

IN THE SUPREME COURT OF PENNSYLVANIA

No. 149 MM 2020

IN RE NOVEMBER 3, 2020 GENERAL ELECTION

**REPUBLICAN INTERVENORS' APPLICATION FOR
LEAVE TO INTERVENE**

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Donald J. Trump for President, Inc.; Republican Party of Pennsylvania;
Republican National Committee; and
National Republican Congressional Committee*

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE NOVEMBER 3, 2020 GENERAL
ELECTION,

Petition of: Kathy Boockvar, Secretary of
the Commonwealth of Pennsylvania

Case No. 149 MM 2020

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents Elizabeth Radcliffe, Donald J. Trump for President, Inc. (the “Trump Campaign”), the Republican Party of Pennsylvania (“RPP”), Republican National Committee (“RNC”), and National Republican Congressional Committee (“NRCC”) (collectively, “Republican Intervenors”), by and through undersigned counsel, respectfully submit the following Application for Leave to Intervene as Respondents in this matter under Pennsylvania Rules of Appellate Procedure 106, 123 and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, and aver the following in support thereof:

PRELIMINARY STATEMENT

The Republican Intervenors support and seek to uphold orderly free and fair elections for all Pennsylvanians and for all voters across the country.

Secretary Boockvar invites the Court to sanction the counting of fraudulent mail-in and absentee ballots under a distorted and legally insupportable interpretation of the Election Code, an interpretation which is owed no deference in light of her attenuated role in administering elections. Under the pretense of a

“statutory construction issue,” Secretary Boockvar seeks a declaration that would reverse the established practice of rejecting applications or ballots with non-matching signatures. Secretary Boockvar’s request—filed less than a month before the election—has the potential to dramatically disrupt the efficient administration of this election, changing the rules mere days before a presidential election, directly violating repeated instructions from the United States Supreme Court. Secretary Boockvar’s requested relief not only would dramatically alter the rules governing the imminent November general election in Pennsylvania, but also would usurp the political branches’ authority to enact the laws governing the Commonwealth’s elections and impose substantial costs on the Commonwealth and its taxpayers.

Secretary Boockvar’s Application is in large part a mirror image of pending litigation in federal court—and a transparent attempt to forum-shop away from that Court and into this Court. On June 29, the Trump Campaign and the RNC filed suit in the U.S. District Court for the Western District of Pennsylvania to protect the constitutional rights of Pennsylvania voters (the “Federal Action”). In the Federal Action, the Trump Campaign and the RNC assert that, “contrary to [the Pennsylvania Department of State’s] September 11, 2020 Guidance, the Pennsylvania Election Code does authorize County Election Boards to set aside and challenge returned absentee or mail-in ballots that contain signatures which do not match the voters’ signatures in their permanent voter registration records,” and that

“[t]o the extent that it states or implies that challenges cannot be asserted to absentee or mail-in ballots that lack genuine signatures, the September 11, 2020 Guidance is contrary to the mandatory terms of the Election Code and Pennsylvania case law.” (Federal Action 2nd Am. & Supp. Compl. ¶¶ 182–83). Secretary Boockvar thus asks this Court to *prohibit* the very actions which the Trump Campaign and RNC have alleged are lawful in the Federal Action. Secretary Boockvar’s *ex parte* Application is an attempted end run around this already-pending litigation.

For this reason, the Republican Intervenors, on behalf of themselves, their candidates, and their member voters, seek to intervene in this action. The Republican Intervenors have a right to intervene in this case. Ms. Radcliffe is a registered Pennsylvania voter who plans to vote in person in the 2020 General Election and seeks to protect her vote against dilution that would occur if the Court permits ballots to be cast in contravention of the requirements of the Election Code and state law.

Moreover, political parties have a recognized interest to assert and protect the rights of their members in upcoming elections and to protect their own agendas and resources from such changes to election laws. Moreover, the Trump Campaign, the RPP, the RNC, and the NRCC have made significant investments in support of Republican candidates up and down the ballot and in connection with voter mobilization and education efforts in Pennsylvania for the past many election cycles,

and continue to do so again in 2020. They thus have a substantial and particularized interest in defending this action to preserve the structure of the competitive environment in which their supported candidates participate and to ensure that Pennsylvania carries out free and fair elections.

No other party to this action represents these private interests, and therefore this timely application for intervention should be granted. The Republican Intervenors respectfully request that the Court grant their application to intervene as Respondents, and to permit them to file of record the Answer attached hereto.

I. BACKGROUND

A. The Republican Intervenors.

1. Elizabeth Radcliffe is a qualified registered elector in the Commonwealth of Pennsylvania. She resides in Ben Avon Heights, Allegheny County, Pennsylvania and is a registered member of the Republican Party of Pennsylvania.

2. Ms. Radcliffe intends to vote in person in the upcoming November 3, 2020 General Election.

3. As a Pennsylvania qualified registered elector who intends to vote in person, she does not want her vote diluted or cancelled by votes that are cast in a manner contrary to the requirements enacted by the Pennsylvania General Assembly.

4. Ms. Radcliffe believes that, to ensure the integrity of elections, all voters in Pennsylvania must follow the rules established by the General Assembly in the Election Code. For voters who choose to cast absentee or mail-in ballots, this includes without limitation complying with the minimal safeguards set forth by the Election Code to ensure that the mail-in or absentee ballot or application for same was completed by the registered elector.

5. The Trump Campaign is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America. President Trump is the Republican nominee for the office of the President of the United States of America in the upcoming November 3, 2020 General Election. The Trump Campaign seeks to intervene on its own behalf and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Section 102(a) of the Election Code, 25 P.S. § 2602(a).

6. The RPP is a major political party, 25 P.S. § 2831(a), and the “State committee” for the Republican Party in Pennsylvania, 25 P.S. § 2834, as well as a federally registered “State Committee” of the Republican Party as defined by 52 U.S.C. § 30101(15). The RPP, on behalf of itself and its members nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania. It works to accomplish this purpose by, among other things, devoting substantial resources toward educating,

mobilizing, assisting, and turning out voters in Pennsylvania. The RPP has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2020. The RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

7. In conjunction with its Election Day Operations (“EDO”), the RPP devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day and to facilitate the efficient running of the canvassing process.

8. As part of its EDO, the RPP also devotes substantial time and resources toward the recruitment and training of a “ground team” of lawyers throughout the Commonwealth who stand ready on Election Day and during the canvass to assist poll workers, poll watchers, and volunteers should questions arise as to election laws or the voting process within the Commonwealth.

9. Each of the RPP’s EDO, training programs, and voter education efforts relies upon, utilizes, and is built upon the clear language of the Election Code.

10. The recent enactment of Act 77, which fundamentally changes the manner in which Pennsylvania voters are permitted to vote, most notably by

providing a new universal mail-in voting regime, required the RPP to significantly update and alter its EDO, training programs, and voter education programs.

11. In particular, the RPP substantially increased the amount of its time and resources dedicated to educating voters, poll workers, poll watchers, volunteers, and its legal teams throughout Pennsylvania's 67 counties regarding the provision of Act 77.

12. The relief sought in this litigation differs and departs from the statutory language of the Election Code and Act 77 upon which the RPP has relied in undertaking its EDO, training programs, and voter education programs.

13. Should this Court grant the relief sought in this litigation, resources and efforts which the RPP have expended on its EDO, training programs, and voter education programs will have been wasted.

14. Moreover, should this Court grant the relief sought in this litigation, the RPP will need to expend substantial new additional resources and effort on overhauling its EDO, training programs, and voter education programs to reflect the changes in Pennsylvania's election laws and election administration scheme.

15. The RNC is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party's business at the national level, including development and promotion of the Party's national platform and fundraising and election strategies; supports Republican candidates for

public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters. The RNC made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2020. The RNC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

16. The NRCC is the national congressional committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The NRCC's mission is to elect Republican candidates to the U.S. House of Representatives from across the United States, including from Pennsylvania's eighteen congressional districts. The NRCC works to accomplish its mission in Pennsylvania by, among other things, providing direct and indirect financial contributions and support to candidates and other Republican Party organizations; providing technical and research assistance to Republican candidates and Party organizations; engaging in voter registration, voter education and voter turnout programs; and other Republican party-building activities. The NRCC made significant contributions and expenditures in support of Republican House candidate and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2020. The NRCC has

a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

B. Procedural history.

17. On June 29, the Trump Campaign and RNC, joined by other plaintiffs, filed the Federal Action in the U.S. District Court for the Western District of Pennsylvania against Secretary Boockvar and the Boards of Elections of each of Pennsylvania’s 67 counties. The Trump Campaign and RNC filed that lawsuit in response to the Defendants’ widespread failure to enforce the requirements of Act 77 in connection with the June 2 primary election.

18. On September 11, 2020, the Pennsylvania Department of State, with the knowledge, approval, and/or consent of Secretary Boockvar, published and disseminated to all of the county boards of elections a guidance titled “GUIDANCE CONCERNING EXAMINATION OF ABSENTEE AND MAIL-IN BALLOT RETURN ENVELOPES.” The September 11, 2020 Guidance is available at the Pennsylvania Department of State’s website at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

19. Under the “Background” section of the September 11, 2020 Guidance, Secretary Boockvar states that “[b]efore sending [an absentee or mail-in] ballot to the applicant, the county board of elections confirms the qualifications of the

applicant by verifying the proof of identification and comparing the information provided on the application with the information contained in the voter record,” that “[i]f the county is satisfied that the applicant is qualified, the application must be approved,” and that “[t]his approval shall be final and binding, except that challenges may be made only on the grounds that the applicant was not a qualified voter”

20. Yet the Election Code mandates that for non-disabled and non-military voters, all applications for an absentee or mail-in ballot “shall be signed by the applicant.” 25 P.S. §§ 3146.2(d), 3150.12(c).

21. Moreover, because of the importance of the applicant’s signature and the use of the word “shall,” Pennsylvania courts have consistently upheld challenges to absentee ballots that have been cast by voters who did not sign their absentee ballot applications. *See, e.g., Opening of Ballot Box of the First Precinct of Bentleyville*, 598 A.2d 1341, 1343 (Pa. Commw. 1991).

22. On September 22, the Trump Campaign and RNC filed a Second Amended and Supplemental Complaint, asserting that, “contrary to the September 11, 2020 Guidance, the Pennsylvania Election Code does authorize County Election Boards to set aside and challenge returned absentee or mail-in ballots that contain signatures which do not match the voters’ signatures in their permanent voter registration records,” and that “[t]o the extent that it states or implies that challenges cannot be asserted to absentee or mail-in ballots that lack genuine signatures, the

September 11, 2020 Guidance is contrary to the mandatory terms of the Election Code and Pennsylvania case law.” (Federal Action 2nd Am. & Supp. Compl. ¶¶ 182–83).

23. On October 4, just 30 days before the General Election, Secretary Boockvar filed an Application for the Invocation of King’s Bench Power to Declare Proper Construction of Election Code.

24. There are no other parties to this action, notwithstanding the fact that Secretary Boockvar’s requested relief would have a significant impact on how each of the 67 county boards of elections would be required to handle mail-in and absentee ballots and applications for same.

25. Noting that the issue is already being litigated in the Federal Action (in which she, the Trump Campaign, and the RNC are parties), Secretary Boockvar suggests it is necessary to bring this *ex parte* action before this Court, as she seeks to obtain an advisory opinion on a matter of “public interest.” (App. at 11–13).

26. This case is still in its infancy. This Court set a deadline of noon on October 7 to file answers to Secretary Boockvar’s King’s Bench Application.

II. THE GOVERNING INTERVENTION STANDARD

27. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa. R.A.P. 1531(b). Insofar as “the exercise of King’s Bench authority is not limited by prescribed forms of procedure” and that

“the Court may employ any type of process necessary for the circumstances,” the Republican Intervenors’ application for leave to intervene in compliance with the rules governing original jurisdiction petitions for review is an appropriate vehicle for the timely intervention of these interested parties.

28. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw. Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

29. The standards for intervention under Pennsylvania Rules of Civil Procedure 2326 to 2329 apply to an original jurisdiction petition for review because Pennsylvania Rule of Appellate Procedure 106 (“Original Jurisdiction Matters”) applies the “general rules” for practice in the courts of common pleas—namely, the Rules of Civil Procedure—“so far as they may be applied.”

30. Pennsylvania Rule of Civil Procedure 2327(4) is permissive and provides in pertinent part:

At any time during the pendency of an action, a person not a party thereto *shall be permitted to intervene therein*, subject to these rules if . . . *the determination of such action may affect any legally enforceable interest of such person* whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327(4) (emphasis added); *see also Allegheny Reprod. Health Ctr. v. Pa. Dep't of Human Servs.*, No. 26 M.D. 2019, 2020 Pa. Commw. LEXIS 104, 2020 WL 424866, at *5 (Pa. Commw. Ct. Jan. 28, 2020) (“Pennsylvania Rule of Civil Procedure No. 2327(4) . . . permits intervention where the determination ‘*may affect* any legally enforceable interest’ of a proposed intervenor.” (quoting Pa. R.C.P. No. 2327(4) and emphasis in original)).

31. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

32. Moreover, the Court may, in its discretion, allow intervention even if it determines that one of the Rule 2329 exceptions applies. *See* Pa. R.C.P. 2329 (instructing that “an application for intervention *may* be refused” if an exception applies (emphasis added)); *see also* 7 Goodrich Amram 2d § 2329:7 (“Even though the petitioner’s interest is adequately represented in the pending action, this fact does not mandate the refusal of intervention since the refusal of intervention on the ground of the adequacy of the representation is permissive in nature.”).

33. The Court should grant the Republican Intervenors’ application to intervene because the Court’s determination of this action may affect the Republican Intervenors’ legally enforceable interests, no exception applies under Pennsylvania

Rule of Civil Procedure 2329, and the Republican Intervenors' participation will aid the Court.

III. BASIS FOR THE REPUBLICAN INTERVENORS' INTERVENTION

A. The Republican Intervenors have substantial interests in this action.

34. The Republican Intervenors, on behalf of their supported candidates, voters, and own institutional interests, have a substantial and particularized interest in preserving the state election laws challenged in this action, which were enacted to ensure the structure and integrity of Pennsylvania's elections.

35. Ms. Radcliffe is a registered Pennsylvania voter who plans to vote in person in the 2020 General Election. She therefore has a substantial and particularized interest in protecting her vote against dilution that would occur if the Court permits ballots to be cast in contravention of the requirements of the Election Code and state law.

36. There can be no question that the Trump Campaign, the RPP, the RNC, and the NRCC have direct and significant interests in the continued enforcement of Pennsylvania's laws governing mail-in ballots as those laws are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws cast aside, the current competitive electoral

environment in Pennsylvania, in which the Trump Campaign, the RPP, the RNC, and the NRCC invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018); *see* ¶¶ 1–4, *supra*.

37. Courts routinely recognize that political parties have interests supporting intervention in litigation concerning elections and election procedures. *See, e.g., Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014 WL 4549001, at *2 (D. Colo. Sept. 15, 2014); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, *1 (N.D. Ill. Nov. 22, 2011); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991). Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the . . . Republican Party.” *See Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005).

38. If Secretary Boockvar’s action succeeds, it will upend the orderly administration of Pennsylvania’s elections shortly before a critical general election.

39. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Republican Intervenors and their members), *Caba v. Weaknecht*, 64 A.3d 39, 50 (Pa. Commw. Ct. 2013) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008)), it would change the “structur[e] of [the] competitive environment” in Pennsylvania’s elections and “fundamentally alter the environment in which [the Republican Intervenors] defend their concrete interests (e.g. their interest in . . . winning [elections]),” *Shays v. Fed. Elec. Comm’n*, 414 F.3d 76, 86 (D.C. Cir. 2005).

40. Such extremely late changes also risk confusing voters and undermine confidence in the electoral process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”). And such a change will force the Republican Intervenors to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation.

41. In particular, if the Court grants Secretary Boockvar the relief she seeks, resources and efforts which the RPP have expended on its EDO, training programs, and voter education programs will have been wasted, and RPP will need to expend

substantial new additional resources and effort on overhauling its EDO, training programs, and voter education programs to reflect the changes in Pennsylvania's election laws and election administration scheme.

42. Such interference with Pennsylvania's election scheme—and with the Republican Intervenors' electoral activities—would impair the Republican Intervenors' interests on behalf of their candidates, members, and themselves, and thus warrants intervention.

43. Finally, the Trump Campaign's and RNC's status as plaintiffs in the earlier-filed Federal Action further supports intervention. A party is entitled to intervention if “its interest may be impaired because it seeks relief that is divergent from, or incompatible with the relief sought by” the original parties. *N. California River Watch v. Fluor Corp.*, No. 10-CV-05105-MEJ, 2014 WL 3385287, at *18 (N.D. Cal. July 9, 2014) (citing *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987)); *see also San Diego Cattlemen's Coop. Ass'n v. Vilsack*, 318 F.R.D. 646, 649 (D.N.M. 2015) (allowing plaintiffs in different lawsuits to intervene in each other's cases in part because they “seek conflicting rulings on the same subject matter and request incompatible injunctions”). The potential preclusive or *stare decisis* effect of a decision is sufficient impairment of a party's interest to justify intervention. *See, e.g.*,

Commonwealth of Pennsylvania v. President of the United States of America, 888 F.3d 52, 59 (3d Cir. 2018).

44. In the Federal Action, the Trump Campaign and RNC have asked the court for an order that, *inter alia*, mandates that county boards of election verify the identification of the registered voter of an absentee or mail-in ballot by comparing the signature information on the absentee or mail-in ballot to the information contained in the voter's permanent registration card. Secretary Boockvar, despite already participating as a defendant in the Federal Action, subsequently filed this parallel Application seeking contrary relief: a declaration that county election officials may *not* reject absentee or mail-in applications or refuse to count voted absentee or mail-in ballots based on a signature comparison.

45. A judgment in this action granting Secretary Boockvar's requested relief threatens the availability of relief to the Trump Campaign and RNC in the Federal Action. Accordingly, the Republican Intervenors are entitled to intervene here to protect their interests in that case.

B. There is no basis to refuse the Republican Intervenors' application for intervention.

46. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the petitioner's interest is already adequately represented; or (3) "the petitioner has unduly delayed

in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

47. None of these factors applies to the Republican Intervenors.¹

48. First, the Republican Intervenors’ defense in this action is in subordination to and in recognition of the action’s propriety.

49. Second, no existing party adequately represents the Republican Intervenors’ particularized interests. *See* Pa. R.C.P. No. 2329(2). Secretary Boockvar clearly does not represent the Republican Intervenors’ interests in this case, and there are no Respondents in this *ex parte* action. In fact, Secretary Boockvar is advancing a position directly adverse to that of the Republican Intervenors.

50. Third, the Republican Intervenors have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. Secretary Boockvar’s Application was filed only three days ago. The Republican Intervenors’ intervention will not cause any undue delay, embarrassment, or prejudice to any party, but it will aid the Court in resolving the important legal and factual questions before it.

¹ As explained above, the Court retains discretion to allow the Republican Intervenors to intervene even if it concludes that an exception under Rule 2329 applies. Pa. R.C.P. 2329:7; 7 Goodrich Amram 2d § 2329:7.

IV. CONCLUSION

51. For the reasons set forth above, the Republican Intervenors have a clear right to intervene in this case challenging important state laws governing the administration of Pennsylvania's elections.

52. Pursuant to Pennsylvania Rule of Civil Procedure 2328, the Republican Intervenors attach a copy of the pleading, in the form of Answer (attached as Exhibit 1), they will file in the action if permitted to intervene.

WHEREFORE, for the foregoing reasons, Elizabeth Radcliffe, Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Honorable Court GRANT this Application for Leave to Intervene, and DIRECT the Prothonotary to enter the names of Elizabeth Radcliffe, the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee on the docket in this matter as Intervenor-Respondents, and DOCKET the Intervenor-Respondents' Answer, attached as Exhibit 1.

Dated: October 7, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher (PA #37950)

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Elizabeth Radcliffe,
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the Republican Party of Pennsylvania,
the Republican National Committee, and
the National Republican Congressional
Committee*

**Pro hac vice application forthcoming*

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I 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/ Kathleen A. Gallagher

VERIFICATION OF DONALD J. TRUMP FOR PRESIDENT, INC.

I, James J. Fitzpatrick, Pennsylvania EDO Director of Donald J. Trump for President, Inc., am authorized to make this verification on behalf of Donald J. Trump for President, Inc. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

/s/ James J. Fitzpatrick

James J. Fitzpatrick

PA EDO Director

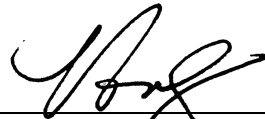
Donald J. Trump for President, Inc.

Date: October 7, 2020

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

I, Vonne Andring, Executive Director at the Republican Party of Pennsylvania, am authorized to make this verification on behalf of the Republican Party of Pennsylvania. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.



Vonne Andring
Executive Director
Republican Party of Pennsylvania

Date: October 7, 2020

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

I, Jon Black, Regional Political Director at the Republican National Committee, am authorized to make this verification on behalf of the Republican National Committee. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

A handwritten signature in black ink, appearing to read 'Jon Black', written in a cursive style.

Jon Black
Regional Political Director
Republican National Committee

Date: October 7, 2020

**VERIFICATION OF NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE**

I, Sarah Clamp, Regional Political Director at the National Republican Congressional Committee, am authorized to make this verification on behalf of the National Republican Congressional Committee. I hereby verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.

Sarah Clamp

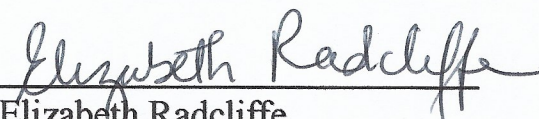
Sarah Clamp
Regional Political Director
National Republican Congressional Committee

Date: October 7, 2020

VERIFICATION OF ELIZABETH RADCLIFFE

I, Elizabeth Radcliffe, verify that the factual statements set forth in the foregoing Application for Leave to Intervene are true and correct to the best of my knowledge or information and belief.

I understand that verification is made subject to the penalties of 18 Pa. Cons. Stat. 4904, relating to unsworn falsifications to authority.


Elizabeth Radcliffe

Date: 10/7/2020

IN THE SUPREME COURT OF PENNSYLVANIA

IN RE NOVEMBER 3, 2020 GENERAL
ELECTION,

Case No. 149 MM 2020

Petition of: Kathy Boockvar, Secretary of
the Commonwealth of Pennsylvania

PROPOSED ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the Application for Leave to Intervene filed by Elizabeth Radcliffe, Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee, it is hereby ORDERED, ADJUDGED, AND DECREED that the Petition is GRANTED. Elizabeth Radcliffe, Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee are permitted to intervene in the above-captioned matter. The Court hereby DIRECTS the Prothonotary to enter the names of Elizabeth Radcliffe, Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee on the docket in this matter as Intervenor-Respondents, and DOCKET the Intervenor-Respondents' Answer.

BY THE COURT:

EXHIBIT 1

IN THE SUPREME COURT OF PENNSYLVANIA

No. 149 MM 2020

IN RE NOVEMBER 3, 2020 GENERAL ELECTION

**REPUBLICAN INTERVENORS' ANSWER TO SECRETARY
BOOCKVAR'S APPLICATION FOR INVOCATION OF KING'S BENCH
POWER TO DECLARE PROPER CONSTRUCTION
OF ELECTION CODE**

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Proposed Intervenor-Respondents Elizabeth Radcliffe, Donald J. Trump for President, Inc. (“Trump Campaign”), the Republican Party of Pennsylvania, the Republican National Committee (“RNC”), and the National Republican Congressional Committee (collectively, the “Republican Intervenors”) support and seek to uphold free and fair elections on behalf of all Pennsylvanians.

For that reason, the Republican Intervenors oppose Secretary Boockvar’s Application for Invocation of King’s Bench Power to Declare Proper Construction of Election Code. The Secretary’s Application is extraordinary to say the least: the Secretary took no steps to present a justiciable case to this Court. The Secretary has not filed a Petition or joined even a single Respondent, even though she elsewhere admitted that county boards of elections, rather than the Secretary, have authority to interpret and implement the Election Code. The Secretary, moreover, has not presented any facts to support her standing to pursue her allegations regarding any county board’s signature-matching practices. And the Secretary does not identify any case pending in a Pennsylvania court that implicates the questions she presents—let alone any voter who claims a deprivation of her right to vote due to a county board’s signature matching on a ballot application or ballot.

Rather, the Secretary asks the Court to weigh in on questions that *already are pending on summary judgment* before a federal district court. As the Secretary recounts, she “urg[ed]” the federal court “to abstain” from ruling on those questions.

App. 15. But just yesterday, that court ordered that it “intends to resolve all claims on summary judgment.” *Donald J. Trump for President v. Boockvar*, No. 2:20-cv-00966-NR (W.D. Pa. Oct. 6, 2020) (Doc. 566).

Merely to point out the myriad flaws in the Secretary’s Application and her effort to preterm a justiciable case currently ripe for the federal court’s review is to demonstrate that the Court should deny the Application. But if more were somehow needed, the Secretary’s position on the merits is multiply flawed. In the first place, an essential premise of the Secretary’s Application is her allegation that the Election Code provides voters no “notice [or] opportunity to cure” an alleged signature mismatch. App. 13. That premise, however, is demonstrably false: the Election Code *expressly* requires county boards of elections to give “immediate” notice of any disapproval of an absentee or mail-in ballot application and to convene formal hearings, with notice to the voter, before sustaining a challenge to an absentee or mail-in ballot. *See* 25 P.S. §§ 3146.2b(d), 3150.12b(c), 3146.8(g)(5). And the Election Code even grants an aggrieved voter a right to judicial review in the court of common pleas. *See id.* § 3146.8(g)(6).

This notice-and-hearing procedure is a longstanding fixture of the Election Code that county boards have utilized Pennsylvania courts have upheld for decades. Thus, far from presenting some “novel question[] of state law,” App. 10, the

Secretary's Application presents only a well-settled and unobjectionable facet of the Commonwealth's election-administration regime.

Moreover, by disregarding this statutory notice-and-hearing procedure, the Secretary overlooks that the Election Code's signature-matching requirement *resolves*, rather than raises, any alleged "constitutional concerns." App. 23. In fact, it is *the Secretary's proposed construction* that "gives rise to serious constitutional concerns." *Id.* at 23. That is because the Secretary's reading of the Election Code would exempt absentee and mail-in voters from the signature-matching requirement while maintaining that requirement for in-person voters. Yet as a matter of Equal Protection, "[h]aving 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." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000).

In short, the Secretary's Application is a bald request for this Court to jettison its jurisdictional rules in high-profile election matters, disregard a live case in federal court, ignore the plain statutory text, and impose the Secretary's preferred statutory interpretation on the county boards and Pennsylvania voters by judicial fiat. The Court should deny the Application.

BACKGROUND

A. Pennsylvania’s Signature-Matching Requirement For Absentee And Mail-In Ballot Applications And Ballots

Pennsylvania law has long required that absentee-ballot applications “shall be signed by the applicant,” 25 P.S. § 3146.2(d), and directed that county boards of elections “shall determine the qualifications of such applicant by verifying the proof of identification and comparing information set forth on such application with the information contained on the applicant’s permanent registration card,” 25 P.S. § 3146.2b(c). Act 77 extended identical requirements to applications for Pennsylvania’s new mail-in ballots. *See* 25 P.S. §§ 3150.12(c), 3150.12b(a). The Election Code also requires that an absentee or mail-in voter “shall . . . fill out, date and sign the declaration printed on” the outside envelope. 25 P.S. §§ 3146.6(a), 3150.16(a).

The Election Code also spells out the requirements for a county board’s “pre-canvass” or “canvass” of “absentee ballots and mail-in ballots.” 25 P.S. § 3146.8(g)(3). “One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed [and canvassed].” *Id.* § 3146.8(g)(1.1) & (2). Additionally, “[w]atchers shall be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.” *Id.* § 3146.8(b). “Any

person challenging an application for an absentee ballot, an absentee ballot, an application for a mail-in ballot or a mail-in ballot” must post a cash deposit. *Id.* § 3146.8(f).

During the pre-canvass or canvass, “the board shall examine the declaration on the envelope of each ballot” that has not been set aside “and shall compare the information thereon with that contained” in the board’s permanent voter registration records, such as the Voters File. *Id.* § 3146.8(g)(3). “If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information” contained in its records “verifies [the voter’s] right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.” *Id.*

Only ballots “that have been verified” through this process “shall be counted.” 25 P.S. § 3146.8(g)(4). If a ballot is not verified or its application has been challenged—including because of a signature mismatch on the ballot or application—it is considered “challenged.” 25 P.S. §§ 3146.8(g)(4)–(5).

All challenged ballots “shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges.” 25 P.S. § 3146.8(g)(5). “[N]otice shall be given where possible to all absentee electors and mail-in electors thus challenged

and to every individual who made a challenge.” *Id.* “The time for this hearing shall not be later than seven (7) days after the deadline for all challenges to be filed.” *Id.*

“The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board.” 25 P.S. § 3146.8(g)(6). The county boards “shall suspend any action in canvassing and computing all challenged ballots” pending “the final determination of all appeals” in the court of common pleas. *Id.* All “votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county” in the final tally. *Id.*

Consistent with these longstanding rules and practices in the Commonwealth, Pennsylvania courts have repeatedly sustained challenges to by-mail ballot applications and completed ballots that lack genuine signatures. *See, e.g., Appeal of Orsatti*, 598 A.2d 1341 (Pa. Commw. Ct. 1991), *appeal denied*, 600 A.2d 956 (Pa. 1991); *Canvass of Absentee Ballots of November 2, 1965, General Election*, 39 Pa. D. & C. 2d 429 (Pa. Com. Pl. Montgomery 1965); *Fogleman Appeal*, 26 Pa. D. & C. 2d 426 (Pa. Com. Pl. Juanita 1964). So, too, have Pennsylvania courts rejected challenges to by-mail ballots where the evidence adduced at the hearing failed to support the claim that the signature was not “genuine.” *Wilkes-Barre Election Appeals*, 44 Pa. D. & C. 2d 535, 541 (Pa. Com. Pl. Luzerne 1967).

B. The Secretary’s Guidance Documents

On September 11, 2020, the Secretary issued a “Guidance Concerning Examination Of Absentee and Mail-in Ballot Return Envelopes.”¹ The Secretary’s September 11 guidance did not quote any provision of the Election Code or mention any of the cases upholding a signature-verification requirement for by-mail ballot applications or ballots. *See* Sept. 11, 2020 Guidance, pp. 1–3. Nonetheless, the September 11 Guidance announced, “The Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.* at 3. The Secretary provided no explanation or elaboration for her construction of the Election Code. *See id.*

On September 28, 2020, the Secretary issued a second guidance document on the issue of signature verification, “Guidance Concerning Civilian Absentee And Mail-In Ballot Procedures.”² The Secretary’s Guidance doubled-down on her September 11 guidance, asserting that “[t]he Election Code does not permit county election officials to reject applications or voted ballots based solely on signature

¹<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>.

²<https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance%20Civilian%20Absentee%20and%20Mail-In%20Ballot%20Procedures.pdf>.

analysis.” Sept. 28, 2020 Guidance, p. 9. This Guidance went even further and claimed that “[n]o challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” *Id.* Once again, the Secretary did not quote any provision of the Election Code, mention any of the cases upholding a signature-matching requirement for by-mail ballot applications or ballots, or provide any basis for her construction of the Election Code. *See id.*

Neither of the Secretary’s Guidances mentioned that the voter’s signature is required to be submitted with an absentee or mail-in ballot application. *See* 25 P.S. §§ 3146.2, 3150.12. Moreover, neither Guidance mentioned that the Election Code expressly extends a signature-verification requirement and challenge procedure to in-person voters. In particular, the Election Code directs that election officials conducting in-person voting “shall compare the elector’s signature on his voter’s certificate with his signature in the district register.” 25 P.S. § 3050(a.3)(2). “[I]f the signature on the voter’s signature, as compared with the signature as recorded in the district register, shall not be deemed authentic by any of the election officers, such elector . . . shall be considered challenged as to the identity and required to make [an] affidavit and produce . . . evidence as provided in” the Election Code. *Id.*

C. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.) And The Secretary’s Application

On June 29, 2020, the Trump Campaign and the RNC, together with Congressmen Glenn Thompson, Mike Kelly, John Joyce, and Guy Reschenthaler,

and registered voters Melanie Stringhill Patterson and Clayton David Show (collectively, the “Republican Plaintiffs”) commenced an action in the United States District Court for the Western District of Pennsylvania, under the caption *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al.*, No. 2:20-cv-966-NR (the “Federal Action”). The Republican Plaintiffs joined the Secretary and all 67 Boards of Elections as defendants. The Republican Plaintiffs asked the federal court for a faithful and constitutional construction of the Election Code.

With leave of the federal district court, the Republican Plaintiffs filed a Second Amendment Complaint in the Federal Action on September 23, 2020. *See* Federal Action Doc. 461. The Republican Plaintiffs specifically challenged the Secretary’s September 11 Guidance as inconsistent with the plain requirements of the Election Code and a violation of the United States and Pennsylvania Constitutions by treating in-person voting differently than by-mail voting. *See, e.g., id.* ¶¶ 183–87, 221–33.

The Republican Plaintiffs moved for summary judgment on their signature-matching claims on October 1. *See* Federal Action Doc. 503. The Secretary cross-moved for summary judgment on October 4. *See* Federal Action Doc. 536. The Secretary’s memorandum specifically asked the federal court to abstain from ruling on the signature-matching claims. *See* Federal Action Doc. 547 at 73–78. The

federal court has now ordered that it “intends to resolve all claims on summary judgment.” Federal Action Doc. 566.

The Secretary also filed her Application on October 4. The Secretary did not file a Petition and did not join any Respondents. The Secretary also has not presented any facts to support her standing or her claims regarding signature-verification practices by county boards. The Secretary also has not identified any voter who claims to have been deprived of the right to vote, or otherwise harmed, by such signature verification.

In a prior case concluded just weeks ago, the Secretary acknowledged that county boards “have jurisdiction over” the elections conducted in their counties and argued that a petitioner’s failure to join the county boards to a lawsuit over the rules governing absentee and mail-in voting divested the Commonwealth Court of jurisdiction. *See, e.g.*, Resps.’ Br. In Support of Prelim. Objs. 18–22, *NAACP v. Boockvar*, 364 MD 2020 (Pa. Commw. Ct. Aug. 13, 2020) (Ex. A). All 67 county boards of elections were named respondents in *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020).

STANDARD FOR THE EXERCISE OF JURISDICTION

This Court exercises its King’s Bench authority only “with extreme caution.” *Com. v. Williams*, 129 A.3d 1199, 1206 (Pa. 2016). In exercising that authority, the Court’s “principal obligations are to conscientiously guard the fairness and probity

of the judicial process and the dignity, integrity, and authority of the judicial system, all for the protection of the citizens of this Commonwealth.” *Id.* In other words, the Court wields its King’s Bench authority to protect “the integrity of the judicial process.” *Id.* at 1207.

“The purpose of” the Court’s King’s Bench authority “is not to permit or encourage parties to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court.” *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014). Rather, the purpose is to “aid[] the Court in its duty to keep all inferior tribunals within the bounds of their own authority.” *Id.* The Court employs the King’s Bench authority only “when the issue requires timely intervention by the court of last resort of the Commonwealth and is one of public importance.” *Id.*

ARGUMENT

The Secretary’s Application is a transparent attempt to engage in forum shopping, to secure a judicial rewrite of the Election Code, and to leverage this Court’s judicial authority into rulemaking authority that the Secretary confesses she does not have. The Secretary, moreover, misreads the plain terms of the Election Code and does not so much as mention its notice-and-hearing requirements. The Court should deny the Application.

I. THE COURT SHOULD DECLINE TO EXERCISE ITS KING'S BENCH POWER

The Secretary's Application fails at the threshold because the Secretary does not satisfy the high standard to invoke this Court's King's Bench power.

A. The Secretary Has Failed To Present A Judicial Case Or Controversy To The Court

It is beyond dispute that the Secretary fails to present a justiciable case or controversy to the Court. *First*, at the threshold, the Secretary has not even filed a Petition or alleged, much less proven, any facts to demonstrate her standing. To establish standing, the Secretary must demonstrate that she "is 'aggrieved'" by the signature-matching practice she challenges. *Erfer v. Com.*, 794 A.2d 325, 329 (Pa. 2002) (citing *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999)). "For a party to be aggrieved, it must have: 1) a substantial interest in the subject matter of the litigation; 2) the party's interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action." *Id.* (quoting *In re T.J.*, 739 A.2d at 481); *accord Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994–95 (Pa. 2002).

"A 'substantial interest' is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *In re Hickson*, 821 A.2d 1238, 1243 (Pa. 2003). "A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest." *Id.* "An

‘immediate’ interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it.” *Id.*

The Secretary posits that the issues she raises implicate “the elective franchise” and require resolution to “prevent arbitrary disenfranchisement of qualified voters.” App. 13. But because “the right to vote is personal,” any entity “not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge” laws allegedly infringing the right to vote. *Albert*, 790 A.2d at 995; *accord Erfer*, 794 A.2d at 329.

The Secretary filed the Application in her official capacity as a Commonwealth official—but she “is not authorized by law to exercise the right to vote” in that capacity. *Albert*, 790 A.2d at 995. Moreover, the Secretary nowhere claims that her *personal* right to vote is implicated by the signature-verification practices that she alleges “some counties . . . may employ.” App. 12. And she nowhere identifies even a single voter unconstitutionally deprived of the right to vote due to signature matching in the decades that Pennsylvania counties have engaged in that practice. *See id.*

Nor could the Secretary claim standing in her official capacity because she lacks authority to construe or to implement the Election Code’s identity-verification requirements—as she admits in prior cases. The Secretary acts primarily in a ministerial capacity under the Election Code, with no power or authority to intrude

upon the province of the General Assembly. *See* 25 P.S. § 2621; *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005); *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). Rather, the county boards “have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of this act.” 25 P.S. § 2641(a). The county boards, not the Secretary, also have authority “[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).

Indeed, in recent litigation, both the Secretary and her Deputy Secretary have acknowledged that county boards—and not the Secretary—have jurisdiction to make rules, regulations, and instructions regarding, and generally to administer, absentee and mail-in voting. *See, e.g.*, Resps.’ Br. In Support of Prelim. Objs. 18–22, *NAACP v. Boockvar*, 364 MD 2020 (Pa. Commw. Ct. Aug. 13, 2020) (Ex. A); *see also* Deposition of Jonathan Marks 31–37, Federal Action (Ex. B). Thus, the county boards’ interpretation of the Election Code—and implementation of any signature-matching practice—does not implicate any “direct” or “substantial interest” of the Secretary. *Erfer*, 794 A.2d at 329. The Secretary therefore lacks standing to raise her questions to this Court. *Id.*

Second, and relatedly, the Secretary has not joined *any* county board to this suit, even though *all* county boards are indispensable parties. The Secretary herself

argued that county boards are indispensable parties in two recent voting-rights cases. *See, e.g.,* Resps.’ Br. In Support of Prelim. Objs. 18–22, *NAACP v. Boockvar*, 364 MD 2020 (Pa. Commw. Ct. Aug. 13, 2020) (Ex. A). The Commonwealth Court agreed in both cases. *See Crossey v. Boockvar*, No. 266 MD 2020 at 8–9 (Pa. Commw. Ct. May 28, 2020) (Leavitt, J.) (Ex. C); *see also* Order, *NAACP v. Boockvar*, 364 MD 2020 (Pa. Commw. Ct. Sept. 11, 2020) (Brobson, J.) (Ex. D). And all 67 county boards are joined as defendants in the Federal Action and were joined as respondents in *Pennsylvania Democratic Party*.

The Secretary’s prior representations to the Commonwealth Court were correct. Given the county boards’ authority and “jurisdiction” to administer elections, 25 P.S. § 2641(a), they are quintessential indispensable parties in cases involving questions of how they administer elections and conduct signature matching, *see, e.g., DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994). That is especially true here: the Secretary contends that “some counties indicated that may employ some form of signature analysis” notwithstanding her non-binding Guidance Memos. App. 12. Thus, the Secretary’s questions are directly “related” to and “interlocked” with the county boards’ clear and crucial “right[s] and interest[s].” *Id.* Consideration of those rights and interests is “essential to the merits” of the Secretary’s questions—and the boards therefore have “due process rights” to be heard. *Id.* The Secretary’s failure to join them “goes absolutely to”—and defeats—

the Court’s “jurisdiction” and power to “grant . . . relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations omitted); *see also City of Phila. v. Com.*, 838 A.2d 566, 581 (Pa. 2003).

B. The Secretary’s Invocation Of The Court’s King’s Bench Authority Does Not Overcome These Flaws

The Secretary asks the Court to brush aside the jurisdictional defects in her Application on the view that the Court may “innovate a swift process” incident to the exercise of its King’s Bench power. App. 12 (quoting *In re Bruno*, 1010 A.3d at 672). But even if the King’s Bench authority extended so far as to reach a non-justiciable proceeding in which standing could not be shown and indispensable parties had not been joined, the Secretary failed to properly invoke it here for several reasons.

First, the Secretary offers no persuasive support for her assertion that her questions “require[] immediate judicial resolution” by this Court. App. 12. The Secretary offers no reason why the able federal district court—before which these questions are pending on summary judgment that the federal court intends to resolve—is incapable of fair and accurate statutory construction and constitutional adjudication. *See* App. 12–13. Nor does she offer any argument that this Court can resolve these issues—including through briefing, any necessary fact-finding, argument, and decision—*more* quickly than the federal court. *See id.* Instead, her objection to litigating the justiciable case or controversy in federal court is her

apparent desire to forum shop into this Court. *See id.* Such forum shopping, however, is a far cry from the “conscientious[] guard[ing] [of] the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system,” for which this Court reserves its King’s Bench power. *Williams*, 129 A.3d at 1206.

Second, the Secretary prognosticates a parade of horrors, predicting that “ballots will be improperly and unlawfully rejected in the upcoming election . . . if this Court does not resolve this matter.” App. 13. Of course, this prognostication incorrectly assumes the correctness of the Secretary’s position on the merits. *See infra* Part II. Moreover, the Secretary ignores that county boards and Pennsylvania courts have been resolving signature-match challenges for decades—and she offers no basis to believe that they are incapable of doing so this year, so long as they are not stripped of their authority to do so. *See, e.g.*, App. 13; *see also* 25 P.S. § 3146.08(g); *In re Dauphin Cty. Fourth Investigating Grand Jury*, 943 A.2d 929, 936 (2007) (explaining that the Court will not “exercise extraordinary jurisdiction to consider . . . challenges that are properly reviewable in the ordinary course”). The Secretary makes no argument that an exercise of King’s Bench power is necessary here to “to keep all inferior tribunals within the bounds of their own authority,” so such an exercise is improper. *In re Bruno*, 101 A.3d at 670.

Third, the Secretary invokes prior cases in which this Court exercised King’s Bench authority “where no dispute is pending in a lower court.” App. 11. But in all of those cases, all indispensable parties were joined and had the opportunity to present arguments to the Court. *See, e.g., In re Avellino*, 690 A.2d 1138, 1140 (Pa. 1997); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020). Thus, whatever “innovat[ion]” the Court may pursue as part of its King’s Bench power, *In re Bruno*, 1010 A.3d at 672, it cannot rush to judgment in a non-justiciable proceeding where the Secretary fails to join parties that even she has recognized are indispensable, *see, e.g., In re Avellino*, 690 A.2d at 1140; *Friends of Danny DeVito*, 227 A.3d 872.

Finally, an exercise of King’s Bench authority here would lead to precisely the untoward results that the Court expressly sought to avoid. After all, granting the Secretary’s Application would “permit or encourage [the Secretary] to bypass an existing constitutional or statutory adjudicative process and have a matter decided by this Court.” *In re Bruno*, 101 A.3d at 670. Indeed, on the Secretary’s theory, the Court could exercise its King’s Bench authority *any* time a Commonwealth official is interested in an advisory opinion regarding a question of state law that does not implicate the official’s duties or direct and substantial interests. The Court’s “extreme caution” militates against such a capacious exercise of its extraordinary

King's Bench authority. *Williams*, 129 A.3d at 1206. The Court should deny the Application.

II. THE COURT SHOULD DENY DECLARATORY RELIEF

Even if the Court's exercise of King's Bench authority were otherwise proper, it still should deny the Application because the Secretary's construction of the Election Code's signature-matching requirement is fundamentally flawed. The Secretary ignores the plain statutory text and decades of precedent, and offers no basis to reject the longstanding practice of county boards across the Commonwealth.

A. State And Federal Law Prohibit This Court From Departing From Plain Statutory Text And Rewriting The Election Code

1. This Court's task in construing statutes is clear: to "ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). "The best indication of legislative intent is the language used in the statute." *Office of Admin. v. Pa. Labor Relations Bd.*, 916 A.2d 541, 547–48 (Pa. 2007). Accordingly, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing the spirit." 1 Pa. C.S. § 1921(b).

Moreover, this Court lacks the authority to rewrite the General Assembly's enactments because the General Assembly—not the judiciary—holds the sole power to write the laws for the Commonwealth. As this Court recently reaffirmed, 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.” See *In re: Fortieth Statewide Investigating Grand Jury*, No. 75, 77–82, 84, 86–87, 89 WM 2018, slip. op. at 12–13 (Pa. Dec. 3, 2018); accord *Heller v. Frankston*, 475 A.2d 1291 (Pa. 1984) (“Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.”). Thus, the Court cannot take unilateral action to rewrite the law. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962). “[E]diting a statute” by the Court “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971).

The foundational rules of statutory construction and fundamental limitations on the Court’s authority apply with even greater force when the Election Code is at issue. “The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); see also *Agre v. Wolf*, 284 F. Supp. 3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

The Pennsylvania Constitution is even more explicit regarding the separation of powers in the context of absentee voting. It provides:

The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a) (emphasis added).

2. The requirements of deference to the General Assembly’s enactments—not the Secretary’s purported “interpretations” of them—and faithful adherence to the statutory text take on particular importance under Act 77. Act 77 contains a non-severability clause that covers all of Pennsylvania’s universal mail-in voting scheme and every statutory provision implicated in this case other than the poll watcher residency requirement. *See* Act 77 § 11.

The Court has “assume[d] that, as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). And that is particularly true here for two reasons.

First, as this Court has recognized, non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* “In an instance involving such compromise,

the General Assembly may determine, the court's application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place." *Id.* That is the case here, since the non-severability clause was part and parcel of the grand bipartisan compromise embodied in Act 77.

Second, Act 77's non-severability provision avoids the defect that the Court identified in *Stilp*. The defect in the provision the Court declined to enforce in *Stilp* was that it had been "employed as a sword against the Judiciary" and appeared "to be aimed at securing a coercive effect upon the Judiciary" (by threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–80. Such provisions are "ineffective and cannot be permitted to dictate [the Court's] analysis." *Id.* at 980.

Act 77's non-severability provision is nothing of the sort. It was permissibly employed by the Legislature "as a shield to ensure preservation of a legislative scheme or compromise," *id.* at 978, in an area "regarded as peculiarly within the province of the legislative branch of government," *Winston*, 91 A. at 522. Not only is there no evidence or basis to believe that the non-severability provision in a law concerning election administration was intended to coerce the courts, but it is also clear that the provision was intended to preserve the compromise struck in Act 77.

Accordingly, Act 77’s non-severability clause is valid, enforceable, and binding on this Court. Accordingly, invalidation of any of the provisions of Act 77 covered by the non-severability clause—including any of the Act 77 provisions implicated in this case—requires invalidation of *all* covered provisions, including the entire universal mail-in voting scheme contained in section 8 of Act 77. *See* Act 77 § 11.

3. Finally, the U.S. Constitution also places crucial and inviolate prohibitions on judicial rewriting of the Election Code. The Elections Clause directs that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by *the Legislature thereof*,” subject to directives of Congress. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Likewise, the Electors Clause directs that “[e]ach State shall appoint, in such Manner as *the Legislature thereof* may direct,” electors for President and Vice President. U.S. CONST. art. II, § 1, cl. 2.

The Electors Clause in particular “convey[s] the broadest power of determination” and “leaves it to the legislature exclusively to define the method” of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). “Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Bush v. Gore*, 531 U.S. at 112–13 (Rehnquist, J., concurring). “A significant departure from the legislative scheme for appointing

Presidential electors presents a federal constitutional question,” including when such departure is carried out by the state judiciary. *Id.* at 113. “[W]ith respect to a Presidential election,” state courts must be “mindful of the legislature’s role under Article II in choosing the manner of appointing electors.” *Id.* at 114. For this reason as well, the Court may not deviate from Act 77’s plain text or rewrite the Election Code.

B. The Election Code Requires County Boards To Perform Signature Verification And To Provide Notice And A Hearing To Aggrieved Voters

As this Court repeatedly recognizes, the Election Code’s use of the word “shall” carries “an imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1231 (Pa. 2004); *see also Pa. Democratic Party*, 2020 WL 5554644, at *25–*26; *see also id.* at *36 (Wecht, J., concurring). The Election Code’s “clear mandate[.]” thus requires county boards to engage in signature verification. *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d at 1231.

In particular, the Election Code mandates that:

- absentee and mail-in ballot applications “*shall* be signed by the applicant,” 25 P.S. §§ 3146.2(d), 3150.12(c) (emphasis added);
- county boards “*shall* determine” an applicant’s qualifications by “verifying the proof of identification” and “comparing information set forth on such application with the information contained on the applicant’s permanent registration card,” 25 P.S. § 3146.2b(c), 3150.12b(a) (emphasis added);

- after completing an absentee or mail-in ballot, the voter “*shall . . . fill out, date and sign the declaration printed on*” the outside envelope, 25 P.S. §§ 3146.6(a), 3150.16(a) (emphasis added);
- county boards “*shall examine the declaration on the envelope of each ballot*” that has not been set aside “*and shall compare the information thereon with that contained*” in the board’s permanent voter registration records, such as the Voters File, and then decide whether they are “*satisfied that the declaration is sufficient and the information [in the Voters File] verifies his right to vote,*” 25 P.S. § 3146.8(g)(3);
- only ballots verified through this process “*shall be counted,*” 25 P.S. § 3146.8(g)(4); and
- watchers “*shall be permitted to be present*” at the opening, counting, and recording of absentee and mail-in ballots, 25 P.S. § 3146.8(b).

Because the voter’s signature is required to be submitted with an absentee or mail-in ballot application and voted ballot, the Election Code’s mandate that county boards verify an applicant’s and voter’s qualifications and satisfy themselves that the voter’s declaration is sufficient and matches the information in the voter’s files necessarily requires boards to engage in signature matching. *See* 25 P.S. §§ 3146.2(d), 3146.6(a), 3146.8(g)(3), 3150.12(c), 3150.16(a). Indeed, courts across the Commonwealth have repeatedly upheld county boards’ practice of verifying signatures on by-mail ballot applications and voted ballots, and the operative language of the Election Code was undisturbed in Act 77 and Act 12. *See,*

e.g., Act 77 § 1306(g)(3); Act 12 § 1306(g)(3).³ And this construction of the Election Code also treats absentee and mail-in voters on a par with their in-person counterparts, who—as even the Secretary acknowledges—are subject to signature verification at the polls. 25 P.S. § 3050(a.3)(2); *see also* App. 21; *Fogleman Appeal*, 26 Pa. D. & C.2d at 427 (noting that the in-person voter’s signature verification process was “incorporated in the absentee elector’s declaration”).

The Election Code safeguards voters against a mistaken signature verification by guaranteeing a formal hearing, “notice where possible,” and a right to judicial review. 25 P.S. § 3146.8(g)(5)–(6). Pennsylvania courts thus reject signature-match challenges to by-mail ballots where the evidence adduced at the hearing fails to show that the signature is not “genuine.” *Wilkes-Barre Election Appeals*, 44 Pa. D. & C. 2d at 541.

C. The Secretary’s Proposed Construction Ignores The Plain Statutory Text And Raises Serious Constitutional Concerns

A major premise of the Secretary’s Application is her assertion that the Election Code “does not require that voters be afforded notice and an opportunity to cure before their absentee or mail-in ballots are rejected due to any perceived signature variations.” App. 13. But the Secretary never even mentions—let alone

³ *See, e.g., Appeal of Orsatti*, 598 A.2d 1341; *Canvass of Absentee Ballots of November 2, 1965, General Election*, 39 Pa. D. & C. 2d 429; *Fogleman Appeal*, 26 Pa. D. & C. 2d 426; *Wilkes-Barre Election Appeals*, 44 Pa. D. & C. 2d 535.

attempts to reconcile her assertion with—section 3146.8(g)’s notice, hearing, and judicial review guarantees. *See id.* Nor does the Secretary mention the robust body of Pennsylvania case law upholding signature verification by county boards subject to those guarantees. *See id.*

The Secretary thus ignores that the Election Code’s signature-verification regime *resolves*, rather than raises, “constitutional concerns” and *provides*, rather than violates, “due process.” App. 23–24. Indeed, courts have upheld signature verification performed by laypersons when, as now, the signature-verification regime provides the voter with notice and an opportunity to be heard before the ballot is excluded from the final tally. *See, e.g., Ne. Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 635 (6th Cir. 2016); *League of Women Voters of Ohio v. LaRose*, No. 2:20-cv-3843, 2020 WL 5757453 (S.D. Ohio Sept. 27, 2020). And the Secretary’s cited cases all involved signature-verification regimes that provided no such process.⁴ Those cases, therefore, are of no moment here.

⁴ *See, e.g., Richardson v. Tex. Sec. of State*, No. SA-19-cv-00963, 2020 WL 5367216, *24–*25 (W.D. Tex. 2020), *appeal docketed*, No. 20-50774 (5th Cir. Sept. 10, 2020); *Frederick v. Lawson*, No. 1:19-cv-01959, 2020 WL 4883696, *15 (S.D. Ind. Aug. 20, 2020); *Democracy N. Carolina v. N. Carolina State Bd. of Elecs.*, 2020 WL 4484063 (MD.N.C. Aug. 4, 2020); *Self Advocacy Sols. N.D. v. Jaeger*, 2020 WL 2951012 (D.N.D. June 3, 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030–31 (N.D. Fla. 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D.N.H. 2018).

The Secretary thus is left to arguing that the Election Code’s mandates that election officials “shall” compare applications and ballot declarations to the voter’s information somehow do not “require or permit signature analysis” by county boards. App. 20. But the Secretary does not consistently embrace this position because she recognizes that election officials must “set aside and investigate[]” some ballots where they have a “good faith” basis to suspect fraud. *Id.* at 20 n.15. The Secretary nowhere explains what might trigger a “good faith” basis to suspect voter fraud other than a comparison of the voter’s signature against the voter registration records. And, in any event, she nowhere explains how the statutory text can bear her situational reading regarding signature verification. *Id.*

Moreover, the Secretary never addresses the longstanding Pennsylvania practice and case law upholding signature verification by county boards. *See id.* 15–25. Also, she never addresses that this longstanding practice exists because “[i]n the casting of an absentee ballot, the ordinary safeguards of a confrontation of a voter by election officials and watchers for the respective parties and candidates at the polling place are absent” and that “the provisions of the law regarding absentee voting must be strictly construed.” *Canvass of Absentee Ballots of April 28, 1964, Primary Election*, 34 Pa. D. & C.2d 419, 420 (Pa. Ct. Com. Pl. Phila. 1964). Further, she ignores well-established law that the statutory requirements for the proper casting of an absentee or mail-in ballot are not mere technicalities but are substantive

in nature and mandatory, and when no followed result in the casting of ballots that are void cannot be counted. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1234 (Pa. 2004).

Instead, the Secretary points out that the Election Code expressly prescribes a signature-verification procedure for in-person voters but does not prescribe such a procedure for absentee or mail-in ballots. *See id.* at 20–21. But there was no reason for the General Assembly to specify such a procedure for absentee and mail-in ballots: that procedure has been widespread in the Commonwealth for decades. *See supra* n.3.

The Secretary also offers no explanation as to why voters would be required to sign applications and ballots if county boards were precluded from verifying those signatures. *See App.* 15–25. Rather, recognizing that the Election Code’s signature-verification requirement is “clear and supported by a weighty interest like fraud prevention,” *Pa. Democratic Party*, 2020 WL 5554644, *26, the Secretary attempts to carve out a fraud exception to her cramped statutory reading, *see App.* 20 n.15. The Secretary cannot have it both ways: the Election Code forecloses her construction and requires county boards to perform signature matching as part of their verification of applications and completed ballots.

In addition, the Secretary’s proposed construction would raise significant constitutional issues. In particular, under the Secretary’s reading, the Election Code

would invalidate in-person votes due to a signature mismatch but require counting absentee and mail-in votes *notwithstanding* such a mismatch. *See, e.g.*, App. 21. By arbitrarily creating two classes of voters whose votes carry different weights, the Secretary's reading would raise Equal Protection and Due Process concerns. *See, e.g., Bush*, 531 U.S. at 104–05; *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 697 (W.D. Pa. 2003).

This is not the first time that guidance issued by the Secretary misstated Pennsylvania law. Prior to the June primary election, the Secretary told county boards that they were to count, and not treat as invalid, mail-in ballots returned without a secrecy envelope. This Court, however, held that any mail-in ballots returned without the inner secrecy envelope are invalid and may not be counted. *See Pa. Democratic Party*, 2020 WL 5554644, *24–*26. Moreover, this Court rebuked the Secretary's interpretation of the Code's mandatory provisions involving the casting of by-mail ballots and held that “violations of the mandatory statutory provisions that pertain to integral aspects of the election process should not be invalidated *sub silentio* for want of a detailed enumeration of consequences.” *Id.* at *26.

Indeed, undeterred by this Court's declaration that her prior guidance regarding secrecy envelopes was flat wrong, the Secretary issued still more guidance, this time relating to poll watching. Yesterday, Secretary Boockvar issued guidance

titled “Guidance Concerning Poll Watchers and Authorized Representatives.” A copy of the October 6 Guidance is attached as Exhibit E. The October 6 Guidance provides that “[p]oll watchers and authorized representatives have no legal right to observe or be present at county election offices, satellite offices or designated ballot return sites, except to vote their own ballot or to perform personal tasks expressly permitted by the Election Code.” Ex. E at 5.

Again, Secretary Boockvar’s Guidance directly contradicts established law. “Watchers *shall* be permitted to be present when the envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded.” 25 P.S. § 3146.8(b). Further, “[o]ne authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed.” 25 P.S. § 3146.8(g)(1.1).

Further, the Secretary’s August 19 “Pennsylvania Absentee and Mail-in Ballot Return Guidance” provides that ballot return sites “may include . . . city and municipal facilities, public libraries, county facilities,” and some counties established ballot return sites that were outdoors. Secretary Boockvar cites no authority in support of her guidance prohibiting poll watchers and authorized representatives from “being present” at these public locations. And for good reason: there is none.

If the Court exercises its King's Bench power, it should reach exactly the same outcome here and declare that the Secretary's Guidance Memos contravene the Election Code's clear and mandatory signature-verification requirements.

CONCLUSION

The Court should deny the Secretary's Application.

Dated: October 7, 2020

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 7,337 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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EXHIBIT A

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

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

Respondents.

No. 364 MD 2020

**RESPONDENTS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS
TO PETITIONER'S PETITION FOR REVIEW**

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I. PRELIMINARY STATEMENT

Respondents neither discount the very real threat of COVID-19 nor deny the effects that the pandemic is having on Pennsylvanians' lives. But even in the face of an unprecedented health crisis, rules of pleading, justiciability, jurisdiction, and sovereign immunity retain their importance. For four reasons, these rules require dismissal of the Petition for Review (the "Petition").

First, Petitioner falls short of carrying the heavy burden required to make out constitutional claims supporting the extremely broad relief sought. Petitioner requests judicial imposition of its preferred reforms to election law, based on a combination of alleged constitutional violations that purportedly *may* arise from some combination of factors related to the current COVID-19 crisis. But, as shown below, Petitioner does not allege facts sufficient to support (a) many of the injuries alleged or (b) a concrete need for the extensive relief sought. Second, for many of the same reasons, much of what Petitioner claims is too speculative to be justiciable. Third, Petitioner seeks affirmative relief from Pennsylvania's county boards of elections, who are not named as Respondents—relief that squarely implicates the jurisdiction vested in the boards of elections by the Election Code. Moreover, Petitioner accuses these nonparties of violating the Pennsylvania Constitution, making them indispensable to resolution of this litigation. And fourth, the Petition is barred by sovereign immunity, as the requested relief takes

the form of mandatory injunctions that would require Respondents, who are both state officials, to issue various directives or implement various judicially imposed policies.

In short, Respondents do not dispute that at least some of the reforms sought by Petitioner might be beneficial and facilitate Pennsylvanians' exercise of the franchise. But the question presented by Petitioner's lawsuit is not whether the reforms would be good public policy; it is whether the Court can require their implementation, in derogation of the Election Code and *as a matter of constitutional law*, based on the facts alleged in the Petition. As a matter of law, the answer is no. Accordingly, the Court should sustain Respondents' Preliminary Objections and dismiss the Petition.

II. STATEMENT OF JURISDICTION

Respondent objects to the exercise of this Court's jurisdiction because Petitioner has failed to join indispensable parties, as detailed *infra* Section VI.C.

III. STATEMENT OF THE CASE¹

No one disputes that the 2020 Pennsylvania primary election was

¹ For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition's well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but "need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

unprecedented. This is true for at least four reasons. First, the recent primary was the first election in which any registered voter in Pennsylvania could vote by “no excuse” mail-in ballot, even if that voter was otherwise ineligible for an absentee ballot. *See* Pet. ¶ 114. Second, most Pennsylvania counties launched new, modernized voting technology during the primary election. Third, the primary election marked the first time in recent memory that the Commonwealth administered an election during a pandemic. *See id.* ¶ 45. The COVID-19 crisis is, as Petitioner alleges, presenting significant and unique challenges to the administration of elections. Fourth, on the eve of the election, several parts of the Commonwealth experienced widespread protests that impeded transportation, closed some election offices, and triggered states of emergency in six counties.

The Petition purports to identify issues that arose from these unique challenges and allegedly affected some voters who cast ballots in person and by mail during the June primary election. Petitioner alleges some voters encountered (i) long lines and overcrowding at consolidated polling places, *id.* ¶ 9; (ii) insufficient notice of relocated polling places, *id.* ¶ 10; (iii) an “increased risk of transmission of coronavirus” allegedly caused by some counties’ use of electronic voting machines, *id.* ¶ 11; and (iv) late-arriving absentee and mail-in ballots, forcing voters to run the risk of mailing votes that might arrive after the election day ballot-return deadline, *id.* ¶ 17.

The Petition assumes that the Department, the Commonwealth, and the county boards of election have learned nothing from the June primary. Instead, Petitioner posits that if all parties responsible for elections follow the *same exact procedures* in November—even after administering the June primary election (which was (i) Pennsylvania’s first time using no excuse mail-in voting and (ii) the first election to coincide with a pandemic in a century) and seeing the issues that voters encountered—the same alleged issues will affect the general election. *See id.* ¶¶ 131–37 (“The experiences of Pennsylvania voters in the Primary Election detailed throughout this Petition is just a preview of what is going to happen during the November General Election[.]”).²

First, Petitioner forecasts that, because of COVID-19, voting *in person* in November will be unsafe because (i) *if* counties consolidate polling places, it will result in crowding and long lines, which will in turn make social distancing difficult, *id.* ¶¶ 8–9; and (ii) *if* counties exclusively use electronic voting machines in the same ways, either voters will have to interact with contaminated surfaces or crowding will increase, *id.* ¶ 11. Additionally, Petitioner asserts that *if* polling places are relocated again, voters who wish to vote in person may not receive

² *See also* Pet. ¶ 73 (“Although the emergency election procedures in Act 12 by its terms applied only to the Primary Election, there is a real threat that substantially similar legislation will be passed that will be applied to the November 2020 election[.]”)

adequate notice of changed or consolidated polling places. *Id.* ¶ 10.

Second, Petitioner identifies difficulties with *voting by mail* that may arise in November, because (i) individual voters might be afraid to vote in person, *id.*; (ii) the processing of applications for absentee and mail-in ballots, and mail delivery of applications and the ballots themselves, may be delayed, *id.* ¶¶ 13–15.

To redress these alleged future injuries, Petitioner seeks an extraordinarily broad array of relief regarding the November general election, including an Order directing Respondents to:

- (i) “require each county board of election to maintain a sufficient number of polling places such that each resident can exercise his or her right to vote”;
- (ii) “provide that each county board of election give adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, as well as posting at old polling places”;
- (iii) “[p]ermit”—and, as recent filings by Petitioner make clear, *require* “early voting for the General Election in advance of election day”;
- (iv) “[r]equire increased access to vote by mail across the Commonwealth”
 - (a) “automatically sending mail-in ballot applications to all registered voters in accordance with their language preferences”;
 - (b) “ensuring that absentee and mail-in ballots are available in formats that are accessible to voters with disabilities without requiring assistance from another person”;
 - (c) “requiring each county to provide ballot dropboxes, and accepting ballots returned to a drop-box by close of polls on Election Day”; and
 - (d) “providing 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”; and

(v) “[r]equire that all polling places in the Commonwealth use handmarked paper ballots for the 2020 General Election, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law.”

See id. at pp. 66–67.³

As Petitioner’s recently filed application for a preliminary injunction makes clear the phrasing of the Petition’s prayer for relief actually *understates* both the breadth and depth of the relief Petitioner seeks. As Petitioner has now clarified, it seeks a mandatory injunction:

1. Directing Respondents to ensure that there are a sufficient number of polling places to ensure that no voter must wait more than 30 minutes to vote;
2. Directing Respondents to require county boards of elections to mail notice to voters of any change in polling place at least three weeks in advance of the General Election, as well as posting at old polling places;
3. Directing Respondents to ensure that Respondents [sic] provide for the accessibility of polling locations when reviewing county board of elections applications to consolidate any polling locations and ensure that no voter needs to travel more than 0.5 miles further [sic] from their normal polling place;
4. Directing Respondents to require at least two weeks of early in-person absentee and mail-in voting for the November general election in advance of election day and instruct county boards

³ The Petition for Review appears to be limited to relief for the November 2020 General Election. *See* Pet. ¶ 4. For some of the requested relief, Petitioner explicitly limits its request to the 2020 General Election, scheduled for November 3, 2020. Additionally, each “Count” is specifically limited to alleged constitutional violations occurring “during this pandemic[.]” *See* Pet. at pp. 58, 61, 63 (capitalization omitted).

of elections to establish satellite or mobile locations where voters can request, complete, and submit their mail-ballots, in a range of easily accessible locations, and during weekends and evenings;

5. Directing Respondents to require increased access to vote by mail across the Commonwealth, by among other things, directing county boards to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences; requiring each county to provide expanded access to ballot drop boxes, and accepting ballots returned to a drop-box by the close of polls on Election Day;
6. Directing Respondents to instruct county boards of elections to expand the number of ballot drop boxes where voters can returned [sic] their voted ballots by the close of polls on Election Day;
7. Directing Respondents to require that all polling places in the Commonwealth use low-touch hand-marked paper ballots as the primary voting method, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law; and
8. Directing Respondents to require all persons in polling places or in lines outside polling places to wear a mask and ensure that all polling places allow six-foot separation at all stages.

Memorandum of Law in Support of Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction 11-12 (Aug. 6, 2020).⁴

⁴ Notably, unlike other petitions currently pending before Pennsylvania courts, *see, e.g.*, Amended Petition (filed July 13, 2020), *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sup. Ct.), the Petition here does *not* seek to extend the deadline by which county boards must receive voters’ completed absentee and mail-in ballots. As Respondents have recently noted, judicial extension of the received-by deadline is—unlike the sweeping structural injunctions sought by Petitioner here—appropriately tailored to redress the burdens on the right to vote caused by recent

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioner speculates about a combination of injuries that may occur and seeks relief that is not tailored to those future constitutional injuries, should the Court dismiss Petitioner's claims because the injuries do not rise to a constitutional level?

Suggested Answer: Yes. *See infra* Section VI.A.

Where Petitioner speculates about a combination of constitutional injuries that may occur and seeks relief that is not tailored to those future constitutional injuries, should the Court dismiss Petitioner's claims because speculation (i) is too remote to satisfy the immediacy requirement for standing and (ii) provides insufficient factual development to render a claim ripe?

Suggested Answer: Yes. *See infra* Section VI.B.

Where Petitioner seeks relief that would mandate that county boards of elections take affirmative action, based on the allegation that the county boards of elections are unconstitutionally disenfranchising voters by burdening the right to cast in person and mailed votes, does the Court lack jurisdiction because Petitioner has not named the county boards of election as respondents?

Suggested Answer: Yes. *See infra* Section VI.C.

Where Petitioner seeks relief that would compel Respondents to implement broad, structural reforms to the administration of Pennsylvania elections, including affirmatively directing action by the county boards, is that relief barred by the doctrine of sovereign immunity?

delays in mail delivery that are expected to continue through the November 2020 general election. *See* Praecipe to Withdraw Certain of Respondents' Preliminary Objections Based on United States Postal Service's Announcement of Statewide Mail Delays Affecting General Election (Aug. 13, 2020), *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Sup. Ct.). Such relief is far more discrete, and far more amenable to implementation by judicial decree, than the panoply of structural reforms sought in the Petition, which would require wide-ranging, ongoing judicial superintendence of county-board-level administrative procedures in every county across the Commonwealth.

Suggested Answer: Yes. *See infra* Section VI.D.

V. SUMMARY OF ARGUMENT

The Petition should be dismissed for four reasons.

First, Petitioner’s claims are legally insufficient because the Petition fails to state a constitutional claim that could warrant the requested relief. Constitutional challenges to election statutes are cognizable only where an injury is concrete. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden 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) (citation and quotation omitted). Moreover, “nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Here, the Petition asserts constitutional violations across all of Pennsylvania, but Petitioner has alleged primarily conjectural—rather than clear, palpable and plain—constitutional injuries. Perhaps even more significantly, Petitioner only speculates that the proper way to address its future injuries is the expansive relief identified in the Petition. As the Supreme Court recently said of a

similar challenge, “the instant request ... is predicated upon mere speculation While circumstances may change, the possibility that votes may be suppressed ... as presently alleged, is too remote at this time to constitute a cognizable injury.” *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020, 2020 WL 2820467, at *1 (Pa. May 15, 2020) (Wecht, J., concurring statement). Because the Petition is speculative with respect to the specific relief requested, the Court should dismiss the claims as legally insufficient.

Second, Petitioner’s claims are not justiciable and are unripe. To have standing to sue, a claimant must have “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). If the claimant’s interest in the litigation is too “remote or speculative,” however, she lacks standing to bring her claims. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). Likewise, for Petitioner’s claims to be ripe, there must be an “actual controversy,” and Petitioner must allege facts “sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Just as Petitioner has not alleged adequate facts to demonstrate a constitutional injury legally sufficient to warrant the relief sought, Petitioner lacks standing to seek that relief.

Third, Petitioner failed to join indispensable parties. Petitioner not only accuses the Department of State of violating the Pennsylvania Constitution,

Petitioner also faults the conduct of the county boards of elections. Petitioner’s requested relief also reaches far beyond a declaration that certain election procedures are unconstitutional during the COVID-19 pandemic; Petitioner also requests an injunction affirmatively requiring Respondents *and the county boards of elections* to adopt new criteria and procedures for administering the November election. *See* Pet. at pp. 66–67. But much of the relief sought by Petitioner would, as a matter of statute, have to be implemented by the boards of election. Because Petitioner seeks to compel action by the county boards of election—and because Petitioner alleges that the county boards are violating the Pennsylvania Constitution—the boards of election are indispensable parties that must be joined in this litigation.

Fourth and finally, each request for relief in the Petition is barred by sovereign immunity. Sovereign immunity⁵ prohibits suits that “seek to compel *affirmative action on the part of state officials.*” *See Fawber v. Cohen*, 532 A.2d 429, 433–34 (Pa. 1987) (emphasis in original) (citation omitted). Here, Petitioner does not merely seek a declaration that certain laws or practices are unlawful. Instead, Petitioner requests that the Court order Respondents to implement various reforms, including by ordering the county boards enact various new procedures.

⁵ Although sovereign immunity is an affirmative defense, it may be raised in preliminary objections where a delayed ruling would serve no purpose. *See Faust v. Dep’t of Revenue*, 592 A.2d 835, 838 n.3 (Pa. Commw. Ct. 1991).

Petitioner’s requests, that the Court compel action by Respondents, violate well-established principles of sovereign immunity.

For all of these reasons, and as shown below, the Court should sustain Respondents’ Preliminary Objections and dismiss the Petition.

VI. ARGUMENT

A. The Court Should Dismiss the Petition as Legally Insufficient Because It Does Not Allege a Constitutional Violation

The Petition is legally insufficient because Petitioner only speculates about remedying potential constitutional injuries on a statewide basis. But Petitioner must make a “clear, palpable and plain demonstration” of unconstitutionality to overcome the “presumption that lawfully enacted legislation is constitutional.” *Yocum*, 161 A.3d at 238. “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.’ The presumption that legislative enactments are constitutional is strong. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.” *Working Families Party v. Commonwealth*, 209 A.3d 270, 278–79 (Pa. 2019) (internal citations omitted).⁶

⁶ Although Petitioner seeks to add new requirements to existing election law rather than expressly challenging the validity of any particular statutory provision currently in effect, the premise from *Yocum* applies with equal force. Each Count of the Petition, for example, demonstrates that Petitioner is challenging “the

Petitioner cannot carry its heavy burden. Petitioner only speculates about potential burdens on in person voting during the General Election. Petitioner alleges, for example, that across Pennsylvania, county boards will consolidate polling places, which will in turn cause confusion about where voters go to vote and will cause in person voters to experience overcrowding and lines. *See* Pet. ¶¶ 54–74. But according to Petitioner, during the June primary election, these issues arose directly from the passage of Act 12 of 2020,⁷ which Petitioner recognizes *only applied to the June 2020 Primary Election*. *See id.* ¶¶ 55–59, 73. Nonetheless, according to Petitioner, “[a]lthough the emergency election procedures in Act 12 by its terms applied only to the Primary Election, there is a *real threat* that substantially similar legislation *will be passed* that will be applied to the November 2020 election to reduce the number of polling places, without adequate notice to voters.” *Id.* ¶ 73 (emphasis added). Because the constitutional injuries that Petitioner attributes to consolidated polling places will allegedly arise only *if* the legislature enacts legislation similar to Act 12, *without making any material revisions*, the allegations lack the palpability required of constitutional injuries. *See Yocum*, 161 A.3d at 238.

Commonwealth’s Election Laws and Practices.” *See* Pet. at p. 58 (Count I); p. 61 (Count II); p. 63 (Count III).

⁷ Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act 2020-12.

It is equally conjectural whether Petitioner’s other allegations regarding potential future issues associated with in person voting will rise to a constitutional level. Petitioner predicts that voters across the Commonwealth may face potential technical difficulties and heightened risk of exposure to COVID-19 on unsanitary surfaces and because of overcrowding and lines caused by attempts to clean electronic voting machines. *See, e.g.*, Pet. ¶¶ 76–78; 90–92. But Petitioner identifies scant evidence of *any* such issue arising during the June primary election: an observation by an unidentified county *in Georgia* that electronic voting machines were “slower than before due to distancing and sanitation requirements” and required additional measures, *id.* ¶ 93 (an observation that is hardly surprising and furnishes no basis for comparison with the performance during the pandemic of other voting systems), and Northampton County’s request that voters “bring their own gloves” to polling places, *id.* ¶ 94. The Petition is silent as to the remaining 65 counties in the Commonwealth.

The alleged injuries are thus contingent on Petitioner’s speculation that certain events may occur and, if those future events do arise, that they will be so severe as to rise to the level of unconstitutionality. Petitioner does not allege any concrete, historical facts supporting its supposition that using electronic voting systems carries particularly high risks of infection or undue delays, compared to the hand-marked paper ballots preferred by Petitioner. Nor does Petitioner assert

how two discrete issues that allegedly arose in the past—one showing that pandemic-related precautions caused delays in one county in Georgia, and another requesting voters elsewhere provide their own gloves—are so severe as to be unconstitutional or are representative of a larger, statewide trend. Because the alleged injury turns on what counties *might* do and requires significant extrapolation to all of Pennsylvania’s 67 counties, Petitioner’s claims do not rise to a constitutional level. *See Yocum*, 161 A.3d at 238.

Petitioner also relies on conjecture in asserting a need for sweeping reforms to absentee and mail-in balloting. Petitioner points to issues with mail-in and absentee ballot application processing that allegedly occurred in June and suggests those same alleged problems will recur: Counties received a late surge of applications to vote by mail, Pet. ¶ 124; Counties could fall behind on processing applications, *see id.* ¶ 125; and thus voters will be “precluded from voting” because they will not have “sufficient time to receive and return the ballot to the board of elections by Election Day,” *id.* ¶ 129; *see also id.* ¶ 137. Even assuming some or all of those events recur, however, Petitioner does not offer anything linking those specific harms to its requested relief, such as automatically sending ballot applications to all registered voters. Pet. at pp. 66–67. That is not to say that Respondents disagree with Petitioner’s requested relief as a matter of *policy*. Nonetheless, to claim entitlement to its requested relief, Petitioner must show that

said relief is actually needed to remedy a clear, palpable and plain constitutional violation. Because Petitioner’s requested relief is not “tailored to the [alleged] injury,” it should be denied. *Ucheomumu v. Cty. of Allegheny*, 729 A.2d 132, 135 (Pa. Commw. Ct. 1999).

On the whole, the Petition is based on speculation, both about certain injuries and the redress sought. On the whole, the allegations in the Petition do not rise to the level of “clear, palpable and plain” constitutional violations, *Yocum*, 161 A.3d at 238,⁸ and, in any event the requested relief is not palpably tied to the violations alleged. Accordingly, because Petitioner’s constitutional claims are legally insufficient, its claims should be dismissed.

B. The Court Should Dismiss the Petition Because Petitioner’s Claims Are Not Justiciable

Petitioner’s claims are not justiciable for two reasons: Petitioner lacks standing and its claims are unripe. First, Petitioner does not have standing to bring its claims. To establish standing to seek relief from this Court, Petitioner must demonstrate that it is “aggrieved,” *i.e.*, that Petitioner has “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). “[A]n individual can demonstrate that he is aggrieved if he can establish

⁸ By contrast, an extension of the received-by deadline for completed absentee and mail-in ballots is relief narrowly tailored to address the Postal Service’s recent announcement of statewide delays that will affect the delivery of ballots in the period leading up to the general election. *See supra* note 4.

that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). “[A]n interest is ‘immediate’ if the causal connection is not remote or speculative.” *Id.* (citation omitted).

Here, Petitioner’s interest is not “immediate” for the same reasons that it has not alleged a constitutional injury: Petitioner relies on speculation to support its assertion that (a) overcrowding and unclean voting surfaces will be so widespread—exacerbated by electronic voting machines in particular—that the attendant issues will rise to an *unconstitutional* level *across the Commonwealth*, and (b) absent the sweeping relief requested by the Petition, voters will have an insufficient opportunity to vote by mail (and, faced with that reality, some voters will be forced to vote in-person). Whether these “possible harm[s]” will come to bear is “wholly contingent on future events”—among other things, the actions taken by election officials (as well as legislators). *Id.* at 660. Because the Petition does not show that the predicted issues with in person voting “ha[ve] harmed [Petitioner] or will harm [Petitioner] in any way that is not remote or speculative, [Petitioner] fail[s] to demonstrate that [it] ha[s] an immediate interest,” as is required for standing. *Id.* Likewise, Petitioner’s speculation about its need for extensive reforms related to mail-in and absentee balloting are not adequately

tethered to Petitioner’s identified harms.

Second, Petitioner’s claims are not justiciable on ripeness grounds. Like standing, the principle of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010). Unlike standing, however, ripeness “also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Respondents *do not* contend that the case cannot possibly become ripe until after the election is over. Instead, Respondents note only that Petitioner must offer facts about the *November* election in support of its claims – and, in particular, in support of Petitioner’s assertion that (a) the alleged difficulties with in person voting that arose in June will recur, and (b) the proposed relief is needed to remedy the alleged injuries regarding absentee and mail-in voting.

Accordingly, because Petitioner has not satisfied the requirements for standing and because its claims are not ripe, Respondents respectfully request that this Court sustain their second Preliminary Objection and dismiss the Petition.

C. The Court Should Dismiss the Petition for Nonjoinder of Indispensable Parties

Petitioner failed to join the county boards of election, who are indispensable parties to this action. “In Pennsylvania, an indispensable party is one 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); *see also CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The 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) (quotations and citations omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that, at least for the upcoming election, Petitioner seeks relief that would write into existence *new law* and compel *affirmative action* by the county boards of election, including requiring, either directly or indirectly, (a) “each *county board of election* to maintain a [certain] number of polling places” in accordance with metrics prescribed by Petitioner⁹; (b) “each *county board of election* [to] give adequate notice to voters of any change in polling place

⁹ See Memorandum of Law in Support of Petitioner’s Application for Special Relief in the Form of a Preliminary Injunction 11-12 (Aug. 6, 2020) (seeking an order “[d]irecting Respondents to ensure that there are a sufficient number of polling places to ensure that no voter must wait more than 30 minutes to vote”).

by mailing notice to voters sufficiently in advance of the General Election,” (c) the boards to permit early voting; (d) “each *county* to provide ballot dropboxes”; and (e) all counties in the Commonwealth to use hand-marked paper ballots for the 2020 General Election. *See* Pet. at pp. 66–67 (emphasis added). As in *CRY, Inc.*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioner’s requested relief will require extensive cooperation and affirmative steps from the county boards of elections.

Moreover, much of Petitioner’s requested relief is uniquely within the purview of the boards of election. The Election Code vests the board of each county with “jurisdiction over the conduct of ... elections in such county.” 25 P.S. § 2641(a). Under the Election Code, the boards are responsible for, among other things, “select[ing] and equip[ping] polling places”; “purchas[ing], preserv[ing], stor[ing] and maintain[ing] primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines, and ... procur[ing] ballots and all other supplies for elections”; and “prepar[ing] and publish[ing] ... all notices and advertisements in connection with the conduct of primaries and elections[.]” 25 P.S. § 2642. Although Petitioners seek to assert judicial control over nearly every aspect of the November election, they have not joined the county boards that

would be responsible for implementing the changes they seek.

Additionally, Petitioner's claims hinge largely on its expectation that county boards of elections, or their employees, will engage in conduct violating voters' constitutional rights. *See* Pet. ¶¶ 90–92. Because Petitioner alleges that the county boards of election will be at least partially responsible for the violations of the Pennsylvania Constitution predicted by the Petition, “justice [cannot] be afforded without violating the due process rights of” the boards. *DeCoatsworth*, 639 A.2d at 797; *see also* *CRY*, 640 A.2d at 376 (party was indispensable where it was accused of “misfeasance and malfeasance”).

Petitioner was required to join the county boards of election. As this Court recently observed in a similar case, *Crossey v. Boockvar*, the presence of accusations “against the county boards of elections” and the fact that “this Court cannot order the court boards of elections to provide [relief] . . . without being allowed to defend” “present[] a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.”

Memorandum Opinion at 9, *Michael Crossey, et al. v. Kathy Boockvar, et al.*, No. 266 M.D. 2020 (Pa. Commw. Ct. May 28, 2020) (Leavitt, J.) (unreported opinion).

Petitioner accuses the county boards of wrongdoing and seeks relief specifically from the county boards. The counties are entitled to defend themselves from the allegations against them and, if the Court decides that a Constitutional violation is

taking place, to have a say in the fashioning of a remedy. Indeed, without the presence of the boards as respondents, the relief sought by Petitioner—even if it could otherwise be granted—would be impossible to implement or enforce. Thus, the county boards of elections are necessary parties to this litigation.

D. Sovereign Immunity Bars the Petition Because the Requested Relief Amounts to a Sweeping Mandatory Injunction

Petitioner requests relief that would require affirmative action by Respondents, running afoul of sovereign immunity. Sovereign immunity prohibits suits that “seek to compel *affirmative action on the part of state officials.*” *Fawber*, 532 A.2d at 433–34 (emphasis in original) (citation omitted); *accord Stackhouse v. Commonwealth*, 892 A.2d 54, 61 (Pa. Commw. Ct. 2006) (“sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials”); *see also Snelling v. Dept. of Transp.*, 366 A.2d 1298, 1304 (Pa. Commw. Ct. 1976) (holding sovereign immunity bars portion of suit seeking to compel the Secretary of the Department of Transportation “to revoke previously issued high-way occupancy permits”).

The relief sought by Petitioner violates sovereign immunity because it includes multiple requests for a mandatory injunction requiring Respondents to issue directives to the county boards of election. For example: “Petitioner requests that this Court . . . a. Direct Respondents to require each county board of elections to maintain a sufficient [] number of polling places such that each resident can

exercise his or her right to vote; b. Direct Respondents to provide that each county board of election give adequate notice to voters of any change in polling place by mailing notice to voters sufficiently in advance of the General Election, as well as posting at old polling places[.]” Pet. at p. 66. Petitioner also asks the Court to order Respondents to institute “early voting for the General Election in advance of election day.”¹⁰ *Id.* at p. 67. The doctrine of sovereign immunity prevents Petitioner from obtaining an order requiring Respondents to issue particular directives to the county boards of elections or otherwise compelling Respondents to engage in affirmative acts. Indeed, for that very reason, this Court denied a preliminary injunction against the former Secretary in an election-related case where the petitioner sought relief “ordering Respondents to immediately cease running any broadcast, print, electronic, Internet or other advertisements or displays that still tell voters they must have photo ID to vote.” *Applewhite v. Com.*, No. 330 M.D. 2012, 2012 WL 5374328, at *1 (Pa. Commw. Ct. Nov. 1, 2012).

The Court said:

Of particular importance is the strong possibility that Respondents are immune from mandatory injunctive relief. Although sovereign immunity does not bar a declaratory judgment action or injunction seeking to prohibit state parties, *i.e.*, state agencies or employees,

¹⁰ To the extent Petitioner also seeks, through this request for relief, to have the Court direct the actions of the counties—who would, of necessity, also need to be intimately involved in the implementation of any early-voting regime—this request for relief further underscores that the county boards of election are indispensable parties.

from acting, sovereign immunity does apply to an action seeking to compel state parties to act. ... Here, it is very doubtful that I can legally compel Respondents to take most of the steps Petitioners seek.

Id. at *3 (alterations, citations, and quotations omitted). The same is true here.

The Court should dismiss all of Petitioner's requested relief as a matter of law, on the grounds that it seeks to compel extensive affirmative action by Respondents and thus violates principles of sovereign immunity.

VII. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents' Preliminary Objections.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: August 13, 2020

By: /s/ Michele D. Hangley
Mark A. Aronchick (ID No. 20261)
Michele D. Hangley (ID No. 82779)
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Fax: (215) 568-0300

Counsel for Respondents

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I 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.

Dated: August 13, 2020

/s/ Michele D. Hangley
Michele D. Hangley

EXHIBIT B

**NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks**

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 - - -
4 DONALD J. TRUMP FOR)
 PRESIDENT, INC., et al.,)
5)
 Plaintiffs,)
6)
 vs.)No.
7)2:20-cv-966-RN
 KATHY BOOCKVAR, et al.,)
8)
 Defendants.)
9

10 - - -
11 Videotape Video Conference Deposition of
 JONATHAN MARKS
12 Wednesday, August 19, 2020

13 - - -
14 The videotape video conference deposition of
15 JONATHAN MARKS, called as a witness by the plaintiffs,
16 pursuant to notice and the Federal Rules of Civil
 Procedure pertaining to the taking of depositions,
17 taken before me, the undersigned, Lance E. Hannaford,
 Notary Public in and for the Commonwealth of
18 Pennsylvania, at 2568 Aldon Drive, Sewickley,
 Pennsylvania 15143, commencing at 9:15 o'clock a.m.,
 the day and date above set forth.

19 - - -
20 NETWORK DEPOSITION SERVICES
 SUITE 1101, GULF TOWER
21 PITTSBURGH, PENNSYLVANIA
 866-565-1929

22 - - -
23
24
25

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 APPEARANCES VIA VIDEO CONFERENCE:

2 On behalf of the Plaintiffs:

3 Porter Wright:
4 Ronald Hicks, Jr., Esquire
5 Carolyn McGee, Esquire
6 Six PPG Place, Third Floor
7 Pittsburgh, Pennsylvania 15222
8 rhicks@porterwright.com

9 On behalf of Bucks, Chester, Montgomery, and
10 Philadelphia County Boards of Elections:

11 Hanglely Aronchick Segal Pudlin & Schiller:
12 Michele Hanglely, Esquire
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14 Philadelphia, Pennsylvania 19103
15 mhanglely@hanglely.com

16 On behalf of NAACP, et al.:

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21 vwalczak@aclupa.org

22 On behalf of Luzerne County Board of Elections:

23 Joyce, Carmody & Moran:
24 Regina M. Blewitt, Esquire
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- - -

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 APPEARANCES VIA VIDEO CONFERENCE CONTINUED:

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4 Nicole J. Boland, Esquire
5 Deputy Attorney General
6 Civil Litigation Section
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16 On behalf of the deponent and Secretary of State
17 Boockvar:

18 Myers Brier & Kelly:
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25 On behalf of Washington County Board of
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- - -

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 APPEARANCES VIA VIDEO CONFERENCE CONTINUED:

2 On behalf of Intervenor-Defendants NAACP
3 Pennsylvania State Conference, Common Cause of
4 Pennsylvania, the League of Women Voters,
5 Patricia M. DeMarco, Danielle Graham Robinson,
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23 On behalf of Intervenors NAACP, Common Cause,
24 and LWV-PA:

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- - -

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 APPEARANCES VIA VIDEO CONFERENCE CONTINUED:

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3 Party, Nilofer Nina Ahmad, Danilo Burgos, Austin
4 Davis, Dwight Evans, Isabella Fitzgerald, Edward
5 Gainey, Manuel M. Guzman, Jr., Jordan A. Harris,
6 Arthur Haywood, Malcolm Kenyatta, Patty H. Kim,
7 Stephen Kinsey, Peter Schweyer, Sharif Street,
8 and Anthony H. Williams:

9
10 Greenberg Traurig:
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12 1717 Arch Street, Suite 400
13 Philadelphia, Pennsylvania 19103
14 farrellg@gtlaw.com

15
16
17 On behalf of Intervenors Michael Crossey, Dwayne
18 Thomas, Irvin Weinreich, Brenda Weinreich, and
19 the Pennsylvania Alliance for Retired Americans:

20 Perkins Coie:
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22 Tyler Bishop, Esquire
23 505 Howard Street, Suite 1000
24 San Francisco, California 94105
25 trodgers@perkinscoie.com

On behalf of Westmoreland County Board of
Elections:

Westmoreland County Courthouse:
David Regoli, Assistant County Solicitor
2 North Main Street
Greensburg, Pennsylvania 15601
dregoli@co.westmoreland.pa.us

- - -

**NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks**

1 CONTINUED:

2 EXHIBIT:	MARKED:
3 Exhibit 35 - JM38	230
Exhibit 36 - JM40	237
4 Exhibit 37 - JM41	247
Exhibit 38 - JM42	251
5 Exhibit 39 - JM43	258
Exhibit 40 - JM44	262
6 Exhibit 41 - JM45	265
Exhibit 42 - JM48	267
7 Exhibit 43 - Declaration prepared by Mr. Marks	280

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NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

10

1 VIDEOGRAPHER: We are now on the record.
2 The date today is August 19, 2020. The time is
3 approximately 9:15 a.m.

4 This is the videotape deposition of
5 Jonathan Marks taking place remotely. The
6 caption of the case is Donald J. Trump for
7 President, Incorporated, et al. versus Kathy
8 Boockvar, et al.

9 Filed in the United States District Court
10 for the Western District of Pennsylvania. Case
11 No. 2:20-CV-966-RN.

12 My name is Raymond Urbash. I will be the
13 videographer. Our court reporter today is Lance
14 Hannaford. We are with Network Deposition
15 Services.

16 We agree to do all appearances on the
17 stenographic record. So our court reporter may
18 swear in the witness, and we may proceed.

19 JONATHAN MARKS
20 called as a witness by the Plaintiffs, having been
21 first duly sworn, as hereinafter certified, was
22 deposed and said as follows:

23 EXAMINATION

24 BY MR. HICKS:

25 Q As the videographer mentioned, we are here

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 Okay. Yes. It is a copy of 25PS section
2 2621. And I am familiar.

3 Q Does codified section 2621 define what the
4 powers and duties of the Secretary of the Commonwealth
5 are under the Pennsylvania election code?

6 MR. BRIER: Objection. He is not here as a
7 lawyer offering legal opinions. You are entitled
8 to ask him his understanding. But he is not here
9 as a lawyer speaking on the law.

10 MR. HICKS: Objection is noted. You can
11 answer.

12 A Yes. This broadly defines the duties of
13 the Secretary. The duties of authority of the
14 Secretary of the Commonwealth as relates to
15 Pennsylvania election code.

16 Q To your knowledge, does codified section
17 2621 provide either you or the Secretary with any rule
18 making powers over the administration of elections?

19 MR. BRIER: Objection to form.

20 A I don't recall that this section
21 provides -- if you are referring to regulations, this
22 section I don't believe explicitly references issuing
23 regulations.

24 Q Are you aware of any section of the
25 election code, which gives either you or the Secretary

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 any regulation making or rule making powers over the
2 administration of elections?

3 A Well, if I forget something, you will
4 forgive me. But there are electronic voting system,
5 that article of the election code does give the
6 Secretary of the Commonwealth explicit authority to
7 issue directives related to the use of electronic
8 voting systems.

9 I believe the Voter Registration Act, Act 3
10 of 2020, which is not codified here. It is codified
11 in the consolidated statutes, title 25, gives the
12 Secretary some explicit authority to issue regulations
13 primarily related to the SURE system and voter
14 registration. Otherwise, it would be sort of these
15 broad duties.

16 There are federal laws that -- I don't know
17 they necessarily give authority. They do sort of
18 identify the Secretary of the Commonwealth as the
19 chief election official in the Commonwealth.

20 Q Are you aware of any provisions under the
21 election code, or any other law which gives either the
22 Secretary, or you as Deputy Secretary any rule making
23 ability with regard to how counties conduct absentee
24 and mail-in voting in Pennsylvania?

25 A I am not aware of anything that gives --

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 again, if you are referring to regulations, I am not
2 aware of any statute that gives the Secretary
3 authority to issue regulations on that.

4 Q Do you agree that under the election code,
5 it is the 67 county boards of election, who are the
6 ones who have been charged with jurisdiction over the
7 conduct of primaries and general elections conducted
8 in Pennsylvania?

9 MR. BRIER: Objection to form.

10 A I don't have section -- I believe it is
11 section 2642 of the statutes. I don't have that in
12 front of me. But as I recall, yes, it does give
13 county boards of elections the authority to issue
14 rules.

15 I'm not sure -- I think there is another
16 word there. I am not sure what it is. But there is a
17 paragraph within that section that gives, again, broad
18 authority to the county election to issue rules
19 related to the conduct of elections within their
20 county.

21 Q Let me pull up, Ray, if you could pull up
22 JM5. For the record, this is a copy of codified
23 section 2642.

24 VIDEOGRAPHER: I did not receive a JM5 in
25 PDF form this morning when they were sent over.

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

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1 So the only JM5 I have is an NRL file that cannot
2 be opened in WebEx.

3 MR. HICKS: She is sending it to you right
4 now, Ray.

5 (Thereupon, Exhibit No. 4 was marked for
6 identification.)

7 Q Do you have Exhibit 4?

8 VIDEOGRAPHER: One second. I just
9 downloaded it.

10 MR. BRIER: This is Dan. We have Exhibit 5
11 is section 2641 of the election code. We have
12 it.

13 VIDEOGRAPHER: In order for me to share the
14 exhibits in that folder I have to go off the
15 screen.

16 MR. BRIER: Are you marking 2641?

17 MR. HICKS: It should be 2642.

18 MR. BRIER: So that is on its way?

19 MR. HICKS: Yes.

20 MR. HICKS: Ray, do you have JM6?

21 VIDEOGRAPHER: I am uploading it in the
22 shared file.

23 Q Mr. Marks, we have what we marked Exhibit
24 4, which is codified section 2642. Are you familiar
25 with that section?

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 A I am, yes.

2 Q You actually have a copy of it in front of
3 you. Correct? You have the election code in front of
4 you?

5 A I do. Yes.

6 Q Is this the section that you were referring
7 to in terms of the county board of election powers?

8 A It was, yes.

9 Q If we take a look down to 2642F, is there a
10 provision there that talks about making and issuance
11 of rules, regulations and instructions?

12 A Yes. At subsection F it says to make and
13 issue such rules, regulations and instructions. So it
14 uses all three of those terms.

15 Q And it goes on to say that those rules,
16 regulations and instructions are not to be
17 inconsistent with law.

18 Correct?

19 A That's correct. Yes.

20 Q Also, doesn't it narrow the types of rules,
21 regulations and instructions that the county board can
22 issue?

23 MR. BRIER: Objection to form.

24 A If you are referring to the next phrase it
25 says as they may deem necessary for the guidance of

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

1 voting machine custodians, election officers and
2 electors, or voters as it is more commonly known.

3 Q Correct. Under Rule 2642F, there are two
4 limitations to the county boards of election ability
5 to make rules, regulations and instructions.

6 Correct?

7 MR. BRIER: Objection. Ron, you are asking
8 him for legal opinions.

9 MR. HICKS: I am not asking for legal
10 opinion.

11 MR. BRIER: I think you are.

12 MR. HICKS: Your objection is noted.

13 Q You can answer, Mr. Marks. There are
14 limitations to the county boards of election rule
15 making powers?

16 A If you are referring to -- certainly there
17 is one, in my opinion. That being not inconsistent
18 with law. The other one, I assume you are referring
19 to guidance of voting machine custodians, elections
20 officers and electors. I'm not sure that is a
21 limitation so much.

22 Q Well, you agree with me that contrary to
23 your previous comment where you said county board of
24 elections have broad powers, 2642F says the rules
25 regulations and instructions have to be deemed

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

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1 necessary for the guidance of voting machine
2 custodians, election officers and electors.

3 Correct?

4 MR. BRIER: Objection. It doesn't say
5 that. You are asking for a legal opinion. He
6 just answered your question.

7 A It says as they, meaning the board of
8 elections, may deem necessary for the guidance. And
9 then it defines those three groups, which are
10 basically everyone who is involved in elections at the
11 county level.

12 Q Aren't there other individuals involved in
13 the election at the county level?

14 A We are talking about the folks -- the
15 people who oversee the voting machines, the election
16 officers, which would be all the poll workers, and
17 electors would include every registered voter in the
18 county.

19 So it is pretty inclusive. Let's put it
20 that way.

21 Q It doesn't refer to political parties, does
22 it?

23 A It does not explicitly refer to political
24 parties in this section. No.

25 Q It doesn't refer to candidates. Does it?

NETWORK DEPOSITION SERVICES
Transcript of Jonathan Marks

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1 NETWORK DEPOSITION SERVICES
 The Gulf Tower
2 707 Grant Street, Suite 1101
 Pittsburgh, Pennsylvania 15219
3 412-281-7908

4 August 20, 2020

5 TO: Daniel Brier, Esquire
 Myers Brier & Kelly:
6 425 Spruce Street, Suite 200
 Scranton, Pennsylvania 18503

7 RE: DEPOSITION OF JONATHAN MARKS

8 NOTICE OF NON-WAIVER OF SIGNATURE

9 Please have the deponent read his deposition
10 transcript. All corrections are to be noted on the
 preceding Errata Sheet.

11 Upon completion of the above, the deponent must
12 affix his signature on the Errata Sheet, and it is to
 then be notarized.

13 Please forward the signed original of the Errata
14 Sheet to Mr. Ronald Hicks, Jr., Esquire, for
 attachment to the original transcript, which is in his
15 possession. Send a copy of same to me.

16 Please return the completed Errata Sheet within
 thirty (30) days of receipt hereof.

17
18 Lance Hannaford,
19 Court Reporter

20 - - -

21
22
23
24
25

EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

v. :

No. 266 M.D. 2020

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

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE LEAVITT

FILED: May 28, 2020

On April 22, 2020, the Pennsylvania Alliance for Retired Americans and four individuals, two of whom are members of the Alliance (collectively, Alliance), filed a Petition for Declaratory and Injunctive Relief (Petition) in this Court's original jurisdiction against the Secretary of the Commonwealth, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries, Jessica Mathis (collectively, Secretary). Alleging disruptions to the June 2, 2020, primary election from the COVID-19 pandemic, the Alliance raises constitutional claims about provisions of the Pennsylvania Election Code (Election Code)¹ related to mail-in ballots, which is a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). On May 8, 2020, the Alliance

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (Preliminary Injunction Application). For the following reasons, the Court denies the Preliminary Injunction Application.

In the Petition, the Alliance challenges the Election Code's requirement that a voter's absentee or mail-in ballot must be received by the county board of elections by 8:00 p.m. on Election Day. It also challenges the Election Code's prohibition against third parties assisting voters in the delivery of their absentee and mail-in ballots and, relatedly, alleges the potential disenfranchisement of voters who are unable to provide their own postage to return their mail ballots. Finally, the Alliance alleges that the Secretary's failure to provide any guidance to county boards of elections on how to verify signatures on mail-in ballots will result in the arbitrary rejection of some ballots.

The four individual petitioners allege they are at risk of being disenfranchised because the county boards of elections may fall behind in processing absentee and mail-in ballot applications. The individual petitioners do not want to vote in person due to health concerns related to the COVID-19 pandemic. Alleging budgetary and staffing issues with the United States Postal Service, the individual petitioners fear their ballots may not be received by the 8:00 p.m. Election Day deadline. They believe they will need third-party assistance in returning their ballots.

The Alliance seeks an order declaring unconstitutional the Commonwealth's failure to: provide prepaid postage for absentee and mail-in ballots; allow for counting of mail-in ballots delivered after 8:00 p.m. on Election Day (to the extent that this does not trigger Act 77's non-severability clause); allow for third-party assistance in the collection of ballots; and establish standards for

signature verification by the county boards of elections. The Alliance also seeks an injunction to require an extension of the ballot return deadline; prepaid postage on all absentee and mail-in ballots; third-party collection of absentee and mail-in ballots; and training in signature matching for the county boards of elections.

On May 8, 2020, the Alliance filed a Preliminary Injunction Application to direct the Secretary to adopt procedures for emergency write-in ballots for all voters who request mail-in ballots; to designate all ballots as emergency ballots; and to count all such ballots if postmarked by Election Day and received within seven days thereof. The Alliance also seeks to enjoin the enforcement of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16,² to the extent that they prohibit third parties from delivering any voter's ballot to a local board of elections.

The Court held a pre-hearing conference on May 19, 2020. At the conference, the Secretary confirmed the statement in her answer to the Preliminary Injunction Application that she intended to file preliminary objections to challenge this Court's jurisdiction over the Petition. At the Court's suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits thereof. The Court provided the parties and proposed intervenors³ an opportunity to file memoranda of law on their respective positions regarding jurisdiction.⁴ Having reviewed the memoranda of law, the Court now

² Added by the Act of October 31, 2019, P.L. 552, No. 77.

³ Proposed intervenors include President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the State Senate Jake Corman; Speaker of the House of Representatives Mike Turzai and Majority Leader of the House Bryan Cutler; and the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee.

⁴ The Court deferred briefing of Respondents other preliminary objections.

considers the two bases upon which the Secretary asserts this Court lacks jurisdiction over the Petition and, by extension, the Preliminary Injunction Application.

Preliminary Injunction Standards

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hearing Board of Little Britain Twp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* A party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. v. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*,

828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Pennsylvania ALF-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996). “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

In its request for a preliminary injunction, the Alliance seeks the performance of positive acts by the Secretary and the county boards of elections. The requested preliminary injunction will require the Secretary to adopt procedures for emergency write-in ballots for all voters who request them. Those procedures must designate all ballots as emergency ballots, and the county boards of elections must count them if postmarked by Election Day and received within seven days thereafter. The requested preliminary injunction will also enjoin enforcement of Sections 1306 and 1306-D of the Election Code so that third parties may collect ballots.

Jurisdiction and Act 77

The threshold issue is whether the Court has jurisdiction to order the relief requested and, for preliminary injunction purposes, whether the Alliance is likely to prevail on the merits. A court must have subject matter jurisdiction over the controversy because, without it, any judgment rendered would be void. *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019). Subject matter jurisdiction is conferred solely by the Pennsylvania Constitution and its laws; the test for whether a court has subject matter jurisdiction is whether the court has the ability to determine controversies in the same general

class as the controversy at issue. *Id.* at 755-56 (quoting *Commonwealth v. Locust Township*, 968 A.2d 1263, 1268-69 (Pa. 2009)).

When it enacted Act 77, the General Assembly included specific provisions on jurisdiction to decide constitutional challenges arising under the act. More specifically, Section 13(2) of Act 77 provides:

The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite final judgment in connection with such a challenge or request for declaratory relief.

Section 13(2) of Act 77. In short, the legislature has vested exclusive jurisdiction in our Supreme Court to hear challenges to certain sections of the Election Code, delineated in subsection (1) of Section 13 of Act 77. Relevant here, subsection (1) provides that “[t]his section applies to the amendment or addition of the following provisions of the act: ... (xix) Section 1306 ... [and] (xxi) Article XIII-D.” Section 13(1) of Act 77.

Section 1306 of the Election Code, 25 P.S. §3146.6, relates to voting by absentee ballots. It provides a deadline for receipt of absentee ballots as follows: “a completed absentee ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3146.6(c). Article XIII-D of the Election Code includes Section 1306-D. It similarly provides a deadline for receipt of mail-in ballots as follows: “a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” 25 P.S. §3150.16(c).

The Petition challenges, *inter alia*, the received-by deadlines found in Sections 1306 and 1306-D. The Alliance stresses that it has lodged an as-applied challenge to avoid the risk of disenfranchisement.⁵ However, it seeks a statewide injunction to extend the received-by deadline set forth in Sections 1306 and 1306-D of the Election Code, arguing that it cannot be constitutionally applied anywhere in the Commonwealth. The Alliance’s claim that the absence of its proposed safeguards renders Act 77 unconstitutional is no different from a facial challenge to the statute as unconstitutional.

The relief sought by the Alliance would not merely supplement, but supplant, provisions set forth in Act 77. Those provisions impose an 8:00 p.m. Election Day deadline for the receipt of absentee and mail-in ballots and preclude a third party from assisting in the delivery of ballots. The Alliance seeks to modify

⁵ See Petition ¶63 (“Pennsylvania’s failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county boards of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. ... Thus, Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.”); ¶64 (“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.”); ¶66 (“Pennsylvania’s failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Protection Clause.”); ¶71 (“Pennsylvania’s rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide [prepaid] postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear[s] heavily on certain groups of voters without sufficient justification.”); and ¶77 (“Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurances that they will be delivered in time, even when submitted well in advance of Election Day.”).

these provisions of the Election Code on the theory that they may disenfranchise voters in violation of their constitutional right to vote.

Because the Alliance has raised a challenge “concerning the constitutionality” of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16, the Secretary’s assertion that the Supreme Court has exclusive jurisdiction over the Petition under Section 13(2) of Act 77 appears meritorious.

Indispensable Parties

Indispensable parties are those whose rights are so directly connected with and affected by the litigation that they must be a party to the action to protect their rights; their absence renders void any court order or decree for lack of jurisdiction. *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (quoting *Scherbick v. Community College of Allegheny County*, 387 A.2d 1301, 1303 (Pa. 1978)). In *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. 1981), the Supreme Court determined that consideration of indispensable parties should involve consideration of at least the following:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

The Petition alleges that the county boards of elections are falling behind in processing mail-in ballot applications; unconstitutionally omitting prepaid postage for ballot return; and will be employing “arbitrary” standards to match voter signatures. Petition ¶59. The Alliance seeks a mandatory injunction to compel county boards of elections to adopt new standards and procedures for counting

ballots. Specifically, the Alliance seeks to require the county boards of elections to: provide prepaid postage for mail-in ballots; receive and count ballots after the 8:00 p.m. deadline; train election board officials on signature verification; and allow for a cure where there are mismatched signatures.

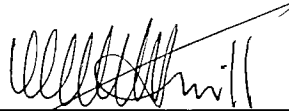
The Secretary contends that the Petition's accusations against the county boards of elections makes them indispensable parties. She further contends that this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without being allowed to defend. Without the presence of indispensable parties, the Court lacks jurisdiction. *Powell v. Shepard*, 113 A.2d, 261, 264-65 (Pa. 1955).

The Secretary has presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.

Conclusion

The Secretary's arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court. The Court does not believe the Alliance is likely to prevail on the question of this Court's jurisdiction over the subject matter of the Petition.

As such, the Court concludes it lacks jurisdiction to grant the Preliminary Injunction Application. Accordingly, the request will be denied.



MARY HANNAH LEAVITT, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
for Retired Americans, :
Petitioners :

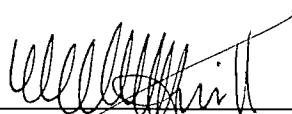
v. :

No. 266 M.D. 2020

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

ORDER

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.



MARY HANNAH LEAVITT, President Judge

EXHIBIT D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP Pennsylvania State Conference,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 364 M.D. 2020
	:	
	:	
Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries,	:	
	:	
Respondents	:	

ORDER

AND NOW, this 11th day of September, 2020, upon consideration of the preliminary objections to the Petition for Review Addressed to this Court’s Original Jurisdiction (Petition) of the National Association for the Advancement of Colored People Pennsylvania State Conference (NAACP), it is hereby **ORDERED** as follows:

1. The first and second preliminary objections of Respondents Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (Respondents), based on demurrer and ripeness, respectively, are **SUSTAINED**. The third preliminary objection of Intervenors Speaker of the Pennsylvania House of Representatives Bryan Cutler and Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff (House Leader Intervenors), based on demurrer, is **SUSTAINED**. The first preliminary objection of Intervenors President Pro Tempore Joseph B. Scarnati III and Pennsylvania Senate

Majority Leader Jake Corman (Senate Leader Intervenors), based on ripeness, is **SUSTAINED**. The second and sixth preliminary objections of Intervenors Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (Republican Committee Intervenors), based on ripeness and demurrer, respectively, are **SUSTAINED**. The NAACP has failed to allege adequate facts demonstrating a constitutional violation/injury, beyond mere speculation, that would warrant the grant of the statewide relief requested in the Petition.

2. In light of our decision sustaining preliminary objections challenging the legal sufficiency of the NAACP's Petition (on the basis of demurrer and ripeness), the Court does not address the remaining preliminary objections. The Court notes, however, that the preliminary objection asserted by Respondents, House Leader Intervenors, Senate Leader Intervenors, and Republican Committee Intervenors raising the failure to join indispensable parties, those being the 67 Pennsylvania county boards of elections, has merit in light of the relief the NAACP seeks in its Petition. Nonetheless, if the Court were to grant this preliminary objection, the Court would not have dismissed the Petition without first providing the NAACP with the opportunity to amend its pleading to add the indispensable parties.

3. The Petition is **DISMISSED**.



P. KEVIN BROBSON, Judge

EXHIBIT E

TLP: WHITE



**GUIDANCE CONCERNING POLL WATCHERS AND
AUTHORIZED REPRESENTATIVES**

Date: October 6, 2020

Version: 1.0

GUIDANCE CONCERNING POLL WATCHERS AND AUTHORIZED REPRESENTATIVES

1 BACKGROUND

This guidance addresses the role of poll watchers at polling places, and the role of authorized representatives at the pre-canvass and canvass of ballots.

2 POLL WATCHER QUALIFICATIONS

To be a poll watcher, a person must be a qualified registered elector of the county in which the election district for which the watcher is to be appointed is located. Poll watchers must be identified and must receive official county credentials in advance, and must be assigned to specific precincts. When a poll watcher is not serving in the election district for which the poll watcher was appointed, he or she may serve in any other election district in the same county in which the poll watcher is a qualified registered elector.

Each poll watcher must be provided with a certificate from the County Board of Elections, which states the poll watcher's name and the name of the candidate, party, or political body he or she represents. Poll watchers are required to show their certificates when requested to do so. If a poll watcher loses his or her certificate or if the certificate is destroyed, the poll watcher may appear before the Court of Common Pleas on election day and after swearing an oath or affirmation may immediately receive a replacement watcher's certificate issued by the Court.

Individuals may not serve as poll watchers except as specifically described above.

3 POLL WATCHERS AT THE POLLING PLACE

What poll watchers CAN do at the polling place

Each candidate may appoint two poll watchers for each election district in which he or she appears on the ballot. Each political party and political body which has nominated candidates on the ballot may appoint three poll watchers for each election district at any general, municipal or special election in which the candidates of such party or body are on the ballot. **However, only one poll watcher may be present in the polling place at one time for each candidate at primaries or for each candidate, party, or political body during general, municipal or special elections,** from the time election officers meet prior to the opening of the polls until the time that the counting of votes is complete. It is also important to note that **all poll watchers must remain outside the enclosed space.**

Watchers allowed in the polling place are permitted to keep a list of voters. Watchers may make good faith challenges to an elector's identity, continued residence in the election district, or qualifications as an eligible voter. Poll watchers should direct permitted challenges directly to the Judge of Elections. The Judge of Elections has the obligation to determine if the challenge is based on actual evidence and whether there is a good faith basis to believe that the person is not or may not be a qualified elector.

Challenges cannot be based on race, national origin, appearance, surname, language, religion or other characteristic not relevant to the qualifications to vote. The race, ethnicity, national origin, language, and religion of a person presenting themselves to vote are not sufficient bases for mounting a challenge. Discriminatory challenges that interfere with the free exercise of the elective franchise are unlawful under Pennsylvania law.

The Judge of Elections must not permit routine or frivolous challenges that are not supported by a stated good faith basis and evidence that a person is or may not be eligible. Challenges may not be affirmed and voters may not be refused a ballot unless the election officers of the precinct are satisfied that the challenger has proven the voter's ineligibility on proper grounds and with sufficient evidence. The elected officers of the precinct (Judge of Elections, Majority and Minority Inspectors) have the responsibility of determining the qualifications of the person presenting themselves to vote. In the event of disagreement, the Judge of Elections decides.

Only when voters are not present in the polling place either voting or waiting to vote, the Judge of Elections shall allow poll watchers to inspect the voting check list and the numbered lists of voters maintained by the County Board of Elections. Poll watchers may not mark upon or alter any official election records. The Judge of Elections shall supervise or delegate supervision to other poll workers over a poll watcher's inspection of these documents.

What watchers CANNOT do at the polling place

Poll watchers must remain a safe and respectful distance away from the space where voting is occurring. Poll watchers may not engage, attempt to influence, or intimidate voters or otherwise interfere with or impinge on the orderly process of voting. Social distancing measures should be maintained to ensure a safe polling place for voters and poll workers.

Voter intimidation and threatening conduct are illegal under federal and Pennsylvania law. Any activity by a poll watcher that threatens, harasses, or intimidates voters, including any activity that is intended to, or has the effect of, interfering with any voter's right to vote, whether it occurs outside the polling place or inside the polling place, is illegal.

Examples of voter intimidation include, but are not limited to:

- Photographing or videotaping voters
- Disseminating false or misleading election information to voters
- Blocking the entrance to a polling place
- Confronting, hovering, or directly speaking to or questioning voters
- Any threatening behavior
- Asking voters for documentation

Poll watchers are also NOT allowed to engage in electioneering while inside the polling place or within 10 feet of the entrance to the polling place. Though watchers are representatives of candidates or political parties and political bodies, they are not entitled to electioneer on behalf of their candidate, political party, or political body while inside the polling place. Electioneering includes soliciting votes,

posting or displaying written or printed campaign materials, and handing out pamphlets or other campaign paraphernalia.

While the Judge of Elections at the polling place may not deter or interfere with a duly appointed watcher who is exercising her or his privileges as a watcher, the Judge of Elections is obligated to remove a watcher who is engaging in activities that are prohibited, including those referenced in this section.

The Judge of Elections has a duty to maintain order and ensure that the rules are being followed at the polling place. A Judge of Elections may call upon a constable, deputy constable, police officer or other peace officer to aid in maintaining order.

After the voting is complete, poll watchers may remain in the polling place, but outside the enclosed space where ballots are being counted and voting machines are being canvassed.

4 AUTHORIZED REPRESENTATIVES AT THE PRE-CANVASS AND CANVASS

The 2019 amendments to the Election Code expressly specify that one authorized representative for each candidate and one authorized representative for each political party must be permitted to remain in the room at the county election board where the pre-canvass and canvass meetings occur.

Authorized representatives are permitted to be present when envelopes containing official absentee ballots and mail-in ballots are opened and when such ballots are counted and recorded. This includes both the pre-canvass and canvass.

Authorized representatives (which includes poll watchers that have been designated by a candidate or political party to serve as authorized representatives during the pre-canvass or canvass) may not challenge an absentee or mail-in ballot during the pre-canvass or canvass of the ballots. Absentee and mail-in ballot applications may only be challenged prior to 5:00 pm on the Friday prior to the election, and only on good faith grounds that the applicant was not a qualified elector. No other challenges are permitted. Authorized representatives may not engage in, attempt to intimidate, nor interfere with the pre-canvass or canvass of the absentee and mail-in ballots. Challenges to mail-in or absentee ballots, based on signature analysis, are not permitted at any time.

Persons observing, attending, or participating in the pre-canvas meeting ARE PROHIBITED from disclosing the result of any portion of the pre-canvass prior to the close of the polls on election day.

Authorized representatives may not interfere with, hinder, or unlawfully delay a district election board or the County Board of Elections in the conduct of its duties. It is likewise a violation of Pennsylvania law to interrupt or improperly interfere with any election officer in the execution of his or her duties.

5 COUNTY ELECTION OFFICES, SATELLITE OFFICES, AND BALLOT RETURN SITES

Poll watchers and authorized representatives have no legal right to observe or be present at county election offices, satellite offices or designated ballot return sites, except to vote their own ballot or to perform personal tasks expressly permitted by the Election Code.

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Version History:

Version	Date	Description
1.0	10.6.2020	Initial document release