

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**Docket No. 717 MD 2018**

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**CASSANDRA ADAMS JONES, ARIELA BERG, FELICIA COOPER, RADHARANI HOWARD, KENEDY KIEFFER, SARAH MEARHOFF, KELLY MYERS, JOHN NEUGEBAUER, EDWARD REAM, AND THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA,**

**Petitioners,**

**v.**

**KATHY BOOCKVAR, IN HER CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA; JONATHAN M. MARKS, IN HIS CAPACITY AS THE COMMISSIONER OF THE BUREAU OF COMMISSIONS, ELECTIONS, AND LEGISLATION OF THE PENNSYLVANIA DEPARTMENT OF STATE; JOSEPH B. SCARNATI III, IN HIS CAPACITY AS THE PENNSYLVANIA SENATE PRO TEMPORE; MICHAEL C. TURZAI, IN HIS CAPACITY AS SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; THOMAS W. WOLF, IN HIS CAPACITY AS GOVERNOR OF PENNSYLVANIA,**

**Respondents,**

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**EXECUTIVE RESPONDENTS' BRIEF IN SUPPORT OF THEIR  
PRELIMINARY OBJECTIONS**

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**INTRODUCTION**

Petitioners—ten voters and the American Civil Liberties Union of Pennsylvania (“ACLU”)—challenge Pennsylvania’s deadline for returning absentee ballots. Specifically, Petitioners assert that 25 P.S. § 3146.8(a), which requires that absentee ballots not be counted if received in the office of the county board of election later than 5:00 p.m. on the Friday immediately preceding election day, violates, *inter alia*, state and federal constitutional guarantees of equal protection, due process, and free and equal elections.

Executive Respondents unreservedly support the ability of Pennsylvanians to cast meaningful ballots. In fact, provisions permitting absentee voting serve to expand the opportunity for eligible voters to exercise the franchise because such laws allow voters to cast ballots in advance and without appearing on election day at their respective precincts.



Such policy choices, however, are not for this Court to make. Further, simply because there could be other ways to provide for absentee voting does not alter the fact that Petitioners' constitutional challenges—as currently pled—are without merit. For the reasons that follow, Executive Respondents' Preliminary Objections should be sustained.

**STATEMENT OF JURISDICTION**

Petitioners invoke 42 Pa.C.S. § 761 as the jurisdictional basis for this litigation.

## SCOPE AND STANDARD OF REVIEW

The standards applicable for the review of Preliminary Objections are well settled. Pennsylvania is a fact pleading state. *See* Pa. R. Civ. P. 1019. As such, while this Court must accept as true all well-pled facts, it need not accept conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *See, e.g., Brendley v. Pa. Dep't of Labor and Indus.*, 926 A.2d 1276, 1280 (Pa. Cmwlth. 2007); *Boyd v. Rockwood Area School Dist.*, 907 A.2d 1157, 1163, n.8 (Pa. Cmwlth. 2006). In the end, unless the well-pled facts establish a right to relief, the Preliminary Objections must be sustained. *Boyd*, 907 A.2d at 1163, n.8.

## STATEMENT OF QUESTIONS INVOLVED

1. Whether the Petition for Review should be dismissed for lack of standing—the ACLU is not, and cannot be, a Pennsylvania voter and the individual voters have not alleged any conduct by Executive Respondents that has substantially, directly, and immediately harmed their ability to vote by absentee ballot.

**Suggested Answer: Yes**

2. Whether the Petition for Review should be dismissed because Petitioners have not alleged any facts against Executive Respondents.

**Suggested Answer: Yes**

3. Whether certain claims for relief should be dismissed because Petitioners seek relief against Executive Respondents that is barred by the doctrines of sovereign immunity and separation of powers.

**Suggested Answer: Yes**

4. Whether the Petition for Review should be dismissed because Petitioners have not joined county elections officials who, given the specific factual allegations in the Petition for Review, are necessary to this matter.

**Suggested Answer: Yes**

5. Whether the Petition for Review’s “facial” constitutional challenges should be dismissed because Petitioners concede that eligible electors successfully vote by absentee ballot.

**Suggested Answer: Yes**

6. Whether the Petition for Review’s “as applied” constitutional challenges should be dismissed because declaratory and injunctive relief are not available to remedy past purported constitutional violations and any suggestion that these Petitioners will suffer constitutional harm in the future is speculative.

**Suggested Answer: Yes**

7. Whether Counts II and IV of the Petition for Review should be additionally dismissed because, as pled, the 5:00 p.m. Friday absentee ballot deadline does not differentiate between different classes of voters.

**Suggested Answer: Yes**

8. Whether Count III of the Petition for Review should be additionally dismissed because this provision of the Pennsylvania Constitution imposes an obligation on the legislature and not Executive Respondents.

**Suggested Answer: Yes**

## STATEMENT OF THE CASE

### **A. Petitioners Raise Several Constitutional Challenges to the 5:00 p.m. Friday Deadline for Absentee Ballots**

On November 13, 2018, Petitioners filed the Petition for Review in this Court’s original jurisdiction. *See* Petition, ¶ 27.<sup>1</sup> Petitioners challenge the constitutionality of the 5:00 p.m. Friday before Election Day deadline for the receipt of absentee ballots, which is established by the Pennsylvania Election Code (“Election Code”). *See, e.g.*, Petition, ¶ 11 (making clear that Petitioners challenge the Friday deadline asserting that the deadline is unconstitutional on its face and as applied to the individual Petitioners).<sup>2</sup>

Specifically, in Count I, Petitioners contend that the Friday at 5:00 p.m. deadline found in 25 P.S. § 3146.8(a) violates Article VII, Section 1 of the Pennsylvania Constitution because it “impermissibly burdens the fundamental right

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<sup>1</sup> On February 12, 2019, counsel for Petitioners certified that, pursuant to Rule of Appellate Procedure 521(a), notice of the constitutional challenges in this litigation, a copy of the Petition for Review, and a copy of the Notice to Defend were all provided to the Attorney General. A review of the docket reflects no subsequent filing by the Office of Attorney General in this litigation. *See* 71 P.S. § 732.204(a)(3).

<sup>2</sup> Petitioners also reference 25 P.S. § 3146.2a(a), which allows Pennsylvania voters until 5:00 p.m. on the Tuesday prior to election day to apply for an absentee ballot. The various causes of action, however, only challenge 25 P.S. § 3146.8(a), which provides that absentee ballot shall not be counted if received in the office of the county board of election later than 5:00 p.m. on the Friday immediately preceding election day. Perhaps this is because voters need not wait until the Tuesday before election day to apply for their ballot. This fact is confirmed by the allegations in the Petition that make clear that most of the individual Petitioners applied for their absentee ballot before October 30, 2018. *See* Petition, ¶¶ 53, 55-60 (Ream applied on October 27; Neugebauer applied on October 25; Myers applied on October 23 or 24; Kieffer Applied on October 16 or 17; Howard applied on October 25; Cooper applied on October 20; Berg applied week of October 9 and actually received her application on October 9).

to suffrage by rendering it difficult, and in many cases impossible, for qualified electors to submit their absentee ballots in time to be counted.” Petition, ¶ 73. *See also* Petition, ¶ 78 (“the absentee ballot return deadline poses an undue burden on the fundamental right to vote, and it violates the guarantee of ‘free and equal’ elections under the Pennsylvania Constitution”).

Count II claims that 25 P.S. § 3146.8(a) violates the Pennsylvania Constitution’s guarantees of equal protection—found in Article I, Sections 1, 5, and 26. The basis for this challenge is that while “[m]any eligible absentee electors in Pennsylvania timely submit their applications for absentee ballots *and* receive them with sufficient time to deliver their completed ballots to their respective county boards of elections in time to have their votes counted” there are “many other eligible absentee electors throughout Pennsylvania” who “through no fault of their own and despite timely submitting applications for absentee ballots, *do not* receive their absentee ballots with sufficient time to deliver their completed ballots to their respective county boards of elections in time to have their votes counted.” Petition, ¶¶ 86, 87 (emphasis in original).

Count IV<sup>3</sup> challenges 25 P.S. § 3146.8(a) on the basis that it purportedly violates not only the First Amendment to the U.S. Constitution but also the

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<sup>3</sup> Count III alleges a violation of Article VII, Section 14(a) of the Pennsylvania Constitution. This provision, by its express text, applies to the legislature. Thus, as discussed further below, Count III cannot be properly asserted against Executive Respondents.

Fourteenth Amendment’s Equal Protection Clause. Much like the state constitutional claims, Petitioners assert that the “Friday absentee ballot return deadline imposes significant burdens on the fundamental right to vote” and that it “inevitably puts a significant number of absentee voters in a position where they timely fill out and return their absentee ballot application in compliance with the application deadline, yet have no opportunity to receive their absentee ballot and return it before the Friday submission deadline.” Petition, ¶ 104.

### **B. Petitioners’ Requested Relief**

Petitioners seek a variety of relief from this Court. Predictably, they ask this Court to declare that the 5:00 p.m. Friday absentee deadline violates Article I, Sections 1, 5, and 26 and Article VII, Sections 1 and 14(a) of the Pennsylvania Constitution as well as the First and Fourteenth Amendments to the U.S. Constitution. Petition, Prayer for Relief, ¶ a. Petitioners also ask this Court to enjoin “Respondents, their agents, officers, and employees from administering, preparing for, or moving forward with any future primary or general elections using the Friday absentee ballot return deadline.” Petition, Prayer for Relief, ¶ b.

Remarkably, however, they also ask this Court to: (1) establish a new deadline for absentee ballot return that complies with the Pennsylvania Constitution and U.S. Constitution; (2) compel the various Respondents to establish a new date for “county boards of election” to begin mailing absentee ballots; and (3) order the



various Respondents to establish a new and later deadline by which the county boards of elections may complete their review and tabulation of all absentee ballots. Petition, Prayer for Relief, ¶¶ c, e, g. And, beyond this, Petitioners also ask this Court to order the various Respondents to direct the county boards of elections to comply with these newly created deadlines even though not one county board of election is party to this litigation. Petition, Prayer for Relief, ¶¶ d, f, h.<sup>4</sup> *See also* Petitioners’ Answer to POs, ¶ 25 (stating that Petitioners seek a “declaration that the Friday absentee ballot return deadline is unconstitutional, and for Respondents to establish and cause to be followed a new absentee ballot return deadline that complies with the Pennsylvania and United States Constitutions”).

**C. Named Executive Respondents**

The specific statutory provision challenged—establishing the 5:00 p.m. Friday deadline—was signed into law on December 11, 1968. *See*, Act 375 of 1968 (Act of Dec. 11, 1968, P.L. 1183, No. 375).

Governor Wolf, however, was first elected in November 2014 (and reelected in November 2018) and inaugurated on January 20, 2015 and January 15, 2019—decades after the passage of the challenged provision. As such, Governor Wolf had no role in the enactment of these provisions and this reality is confirmed by the fact

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<sup>4</sup> Of course, Petitioners also seek attorney’s fees and costs and other relief that is just and necessary. Petition, Prayer for Relief, ¶¶ i, j.

that Petitioners fail to allege how Governor Wolf is statutorily or constitutionally charged with any duty with respect to the enforcement or administration of the challenged provision. *See also* Petition, ¶ 26 (alleging only that Governor Wolf is responsible for signing bills into law); Petition, Prayer for Relief (seeking no relief against Governor Wolf whatsoever).<sup>5</sup>

In addition to Governor Wolf, Petitioners initially named Acting Secretary Torres and Commissioner Marks as Respondents in their official capacities. As to the Acting Secretary, Petitioners only assert that the Acting Secretary is responsible for the general supervision and administration of Pennsylvania’s elections and election laws. Petition, ¶ 22. And as for Commissioner Marks, Petitioners allege that he is responsible for the supervision and administration of the Commonwealth’s elections and electoral process. Petition, ¶ 23.<sup>6</sup>

#### **D. Named Petitioners**

Petitioners are comprised of the ACLU of Pennsylvania and a handful of

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<sup>5</sup> In Petitioners’ Answer to POs, additional allegations are made against the Governor. *See* Answer, ¶ 17. Obviously, Governor Wolf is required to faithfully execute the Election Code’s 5:00 p.m. Friday deadline, which remains the law in Pennsylvania. Further, the fact that the Governor must issue certifications of election, while also true, has no bearing on the precise constitutional challenge here. Regardless, this Answer—and any new factual allegations or denials in it—are not verified and, thus, violate the applicable rules of civil procedure. *See* Pa. R. Civ. P. 1024.

<sup>6</sup> Kathy Boockvar is now the Acting Secretary of the Commonwealth and she has been substituted for Acting Secretary Torres. Petitioners have also sued Legislative Respondents—Joseph B. Scarnati, III, the Senate President Pro Tempore and Michael C. Turzai, the Speaker of the Pennsylvania House of Representatives. Legislative Respondents are separately represented and filed their own Preliminary Objections.

individual voters. *See* Petition, ¶¶ 12-21. As to the individual voters, the Petitioners allege the following.

Jones is a resident of Pennsylvania who moved from Clarion County to Philadelphia County on October 14, 2018. Petition, ¶ 12. Jones does not allege specifically when their absentee ballot application was sent—merely claiming that it was before 5:00 p.m. on October 30, 2018. Petition, ¶ 54.<sup>7</sup> Jones alleges that their ballots arrived after November 2, 2018. Petition, ¶ 54. Jones asserts that they “anticipate that their professional obligations will require them to vote by absentee ballot in the future. Petition, ¶ 54.

Berg is registered to vote in Allegheny County. Petition, ¶ 13. She is in Chicago and received her absentee ballot application from Allegheny County on October 9, 2018. Petition, ¶ 56. Berg mailed the application “later that week” and received her absentee ballot on November 2, 2018. Petition, ¶ 56. She “anticipates having to vote by absentee ballot in the future, as she will still be enrolled in the Emerging Leaders program during the May 2020 primary.” Petition, ¶ 56.

Cooper is a student who is registered voter in Allegheny County. Petition, ¶ 14. Cooper is attending the University of Connecticut. Petition, ¶ 60. She alleges that she mailed her absentee ballot application on or about October 20, 2018 and that

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<sup>7</sup> Petitioners have confirmed that they intended to include, as another claimant, Christopher Jones. *See* Answer, ¶ 4.

she received her ballot on November 5, 2018. Petition, ¶ 60. She “anticipates graduating in May of 2021 and having to vote by absentee ballot in Pennsylvania in the 2020 elections.” Petition, ¶ 60.

Howard is a student who is registered to vote in Juniata County. Petition, ¶ 15. Howard is a student in Georgia. Petition, ¶ 59. She mailed her absentee ballot application on or about October 25, 2018 and she received her ballot on November 3, 2018. Petition, ¶ 59. Howard “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election.” Petition, ¶ 59.

Kieffer is a graduate student who is registered to vote in York County. Petition, ¶ 16. Kieffer is in school in South Dakota and she mailed her absentee ballot application on October 16 or 17 and received her absentee ballot on November 2, 2018. Petition, ¶ 57. She “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election. Petition, ¶ 57.

Mearhoff is a journalist who is registered to vote in Berks County. Petition, ¶ 17. Mearhoff travels frequently for work and accepted a job in mid-October 2018 in South Dakota. Petition, ¶ 52. Mearhoff fails to allege when she specifically mailed her ballot application—merely stating that it was before October 30, 2018—but she claims that she received her ballot on November 3, 2018, which was after the return deadline. Petition, ¶ 52. Mearhoff also says that she “anticipates ... frequent out-of-town professional obligations” and it is “likely she will have to vote

again by absentee ballot in the future.” Petition, ¶ 52.

Myers is a costume designer who is registered to vote in Butler County. Petition, ¶ 18. Myers constantly rotates between short-term contracts that require her to spend months at a time at locations all over the country. Petition, ¶ 53. Myers alleges that she mailed her application on October 23 or October 24 and received her ballot on November 2, 2018. Petition, ¶ 53. Myers “anticipates having to vote by absentee ballot in future elections because she is constantly traveling for work.” Petition, ¶ 53.

Neugebauer is a law student who is registered to vote in Montgomery County. Petition, ¶ 19. Neugebauer is in his second year of law school at American University in Washington, DC. Petition, ¶ 58. He mailed his absentee ballot application on October 25, 2018 and received it on November 2, 2018. Petition, ¶ 58. Neugebauer “anticipates graduating in 2020 and having to vote by absentee ballot in Pennsylvania in the 2020 primary election.” Petition, ¶ 58.

Ream is an EMT who is registered to vote in Perry County. Petition, ¶ 20. Ream learned, at some unspecified date, that he was scheduled to work a twenty-four-hour shift beginning at 7:00 am on election day. Petition, ¶ 55. On October 27, 2018, Ream mailed his absentee ballot application and he received it on October 31, 2018. Petition, ¶ 55. He asserts that he was unable to return it by November 2, 2018. Petition, ¶ 55. Ream “anticipates that his varied and unexpected schedule as an

emergency responder will require him to vote by absentee ballot in the future.”  
Petition, ¶ 55.

As for the ACLU of Pennsylvania, it alleges that it is a non-profit and nonpartisan public-interest organization. Petition, ¶ 21. The ACLU further alleges that it has a long history of litigating, as the attorneys for individuals, election and voting cases and “anticipates that a portion of its election-protection work will in the future involve helping absentee voters vindicate their right to vote.” Petition, ¶ 64. The ACLU alleges that, because of these efforts, additional resources will be expended to help future absentee voters overcome the “systemic and recurring problems at issue in this case.” Petition, ¶ 64.

## SUMMARY OF THE ARGUMENT

The Petition for Review, as presently pled, is legally deficient for a myriad of reasons. For example, Petitioners are not proper challengers, nor have they named proper Respondents. Indeed, the ACLU itself has no right to vote and, as such, it lacks standing to pursue these claims. Petitioners also have sued Governor Wolf, apparently because he signs bills into law—even though he has no role in the absentee election process. Moreover, Petitioners have sued Acting Secretary Boockvar and Commissioner Marks even though Petitioners allege no conduct by either that gives rise to any constitutional claim. Indeed, Petitioners fail to factually allege how any action by any Executive Respondent has substantially, directly, and immediately harmed their ability to cast an absentee ballot. And, even if properly named, much of the relief sought against Executive Respondents is barred by the doctrine of sovereign immunity or the separation of powers doctrine.

The Petition also suffers from being underinclusive. In this regard, the handful of individual voters all claim that they submitted applications to their respective counties and that their respective counties did not provide them with absentee ballots in sufficient time for those votes to be counted by the respective counties. Petitioners further ask this Court to direct Executive Respondents to

compel these counties to take various actions in the future. Petitioners' failure to name these counties is fatal to their claims.

Petitioners' substantive challenges, as currently pled, also fail. While policy makers might fashion other, and more expansive, ways to vote by absentee ballot, Petitioners' own allegations make clear that the 5:00 p.m. Friday deadline is not "facially" unconstitutional because, as they concede, there are many voters who successfully vote by absentee ballot. Moreover, as it relates to the "as-applied" attacks, Petitioners' cannot obtain declaratory or injunctive relief for past violations and their future claims are speculative.

In addition, Petitioners' claims of equal protection fail because it was their unique circumstances, and not the Election Code, that "prevented" them from voting in November 2018. And, finally, the Pennsylvania Constitution's provision requiring absentee voting imposes this obligation on the legislature and not the Executive Respondents.



## ARGUMENT

### **I. PETITIONERS LACK STANDING TO ASSERT A CHALLENGE TO PENNSYLVANIA’S DEADLINE FOR THE RECEIPT OF ABSENTEE BALLOTS.**

Standing to litigate requires Petitioners to allege (and ultimately prove) that they have an interest in the litigation that is substantial, direct, and immediate. *William Penn Parking Garage, Inc. v. Pittsburgh*, 346 A.2d 269, 282-83 (Pa. 1975). Our Supreme Court has defined “substantial” as requiring there to be “some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Id.* at 282. For an interest to be “direct” the party “claiming to be aggrieved must show causation of the harm to [its] interest by the matter of which he complains.” *Id.* at 282. And, an “immediate” interest exists where the interest is “not a remote consequence of the judgment.” *Id.* at 283. Applying this standard to the factual allegations in the Petition for Review, demonstrates that Petitioners lack standing and, thus, the Petition for Review should be dismissed.

This case challenges Pennsylvania’s deadline for absentee voting. Without question, “the right to vote is personal.” *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). The ACLU, however, is a “non-profit, nonpartisan public-interest organization[.]” Petition, ¶ 21. The ACLU does not allege to be an eligible voter and does not allege

that it seeks to become an eligible voter. Put simply, the ACLU may not vote and may not seek an absentee ballot; therefore, the ACLU does not have an interest that is substantially or directly or immediately affected by the 5:00 p.m. Friday deadline for the submission of absentee ballots. It lacks standing to pursue this litigation as a petitioner.<sup>8</sup>

As for the individual voters, Executive Respondents agree that their allegations sufficiently state that they tried to vote by absentee ballot but were not successful in doing so. Nevertheless, their factual allegations make clear that they were “disenfranchised” not by the statute that they challenge but because they did not receive absentee ballots in sufficient time to return those ballots by the 5:00 p.m. Friday deadline. *See* Petition, ¶ 51 (“[a]ll petitioners submitted ballot applications before the 5:00 p.m. October 30 deadline” but “received their ballots too late to return them by the 5:00 p.m. November 2 deadline and were thus disenfranchised”); *see also* Petition, ¶¶ 52-60 (individual allegations by each individual petitioner

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<sup>8</sup> That is not to say that the ACLU may not represent Petitioners as their lawyers. Indeed, many of the facts alleged by the ACLU highlight its role as the attorney for voters challenging provisions of Pennsylvania’s Election Code. *See, e.g.*, Petition, ¶ 61 (referencing their role, as attorneys, in the *Applewhite* and *Stevenson* litigations); ¶ 62 (highlighting their role of assisting voters and recruiting volunteer lawyers to be prepared to petition local courts for relief when voters are “illegally blocked from voting”); ¶ 63 (noting its success in obtaining court orders, on behalf of “four out-of-state Pennsylvania students, who did not receive timely absentee ballots, that required Allegheny County to accept these ballots”); ¶ 64 (claiming that it “reasonably anticipates that a portion of its election-protection work will in the future involve helping absentee voters vindicate their right to vote”). The ACLU’s job—as lawyers for various individuals in litigation—simply does not grant them standing to be a party to this constitutional challenge. In fact, adoption of the ACLU’s position would mean that any law firm could challenge laws that impact their clients merely because of potential future representation.

making clear that the applications for absentee ballots were sent to the particular county election board but that the county election board did not provide the absentee ballot in time for the ballot to be returned before the 5:00 p.m. Friday deadline). Nothing in Petitioners' complaint alleges that Executive Respondents had any role in disseminating absentee ballots and, likewise, there is no factual allegation that Executive Respondents prevented or delayed these 10 individuals from applying for absentee ballots.

Because petitioners plead no facts establishing any direct, immediate interest in Executive Respondents' actions, the individual petitioners lack standing to sue Executive Respondents and the Petition for Review should be dismissed.

**II. PETITIONERS HAVE IMPROPERLY NAMED GOVERNOR WOLF, ACTING SECRETARY BOOCKVAR, AND COMMISSIONER MARKS AS RESPONDENTS IN THIS LITIGATION.**

Despite the fact that the challenged 5:00 p.m. Friday deadline was enacted into law decades earlier, Petitioners have named, *inter alia*, Governor Wolf, Acting Secretary Boockvar, and Commissioner Marks as Respondents in this litigation. None of these Respondents were engaged in their present role at the time that the legislature established the absentee ballot deadline. Further, the allegations that Petitioners actually do make about these Respondents are limited and conclusory.

Indeed, even recognizing that Petitioners raise their claims against Executive Respondents in their "official capacities," the only factual allegations against these

persons are as follows: (1) paragraph 22, which alleges that Acting Secretary Boockvar is responsible for the general supervision and administration of Pennsylvania's elections and election laws; (2) paragraph 23, which alleges that Commissioner Marks is responsible for the supervision and administration of the Commonwealth's elections and electoral process; and (3) paragraph 26, which alleges that Governor Wolf "is responsible for signing bills into law." *See* Petition, ¶¶ 22, 23, 26.

The Petition does not allege any facts to support a claim that Governor Wolf plays *any* role in enforcing or administering the Election Code, or even had any role in enactment of the challenged provisions. Indeed, as a matter of law, the Election Code does not vest any powers or duties of administration or enforcement of its provisions in the Office of the Governor. *See* 25 P.S. §§ 2601 *et seq.* The Governor's general obligation to "faithfully execute" the laws or sign legislation into law is insufficient to render the Governor a proper respondent. *See, e.g., Pa. School Boards Ass'n, Inc. v. Commonwealth Ass'n of Sch. Adm'rs.*, 696 A.2d 859, 868 (Pa. Cmwlth. 1997) (challenge to constitutionality of a statute does not render the Governor proper defendant), *appeal dismissed*, 704 A.2d 631 (Pa. 1998); *Rode v. Delarciprete*, 845 F.2d 1195, 1208-09 (3d Cir. 1988) (same). And, in the end, without a substantive factual allegation against Governor Wolf, the Petition is legally

insufficient. *See Wagaman v. Attorney General*, 872 A.2d 244, 247 (Pa. Cmwlth. 2005).

As for Acting Secretary Boockvar, the Election Code charges her with specific, discrete and enumerated powers and duties, related to the conduct of elections. As it relates to absentee voting, the Secretary's sole function is to prescribe the form of the absentee ballot application as well as other absentee balloting materials. *See* 25 P.S. §§ 3146.2(i), 3146.2a(a.1), 3146.4 & 3146.6a. Similarly, the Election Code vests Commissioner Marks with no independent, free-standing power of "supervision and administration" under the Election Code; rather, he carries out some of the specifically-enumerated tasks and duties of the Secretary of the Commonwealth on behalf of the Secretary. Indeed, not only does the Petition fail to allege a single action or inaction by either individual that would establish any of the constitutional challenges asserted but Petitioners' factual allegations focus on their submission of applications to specific counties and receipt of absentee ballots from specific counties. *See* Petition, ¶¶ 51-60; *see also* Petition, ¶ 86 (making clear that there are Pennsylvanians who vote by absentee ballot).

Given the specific facts alleged and claims raised, Executive Respondents are improperly named in this litigation and the case should be dismissed as to them.

### **III. MUCH OF THE RELIEF SOUGHT BY PETITIONERS IS BARRED BY SOVEREIGN IMMUNITY AND THE SEPARATION OF POWERS DOCTRINE.**

Petitioners seek, in part, affirmative injunctive relief against Executive Respondents. To that end, Petitioners ask this Court to: (a) establish a new absentee ballot return deadline; (b) order Respondents to direct county boards of election to accept absentee ballots that are received as of the new deadline; (c) order Respondents to establish a new date for county boards of election to begin mailing absentee ballots to voters; (d) order Respondents to direct county boards of election to begin mailing absentee ballots to voters on this newly established date; (e) order Respondents to establish a new, later deadline by which county boards of election may complete their review and tabulation of all absentee ballots; (f) order Respondents to direct county boards of elections to complete their review and tabulation of all absentee ballots by this newly established date. *See* Petition, Prayer for Relief, ¶¶ c, d, e, f, g, h. *See also* Answer, ¶ 25.

Pennsylvania law is clear that such requests for mandatory injunctive relief against Executive Respondents are barred by sovereign immunity. *See Stackhouse v. Commonwealth*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006) (“sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials”).

Furthermore, such relief—directing Executive Respondents to rewrite existing law and/or enact new legislation—violates the separation of powers doctrine. *See, e.g., In re Fortieth Statewide Investigative Grand Jury*, 191 A.3d 750, 759 (Pa. 2018) (noting that courts are not authorized to insert words into a statute); *see also Pap’s A.M. v. City of Erie*, 719 A.2d 273, 281 (Pa. 1998), *rev’d on other grounds*, 529 U.S. 277 (2000) (“[t]o aggregate to ourselves the power to write legislation would upset the delicate balance in our tripartite system of government”); *First Citizens Nat. Bank v. Sherwood*, 879 A.2d 178, 182 (Pa. 2005) (declining to interfere with a statutory scheme developed by the legislature on separation of powers grounds).<sup>9</sup>

#### **IV. GIVEN THE FACTUAL ALLEGATIONS IN THE PETITION FOR REVIEW, PETITIONERS HAVE FAILED TO JOIN NECESSARY PARTIES.**

The Election Code requires that absentee ballot applications be submitted to and approved by county boards of elections. *See* 25 P.S. §§ 3146.2, 3146.2a(a) & 3146.2b. Petitioners acknowledge submitting applications to county boards of elections. *See* Petition, ¶¶ 51-60. Petitioners also claim that their respective counties

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<sup>9</sup> *Accord Stander v. Kelley*, 250 A.2d 474, 482 (Pa. 1969) (discussing that the executive branch has the “power to recommend legislation and the power and the duty to see that the laws are faithfully administered and carried out” and that the judiciary has the “power, the duty and the responsibility of interpreting the Constitution and all legislation and determining whether legislation ... meet or violate the requirements of the Constitution”). *See also Pennsylvania State Ass’n of Jury Com’rs v. Commonwealth*, 78 A.3d 1020, 1032 (Pa. 2013); *Stilp v. Commonwealth*, 905 A.2d 918, 951 (Pa. 2006).

did not timely provide absentee ballots and, as a result, their absentee votes were not properly counted. *See* Petition, ¶¶ 51-60. *See also* Petition, ¶ 70 (“county boards of elections routinely fail to deliver absentee ballots to voters in time for them to be returned by the Friday statutory deadline, even though these qualified absentee electors have timely applied for their ballots”). Petitioners allege that they called their respective county board of election and that certain statements were made to them by persons at the county board of elections. *See* Petition, ¶¶ 51-60.

Despite these factual allegations against the counties, and despite the fact that Petitioners seek to alter the future conduct of these counties, Petitioners have not joined those county elections officials in this litigation. Put another way, Petitioners’ claims relate to the counties’ responsibilities, rather than to the actions of Executive Respondents, and Petitioners seek to change those responsibilities of the counties; yet the counties are not party to this matter. *See also* Petition, Prayer for Relief, ¶¶ d, e, f, h.

A court must join the necessary party or, if that is not possible, dismiss the action “[w]henver it appears by suggestion of the parties or otherwise...that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b).<sup>10</sup> As such, the counties referenced by the individual Petitioners are necessary parties to this

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<sup>10</sup> Executive Respondents have asserted a Preliminary Objection seeking dismissal of the Petition’s facial constitutional claims. Should this Court allow the facial claims to proceed, then all 67 counties are necessary to this litigation.



litigation. Pa. R. Civ. P. 1028(a)(5); *Orman v. Mortg., I.T.*, 118 A.3d 403, 406 (Pa. Super. 2015) (failure to join a necessary party raises a question of the Court’s subject matter jurisdiction).<sup>11</sup> Because Petitioners have failed to join those parties, their Petitioner should be dismissed.

**V. PETITIONERS’ “FACIAL” CONSTITUTIONAL CLAIMS FAIL BECAUSE THEY CONCEDE THAT “MANY ELIGIBLE ABSENTEE ELECTORS IN PENNSYLVANIA TIMELY SUBMIT THEIR APPLICATIONS FOR ABSENTEE BALLOTS AND RECEIVE THEM WITH SUFFICIENT TIME TO DELIVER THEIR COMPLETED BALLOTS TO THEIR RESPECTIVE COUNTY BOARDS OF ELECTIONS IN TIME TO HAVE THEIR VOTES COUNTED.”**

Petitioners make clear that they are making a series of “facial” constitutional challenges. *See* Petition, ¶ 11 (making clear that the position of Petitioners is that the challenged Friday deadline provision of Pennsylvania’s Election Code is unconstitutional on its face); Petition Prayer for Relief, ¶ a (seeking a declaration that the Friday absentee ballot return deadline is “unconstitutional and invalid because it violates the rights of Petitioners and *other current and future absentee*

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<sup>11</sup> Petitioners claim that joining the counties is not necessary because they raise constitutional challenges to the 5:00 p.m. Friday deadline. *See also* Answer, ¶ 25. Executive Respondents reserve the right to further address this contention depending on what Petitioners argue in their forthcoming opposition brief. For now, however, the Petition for Review clearly sets forth allegation after allegation after allegation that the individual voters timely applied to the counties for absentee ballots but that the counties did not provide those absentee ballots in time for the absentee ballots to be completed and returned before the 5:00 p.m. Friday deadline. *See* Petition, ¶¶ 51-60. Indeed, Petitioners concede in their Petition for Review that *many* Pennsylvanians successfully vote by absentee ballot. *See* Petition, ¶ 85. In other words, given how Petitioners have framed their constitutional challenges, the counties are necessary.

voters in Pennsylvania”) (emphasis added). *See also* Answer, ¶ 25 (arguing that joining the counties is not necessary because the challenge is to the 5:00 p.m. Friday deadline of the Election Code).<sup>12</sup>

As to Federal constitutional claims, a “party asserting a facial challenge ‘must establish that no set of circumstances exist under which the Act would be valid.’” *Heffner v. Murphy*, 745 F.3d 56, 65 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 220 (2014) (citing and quoting *United States v. Mitchell*, 652 F.3d 387, 405 (3d Cir. 2011) and *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This is a “particularly demanding standard and is the ‘most difficult challenge to mount successfully.’” *Heffner*, 745 F.3d at 65 (quoting *Salerno*, 481 U.S. at 745).

As to state constitutional claims, a challenger must demonstrate that a substantial number of the challenged statute’s potential applications are unconstitutional (the “plainly legitimate sweep” standard). Under the plainly legitimate sweep standard, a law will be found facially invalid only when its invalid

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<sup>12</sup> Election regulations need only be reasonable, neutral, and not work a “severe restriction” on the right to vote. *See, e.g., Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003); *see also Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006). Indeed, “[c]ommon sense, as well as constitutional law,” require that governments “must play an active role in structuring elections; as a practical matter, there must be 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.” *In re Zulick*, 832 A.2d 572, 578 (Pa. Cmwlth.) (quotation omitted), *aff’d*, 834 A.2d 1126 (Pa. 2003); *see also* 110 A.3d at 176-77 (the Commonwealth “may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.”). As relevant to this litigation, moreover, courts have routinely recognized that States may determine how the right to vote may be expanded by absentee ballot. *See, e.g., McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 809-11 (1969) (upholding the limited categories of voters entitled to absentee ballots in Illinois law).

applications are so real and substantial that they outweigh the statute’s plainly legitimate sweep. *See Commonwealth v. Ickes*, 873 A.2d 698 (Pa. 2005). *See also Clifton v. Allegheny County*, 969 A.2d 1197 (Pa. 2009) (A statute is facially invalid when its state constitutional deficiency is so evident that proof of actual unconstitutional applications is not needed).

Here, the individual Petitioners number 10 in total. Petition, ¶¶ 12-20. Petitioners concede, however, that “[m]any eligible absentee electors in Pennsylvania timely submit their applications for absentee ballots *and* receive them with sufficient time to deliver their completed ballots to their respective county boards of elections in time to have their votes counted.” Petition, ¶ 85 (emphasis in original). Petitioners own allegations, therefore, preclude their “facial” constitutional challenges.<sup>13</sup>

**VI. PETITIONERS’ “AS APPLIED” CONSTITUTIONAL CLAIMS FAIL BECAUSE THE LAW DOES NOT ALLOW DECLARATORY RELIEF FOR ALLEGED PAST VIOLATIONS AND BECAUSE THEIR FUTURE CLAIMS ARE SPECULATIVE.**

Petitioners also assert “as applied” constitutional challenges and seek a declaration that their rights were violated, and that prospective injunctive relief is

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<sup>13</sup> The ACLU admits that it helped four “out-of-state Pennsylvania students, who did not receive timely absentee ballots, exercise their right to vote by obtaining court orders from Allegheny County judges directing the County Elections Division to accept the students’ ballots.” Petition, ¶ 63. In other words, even voters similarly situated to the individual petitioners here had their votes counted in the most recent election.

warranted in light of their inability to vote in November 2018. *See* Petition, ¶ 11. *See also* Petition, Prayer for Relief, ¶¶ a, b.

An “as-applied attack ... does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *U.S. v. Marcavage*, 609 F.3d 264 (3d Cir. 2010). Accordingly, Petitioners may not secure declaratory relief as to past alleged constitutional violations, nor may they secure a future injunction to remedy past conduct. *See Mollett v. Leitch*, 511 Fed. Appx. 172 (3d Cir. 2013) (dismissing requested declaratory relief and reasoning that “in the context of an action for declaratory relief, a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed by the defendant”) (further quotations and citations omitted); *Corliss v. O’Brien*, 200 Fed. Appx. 80 (3d Cir. 2006) (upholding dismissal of a plaintiff’s declaratory relief claim, which asked that the District Court “declare that his constitutional rights were violated”); *Hodinka v. Delaware Cty.*, 759 F. Supp. 2d 603, 610 (E.D. Pa. 2011) (“[d]eclaratory judgment is inappropriate solely to adjudicate past conduct”). *See also In re Gen. Election 2014 Kauffman*, 111 A.3d 785 (Pa. Cmwlth. 2015) (the individual Petitioners lack standing to seek declaratory and/or injunctive relief for their “as-applied” challenges based on past conduct, particularly as Petitioners plead no facts to indicate that the circumstances that led to the alleged deprivation are likely to reoccur).

Regardless of when the next election is, regardless of whether the individual voters “anticipate” voting by absentee ballot in these future elections, and regardless of whether the ACLU may assist voters in future elections, Petitioners have not pled critical facts to establish future “as applied” constitutional challenges to the 5:00 p.m. Friday deadline.<sup>14</sup> For example, as for the Joneses, they now live in Philadelphia and, presumably, will need to register to vote there. There are no facts pled to establish that they cannot vote in person in May 2019 or beyond or that they will not receive their absentee ballot in time to complete it and submit it by the 5:00 p.m. Friday deadline. Similarly, as to all of the other individual Petitioners, Petitioners do not factually allege that they will not be able to vote in person in subsequent elections or that they cannot apply for an absentee ballot earlier in the process, or that their absentee ballot will not be received by the relevant county before the statutory deadline, or that their absentee ballot will otherwise be rejected due solely to the timing of receipt.

Thus, Petitioners have alleged no facts to demonstrate that they will be “disenfranchised” in any future election. As such, their “as applied” constitutional challenges are not ripe. *See, e.g., Wyatt, Virgin Islands, Inc. v. Government of the*

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<sup>14</sup> Petitioners admit that the next state-wide election is the May 2019 primaries. Nevertheless, Petitioners claim that there “will be special elections in portions of the Commonwealth before May 2019.” Answer, ¶ 45. Whether this is true or not misses the point as Petitioners have not factually linked these “special elections in portions of the Commonwealth” to them. For example, even assuming there is a special election in, for example, Lycoming County before May 2019, the individual petitioners have not alleged that they are eligible to vote there.

*Virgin Islands*, 385 F.3d 801, 806-07 (3d Cir. 2004) (rejecting claim on ripeness grounds and reasoning that a “dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all”) (internal quotations omitted but quoting *Doe v. County of Centre, PA*, 242 F.3d 437, 453 (3d Cir. 2001), which in turn quotes *Texas v. U.S.*, 523 U.S. 296, 300 (1998)). *See also Constitution Party of Pa. v. Cortés*, 712 F. Supp. 2d 387 (E.D. Pa. 2010) (dismissing challenges to Election Code because claims were not ripe); *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010) (the doctrine of ripeness “is a judicially-created principle which mandates the presence of an actual controversy”). *See also Kauffman* (the individual Petitioners lack standing to seek declaratory and/or injunctive relief for their “as-applied” challenges based on past conduct, particularly as Petitioners plead no facts to indicate that the circumstances that led to the alleged deprivation are likely to reoccur).

**VII. PETITIONERS’ EQUAL PROTECTION CLAIMS, AS PLED, ADDITIONALLY FAIL BECAUSE ANY DIFFERENTIAL TREATMENT WAS CAUSED BY THEIR INDIVIDUALIZED CIRCUMSTANCES AND NOT BY THE TEXT OR OPERATION OF THE ELECTION CODE.**

Petitioners assert that various circumstances prevented them from voting in the November 2018 election. *See* Petition, ¶¶ 51-60. Based on these various circumstances, they raise—in Counts II and IV—equal protection claims against

Executive Respondents. In short, Petitioners argue that the 5:00 p.m. Friday deadline violates their rights to equal protection because there are two classifications of absentee voters: those whose votes were “counted” and those whose votes were not counted.

The Pennsylvania Election Code, however, is neutral as to such classifications. In fact, the 5:00 p.m. Friday deadline makes no such classification. Instead, it is Petitioners’ myriad of individualized circumstances—pled at length in the Petition for Review and not any classification expressed in, or resulting from, the application of the Election Code—that resulted in Petitioners’ alleged inability to cast a ballot. Accordingly, where, as here, a statute is neutral on its face and in its effect, it does not offend equal protections guarantees. *See, e.g., Working Families Party v. Commonwealth*, 169 A.3d 1247, 1257 (Pa. Cmwlth. 2017).

**VIII. COUNT III, ADDITIONALLY, CANNOT STAND AGAINST EXECUTIVE RESPONDENTS BECAUSE ITS TEXT IMPOSES A REQUIREMENT ON THE LEGISLATURE AND NOT ON GOVERNOR WOLF, ACTING SECRETARY BOOCKVAR, OR COMMISSIONER MARKS.**

Petitioners also allege that the 5:00 p.m. Friday deadline violates Article VII, Section 14(a) of the Pennsylvania Constitution. *See* Petition, Count III. This provision, however, requires the legislature to provide for absentee voting for certain enumerated categories of voters. Pa. Const. art. VII, § 14(a). As reflected in its text, this Pennsylvania Constitutional requirement relating to development of absentee

ballots does not vest the Governor with any duty beyond the legislative act of approving or vetoing such legislation. *Id.* Similarly, this Pennsylvania Constitutional provision vests Acting Secretary Boockvar and Commissioner Marks with no duty or obligation. *Id.*

Consequently, Count III cannot stand as against Executive Respondents and it should be dismissed.

### **CONCLUSION**

For these reasons, Executive Respondents respectfully request that this Court sustain their Preliminary Objections and dismiss the Petition for Review.

**Respectfully submitted,**

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**Date: March 8, 2019**

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the Brief of Respondent complies with the word-count limit set forth in Rule 2135(a)(1). Based on the word-count function of the word processing system used to prepare the brief, the brief contains 7,209 words (excluding portions of the brief covered by Rule 2135(b)).

*/s/ Kenneth L. Joel* \_\_\_\_\_

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**CERTIFICATE OF COMPLIANCE**

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.

By: /s/ Kenneth L. Joel  
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**CERTIFICATE OF SERVICE**

I, Kenneth L. Joel, hereby certify that on this 8th day of March, 2019, the foregoing **Executive Respondents' Brief in Support of Their Preliminary Objections** has been served upon counsel in the manner indicated below, which service satisfies the requirements of Pennsylvania Rule of Appellate Procedure 121:

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