

In addition to this Memorandum of Law, Applicants submit their proposed Preliminary Objection to Petitioners' pleading, attached as Exhibit A, as well as a supporting Memorandum of Law.

BASES FOR PROPOSED INTERVENORS' APPLICATION

1. Pursuant to 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.

2. Pennsylvania Rule of Civil Procedure 2327 allows a person not named as a party to seek leave to intervene by filing an application with the court.

3. Proposed Intervenors seek to intervene pursuant to Pennsylvania Rule of Civil Procedure 2327(4), which states, in pertinent part, as follows:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . .

(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.

Pa.R.C.P. 2327.

4. Proposed Intervenors meet the requirements for intervention under Pa.R.C.P. 2327(4). They seek to protect the Pennsylvania Senate's exclusive constitutional rights, together with the Pennsylvania House of Representatives, of determining the times, places, and manner of holding elections under Art. 1, §4 of the U.S. Constitution and Art. 2, §1 of the Pennsylvania Constitution; of suspending laws under Art. 1, §12 of the Pennsylvania Constitution; and of appropriating funds for expenditure by the state, under Art. III, §24 of the Pennsylvania Constitution, which may be adversely affected or usurped by Petitioners' requested relief, as described below.

5. Petitioners seek the suspension of certain provisions of the Election Code concerning deadlines for the delivery, canvassing, and counting of mail-in ballots for the duration of the COVID-19 pandemic. Such relief would be contrary to Article I, §12 of the Pennsylvania Constitution, which states that “no power of suspending laws shall be exercised unless by the legislature.”

6. Petitioners further seek an order imposing new timeframes for the delivery, canvassing, and counting of mail-in ballots for the duration of the COVID-19 pandemic. Such an order would be contrary to Art. 2, §1 of the Pennsylvania Constitution, which vests the legislative power of the Commonwealth in the General Assembly, and Art I, §4 of the United States Constitution (the “Elections Clause”) which reserves to state legislatures and Congress the power of determining the times, places, and manner of holding elections for Senators and Representatives to Congress.

7. The United States District Court for the Middle District of Pennsylvania in *Corman v. Torres*, 287 F.Supp.3d 558, 573 (M.D. Pa. 2018), recognized that only the General Assembly has standing to assert its prerogatives under the Elections Clause.¹ *See also Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 194 (1972) (granting intervention in a redistricting case to the Minnesota Senate because the district court orders directly impacted the Senate).

8. Petitioners seek an order that the Commonwealth subsidize the cost of postage for mail-in ballots. Such relief would be contrary to Article III, Section 24 of the Pennsylvania Constitution, which provides that “no money shall be paid out of the treasury except on appropriations made by law” by the General Assembly. Pa. Const. Art. III, §24.

¹ Upon information and belief, the Speaker of the Pennsylvania House of Representatives is moving to intervene this same or the following day, placing the entire legislative branch before this court.

9. Petitioners seek a declaration that certain provisions of the mail-in ballot provisions of Act 77 of 2019 burden the right to vote in violation of Art. 1, Sec. 5 of the Pennsylvania Constitution. Proposed Intervenors wish to be heard on the question whether such a declaration would void the entire Act and deprive voters of the ability to vote by mail-in ballot, under the terms of the non-severability provision in §11 of the Act.

10. Proposed Intervenors seek to prevent a judicial determination that any provision of Act 77 of 2019 is invalid and to prevent the disruption of the statutory scheme for voting in Pennsylvania's 2020 primary and general elections.

11. If the requirements for who may intervene are met, intervention shall be granted, unless the petition to intervene is unduly delayed, the interest of the proposed intervenor is already adequately represented, or the intervenor does not take the litigation as he finds it. Pa.R.C.P. 2329; *Appeal of the Municipality of Penn Hills*, 519 Pa. 164, 546 A.2d 50, 52 (1988).

12. The Proposed Intervenors have filed a motion to intervene promptly.

13. On information and belief, the named respondents do not take the same position as the Proposed Intervenors and will not adequately represent their interests.

14. Proposed Intervenors seek to intervene as respondents. They will assert defenses to petitioners' claims but will not raise claims against the named respondents that the petitioners have not raised.

15. Petitioners' case rests mainly on the effects of the pandemic on voting behavior. The Proposed Intervenors believe that the alleged burdens on the right to vote are not the result of the laws themselves, but are the result of the voters' and poll workers' reactions to the pandemic.

16. The relief petitioners seek is not limited to the named petitioners but would affect all voters, whether or not they are similarly situated or similarly burdened.

17. In such a situation, the proper mechanism for adjusting rights is legislative. The General Assembly has already taken steps to give voters more time to apply for, receive, and post their mail-in ballots by postponing the primary elections to June 2, 2020. See Act 12 of 2020, §1804-B(a). The Pennsylvania Senate has recently held hearings on whether the primary elections should be postponed even further, and/or other necessary legislative actions taken to ensure a free and fair election.

18. If allowed to intervene, Proposed Intervenors intend to file the attached preliminary objections, objecting to the petitioners' standing and to the jurisdiction of the Commonwealth Court in this case.

19. Section 13(2) of Act 77 of 2019 states that "the Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)." The provisions to which paragraph (1) refers include Article XIII-D. That Article sets forth the provisions concerning mail-in ballots.

20. Petitioners have not alleged any direct harm and only allege that they may suffer harm, if they delay to apply for mail-in or absentee ballots.

21. Since petitioners and their members have had time and still have time to apply for and cast mail-in ballots, they lack standing to seek injunctive relief.

22. Finally, petitioners' claim that the Commonwealth must subsidize the cost of postage is moot and should be dismissed.

Dated: May 11, 2020

Respectfully submitted,
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EXHIBIT “A”

<p>Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans,</p> <p style="text-align: center;">Petitioners</p> <p style="text-align: center;">v.</p> <p>Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,</p> <p style="text-align: center;">Respondents, and</p> <p>Senator Joseph B. Scarnati, III, President Pro Tempore; and</p> <p>Senator Jake Corman, Senate Majority Leader,</p> <p style="text-align: center;">Intervenor Respondents</p>	<p style="text-align: center;">IN THE COMMONWEALTH COURT OF PENNSYLVANIA</p> <p style="text-align: center;">No. 266 MD 2020</p>
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PRELIMINARY OBJECTIONS OF INTERVENOR RESPONDENTS, JOSEPH B. SCARNATI III, PRESIDENT PRO TEMPORE, AND JAKE CORMAN, MAJORITY LEADER OF THE PENNSYLVANIA SENATE

Intervenor respondents, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader,¹ by and through the undersigned counsel, objects preliminarily to plaintiffs’ petition for declaratory and injunctive relief pursuant to Pa.R.C.P. 106 and 1028(a)(1) for the reasons set forth below:

¹ Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Senate as a whole.

1. Petitioners commenced this case in Commonwealth Court as an original jurisdiction matter.
2. Pursuant to 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.
3. Pa.R.C.P. 1028(a)(1) authorizes a party to file a preliminary objection for lack of subject matter jurisdiction.
4. Petitioners seek relief from certain provisions of the Elections Code for the duration of the COVID-19 pandemic, including: (a) deadlines for the delivery, canvassing and counting of mail-in ballots; (b) the requirement that voters personally deliver to election officials any mail-in ballots that were not posted; (c) the prohibition against third-party assistance; (d) the cost of postage for mail-in ballots; and (e) the lack of training and standards for signature matching, all of which Petitioners allege burden the right to vote in violation of Pennsylvania's Free and Equal Elections Clause, Art. 1, §5.
5. Petitioners further allege that these same features of the mail-in ballot process violate the Equal Protections Clause and the Due Process Clause of the Pennsylvania Constitution, Art. 1, §26 and §1.
6. The provisions concerning mail-in ballots were added to the Elections Code by Act 77 of 2019.
7. Section 13(2) of Act 77 of 2019 states that "the Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1)."
8. The provisions to which paragraph (1) of §13 refers include Article XIII-D. That Article sets forth the provisions concerning mail-in and absentee ballots from which plaintiffs seek relief on constitutional grounds.
9. By virtue of §13 of Act 77 of 2019, the Commonwealth Court lacks subject matter jurisdiction to hear plaintiffs' petition for declaratory and injunctive relief.

10. Moreover, and in any event, Petitioner Pennsylvania Alliance for Retired Americans does not have standing.

11. To establish standing, a plaintiff must “have a direct interest in the subject-matter of the particular litigation.” *See Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994 (Pa. 2002) (quoting *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269 (Pa. 1975)).

12. The subject matter in this case—mail-in balloting procedures—involves an “individual’s right to vote and to have that vote counted.” *Id.*

13. Because “[t]he right to vote is personal,” *Id.* at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (internal citations omitted)), that right inheres in individuals, not organizations. *See Id.* at 995 (“[A]ny entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan.”).

14. Therefore, the Pennsylvania Alliance for Retired Americans, as an organization without voting rights, does not have a direct interest at stake in this litigation and, thus, should be dismissed from this lawsuit. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n. 3 (Pa. 2018) (noting that the Commonwealth Court dismissed the League of Women Voters from the case because, as an organization without the right to vote, it lacked standing).

15. Similarly, individual petitioners lack standing.

16. None of the petitioners aver that they (1) have encountered any difficulties in returning—or have even attempted to return—their mail-in ballots, (2) cannot afford postage for returning their mail-in ballots, (3) require community assistance to cast their mail-in ballots, or (4) had their mail-in ballots rejected for signature mismatch.

17. The individual petitioners base their claims for relief on nebulous concerns that, in the future, their ballots may not be received on time or processed, even though there are still more than four weeks until the next election.

18. Because future speculative fear is not a sufficiently “substantial interest” to confer standing to the individual petitioners, *see Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002)

(holding that a party must establish “a substantial interest in the subject matter of the litigation” to be granted standing), the individual petitioners should be dismissed from this lawsuit.

19. Additionally, petitioners failed to include indispensable parties in their suit. Petitioners themselves acknowledge that individual county election officials have individual authority. Pet. ¶¶ 50, 52, 54 (stating that Allegheny County Executive will use prepaid postage return envelopes for mail-in ballots, Beaver County will no longer cover prepaid postage costs, and stating that some counties “rely on signature matching to determine whether mail ballots should be counted.”). County election officials are the ones who “engage in an opaque verification process” of verifying mail-in ballots. Pet. ¶ 53. The county election officials “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.” Pet. ¶¶ 53, 67 (stating that Pennsylvania law “empowers” county boards to examine the declarations that are mailed with the ballot for verification purposes). Furthermore, it is the county election officials who mail absentee ballot request forms and receive the ballots on Election Day, thereby enforcing the 8pm deadline. Pet. ¶¶ 25, 34. County election officials have strict deadlines in counting ballots and making determinations on provisional ballots. Pet. ¶ 38. Accordingly, a ruling against the Commonwealth of Pennsylvania impacts the rights of the county election officials and they should be present in this Court to represent their rights. Pa. R. Civ. P. 1032(b); *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955).

WHEREFORE, Senators Joseph B. Scarnati, III, and Jake Corman respectfully request that this Court dismiss Petitioners’ petition for declaratory and injunctive relief.

Dated: ____, 2020

Respectfully submitted,

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**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, and

**Senator Joseph B. Scarnati, III,
President Pro Tempore; and**

**Senator Jake Corman, Senate
Majority Leader,**

Intervenor Respondents

**IN THE COMMONWEALTH
COURT OF PENNSYLVANIA**

No. 266 MD 2020

**MEMORANDUM OF LAW IN SUPPORT OF
PRELIMINARY OBJECTIONS OF
INTERVENOR RESPONDENT JOSEPH B. SCARNATI, III,
PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE AND
JAKE CORMAN, PENNSYLVANIA SENATE MAJORITY LEADER**

Intervenor respondents, Joseph B. Scarnati, III, Pennsylvania Senate
President Pro Tempore, and Jake Corman, Pennsylvania Senate Majority Leader,
acting as representatives of the Pennsylvania Senate and Senate Republican

Caucus (the “Applicants”),² by and through undersigned counsel, respectfully submits this memorandum of law in support of their preliminary objections to petitioners’ petition for declaratory and injunctive relief pursuant to Pa.R.C.P. 106 and 1028(a)(1).

This case was commenced in Commonwealth Court as an original jurisdiction matter. According to Pa.R.A.P. 106, the practice and procedures relating to original jurisdiction matters in Commonwealth Court are to be in accordance with the Pennsylvania Rules of Civil Procedure.

Pa.R.C.P. 1028(a)(1) authorizes a party to file a preliminary objection for lack of subject matter jurisdiction.

Petitioners seek relief from certain provisions of the Election Code for the duration of the COVID-19 pandemic, including: (a) deadlines for the delivery, canvassing and counting of mail-in ballots; (b) the requirement that voters personally deliver to election officials any mail-in ballots that were not posted; (c) the prohibition against third-party assistance; (d) the cost of postage for mail-in ballots; and (e) the lack of training and standards for signature matching, all of which plaintiffs allege burden the right to vote in violation of Pennsylvania’s Free and Equal Elections Clause, Art. 1, §5.

² Senators Scarnati and Corman have been duly authorized to act in this matter by each of the members of the Senate Republican Caucus, which constitutes a majority of the Senate as a whole.

Petitioners further allege that these same features of the mail-in ballot process violate the Equal Protection Clause and the Due Process Clause of the Pennsylvania Constitution, Art. 1, §26 and §1.

The provisions concerning mail-in ballots were added to the Elections Code by Act 77 of 2019.

Section 13(2) of Act 77 of 2019 states that “The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1).”

The provisions to which paragraph (1) of §13 refers include Article XIII-D. That Article sets forth the provisions concerning mail-in ballots from which plaintiffs seek relief on constitutional grounds.

As a result of the jurisdictional provision of Section 13 of Act 77, the Commonwealth Court lacks subject matter jurisdiction to hear petitioners’ petition for declaratory and injunctive relief.

Furthermore, petitioners lack standing to sue under the standard set forth in *William Penn Parking Garage, Inc. v. Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (Pa. 1975) (standing requires a substantial, direct and immediate interest in the matter being litigated).

The Pennsylvania Supreme Court has explained the standard as follows:

A “substantial” interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring

obedience to the law. A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 521 Pa. 82, 86-87, 555 A.2d 793, 795 (1989).

Petitioner Pennsylvania Alliance for Retired Americans does not have standing because the subject matter in this case—mail-in balloting procedures—involves an “individual’s right to vote and to have that vote counted.” *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 994 (Pa. 2002) (quoting *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 281 (Pa. 1975)). Because “[t]he right to vote is personal,” *Id.* at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (internal citations omitted)), that right inheres in individuals, not organizations. *See Id.* at 995 (“[A]ny entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan.”). Therefore, the Pennsylvania Alliance for Retired Americans, as an organization without voting rights, does not have a direct interest at stake in this litigation and, thus, should be dismissed from this lawsuit. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n. 3 (Pa. 2018) (noting that the Commonwealth Court dismissed the League of Women Voters

from the case because, as an organization without the right to vote, it lacked standing).

Similarly, the individual petitioners lack standing. None of them aver that they (1) have encountered any difficulties in returning—or have even attempted to return—their mail-in ballots; (2) cannot afford postage for returning their mail-in ballots; (3) require community assistance to cast their mail-in ballots, or (4) had their mail-in ballots rejected for signature mismatch. The individual petitioners based their claims for relief on nebulous concerns that, in the future, their ballots may not be received on time or processed, even though there are still more than four weeks until the next election.

Petitioners' claim that the Commonwealth must subsidize the cost of postage is moot and should be dismissed. In particular, this Court may take judicial notice that “In cases where postage on returning Absentee or Vote-By-Mail ballots has not been affixed or is insufficient, it is the United States Postal Service’s policy to not delay returning ballots to the appropriate Board of Election as addressed on the return ballot envelope,” according to Postal Service spokesperson Kim Frum. “The Postal Service is steadfast in our commitment to support democracy. We will not deny a voter their right to vote by delaying a time-sensitive ballot because of

insufficient postage.”³ This statement is consistent with longstanding written

United States Postal Service policy. That policy states:

Employees need to be aware that absentee balloting materials are handled differently than other unpaid or short-paid mailpieces. **ABSENTEE BALLOTING MATERIALS ARE NOT TO BE RETURNED FOR ADDITIONAL POSTAGE OR DETAINED!** The postage is collected from the election office. Any delay of absentee ballots is a violation of Postal Service policy.⁴

Therefore, because future speculative fear is not a sufficiently “significant interest” to confer standing to the individual petitioners, *see Erfer v.*

Commonwealth, 794 A.2d 325, 329 (Pa. 2002) (holding that a party must establish “a substantial interest in the subject matter of the litigation” to be granted standing), the individual petitioners should be dismissed from this lawsuit.

Finally, petitioners failed to include indispensable parties in their suit.

Petitioners themselves acknowledge that individual county election officials have individual authority. Pet. ¶¶ 50, 52, 54 (stating that Allegheny County Executive

³ <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety>

⁴ *See Additional Information for Employees: Handling Absentee Balloting Materials With Insufficient Postage*, United States Postal Service available at https://about.usps.com/postal-bulletin/2008/html/pb22239/html/ElectMailkit_012.html (last visited May 5, 2020) (emphasis in the original); *see also Requirements and Tips for Handling Official Election Mail and Political Campaign Mail*, United States Postal Service available at https://about.usps.com/postal-bulletin/2014/pb22391/html/cover_003.htm (last visited May 5, 2020).

will use prepaid postage return envelopes for mail-in ballots, Beaver County will no longer cover prepaid postage costs, and stating that some counties “rely on signature matching to determine whether mail ballots should be counted.”). County election officials are the ones who “engage in an opaque verification process” of verifying mail-in ballots. Pet. ¶ 53. The county election officials “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.” Pet. ¶¶ 53, 67 (stating that Pennsylvania law “empowers” county boards to examine the declarations that are mailed with the ballot for verification purposes). Furthermore, it is the county election officials who mail absentee ballot request forms and receive the ballots on Election Day, thereby enforcing the 8pm deadline. Pet. ¶¶ 25, 34. County election officials have strict deadlines in counting ballots and making determinations on provisional ballots. Pet. ¶ 38. Accordingly, a ruling against the Commonwealth of Pennsylvania impacts the rights of the county election officials and they should be present in this Court to represent their rights. Pa. R. Civ. P. 1032(b); *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955).

CONCLUSION

The petitioners' petition for declaratory and injunctive relief should be dismissed for lack of subject matter jurisdiction.

Dated: ____, 2020

Respectfully submitted,

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