennsylvania House of Representatives
Mike Turzai and Majority Leader of the
House of the Pennsylvania House of
Representatives Bryan Cutler*

Dated: May 12, 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
the Pennsylvania House of Representatives
Mike Turzai and Majority Leader of the
House of the Pennsylvania House of
Representatives Bryan Cutler*

Dated: May 12, 2020

IN THE SUPREME COURT OF PENNSYLVANIA

No. 83 MM 2020

**DISABILITY RIGHTS PENNSYLVANIA; SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL ASSISTANCE ASSOCIATIONS
COALITION, INC. (SEAMAAC); SUZANNE ERB;
THE BARRISTERS' ASSOCIATION OF PHILADELPHIA,**

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,

**MIKE TURZAI, SPEAKER OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES, BRYAN CUTLER, 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 Mike Turzai and Majority Leader of the Pennsylvania House of Representatives Bryan

Cutler, 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:
