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**Pro hac vice application forthcoming*

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Republican Party of Pennsylvania,
Republican National Committee, and
National Republican Congressional Committee*

IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS
PENNSYLVANIA *et al.*,

Petitioners,

v.

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

Respondents.

No. 83 MM 2020

APPLICATION FOR LEAVE TO INTERVENE

Proposed Intervenor-Respondents, the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican Committees”), by and through undersigned counsel, respectfully submit the following Application for Leave to Intervene as

Respondents in this original jurisdiction matter under Pennsylvania Rules of Appellate Procedure 106, 123, and 1531(b) and Pennsylvania Rules of Civil Procedure 2326 through 2329, and aver the following in support thereof:

PRELIMINARY STATEMENT

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

For this reason, the Republican Committees, on behalf of themselves, their candidates, and their member voters, seek to intervene in this action. This case challenges the legality of Pennsylvania's commonsense election-night return deadline for mail-in and absentee ballots. Were the Court to enjoin this return deadline as Petitioners request, it would dramatically alter the rules governing Pennsylvania's upcoming primary and general elections in which the Republican Committees' supported candidates and member voters participate.

Under Pennsylvania's liberal intervention standard, the Republican Committees have a right to intervene in this case. Indeed, political parties have a recognized interest to assert and protect the rights of their members in upcoming elections and to protect their own agendas and resources from such changes to election laws. Moreover, the Republican Committees have made significant investments in support of Republican candidates up and down the ballot and in connection with voter mobilization and education efforts in Pennsylvania for the past

many election cycles, and intend to do so again in 2020. They thus have a substantial and particularized interest in defending this action to preserve the structure of the competitive environment in which their supported candidates participate and to ensure that Pennsylvania carries out free and fair elections. No other party to this action represents these private interests, and therefore this timely application for intervention should be granted.

The Republican Committees, therefore, respectfully request that the Court grant their application to intervene as Respondents, and to permit them to file of record the Preliminary Objections attached hereto.

I. BACKGROUND

A. The Republican Committees.

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

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

2. The Republican National Committee (“RNC”) is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14). The RNC manages the Republican Party’s business at the national level, including development and promotion of the Party’s national platform and fundraising and election strategies; supports Republican candidates for public office at all levels across the country, including those on the ballot in Pennsylvania; and assists state parties throughout the country, including the Republican Party of Pennsylvania, to educate, mobilize, assist, and turn out voters. The RNC has made significant contributions and expenditures in support of Republican candidates up and down the ballot and in mobilizing and educating voters in Pennsylvania in the past many election cycles and intends to do so again in 2020. The RNC has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections.

3. The National Republican Congressional Committee (“NRCC”) is the national congressional committee of the Republican Party as defined by 52 U.S.C.

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

B. Procedural history.

4. On April 27, Petitioners filed their Petition for Review addressed to this Court's original jurisdiction against Kathy Boockvar, the Secretary of the Commonwealth, and Jessica Mathis, the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, in their official capacities. Petition ¶¶ 12–13.

5. The Petition challenges as unconstitutional Pennsylvania law’s practical requirement that mail-in and absentee ballots be received by the county boards of elections “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) (hereafter, the “received-by deadline”). *See* Petition ¶¶ 15–30.

6. The received-by deadline was part of the General Assembly’s October 2019 overhaul of Pennsylvania’s election procedures in Act 77, which permits all Pennsylvania voters to vote by mail. *See* 25 P.S. § 3150.11. Act 77 represented a grand bipartisan compromise among the General Assembly and the Governor, and it passed the General Assembly by an overwhelming and bipartisan majority.

7. Mere months after Governor Wolf signed Act 77 into law, Petitioners seek to use the COVID-19 pandemic to obtain (i) a declaration that the received-by deadline is unconstitutional and invalid; (ii) a declaration that Act 77’s non-severability clause is unenforceable; (iii) an injunction preventing Respondents from enforcing the received-by deadline in the 2020 primary and general elections; and (iv) an injunction requiring Respondents to consider timely any absentee or mail-in ballot if any of several conditions are met. *See* Petition at 61–62.

8. Petitioners ask this Court to ignore the policy decisions of the General Assembly and Governor and require Respondents to consider a mail-in or absentee ballot to be timely if it “is postmarked on or before the date of the primary or general

election, and is received in the office of the county board of elections no later than seven days after the day of the primary or general election.” *Id.* at 62. Petitioners also seek an order requiring Respondents to deem timely a ballot even “[i]f the ballot has no postmark, a postmark with no date, or an illegible postmark,” so long as it is delivered “to the office of the county board of elections no later than *the day after* the primary or general election.” *Id.* (emphasis added). Moreover, Petitioners’ requested relief includes a catch-all provision allowing a mail-in or absentee ballot to be deemed timely if it “contains any other indicia that the Court deems to be reliable indicia that the ballot was mailed by the voter on or before the day of the primary or general election.” *Id.*

9. This case is still in its infancy. Respondents just filed Preliminary Objections to the Petition on May 5, and the Court has not entered any substantive ruling in this case. On May 4, Petitioners filed an Application for Special Relief in the Nature of a Preliminary Injunction.

II. THE GOVERNING INTERVENTION STANDARD

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

11. “The right to intervention should be accorded to anyone having an interest of his own which no other party on the record is interested in protecting.” *Keener v. Zoning Hearing Bd. of Millcreek Twp.*, 714 A.2d 1120, 1123 (Pa. Commw.

Ct. 1998) (citing *Bily v. Bd. of Property Assessment, Appeals and Review of Allegheny Cty.*, 44 A.2d 250 (Pa. 1945)).

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

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

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

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

14. If the determination may affect the intervenor’s legally enforceable interest, and no exception applies, approving intervention is mandatory, not

discretionary. *Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. Ct. 1999).

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

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

III. BASIS FOR THE REPUBLICAN COMMITTEES’ INTERVENTION

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

17. The Republican Committees, on behalf of their supported candidates, voters, and own institutional interests, have a substantial and particularized interest in preserving the state election laws challenged in this action, which were enacted

mere months ago as part of Act 77’s grand compromise designed to ensure the structure and integrity of Pennsylvania’s elections.

18. There can be no question that the Republican Committees have direct and significant interests in the continued enforcement of Pennsylvania’s laws governing mail-in ballots—including the established return deadline—as those laws are designed to ensure “the integrity of [the] election process,” *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the “orderly administration” of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Were these validly enacted laws to be cast aside, the current competitive electoral environment in Pennsylvania, in which the Republican Committees invest substantial resources in support of Republican candidates to try to win elections, would be altered or impaired. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5, 800 (Pa. 2018); *see* ¶ 13, *supra*.

19. Courts routinely recognize that political parties have interests supporting intervention in litigation concerning elections and election procedures. *See, e.g., Siegel v. LePore*, 234 F.3d 1163, 1169 n.1 (11th Cir. 2001); *Trinsey v. Pennsylvania*, 941 F.2d 224, 226 (3d Cir. 1991); *Anderson v. Babb*, 632 F.2d 300, 304 (4th Cir. 1980); *Democratic Nat’l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 76765, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020); *Citizens United v. Gessler*, No. 14-002266, 2014 U.S. Dist. LEXIS 128669, 2014

WL 4549001, at *2 (D. Colo. Sept. 15, 2014); *Libertarian Party of Mich. v. Johnson*, No. 12-12782, 2012 U.S. Dist. LEXIS 126096 (E.D. Mich. Sept. 5, 2012); *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-4884, 2011 U.S. Dist. LEXIS 134520, 2011 WL 5868225, *1 (N.D. Ill. Nov. 22, 2011); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 639 (N.D. Ill. 1991). . . Indeed, courts generally recognize that political parties have “an interest in the subject matter of [a] case,” when “changes in voting procedures could affect candidates running as Republicans and voters who [are] members of the . . . Republican Party.” *See Ohio Democratic Party v. Blackwell*, No. 04-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005).

20. The Republican Committees’ interests here are at least the same as—if not greater than—those that several Petitioners contend give them standing to sue. *See* Petition ¶ 78 (Petitioner Disability Rights “has had to divert, and will continue to have to divert, substantial time, money, and resources” due to the received-by deadline); *id.* ¶ 88 (received-by deadline has “injure[d]” Petitioner SeniorLAW Center “because it is already expending resources” on voter education); *id.* ¶ 101 (Petitioner SEAMAAC “is currently heavily concentrating its human resources on get-out-the-vote work”). If Petitioners are correct that their interests support standing, then the Republican Committees’ mirror interests must be sufficient for intervention.

21. If Petitioners' action succeeds, then the received-by deadline, and in turn the orderly administration of Pennsylvania's elections, will be upended just weeks before Pennsylvania's June 2 primary election, and in the run-up to a critical general election.

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

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

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

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

25. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused if: (1) the petitioner’s claim or defense “is not in subordination to and in recognition of the propriety of the action”; (2) the petitioner’s interest is already adequately represented; or (3) “the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.”

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

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

28. Second, no existing party adequately represents the Republican Committees’ particularized interests. *See* Pa. R.C.P. No. 2329(2). Petitioners

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

clearly do not represent the Republican Committees' interests in this case, and Respondents do not adequately represent them either.

29. Although the Republican Committees and Respondents putatively share the same overall goal of upholding the challenged received-by deadline, their interests are not identical, as is clearly evidenced by Respondents' Preliminary Objections to the Petition filed on May 5. The Republican Committees' Preliminary Objections attached to this Application explain that Act 77's non-severability provision is valid and requires dismissal of the Petition; that Petitioners have failed to bring cognizable as-applied challenges; and that Petitioners have failed to state a claim upon which relief may be granted. Respondents' Preliminary Objections wholly fail to address the significance of Act 77's enforceable non-severability provision or the insufficiencies in Petitioners' pleadings on their particular constitutional claims. Rather, Respondents' Preliminary Objections focus on Petitioners' failure to allege a cognizable injury, lack of standing, failure to join necessary parties, and failure to provide notice.

30. Respondents, as Commonwealth officials, do not represent the private interests of the Republican Committees at stake in this litigation, which are fundamentally different from, and far narrower than, the broad public interests represented by Respondents. Indeed, "the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial

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

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

458, 461–62 (11th Cir. 1999), “the social and political divisiveness of the election issue,” *Meek*, 985 F.2d at 1478, “their own desires to remain politically popular and effective leaders,” *id.*, and the interests of opposing parties, *In re Sierra Club*, 945 F.2d 776, 779–80 (4th Cir. 1991). Given that Respondents may take these other interests into account, their interests may diverge with the Republican Committee’s interests throughout this litigation.

32. Third, the Republican Committees have not unduly delayed in submitting their application to intervene in this action, which remains in its infancy. The Petition was filed a little over a week ago, and Respondents filed Preliminary Objections this week, on May 5. The Republican Committees’ Intervention will not cause any undue delay, embarrassment, or prejudice to any party, but it will aid the Court in resolving the important legal and factual questions before it.

IV. CONCLUSION

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

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

WHEREFORE, for the foregoing reasons, Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee, respectfully request that this Honorable Court GRANT this Application for Leave to Intervene, and DIRECT the Supreme Court Prothonotary to enter the names of Republican Party of Pennsylvania, Republican National Committee, National Republican Congressional Committee, on the docket in this matter as Intervenor Respondents, and DOCKET the Intervenor Respondents' Preliminary Objections and Brief in Support, attached as Exhibit A.

Dated: May 7, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

Kathleen A. Gallagher

PA I.D. #37950

Russell D. Giancola

PA. I.D. #200058

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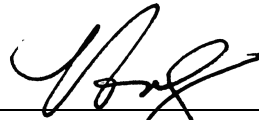
*Counsel for Proposed Intervenor-
Respondents Pennsylvania Republican
Party, Republican National Committee, and
National Republican Congressional
Committee*

**Pro hac vice application forthcoming*

VERIFICATION OF REPUBLICAN PARTY OF PENNSYLVANIA

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

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




Vonne Andring
Executive Director
Republican Party of Pennsylvania

Date: 5/6/2020

VERIFICATION OF REPUBLICAN NATIONAL COMMITTEE

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

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



Jon Black
Regional Political Director
Republican National Committee

Date: 05/07/2020

**VERIFICATION OF NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE**

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

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

Sarah Clamp

Sarah Clamp
Regional Political Director
National Republican Congressional
Committee

Date: 05/07/2020

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

/s/ Kathleen A. Gallagher

IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS
PENNSYLVANIA *et al.*;

Petitioners,

v.

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

Respondents.

No. 83 MM 2020

PROPOSED ORDER

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

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

BY THE COURT:

EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS
PENNSYLVANIA; THE
BARRISTERS' ASSOCIATION OF
PHILADELPHIA, INC.;
SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL
ASSISTANCE ASSOCIATION
COALITION, INC. (SEAMAAC);
SUZANNE ERB,

Petitioners,

v.

KATHY BOOCKVAR, IN HER
CAPACITY AS SECRETARY OF
THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA
MATHIS, IN HER CAPACITY AS
DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND
NOTARIES OF THE
PENNSYLVANIA DEPARTMENT
OF STATE,

Respondents.

Case No.: 83 MM 2020

NOTICE TO PLEAD

To Petitioners:

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

/s/ Kathleen A. Gallagher
COUNSEL FOR INTERVENOR-
RESPONDENTS THE REPUBLICAN
PARTY OF PENNSYLVANIA,
REPUBLICAN NATIONAL COMMITTEE,
AND NATIONAL REPUBLICAN
CONGRESSIONAL COMMITTEE

IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS
PENNSYLVANIA; THE
BARRISTERS' ASSOCIATION OF
PHILADELPHIA, INC.;
SENIORLAW CENTER;
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KATHY BOOCKVAR, IN HER
CAPACITY AS SECRETARY OF
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MATHIS, IN HER CAPACITY AS
DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND
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Case No.: 83 MM 2020

**INTERVENOR-RESPONDENTS THE REPUBLICAN PARTY OF
PENNSYLVANIA, REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE'S
PRELIMINARY OBJECTIONS**

The Petition for Review filed by the Petitioners asks the Court to undo the grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections during the COVID-19 pandemic and beyond. Intervenor-Respondents, the Republican Party of Pennsylvania, the Republican

National Committee, and the National Republican Congressional Committee (collectively, “Republican Committee Respondents”) file these Preliminary Objections to explain that the Court should uphold the policy decisions of its two co-equal political branches of government and dismiss the Petition.

PRELIMINARY STATEMENT

Petitioners ask this Court to upset the grand bipartisan compromise struck by the General Assembly and the Governor in Act 77—and to second-guess the General Assembly’s and the Governor’s policy decisions to address the COVID-19 pandemic—by invalidating Act 77’s extended “received-by” deadline as a violation of the Pennsylvania Constitution. Petitioners are wrong on the merits, but there is an even more basic problem: if Petitioners were correct, invalidation of the received-by deadline would void nearly all of Act 77—including the new universal no-excuse mail-in voting scheme. This is so because the General Assembly and the Governor preserved their delicate compromise by including a non-severability provision in Act 77. Realizing as much, Petitioners briefly (and incorrectly) claim that the non-severability provision is unenforceable. But they emphasize that they “would withdraw their claims without seeking any relief if the non-severability provision were going to apply.” Pet. ¶ 108. Non-severability, therefore, is the threshold issue. It is also a straightforward issue, as this Court has recognized that non-severability provisions are binding where, as here, they preserve political compromises between

the co-equal branches of government. The Court should give full effect to the non-severability provision and dismiss the Petition.

Even if the Court chooses to reach the merits, however, it may efficiently dispose of this case by holding that, although Petitioners seek broad facial relief against the received-by deadline, they have failed to sufficiently allege a facial constitutional challenge. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). Petitioners’ facial challenge here fails because—while they bear the burden to show that no constitutional applications of Act 77’s received-by deadline exist—Petitioners all but concede that the deadline is constitutional as applied to vast numbers of Pennsylvania voters. Beyond that cross-cutting failure, Petitioners’ constitutional claims all fail on their own terms.

Here, Petitioners would induce this Court to counter the unfolding policy judgments in the other two branches of government. But this Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa., Inc. v. Com., Ins. Dep’t*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (emphasis in original). This principle applies with particular force to questions of election administration because “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914). This Court should dismiss the Petition.

I. FACTUAL BACKGROUND

A. As Amended By Act 77, Pennsylvania Law Permits All Pennsylvania Voters To Vote by Mail

1. The Pennsylvania House of Representatives passed Act 77 on a bipartisan majority vote, 138-61. The Pennsylvania Senate passed Act 77 on a bipartisan majority vote, 35-14. Governor Wolf signed Act 77 into law on October 31, 2019. *See* Pennsylvania General Assembly, Senate Bill 421; Regular Session 2019-2020, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2019&sind=0&body=S&type=B&bn=421.

2. According to the facts alleged in the Petition,¹ Pennsylvania law, as amended by Act 77, now creates two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters. Pet. ¶ 15.

3. “Qualified absentee electors” include, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on Election Day due to work, and

¹ The Republican Committee Respondents accept the factual allegations of the Petition as true only for purposes of these Preliminary Objections.

people who cannot vote in person because of observance of a religious holiday. *Id.* ¶ 16 (citing 25 P.S. § 3146.1).²

4. With the passage of Act 77, any registered voter who does not qualify as an absentee voter may apply to submit their ballot by mail-in voting, without providing a justification (*i.e.*, “no-excuse voting”). *Id.* ¶ 17 (citing 25 P.S. §§ 3150.11–3150.12b). These voters are known as “qualified mail-in electors.” *Id.* (citing 25 P.S. § 3150.11).

5. The same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. *Id.* ¶ 18.

B. Act 77 Has a Non-Severability Provision

6. Act 77 also contains a non-severability provision. *Id.* ¶ 105.

7. In particular, Section 11 provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

² As the Petition notes, military and overseas voters may also vote by absentee ballot, but Petitioners “do not challenge the deadline for military and overseas voters in this case.” Pet. ¶ 16 n.1.

C. Petitioners Challenge Act 77's Received-By Deadline

8. Petitioners allege that “the received-by deadline will inevitably result in a substantial number of absentee and mail-in ballots not being counted, even though voters timely requested them.” *Id.* ¶ 34.

9. Petitioners allege that a “typical” Pennsylvania voter will “submit[] her application for an absentee or mail-in ballot the day before the application deadline (the Tuesday before the election).” *Id.* ¶ 36. Estimating mailing and processing times, Petitioners reason that “the voter will not receive the ballot until the Saturday before the election.” *Id.* Petitioners allege that the voter “has no assurance” that a completed ballot could be received by the deadline two business days later. *Id.* Thus, “[t]he voter’s ballot may not be received by the deadline and accordingly may not be counted.” *Id.*

10. Petitioners also allege that “the unpredictable variation in USPS’s delivery times” would cause two similarly situated voters to be treated differently. *Id.* ¶ 37. “[T]wo voters who are otherwise identically situated could mail their absentee or mail-in ballots on the exact same day and time and have different outcomes—the voter whose local USPS branch delivers mail faster could have her vote counted while the voter who lives in an area with slower delivery times could have her ballot discarded as too late.” *Id.*

11. Finally, Petitioners allege that “[t]he disenfranchisement caused by the received-by deadline for absentee and mail-in ballots will be magnified enormously in the context of the current public health crisis resulting from the COVID-19 pandemic.” *Id.* ¶ 39.

12. The Petitioners request: (1) a declaration that enforcement of the received-by deadline is unconstitutional and invalid, “as applied during the duration of the public health emergency related to COVID-19, because it violates the rights of Petitioners and all voters in Pennsylvania”; (2) a declaration that the non-severability clause is unenforceable; (3) an injunction preventing Respondents from enforcing the received-by deadline in the 2020 primary and general elections; and (4) an injunction requiring Respondents to consider timely any absentee or mail-in ballot if, among other circumstances, (i) the ballot is post-marked on or before the date of the election and was received within seven days after the date of the election, or (ii) the ballot contains any reliable indicia that the ballot was mailed on or before the date of the election. *Pet.* at 61–62.

II. PRELIMINARY OBJECTIONS

A. Act 77’s Non-Severability Provision Is Enforceable, and the Petition Should Be Dismissed, Pa. R.C.P. 1028(a)(4)

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

14. This Court need not reach the merits of this case because Act 77’s non-severability provision is binding and enforceable, and Petitioners have pled that they would withdraw their Petition under those circumstances.

1. Act 77’s non-severability provision is squarely implicated.

15. As previously noted, Act 77 contains a non-severability provision, which provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

16. The non-severability provision is squarely implicated in this case. Sections 6, 7, and 8 of Act 77 contain the received-by deadline. In addition, Petitioners’ prayer for relief requests, among other things, a declaration “that enforcement of the received-by deadline is unconstitutional and invalid.” Pet. ¶ 61. In other words, Petitioners have asked that “[a] provision of this act or its application to any person or circumstance [be] held invalid.” Act 77, § 11. As a result, if the received-by deadline is deemed invalid, then the remaining Sections listed in Section 11—including Section 8, which creates Pennsylvania’s universal no-excuse mail-in voting scheme—are likewise invalid.

2. Act 77's non-severability provision is enforceable.

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

18. *First*, this Court has recognized that non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* “In an instance involving such compromise, the General Assembly may determine, the court’s application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.*

19. That is what happened with Act 77.

20. Because Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process,” *Stilp*, 905 A.2d at 978, it is enforceable as an expression of the General Assembly’s desire that the critical compromise provisions of Act 77 rise and fall together.

21. *Second*, Act 77’s non-severability provision avoids the defect that this Court identified in *Stilp*. The defect in the provision the Court declined to enforce in *Stilp* was that it had been “employed as a sword against the Judiciary” and appeared “to be aimed at securing a coercive effect upon the Judiciary” (by

threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–80. Such provisions are “ineffective and cannot be permitted to dictate [the Court’s] analysis.” *Id.*

22. Act 77’s non-severability provision is nothing of the sort. It was permissibly employed by the Legislature “as a shield to ensure preservation of a legislative scheme or compromise,” *id.* at 980, in an area “regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522. Not only is there no evidence or basis to believe that the non-severability provision in a law concerning election administration was intended to coerce the Court, but it is also clear that the provision was intended to preserve the weighty compromise struck in Act 77.

23. Moreover, Act 77’s non-severability provision is partial and targeted. It omits from the list of non-severable Act 77 provisions Sections 3.1, 10, 11, 13, 14, and 15. Act 77, § 11.³ These omissions illustrate that the General Assembly

³ The first sentence of Section 11 of Act 77 states that only the listed provisions are non-severable, while the second sentence implies that invalidation of any provision in Act 77 would render the remaining provisions void. The best reading of Section 11 is that the second sentence describes the consequence of the first sentence—that invalidation of any of the *listed* provisions would render the remaining listed provisions void. Indeed, this is precisely how Chairman Everett described Section 11: “Yes; that would be just in those sections that have been designated as nonseverable.” 2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). But even without the first sentence in Section 11, Act 77’s non-severability provision would be enforceable consistent with the presumption of enforceability of such provisions under *Stilp*.

carefully thought about which provisions of Act 77 necessarily must rise and fall together, and deliberately included those Sections in Section 11's non-severability provision.

24. For all of these reasons, Act 77's non-severability provision is valid, enforceable, and dispositive in this case.

3. Petitioners' counterarguments do not withstand scrutiny.

25. In an attempt to circumvent the non-severability provision, Petitioners argue that "enforcement of the non-severability provision would 'intrude upon the independence of the judiciary and impair the judicial function.'" Pet. ¶ 106 (quoting *Stilp*, 905 A.2d at 980).

26. But the Court, in *Stilp* or elsewhere, has never held that all non-severability provisions are unenforceable, particularly where, as here, a non-severability provision seeks to preserve a political compromise.

27. Section 11 is not intended to coerce the Judiciary; accordingly, the Court should heed the general presumption that non-severability provisions are valid.

28. Petitioners also suggest that "[t]he ultimate question for the Court" is "whether the valid provisions of the statute are essentially and inseparably connected with and depend upon the invalid received-by deadline." Pet. ¶ 106 (quotation marks and citation omitted).

29. But that is the default test for *severability* in the absence of a non-severability provision, not the governing test for whether to uphold *non-severability provisions*.

30. In any event, if the Court ignored the non-severability provision and conducted the standard severability analysis, the upshot of severing the received-by deadline would be that there would be no deadline for absentee and mail-in ballots. *See, e.g., Commonwealth v. Hopkins*, 117 A.3d 247, 261–62 (Pa. 2015) (declining to “rewrite” non-severable portions of a statute, which, “standing alone, without a wholesale rewriting, are incomplete and incapable of being vindicated in accord with the legislature’s intent”).

31. Next, Petitioners suggest that applying the non-severability provision to invalidate nearly all of Act 77 would itself be unconstitutional. Pet. ¶ 107 (“[I]f Petitioners are correct that the received-by deadline for absentee and mail-in ballots violates the Pennsylvania Constitution by abridging Pennsylvanians’ ability to vote during the pandemic, then eliminating all no-excuse mail voting in a pandemic necessarily would violate the Pennsylvania Constitution as well.”).

32. But, if Petitioners were correct, then pre-Act 77 Pennsylvania election law was unconstitutional. Yet Petitioners have never asserted a constitutional claim against the earlier pre-Act 77 ballot-receipt deadline or against pre-Act 77 law’s

failure to provide mail-in voting. Petitioners are thus incorrect in suggesting that enforcing the non-severability provision would be unconstitutional.

33. Act 77’s non-severability provision is enforceable and binding. The Court, therefore, should dismiss the Petition or permit Petitioners to “withdraw their claims without seeking any relief.” Pet. ¶ 108.

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

B. Petitioners Fail to Sufficiently Allege a Facial Challenge to the Received-By Deadline, Pa. R.C.P. 1028(a)(4)

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

35. On the merits, the Petition is deficient from the start because it fails to sufficiently allege a facial challenge to the received-by deadline.

36. Although Petitioners claim they are bringing an “as applied” challenge—that is, a challenge to the received-by deadline “as applied during the duration of the public health emergency related to COVID-19,” Pet. ¶ 61, “the question of whether a particular constitutional challenge is ‘facial’ or ‘as applied’ should not be dictated by the label a litigant attaches to it.” *Nextel Commcns. of*

Mid-Atlantic, Inc. v. Commonwealth, Dep't of Revenue, 171 A.3d 682, 706 (Pa. 2017) (Baer, J., concurring).

37. This is an attempted facial challenge, not an as-applied challenge.

38. Here, Petitioners seek facial relief on behalf of “all voters in Pennsylvania,” not a particular person—that is, a declaration that the received-by deadline is “unconstitutional and invalid.” Pet. ¶ 61.

39. Moreover, nothing in Petitioners’ arguments hinges on the circumstances surrounding COVID-19, so their assertion of an as-applied challenge based on those circumstances fails.

40. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). “A statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.” *Pa. Env. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017).

41. But the Petition acknowledges that, even under Petitioners’ view, there are circumstances in which the received-by deadline is valid. Petitioners repeatedly allege disenfranchisement of “large numbers of Pennsylvanians,” Pet. ¶ 2; “many voters,” *id.* ¶ 3; “a substantial number” of voters, *id.* ¶ 34; “tens of thousands of Pennsylvanians,” *id.* ¶ 51; “certain groups of Pennsylvanians,” *id.* ¶ 58; and “a significant number of Pennsylvanians,” *id.* ¶ 118. These carefully limited references implicitly concede that there are circumstances in which the received-by deadline is

constitutional, such as when voters timely receive and return their ballots or choose to vote in person.

42. Because Petitioners concede that at least some applications of the received-by deadline are constitutional, they have failed to sufficiently plead a facial challenge as a matter of law. *See Pennsylvania Env. Def. Found.*, 161 A.3d at 938 n.31.

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

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

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

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

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

46. Petitioners' claim that the ballot-receipt deadline violates the Pennsylvania Constitution has it backwards: *Act 77 extended* the absentee ballot received-by deadline from five o'clock P.M. on the Friday before the primary or general election to eight o'clock P.M. on the day of the primary or general election.

47. Petitioners cannot carry the heavy burden to prove that *Act 77's* extended received-by deadline violates the Pennsylvania Constitution as to any of their claims.

1. Petitioners fail to state a claim for relief under the Free and Equal Elections Clause.

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

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

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

courts,” and if some restrictions are “onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to amend.” *Id.*

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

52. Petitioners’ Free and Equal Elections Clause claim fails under *Winston* because the received-by deadline does not deny a qualified elector the right to vote. *Winston*, 91 A. at 523. It treats all voters alike. *Id.* Primaries held with the deadline in effect are open and public to all those who are entitled to vote and “take the trouble to exercise the right of franchise.” *Id.* And “the inconveniences if any bear upon all in the same way under similar circumstances.” *Id.*

53. The received-by deadline does not violate the Free and Equal Elections Clause.

WHEREFORE, Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional

Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

2. Petitioners fail to state a claim for relief under the Free Expression and Association Clauses.

54. As alleged, the Free Expression Clause provides, as relevant here: “The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”

55. Also as alleged, the Free Association Clause provides: “The citizens have a right in a peaceable manner to assemble together for their common good[.]”

56. The received-by deadline, however, plainly does not restrict Petitioners’ “communication of thoughts and opinions,” nor does it restrict Petitioners’ ability “to assemble together.” Instead, it is an election-administration measure that is more properly assessed under the Free and Equal Elections Clause. *See Working Families Party v. Commonwealth*, 209 A.3d 270, 305 n.28 (Pa. 2019) (Wecht, J., concurring and dissenting) (“[I]t is not clear to me, at least when it comes to ballot restrictions, that Article I, Sections 7 and 20, ever would furnish relief where the Free and Equal Elections Clause did not.”); *cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) (“The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right[.]”).

57. Petitioners do not cite a single case in which this Court (or any other) has analyzed under the Free Expression and Association Clauses an election-administration measure that governs only the act of voting.

58. In fact, Petitioners invoke only an inapposite analysis and do not even mention the analysis that this Court has adopted to address claims that a state election-administration law unconstitutionally burdens the right to vote.

59. In a case cited by Petitioners, this Court made clear that while “the right to vote is fundamental and pervasive of all other rights, the state may enact substantial regulation containing reasonable, nondiscriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (citation and quotation marks omitted). Thus, “when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* at 177 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

60. Here, there can be no dispute that the Commonwealth has strong and imperative interests “in ensuring fair elections that are free from the taint of fraud,” *In re Nader*, 905 A.2d 450, 465 (2006), safeguarding “public confidence” in its elections and “in the integrity and legitimacy of representative government,” *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 197 (2008), and guaranteeing

finality of election results, *see, e.g., Banfield*, 110 A.3d at 176-77 (state has an interest in “ensur[ing] honest and fair elections that proceed in an orderly and efficient manner”).

61. The received-by deadline directly advances these interests: it prevents fraud by ensuring that mail-in and absentee ballots are received by election officials before any ballot is counted; promotes public confidence by ensuring that all ballots are cast by a single deadline before any results may become publicly known; and establishes an end date and time for voters to vote and election officials to tabulate ballots. By promoting these important interests, the received-by deadline “encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197.

62. Petitioners implicitly acknowledge that the received-by deadline, as a general matter, does not impose an unconstitutional burden on the right to vote. As indeed they must: the received-by deadline is a “reasonable, nondiscriminatory” rule applicable to all Pennsylvania voters that advances “important regulatory interests.” *Banfield*, 110 A.3d at 176-77. Moreover, the burden imposed by the received-by deadline is no greater than—and, in fact, is *lesser* than—“the usual burdens of voting.” *Crawford*, 553 U.S. at 198. After all, prior to enactment of Act 77, all non-absentee Pennsylvania voters were required to vote in person, but Act 77 alleviates

that burden and replaces it with a less demanding burden by permitting *all* Pennsylvania voters to vote by mail without excuse by the received-by deadline.

63. Instead, Petitioners purport to limit their challenge to “the context of the COVID-19 pandemic,” Pet. ¶ 137, but nothing in their argument hinges on the COVID-19 pandemic. Indeed, the vagaries of mail service, *id.* ¶ 138, or the decision-making process of “undecided and late-deciding voters,” *id.* ¶ 140, exist even outside “the context of the COVID-19 pandemic,” *id.* ¶ 137.

64. In all events, any burden that Petitioners might ascribe to the pandemic flow from COVID-19, not the received-by deadline or any other action by the Commonwealth. They therefore are not attributable to the Commonwealth and provide no basis for striking down the received-by deadline. *See Banfield*, 110 A.3d at 176-77; *In re Nader*, 905 A.2d at 465. Yet what Petitioners seek to do is to leverage the COVID-19 pandemic—which the Commonwealth did not create—into a ruling from this Court invalidating the grand legislative bargain captured in received-by deadline based on conditions like disuniform mail service and voters’ decision-making delays that may repeat in future elections. The Court should decline to grant Petitioners their preferred rule of election administration that the General Assembly and the Governor have declined to grant as both a general matter in Act 77 and as a specific matter in the context of the COVID-19 pandemic.

65. Petitioners assert that the received-by deadline is not valid as a “time, place, and manner” restriction. That framework is inapplicable here—and even if it were, the received-by deadline would satisfy it.

66. Because the received-by deadline cannot be characterized as a “direct” restriction on speech, the Court would analyze it as “merely a time, place and manner restriction.” *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 979 (Pa. Commw. 1997).

67. A time, place, and manner restriction will be upheld if (1) it is justified without reference to the content of the regulated speech; (2) it is narrowly tailored to serve a significant or substantial government interest; and (3) it leaves open ample alternative channels of communication. *Id.* at 981.

68. The received-by deadline plainly does not turn on the content of any speech.

69. It is also narrowly tailored to serve significant government interests—namely, orderly election administrations free from chaos. *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) (“The state’s interest in a timely and orderly election is strong.”).

70. Petitioners claim that there is a “significantly less restrictive means” of serving those interests. Pet. ¶ 142. But, as Petitioners’ own case states, “a ‘least restrictive means’ analysis does not apply when a content-neutral time, place and manner restriction is at issue.” *Golden Triangle News, Inc.*, 689 A.2d at 982–83. Instead, “a restriction is deemed to be narrowly tailored if it promotes a substantial government interest that would be achieved less effectively without the regulation.” *Id.* at 983.

71. That is the case here. The legitimate government interests in conducting an orderly election would be “achieved less effectively” by extending the received-by deadline beyond the deadline by which voters must have voted in person.

72. Finally, although Petitioners do not expound on the third prong of the test—ample alternative channels of communication—every Pennsylvania citizen has the same channels to vote that every other Pennsylvania citizen enjoys. Each elector may vote in person or by mail. There is simply nothing to the Free Expression and Association Clause claim.

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

3. Petitioners fail to state a claim for relief under the Equal Protection Guarantees.

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

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

75. Although Petitioners discuss whether strict scrutiny, intermediate scrutiny, or rational basis should apply, Pet. ¶¶ 147–153, the Court has eschewed such categorization for election measures: “Although this Court has acknowledged that the right to vote is fundamental,” “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176–77.

76. As explained above, *see supra* ¶¶ 58-64, the received-by deadline is a reasonable, non-discriminatory restriction that ensures Pennsylvania elections will proceed in an orderly and efficient manner. As previously explained, it applies equally to all voters. And it reasonably tracks the same Election Day deadline by

which a county board of elections must have received a ballot from a voter who elected to vote in person.

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

4. Petitioners fail to state a claim for relief under Article VII, Section 14(a).

77. Article VII, Section 14(a) provides: “The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.”

78. Petitioners recycle their allegations that “[e]nforcement of the statutory received-by deadline during the COVID-19 pandemic will ensure that many voters who timely request absentee ballots in compliance with the Election Code, and who

place their ballots into the mail on or before Election Day will, by no fault of their own, have their votes discarded.” Pet. ¶ 158.

79. For reasons stated above, this claim fails as a matter of law.

80. In addition, this claim does not apply to mail-in voters; it only applies to absentee voters.

81. Article VII, Section 14(a) says nothing about a received-by deadline—and Petitioners do not dispute that Pennsylvania law provides “a manner in which” qualified absentee electors “may vote.” Pa. Const. Art. VII, § 14(a); *see also, e.g.*, 25 P.S. § 3146.1.

82. Further, Petitioners do not cite a single case in support of this claim. Indeed, one of the cases cited by Petitioners effectively sanctioned the received-by deadline. *See In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968).

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

5. Petitioners impermissibly ask this Court to override political policy decisions.

83. Finally, Petitioners insist at various points that they only allege that the received-by deadline is unconstitutional “as applied during the COVID-19 crisis.” *E.g.*, Pet. ¶ 142.

84. As previously noted, however, nothing in Petitioners’ arguments turns on the existence of COVID-19. *See, e.g., id.* ¶ 118 (“The received-by deadline would disenfranchise an inordinate number of people in *any election*, but the numbers will be staggering amid the COVID-19 crisis.”) (emphasis added).

85. But even if Petitioners assert only an as-applied challenge, Petitioners effectively ask this Court to override the policy judgments of the Governor and the General Assembly regarding COVID-19.

86. The political branches of government are engaged in ongoing efforts to address COVID-19. These efforts produced legislation—unanimously passed by the General Assembly and signed by the Governor—which delayed the primary election until June 2 and amended Act 77.

87. At the time that the General Assembly and the Governor unanimously agreed to amend Act 77 and postpone the primary election to June 2, they were aware of Act 77 and the received-by deadline of eight o’clock P.M. on the day of the primary election. The General Assembly and the Governor, however, opted to leave that deadline in place.

88. By pressing this constitutional challenge, Petitioners are asking this Court to weigh in on the political policy judgments regarding ongoing preparations for voting and the best path forward in light of COVID-19.

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

90. Should the General Assembly and the Governor permit the primary and general elections to proceed in line with ongoing preparations, this Court’s intervention would constitute a determination that their political policy judgment concerning the current circumstances is incorrect. The Court should decline Petitioners’ invitation.

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

Dated: May 7, 2020

Respectfully submitted,

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**Pro hac vice application forthcoming*

CERTIFICATE OF COMPLIANCE

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

/s/ Kathleen A. Gallagher

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National Republican Congressional
Committee*

IN THE SUPREME COURT OF PENNSYLVANIA

DISABILITY RIGHTS
PENNSYLVANIA; THE
BARRISTERS' ASSOCIATION OF
PHILADELPHIA, INC.;
SENIORLAW CENTER;
SOUTHEAST ASIAN MUTUAL
ASSISTANCE ASSOCIATION
COALITION, INC. (SEAMAAC);
SUZANNE ERB,

Petitioners,

v.

KATHY BOOCKVAR, IN HER
CAPACITY AS SECRETARY OF
THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA
MATHIS, IN HER CAPACITY AS
DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND
NOTARIES OF THE
PENNSYLVANIA DEPARTMENT
OF STATE,

Respondents.

Case No.: 83 MM 2020

ORDER

AND NOW, this ____ day of _____, 2020, upon consideration of the Preliminary Objections filed by Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee and any response thereto, it is hereby ORDERED that the

Preliminary Objections are SUSTAINED. The Petition for Review in the above action is dismissed with prejudice.

BY THE COURT:

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**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS OF
INTERVENOR-RESPONDENTS THE REPUBLICAN PARTY OF
PENNSYLVANIA, REPUBLICAN NATIONAL COMMITTEE, AND
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE**

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Intervenor-Respondents the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican Committee Respondents”) seek to uphold free and fair elections on behalf of all Pennsylvanians. The Petition for Review filed by Petitioners Disability Rights Pennsylvania, *et al.* (collectively, “Petitioners”) asks the Court to undo the grand bipartisan compromise that the General Assembly and the Governor crafted to promote free and fair elections during the COVID-19 pandemic and beyond. The Republican Committee Respondents therefore file this Brief in Support of Preliminary Objections to explain that the Court should uphold the policy decisions of the two co-equal political branches of government and dismiss the Petition.

PRELIMINARY STATEMENT

This Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Penn., Inc. v. Com., Ins. Dep’t*, 970 A.2d 1108, 1122 n.15 (Pa. 2009) (emphasis in original). This principle applies with particular force to questions of election administration because “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914).

The General Assembly and the Governor are hard at work to address the COVID-19 pandemic and to decide the best manner in which to administer

Pennsylvania’s primary and general elections this year. Recognizing the unique challenges presented by COVID-19, a month ago the General Assembly unanimously passed, and the Governor signed, legislation that amended the Election Code and delayed the primary election until June 2, 2020. Within the past week, the General Assembly held a hearing with election officials and experts to discuss ongoing preparations for the primary and general elections. Moreover, the Governor’s stay-at-home order permits elections to proceed—and the Governor has even begun easing restrictions and has announced his plan to lift the remainder of the order in phases starting in early May.

Unsatisfied with these ongoing efforts, Petitioners now ask this Court to impose a policy change to Pennsylvania’s Election Code that the General Assembly so far has declined to adopt—and, in the process, to rewrite one of the most transformative legislative enactments in Pennsylvania history. In 2019, the General Assembly and the Governor struck a grand bipartisan compromise to reform Pennsylvania’s Election Code through the Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”). The base bill that became Act 77 was a one-subject proposal to end straight-ticket voting. Through a series of give-and-take negotiations, the General Assembly and the Governor expanded Act 77 into an overhaul of the Commonwealth’s elections system. Among other things, Act 77 as enacted not only eliminated straight-ticket voting, but also provided funding to counties for voting

machines and extended voter registration deadlines to allow Pennsylvanians more time to register to vote. One central component of the grand compromise struck in Act 77 was a comprehensive new scheme to permit all Pennsylvanians to vote by mail.

Prior to Act 77's enactment, voting by mail in Pennsylvania was strictly limited to a handful of categories of absentee voters, including members of the military, individuals with a physical disability or illness, and individuals who would be away from their home municipalities on election day. *See* 25 P.S. § 3146.1. All voters other than qualified absentee voters were required to vote in person. *See id.* Act 77 ushered in a sea change in Pennsylvania elections: it permits *all Pennsylvania voters*, including those who are not qualified absentee voters, to vote by mail without providing a reason or excuse. *See* 25 P.S. § 3150.11.

Act 77 further increased the convenience of absentee and mail-in voting by extending the deadlines for submission of absentee and mail-in ballots. Pre-Act 77 Pennsylvania law required absentee ballots to be received by the local election official by five o'clock P.M. on the Friday before the primary or general election in order to be counted. Act 77 extended this received-by deadline for absentee and mail-in ballots to eight o'clock P.M. on the day of the primary or general election. *See* 25 P.S. §§ 3146.6, 3150.16.

Petitioners ask this Court to upset the grand bipartisan compromise struck by the General Assembly and the Governor in Act 77—and to second-guess the General Assembly’s and the Governor’s policy decisions to address the COVID-19 pandemic—by invalidating Act 77’s extended “received-by” deadline as a violation of the Pennsylvania Constitution. Petitioners are wrong on the merits of their claim. This is fortunate because if their claim was meritorious, it would pose an even more basic problem: under well-established principles of Pennsylvania law, if Petitioners were correct, invalidation of the received-by deadline would void nearly all of Act 77—including the universal no-excuse mail-in voting scheme. In other words, granting Petitioners the injunction they seek not only would invalidate the received-by deadline; it would do away with mail-in voting entirely.

This is so because the General Assembly and the Governor preserved their delicate compromise by including a non-severability provision in Act 77. Realizing as much, Petitioners briefly (and incorrectly) claim that the non-severability provision is unenforceable. But they emphasize that they “would withdraw their claims without seeking any relief if the non-severability provision were going to apply.” Pet. ¶ 108. Non-severability, therefore, is the threshold issue. It is also a straightforward issue, as this Court has recognized that non-severability provisions are binding where, as here, they preserve political compromises between the co-

equal branches of government. The Court should give full effect to the non-severability provision and dismiss the Petition.

If the Court chooses to reach the merits, however, it may efficiently dispose of this case by holding that, although Petitioners seek broad facial relief against the received-by deadline, they have failed to sufficiently allege a facial constitutional challenge. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). Petitioners’ facial challenge here fails because—while they bear the burden to show that no constitutional applications of Act 77’s received-by deadline exist—Petitioners all but concede that the deadline is constitutional as applied to vast numbers of Pennsylvania voters. Beyond that cross-cutting failure, Petitioners’ constitutional claims all fail on their own terms.

Petitioners invite this Court to counter the unfolding policy judgments in the other two branches of government—and to do so in the face of an “imminen[t]” primary election. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). That invitation to abridge the separation of powers is a bridge too far, especially given the day-to-day oversight that the political branches are exercising with an eye toward the 2020 elections and the need to reinforce “[c]onfidence in the integrity of [the Commonwealth’s] electoral process.” *Id.* The Court should dismiss the Petition.

I. FACTUAL BACKGROUND

A. As Amended by Act 77, Pennsylvania Law Permits All Pennsylvania Voters to Vote by Mail

Prior to enactment of Act 77, Pennsylvania law permitted only qualified absentee electors to vote by mail and required all other Pennsylvania voters to vote in person. 25 P.S. § 3146.1. Absentee ballots had to be received by the local election official in the voter's jurisdiction no later than five o'clock P.M. on the Friday before the primary or general election in order to be counted. 25 P.S. §§ 3146.2a(a)

The Pennsylvania House of Representatives passed Act 77 on a bipartisan majority vote, 138-61. The Pennsylvania Senate passed Act 77 on a bipartisan majority vote, 35-14. Governor Wolf signed Act 77 into law on October 31, 2019. *See* Pennsylvania General Assembly, Senate Bill 421; Regular Session 2019-2020, https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2019&sind=0&body=S&type=B&bn=421.

As alleged in the Petition,¹ Pennsylvania law, as amended by Act 77, now creates two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters. Pet. ¶ 15. “Qualified absentee electors” include, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from

¹ The Republican Committee Respondents accept the allegations of the Petition as true only for purposes of the Brief in Support of Preliminary Objections.

the municipality of their residence on Election Day due to work, and people who cannot vote in person because of observance of a religious holiday. *Id.* ¶ 16 (citing 25 P.S. § 3146.1).² With the passage of Act 77, any registered voter who does not qualify as an absentee voter may apply to submit her ballot by mail-in voting, without providing a justification (*i.e.*, “no-excuse voting”). *Id.* ¶ 17 (citing 25 P.S. §§ 3150.11–3150.12b). These voters are known as “qualified mail-in electors.” *Id.* (citing 25 P.S. § 3150.11).

As relevant in this case, the same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. *Id.* ¶ 18. To apply for an absentee or mail-in ballot, a voter must apply to the voter’s county board of elections by five o’clock P.M. on the first Tuesday prior to the day of any primary or election. *Id.* ¶ 20 (citing 25 P.S. §§ 3146.2a(a), 3150.12a(a)). The voter may do so online if the voter has a Pennsylvania driver’s license or non-driver photo identification from the Pennsylvania Department of Transportation. *Id.* ¶ 22. The voter also may download and print a ballot application, complete it, and mail it to the county board of elections. *Id.* ¶ 23. In addition, the voter may call, email, or write a letter to the Department of State or her county board of elections to request an application. *Id.* ¶ 24. Finally, the voter may obtain a ballot application in person at her county board

² As the Petition notes, military and overseas voters may also vote by absentee ballot, but Petitioners “do not challenge the deadline for military and overseas voters in this case.” Pet. ¶ 16 n.1.

of elections, although, at the time the Petition was filed, some of the relevant offices were not open to public walk-ins. *Id.* ¶ 24 n.4.

Once a voter submits her application, the county board of elections will determine whether the voter meets the statutory requirements and, if so, will mail the absentee or mail-in ballot to the voter. *Id.* ¶ 25 (citing 25 P.S. §§3146.2a(a.3)(3), 3150.12b(a)(1)). To be counted, the voter’s absentee or mail-in ballot must be received by the county board of elections “on or before eight o’clock P.M. the day of the primary or election.” *Id.* ¶ 26 (25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)).

Once a voter requests an absentee or mail-in ballot, the voter ordinarily may not vote by regular ballot in person on Election Day. *Id.* ¶ 28 (citing 25 P.S. §§ 3146.3(e), 3150.13(e)). If the voter changes his mind after requesting a ballot, however, he may cast a regular ballot at a polling place so long as the voter brings the ballot and accompanying envelope, remits it, and submits a sworn statement declaring that he has not cast his absentee or mail-in ballot. *Id.* (citing 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3)). Even if the voter neglects to bring the ballot and accompanying envelope to the polling place, he may cast a provisional ballot. *Id.* ¶ 29 (citing 25 P.S. §§ 3146.3(e), 3150.16(b)(2)).

Act 77 also contains a non-severability provision. *Id.* ¶ 105. In particular, Section 11 provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are

nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

B. Petitioners Challenge Act 77’s Received-By Deadline

Petitioners are a disability rights advocate and non-profit organizations that support and serve persons with disabilities, senior citizens, immigrants, refugees, and various other communities. Pet. ¶¶ 7–11.

Petitioners allege that “the received-by deadline will inevitably result in a substantial number of absentee and mail-in ballots not being counted, even though voters timely requested them.” *Id.* ¶ 34. Petitioners allege that a “typical” Pennsylvania voter will “submit[] her application for an absentee or mail-in ballot the day before the application deadline (the Tuesday before the election).” *Id.* ¶ 36. Estimating mailing and processing times, Petitioners reason that “the voter will not receive the ballot until the Saturday before the election.” *Id.* Petitioners allege that the voter “has no assurance” that a completed ballot could be received by the deadline two business days later. *Id.* Thus, “[t]he voter’s ballot may not be received by the deadline and accordingly may not be counted.” *Id.*

Petitioners also allege that “unpredictable variation in USPS’s delivery times” would cause two similarly situated voters to be treated differently. *Id.* ¶ 37. “[T]wo voters who are otherwise identically situated could mail their absentee or mail-in

ballots on the exact same day and time and have different outcomes—the voter whose local USPS branch delivers mail faster could have her vote counted while the voter who lives in an area with slower delivery times could have her ballot discarded as too late.” *Id.*

Finally, Petitioners allege that “[t]he disenfranchisement caused by the received-by deadline for absentee and mail-in ballots will be magnified enormously in the context of the current public health crisis resulting from the COVID-19 pandemic.” *Id.* ¶ 39.

C. Petitioners Advance Four Claims for Relief

First, Petitioners allege that the received-by deadline will violate the Pennsylvania Constitution’s Free and Equal Elections Clause, Art. I, § 5. Pet. ¶¶ 109–129. Petitioners allege that the received-by deadline will violate this provision because the Pennsylvania primary and general elections will not be free and equal, but will instead amount to a denial of the right to vote. *Id.* ¶ 117.

Second, Petitioners allege that the received-by deadline will violate the Pennsylvania Constitution’s Free Expression and Association Clauses, Art. I, §§ 7, 20. Pet. ¶¶ 130–142. Petitioners allege that the received-by deadline will violate these provisions because it will “significantly burden” and “outright deny” many voters’ ability to engage in political expression by voting. *Id.* ¶ 137.

Third, Petitioners allege that the received-by deadline will violate the Pennsylvania Constitution’s Equal Protection Guarantees, Art. I, §§ 1, 26. Pet. ¶¶ 143–153. Petitioners allege, among other things, that the received-by deadline will violate these provisions because “[e]nforcement of the received-by deadline will necessarily result in differential treatment of similarly situated voters—some disenfranchised and some not—based on inherent, unpredictable variation in delivery and application-processing times.” *Id.* ¶ 149.

Fourth, Petitioners allege that the received-by deadline will violate Article VII, Section 14(a) of the Pennsylvania Constitution, which requires the Legislature to enact a means for qualified absentee electors to vote. *Id.* ¶¶ 154–160. According to Petitioners, this is so because “[e]nforcement of the statutory received-by deadline during the COVID-19 pandemic will ensure that many voters who timely request absentee ballots in compliance with the Election Code, and who place their ballots into the mail on or before Election Day will, by no fault of their own, have their votes discarded.” *Id.* ¶ 158.

For all of these reasons, Petitioners request: (1) a declaration that enforcement of the received-by deadline is unconstitutional and invalid, “as applied during the duration of the public health emergency related to COVID-19, because it violates the rights of Petitioners and all voters in Pennsylvania”; (2) a declaration that the non-severability clause is unenforceable; (3) an injunction preventing Respondents

from enforcing the received-by deadline in the 2020 primary and general elections; and (4) an injunction requiring Respondents to consider timely any absentee or mail-in ballot if, among other circumstances, (i) the ballot is post-marked on or before the date of the election and was received within seven days after the date of the election, or (ii) the ballot contains any reliable indicia that the ballot was mailed on or before the date of the election. Pet. at 61–62.

II. ARGUMENTS IN SUPPORT OF PRELIMINARY OBJECTIONS

Pursuant to Pennsylvania Rule of Civil Procedure 1028(a), “[p]reliminary objections may be filed by any party to any pleading” based upon grounds including “legal insufficiency of a pleading (demurrer).” Pa. R.C.P. 1028(a)(4). The Rules also provide that the preliminary objections “shall state specifically the grounds relied upon and may be inconsistent. Two or more preliminary objections may be raised in one pleading.” Pa. R.C.P. 1028(b).

A. First Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Act 77’s Non-Severability Provision Is Enforceable, and the Petition Should Be Dismissed

This Court need not reach the merits of this case because Act 77’s non-severability provision is binding and enforceable, and Petitioners have pled that they would withdraw their Petition under those circumstances. The Court therefore should dismiss the Petition.

1. Act 77's non-severability provision is squarely implicated.

As previously noted, Act 77 contains a non-severability provision, which provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act 77, § 11.

The non-severability provision is squarely implicated in this case. Sections 6, 7, and 8 of Act 77 contain the received-by deadline. In addition, Petitioners’ prayer for relief requests, among other things, a declaration “that enforcement of the received-by deadline is unconstitutional and invalid.” Pet. at 61. In other words, Petitioners have asked that “[a] provision of this act or its application to any person or circumstance [be] held invalid.” Act 77, § 11. As a result, if the received-by deadline is deemed invalid, then the remaining Sections listed in Section 11—including Section 8, which creates Pennsylvania’s universal no-excuse mail-in voting scheme—are likewise invalid.

2. Act 77's non-severability provision is enforceable.

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

First, this Court has recognized that non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which

animate the legislative process.” *Id.* “In an instance involving such compromise, the General Assembly may determine, the court’s application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.*

That is what happened with Act 77. It is widely known that Act 77 began as a one-subject bill introduced by Senator Boscola to target straight-ticket voting. Paul Muschick, *How Pennsylvania’s biggest elections reforms in 80 years started in Lehigh Valley*, *The Morning Call* (Dec. 6, 2019), <https://www.mcall.com/opinion/mc-opi-pa-elections-reform-legislation-compromise-muschick-20191206-euuesozlw5dnpcuunu3lhl2tga-story.html>. Over time, Senator Boscola’s bill was amended to authorize payments to counties for voting machines, extend deadlines, and so on. *Id.* And after the Governor vetoed an earlier iteration of the bill, the General Assembly and the Governor went back to the drawing board and, through difficult and prolonged negotiations, ultimately reached a compromise. *Id.*

It is no secret that Act 77 was the result of a tough compromise. On the House floor, Senator Boscola (a Democrat), who introduced the bill, expressed “disappoint[ment] that the bill would not go as far as I would like” and did “not include every reform I would like to see.” 2019 Pa. Legislative Journal—*Senate* 1000

(Oct. 29, 2019). But she pushed forward nonetheless because “modernizing our elections and providing greater voter access are key.” *Id.* On the Senate floor, Republican Senate Majority Leader Corman described a similar experience:

All negotiations add some things and, unfortunately, lose some things. But to get to a point where there is bipartisan support to get agreement--we have a divided government in Pennsylvania, we have a Democratic Governor and a Republican legislature--there is always give and take. You have to be able to give to get. I think this bill is a product of that. The Governor led a difficult negotiation. It received 130 votes in the House, it was bipartisan, almost two-thirds of the Chamber, and we come here today. Again, every bill we can pick some pieces that we do not like about it, but I think, ultimately, this is the most significant modernization of our Election Code in decades.

Id. at 1002. The Governor likewise described Act 77 as “bipartisan compromise legislation.” *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting*, <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

It is also no secret that the non-severability provision was a key part of that compromise. This precise issue arose on the House floor in a colloquy involving State Government Committee Chair Garth Everett:

Mrs. DAVIDSON. Thank you.

My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to elimination of straight-party voting, absentee voting, and mail-in voting. Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille,

would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?

Mr. EVERETT. Thank you, Mr. Speaker.

There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.

Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.

Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

Mrs. DAVIDSON. All right. Thank you.

2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). It was thus eminently clear that the non-severability provision would serve to keep the relevant provisions of Act 77 “together,” such that they would rise and fall as one.

Because Act 77’s non-severability provision arises from “the concerns and compromises which animate the legislative process,” *Stilp*, 905 A.2d at 978, it is enforceable as an expression of the General Assembly’s desire that the critical compromise provisions of Act 77 rise and fall together.

Second, Act 77’s non-severability provision avoids the defect that this Court identified in *Stilp*. The defect in the provision the Court declined to enforce in *Stilp*

was that it had been “employed as a sword against the Judiciary” and appeared “to be aimed at securing a coercive effect upon the Judiciary” (by threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–80. Such provisions are “ineffective and cannot be permitted to dictate [the Court’s] analysis.” *Id. at 980.*

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

Moreover, Act 77’s non-severability provision is partial and targeted. It omits from the list of non-severable Act 77 provisions Sections 3.1, 10, 11, 13, 14, and 15. Act 77, § 11.³ These omissions illustrate that the General Assembly carefully

³ The first sentence of Section 11 of Act 77 states that only the listed provisions are non-severable, while the second sentence implies that invalidation of any provision in Act 77 would render the remaining provisions void. The best reading of Section 11 is that the second sentence describes the consequence of the first sentence—that invalidation of any of the *listed* provisions would render the remaining listed provisions void. Indeed, this is precisely how Chairman Everett described Section 11: “Yes; that would be just in those sections that have been

thought about which provisions of Act 77 necessarily must rise and fall together, and deliberately included those Sections in the non-severability provision.

The omission of Section 3.1 is particularly notable: Section 3.1 constitutes a significant portion of Act 77 and addresses “Voting Apparatus Bonds” to fund new voting machines in Pennsylvania. The General Assembly would have had good reasons to omit Section 3.1 from the non-severability clause. For example, the General Assembly may have wanted to fund new voting machines independent of the other provisions of Act 77, and may have wanted to preserve the rights and obligations of the Commonwealth and bondholders who transact in Voting Apparatus Bonds even if some other provision of Act 77 is invalidated during the term of such bonds.

For all of these reasons, Act 77’s non-severability provision is valid, enforceable, and dispositive in this case.

3. Petitioners’ counterarguments do not withstand scrutiny.

In an attempt to avoid the non-severability provision, Petitioners argue that “enforcement of the non-severability provision would ‘intrude upon the independence of the judiciary and impair the judicial function.’” Pet. ¶ 106 (quoting

designated as nonseverable.” 2019 Pa. Legislative Journal—*House* 1740–41 (Oct. 29, 2019). But even without the first sentence in Section 11, Act 77’s non-severability provision would be enforceable consistent with the presumption of enforceability of such provisions under *Stilp*.

Stilp, 905 A.2d at 980). But the Court made that statement in *Stilp* with regard to non-severability provisions intended to coerce the Judiciary, not all non-severability provisions or non-severability provisions that preserve a political compromise. As discussed above, Section 11 is not intended to coerce the Judiciary, so that driving consideration in *Stilp* is absent here, and the Court should heed the general presumption that non-severability provisions are valid.

Petitioners also suggest that “[t]he ultimate question for the Court” is “whether the valid provisions of the statute are essentially and inseparably connected with and depend upon the invalid received-by deadline.” Pet. ¶ 106 (quotation marks and citation omitted). But that is the default test for *severability* in the absence of a non-severability provision, not the governing test for whether to uphold *non-severability provisions*. In any event, if the Court ignored the non-severability provision and conducted the standard severability analysis, the upshot of severing the received-by deadline would be that there would be no deadline for absentee and mail-in ballots. *See, e.g., Commonwealth v. Hopkins*, 117 A.3d 247, 261–62 (Pa. 2015) (declining to “rewrite” non-severable portions of a statute, which, “standing alone, without a wholesale rewriting, are incomplete and incapable of being vindicated in accord with the legislature’s intent”). That is the definition of an “incomplete” statute that is “incapable of being vindicated in accord with the

legislature’s intent.” *Id.* Thus, even setting aside the non-severability provision, a straightforward severability analysis would not save Act 77 under Petitioners’ view.

Next, Petitioners suggest that applying the non-severability provision to invalidate nearly all of Act 77 would itself be unconstitutional. Pet. ¶ 107 (“[I]f Petitioners are correct that the received-by deadline for absentee and mail-in ballots violates the Pennsylvania Constitution by abridging Pennsylvanians’ ability to vote during the pandemic, then eliminating all no-excuse mail voting in a pandemic necessarily would violate the Pennsylvania Constitution as well.”). But, if Petitioners were correct, then pre-Act 77 Pennsylvania election law was unconstitutional. That, of course, is not true and highlights a fatally incorrect premise in Petitioners’ argument: that there is a constitutional right to no-excuse mail-in voting. Yet Petitioners have never asserted a constitutional claim against the earlier pre-Act 77 ballot-receipt deadline. Petitioners are thus incorrect in suggesting that enforcing the non-severability provision would be unconstitutional.

Finally, Petitioners argue that the Court in *Stilp* “declin[ed] to apply” an “identically worded non-severability provision.” *Id.* ¶ 106. But the non-severability provision in *Stilp* was not “identically worded” to Section 11 of Act 77, which in its first sentence specifically targets “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act.” Act 77, § 11. Rather, as this Court noted, the provision in *Stilp* was “a

global and boilerplate nonseverability provision, and not a partial, targeted, or specific one.” 905 A.2d at 980 n.48.

To be sure, although not controlling of its decision, the Court in *Stilp* thought the global scope of the non-severability provision “notable” in light of its animating separation-of-powers concerns. *Id.*; *but see also id.* at 976 (citing *Kennedy v. Commonwealth*, 546 A.2d 733 (1988) (upholding a global non-severability provision)). But any resemblance between that provision and the second sentence of Section 11 is of no moment: this Court’s decision in *Stilp* did not treat the provision’s global language as dispositive; other courts in the Commonwealth have upheld global non-severability provisions where separation-of-powers considerations were absent, *see id.* at 976 (citing *Kennedy v. Commonwealth*, 546 A.2d 733 (1988) (upholding a global non-severability provision)); and the second sentence of Section 11 is best read as coterminous with the first sentence, not as a global non-severability provision, *see supra* n.3.

The upshot of all this is that Act 77’s non-severability provision is enforceable and binding. The Court, therefore, should dismiss the Petition or permit Petitioners to “withdraw their claims without seeking any relief.” Pet. ¶ 108.

B. Second Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Fail to Sufficiently Allege a Facial Challenge to the Received-By Deadline

On the merits, the Petition is deficient from the start because it fails to sufficiently allege a facial challenge to the received-by deadline. To be sure, Petitioners claim they are bringing an “as applied” challenge—that is, a challenge to the received-by deadline “as applied during the duration of the public health emergency related to COVID-19.” Pet. at 61. But “the question of whether a particular constitutional challenge is ‘facial’ or ‘as applied’ should not be dictated by the label a litigant attaches to it.” *Nextel Commcns. of Mid-Atlantic, Inc. v. Commonwealth, Dep’t of Revenue*, 171 A.3d 682, 706 (Pa. 2017) (Baer, J., concurring).

This is an attempted facial challenge, not an as-applied challenge. The hallmark of an as-applied challenge is a complaint about a law’s application “to a particular person under particular circumstances.” *Nigro v. City of Phila.*, 174 A.3d 693, 699 (Pa. Cmwlth. 2017) (quotation marks and citation omitted). Moreover, “an as-applied challenge will not necessarily invalidate a law[.]” *Id.* at 700.

Petitioners, however, seek facial relief on behalf of “all voters in Pennsylvania,” not a particular person—that is, a declaration that the received-by deadline is “unconstitutional and invalid.” Pet. at 61. Moreover, nothing in Petitioners’ arguments hinges on the circumstances surrounding COVID-19, so their

assertion of an as-applied challenge based on those circumstances fails. Petitioners effectively concede as much in arguing that “[t]he disenfranchisement caused by the received-by deadline for absentee and mail-in ballots will be *magnified* enormously in the context of the current public health crisis resulting from the COVID-19 pandemic.” *Id.* ¶ 39 (emphasis added); *see also id.* ¶ 118 (“The received-by deadline would disenfranchise an inordinate number of people in *any election*, but the numbers will be staggering amid the COVID-19 crisis.”) (emphasis added). This is a quintessential facial challenge to the law “as written.” *Nigro*, 174 A.3d at 699 (quotation marks and citation omitted).

The problem for Petitioners is that they pled themselves out of a facial challenge. “[F]acial challenges are generally disfavored.” *Clifton v. Allegheny Cty.*, 969 A.2d 1197, 1223 n.37 (Pa. 2009). For that reason, a statute is only facially invalid “when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary.” *Id.* More recently, this Court has emphasized that “[a] statute is facially unconstitutional only where no set of circumstances exist under which the statute would be valid.” *Pa. Env. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 n.31 (Pa. 2017). “A facial challenge must fail where the statute has a plainly legitimate sweep.” *Id.* (quotation marks and citation omitted).

But the Petition acknowledges that, even under Petitioners' view, there are circumstances in which the received-by deadline is valid. Petitioners repeatedly allege disenfranchisement of "large numbers of Pennsylvanians," Pet. ¶ 2; "many voters," *id.* ¶ 3; "a substantial number" of voters, *id.* ¶ 34; "tens of thousands of Pennsylvanians," *id.* ¶ 51; "certain groups of Pennsylvanians," *id.* ¶ 58; and "a significant number of Pennsylvanians," *id.* ¶ 118. These carefully limited references implicitly concede that there are circumstances in which the received-by deadline is constitutional, such as when voters timely receive and return their ballots or choose to vote in person. Because Petitioners concede that at least some applications of the received-by deadline are constitutional, they have failed to sufficiently plead a facial challenge as a matter of law. *See Pa. Env. Def. Found.*, 161 A.3d at 938 n.31.

In the same vein, the received-by deadline has "a plainly legitimate sweep." *See id.* (quotation marks and citation omitted). Petitioners' fundamental concern is that an absentee ballot or mail-in ballot may arrive at the county board of elections after the received-by deadline due to no fault of their own.

This speculation rests on a mountain of double-edged assumptions. For example, Petitioners speculate that some voters may not have the photo identification necessary to apply online for a ballot, which might delay the overall ballot submission process. Pet. ¶ 22. The flipside of that reasoning is that many voters *do* have such photo identification and thus may apply online, receive their

ballot, and submit it without delay. Similarly, Petitioners opine that some voters do not have a printer and thus cannot download and print an application for an absentee or mail-in ballot, thereby delaying their overall ballot submission process. *Id.* ¶ 23. The flipside of that reasoning is that many voters *do* have printers and can submit their application by mail, receive their ballot, and submit it without delay.

Petitioners further speculate that voters will likely request their ballots close to a week before Election Day, which means “[t]he voter’s ballot may not be received by the deadline and accordingly may not be counted.” *Id.* ¶ 36. That concern overlooks that potential absentee and mail-in electors may request their ballots up to 50 days before the date of the election, *see* 25 P.S. §§ 3146.2a(a), 3150.12a(a), and that any voter who already requested an absentee or mail-in ballot for the primary as originally scheduled on April 28 “do[es] NOT need to reapply” for such a ballot for the June 2 primary, VOTESPA, An Official Pennsylvania Government Website, <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>. Thus, even if the Court were to agree with Petitioners’ speculation that the average Pennsylvania voter will procrastinate and assume *arguendo* that the U.S. Postal Service will run markedly slower than average, many voters would *still* escape the hypothetical harm Petitioners imagine.

Finally, Petitioners allege that the last-minute voters with whom they are concerned will receive their ballots “days before election day,” and “USPS estimates

that standard First Class delivery takes one to three business days.” Pet. ¶¶ 32, 118. By Petitioners’ own lights, therefore, these voters will almost certainly be able to submit their ballots on time. Petitioners can only suggest otherwise by asking the Court to speculate about how, if at all, delivery times might change.

In sum, for those voters who have the requisite photo identification, or for those who have printers, or for those who apply for their ballots with sufficient time to receive and return them, Petitioners’ chain of speculation breaks down—and Act 77’s received-by deadline is indisputably valid as to those voters. By Petitioners’ admission, the hypothesized harm—if it is indeed a constitutional harm—will occur only if a chain of hypotheticals all take place.⁴ Moreover, Petitioners’ own numbers show that the remaining voters will almost certainly be likely to timely submit their ballots. That is the definition of “a plainly legitimate sweep,” and the facial challenge must fail.

⁴ Petitioners’ reliance on this attenuated chain of increasingly unlikely hypothetical events also raises serious questions about their standing to bring this action. As Respondents point out in their Preliminary Objections to Petitioners’ Petition for Review, “any possible harm to Petitioners is wholly contingent on future events,” and the Petition is far too speculative “to demonstrate that they have an immediate interest,’ as is required for standing.” Resp. Prel. Objs. ¶ 35 (quoting *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005)).

C. Third Preliminary Objection Pursuant to Pa. R. Civ. P. 1028(a)(4): Petitioners Fail to State a Claim for Relief Under the Pennsylvania Constitution

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

At the threshold, Petitioners’ claim that the ballot-receipt deadline violates the Pennsylvania Constitution makes no sense. *Act 77 extended* the absentee ballot received-by deadline from five o’clock P.M. on the Friday before the primary or general election to eight o’clock P.M. on the day of the primary or general election. Thus, Petitioners’ theory presumes that the pre-Act 77 deadline was unconstitutional—but Petitioners have never asserted such a claim, then or now.

In all events, Petitioners cannot carry their heavy burden to prove that Act 77’s extended received-by deadline violates the Pennsylvania Constitution as to any of their claims.

1. Petitioners fail to state a claim for relief under the Free and Equal Elections Clause.

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

This Court has long held that “[t]he power to regulate elections is legislative.” *Winston*, 91 A. at 522. Indeed, “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Id.* For that reason, such laws “should never be stricken down by the courts unless in plain violation of the fundamental law.” *Id.* This Court “cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy.” *Id.* at 525. Those questions are “for the Legislature and not for the courts,” and if some restrictions are “onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to amend.” *Id.*

Against that backdrop, the Court has interpreted the Free and Equal Elections Clause to mean that elections are free and equal

when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and

when no constitutional right of the qualified elector is subverted or denied him.

Id. at 523.

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

This Court recently reaffirmed *Winston*—albeit in a vote-dilution case—as setting out “the minimum requirements for ‘free and fair’ elections.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 810 (Pa. 2018). This, of course, is not a vote-dilution case, and this Court’s focus on vote dilution in *League of Women Voters* is inapposite here. But *League of Women Voters* illustrates that the central tenets outlined in *Winston* remain controlling.

Petitioners’ Free and Equal Elections Clause claim fails under *Winston*. This is because the received-by deadline does not deny a qualified elector the right to vote. *Winston*, 91 A. at 523. It treats all voters alike. *Id.* Primaries held with the deadline in effect are open and public to all those who are entitled to vote and “take the trouble to exercise the right of franchise.” *Id.* And “the inconveniences if any

bear upon all in the same way under similar circumstances.” *Id.* Petitioners’ arguments otherwise are misplaced.

First, Petitioners argue that the 2020 elections will not be *free* because, “as a direct result of enforcing the received-by deadline, a significant number of Pennsylvanians will not have their votes counted through no fault of their own.” Pet. ¶ 118. Petitioners forecast that, due to increased ballot requests and delays in mail delivery, “tens of thousands of Pennsylvanians (if not more)” will receive their ballots only days before date of the election and submit them, only to have them arrive after the received-by deadline. *Id.* Other voters, Petitioners allege, will conclude that there is not enough time to return the ballot and will be forced to decide either not to vote or “to risk their health and safety by instead voting in person.” *Id.* ¶ 119. According to Petitioners, “[e]lections are not ‘free’ when voters must risk their lives to vote.” *Id.* ¶ 120.

At the outset, it is important to appreciate the extent of Petitioners’ speculation. There are no facts alleged in this argument. There are only wild guesses dressed up in soaring rhetoric. In addition, it is important to recall that many of the assumptions underlying this argument are easily overcome. And to the extent the voters described in this argument are not a null set, Petitioners’ own numbers show that the voters will almost certainly be able to submit their ballots on time. *Id.* ¶¶ 32, 118.

More fundamentally, this argument fails to overcome *Winston*. Petitioners’ complaint that some voters may be hindered by mail delays or COVID-19 describes “the inconveniences [that] bear upon all in the same way under similar circumstances.” *Winston*, 91 A. at 523. All of America—and indeed, the world—is laboring under the present circumstances. And whether a Pennsylvania voter “take[s] the trouble to exercise the right of franchise” in person or by mail, that voter is in substantially the same position as every other voter. *Id.* None of these voters has been denied the right to vote.

To illustrate the point, suppose that Act 77 and mail-in voting did not exist. To exercise the right to vote, non-absentee voters would be required to attend their ordinary polling places in person and brave the dangers that Petitioners forecast. But there is no good-faith argument that this ordinary election process would violate non-absentee voters’ constitutional rights. The result cannot be different simply because the General Assembly struck a grand compromise in Act 77 and sought to ease the burdens of voting by authorizing no-excuse mail-in voting.

Second, Petitioners argue that the received-by deadline does not give voters an *equal* opportunity to vote because “[t]wo similarly situated individuals could timely request mail-in ballots the same day, and yet inherent variation in mail-delivery schedules or application-processing speed could result in one individual

having her vote counted, while the other does not.” Pet. ¶ 123. Petitioners are mistaken.

To begin with, any such injury would be caused by mail-delivery and application-processing mechanisms that Petitioners have not challenged in this case. Petitioners cannot conjure up a constitutional violation based on a hypothetical injury that would be traceable to unchallenged mechanisms, not the received-by deadline. *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (“[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”).

What is more, the alleged variations in mail-delivery and application-processing times are not different in kind than the myriad differences among Pennsylvania citizens that are out of their control—and that may exist even outside of the COVID-19 pandemic. Some are old; some are young. Some are in good health; some are in poor health. Some live downtown by a polling place; some live far away in a rural area. Some have reliable means of transportation; some have no transportation. So, too, some may happen to live in counties with more efficient mail service and ballot processing than the same services in other counties. That the burden of exercising the right to vote varies from voter to voter because of these

differences does not render the election laws discriminatory. It demonstrates only that voters are not shaped by a cookie cutter.

Attempting to show otherwise, Petitioners invoke this Court’s statement that the framers sought to eradicate “laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs.” Pet. ¶ 127 (quoting *League of Women Voters*, 178 A.3d at 808). But the Court’s complete statement was that the framers sought to preserve popular elections that “would, hereinafter, not be *intentionally* diminished by laws that discriminated against a voter” on those bases. *League of Women Voters*, 178 A.3d at 808 (emphasis added). No such intentional discrimination exists here.

Similarly, Petitioners argue that “[t]his sort of arbitrary, differential treatment of similarly situated voters is precisely what the Free and Equal Elections Clause was written to ‘end, once and for all.’” Pet. ¶ 124 (quoting *League of Women Voters*, 178 A.3d at 808). But again, the Court’s complete statement was that the framers sought to end the dilution of voting rights “*based on considerations* of the region of the state in which [voters] lived, and the religious and political beliefs to which they adhered.” *League of Women Voters*, 178 A.3d at 808–09 (emphasis added). There is no basis to infer that the framers would have blinked twice at a neutral ballot measure that applies to all voters equally without regard to any of the considerations listed above.

The received-by deadline does not violate the Free and Equal Elections Clause.

2. Petitioners fail to state a claim for relief under the Free Expression and Association Clauses.

Petitioners' claim based on the Free Expression and Association Clauses, Article I, Sections 7 and 20, fares no better. As alleged, the Free Expression Clause provides, as relevant here: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Pa. Const. art. I, § 7. Also as alleged, the Free Association Clause provides: "The citizens have a right in a peaceable manner to assemble together for their common good[.]" Pa. Const. art. I, § 20.

The received-by deadline, however, plainly does not restrict Petitioners' "communication of thoughts and opinions," nor does it restrict Petitioners' ability "to assemble together." Instead, it is an election-administration measure that is more properly assessed under the Free and Equal Elections Clause. *See Working Families Party v. Commonwealth*, 209 A.3d 270, 305 n.28 (Pa. 2019) (Wecht, J., concurring and dissenting) ("[I]t is not clear to me, at least when it comes to ballot restrictions, that Article I, Sections 7 and 20, ever would furnish relief where the Free and Equal Elections Clause did not."); *cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) ("The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right[.]").

The best evidence that Petitioners' claim is misplaced is that Petitioners do not cite a single case in which this Court (or any other) has analyzed an election-administration measure that governs only the act of voting under the Free Expression and Association Clauses. Instead, Petitioners cobble together edited quotations from irrelevant cases to suggest that this Court *should* do so. But Petitioners' own cases refute that suggestion. Take this quotation: "Each individual voter as he enters the booth is given an opportunity to freely express his will." Pet. ¶ 135 (quoting *Oughton v. Black*, 61 A. 346, 348 (1905)). *Oughton* was a ballot-measure case assessed under the Free and Equal Elections Clause, which cuts against Petitioners' attempt to state a claim under the Free Expression and Association Clauses. 61 A. at 347.

The other cases are even farther afield. See *Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (Free Expression Clause case concerning nude dancing); *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (Free Expression and Association Clauses case concerning political contributions); *Commonwealth v. Cobbs*, 305 A.2d 25 (Pa. 1973) (federal Equal Protection Clause case concerning juror eligibility requirements); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (federal Article I, Section 2, case concerning the apportionment of congressional districts); *Elrod v. Burns*, 427 U.S. 347 (1976) (federal First and Fourteenth Amendments case concerning the discharge of public employees solely because of their partisan

political affiliation or nonaffiliation); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (federal First Amendment case concerning political contributions); *Commonwealth v. Wadzinski*, 422 A.2d 124 (Pa. 1980) (federal First and Fourteenth Amendments case concerning criminal sanctions on candidates for public office who publish certain political advertisements). Indeed, the only cases mentioning the Free Expression and Association Clauses (*Pap's A.M.* and *DePaul*) involved what has been traditionally understood as freedom of expression and freedom of association, not the act of voting. The upshot is that there is no good reason to shoehorn a Free and Equal Elections Clause claim into the Free Expression and Association Clauses.

Thus, Petitioners are incorrect that the Free Expression and Association Clauses foreclose the received-by deadline. In fact, Petitioners invoke only an inapposite analysis, and nowhere even mention, let alone engage in, the analysis that this Court has adopted to address claims that a state election-administration law unconstitutionally burdens the right to vote. Petitioners own cited case, *Banfield v. Cortes*, 110 A.3d 155 (Pa. 2015) (cited at Pet. ¶ 148), demonstrates as much. There, this Court made clear that while “the right to vote is fundamental and pervasive of other basic civil and political rights, the state may enact substantial regulation containing reasonable, nondiscriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176–77 (citation and quotation marks omitted). Thus, ““when a state election law

provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* at 177 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Here, there can be no dispute that the Commonwealth has strong and imperative interests “in ensuring fair elections that are free from the taint of fraud,” *In re Nader*, 905 A.2d 450, 465 (Pa. 2006), safeguarding “public confidence” in its elections and “in the integrity and legitimacy of representative government,” *Crawford v. Marion County Elec. Bd.*, 553 U.S. 181, 197 (2008), and guaranteeing finality of election results, *see, e.g., Banfield*, 110 A.3d at 176–77 (state has an interest in “ensur[ing] honest and fair elections that proceed in an orderly and efficient manner”). The commonsense received-by deadline directly advances these interests: it prevents fraud by ensuring that mail-in and absentee ballots are received by election officials before any ballot is counted; promotes public confidence by ensuring that all ballots are cast by a single deadline before any results may become publicly known; and establishes an end date and time for voters to vote and election officials to tabulate ballots. By promoting these important interests, the received-by deadline “encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197.

Petitioners implicitly acknowledge that the received-by deadline, as a general matter, does not impose an unconstitutional burden on the right to vote. As indeed they must: the received-by deadline is a “reasonable, nondiscriminatory” rule applicable to all Pennsylvania voters that advances “important regulatory interests.” *Banfield*, 110 A.3d at 176-77. Moreover, the burden imposed by the received-by deadline is no greater than—and, in fact, is *lesser* than—“the usual burdens of voting.” *Crawford*, 553 U.S. at 198. After all, prior to enactment of Act 77, all non-absentee Pennsylvania voters were required to vote in person, but Act 77 alleviates that burden and replaces it with a less demanding burden by permitting *all* Pennsylvania voters to vote by mail without excuse by the received-by deadline.

Instead, Petitioners purport to limit their challenge to “the context of the COVID-19 pandemic,” Pet. ¶ 137, but as explained above, nothing in their argument hinges on the COVID-19 pandemic, *see supra* p. 23. Indeed, the vagaries of mail service, Pet. ¶ 138, or the decision-making process of “undecided and late-deciding voters,” *id.* ¶ 140, exist even outside “the context of the COVID-19 pandemic,” *id.* ¶ 137. In all events, any burden that Petitioners might ascribe to the pandemic flow from *COVID-19*, not the received-by deadline or any other action by the Commonwealth. They therefore are not attributable to the Commonwealth and provide no basis for striking down the received-by deadline. *See Banfield*, 110 A.3d at 176-77; *In re Nader*, 905 A.2d at 465. Yet what Petitioners seek to do is to

leverage the COVID-19 pandemic—which the Commonwealth did not create—into a ruling from this Court invalidating the grand legislative bargain captured in received-by deadline based on conditions like disuniform mail service and voters’ decision-making delays that may repeat in future elections. The Court should decline to grant Petitioners their preferred rule of election administration that the General Assembly and the Governor have declined to grant as both a general matter in Act 77 and as a specific matter in the context of the COVID-19 pandemic.

Ignoring the governing *Banfield* framework, Petitioners assert that the received-by deadline is not valid as a content neutral “time, place, and manner” restriction. Pet. ¶ 142. But as explained above, the “time, place, and manner” framework is inapplicable here. In all events, even if it were applicable, the received-by deadline would satisfy it. A time, place, and manner restriction will be upheld if (1) it is justified without reference to the content of the regulated speech; (2) it is narrowly tailored to serve a significant or substantial government interest; and (3) it leaves open ample alternative channels of communication. *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 981 (Pa. Commw. Ct. 1997).

Here, the received-by deadline plainly does not turn on the content of any speech. It is narrowly tailored to serve significant government interests—namely, orderly election administrations free from chaos. *See, e.g., Storer v. Brown*, 415 U.S. 724, 730 (1974) (“[A]s a practical matter, there must be a substantial regulation

of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”); *Valenti v. Mitchell*, 962 F.2d 288, 301 (3d Cir. 1992) (“The state's interest in a timely and orderly election is strong.”). Petitioners claim that there is a “significantly less restrictive means” of serving those interests. Pet. ¶ 142. But, as Petitioners’ own case states, “a ‘least restrictive means’ analysis does not apply when a content-neutral time, place and manner restriction is at issue.” *Golden Triangle News, Inc.*, 689 A.2d at 982–83. Instead, “a restriction is deemed to be narrowly tailored if it promotes a substantial government interest that would be achieved less effectively without the regulation.” *Id.* at 983. That is the case here as the legitimate government interests in conducting an orderly election would be “achieved less effectively” by extending the received-by deadline beyond the deadline by which voters must have voted in person. Finally, although Petitioners do not expound on the third prong of the test—ample alternative channels of communication—every Pennsylvania citizen has the same channels of submitting her vote that every other Pennsylvania citizen enjoys. She may vote in person or she may vote by mail. There is simply nothing to Petitioners’ Free Expression and Association Clause claim.

3. Petitioners fail to state a claim for relief under the Equal Protection Guarantees.

The same is true of the Equal Protection Guarantees claim. Article I, Section 1 provides: “All men are born equally free and independent, and have certain inherent

and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Article I, Section 26 provides: “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right.” Pa. Const. art. I, § 26.

Petitioners do not assert any intentional discrimination by the Commonwealth in the adoption or implementation of the received-by deadline. *See* Pet. ¶¶ 147–153. Moreover, although Petitioners spend considerable time discussing whether strict scrutiny, intermediate scrutiny, or rational basis apply, *see id.*, *Banfield*—Petitioners’ own case—illustrates that the Court has eschewed such categorization for election measures. Rather, the governing rule is that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176–77.

As explained above, *see supra* Part II.C.2, the received-by deadline is a reasonable, nondiscriminatory rule that ensures Pennsylvania elections will proceed in an orderly and efficient manner. It applies equally to all voters. And it reasonably tracks the same Election Day deadline by which a county board of elections must have received a ballot from a voter who elected to vote in person.

Petitioners return to their suggestion that similarly situated voters may be treated differently “based on inherent, unpredictable variation in delivery and application-processing times,” Pet. ¶ 149, but that argument is unpersuasive for the reasons stated above, *see supra* Section II.C.1. This claim thus fails as well.

4. Petitioners fail to state a claim for relief under Article VII, Section 14(a).

Nor is there any merit to Petitioners’ claim for relief under Article VII, Section 14(a). Article VII, Section 14(a) provides:

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

Pa. Const. art. VII, § 14(a). Petitioners recycle their allegations that “[e]nforcement of the statutory received-by deadline during the COVID-19 pandemic will ensure that many voters who timely request absentee ballots in compliance with the Election Code, and who place their ballots into the mail on or before Election Day will, by no fault of their own, have their votes discarded.” Pet. ¶ 158.

Again, these arguments have already been addressed, *see supra* Section II.C.1, but three additional notes bear mentioning. *First*, this claim does not apply to mail-

in voters; it only applies to absentee voters covered by Article VII, Section 14(a). *Second*, Article VII, Section 14(a) says nothing about a received-by deadline—and Petitioners do not dispute that Pennsylvania law provides “a manner in which” qualified absentee electors “may vote.” Pa. Const. art. VII, § 14(a); *see also, e.g.*, 25 P.S. § 3146.1.

Third, Petitioners do not cite a single case in support of this claim. Of the four cases in which this Court has cited Article VII, Section 14(a), one concerned who may vote, *Ray v. Commonwealth*, 276 A.2d 509 (Pa. 1971); one concerned where absentee votes may be canvassed, *In re Canvass of Absentee Ballots of 1967 General Election*, 245 A.2d 258 (Pa. 1968); one was dismissed for lack of standing, *Kauffman v. Osser*, 271 A.2d 236 (Pa. 1970); and the fourth—somewhat identical to *In re Canvass of Absentee Ballots of 1967 General Election*—effectively sanctions the received-by deadline.

In *In re 223 Absentee Ballot Appeals*, 245 A.2d 265 (Pa. 1968), the appellant argued that, under Article VII, Section 14(a), *district* elections boards rather than *county* election boards must count absentee ballots. Rejecting that argument, this Court explained that district election boards were ill-suited to do so because they are “one-day operation[s]” and absentee ballots “might well not arrive at the place where the district election board sits until days after the board has completed its labors and

has disbanded.” *Id.* at 266. This Court then endorsed what is effectively the received-by deadline:

Perhaps the Legislature should amend the Election Code to provide that absentee ballots must be mailed at such a time to insure their arriving at the district election board the day before the date of the election, on penalty of invalidation of such ballots that arrive later. With machinery of this kind, the District Election Boards could efficiently, speedily and properly handle all absentee ballots on election day so that when the computation would have been completed, it would include the counting of the ballots of those who voted by mail, as well as those who voted in person.

Id. In no uncertain terms, this Court mused that it makes good, and perhaps better, sense, to have a received-by deadline. That is enough to dispose of this claim and this case.

5. Petitioners impermissibly ask this Court to override political policy decisions.

Finally, Petitioners insist at various points that they only allege that the received-by deadline is unconstitutional “as applied during the COVID-19 crisis.” *E.g.*, Pet. ¶ 142. As previously noted, however, nothing in Petitioners’ arguments turns on the existence of COVID-19. *See, e.g., id.* ¶ 118 (“The received-by deadline would disenfranchise an inordinate number of people in *any election*, but the numbers will be staggering amid the COVID-19 crisis.”) (emphasis added). Petitioners’ claim that their challenge is limited to the circumstances of COVID-19 is thus belied by the substance of their arguments.

In any event, taking Petitioners' representation on its own terms, Petitioners effectively ask this Court to override the policy judgments of the Governor and the General Assembly regarding COVID-19. The political branches of government are engaged in ongoing efforts to address COVID-19. These efforts produced legislation—unanimously passed by the General Assembly and signed by the Governor—which delayed the primary election until June 2 and amended Act 77. *Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election*, <https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-response-bills-to-bolster-health-care-system-workers-and-education-and-reschedule-the-primary-election/>. At the time that the General Assembly and the Governor unanimously agreed to amend Act 77 and postpone the primary election to June 2, they were aware of Act 77 and the received-by deadline of eight o'clock P.M. on the day of the primary election. The General Assembly and the Governor, however, opted to leave that deadline in place.

Moreover, on April 30, the Senate State Government Committee held a public hearing with election officials and experts to discuss preparations for the primary and general elections. Chelsea Koerbler, *State lawmakers weigh options on how to proceed with June 2nd primary*, Fox43 (April 30, 2020), <https://www.fox43.com/article/news/local/state-lawmakers-weigh-options-on-how->

to-proceed-with-june-2nd-primary/521-a3949c23-5935-4354-a69f-bce08fde1aca.

And for his part, the Governor has issued, and will continue to issue, a series of orders related to COVID-19. *See generally Responding to COVID-19 in Pennsylvania*, <https://www.pa.gov/guides/responding-to-covid-19/>. This includes a statewide stay-at-home order that expires on May 8, 2020, more than three weeks before the June 2 primary election. *Gov. Wolf, Sec. of Health Extend Statewide Stay-at-Home Order Until May 8*, <https://www.governor.pa.gov/newsroom/gov-wolf-sec-of-health-extend-statewide-stay-at-home-order-until-may-8/>. The Governor's statewide stay-at-home order permits government activities, including elections, to continue during the term of the order.

In addition, on April 28, the Governor announced that “he’ll begin gradually reopening some counties in early May.” Ron Southwick, *Gov. Tom Wolf talks about reopening Pa. amid COVID-19, nursing homes and going outdoors*, PennLive (Apr. 28, 2020), <https://www.pennlive.com/news/2020/04/gov-tom-wolf-talks-about-covid-19-in-pa-live-updates.html>; *see also Phased Reopening*, <https://www.pa.gov/guides/responding-to-covid-19/#PhasedReopening>. On May 1, the Governor made a further announcement reopening 24 counties as of May 8 and providing further details regarding his plan to lift the remainder of his stay-at-home order in phases. *See Governor Wolf Announces Reopening Of 24 Counties*

Beginning May 8, <https://www.governor.pa.gov/newsroom/gov-wolf-announces-reopening-of-24-counties-beginning-may-8/>.

By pressing this constitutional challenge, Petitioners are asking this Court to weigh in on the political policy judgments regarding ongoing preparations for voting and the best path forward in light of COVID-19. But this Court’s “role is distinctly *not* to second-guess the policy choices of the General Assembly.” *Ins. Fed. of Pa.*, 970 A.2d at 1122 n.15 (emphasis in original). Indeed, “[i]t is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring.” *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). And “[i]f, in the domain of economic and social controversies, a court were, under the guise of the application of the doctrine of public policy, in effect to enact provisions which it might consider expedient and desirable, such action would be nothing short of judicial legislation[.]” *Id.* Should the General Assembly and the Governor permit the primary and general elections to proceed in line with ongoing preparations, this Court’s intervention would constitute a determination that their political policy judgment concerning the current circumstances is incorrect. The Court should decline Petitioners’ invitation.

III. CONCLUSION

For the foregoing reasons, the Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee respectfully request that this Court sustain the Preliminary Objections to the Petition for Review and dismiss the Petition for Review with prejudice.

Dated: May 7, 2020

Respectfully submitted,

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**Pro hac vice application forthcoming*

CERTIFICATION OF WORD COUNT

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 11,092 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

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CERTIFICATE OF COMPLIANCE

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

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