

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 266 MD 2020

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

Petitioners,

v.

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

Respondents,

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

Proposed-Intervenor Respondents.

**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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*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*

Proposed Intervenors, Mike Turzai, Speaker of the Pennsylvania House of Representatives, and Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives (collectively, “House Leaders”), by and through their undersigned counsel, hereby move to intervene as respondents in the above-captioned proceeding under Rule 2328 of the Pennsylvania Rules of Civil Procedure.

As is affirmed by an authorization signed by 109 out of 203 members of the Pennsylvania House of Representatives (“Pennsylvania House”), the House Leaders have been duly authorized to act in this matter on behalf of a majority of the members of the Pennsylvania House. In support of this Petition, the House Leaders submit a:

- (1) 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, which is filed contemporaneously herewith;
- (2) proposed Preliminary Objections and supporting Memorandum of Law, which the House Leaders will file in this action if permitted to intervene, are attached as **Exhibit “A”**;
- (3) proposed Order, granting this Petition, is attached as **Exhibit “B”**;
- (4) verifications, affirming the truth of the factual statements set forth in this Petition, are attached as **Exhibit “C”**.

WHEREFORE, the House Leaders respectfully request that the Court **GRANT** this Petition to Intervene and allow the House Leaders to intervene as respondents in this action.

Dated: May 14, 2020

Respectfully submitted,

/s/ James E. DelBello

James E. DelBello

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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

CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2020, I caused a true and correct copy of this 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:

<p>Adam Craig Bonin The Law Office of Adam C. Bonin 121 S. Broad Street, Suite 400 Philadelphia, PA 19107 adam@boninlaw.com</p> <p><i>Counsel for Petitioners, Irvin Weinreich, Brenda Weinreich, Dwayne Thomas, Pennsylvania Alliance for Retired Americans and Michael Crossey</i></p>	<p>Emily R. Brailey Stephanie I. Command Marc E. Elias Perkins Coie LLP 700 Thirteenth St. N.W., Suite 800 Washington, D.C. 20005 EBrailey@perkinscoie.com scommand@perkinscoie.com MElias@perkinscoie.com</p> <p><i>Counsel for Petitioners, Irvin Weinreich, Brenda Weinreich, Dwayne Thomas, Pennsylvania Alliance for Retired Americans and Michael Crossey</i></p>
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/s/ James E. DelBello

James E. DelBello

EXHIBIT A

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**

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PENNSYLVANIA HOUSE OF REPRESENTATIVES,**

Proposed-Intervenor Respondents.

**PRELIMINARY OBJECTIONS OF PROPOSED INTERVENORS
SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
MIKE TURZAI AND MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES BRYAN CUTLER**

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House of the Pennsylvania House of
Representatives Bryan Cutler*

Proposed Intervenors, 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 drafting of the Election Code, including the recent bipartisan enactment of Act 77 of 2019 made in conjunction with the Senate and the Executive Branch, and dismiss the Petition (**Exhibit 1**).

PRELIMINARY STATEMENT

1. The Pennsylvania General Assembly has worked in a bipartisan fashion in conjunction with the Governor to modernize Pennsylvania’s Election Code.

2. The Petitioners, while not questioning that commitment to free and fair elections, or making a direct constitutional challenge to any particular statute, seek to have this Court impose four boilerplate, liberal policies on the Commonwealth—the absence of which allegedly renders the entire Pennsylvania Election Code unconstitutional—notwithstanding the violence to our constitutional norms caused by this proposed usurpation of the political process.

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

4. The remaining Petitioners seemingly structure their claims as an “as-applied challenge,” but do not properly support their allegations. Petitioners make a series of suppositions of future calamitous harms—many extremely far-fetched or premised on a deep-seated mistrust of the United States Postal Service—that would allegedly require this Court to impose liberal wish list policies by judicial fiat. 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 with Act 77 of modernizing Pennsylvania’s voting process to allow for no-excuse voting by mail. When the unforeseen COVID-19 pandemic swept the world, the Commonwealth’s political branches were ready with carefully considered voting procedures that will allow for free and fair elections. Furthermore, the Legislative and Executive Branches took further bipartisan steps to move the Primary Election date and to enact 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—who do not possess a cognizable injury other than their own speculation—look to undo these bipartisan reforms and to have this Court set election policy of 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 policies are all perfectly constitutional election regulations. For the feasibility of election administration, the Commonwealth's political branches have 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 decision 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. Similarly, the Pennsylvania Election Code does not permit third party ballot harvesting because of well-warranted concerns about fraud, including voter intimidation. Even as recently amended, the Election Code rejects ballot harvesting as an election security risk, which is not surprising since ballot harvesting fraud recently led to overturning of an entire congressional election in North Carolina. Moreover, the Pennsylvania Supreme Court has already determined that this practice is not permitted by law.

9. Also ignored by the Petitioners is the integral role of Pennsylvania's counties in the election process. Petitioners demand that the Department of State appropriate funds for absentee and mail-in ballots, and centrally direct their

tabulation, despite the fact that those functions are statutorily within the sole province of the county election boards.

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

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

I. FACTUAL BACKGROUND

12. Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with this Court on April 22, 2020, seeking for this Court to impose four election policies of their choosing, namely that this Court require the Secretary of the Commonwealth's office to “a. [p]rovide postage on all absentee and mail-in ballots; b. [i]mplement additional procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail services delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77's non-severability clause; c. [a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots. . .and d. [p]rovide uniform guidance and training to election officials involved in verifying

mail ballots and implement procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” Pet. at Pages 34-35.

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

14. The Legislative and Executive branches have worked hard over the past year to create a series of bipartisan election reforms, starting with Act 77 of 2019. *See* 2019 Pa. Legis. Journal-House 1741 (Oct. 29, 2019) (documenting the 138-61 vote on SB 421 (Act 77)); *see also* Pennsylvania House of Representatives, Members of the House, https://www.legis.state.pa.us/cfdocs/legis/home/member_information/mbrList.cfm?body=H&sort=alpha (the current composition of the Pennsylvania House of Representatives is 110 Republicans and 93 Democrats).

15. Pennsylvania has traditionally only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from one’s municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee, the voter 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.*

16. 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.*

17. 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.

18. 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).

19. In the wake of the COVID-19 global pandemic, 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.*

20. 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: Petitioners Lack Standing to Bring This Action (Pa. R. Civ. P. 1028(a)(4))

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

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

23. 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)).

24. 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)).

25. 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).

26. “[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).

27. 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.

28. By contrast, the Alliance brings suit based on vague allegations that Pennsylvania’s Election Code “frustrates the Alliance’s mission” by not allowing it to engage in ballot harvesting. Pet. ¶ 16.

29. There is no allegation that the Alliance is authorized by law to vote in the Commonwealth, accordingly, it lacks capacity to sue—either individually or on behalf of its members—due to the nature of the claims in this case and must be dismissed as a party.

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

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

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

31. 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.

32. Petitioners' allegations are a combination of attenuated theories and suppositions: that increases in absentee ballot and mail-in ballot applications *could* lead to some processing backlogs, Pet. ¶ 35; that the U.S. postal system *may* need more time to deliver some things (while citing to an article noting the USPS' struggles with "decreases in mail volume" Pet. fn. 6) and therefore *may* delay ballot deliveries, Pet. ¶25; that the USPS *may* "need to make cuts to routes, processing centers or staff" citing to the 2015 consolidation of postal services processing centers, Pet. ¶ 23; that because of these supposed delays, some voters' ballots *might* not arrive on time; and that this outcome *might* disproportionately affect one or

another group of voters, Pet. ¶ 32. These conjectures simply do not rise to the level of a cognizable legal injury.

33. 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.

34. “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).

35. 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).

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

37. 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).

38. 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.

39. 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.”).

40. “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).

41. “[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).

42. “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).

43. 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.”)).

44. 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).

45. The laws in question in this case are clear, bipartisan policy choices made by the Legislature in consultation with the Governor.

a. The Received-By Deadline for Absentee and Mail-in Ballots

46. “The Code sets forth various time requirements for the completion of balloting, the strict enforcement of which is necessary to ensure the fair and orderly administration of elections.” *In re Apr. 10, 1984 Election of E. Whiteland Twp., Chester Cty.*, 483 A.2d 1033, 1035 (Pa. Commw. 1984).

47. For example, nomination petitions must be “filed on or before the tenth Tuesday prior to the primary” and polling places close at 8:00 p.m. on Election Day. 25 P.S. § 2873(d); 25 P.S. § 3045.

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

b. Prohibition on Ballot Harvesting

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

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

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

52. The absentee voter shall:

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

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

53. The Pennsylvania Supreme Court has already examined and rejected the argument that this statutory language permits third party ballot harvesting. The case in question considered a challenge to the requirement that “absentee ballots delivered by third persons on behalf of non-disabled voters are invalid under Section 3146.6 of the Election Code. . .” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004).

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

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

56. The fear of fraud in the area of ballot harvesting is borne out by recent, real world events. In 2018, North Carolina had to take the extreme step of re-doing a congressional election when illegal ballot harvesting led to the belief that the entire election was compromised. [Operative in North Carolina Congressional Race](#)

Arrested in ‘Ballot Harvesting’ Case, Associated Press, Feb. 27. 2019, *available at* <https://www.latimes.com/nation/la-na-nc-election-fraud-charge-20190227-story.html>.

57. The political branches have determined that the fraud concerns pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

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

c. Payment of Postage for Absentee and Mail-In Ballots

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

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

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

62. Just as the Election Code constitutionally does not require the counties to provide voter transport to the polls, it does not require the counties to provide return postage for absentee and mail-in ballots. Both questions are policy considerations for the counties, which “shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).¹

63. The Pennsylvania Election Code clearly provides for mail-in and absentee voters to pay for their own postage if they choose to vote by those means, rather than an alternative method that does not require postage. 25 P.S. § 3146.6(a); 25 P.S. § 3150.16(a).

64. As this provision merely provides voters with more options to vote rather than mandating that anyone mail in their ballots, it is a constitutional provision that should be upheld.

d. Challenge to Absentee and Mail-in Voting Procedures

65. Similarly, the counting and tabulation of absentee and mail-in ballots is performed by the county election boards. 25 P.S. § 3146(8). The state Election Code

¹ Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.*, Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots).

provides that tabulation is solely within the purview of the county elections boards, and as such, the counties are tasked “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f).

66. For the state to be expected to centrally manage the counting of ballots is simply not within its statutory authority. As such, this is not relief that the state can be constitutionally required to provide.

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.

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

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

68. 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.

69. 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.

70. 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).

71. 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).

72. 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.

73. Should this Court determine that a statute at issue is unconstitutional, the Court does not have the authority to issue the orders or take any actions requested by 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.”).

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

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

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

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

76. 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).

77. 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).

78. 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).

79. Here, the Commonwealth’s county boards of elections are indispensable parties to this case because the Petition seeks to alter their conduct, requiring them to be parties in the case. It is the *county boards of elections*, not the Secretary of the Commonwealth, who would have to extend by seven days their acceptance, consideration, and processing of absentee and mail-in ballots, and alter their absentee ballot verification procedures. *See* Pet. at Pages 34-35.

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

Respectfully submitted,

/s/ James E. DelBello

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House of the Pennsylvania House of
Representatives Bryan Cutler*

Dated: May 14, 2020

CERTIFICATE OF COMPLIANCE

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

/s/ Zachary M. Wallen

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

Dated: May 14, 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 266 MD 2020

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

Petitioners,

v.

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

Respondents,

**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:

EXHIBIT 1

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 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. 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:

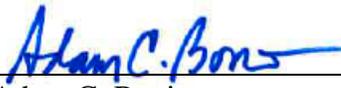
a) Declare unconstitutional the Commonwealth’s failure to: (i) provide prepaid postage on absentee and mail-in ballots; (ii) provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted—to the extent such 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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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 266 MD 2020

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

Petitioners,

v.

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

Respondents,

**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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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

The Pennsylvania General Assembly has worked in a bipartisan fashion in conjunction with the Governor to modernize Pennsylvania’s Election Code.

The Petitioners, while not questioning that commitment to free and fair elections, or making a direct constitutional challenge to any particular statute, seek to have this Court impose four boilerplate policies on the Commonwealth—the absence of which allegedly renders the entire Pennsylvania Election Code unconstitutional—notwithstanding the violence to our constitutional norms caused by this proposed usurpation of the political process.

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

The remaining Petitioners seemingly structure their claims as an “as-applied challenge,” but do not properly support their allegations. Petitioners make a series of suppositions of future calamitous harms—many extremely far-fetched or

premised on a deep-seated mistrust of the United States Postal Service—that would allegedly require this Court to impose wish list policies by judicial fiat. Moreover, this relief allegedly needs to occur *now*, rather than to allow the continued bipartisan triaging of COVID-19-related issues.

The Legislative and Executive Branches took the proactive step with Act 77 of modernizing Pennsylvania’s voting process to allow for no-excuse voting by mail. When the unforeseen COVID-19 pandemic swept the world, the Commonwealth’s political branches were ready with carefully considered voting procedures that will allow for free and fair elections. Furthermore, the Legislative and Executive Branches took further bipartisan steps to move the Primary Election date and to enact 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—who do not possess a cognizable injury other than their own speculation—look to undo these bipartisan reforms and to have this Court set election policy of 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 policies are all perfectly constitutional election regulations. For the feasibility of election administration, the Commonwealth’s political branches have 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 decision 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.

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

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

Not only are all of the challenged policies constitutional, Petitioners have failed to even join the indispensable parties, the county election boards, that would be tasked with implementing 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, request a nonjusticiable remedy, and failed to join necessary parties, this action should be dismissed with prejudice.

I. FACTUAL BACKGROUND

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

While Petitioners do not expressly cite to a single statute that they consider unconstitutional, this suit was brought as the Pennsylvania General Assembly has

been passing bipartisan legislation that has greatly *expanded* the ability of Pennsylvania’s voters to vote by mail.

The Legislative and Executive branches have worked hard over the past year to create a series of bipartisan election reforms, starting with Act 77 of 2019. *See* 2019 Pa. Legis. Journal-House 1741 (Oct. 29, 2019) (documenting the 138-61 vote on SB 421 (Act 77)); *see also* Pennsylvania House of Representatives, Members of the _____ House, https://www.legis.state.pa.us/cfdocs/legis/home/member_information/mbrList.cfm?body=H&sort=alpha (the 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 one’s 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 been allowed—8:00 p.m. on Election Day. *Id.* The traditional voting options remain available—voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

The Legislative and Executive Branches have continued to work diligently to fine-tune these election reforms. Act 94 of 2019 was enacted in November 2019 to streamline operations to ensure that the ballot materials 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 thereafter. *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 to 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.

I. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS

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

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

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

In certain contexts, it is true that an association “has standing as representative of its members to bring a cause of action even in the absence of injury to itself, if the association alleges that at least one of its members is suffering immediate or

threatened injury as a result of the action challenged.” *Id.* at 922 (citing *Phila. Med. Soc’y v. Dep’t of Pub. Welfare*, 39 A.3d 267, 278 (Pa. 2012)).

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

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

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

By contrast, the Alliance brings suit based on vague allegations that Pennsylvania's Election Code "frustrates the Alliance's mission" by not allowing it to engage in ballot harvesting. Pet. ¶ 16.

There is no allegation that the Alliance is authorized by law to vote in the Commonwealth. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95. Entities such as a state political party (the Pennsylvania State Democratic Committee), governmental entities (the Board of Commissioners of Radnor Township, the Board of Commissioners of the Township of Lower Merion, the Township of Lower Merion, the Township of Ross, and the North Hills School District), civic groups (the Lehigh Valley Coalition for Fair Reapportionment, the Neighborhood Club of Bala Cynwyd, and the League of Women Voters of Pennsylvania), and political party committee chairs (Dennis J. Sharkey and Nora Winkelman in their representative capacities as chairs of Republican and Democratic committees)—notwithstanding their own organizational interests in voting rights, as the Alliance

alleges in this case—have each been held not to have standing in voting rights cases. *See Erfer*, 794 A.2d at 330; *Albert*, 790 A.2d at 994–95.

Accordingly, the Alliance lacks the 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 a party.

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

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

Petitioners’ allegations are a combination of attenuated theories and suppositions: that increases in absentee ballot and mail-in ballot applications *could* lead to some processing backlogs, Pet. ¶ 35; that the U.S. postal system *may* need more time to deliver some things (while citing to an article noting the USPS’ struggles with “decreases in mail volume” Pet. fn. 6) and therefore *may* delay ballot deliveries, Pet. ¶ 25; that the USPS *may* “need to make cuts to routes, processing centers or staff” citing to the 2015 consolidation of postal services processing centers, Pet. ¶ 23; that because of these supposed delays, some voters’ ballots *might* not arrive on time; and that this outcome *might* disproportionately affect one or

another group of voters, Pet. ¶ 32. 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).

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

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

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

Petitioners challenge the constitutionality of the Pennsylvania Election Code’s requirement that to be deemed as validly cast, a voter’s absentee or mail-in ballot “must be *delivered to* election officials by 8:00 p.m. on Election Day.” Pet. ¶ 3 (emphasis in original) (*paraphrasing* 25 P.S. § 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) (ballots must be received by the voter’s county board of elections “on or before eight o’clock P.M. the day of the primary or election.”)).

The provision in question is a component of the bipartisan election reform legislation that the Legislative and Executive branches have 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.*

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

The “received by” deadline is a clear policy choice made by the Legislature in consultation with the Governor. Petitioners seem to have the mistaken opinion that Election Day is somehow the beginning of the election process, where instead it is the final step in a cycle that began many months before when candidates began

circulating nomination petitions. *See* 25 P.S. § 2868. Election Day is the end of the election cycle and Act 77 is reflective of that bipartisan policy choice.

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

2. Ballot Harvesting

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

A touchstone principle of Pennsylvania elections is that “the spirit and intent of our election law. . . requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General*

Election, 843 A.2d 1223, 1230 (Pa. 2004). This principle is codified by statute in 25 P.S. § 3058, which states that “[n]o voter shall be permitted to receive any assistance in voting unless ... he has a physical disability.” This extends to absentee and mail-in balloting where “the elector shall, in secret, proceed to mark the ballot. . .” 25 P.S. § 3146.6(a)

The absentee voter shall:

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

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

The Pennsylvania Supreme Court has already examined and rejected the argument that this statutory language permits third party ballot harvesting. The case in question considered a challenge to the requirement that “absentee ballots delivered by third persons on behalf of non-disabled voters are invalid under Section 3146.6 of the Election Code. . .” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1230 (Pa. 2004). The Court held that “under the statute’s plain meaning, a non-disabled absentee voter has two choices: send the

ballot by mail, or deliver it in person. Third-person hand-delivery of absentee ballots is not permitted.” *Id.* at 1231.

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

The fear of fraud in the area of ballot harvesting is borne out by recent, real world events. In 2018, North Carolina had to take the extreme step of re-doing a congressional election when illegal ballot harvesting led to the belief that the entire election was compromised. [Operative in North Carolina Congressional Race Arrested in ‘Ballot Harvesting’ Case](#), Associated Press, Feb. 27, 2019, *available at* <https://www.latimes.com/nation/la-na-nc-election-fraud-charge-20190227-story.html>. The political branches have determined that the fraud concerns pertaining to ballot harvesting outweigh any benefits, and that decision should be respected.

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

3. Payment of Postage for Mail-In Ballots

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

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

Providing voters with a wide variety of options on voting is not a constitutional violation, but rather a valid policy determination by the political branches to provide for free and fair elections. Just as the Election Code constitutionally does not require for the counties to provide voter transport to the polls, it does not provide for postage for absentee and mail-in ballots. Both questions are policy considerations for the counties, which “shall appropriate annually, and from time to time, to the county board of elections of such county, the funds that shall be necessary for the maintenance and operation of the board and for the conduct of primaries and elections in such county. . .” 25 P.S. § 2645(a).¹

¹ Counties have sometimes decided to pay for postage for absentee ballots, but that decision is entirely within their purview. *Id.*; *See, e.g.*, Daveen Rae Kurutz, No Stamp: Beaver County to Cease Providing Postage for Absentee Ballots, Ellwood City Ledger, Jan. 20, 2020, *available at* <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cease-providing-postage-for-absentee-ballots> (noting the significant cost to the county in paying for postage for absentee ballots).

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

4. Mail-In Voting Procedures

Similarly, the counting and tabulation of absentee and mail-in ballots is performed by the county election boards. 25 P.S. § 3146(8). The state Election Code provides that tabulation is solely within the purview of the county elections boards, and as such, the counties are tasked “[t]o make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. § 2642(f). For the state to be expected to centrally manage the counting of ballots is simply not within their statutory authority. As such, this is not relief that the state can be constitutionally required to provide.

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

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

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

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

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

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

Should this Court determine that a statute at issue is unconstitutional, the Court does not have the authority to issue the orders or take any actions requested by 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.”).

While the Court has the power to review the Pennsylvania Election Code, it cannot direct the Legislature *how* to fix any alleged constitutional defect, let alone fix the alleged defect itself. If any of the regulations questioned by the Petitioners are held to be unconstitutional, it is the sole province of the Legislature to determine how to address that. Accordingly, because the Court cannot grant the requested relief contained in the Petitioners’ Prayer for Relief as a matter of law, the offending requests must be struck pursuant to Pa. R. Civ. P. 1028(a)(2).

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

Pennsylvania law establishes that a court must join indispensable parties to an action, or, if not possible, dismiss the action “[w]henver it appears by suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b). Indispensable parties are those “whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975). Significantly, “[t]he absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264-65 (Pa. 1955). 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’s county boards of elections are indispensable parties to this case because the Petition seeks to alter their conduct, requiring them to be parties in the case. It is the *county boards of elections*, not the Secretary of the Commonwealth, who would have to extend their acceptance, consideration and processing of absentee and mail-in ballots by seven days, and alter their absentee ballot verification procedures, and to “[p]rovide prepaid postage on all absentee and mail-in ballots. “ *See* Pet. at pages 34-35.

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

/s/ James E. DelBello

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Memorandum of Law contains 6,284 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 14, 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 14, 2020

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 266 MD 2020

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

Petitioners,

v.

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

Respondents,

**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 Petition to Intervene 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 Petition is **GRANTED.**

SO ORDERED BY THE COURT:

EXHIBIT C

VERIFICATION

I, Bryan D. Cutler, Majority Leader, Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, that the allegations set forth in the foregoing *Petition to Intervene* are true and correct to the best of my knowledge, information, and belief.



BRYAN D. CUTLER
Majority Leader
PA House of Representatives

Date: May 14, 2020

VERIFICATION

I, Mike Turzai, Speaker of the Pennsylvania House of Representatives, depose and say, subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities, that the allegations set forth in the foregoing *Petition to Intervene* are true and correct to the best of my knowledge, information, and belief.



MIKE TURZAI
Speaker
PA House of Representatives

Date: May 14, 2020