

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH OF
PENNSYLVANIA AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No. 364 MD 2020

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican Committees”), by and through undersigned counsel, respectfully submit the following Application for Leave to Intervene as Respondents in this original jurisdiction 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 Committees support and seek to uphold orderly free and fair elections for all Pennsylvanians and for all voters across the country.

Petitioner asks the Court for a sweeping judicial order that would rewrite Pennsylvania's Election Code and impose a new and wide-ranging election-administration regime on the Commonwealth, its citizens, and its voters. Petitioner's requested relief not only would dramatically alter the rules governing the November general election in Pennsylvania, but also would usurp the political branches' authority to enact the laws governing the Commonwealth's elections.

For this reason, the Republican Committees, on behalf of themselves, their candidates, and their member voters, seek to intervene in this action. The Republican Committees have a right to intervene in this case. Indeed, 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 Republican Committees 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 intend 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 Committees respectfully request that the Court grant their application to intervene as Respondents, and to permit them to file of record the Preliminary Objections attached hereto.

I. BACKGROUND

A. The Republican Committees.

1. Donald J. Trump for President, Inc. (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 presumptive 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 Election Code Section 102(a), 25 P.S. § 2602(a). *See Rowland v. Smith*, 83 Pa. D. & C. 99, 101-2 (Pa. Ct. Com. Pl. Dauphin 1952) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States).

2. The Republican Party of Pennsylvania 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 Republican Party of Pennsylvania 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 Republican Party of Pennsylvania 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 Republican Party of Pennsylvania has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

3. The Republican National Committee (“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 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 RNC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

4. The National Republican Congressional Committee (“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 has 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.

5. On June 18, Petitioner filed its Petition for Review addressed to the Commonwealth Court of Pennsylvania’s original jurisdiction against Kathy Boockvar, the Secretary of the Commonwealth, and Jessica Mathis, the

Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, in their official capacities. Pet. ¶¶ 24–25.

6. Petitioner seeks to leverage the COVID-19 pandemic into a wholesale judicial rewrite of the Pennsylvania Election Code. In particular, Petitioner asks the Court to, mandate a “sufficient number” of polling places that must remain open, establish a minimum notice period for any changes in polling places, impose early in-person voting in advance of Election Day, require every board of elections to send mail-in ballot applications to all registered voters, compel every county to use drop-boxes for mailed ballots, and require all polling places to use hand-marked paper ballots for the 2020 General Election. *See* Pet. Request for Relief.

7. The Petition also even challenges as unconstitutional *non-existent* laws it fears *may* be passed in response to the COVID-19 pandemic.

8. This case is still in its infancy. As of the filing of this Application for Leave to Intervene, the only pleadings that have been filed in this proceeding are Entries of Appearance for Respondents, Applications to be Admitted Pro Hac Vice, and two Applications to Intervene.

II. THE GOVERNING INTERVENTION STANDARD

9. In an original jurisdiction petition for review, a nonparty may file an application for leave to intervene. Pa. R.A.P. 1531(b).

10. “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)).

11. 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.”

12. 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)).

13. 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).

14. 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.”).

15. The Court should grant the Republican Committees’ application to intervene because the Court’s determination of this action may affect the Republican Committees’ legally enforceable interests, no exception applies under Pennsylvania Rule of Civil Procedure 2329, and the Republican Committees’ participation will aid the Court.

III. BASIS FOR THE REPUBLICAN COMMITTEES' INTERVENTION

A. The Republican Committees have substantial interest in this action.

16. The Republican Committees, 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.

17. There can be no question that the Republican Committees have direct and significant interests in the continued enforcement of Pennsylvania's laws governing mail-in ballots—including the established return deadline—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 to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Committees 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*.

18. 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).

19. If Petitioner’s action succeeds, the orderly administration of Pennsylvania’s elections will be upended shortly before a critical general election.

20. Not only would this undercut democratically enacted laws that protect voters and candidates (including the Republican Committees’ 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 Committees] 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).

21. 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 the Republican Committees will be forced to spend substantial resources informing their Republican voters of changes in the law, fighting inevitable confusion, and galvanizing participation as a result of such a change.

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

B. There is no basis to refuse the Republican Committees’ application for intervention.

23. 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.”

24. None of these factors applies to the Republican Committees.¹

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

26. Second, no existing party adequately represents the Republican Committees’ particularized interests. *See* Pa. R.C.P. No. 2329(2). Petitioner clearly does not represent the Republican Committees’ interests in this case, and Respondents do not adequately represent them either.

27. Although the Republican Committees and Respondents putatively share the same overall goal of upholding the challenged received-by deadline, their interests are not identical.

28. Respondents, as Commonwealth officials, do not represent the private interests of the Republican Committees at stake in this litigation, which are fundamentally different from, and far narrower than, the broad public interests represented by Respondents. Indeed, “the government’s representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a [private movant] merely because both entities occupy the same posture

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

in the litigation.” *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001); *see also, e.g., Crossroads Grassroots Policy Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 321 (D.C. Cir. 2015) (“[W]e look skeptically on government entities serving as adequate advocates for private parties.” (citing *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003))).

29. Whereas the Republican Committees have particularized interests in maintaining the competitive electoral environment adopted through Act 77, Respondents have no interest in the election of particular candidates. *See, e.g., Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that the government’s representation of the general public interest did not adequately represent the intervenor’s narrower private interests, despite the similarity in their goals). Instead, in acting on behalf of all Pennsylvania citizens and the Commonwealth, Respondents must consider “a range of interests likely to diverge from those of the intervenors.” *Meek v. Metro. Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). In other words, “[i]n litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of [a private party] intervenor.” *Utah Ass’n of Ctys.*, 255 F.3d at 1256. These considerations may include “the expense of defending the current [laws] out of [state] coffers,” *Clark v. Putnam Cty.*, 168 F.3d 458, 461–62 (11th Cir. 1999), “the social and political divisiveness of the election

issue,” *Meek*, 985 F.2d at 1478, “their own desires to remain politically popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). Given that Respondents may take these other interests into account, their interests may diverge with the Republican Committee’s interests throughout this litigation.

30. Third, the Republican Committees have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. The Petition was filed only three weeks ago. The Republican Committees’ 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.

IV. CONCLUSION

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

32. Pursuant to Pennsylvania Rule of Civil Procedure 2328, the Republican Committees attach a copy of the pleading, in the form of Preliminary Objections (attached as Exhibit A), they will file in the action if permitted to intervene.

WHEREFORE, for the foregoing reasons, 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 Commonwealth Court Prothonotary to enter the names of 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' Preliminary Objections, attached as Exhibit A.

Dated: July 20, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher (PA #37950)

Ronald L. Hicks, Jr. (PA #49520)

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*Counsel for Proposed Intervenor-Respondents
Donald J. Trump for President, Inc., Republican
Party of Pennsylvania, Republican National
Committee, and National Republican
Congressional Committee*

**Pro hac vice application forthcoming*

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 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.



James J. Fitzpatrick
PA EDO Director
Donald J. Trump for President, Inc.

Date: July 16, 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.



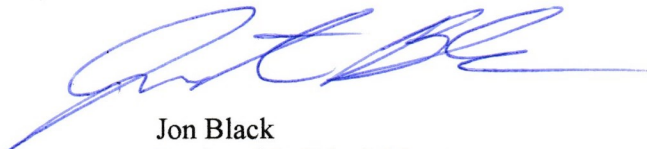
Vonne Andring
Executive Director
Republican Party of Pennsylvania

Date: July 18, 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.



Jon Black
Regional Political Director
Republican National Committee

Date: 07/14/2020

**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: 07/14/2020

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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PROPOSED ORDER

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

docket in this matter as Intervenor-Respondents, and DOCKET the Intervenor-Respondents' Preliminary Objections.

BY THE COURT:

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Respondents.

Case No. 364 MD 2020

NOTICE TO PLEAD

To Petitioner:

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

/s/ Kathleen A. Gallagher
*COUNSEL FOR PROPOSED
INTERVENOR-RESPONDENTS
DONALD J. TRUMP FOR PRESIDENT,
INC., THE REPUBLICAN PARTY OF
PENNSYLVANIA, REPUBLICAN
NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE.*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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**PRELIMINARY OBJECTIONS OF INTERVENOR-RESPONDENTS
DONALD J. TRUMP FOR PRESIDENT, INC., THE REPUBLICAN PARTY
OF PENNSYLVANIA, REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE**

Petitioner asks the Court for a sweeping injunction that would rewrite Pennsylvania’s Election Code and impose by judicial fiat a new and wide-ranging election-administration regime on the Commonwealth, its citizens, and its voters. In the process, Petitioner invites the Court to undo the grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections during the COVID-19 pandemic and beyond. Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee (collectively, “Republican Committee Respondents”) file these

Preliminary Objections to explain that the Court should uphold the policy decisions of its two co-equal political branches of government and dismiss the Petition.

PRELIMINARY STATEMENT

Petitioner's requested relief would cut both the General Assembly and the Governor out of the lawmaking process and usurp the political branches' authority to enact the laws governing elections in Pennsylvania. Petitioner asks the Court for an order that not only would invalidate a large swath of the Election Code duly enacted by Pennsylvania's political branches, but also would substitute in its place Petitioner's preferred election-administration regime. In particular, Petitioner asks the Court to promulgate standards regarding such disparate topics as the closure of polling places and the use of hand-marked paper ballots, to compel the Commonwealth to offer early in-person voting, and to require county boards of election to automatically send applications for mail-in ballots to all registered voters and to establish brand-new "drop-boxes" to receive absentee and mail-in ballots.

Fortunately, the Court need not entertain Petitioner's overbroad request because Petitioner's claims fail at the threshold and should be dismissed. *First*, Petitioner is "an[] entity not authorized by law to exercise the right to vote in this Commonwealth" and therefore "lacks standing" to bring this suit. *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 995 (Pa. 2002). *Second*, Petitioner's claims are not ripe. In the first place, Petitioner's action is premised on

its speculation regarding the effect of the COVID-19 pandemic on the November general election approximately three and a half months from now. But as the Pennsylvania Supreme Court made clear in dismissing two COVID-19-related petitions just days before the June primary election, such speculation defeats a claim for judicial relief. *See, e.g., Disability Rights Pa. v. Boockvar*, 83 MM 2020, 2020 WL 2507661, 2020 Pa. LEXIS 2751 (Pa. May 15, 2020); *Delisle v. Boockvar*, 95 MM 2020, 2020 WL 3053629, 2020 Pa. LEXIS 2970 (Pa. May 29, 2020).

Moreover, the gravamen of Petitioner’s action is the consolidation and closure of polling places, which was made possible by Act 12 of 2020. But Petitioner acknowledges Act 12 applied only to the June primary election, and that no law authorizes such consolidations or closures for the November general election. Petitioner thus seeks to litigate the constitutionality of a statute that does not—and may never—exist.

Third, Petitioner’s requested relief far exceeds the Court’s authority. The Court only has the power to uphold or overturn laws. It cannot, as Petitioner seeks, rewrite the Election Code. Such relief can only be achieved from the political branches via legislation, not this Court via litigation.

Fourth, Petitioner’s request for partial invalidation of Pennsylvania’s new universal mail-in voting scheme violates the plain terms of Act 77 of 2019, a historic piece of legislation that codified a grand bipartisan compromise between the General

Assembly and the Governor to overhaul and to modernize the Election Code. *Fifth*, the Court lacks jurisdiction to hear this matter because Petitioner has failed to join indispensable parties, namely, each of the county boards of elections. *Finally*, in all events, Petitioner fails to state a claim upon which any relief may be granted.

For each of these reasons, the Court should dismiss the Petition.

A. The Petitioner Lacks Standing, Pa. R.C.P. 1028(a)(5)

1. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

2. The Petitioner, as a “non-partisan organization,” Pet. ¶ 23, does not have standing to pursue this action.

3. “[A] party has standing where that party is ‘aggrieved.’” *Erfer v. Commonwealth*, 794 A.2d 325, 329 (Pa. 2002) (citing *In re T.J.*, 739 A.2d 478, 481 (Pa. 1999)).

4. “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*, 790 A.2d at 994–95.

5. “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).

6. “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.*

7. The subject matter of this action is an “individual’s right to vote and to have that vote counted,” *Albert*, 790 A.2d at 994–95, or, as Petitioner states, protecting the “fundamental right to vote in the midst of an unprecedented public health crisis,” Pet. ¶ 3.

8. “[T]he right to vote is personal.” *Id.* at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964)).

9. Accordingly, 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. *Id.* (dismissing a local chapter of League of Women Voters); *accord Erfer*, 794 A.2d at 329 (holding that the Democratic Committee did not have standing); *League of Women Voters of Pa. v. Commonwealth*, 261 MD 2017 (Pa. Commw. Nov. 13, 2017 (dismissing League of Women Voters of Pennsylvania as a party petitioner)).

10. So too here. The Petitioner does not assert that it is authorized to vote or that it is suing on behalf of its members. It therefore lacks standing to pursue this litigation regarding the “personal and individual” right to vote.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

B. Petitioner’s Claims Are Not Ripe and Thus Not Justiciable, Pa. R.C.P. 1028(a)(4)

11. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

12. This action must be dismissed because Petitioner’s claims are not ripe.

13. The doctrine of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Dep’t of Labor & Industry*, 8 A.3d 866, 874 (Pa. 2010).

14. “Standing and ripeness are distinct concepts insofar as ripeness also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013).

15. “Parties may raise questions regarding standing, ripeness, and the political question doctrine by filing preliminary objections to a petition for review filed in the original jurisdiction of the Commonwealth Court.” *Id.*

16. A claim is not ripe where it rests on speculation regarding future events. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring).

17. Prior to the June 2 primary election, Commonwealth voters brought two petitions seeking relief from the Election Code's received-by deadline for absentee and mail-in ballots based on the alleged effect of the COVID-19 pandemic on the Commonwealth's administration of elections. *See Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970.

18. The Pennsylvania Supreme Court dismissed those petitions on May 15 and May 29—18 days and 3 days before the primary election, respectively—because the allegations regarding the effect of the COVID-19 pandemic on the primary election were speculative. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS 2751; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring).

19. Petitioner's allegations regarding the effect—if any—of the COVID-19 pandemic on the November general election approximately three and a half months from now are likewise speculative and unripe and, therefore, should be dismissed. *See, e.g., Disability Rights Pa.*, 2020 WL 2820467, 2020 Pa. LEXIS

2751; *id.* (Wecht, J., concurring); *Delisle*, 2020 WL 3053629, 2020 Pa. LEXIS 2970; *id.* (Wecht, J., concurring); *see also Erfer*, 794 A.2d at 329.

20. Petitioner’s action is unripe for the additional reason that the gravamen of Petitioner’s action is the consolidation and closure of polling places, which was made possible under Act 12 of 2020. *See* Pet. ¶¶ 54–74.

21. At this time, no polling places have been closed or consolidated for the general election—and no statutory authority to effect such a closure or consolidation exists. Petitioner even acknowledges that Act 12, which provided the authority to close and consolidate polling places, “by its terms applied only to the Primary Election” held in June. Pet. ¶ 73.

22. Yet Petitioner seeks judicial intervention requiring the county boards of election to maintain a certain number of polling places and provide adequate notice to voters of any change in polling place, among other relief, when there is no statutory authority for the Commonwealth or the county boards of elections to reduce the number of polling places.

23. Indeed, all of Petitioner’s requested relief seeks to address alleged injuries that might—but might not—occur. Petitioner does not allege any facts to show that the Petitioner or its members are likely to suffer a constitutional deprivation.

24. That Petitioner can speculate regarding the possibility of closed or consolidated polling places for the general election or difficulties with mail-in ballot voting does not give rise to a cause of action. *See Erfer*, 794 A.2d at 329.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

C. Petitioner Requests Relief the Court Cannot Lawfully Grant, Pa. R.C.P. 1028(a)(4)

25. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

26. Petitioner asks this Court to rewrite the Election Code. Petitioner asks the Court to mandate a “sufficient number” of polling places that must remain open, establish a minimum notice period for any changes in polling places, impose early in-person voting in advance of Election Day, require every board of elections to send mail-in ballot applications to all registered voters, compel every county to use dropboxes for mailed ballots, and require all polling places to use hand-marked paper ballots for the 2020 General Election. *See Pet. Request for Relief*.

27. The Court lacks the authority to grant any of this relief because the Pennsylvania General Assembly—not the judiciary—holds the sole power to write

the laws for the Commonwealth. *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); *see also* PA. CONST. art. VII, § 14(a) (vesting the “Legislature” with the power to establish the laws governing the time, place, and manner in which absentee voting may be conducted).

28. “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 (E.D. Pa. 2018) (Smith, C.J., mem.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

29. The Court cannot take unilateral action to rewrite the law, as that would overstep the bounds of its authority. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Philadelphia*, 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). For the Court to assume “the power to write legislation would upset the delicate balance in our tripartite system of government.” *Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev’d on other grounds*, 529 U.S. 277 (2000).

30. By pressing this constitutional challenge, Petitioner is asking this Court to weigh in on the political policy judgments regarding the regulation of elections, the Commonwealth's ongoing preparations for the November general election, and the best path forward in light of COVID-19.

31. Moreover, this Court's "role is distinctly *not* to second-guess the policy choices of the General Assembly." *Ins. Fed. of Pa., Inc.*, 970 A.2d at 1122 n.15. (emphasis in original). Indeed, "[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring." *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). And "[i]f, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation[.]" *Id.*

32. Although the Court has the power to review the constitutionality of various provisions of the Election Code, it cannot direct the Legislature *how* to fix any alleged constitutional defect.

33. The problem is even more pronounced here. Petitioner's action is premised upon laws that do not yet exist. *See* Pet. ¶ 73 ("there is a real threat that [legislation substantially similar to Act 12] will be passed that will be applied to the

November 2020 election”). Thus, Petitioner is not even asking this Court to *second-guess* the Legislature’s decision. Rather, Petitioner would have this Court cut the Legislature out of the process entirely, pursuing this action premised on the alleged “threat” that the Legislature *might* pass certain legislation, and asking the Court to instead bring into existence the laws Petitioner would prefer.

34. The sweeping relief sought by the Petitioner cannot be achieved via litigation. If it is to be accomplished at all, it may only be done legislatively.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

D. Petitioner Requests Relief Foreclosed by Act 77, Pa. R.C.P. 1028(a)(4)

35. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

36. In 2019, the General Assembly and the Governor crafted a historic grand bipartisan compromise to overhaul and modernize Pennsylvania’s Election Code.

37. The result of that compromise was Act 77 of 2019. *See* 25 P.S. §§ 3150.11–3150.12b.

38. Among other things, Act 77 created Pennsylvania’s new universal no-excuse mail-in voting regime. *See Act 77 § 8.*

39. To preserve their grand bipartisan compromise, the General Assembly and the Governor included in Act 77 a non-severability clause, which provides: “Section 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9, and 12 of this act are nonseverable. If any provision of this act or its application to any circumstance is held invalid, the remaining provisions of this act are void.” Act 77 § 11.

40. The Pennsylvania Court has “assume[d] that, as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006).

41. Act 77’s non-severability provision is constitutionally proper and enforceable because it arose from “the concerns and compromises which animate the legislative process” and was an integral part of the grand bipartisan compromise that was “essential to securing the support necessary to enact” Act 77 “in the first place.” *Id.* at 978.

42. Act 77’s non-severability provision is constitutionally proper and enforceable because it is not in any way “a sword against the Judiciary” “aimed at securing a coercive effect upon” this Court in violation of the separation of powers. *Id.* at 978–80.

43. Accordingly, Act 77’s non-severability clause precludes the Court from invalidating any portion of Pennsylvania’s universal no-excuse mail-in voting scheme without invalidating the entire scheme. *See Act 77 § 11.*

44. Petitioner, however, asks the Court to do precisely that. For example, Petitioner’s request that the Court order county election boards “to provide ballot drop[-]boxes,” Pet. Request for Relief ¶ d, requires invalidation of the requirement in Act 77 that voters return their absentee or mail-in ballots to the office of the county board of election “by mail” or “in person,” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.16, 3150.16. Moreover, Petitioner’s request that county election officials “accept[] ballots returned to a drop-box by close of polls on Election Day,” Pet. Request for Relief ¶ d, requires invalidation of the requirement in section 8 of Act 77 that absentee and mail-in ballots “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,” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.16, 3150.16 (emphasis added).

45. But Petitioner has not asked the Court to invalidate the universal mail-in voting scheme created by Act in its entirety. To the contrary, Petitioner asks the Court to retain universal mail-in voting subject to the partial invalidations of Act 77 it seeks. Pet. Request for Relief ¶ d.

46. Petitioner’s request for partial invalidation of Act 77’s universal non-excuse mail-in voting regime violates Act 77’s non-severability clause. *See* Act 77 § 11.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

E. The Court Lacks Jurisdiction Because Petitioner Failed to Join Indispensable Parties, Pa. R.C.P. 1028(a)(1)

47. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

48. “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 and emphasis added); *see also City of Phila. v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003).

49. “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); *accord CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 375 (Pa. 1994).

50. The Supreme Court has articulated four questions “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).

51. Petitioner’s claims bear directly on—that is, they are directly “related” to, “essential” to, and “interlocked” with—the county boards of elections’ fundamental rights and interests. County boards of elections have clear and crucial “right[s] and interest[s]” related to Petitioner’s claims whose consideration is “essential to the merits of the case” and the administration of justice. *DeCoatsworth*, 639 A.2d at 797. Under Pennsylvania law, county boards are responsible for administering virtually all aspects of the primary and general elections. *See* 25 P.S. § 2641(a) (“There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county[.]”). Indeed, county boards of elections, rather than the Secretary of State, are responsible to mail out, receive, count, and verify absentee

and mail-in ballots. *See, e.g.*, 25 P.S. §§ 3146.5, 3146.6(a), 3146.6(c), 3146.8(g)(3), 3150.15, 3150.16(a), 3150.16(c).

52. Petitioner’s own allegations leave no doubt that Petitioner seeks “redress” that would impose obligations on county boards of elections and, thus, that the boards are indispensable. *Sprague v. Casey*, 550 A.2d 184, 189 (Pa. 1988) (“A party is indispensable when his or her rights are so connected to the claims of the litigants that no decree can be made without impairing those rights.”).

53. Petitioner’s prayer for relief would require each county board of election “to provide ballot dropboxes” and to accept ballots returned to a drop-box by close of polls on Election Day. Pet. Request for Relief ¶ d; *but see* 25 P.S. §§ 3146.6, 3150.16 (absentee or 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” (emphasis added)).

54. In addition, Petitioner seeks to impose restrictions and guidelines on whether and how county boards of election may seek to consolidate polling places—even absent any statutory authority permitting same.

55. County boards of elections “have a right or interest related to [Petitioner’s claims]” insofar as Petitioner alleges that at least some county boards should accept and process ballots delivered by third parties and ballots received after the received-by deadline. *DeCoatsworth*, 639 A.2d at 797 (citation omitted).

56. The county boards alone are *specifically* required to enforce the very election laws that Petitioner challenges, and they would be tasked with carrying out any relief ordered by the Court.

57. The county boards' rights or interests are "essential to the merits of the issue" because Petitioner's requested relief would fundamentally and immediately alter how the county boards administer the upcoming elections.

58. Justice cannot "be afforded without violating the due process rights of" the county boards because these boards deserve an opportunity to defend themselves and, if necessary, to have a voice in whatever relief the Court orders.

59. In a similar challenge to the received-by deadline, the Commonwealth Court held that the petitioners' failure to join the county boards of elections deprived the court of jurisdiction. *See Crossey v. Boockvar*, No. 266 MD 2020 at 8–9 (Pa. Commw. Ct. May 28, 2020) (Leavitt, J.) (attached as Exhibit A).

60. The county boards of elections are quintessential indispensable parties. The Court should therefore dismiss the Petition for failure to join the county boards of elections.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court

sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

F. Petitioner Fails to State a Claim for Relief Under the Pennsylvania Constitution, Pa. R.C.P. 1028(a)(4)

61. Republican Committee Respondents hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

62. If the Court chooses to reach the substantive merits of the case, the Petition still should be dismissed.

63. “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for we presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” *DePaul v. Commonwealth*, 969 A.2d 536, 545 (Pa. 2009) (citation omitted). This presumption of constitutionality is “strong.” *Id.*

64. Petitioner cannot carry the heavy burden to prove that the Election Code—or any other statute which has not yet been enacted—violates the Pennsylvania Constitution as to any of their claims.

1. Petitioner fails to state a claim for relief under the Free and Equal Elections Clause.

65. The Free and Equal Elections Clause provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

66. This Court has long held that “[t]he power to regulate elections is legislative.” *Winston*, 91 A. at 522. Indeed, “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Id.*

67. For that reason, such laws “should never be stricken down by the courts unless in plain violation of the fundamental law.” *Id.* This Court “cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy.” *Id.* at 525. Those questions are “for the Legislature and not for the courts,” and if some restrictions are “onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to amend.” *Id.*

68. This Court will uphold an election-administration measure under that definition where: (1) “[i]t denies no qualified elector the right to vote”; (2) “it treats all voters alike”; (3) the primaries held under it are open and public to all those who are entitled to vote and take the trouble to exercise the right of franchise; and (4) “the inconveniences if any bear upon all in the same way under similar circumstances.” *Id.*; accord *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018).

69. Petitioner’s Free and Equal Elections Clause claims fail under *Winston* because the Election Code does not deny a qualified elector the right to vote. *Winston*, 91 A. at 523. It treats all voters alike. *Id.* The General Election is scheduled to be open to all those who are entitled to vote and “take the trouble to exercise the right of franchise.” *Id.* And “the inconveniences if any bear upon all in the same way under similar circumstances.” *Id.*

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

2. Petitioner fails to state a claim for relief under the Equal Protection Guarantees.

70. Article I, Section 1 provides: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

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

72. Although Petitioner discusses whether strict scrutiny, intermediate scrutiny, or rational basis should apply, Pet. ¶¶ 164–69, the Court has eschewed such categorization for election measures: “Although this Court has acknowledged that the right to vote is fundamental,” “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield v. Cortes*, 110 A.3d 155, 176–77 (Pa. 2015).

73. But the discussion about levels of scrutiny is nonsensical here. There is no statute to review. Petitioner’s complaint about the consolidation of polling places that occurred during the primary election. But that consolidation was performed pursuant to a statute that even Petitioner acknowledges does not apply to the General Election.

74. The Election Code as written is reasonable and non-discriminatory that ensures Pennsylvania elections will proceed in an orderly and efficient manner. It applies equally to all voters.

WHEREFORE, Intervenor-Respondents Donald J. Trump for President, Inc., the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

Dated: July 20, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

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Committee*

**Pro hac vice application forthcoming*

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

v. :

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.

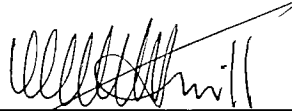
The Secretary contends that the Petition's accusations against the county boards of elections makes them indispensable parties. She further contends that this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without being allowed to defend. Without 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 :

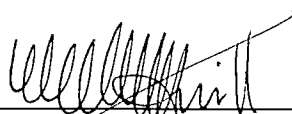
v. :

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

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH OF
PENNSYLVANIA AND
JESSICA MATHIS, DIRECTOR OF
THE BUREAU OF ELECTION
SERVICES AND NOTARIES,

Respondents.

Case No. 364 MD 2020

PROPOSED ORDER

AND NOW, this ___ day of _____, 2020, upon consideration of the Preliminary Objections filed by the Republican Party of Pennsylvania, the Republican National Committee, the National Republican Congressional Committee, and Donald J. Trump for President, Inc., it is hereby ORDERED, ADJUDGED, AND DECREED that the Preliminary Objections are SUSTAINED. The Petition for Review is hereby dismissed with prejudice.

BY THE COURT:

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