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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 717 MD 2018

CASSANDRA ADAMS JONES, *et al.*,

Petitioners,

v.

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

Respondents.

PETITIONERS' BRIEF IN OPPOSITION TO THE PRELIMINARY OBJECTIONS OF ALL RESPONDENTS

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INTRODUCTION

In election after election, thousands of Pennsylvania voters cannot exercise their constitutional right to vote because the Commonwealth's antiquated absentee voting system imposes an unreasonably early deadline for returning their ballots. Pennsylvania's deadline is the earliest in the country. Even voters who comply with every other deadline for registering to vote and requesting an absentee ballot often receive their ballot too late to return it, through no fault of their own. Pennsylvania law is clear that Respondents are responsible for fixing this. But instead of fixing the problem, they have raised a myriad of preliminary objections, all of which lack merit and should be overruled.

Voting is the "most sacred privilege of citizenship." *In re Absentee Ballots Case of 1967 Gen. Election*, 245 A.2d 258, 261 (Pa. 1968). To ensure that eligible citizens can exercise this privilege, the Pennsylvania Constitution requires the Legislature to create a process so that voters who are absent from their districts on Election Day can cast their ballot. The system is "a salutary feature in our democratic processes," which "assures . . . participation in the selection of those who are to guide the destiny of the community, state and nation, even though illness or pressing business might" prevent a voter from appearing at the polls. *Id.* Petitioners have filed this lawsuit to eliminate a constraint on that process that unconstitutionally restricts their right to vote.

It is a matter of public record that in each major election, Pennsylvania's compressed timelines for requesting, mailing, returning, and counting absentee ballots disenfranchise thousands of eligible voters. Most of these disenfranchised voters never learn that their vote did not count.[1] Petition for Review (Pet.) ¶ 46. As set forth extensively in the Petition for Review, this problem has persisted for over a decade, and post-election data that became public following the filing of the Petition confirm that it continued in the November 2018 midterm election.[2] Meanwhile, Respondents, the actors charged in the first instance with remedying these state and federal constitutional violations, have been put on notice of these recurrent problems with Pennsylvania's absentee voting regime but have failed to remedy the situation.

On November 13, 2018, nine disenfranchised absentee voters and the ACLU-PA (collectively, "Petitioners") brought this case to vindicate their fundamental right to vote. Petitioners seek permanent relief from the current absentee ballot deadline, which violates Petitioners' and other current and future

[1] Jonathan Lai, *Pa.'s Absentee-Ballot Problem: Votes Come in Late Because of Tight Deadlines*, Phila. Inquirer (Aug. 8, 2018), https://www.philly.com/philly/news/politics/pennsylvania-absentee-ballot-voting-deadline-missed-uncounted-20180808.html.

[2] Jonathan Lai, *Thousands of Absentee Ballots Were Rejected as Record Turnout Encountered Pa.'s Tight Deadlines*, Phila. Inquirer (Jan. 21, 2019), https://www.philly.com/politics/pa-absentee-ballot-deadlines-rejected-midterm-election-20190118.html ("In Bucks County, 777 domestic civilian absentee ballots arrived after the deadline and were not counted. There were 935 in Chester County; 636 in Delaware County; 1,327 in Montgomery County; and more than 1,000 in the city, where officials stopped counting after a while.").

absentee voters' right to vote under the Pennsylvania Constitution's Equal Protection Clause, Free and Equal Clause, and Absentee Voting Clause, and the First and Fourteenth Amendments of the U.S. Constitution. *See* Pet. ¶¶ 73-106. The individual Petitioners allege that they timely mailed absentee ballot applications for the November 2018 elections, but received their absentee ballots too late to return them by the Friday 5 p.m. deadline. And the ACLU-PA—a nonpartisan organization dedicated to upholding individual liberties through advocacy, education, and litigation—has diverted, and will continue to divert, significant organizational resources to educate, guide, and assist these and other absentee voters who are at risk of disenfranchisement because of the early deadline.

The case is now before this Honorable Court on Preliminary Objections by Respondent Scarnati, Respondent Turzai, and the Executive Respondents. Petitioners respectfully request that the Court overrule each of their Preliminary Objections.

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Whether ACLU-PA has standing because the unconstitutional absentee voting scheme has forced ACLU-PA to divert its resources.

   Suggested Answer: Yes

2. Whether individual Petitioners have standing because the unconstitutional absentee voting deadline has disenfranchised them and puts them at serious risk of future disenfranchisement.

Suggested Answer: Yes

3. Whether Petitioners' "as applied" constitutional challenges should proceed because the current unconstitutional absentee voting regime disenfranchised each individual Petitioner and renders them at risk of future disenfranchisement.

   Suggested Answer: Yes

4. Whether counties are necessary parties when they have no role in any requested remedy.

   Suggested Answer: No

5. Whether Acting Secretary Boockvar, Governor Wolf, and Deputy Secretary Marks are proper parties to the lawsuit because they are directly responsible for administration of the current unconstitutional absentee voting scheme and necessarily will be involved in enacting and implementing any remedy.

   Suggested Answer: Yes

6. Whether Article VII, Section 14(a) imposes an obligation on the Executive Respondents because they are directly responsible for administering the current unconstitutional absentee voting scheme and necessarily will be involved in enacting and implementing any remedy.

   Suggested Answer: Yes

7. Whether Petitioners' "facial" constitutional challenges should proceed where the current unconstitutional absentee voting scheme disenfranchised each individual Petitioner and thousands of other voters and renders them at risk of future disenfranchisement.

   Suggested Answer: Yes

8. Whether Petitioners' Equal Protection claim should proceed where the current absentee voting scheme unconstitutionally burdens their fundamental right to vote.

   Suggested Answer: Yes

9. If the Court strikes down the current deadline for returning absentee ballots and Respondents failed to enact a new deadline, whether the doctrines of separation of powers and sovereign immunity bar the Court from ordering a remedy.

Suggested Answer: No

STATEMENT OF THE CASE

I. Form of the Action

Petitioners seek a declaration that Pennsylvania's absentee ballot deadline, 25 P.S. § 3146.6(a), violates their right to vote under the Pennsylvania and U.S. Constitutions (as set forth in detail in the Petition for Review). Accordingly, Petitioners ask this Court to grant injunctive relief barring the use of the current absentee ballot deadline in future elections. Petitioners request that the Legislature receive an opportunity to enact a constitutionally compliant remedy. Petitioners ask the Court to establish a new deadline only if (and when) the Legislature fails to take action to remedy the currently unconstitutional absentee voting scheme in response to an Order of this Court.

II. Procedural History

Petitioners filed this action on November 13, 2018. On January 14 and 16, 2019, Respondents filed their Preliminary Objections asserting a variety of objections to the relief Petitioners seek. This Brief responds to all three Preliminary Objections Briefs filed by Respondents.

III. Statement of the Facts

The facts in this case are set forth in detail in the Petition.

Petitioners draw the Court's attention to certain key facts:

- Pennsylvania has the earliest absentee ballot receipt deadline of any state in the country. Pet. ¶ 3. For an absentee ballot to count, the county board of elections must receive it by 5:00 p.m. on the Friday before the election—four days before Election Day. 25 P.S. § 3146.8(a).

- In the November 2018 midterm election, each of the nine individual Petitioners was denied their right to vote because of this statutory scheme. Pet. ¶¶ 51-60. The individual Petitioners all timely requested absentee applications. Four did not receive their ballots until after the statutory deadline, when it was too late to return their ballots. Five received their absentee ballots prior to the statutory deadline (in some cases, on the Friday before Election Day) but still too late for them to return the ballot by the deadline. *See id.* ¶¶ 52, 53, 54, 56, 57, 58, 59. These Petitioners expect that they will have to cast absentee ballots in future elections because they will still be in school or they may have to travel for work-related reasons. *Id*.

- In 2018, the ACLU-PA's efforts to protect constitutional voting rights included assisting four out-of-state Pennsylvania students, who did not receive timely absentee ballots, to exercise their right to vote by obtaining court orders. The ACLU-PA also spoke with and advised numerous other voters who complained about receiving absentee ballots too near or after the statutory deadline. The ACLU-PA will continue its election protection-related work in the future and anticipates that, absent a constitutionally compliant absentee voting process, it will have to continue diverting resources to assisting, educating, and advocating on behalf of disenfranchised Pennsylvania absentee voters. *Id.* ¶¶ 61-63.

- The disenfranchisement of absentee voters has been a problem in Pennsylvania for at least a decade. In 2014, approximately 2,030 absentee ballots were rejected in Pennsylvania because they missed the statutory deadline, and 2,162 were rejected for the same reason in 2010. These problems have only gotten worse with time due to slower delivery standards employed by the U.S. Postal Service. The current absentee ballot mailing and return timelines therefore will continue to result in

widespread disenfranchisement of absentee voters absent a change to the current statutory scheme. *Id.* ¶¶ 42-50.

SUMMARY OF ARGUMENT

The ACLU-PA has standing because it has diverted significant organizational resources to educating, advocating, and litigating on behalf of disenfranchised absentee voters and it expects to divert resources in future elections. The nine individual voters also have standing because they were disenfranchised by the statutory absentee scheme that Respondents—sued in their official capacities—are responsible for overseeing, implementing, and remedying. And their as-applied claims are ripe because they will likely have to vote absentee again and are at risk of being disenfranchised in future elections.

Petitioners have also sued the right parties. The Pennsylvania Constitution requires the Legislature to provide for absentee voting. Pa. Const. art. VII, § 14(a). Thus, the 67 local counties and election officials are not necessary parties because Petitioners' claims turn on the Pennsylvania Legislature's statutory scheme and counties would play no role in enacting a remedy if the Court declares the current statute unconstitutional. In addition, the Governor, Acting Secretary, and Deputy Secretary (collectively, "Executive Respondents") are proper parties to the lawsuit because they oversee critical aspects of the election process, such as directly participating in potential absentee voting legislation, regulating elections, and supervising local actors with respect to implementing the absentee ballot process.

The Executive Respondents cannot be dismissed from Count III because they have responsibilities in implementing and enforcing any new absentee ballot deadlines.

Petitioners have brought legitimate Equal Protection claims. Their facial constitutional challenge satisfies the applicable legal standard because they have shown that a substantial number of would-be voters across Pennsylvania have been and will continue to be disenfranchised because of the burdensome absentee ballot deadline. Petitioners' challenge to the absentee ballot return deadline accords with precedent permitting challenges to facially neutral laws where, as here, they offend Equal Protection guarantees of the Pennsylvania Constitution by burdening a fundamental right.

Finally, the relief sought in paragraphs (c) through (h) of the Petition is not barred by separation-of-powers and sovereign-immunity doctrines because it contemplates that the General Assembly will obey an Order of this Court directing it to comply with its affirmative duty to enact a constitutionally compliant absentee deadline in the first instance. Only if the Legislature fails to do so does the Petition suggest that this Court implement a remedy on its own accord.

ARGUMENT

I. Petitioner ACLU-PA Has Standing

ACLU-PA has standing to sue in its own right. ACLU-PA is "concerned with protecting the right to vote of Pennsylvanians and maximize their

opportunities to exercise that right." *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988, at *7 (Pa. Commw. Ct. Jan. 17, 2014). Pennsylvania's unreasonably compressed deadline has forced ACLU-PA "to divert scarce resources," *id.*, from its core mission of protecting constitutional rights through various means including advocacy, education, and litigation, to assist individual absentee voters at risk of disenfranchisement by, *inter alia*, educating them about the early deadline, taking and returning their phone calls, and calling boards of elections on their behalf. *See* Pet. ¶¶ 61-63. ACLU-PA anticipates the current, unconstitutional absentee deadline will force it to expend additional resources to assist absentee voters vindicate their right to vote in forthcoming elections. *Id.* ¶ 64.

"Th[at] loss of resources is a direct harm sufficient for standing." *Applewhite*, 2014 WL 184988, at *7 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009).[3] This Court has routinely recognized that when a corporate person such as a nonprofit organization has sustained injury to itself, it has standing. *See, e.g.*,

[3] Pennsylvania courts "tak[e] guidance from federal interpretation of standing principles." *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 646 A.2d 689, 691 (Pa. Commw. Ct. 2014). Federal principles are well-settled: an organization has standing to sue in its own right when the unlawful effects of government policy "perceptibly impair" its ability to "provide services." *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Washington v. Dep't of Pub. Welfare, 71 A.3d 1070, 1083-84 (Pa. Commw. Ct. 2013) (en banc), *rev'd on other grounds*, 188 A.3d 1135 (Pa. 2018); *Friends of the Atglen-Susquehanna Trail Inc. v. Pa. PUC*, 717 A.2d 581, 585 (Pa. Commw. Ct. 1998) (en banc); *Pittsburgh Trust for Cultural Res. v. Zoning Bd. of Adjustments*, 604 A.2d 298, 304 (Pa. Commw. Ct. 1992).

The cases Respondents cite, Scarnati Br. at 15, are not to the contrary. Without exception, they involve challenges solely to the State's reapportionment plans. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) (challenging congressional redistricting plan); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (same); *Albert v. 2001 Legis. Reapportionment Comm'n*, 790 A.2d 989, 994-95 (Pa. 2002). In redistricting cases, Pennsylvania courts deny standing to "entit[ies] not authorized . . . to vote," because the *specific* interests implicated in "challenging an apportionment scheme are 'personal and individual.'" *Albert*, 790 A.2d at 995 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964)).

Those holdings have no bearing on vote-denial or ballot-access cases. Redistricting cases involve the rights of voters in a particular district to have their votes carry the relative weight that they would carry in another district. *See League of Women Voters*, 178 A.3d at 814 ("[A] diluted vote is not an equal vote."); *see also Albert*, 790 A.2d at 995. Gerrymandering dilutes the ability of

voters in a district "to translate" ballots "into representation." *League of Women Voters*, 178 A.3d at 814.[4] That principle has no bearing where a state law impedes voters' ability to cast ballots and an organization committed to protecting voting rights is required to expend its limited resources to assist individuals who are at risk of disenfranchisement because of a statutory restriction. *Applewhite*, 2014 WL 184988, at *7; *see also id.* at *18 (finding "[b]oth the [League of Women Voters] and NAACP . . . have a stake in the outcome and will be directly affected by" implementation of voting ID law).

II. Individual Voter Petitioners Have Standing

Executive Respondents contend that the nine individual petitioners do not have standing because they lack "any direct, immediate interest in Executive Respondents' actions." Exec. Br. at 20.[5] This objection should be overruled because Respondents apply an incorrect legal standard that improperly incorporates Executive Respondents' direct interactions with Petitioners into the

[4] Respondents cite the Commonwealth Court's order in *League of Women Voters* dismissing that organization as a petitioner. Turzai Br. at 13 (citing 261 MD 2017 (Pa. Commw. Ct. Nov. 13, 2017)). Further proving petitioners' point, *supra*, the order dismissed League of Women Voters because *Erfer*, 794 A.2d 325, held "that [an] entity not authorized by law to exercised [the] right to vote in [the] Commonwealth lacks standing *to file political gerrymandering claims*." In any event, neither the *League of Women Voters* nor *Erfer* petitioners alleged injury through diversion of resources, the basis for Petitioner ACLU-PA's standing in this case.

[5] The Legislative Respondents do not contest that the individual Petitioners have standing. *See generally* Scarnati Br. & Turzai Br.

test and that misstates the role causation plays in the "direct interest" and "immediate interest" prongs of the standing inquiry.[6]

A petitioner filing suit has standing where he or she "demonstrate[s] aggrievement, by establishing 'a substantial, direct and immediate interest in the outcome of the litigation.'" *Robinson Twp., Washington Cty. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). The "direct interest" and "immediate interest" elements of this test have been defined by the Pennsylvania Supreme Court as follows:

> A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question . . . .

S. Whitehall Twp. Police Serv. v. S. Whitehall Twp., 555 A.2d 793, 795 (1989).

Both this test and the analog cited by the Executive Respondents, Exec. Br. at 18, require that the *"matter" complained of*, as opposed to direct actions taken by the Executive Respondents, directly cause harm to Petitioners. In considering voters' standing in *Applewhite*, for example, this Court considered whether "the Voter ID Law"—not the particular actions of election officials or other

[6] Since the Executive Respondents contest only the "direct" and "immediate interest" prongs of the standing test, this brief does not address the "substantial interest" prong.

Respondents—"may result in disenfranchisement of qualified electors, including Individual Petitioners." *Applewhite*, 2014 WL 184988, at *6. This standard is consistent with those applied by other courts. *See*, *e.g.*, *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 366 (3d Cir. 2014) (observing that "[c]ausation in the context of standing is not the same as proximate causation from tort law" and that defendant's actions need not be the last step in the chain of causation).[7]

In *Applewhite*, this Court found that the individual voters had standing because "under the current statute, Individual Petitioners are unable to exercise their right to vote without obtaining a compliant photo ID." 2014 WL 184988, at *6. Even voters who had obtained identification after the lawsuit had been filed had standing. *Id*. at *6 n.16. Here, the case for standing is similarly strong: all nine individual Petitioners were disenfranchised in the November 2018 election, Exec. Br. at 19, but their ballots could or would have counted if Pennsylvania's absentee ballot deadline was Election Day (or later). And these Petitioners are at risk of being disenfranchised again in future elections if the current absentee ballot return deadline remains in place. *See* Pet. ¶¶ 52-60. In both this case and

[7] It is "standard operating procedure" to bring election-related suits against "officials who administer the state election system" even if they do not directly enforce the statute at issue. *See id.* at 367; *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (rejecting argument by state and secretary of state that county election officials alone could redress alleged injuries caused by state voting law); *Miller v. Brown*, 462 F.3d 312, 318 (4th Cir. 2006) (finding a "causal connection between the plaintiffs' injuries and the law they challenge" conferring standing because "[t]he mere existence" of the law causes injury).

Applewhite, the individual Respondents "would be able to exercise their right to vote but for the statute and Respondents' implementation thereof," creating an injury sufficient to confer standing. 2014 WL 184988, at *60.

III. Petitioners' As-Applied Constitutional Claims Are Ripe

Executive Respondents' objection that Petitioners' as-applied constitutional claims are unripe because they "have alleged no fact to demonstrate that they will be 'disenfranchised' in any future election," Exec. Br. at 30, is directly at odds with the detailed factual allegations and statistical evidence set forth in the Petition establishing that the Commonwealth's absentee ballot deadline creates a systemic problem, causing Petitioners and other voters to be at risk of future disenfranchisement.

"[I]n determining whether a matter is ripe for judicial review, courts generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed." *Twp. of Derry v. Dep't of Labor & Indus.*, 932 A.2d 56, 60 (Pa. 2007) (reversing dismissal of petition seeking declaratory relief). The Petition more than adequately develops the issues, demonstrating that disenfranchisement is ongoing and likely to recur and that the "compressed deadlines" create hardships for eligible absentee electors:

- Between 2009 and the date of the 2018 primary election, more than 300,000 absentee ballots requested from across the Commonwealth were never returned. Pet. ¶ 43. For some elections, tens of thousands of ballots are not returned.

- In the 2014 election, 86% of absentee ballots that were rejected were rejected solely because they were untimely. *Id.* ¶ 46.
- Individual Petitioners in eight different counties timely applied for their absentee ballots for the 2018 general election but received them too late to return them in time to be counted. *Id.* ¶¶ 12-20.
- Petitioners—students and professionals who travel frequently for work—"likely will be voting by absentee ballot in future elections," and "are at substantial risk of being disenfranchised again" absent judicial intervention. *Id.* ¶¶ 8, 52-60.

These detailed allegations reflect that this is not a case where "relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp.*, 83 A.3d at 917 (Pa. 2013). As the Pennsylvania Supreme Court has recognized, "[t]he basic rationale underlying the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" or otherwise "make decisions based on assertions as to hypothetical events that might occur in the future." *Phila. Entm't & Dev. Partners v. City of Phila.*, 937 A.2d 385, 392 (Pa. 2007). None of these concerns is presented by the Petition, which includes granular allegations regarding how the challenged absentee ballot deadlines have disenfranchised Petitioners and other eligible Commonwealth voters and why they will continue to do so. *Compare* Pet. ¶¶ 8, 52-60, *with Phila. Entm't & Dev. Partners* at 392 n.7

(recognizing as-applied challenge requires only "*application* of the [law] to be ripe" (emphasis added)).[8]

Contrary to Executive Respondents' arguments, Exec. Br. at 29, Petitioners seek a declaration that state law, not merely conduct in past elections, is unconstitutional.[9] By focusing exclusively on the Petition's allegations of past disenfranchisement, Executive Respondents miss its gravamen: Petitioners' claims are ripe because they rely on a substantial risk of future disenfranchisement due to the operation of existing law. *See, e.g.*, *Black v. McGuffage*, 209 F. Supp. 2d. 889, 896 (N.D. Ill. 2002) ("Because the [challenged punch card voting system] will more than likely be in . . . upcoming elections in which Plaintiffs will cast votes . . . . Plaintiffs do not have to wait for yet another opportunity for their votes

[8] Petitioners do not seek to remedy merely contingent or developing events. *Compare Texas v. United States*, 523 U.S. 296, 300 (1998) (declaratory judgment action regarding legality of statute permitting appointment of a master or management team as an educational sanction unripe where state had not identified any school district in which application of the statute was foreseen); *Wyatt, V.I., Inc. v. Gov't of the V.I.*, 385 F.3d 801, 806-07 (3d Cir. 2004) (declaratory judgment action regarding legality of binding arbitration agreement where government had sent cease and desist letters but no further regulatory action).

[9] Executive Respondents cite several cases for their argument that "Petitioners may not secure declaratory relief as to past alleged constitutional violations, nor may they secure a future injunction to remedy past conduct." Exec. Br. at 29. However, these cases are inapposite. As Executive Respondents helpfully point out in their parenthetical explanation of *In re Gen. Election 2014 Kauffman*, 111 A.3d 785 (Pa. Commw. Ct. 2015), in these cases, "Petitioners [pled] no facts to indicate that the circumstances that led to the alleged deprivation are likely to reoccur." Exec. Br. at 29. Petitioners here have pled extensive facts indicating the arbitrary disenfranchisement of absentee voters will continue to occur without this Court's intervention.

not to be counted before bringing suit."); *see also Babbitt v. Farm Workers*, 442 U.S. 289, 300 n.12 (1979).

Any alternative is untenable; awaiting judicial review until days before the next election would expose Petitioners, again, to the risk of imminent disenfranchisement. And precedent confirms that Pennsylvania courts engage in post-election adjudication of claims involving citizens' voting rights in appropriate circumstances. *See, e.g.*, *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1226 n.3 (Pa. 2004) ("[W]e deem the issue regarding third-party deliveries of absentee ballots not to be moot since it is an important issue, of general concern beyond this election, which is capable of repetition and of escaping review."); *W. Pa. Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1333 (Pa. 1986) ("Although the 1982 election is over . . . issues [concerning collection of signatures to place candidate on ballot] are highly unlikely to reach the appellate courts during the relatively brief campaign season." (citation omitted)); *see also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) (finding "hardship to would-be voters," where "there is no doubt that the [challenged] statute will be enforced" and "there may not be enough time to reach a decision on the merits before the actual election"); *Miller v.*

Brown, 462 F.3d 312, 319 (4th Cir. 2006) (finding "plaintiffs would suffer undue hardship by waiting until the eve of the election to seek a decision in their case").[10]

IV. The 67 Counties Are Not Necessary Parties Because Petitioners' Claims Turn On Pennsylvania's Statutory Regime, Not Local Actors

Executive Respondents' objection that this case must be dismissed because Petitioners' claims relate to county election officials' responsibilities, making each county a necessary party, Exec. Br. at 24-25, should be overruled. Respondents fail to apply the proper legal standard for determining whether parties are indispensable according to Pa. R. Civ. P. 1032(b).

To ascertain whether a party is indispensable pursuant to Pa. R. Civ. P. 1032(b), "the basic inquiry remains 'whether justice can be done in the absence of a third party.'" *City of Phila. v. Commonwealth*, 838 A.2d 566, 581 (2003) (quoting *Sprague v. Casey*, 550 A.2d 184, 189 (1988)). Four factors guide this determination: (1) whether absent parties have a right or an interest related to the claim, (2) the nature of that right or interest, (3) whether the right or interest is essential to the merits of the issue, and (4) whether there is prejudice to the absent

[10] In the few election cases cited by Executive Respondents, in contrast, the alleged injury was unlikely to recur. *See Hodinka v. Del. Cty.*, 759 F. Supp. 2d 603, 610 (E.D. Pa. 2011) (seizure of campaign literature by county officials pursuant to a particular court order); *Constitution Party of Pa. v. Cortés*, 712 F. Supp. 2d 387 (E.D. Pa. 2010) (challenge to assessment of costs against non-major party candidates based on just two cases, and each time, based on "fraud, bad faith, or similar inappropriate conduct"); *In re Gen. Election 2014 Kauffman*, 111 A.3d 785, 794-95 (Pa. Commw. Ct. 2015) (order granting emergency application for absentee ballot for a single patient of a rehabilitation center).

party or justice can be afforded without violating the due process rights of absent parties. *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981).

This Court addressed this issue in *Banfield v. Cortés*, 922 A.2d 36 (Pa. Commw. Ct. 2007), a case concerning direct recording electronic voting machines ("DREs"). *Id.* at 43-44. The Court overruled a preliminary objection claiming that the case should be dismissed for failure to join the 56 counties operating DREs, concluding that they were not indispensable:

> Here, Electors do not seek redress from the fifty-six counties, and, because the November 2006 election has passed, the fifty-six counties will not be prejudiced by a judgment in favor of Electors. Even absent a request, the Secretary could de-certify a DRE at any time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared for that possibility.

Id. at 44. As in *Banfield*, the counties' participation is not essential to defending the Commonwealth's statutory deadline for returning absentee ballots, since the statute's constitutionality is being defended by, among others, Pennsylvania's primary election officials, Respondents Boockvar and Marks. Moreover, if the Court finds the current statute unconstitutional, counties would play no role in any remedial legislative process, unlike Respondents Turzai, Scarnati, and Wolf. Furthermore, there is no prejudice to the counties, since they must follow Pennsylvania law and are often obliged to adjust their election administration practices to accommodate changes to the Election Code or court decrees. *See, e.g.*, *Applewhite v. Commonwealth*, 2012 WL 4497211, at *7-8 (Pa. Commw. Ct. Oct.

2, 2012) (preliminarily enjoining enforcement of photo identification statute in case without any counties or county officials as parties). Counties do not have an interest essential to the resolution of this case and election officials' due process rights are not implicated, as the Petition does not allege any misconduct by, or seek any relief directed to, any county official.

Executive Respondents cite no precedent undermining the applicability of *Banfield* and instead resort to unsupported argumentation that joining the counties is necessary for the facial constitutional claim because Petitioners "seek to alter the future conduct of the counties," and county election officials receive absentee ballots and enforce state laws allowing voters to cast ballots. Exec. Br. at 25 & n.11. This argument, which even the Legislative Respondents do not advance, boils down to the contention that counties must be joined in any challenge to a statute that impacts county officials' behavior, which would embroil counties in a wide swath of litigation involving the Commonwealth and would be unworkable even if it were not contradicted by precedent.[11]

[11] For example, under the Executive Respondents' theory, if a lawsuit were filed challenging the constitutionality of the Election Code's emergency absentee ballot procedures, it would be necessary to name as respondents thousands of judges of elections across Pennsylvania. *See* 25 P.S. § 3146.6(b) ("An elector who has received an absentee ballot under the emergency application provisions of section 1302.1 . . . shall sign the aforementioned affidavit in any case, which the local judge of elections shall then cause to be inserted in the district register with the elector's permanent registration card."). In addition to lacking any precedential support, this standard would be impracticable.

V. The Executive Respondents Are Proper Parties to This Lawsuit

The Executive Respondents claim they should be dismissed from this lawsuit because they do not carry out any duties connected with the relief sought. Exec. Br. at 20-22. That glosses over critical allegations in the Petition, specifically relating to the Executive Respondents, as Respondent Scarnati recognizes:

> the Petition for Review is replete with allegations that Respondents Wolf, Boockvar and Marks . . . are responsible for the administration, supervision and enforcement of the absentee ballot provisions at issue in this case, and the Petition describes with specificity the ways in which their administration of the law has allegedly harmed the Petitioners. Pet. ¶¶ 22–23, 34, 36-40.

Scarnati Br. at 8.[12] Respondents Wolf, Boockvar, and Marks are discussed in turn.

A. Governor Wolf

The Governor is a proper party to this lawsuit. Not only does he oversee critical aspects of the elections process, he will also need to sign remedial legislation passed by the General Assembly should this Court invalidate the current unconstitutional absentee ballot deadline. Although Executive Respondents claim "the Election Code does not vest any powers or duties of administration or

[12] The Executive Respondents also emphasize that they did not take office until decades after the enactment of the challenged provision. Exec. Br. at 10-11, 20. This argument has no relevance in an official-capacity suit seeking prospective relief, and it would permanently immunize any statute or government action from review once the officials responsible for its adoption leave office. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity [] should be treated as suits against the State.").

enforcement of its provisions in the Office of the Governor," Exec. Br. at 21, this is simply not true. *See* 25 P.S. §§ 3160(b) (issuing commissions to elected officials), 3163 (issuing certificates of election and transmitting election returns), 3165 (issuing commissions), 3166 (enumerating votes and issuing certificates of election). The Governor, by certifying election results and issuing commissions and certifications of election to election winners, plays a substantial role in elections that may turn on the counting of absentee ballots.

Moreover, because the Pennsylvania Constitution mandates legislation setting up a system for absentee voting, Pa. Const. art. VII, § 14, the Governor must sign any remedial bill addressing the absentee ballot deadline. *Id.* art. IV, § 15 ("Every bill which shall have passed both Houses shall be presented to the Governor; if he approves he shall sign it . . . ."). Thus, the essential relief sought in this case, enactment of a new absentee ballot law, requires the Governor's direct participation because a new absentee balloting bill needs his signature to become law. This alone makes him a necessary party for relief. *See Drack v. Tanner*, 172 A.3d 114, 121 (Pa. Commw. Ct. 2017) ("A party is necessary if its presence is needed to resolve the dispute and render complete relief."). The Pennsylvania Supreme Court considered a similar situation last year in a challenge to Pennsylvania's congressional district map. In its order striking the map as unconstitutional, the court ordered the General Assembly *and the Governor* to

attempt to enact legislation providing for a constitutionally compliant map. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282, 284 (Pa. 2018).

B. Acting Secretary Boockvar

Because of her expansive authority related to the regulation of Pennsylvania's elections, Acting Secretary Boockvar is also a necessary party to this litigation. As Acting Secretary of the Commonwealth, Respondent Boockvar is Pennsylvania's Chief Election Official and has numerous responsibilities related to certifying election results, which are affected by the absentee ballot deadline. *See* 25 P.S. §§ 3159-3166, 3168. Indeed, in addition "to prescrib[ing] the form of the absentee ballot application as well as other absentee balloting materials," Exec. Br. at 22, the Acting Secretary must receive election returns from the county boards of election, *id.* § 2621(f), develop a poll worker training program, *id.* § 2621(f.1), and order county boards to conduct recounts and recanvasses, *id.* § 2621(f.2), all of which involve or depend on the counting of absentee ballots.

Additionally, the Acting Secretary "promulgate[s] regulations necessary to establish, implement and administer the SURE system," 25 Pa.C.S. § 1222(f), which directs county boards on how to record absentee ballot applications, mail absentee ballots, process absentee ballot returns, and count absentee ballots. *See* Exhibit 1, Pet. at 56-144 (SURE Manual).

Accordingly, courts routinely find Secretaries of State to be necessary parties to litigation, such as this case, challenging election-related statutes. *See Libertarian Party of Ky. v. Grimes*, 164 F. Supp. 3d 945, 949 (E.D. Ky. 2016) (noting Secretary of State is proper party because she is "empowered with expansive authority to administer Kentucky's election laws") (internal quotations omitted); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335, 1341-42 (N.D. Ga. 2018); *Common Cause Ind. v. Ind. Sec'y of State*, No. 12-cv-1603, 2013 WL 12284648, at *4 (S.D. Ind. Sept. 6, 2013); *Voting for Am. v. Andrade*, 888 F. Supp. 2d 816, 828-32 (S.D. Tex. 2012), *rev'd on other grounds*, *Voting for Am. v. Steen*, 732 F.3d 382 (5th Cir. 2013); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1267-68 (W.D. Wash. 2006).

C. Deputy Secretary Marks

In both his former capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State ("BCEL"), and his new position as Deputy Secretary, Respondent Marks's responsibilities include the supervision and administration of the Commonwealth's elections and electoral process. The BCEL is responsible for registering absentee voters, processing absentee ballots, and counting absentee votes for President and Vice President. 4 Pa. Code §§ 171.11, 171.12, 171.16. This includes "tracking absentee ballots that are processed at the county level." *Republican Party of Pa. v. Cortés*, 218 F. Supp.

3d 396, 411 (E.D. Pa. 2016) (quoting testimony of Respondent Marks). While the Commissioner "carries out some of the specifically-enumerated tasks and duties of the Secretary of the Commonwealth on behalf of the Secretary," Exec. Br. at 22, the Deputy Secretary for Elections and Commissions oversees and supports the BCEL. Accordingly, and because of his general responsibilities supporting Respondent Boockvar, Deputy Secretary Marks is a proper party.

D. The Executive Respondents' Cases Are Inapposite

The cases cited by Executive Respondents where a Court dismissed an executive official from a challenge to a state statute are not on point. In *Pennsylvania School Boards Ass'n v. Commonwealth Ass'n of School Administrators, Teamsters Local 502*, this Court dismissed Governor Ridge with respect to some, but not all, of petitioners' claims because he did not have "any powers or duties with respect to [the statute's] enforcement or administration." 696 A.2d 859, 868 (Pa. Commw. Ct. 1997). Here, by contrast, each Executive Respondent has discrete responsibilities under the Election Code that relate to the counting of absentee ballots. Furthermore, *Pennsylvania School Boards* concerned a statute providing for collective bargaining and arbitration with respect to school administrators, *id*. at 862, and the General Assembly was not required by the Pennsylvania Constitution to enact a legislative remedy, as is the case here. *See id.* at 868.

The other two cases Respondents cite are irrelevant. *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988), involved a civil rights claim brought by a state police employee who alleged she had been unlawfully suspended from work, in which the Court correctly dismissed the Governor and Attorney General. *Id*. at 1197, 1208-09. *Wagaman v. Attorney General*, 872 A.2d 244 (Pa. Commw. Ct. 2005), did not involve any of the executive officials at issue in this case and, in any event, was correctly decided because accepting petitioners' arguments would "result in the Attorney General becoming a party to every action challenging the constitutionality of legislation." *Id*. at 247. That is not an issue in this case.

VI. Count III Asserts Valid Claims Against the Executive Respondents Because They Have Responsibilities in Implementing and Enforcing the Absentee Ballot Deadline

Executive Respondents argue Count III cannot stand against them because the "Pennsylvania Constitutional requirement relating to development of absentee ballots does not vest the Governor with any duty beyond the legislative act of approving or vetoing such legislation." Exec. Br. at 32-33. Yet this argument proves Petitioners' point. The Governor is a proper party with respect to Count III because, as explained above, if this Court strikes down the absentee ballot deadline, the Governor must sign legislation establishing a new, constitutional deadline. *See* Pa. Const. art. IV, § 15; *see also* Section V, supra. The other Executive Respondents are similarly proper parties with respect to Count III

because they each have responsibilities in implementing and enforcing any new absentee ballot deadline. *Id*.

VII. Petitioners Have Adequately Pled Their Facial Constitutional Claims

To mount a facial challenge to the absentee ballot scheme, Petitioners must allege that "a 'substantial number' of its applications are unconstitutional." *Applewhite*, 2014 WL 184988, at *17 (quoting *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1222 n. 35 (Pa. 2009)).[13] Petitioners have more than satisfied their burden by alleging that thousands of would-be voters across Pennsylvania have been disenfranchised, and will continue to be disenfranchised, by overly burdensome absentee ballot deadlines. *See* Pet. ¶ 5 (alleging that "even county election officials who follow the law . . . often cannot give absentee voters a meaningful opportunity to receive, complete, and return their ballot by the Friday deadline"). *See generally Perles v. Cty. Return Bd. of Northumberland Cty.*, 202 A.2d 538, 540 (Pa. 1964) ("The disfranchisement of even one person validly exercising his right to vote is an extremely serious matter."); *In re Absentee Ballots*, 245 A.2d at 262

[13] Citing Third Circuit law, Executive Respondents argue that Petitioners' federal facial constitutional claims fail unless "no set of circumstances exist under which the [statute] would be valid," a test first announced in *United States v. Salerno*, 481 U.S. 739 (1987). Exec. Br. at 27. However, the Pennsylvania Supreme Court has suggested that the "more lenient 'plainly legitimate sweep' standard"—under which the invalid applications of a statute must be "real and substantial" as "judged in relation to the statute's plainly legitimate sweep"—applies to both state and federal constitutional claims in Pennsylvania courts. *See Clifton*, 969 A.2d at 1222 n.36; *id.* at 1223 ("Recently, the [U.S. Supreme] Court seems to have settled on the 'plainly legitimate sweep' standard."); *Commonwealth v. Ickes*, 873 A.2d 698, 702 (Pa. 2005) (characterizing the *Salerno* test as "based on *dicta*").

("The disfranchisement of 5,506 citizens for following a procedure laid down by the election authorities would be unconscionable . . . .").

As described in the Petition, Pennsylvania has the earliest absentee ballot receipt deadline of any state in the country by a significant margin. Forty-seven states accept absentee ballots received on or after Election Day; the two remaining states accept them as late as the day before Election Day. *Id.* ¶ 3. In Pennsylvania, in contrast, "the entire absentee ballot period is so compressed as to make election officials' and voters' responsibilities logistically impossible to fulfill." *Id.* ¶ 10. Courts around the country have recently upheld facial challenges to absentee ballot schemes that mandate procedures that—like Pennsylvania's—will inevitably disenfranchise a significant portion of voters, even if not every voter is affected. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1336-37 (N.D. Ga. 2018) (Georgia statute permitting rejection of absentee ballots based on signature mismatches without sufficient notice nor opportunity to cure violates due process); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222-23 (D.N.H. 2018) (same).[14]

[14] The states' authority to regulate absentee voting, Exec. Br. at 27 n.12, does not permit states to deny or substantially burden absentee voting rights created by state law. *See, e.g.*, *Am. Party of Texas v. White*, 415 U.S. 767, 795 (1974) ("[P]ermitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters . . . is an arbitrary discrimination violative of the Equal Protection Clause."); *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010) ("[W]here a state has authorized the use of absentee ballots, any restriction it imposes on the use of those absentee ballots which has the effect of severely burdening a group of voters must be narrowly tailored to further a compelling state interest."); *Zessar v. Helander*,

Executive Respondents' suggestion that the law is facially valid because many absentee electors *do* receive their ballot in time to vote turns the "legitimate sweep" standard on its head. Exec. Br. at 28. That is emphatically not the law. To state a valid claim, Petitioners need allege only that the law "disenfranchise[s] valid voters"—not *every single* voter. *Applewhite*, 2014 WL 184988, at *18. Indeed, Executive Respondents' argument that some electors needed to file emergency lawsuits to have their votes counted only underscores the statute's failure to meet the "legitimate sweep" test.[15] *See* Exec. Br. at 28 n.13. In any event, when evaluating a facial challenge, this Court need not "go beyond the statute's facial requirements" and consider hypothetical voters who were not adversely affected by the statute's operation. *Martin*, 341 F. Supp. 2d at 1337 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). By its clear terms, Pennsylvania's absentee ballot deadline—a national outlier—is facially invalid.

No. 05-C-1917, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006) ("[O]nce [states] create such a regime, they must administer it in accordance with the Constitution.").

[15] That test provides that, to succeed in a facial attack, the plaintiff must establish "that the statute lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring)).

VIII. Petitioners Have Stated a Valid Equal Protection Claim Because Facially Neutral Classifications Offend Equal Protection Guarantees When They Burden or Deprive Some Citizens of a Fundamental Right

Respondents' preliminary objections that the absentee ballot statute cannot raise equal protection concerns under the Pennsylvania Constitution because the deadline is "neutral on its face" and Petitioners' "individualized circumstances" are to blame for their disenfranchisement, Exec. Br. at 31-32, are deeply flawed and should be overruled. These objections reflect a misunderstanding of equal protection law and disregard the foundational legal principle that the right to vote is fundamental. The Equal Protection question at issue is not whether a particular distinction is neutral, but whether the different outcomes caused by the statute are justified by a sufficient governmental interest. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (noting that the Equal Protection Clause "den[ies] States the power to legislate that different treatment be accorded to persons . . . on the basis of criteria wholly unrelated to the objective of that statute").

Under both Pennsylvania and federal law,[16] facially neutral statutes are subject to strict scrutiny where their strictures permit some individuals but not others to exercise their constitutional rights. *See, e.g.*, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 458 (Pa. 2017) (strict scrutiny is applied where a

[16] *Kramer v. Workers' Comp. Appeal Bd. (Rite Aid Corp.)*, 883 A.2d 518, 532 (Pa. 2005) ("In evaluating equal protection claims under the Pennsylvania Constitution, this Court has employed the same standards applicable to federal equal protection claims . . . .").

fundamental right has been burdened) (quoting *James v. SEPTA*, 477 A.2d 1302, 1305-06 (Pa. 1984)); *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995) (observing "classifications which implicate a 'suspect' class *or a fundamental right* . . . [are] strictly construed in light of a 'compelling' government purpose") (quoting *Smith v. City of Phila.*, 516 A.2d 306, 311 (Pa. 1986)). The right to vote is one such fundamental right under both the U.S. and Pennsylvania Constitutions that can trigger the application of strict scrutiny. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d at 804; *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (observing, in Equal Protection case, that "any restrictions on that right strike at the heart of representative government"); *United States v. Mosley*, 238 U.S. 383, 386 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).[17]

Courts have repeatedly held that an Equal Protection challenge can be brought against a system in which some persons are severely burdened or deprived of fundamental or important rights, even if the statutory regime does not itself include a suspect classification. *See, e.g.*, *William Penn Sch. Dist.*, 170 A.3d at 459 (overruling preliminary objection to Equal Protection challenge to public school funding system); *see also Banfield*, 922 A.2d at 48-49 (holding that

[17] Petitioners' equal protection claim triggers strict scrutiny because the absentee ballot deadline disenfranchises voters, imposing a "severe" burden on those affected; even if the Court deems this burden to be "modest," the deadline cannot be justified because the State has a weak regulatory interest in imposing such an unnecessarily early deadline. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

variances in voting machine technology by county may be grounds for Equal Protection claim). Indeed, courts routinely strike down redistricting plans, *see, e.g.*, *Reynolds*, 377 U.S. at 583-84, and other facially neutral laws on Equal Protection grounds where they burden the fundamental right to vote. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104 (2000) (noting that "the right to vote . . . is fundamental"); *Charfauros v. Bd. of Elections*, 249 F.3d 941, 952 (9th Cir. 2001) (same); *Applewhite*, 2014 WL 184988, at *18-19 ("In the majority of its applications, the Voter ID Law renders Pennsylvania's fundamental right to vote so difficult to exercise as to cause *de facto* disenfranchisement.").

In support of the sweeping proposition that facially neutral statutes are beyond the purview of equal protection, Executive Respondents point to only one case, *Working Families Party v. Commonwealth*, 169 A.3d 1247 (Pa. Commw. Ct. 2017) (en banc). That case, however, undermines Respondents' argument; the *Working Families* court upheld Pennsylvania's anti-fusion laws against an Equal Protection challenge precisely because it concluded that the classification did *not* affect the fundamental right to vote; the laws at issue merely prohibited political parties and bodies from fusing their candidate with another organization's candidate. *See id.* at 1257-58. By contrast, the challenged provisions here allow some absentee voters' ballots to be counted, but prevents other voters' ballots from being counted, thereby impermissibly burdening their fundamental right to vote.

See, e.g., *Doe*, 746 F. Supp. 2d at 681 (holding "where a state has authorized the use of absentee ballots, any restriction it imposes on the use of those absentee ballots which has the effect of severely burdening a group of voters must be narrowly tailored"); *Banfield*, 922 A.2d at 48 n.13 (finding that a sound "equal protection claim is based on the disparate effect of the Secretary's certification process" for voting machines).

IX. Paragraphs (c) Through (h) of Petitioners' Prayer Relief Are Not Barred by the Doctrines of Separation of Powers or Sovereign Immunity

Respondents assert that this Court lacks the authority to order the relief requested in Paragraphs (c) through (h) of Petitioners' Prayer for Relief. Exec. Br. at 23-24; Scarnati Br. at 10-13; Turzai Br. at 5-11. This argument fails because it (1) misreads Petitioners' Prayer for Relief, which plainly contemplates the General Assembly remedying the violation pursuant to a holding that the current statute is unconstitutional; (2) overlooks precedent confirming the Pennsylvania judiciary's power to order injunctive relief if it strikes down a statute and the General Assembly fails to fulfill its constitutional obligation to enact a remedy; and (3) ignores the fact that Petitioners also have brought a federal claim.

A. Petitioners' Requested Affirmative Injunctive Relief Is Conditioned Upon a Failure of the General Assembly to Enact a Constitutionally Compliant Absentee Ballot Scheme

Respondents' request that Paragraphs (c) through (h) of Petitioners' Prayer for Relief be stricken is founded upon the flawed premise that Petitioners are asking this Court to usurp the role of the General Assembly and "assume legislative duties" to remedy the constitutional violation in the first instance. *See* Turzai Br. at 10. To the contrary, Paragraph (c) explicitly conditions the request for affirmative relief on the General Assembly's failure to act:

> [e]stablish a new absentee ballot return deadline that complies with the Pennsylvania and United States Constitutions, *if the Pennsylvania legislature fails to enact a constitutionally compliant absentee ballot return deadline in a timely manner*.

Pet., Prayer for Relief ¶ (c) (emphasis added). The requests in Paragraphs (d) through (h) are all founded upon the same premise that judicial action is necessary only if the General Assembly fails to enact a constitutionally compliant remedy. *See* Turzai Br. at 10-11 (noting Paragraphs (d) through (h) are "directly related to and derived from . . . paragraph (c)").[18]

Respondents' assertion that Petitioners' Prayer for Relief "direct[s] the Legislature *how* to fix any alleged constitutional defect," and that "'[e]stablish[ing] a new ballot return deadline' is but one of many possible approaches," *see*, *e.g.*,

[18] Because any actions taken by Executive Respondents will implement a remedy enacted by the Pennsylvania Legislature, sovereign immunity does not apply here.

Turzai Br. at 10, misses the mark. Petitioners seek the relief set forth in paragraphs (c) through (h) solely in the event that the General Assembly fails to take an approach that remedies the constitutional violations.

B. This Court Has the Requisite Authority and Responsibility to Invalidate Unconstitutional Legislative Acts and to Order Remedies When Required by Legislative Inaction

Petitioners do not contest that the responsibility to enact legislation to remedy a constitutional violation lies with the Pennsylvania General Assembly in the first instance.[19] *See, e.g.*, *First Citizens Nat'l Bank v. Sherwood*, 879 A.2d 178, 182 (Pa. 2005). But once a court has invalidated a statute and the General Assembly is unable or willing to replace it, the court "possesses broad authority to craft meaningful remedies when required." *League of Women Voters*, 178 A.3d at 822. Here, Petitioners seek an injunction that requires Respondents to comply with their constitutional obligations by providing a manner in which qualified electors may vote by absentee ballot. *See* Pa. Const. art. VII, § 14. Sovereign immunity does not bar suits seeking to require government officials to comply with the Pennsylvania Constitution. *See, e.g.*, *Twps. of Springdale & Wilkins v. Kane*, 312

[19] The legislative Respondents perhaps imply that Petitioners should have named the General Assembly, although they never filed a preliminary objection that Petitioners failed to name a necessary party. *See* Scarnati Br. at 11. Nor could they, because Respondents Turzai and Scarnati in their official capacities as Speaker of the House and President Pro Tempore of the Senate are capable of representing the interests of the Legislature as a whole. *Cf. City of Phila. v. Commonwealth*, 838 A.2d 566, 584 (2003).

A.2d 611, 617 (Pa. Commw. Ct. 1973) (finding that "plaintiffs are not seeking some affirmative action on the part of State officials required by statute, but rather that the affirmative action sought is mandated by the constitutional provision").

As President Pro Tempore Scarnati has acknowledged, Scarnati Br. at 10 (citing *League of Women Voters*, 178 A.3d at 737), Pennsylvania courts have the power to order affirmative injunctive relief to remedy a constitutional violation if the General Assembly fails to remedy the situation. Contrary to one Respondent's assertion, Turzai Br. at 6, this authority extends to election law. *See, e.g.*, *League of Women Voters*, 178 A.3d at 824 (acknowledging "the authority of the state judiciary to formulate a valid redistricting plan"); *see also Butcher v. Bloom*, 216 A.2d 457, 458-59 (Pa. 1966) (asserting court's authority to take up reapportionment if the General Assembly did not enact a redistricting plan by a certain date).

When a Pennsylvania court strikes down a statute, it often stays its decision to give the General Assembly time to enact a new law while retaining jurisdiction to enact affirmative remedies should the legislature fail to fulfill its obligation. Turzai Br. at 9 ("[W]hen a court invalidates a law, it must grant the Legislature sufficient time to consider and enact remedial legislation."); *see also Robinson Twp.*, 147 A.3d at 583 (staying its decision for 180 days); *Commonwealth v. Neiman*, 84 A.3d 603, 616 (Pa. 2013); *City of Phila. v. Commonwealth*, 838 A.2d

566, 594 (Pa. 2003). Where the General Assembly fails to take action sufficient to cure the constitutional violation, courts reserve the right to "proceed with the task of fashioning such affirmative relief as would be necessary" to cure the violation, for example by crafting a new redistricting plan. *Butcher*, 216 A.2d at 459; *League of Women Voters*, 178 A.3d at 825.

Outside of the redistricting context, courts have issued orders compelling the General Assembly and counties to adopt specific legislation and other measures providing funding for judicial systems to cure constitutional violations. *See, e.g.*, *Beckert v. Warren*, 439 A.2d 638, 651 (Pa. 1981) (ordering Bucks County Commissioners to increase funding for Court of Common Pleas); *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 199-200 (Pa. 1971) (similar result for Philadelphia).[20]

None of the cases cited by Respondents, all of which are distinguishable on factual grounds, support a contrary conclusion. Respondents do not cite a single case in which a court struck portions of a petitioner's prayer for relief at the preliminary objection stage. Instead, courts have frequently emphasized that it is not their role to "rewrite" a statute when they reject a party's proffered statutory interpretation. *See*, *e.g.*, *In re Fortieth Statewide Investigating Grand Jury*, 197

[20] Pennsylvania courts have also issued orders prohibiting certain official actions. *See, e.g., Bd. of Revision of Taxes, City of Phila. v. City of Phila.*, 4 A.3d 610, 627 (Pa. 2010); *Phila. Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 n.11 (Pa. 1978).

A.3d 712, 721-22 (Pa. 2018) (refusing to re-call a grand jury after the statutory maximum time period had elapsed because it would contravene plain legislative command and amount to rewriting statute); *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) (declaring that statute was unconstitutional as applied to a particular class of conduct and that upholding and applying the same statute to a different class of conduct would require inserting new language). These holdings do not reflect the judiciary's refusal to step in when the legislature has failed to take action to remedy a statute that the court has already declared unconstitutional.

Ultimately, Petitioners are not asking this Court to rewrite an entire statutory scheme, *contra Commonwealth v. Hopkins*, 117 A.3d 247, 262 (Pa. 2015) (mandatory-minimum criminal sentencing); *Heller v. Frankson*, 475 A.2d 1291, 1296 (Pa. 1984) (arbitration system), but rather to serve as a backstop should it find the current deadline unconstitutional. *See William Penn Sch. Dist.*, 170 A.3d at 418 (observing "it [is] well-established that the separation of powers in our tripartite system of government typically depends upon judicial review to check acts or omissions by the other branches in derogation of constitutional requirements").

C. Petitioners Are Entitled to Relief on Their Federal Claim

In addition to comporting with state law, Paragraphs (c) through (h) should not be struck because they are appropriate remedies under 42 U.S.C. § 1983 for the violation of Petitioners' rights under the First and Fourteenth Amendments to the U.S. Constitution. Pet. ¶¶ 102-106. Pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2, this Court has the jurisdiction and the authority to order the relief necessary to fully remedy the federal constitutional violation because Pennsylvania and federal courts have concurrent jurisdiction with respect to 42 U.S.C. § 1983. *See Haywood v. Drown*, 556 U.S. 729, 735 (2009). Respondents do not contest that this Court has jurisdiction to adjudicate Petitioners' § 1983 claim, a fact that is meaningless if it is not accompanied by the power to order the relief necessary to remedy the federal constitutional violation.

U.S. Supreme Court precedent confirms that state courts of general jurisdiction are "fully competent to provide the remedies [§ 1983] requires." *Haywood*, 556 U.S. at 741 (quoting *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 378-79 (1990)). Federal courts routinely order injunctive relief like that requested by Petitioners for the benefit of voters harmed by absentee voting-related statutes that violate the U.S. Constitution. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1328 (11th Cir. 2019) (denying stay of order requiring the counting of absentee ballots cast by certain voters because Florida's signature

matching regime burdened the right to vote); *see generally Ga. Muslim Voter Project v. Kemp*, --- F.3d ----, 2019 WL 1303550 (11th Cir. Mar. 21, 2019) (denying stay of order that found a due process violation and established procedures allowing certain Georgia voters to "cure" the rejection of their absentee ballot).

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to overrule the Preliminary Objections of Respondent Joseph B. Scarnati III, Respondent Speaker Michael C. Turzai, and the Executive Respondents Governor Wolf, Acting Secretary Boockvar, and Deputy Secretary Marks.

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Respectfully submitted,

/s/ Benjamin D. Geffen

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 127(a) of the Pennsylvania Rules of Appellate Procedure, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 8, 2019 By: */s/ Benjamin D. Geffen*
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CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 9,883 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Dated: April 8, 2019 By: */s/ Benjamin D. Geffen*
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