

IN THE SUPREME COURT OF PENNSYLVANIA

No. 133 MM 2020

PENNSYLVANIA DEMOCRATIC PARTY *et al.*,

Petitioners,

v.

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

Respondents.

**INTERVENORS SENATOR JOSEPH B. SCARNATI, III, PRESIDENT
PRO TEMPORE AND SENATOR JAKE CORMAN, MAJORITY LEADER
OF THE PENNSYLVANIA SENATE COMBINED SUPPLEMENTAL
PRELIMINARY OBJECTIONS AND BRIEF**

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**COMBINED SUPPLEMENTAL PRELIMINARY OBJECTIONS AND
BRIEF OF INTERVENOR RESPONDENTS, JOSEPH B. SCARNATI III,
PRESIDENT PRO TEMPORE, AND JAKE CORMAN, MAJORITY
LEADER OF THE PENNSYLVANIA SENATE**

Intervenor respondents, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader,¹ by and through the undersigned counsel, submit this supplementary filing in accordance with the Court's order and preliminarily object to the petition for declaratory and injunctive relief pursuant to Pa.R.A.P. 106 and Pa.R.C.P. 1028(a)(1) for the reasons set forth below:²

1. Petitioners commenced this case in Commonwealth Court as an original jurisdiction matter.
2. Pursuant to Pennsylvania Rule of Appellate Procedure 106, the practice and procedures relating to original jurisdiction matters are to be in accordance with the Pennsylvania Rules of Civil Procedure.
3. Pa.R.C.P. 1028(a)(1) authorizes a party to file a preliminary objection for lack of subject matter jurisdiction.

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

² Senators Scarnati and Corman continue to assert all of the defenses and objections contained in their prior filings with the Commonwealth Court that have now been transferred to this Court. This filing is a supplemental filing.

4. Petitioners seek relief from certain provisions of the Election Code³ for the duration of the COVID-19 pandemic, including (a) deadlines for the delivery,⁴ canvassing, and counting of mail-in ballots; (b) the requirement that voters personally deliver to election officials any mail-in ballots that were not posted; (c) the prohibition against third-party assistance;⁵ (d) the cost of postage for mail-in ballots;⁶ and (e) the lack of training and standards for signature matching; all of which Petitioners allege burden the right to vote in violation of Pennsylvania’s Free and Equal Elections Clause, Art. 1, §5.

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

6. The provisions concerning mail-in ballots were added to the Election Code by Act 77 of 2019, and amended by Act 12 of 2020.

**I. ORGANIZATIONAL PETITIONER, PENNSYLVANIA
DEMOCRATIC PARTY, LACKS STANDING.**

³ 25 P.S. §§2600 *et seq.* (hereinafter the “Election Code”).

⁴ Judge Leavitt addressed Pennsylvania’s Ballot Receipt deadline—8:00 pm on Election Day—in her Report and Recommendation in *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 35-37 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation) (rejecting argument that Pennsylvania’s Constitution required extending the Receipt-By Deadline).

⁵ As Judge Leavitt found in *Crossey*, there is simply no evidence that would permit this Court to override the Commonwealth’s statutes. *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 29, ¶ 22. Judge Leavitt’s Report and Recommendation on this issue should also be adopted by the Court. If the Court in *Crossey* adopts Judge Leavitt’s Report and Recommendation, Petitioners’ claim here is effectively moot.

⁶ This issue has been effectively made moot by the Executive Branch’s recent actions, as Judge Leavitt confirmed in her Report and Recommendation in *Crossey*. *See Crossey*, No. 266 MD 2020 at 29, ¶ 23. This Court should similarly find this Claim moot..

7. Petitioner Pennsylvania Democratic Party lacks standing on Claims I-IV.

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

9. Petitioners’ Claims I-IV involve adding additional locations for voters to drop-off their mail-in ballots (Count I); extending the deadline for mail-in ballots to be received by the county elections boards (Count II);⁷ ordering the county boards to contact voters to cure facial defects with their ballots (Count III); and ordering the county boards to count mail-in ballots that reveal the voter’s identity (Count IV). These counts all involve an “individual’s right to vote and to have that vote counted.” *Albert*, 790 A.2d at 994.

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

⁷ *See* fn 4, *supra*.

11. Therefore, Petitioner Pennsylvania Democratic Party, as an organization without voting rights, does not have a direct interest at stake in this litigation and, thus, should be dismissed from this lawsuit with respect to Counts I-IV. *See Albert*, 790 A.2d at 995; *see also League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n. 3 (Pa. 2018) (noting that the Commonwealth Court dismissed the League of Women Voters from the case because, as an organization without the right to vote, it lacked standing).

II. INDIVIDUAL PETITIONERS LACK STANDING

12. Similarly, Individual Petitioners lack standing.

13. Individual Petitioners are not before this Court seeking redress for injuries, past or imminent. Instead, Individual Petitioners are here asking this Court to order the implementation of Petitioners' statewide policy preferences. Pet. ¶ 7. Accordingly, Individual Petitioners lack standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (“[T]his Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.”).

14. Individual Petitioners do not claim to have voted in every county in the Commonwealth, but they nonetheless seek redress against every county board of elections. Pet. ¶¶ 165-66 (mandatory injunction against all counties requiring all counties to evaluate their jurisdiction’s needs and develop “a reasonable plan

reflecting the needs of the citizens of the county...)” (emphasis added); Pet. ¶¶ 178-79 (requiring county boards of election to extend deadline to accept ballots); Pet. ¶¶ 187, 198-99 (requiring counties that review ballots that are not correctly completed to contact voters to cure that information, and prohibiting counties from invalidating a “Naked Ballot.”). The right to vote is individual and to the extent Individual Petitioners assert statewide remedies are required to vindicate the individual right to vote, a petitioner who is actually suffering a harm is needed in every county. *See Gill*, 138 S. Ct. at 1934 (“We caution, however, that standing is not dispensed in gross: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”); *see Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 15, ¶ 3 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation) (crediting testimony of Secretary Boockvar that she originally opposed a statewide remedy on the received-by deadline preferring instead to handle issues on a county-by-county basis).

15. To the extent harm is alleged, Individual Petitioners’ harm is based upon predictions of events that have yet to occur. These harms are too speculative to warrant judicial intervention. *Crossey*, No. 266 MD 2020 at 30, ¶¶ 3-4.

16. To have standing, Individual Petitioners must demonstrate that they have a “substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). The immediacy inquiry requires an analysis of the causal connection between the governmental action complained of and the injury to the

party complaining of the action. *S. Whitehall Twp. Police Serv. v. S. Whitehall Twp.*, 555 A.2d 793, 795 (Pa. 1989). A speculative interest, therefore, is not immediate and is insufficient to afford standing. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005). Interrelated with the immediacy analysis is the ripeness analysis. This portion of the analysis determines whether the facts are sufficiently developed “to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013).

17. Individual Petitioners do not present a “substantial, direct, and immediate interest” in this litigation as their claims are speculative. Their harms are contingent upon events that *might* occur in the future. Petitioners’ verified petition refers throughout to speculative harms that “may” or “might” occur.

18. No Individual Petitioner asserts that delivering his or her individual ballot to his or her specific county board of election office would be an unconstitutional burden. (Count I)

19. None of the Individual Petitioners assert that they even intend to cast a mail-in ballot. Furthermore, no Individual Petitioner asserts that casting his or her ballot in sufficient time before the Election-Day received-by deadline would constitute an unconstitutional burden. Moreover, the Pennsylvania Supreme Court previously dismissed this very claim because the prospective and potential injuries asserted

were too speculative. *See Disability Rights Pennsylvania, et al. v. Boockvar, et al.*, Pa. Supreme Court, No. 83 MM 2020, Per Curiam Order of 5/15/2020. (Count II).⁸

20. None of the Individual Petitioners assert that they are even likely to commit errors on their ballot that would require this Court to order county boards to contact voters to cure their mistakes. (Count III).

21. None of the Individual Petitioners assert that they are likely to mail in their ballots in a manner that displays their identity. (Count IV).

22. None of the Individual Petitioners identify how they are harmed by the poll-watcher provision or how they would benefit if the poll-watcher provision were declared unconstitutional. In fact, none of the Individual Petitioners assert that they want to serve as poll watchers or would be intimidated by poll-watchers should a court declare the provision unconstitutional. This is nothing more than Individual Petitioners seeking an advisory opinion of this Court. (Count V).

23. The Individual Petitioners base their claims for relief on nebulous concerns that, in the future, their ballots may not be received on time or processed, even though the next election is still more than two months away.

24. Because future speculative fear is not a sufficiently “substantial interest” to confer standing to the Individual Petitioners, *see Pittsburgh Palisades Park, LLC v.*

⁸ *See also* fn 4, *supra*.

Com., 888 A.2d 655, 660 (Pa. 2005), the Individual Petitioners should be dismissed from this lawsuit.

III. PETITIONERS' CLAIMS ARE NON-JUSTICIABLE POLITICAL QUESTIONS.

25. This case presents a non-justiciable political question.⁹ *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 36-37 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation) (stating that it is the province of the legislature, and not the judiciary, to make policy choices, and further stating that if a statewide remedy is needed due to COVID-19's impact on the elections, the General Assembly can enact appropriate legislation).

26. Issues that are “entrusted to one of the political branches or involve[] no judicially enforceable rights . . . present a political question . . . outside the courts’

⁹ While the currently named Respondents have not raised arguments based on the political question doctrine and the separation of powers more broadly, these arguments are jurisdictional. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019); *Jacobson v. Fla. Sec’y of State*, No. 19-14552, 2020 U.S. App. LEXIS 28078 *54-81 (11th Cir. Sept. 3, 2020) (Pryor, J., and Luck, J., agreeing that challenges to a state’s ballot order statute are non-justiciable political questions left to the legislature to determine); *Sweeney v. Tucker*, 375 A.2d 698, 712 (Pa. 1977) (holding that “the Court . . . should permit state adjudication of those federal claims . . . which are cognizable in federal court.” (emphasis added)); see also *Harrington v. Carroll*, 428 Pa. 510, 239 A.2d 437 (Pa. 1968). As this Court is well aware, “questions relating to jurisdiction are not waived by the failure of the parties to raise them, and may properly be raised by the court *sua sponte*.” *Fried v. Fried*, 509 Pa. 89, 501 A.2d 211 (Pa. 1985) (citing *Commonwealth v. Little*, 455 Pa. 163, 314 A.2d 270 (1974); *Sch. Dist. of Borough of West Homestead v. Allegheny Cty. Bd. of Sch. Directors*, 440 Pa. 113, 269 A.2d 904 (Pa. 1970); *Daly v. Sch. Dist. of Darby Twp.*, 434 Pa. 286, 252 A.2d 638 (1969); *Commonwealth, ex rel. Ransom Twp. v. Mascheska*, 429 Pa. 168, 239 A.2d 386 (1968); *Barco, Inc. v. Steel Crest Homes*, 420 Pa. 553, 218 A.2d 221 (1966)).

competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (internal quotations omitted); *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 U.S. App. LEXIS 28078 *62-63 (11th Cir. Sept. 3, 2020) (Pryor, J., and Luck, J., majority) (stating that plaintiffs' claims are non-justiciable because they pose basic questions that are political, not legal, and "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.") Therefore, "[a]bsent pellucid proof provided by plaintiffs that a political question is not at issue, courts should not substitute their own judgments for state election codes." *Coalition v. Raffensperger*, 2020 U.S. Dist. LEXIS 86996, *9 (N.D. Ga. May 14, 2020). The Pennsylvania Supreme Court has largely adopted the United States Supreme Court's political question theory in its interpretation of the Pennsylvania Constitution. *See, e.g., Sweeney v. Tucker*, 375 A.2d 698, 705-07 (Pa. 1977) (quoting and citing, among others, *Baker v. Carr*, 369 U.S. 186, 211 (1962) and *Powell v. McCormack*, 395 U.S. 486, 519-21 (1969)). The political question doctrine is derived from the separation of powers, which is "[a] basic precept of our form of government . . . that the executive, legislature and the judiciary are independent co-equal branches of government." *Id.* at 705.

27. The Pennsylvania Supreme Court, in adopting standards set by the U.S. Supreme Court, has found at least six areas where courts are not competent to render a decision:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 706 (quoting *Baker*, 369 U.S. at 210).

28. An affirmative finding of any one of these areas causes the case to present a non-justiciable political question outside the judicial expertise. *Id.* At least three of these factors are implicated here: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;”¹⁰ (2) “a lack of judicially discoverable and manageable standards for resolving it;” and (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.” *Id.*

29. Petitioners’ claims violate all three factors.

¹⁰ Article I, § IV of the U.S. Constitution (the “Elections Clause”) provides the “textually demonstrable commitment” in this case. *See infra* ¶ 30.

30. Petitioners' claims all breach the U.S. Constitution's textually unambiguous commitment to the state legislatures of the right and obligation to establish the Time, Place, and Manner for elections. *See* U.S. Const. art. I, § 4.

31. For example, the relief requested in Count I violates the General Assembly's decision to mandatorily require that electors, who mail their ballot, "*shall send same by mail, postage prepaid, except where franked . . . to said county board of election.*" 25 P.S. § 3146.6(a) as to Absentee Ballots and 25 P.S. §3150.16(a) as to Mail-In Ballots (emphasis added). Lest there be any doubt, the General Assembly made clear that the ballot was to be mailed to the county board of elections when it said that the envelope containing the completed ballot "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 . . .*" *Id.* (emphasis added); *see also id.* § 3146.4 as to Absentee Ballots and § 3150.16(a) as to Mail-In Ballots (requiring that the mailing envelope contain the "name and address of the county board of election of the proper county."). The General Assembly established definitely the "Place" and "Manner" for mail-in balloting to occur. The General Assembly did not leave room for the counties to devise alternate locations to deliver ballots. *See In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014). Petitioners' requested relief violates a textually unambiguous grant of authority, the General Assembly's prerogative to establish the "Places" of election.

32. Count II also violates the General Assembly’s right and obligation to establish the “Times” of the election. Petitioners seek an injunction that would require county boards of elections to receive ballots *after* election day so long as they are postmarked on election day. Pet. ¶¶ 172-183. This violates the textually unambiguous grant of authority to the legislature to determine the “Time” of the election. Here, the General Assembly determined that the right and appropriate time for a ballot to be received by the county election boards is 8 p.m. on Election Day.¹¹

33. Count III, Pet. ¶¶ 185-191, Petitioners ask this Court to mandate a procedure for contacting voters whose ballots have facial defects and allow those voters to cure the defects. But this too infringes the General Assembly’s constitutionally vested prerogative to set the manner for elections. In fact, the General Assembly, acting as both the House and the Senate, have introduced legislation to permit a voter to establish the validity of his or her signature. *See* H.B. 2626, Reg. Sess. (Pa. 2020); S.B. 10, Reg. Sess. (Pa. 2020).

34. Count IV, Pet. ¶¶ 197-99 also infringes the constitutionally unambiguous right and obligation of the Pennsylvania legislature to devise the “manner” of counting ballots. *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (stating that the Constitution vests state legislatures with the authority to enact comprehensive

¹¹ *See Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 27 ¶ 14 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation).

election codes). Here, the legislature deliberated and decided that ballots displaying the identity of the voter are defective. County boards are therefore statutorily required to set these ballots aside and declare these ballots “void.” 25 P.S. § 3146.8(g)(4)(ii). To grant Petitioners’ relief would violate the legislature’s constitutionally vested authority.

35. Finally, in Count V, Petitioners seek to change who can serve as a poll watcher. Pet. ¶¶ 205-07. But this challenge invades the constitutionally unambiguous right of the Pennsylvania legislature to decide the manner of election, in particular how to maintain the integrity of the election. *Smiley*, 285 U.S. at 366 (stating that included with the U.S. Constitution’s vesting of authority in state legislatures to enact comprehensive election codes is the authority to enact statutes to prevent fraud and corrupt practices).

36. Additionally, to grant the relief Petitioners request, this Court will be required to make initial policy decisions. But this Court should not micromanage “the State's election process.” *Coalition v. Raffensperger*, 2020 U.S. Dist. LEXIS 86996, *9 (N.D. Ga. May 14, 2020). *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 32 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation) (“Moreover, “[i]t is a mistake to suppose[] that a court of equity is amenable to no law, either common or statute, and assumes the rule of an arbitrary legislator in every particular case.’ When the rights of a party are clearly established by defined principles of law,

equity should not change or unsettle those rights. Equity follows the law.”); *id.* at 36 (“There are an infinite number of considerations that go into setting the rules for a free and equal election. It is the job of the legislature, not the judiciary, to make these policy choices.”).

37. Furthermore, Petitioners do not offer this Court any judicially manageable standards to adjudicate this case. *See Raffensperger*, 2020 U.S. Dist. LEXIS 86996, *9. How many days after Election Day is constitutionally acceptable? How “naked” does a ballot have to be before a county election board can dispose of it? These are policy questions with no judicially manageable standards to guide the answer. *See id.* (“Similarly here, there are no discernable and manageable standards to decide issues such as how early is too early to hold the election or how many safety measures are enough.”); *Jacobson v. Fla. Sec’y of State*, No. 19-14552, 2020 U.S. App. LEXIS 28078 *62-63 (11th Cir. Sept. 3, 2020) (Pryor, J., and Luck, J., majority) (“There are no discernable and manageable standards “to answer the determinative question”: How much partisan advantage from ballot order is too much?”). One could similarly ask here, how many days after the statutory deadline to receive ballots is sufficient under the Constitution? How many days is too few?

38. The Pennsylvania General Assembly is currently engaged in a legislative effort to address voting concerns related to COVID-19, which indicates that the issues raised by Petitioners are already being worked out among the political

branches to whom those decisions are constitutionally delegated. Two bills with very similar provisions are currently pending in the General Assembly: House Bill 2626 (“HB 2626”) and Senate Bill 10 (“SB 10”). *See* H.B. 2626, Reg. Sess (Pa. 2020); S.B. 10, Reg. Sess. (Pa. 2020). HB 2626 has already been passed by the House of Representatives and sent to the Senate. Both SB 10 and HB 2626 have been referred to the State Senate Government Committee. HB 2626 is scheduled to be voted upon by the State Government Committee on September 8, 2020, and if it votes in favor of the bill, then it would require three days of consideration by the Senate. It could then be voted upon on the third legislative day by the Senate and sent to the Governor. On its current timeline, HB 2626, as enacted by the General Assembly, could be sent to the Governor by September 21, 2020. If the Senate decides to move forward and pass SB 10 instead, it would be sent to the House to follow only a slightly elongated timeline to be passed and sent to the Governor.

39. Accordingly, Petitioners’ claims are barred as non-justiciable political questions.

IV. PETITIONERS FAILED TO STATE A CLAIM.

40. Petitioners’ proposed relief, if granted, would create an equal protection problem. Some counties will provide more locations for voters to drop off their ballots while other counties will maintain that only the county election office is a suitable location. Pet. ¶ 165. This would violate the Equal Protection Clause. *See,*

e.g., *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”).

41. While Pennsylvania law permits county election boards to provide for mail-in and absentee application processing and balloting at more than one County Election Board Office located within the county’s borders (“CEO”),¹² those additional CEOs must comply with the following requirements:¹³

- a. Must be staffed by appointed elections personnel in municipal or county-owned or leased properties;
- b. Must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (“SURE”) and staff trained and approved to access SURE;

¹² See, 25 P.S. § 2645(b). The County Boards of Election are permitted to have “suitable and adequate offices at the county seat, property furnished for keeping its records, holding its public sessions and otherwise performing its public duties, and shall also provide, such branch offices for the board in cities other than the county seat, as may be necessary.”

¹³ Pennsylvania Department of State, *Pennsylvania Applications and Balloting Guidance: Mail-in and Absentee Ballots and Voter Registration Changes*, Jan. 10, 2020, Version 1.0. (“DOS January 2020 Guidance”), at 4, available at: https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Act%2077_Absentee%20and%20Mail-in%20Guidance.pdf.

- c. Must have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county; and
- d. Must have a secure ballot collection receptacle to store voted and mail-in or absentee ballots submitted at the location.

42. An unstaffed off-site drop box (“Drop Box”) is not authorized under the law and does not constitute a “branch office.” 25 P.S. §2645(b). Such Drop Boxes do not come close to meeting the statutory requirements to be a CEO, and their use is not permitted under the law. The DOS January 2020 Guidance explicitly acknowledges that CEOs are “allowed under existing law,” but its later reference to “other secure ballot locations” in addition to CEOs significantly does not cite nor reference any statutory authority for Drop Boxes. DOS January 2020 Guidance at 4-5. The Election Code specifically restricted “branch offices” to those that meet the requirements of § 2645(b) to ensure security of a voter’s ballot at the CEO under the supervision of appointed elections personnel, who are also trained to use the SURE system located at the CEOs to assist voters.

43. Furthermore, Drop Boxes were not authorized in Act 77, which provided for Mail-In Ballots. Act 77 was passed by bi-partisan majorities in the General Assembly and signed by the Governor. Additionally, in response to the COVID-19 pandemic, Act 12 was passed by bi-partisan majorities in the General Assembly and

signed by the Governor to respond to the pandemic's issues regarding voting, and again Drop Boxes were not authorized or included in that Act.

44. Different counties are not constitutionally permitted to establish different rules for where voters may cast their vote-by-mail ballots, including the operation of unstaffed locations to deliver ballots. If some counties, in compliance with existing law, require ballots to be delivered to the county elections office only, while others, without statutory authority, establish Drop Boxes in numbers and locations and with such security measures as are left to each county's sole discretion, voters in the same election will be operating under different rules. This would violate the Equal Protection Clause.

V. PETITIONERS HAVE NOT ALLEGED ANY VIOLATION OF PROTECTED RIGHTS.

45. Pennsylvania has not violated any rights enjoyed by Petitioners in providing multiple voting options to its citizens.

46. The Pennsylvania Constitution mandates that “[e]lections shall be free and equal; and no power ... shall at any time interfere to prevent the exercise of the right of suffrage.” Pa. Const. art. 1, § 5. The U.S. Constitution prohibits discriminatory denial of the right to vote on the basis of race, sex, and age for citizens over eighteen. See U.S. Const. amends. XV, XIX, and XXVI. Pennsylvania's election code does not violate any of these constitutional prohibitions. Pennsylvania has provided

multiple voting options to all of its citizens, and Petitioners are simply demanding more.

47. Pennsylvania's recent legislative enactments have expanded the franchise rather than restricted it. In 2019, the Pennsylvania General Assembly amended the state election code to enable all qualified electors to vote by mail. 2019 (P.L. 552, No. 77) 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West). All registered Pennsylvania voters can now apply to vote by mail in 2020 and subsequent elections, and their mail-in ballots will be recorded so long as they comply with the requirements for valid submission. Thus, Pennsylvania voters have *more* voting options this year than they have ever had before, and eligibility was expanded in a manner that did not discriminate on any prohibited basis. *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 35-36 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation).

48. There is no constitutional right to vote by mail. *See Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (“[T]here is no constitutional right to an absentee ballot.”); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) (“[T]he plaintiffs are welcome and permitted to vote, and there is no indication that they are in fact absolutely prohibited from voting by the State. So the right to vote is not ‘at stake,’ and rational-basis review follows.”) Pennsylvania’s decision to offer mail-in

voting as an option does not create a constitutional right thereto and open the door for Petitioners to demand that they be allowed to vote-by-mail in various other ways.

49. The seminal United States Supreme Court decision that squarely governs this issue in federal jurisprudence is *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807-811 n.7 (1969). In *McDonald*, the United States Supreme Court held that an Illinois statute denying certain inmates mail-in ballots did not restrict their right to vote. *Id.* at 807. Instead, it burdened only their asserted right to an absentee ballot, because there was no evidence that the state would not provide them another way to vote. *Id.* at 807-08. Put differently, there was no indication that the inmates were “in fact absolutely prohibited from voting by the State[.]” *Id.* at 808 n.7 (emphasis added). The absentee rules did “not themselves deny [the inmates] the exercise of the franchise; nor, indeed, d[id] Illinois' Election Code so operate as a whole[.]” *Id.* at 807-08. Accordingly, the *McDonald* Court applied only rational-basis review, not strict scrutiny, and easily upheld the absentee-ballot scheme. *Id.* at 808-11. The state’s refusal to give the inmates a mail ballot was not irrational, “particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may [have been] extremely difficult, if not practically impossible.” *Id.* at 809-10.

50. Here, the Commonwealth of Pennsylvania is engaging in a “constant assessment and evaluation” to ensure “the highest level of accessibility, security, and

safety to the voters of Pennsylvania to make sure that they can exercise their right to vote.” *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 14-15, ¶ 2 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation). In fact, “there is no evidence that the health and safety procedures used by the county boards during the June 2020 primary were ineffective.” *Id.* at 27 ¶ 17. Voters have the option of voting in person on Election Day. *See id.* at 36.

51. Beyond the fact that Pennsylvania has no affirmative obligation to provide off-site, unstaffed drop-boxes for mail-in ballots, and has never provided such drop-boxes before, it also has a rationale for the two mail-in voting options that it has selected (i.e., submission by mail or in-person at the Board). “[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). To satisfy this goal, Pennsylvania is entitled to enact “substantial regulations” to govern its elections. *Id.* at 432. The *Anderson-Burdick* framework imposes a flexible two-step standard for evaluating burdens on voting that asks: (1) whether the challenged law actually imposes a burden, and if so whether that burden is severe or light; and (2) whether the burden outweighs the state interest asserted. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick*, 504 U.S. at 433-34. Only severe restrictions will justify strict scrutiny whereas

nondiscriminatory and reasonable burdens are justified by the state's important regulatory interests. *Burdick*, 504 U.S. at 434.

52. *First*, the burden imposed on voting here is excessively slight. Instead of Petitioners depositing their mail-in ballots in off-site drop-boxes as they would prefer, Petitioners are required to either return their mail-in ballots via the mail or in-person at their local Board. 25 P.S. §§ 3146.6(a), 3150.16(a). These burdens are akin to other state regulations, which have been upheld by the U.S. Supreme Court. *See, e.g., Burdick*, 504 U.S. at 437 (ban on write-in votes); *Timmons*, 520 U.S. at 359 (ban on candidates appearing on ballot as candidate of multiple parties). Even though a voter's designated Board might be further away than a hypothetical drop-box, it is by definition located within the same county and hence not an extremely distant trip. It is also quite likely in most counties that mailboxes maintained by the United States Postal Service or other methods of access to the USPS system are already more prevalent than any drop-boxes that would be maintained by counties. And it is difficult to argue that the act of depositing a ballot in one's own mailbox for pickup, or handing it to the letter carriers who visit nearly every residence in the Commonwealth six days per week—all of which would involve less time and effort than travel to an off-site drop-box maintained by a county election office and left unstaffed—imposes any burden at all. Additionally, the decision whether to utilize drop-boxes, the number and location thereof, and the method of providing security

for the drop-boxes will vary from county to county and be subject to a particular county's discretion. This lack of a uniform process for casting ballots throughout the Commonwealth imposes a substantial burden on electors as their ability to cast a ballot will be a factor of the county in which they live, thus giving some voters greater rights than others.

53. *Second*, even if a slight burden is imposed by Pennsylvania's election regulations, that burden is outweighed by the state's interest in preventing fraud. States have a valid interest in "deterring and detecting voter fraud." *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 191 (2008). Voter fraud can occur in a variety of ways, but recent evidence indicates that absentee ballots are particularly susceptible to manipulation by third parties.¹⁴ Pennsylvania has balanced expanded eligibility for mail-in voting with two longstanding and reliable methods of submission: return by mail, or in-person delivery by the voter at their local Board. Both of these options have advanced the Commonwealth's valid interest in protecting the integrity of its elections and will continue to do so in the future.

¹⁴ The 2018 election in North Carolina's 9th congressional district was ultimately overturned by the State Board of Elections because so many absentee ballots were unlawfully "harvested" from voters. *See* In the Matter of: Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, *available at* https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

54. Pennsylvania’s interest in ensuring the integrity of mail-in ballots outweighs Petitioners’ alleged harms by a voter who is forced to return their ballot by mail or in-person at their local Board.

VI. HARMS ALLEGED BY PETITIONERS WERE NOT CAUSED BY STATE ACTION.

55. Any burden imposed on voters due to COVID-19 is not actionable because COVID-19 is not state action

56. “[T]he Fourteenth Amendment, by its very terms, prohibits only state action.” *See United States v. Morrison*, 529 U.S. 598, 612 (2000); *see also Coalition v. Raffensperger*, No. 20-cv-1677, 2020 U.S. Dist. LEXIS 86996, *9 n. 2 (N.D. Ga. May 14, 2020) (“Here, the underlying burden on the right to vote emanates from a virus, which obviously was not created or imposed by [the State]. While Plaintiffs contend that [the State has] done a poor job of responding to that virus, the fact that the virus’s provenance was not through [the State] further increases, in this Court’s opinion, the impropriety of judicial intervention.”).

57. COVID-19 is an unprecedented global pandemic that has had repercussions at every level of society. The “fear” asserted by Petitioners is one which is caused by the virus itself, and not any action or inaction by the Commonwealth. (Count I). On the contrary, Pennsylvania has taken affirmative legislative steps to minimize the burdens on voters in 2020. *See Act of Mar. 27, 2020 (P.L. 41, No 12), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422) (West).*

58. The real problem that Petitioners confront is COVID-19, which is not a problem created by the state. *See Bethea v. Deal*, 2016 U.S. Dist. LEXIS 144861 (S.D. Ga. Oct. 19, 2016) (stating that the State’s decision not to extend the voter registration deadline in light of Hurricane Matthew was not a state action creating an impediment to the right to vote). Accordingly, because there is no state action, Petitioners do not bring an actionable claim. *Clark v. Edwards*, No. 20-308 2020 U.S. Dist. LEXIS 108714, *39-40 (M.D. La. June 22, 2020) (“Even assuming that Power Coalition had alleged an injury, that injury is traceable to the Virus, not to the State actions of Defendants... And it would be a stretch for Power Coalition to argue that the state's actions - which, after all, expanded early voting and access to absentee by mail voting - somehow frustrates their mission of "increas[ing] voter participation.”).

59. Pennsylvania, exercising its constitutional authority over elections while addressing COVID-19’s impact, has offered its citizens multiple voting options for the November 2020 election while excluding other options that pose a heightened risk of fraud. *See Act of Mar. 27, 2020*. Any corresponding burden imposed on Petitioners is slight, and is caused by COVID-19 rather than the Commonwealth.

VII. PENNSYLVANIA HAS A COMPELLING INTEREST IN A FAIR AND ORDERLY ELECTION.

60. Petitioners’ requested 7-day extension of the received-by deadline would have a cascading effect on other election code deadlines, thereby causing chaos for election officials and confusion for voters. (Count II).¹⁵

61. As an exercise of its constitutional authority over the time, place, and manner of elections, the Pennsylvania General Assembly in 2019 enacted major changes to the state election code. 2019 (P.L. 552, No. 77) 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West). As part of this reform, the General Assembly extended the deadline for the timely receipt of absentee and mail-in ballots to 8:00 p.m. on Election Day. 25 P.S. §§ 3146.6(c), 3150.16(c).

62. Petitioners now demand that the Court enjoin the statutory deadline and force the county boards to accept and count absentee and mail-in ballots received up to seven days after Election Day. (Count II). Such a remedy would have cascading consequences for other deadlines in the election code and inflict an irreparable harm upon the state.

63. This Court has held that Pennsylvania courts lack the authority to use principles of equity to override statutorily enacted deadlines related to the elections calendar. *In re Guzzardi*, 99 A.3d 381, 382 (Pa. 2014). This is because equity only applies “in the absence of a specific statutory mandate.” *Id.* at 385. Especially with regard to election laws, courts should not “create an equitable remedy for a hardship

¹⁵ See generally, fn 4, *supra*.

created by an unambiguous, validly enacted, legislative decree.” *Id.* A court’s use of equity to invalidate statutory election deadlines “would create ambiguity and inconsistency in what needs to be a uniform and stable area of law.” *Id.*

64. As a general principle, courts should avoid intervening to alter election-related procedures as the date of the election gets closer. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). This is because “[c]ourt orders affecting elections ... can themselves result in voter confusion and consequent incentive to stay away from the polls.” *Id.* at 4-5. The U.S. Supreme Court recently enforced this principle in the 2020 Wisconsin primary election, staying a district court order that extended that state’s received-by deadline just as Petitioners request here. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, 589 U.S. ___, ___, 2020 U.S. LEXIS 2195, at *1-2 (Apr. 6, 2020) (per curiam).

65. The Pennsylvania state government has already advertised the Election Day deadlines for submitting mail-in and absentee ballots which are codified in state law.¹⁶ A change of deadlines at this late date would require the Commonwealth to expend funds publicizing new deadlines to voters, potentially confusing Pennsylvanians regarding when they must submit their ballots.

¹⁶ *See Voting in Pennsylvania*, available at <https://www.pa.gov/guides/voting-and-elections/#RecentAct77VotingReforms>.

66. Judicial intervention would also require the Commonwealth to expend funds training local elections officials to enforce the new deadlines. With only weeks remaining until the 2020 general election, there is insufficient time remaining to bring all county boards into compliance with a court-ordered change to election procedures. *See, e.g., Conservative Party of N.Y. State v. N.Y. State Bd. Of Elections*, 10 cv 6923, 2010 U.S. Dist. LEXIS 114155, *7-8 (S.D.N.Y. Oct. 15, 2010) (denying preliminary injunction six weeks before an election because there was insufficient time to retrain poll workers).

67. There would also be practical consequences to ordering an extension of the received-by deadline while leaving other election-related deadlines untouched.¹⁷ The boards have a number of post-election legal duties which would be impacted by a 7-day extension of the received-by deadline. The boards must begin their canvassing of election results no more than three days after Election Day, and report their results to the Secretary of the Commonwealth no later than five days after that. 25 P.S. § 3146.8(g)(2). This early deadline exists so that the Secretary has at least 24 hours to decide whether a recount is necessary, a decision which she must make no more than nine days after an election. 25 P.S. § 2154(f), (g)(2). Final results must

¹⁷ *See, e.g.,* 3 U.S.C. §§ 1, 5 (stating that so long as state contests, recounts, and challenges to elections are resolved at least 6 days prior to the meeting of electors—this year, 41 days after the General Election is December 14—shall govern the counting of electoral votes). Moving back the received-by deadline risks a cascading effect on other post-election deadlines, including the calling for recounts. *Crossey, et al. v. Boockvar*, No. 266 MD 2020 at 18 ¶15 (Leavitt, P.J.) (Pa. Sept. 4, 2020) (Report and Recommendation).

be certified by the Secretary no later than twenty days after Election Day. 25 P.S. § 2642(k).

68. Hence, the extension of one deadline as Petitioners request would have the concomitant effect of compressing other equally significant deadlines, thereby increasing the risk of human error in computing election returns. Petitioners' requested relief would upend Pennsylvania's entire post-election calendar and impose significant stress on election administration.

69. Finally, judicial intervention that overrides the validly enacted laws of Pennsylvania would cause irreparable harm to the Commonwealth. "[A]ny time a State is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *King*, 133 S. Ct. 3 (Roberts, C.J., in chambers). Petitioners' requested injunction would override the election deadlines which were fully debated and properly enacted by the peoples' representatives in the Pennsylvania General Assembly. This Court should be reluctant to supersede that legislative decision on such a rushed timetable.

70. Granting Petitioners' requested relief would have a plethora of cascading effects on voters, elections officials, and Pennsylvania's entire apparatus of election administration, and judicial intervention would supersede the Commonwealth's constitutional authority to regulate elections.

VIII. PENNSYLVANIA HAS A VALID STATE INTEREST IN PRESERVING VOTER SECRECY AND PREVENTING FRAUD.

71. Pennsylvania has a valid state interest in preserving voter secrecy and preventing fraud that would be undermined by Petitioners' requested relief. (Count IV).

72. Pennsylvania law requires local election officials to void any absentee and mail-in ballots which "contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference" on the official envelope. 25 P.S. § 3146.8(g)(4)(ii). This statutory requirement is commensurate with the Pennsylvania Constitution's mandate that "secrecy in voting be preserved." Pa. Const. art. VII, § 4. Petitioners request that the Court enjoin the Boards from rejecting absentee and mail-in ballots which are returned without a privacy envelope. (Count IV). A grant of the requested relief would override Pennsylvania's legislative determination embodied in Act 77 which advances the Commonwealth's valid interests in preventing voter fraud and protecting voter secrecy.

73. The U.S. Supreme Court has recognized a number of valid interests that are "unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process." *See Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 191 (2008). Among these valid interests are the state's interests in

“deterring and detecting voter fraud [and] safeguarding voter confidence.” *Id.* The decision of some Boards to reject “naked ballots” is supported by the Commonwealth’s dual interests in preventing fraud and in safeguarding voter confidence, and those interests outweigh any injury asserted by Petitioners when applying the *Anderson-Burdick* framework.

74. Privacy envelopes are small envelopes which are provided to Pennsylvanians who vote by mail-in or absentee ballot. 25 P.S. §§ 3146.4, 3150.14(a). Voters are instructed to place their completed ballots inside these envelopes to protect the secrecy of their vote, and then seal the privacy envelope and place it inside a larger mailing envelope. 25 P.S. §§ 3146.4, 3150.14(c). “Naked ballots” are mail-in or absentee ballots which are returned to the Board without the required privacy envelope. (Count IV). Hence, when an elections official opens a mailing envelope to discover a “naked ballot,” the secrecy of that individual’s vote has been destroyed.

75. Pennsylvania law requires elections officials to reject mail-in and absentee ballots which disclose the identity of the voter on the exterior of the privacy envelope. 25 P.S. § 3146.8(g)(4)(ii). Although the statute does not explicitly address a scenario in which a voter returns a ballot *without* a privacy envelope, it is reasonable to infer that a “naked ballot” presents an identical harm: the voter’s identity has forever been associated with their candidate preference.

76. Failure to preserve the secrecy of the voting process is a violation of the Pennsylvania Constitution. *See* Pa. Const. art. VII, § 4. Accepting mail-in and absentee ballots which are not properly sealed also raises concerns about third-party tampering with ballots, which can impact voter confidence in the integrity of the electoral process. The preservation of public confidence “has independent significance” beyond the state’s interest in preventing fraud “because it encourages citizen participation in the democratic process.” *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 197 (2008). Pennsylvania’s statutory prohibition against accepting mail-in ballots which disclose the identity of the voter is reasonably calculated to advance the state’s interest in preserving voter secrecy and confidence.

77. Beyond the betrayal of voter secrecy inherent in the acceptance of a “naked ballot,” Petitioners’ requested remedy also infringes on Pennsylvania’s valid interest in combatting voter fraud. The U.S. Supreme Court has recognized that voter fraud is a continuing problem nationwide and that states are empowered to protect the integrity of their electoral processes. *Crawford*, 553 U.S. at 194-95.

78. “Naked ballots” raise obvious concerns about fraud. When a ballot arrives without the protective shield of a sealed privacy envelope, there is no guarantee that it traveled unmolested from the voter’s hands to their county board. There is no way for the election official to verify that the vote was accurately recorded, because the mere act of ascertaining the voter’s identity in order to follow up “may violate the

ballot secrecy requirement in the Pennsylvania Constitution.” *Banfield v. Cortés*, 631 Pa. 229, 251 (Pa. 2015). The only surefire way to be certain that no fraud has been accomplished is to reject the suspect ballot, and this is the very legislative determination at which the Pennsylvania General Assembly arrived.

79. In accordance with the state constitutional mandate to preserve voter secrecy and the Commonwealth’s vital interests in eliminating fraud and preserving voter confidence in the electoral process, Pennsylvania acted to invalidate certain ballots which raise such concerns. This legislative decision is nondiscriminatory and does not unduly restrict the right of Pennsylvanians to vote, either by mail or otherwise.

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

<p>Dated: September 8, 2020</p>	<p>Respectfully submitted, Obermayer Rebmann Maxwell & Hippel LLP</p> <p>By: <i>/s/ Richard Limburg</i></p> <hr/> <p>Lawrence J. Tabas (ID No. 27815) Mathieu J. Shapiro (ID No. 76266) Richard Limburg (ID No. 39598) Centre Square West 1515 Market St., Suite 3400 Philadelphia, PA 19102 <i>Attorneys for Joseph B. Scarnati III and Jake Corman</i></p> <p>Holtzman Vogel Josefiak Torchinsky PLLC</p> <p>By: <i>/s/ Jason B. Torchinsky</i></p> <hr/> <p>Jason B. Torchinsky (Va. ID No. 47481) Jonathan P. Lienhard (Va. ID No. 41648) Philip M. Gordon (DC. ID No. 1531277) Shawn T. Sheehy (Va. ID No. 82630) Gineen Bresso (Md. ID No. 9912140076) 45 North Hill Drive, Suite. 100 Warrenton, VA 20186 (540) 341-8808 (P) (540) 341-8809 (F)</p> <hr/> <p><i>Attorneys for Joseph B. Scarnati III, and Jake Corman pending approval of application for admission pro hac vice</i></p>