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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 CASE<sup>1</sup>**

No one disputes that the 2020 Pennsylvania primary election was

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<sup>1</sup> 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[.]”).<sup>2</sup>

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

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<sup>2</sup> *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” by
  - (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.<sup>3</sup>

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

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<sup>3</sup> 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).<sup>4</sup>

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<sup>4</sup> 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?

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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 immunity<sup>5</sup> 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.

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<sup>5</sup> 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).<sup>6</sup>

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<sup>6</sup> 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,<sup>7</sup> 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.

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

<sup>7</sup> 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,<sup>8</sup> 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

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<sup>8</sup> 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 Petitioner<sup>9</sup>; (b) “each *county board of election* [to] give adequate notice to voters of any change in polling place

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<sup>9</sup> 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.”<sup>10</sup> *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,

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<sup>10</sup> 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,

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Dated: August 13, 2020

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**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