

COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 1094 C.D. 2020

IN RE: CANVASSING OBSERVATION

**BRIEF OF APPELLEES THE CITY OF PHILADELPHIA
BOARD OF ELECTIONS**

**APPENDIX TO BRIEF OF APPELLEES THE CITY OF PHILADELPHIA
BOARD OF ELECTIONS**

November 5, 2020

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Unpublished Opinions

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Pa. Democratic Party v. Boockvar, No. 133 MM 2020, --- A.3d ----, 2020 WL 5554644, (Pa. Sept. 17, 2020)

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EXHIBIT 1

REC'D & FILED

2020 OCT 29 PH 5:44

AUBREY HOWLAND

BY  DEPUTY

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5
6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
7 **IN AND FOR CARSON CITY**

8 -oOo-

9 **FRED KRAUS, an individual registered**
10 **to vote in Clark County, Nevada,**
11 **DONALD J. TRUMP FOR PRESIDENT,**
12 **INC., and the NEVADA REPUBLICAN**
13 **PARTY,**

14 **Petitioners,**

15 **vs.**

16 **BARBARA CEGAVSKE, in her official**
17 **capacity as Nevada Secretary of State,**
18 **JOSEPH P. GLORIA, in his official**
19 **capacity as Registrar of Voters for Clark**
20 **County, Nevada,**

21 **Respondents.**

22 **CASE NO. 20 OC ⁰⁰¹⁴² ~~00004~~ 1B**

23 **DEPT. 2**

24 **ORDER DENING EMERGENCY PETITION FOR WRIT OF MANDAMUS, OR**
25 **IN THE ALTERNATIVE, WRIT OF PROHIBITION**

26 **PROCEDURAL BACKGROUND**

27 Before the Court is the Emergency Petition for Writ of Mandamus, or in the
Alternative, Writ of Prohibition. The Court held an evidentiary hearing on October 28,
2020.

1 **ISSUES**

2 Do Petitioners have standing to bring these claims?

3 Has Registrar Joseph P. Gloria failed to meet his statutory duty under NRS
4 293B.353(1) to allow members of the general public to observe the counting of ballots?

5 Has Registrar Gloria unlawfully precluded Petitioners from the use and
6 enjoyment of a right to which Petitioners are entitled?

7 Has Registrar Gloria exercised discretion arbitrarily or through mere caprice?

8 Has Registrar Gloria acted without or in excess of authorized powers?

9 Has Secretary of State Barbara Cegavske failed to meet any statutory duty under
10 NRS 293B.353(1) to allow members of the general public to observe the counting of
11 ballots?

12 Has Secretary of State Barbara Cegavske unlawfully precluded Petitioners from
13 the use and enjoyment of a right to which Petitioners are entitled?

14 Has Secretary Cegavske exercised discretion arbitrarily or through mere caprice?

15 Has Secretary Cegavske acted without or in excess of authorized powers?

16 Has Secretary of State Cegavske unlawfully precluded Petitioners the use and/or
17 enjoyment of a right to which Petitioners are entitled?

18 Have Petitioners proved they are entitled to a writ of mandamus on their equal
19 protection claims?

20
21 **FACTS**

22 It is important to note the factual context in which this case arose. All of the
23 states in the United States are attempting to hold elections under the health, political,
24 social, and economic consequences of the COVID-19 pandemic. Nevada's state and
25 county election officials had relatively little time to assess, plan, modify, and implement
26 procedures that are quite different from the established election procedures in an effort

1 to provide safe, open elections that would not result in long waiting lines. The
2 modification of procedures includes fewer polling places, a very large increase in mail-in
3 voting, and long lines as a result of social distancing.

4 A second important context is that this lawsuit was filed October 23, 2020—11
5 days before the general election.

6 Every Nevada county is required to submit to the Secretary of State, by April 15,
7 2020, the county's plan for accommodation of members of the general public who
8 observe the processing of ballots. NRS 293B.354(1). Registrar Gloria did not submit a
9 plan by April 15, 2020.

10 Registrar Gloria submitted a plan to the Secretary of State on October 20, 2020.
11 A copy of the plan is attached as Exhibit 1.

12 Historically, the Secretary of State has not sent letters or other notification to the
13 counties approving the counties' plans.

14 The Secretary of State's office reviewed Registrar Gloria's plan, concluded it
15 complied with the law, and Secretary Cegavske issued a letter to Registrar Gloria on
16 October 22, 2020. The letter is attached as Exhibit 2. The Secretary did not write that
17 Registrar Gloria's plan was "approved," but it is clear from the letter that the plan was
18 approved with a suggestion to that the Registrar consider providing additional seating in
19 public viewing areas for observers to view the signature verification process to the extent
20 feasible while ensuring that no personally identifiable information is observable by the
21 public.

22 A copy of all 17 county plans were admitted as exhibits. Clark County's plan is not
23 substantially different from the plan of any of the other 16 counties, and none of the
24 plans is substantially different from the plans of previous years.

25 Clark County uses an electronic ballot sorting system, Agilis. No other Nevada
26 county uses Agilis. Some major metropolitan areas including Cook County, Illinois, Salt
27

1 Lake City, Utah, and Houston, Texas use Agilis. Some Nevada counties use other brands
2 of ballot sorting systems.

3 Registrar Gloria decided to purchase Agilis because of the pandemic and the need
4 to more efficiently process ballot signatures.

5 One of Petitioners' attorneys questioned Registrar Gloria about Agilis in earlier
6 case, Corona v. Cegavske, but never asked Registrar Gloria to stop using Agilis.

7 Clark County election staff tested Agilis by manually matching signatures. Clark
8 County election staff receives yearly training on signature matching from the Federal
9 Bureau of Investigation. The last training was in August of this year.

10 For this general election Clark County is using the same they used for the June
11 primary election. No evidence was presented that the setting used by Clark County
12 causes or has resulted in any fraudulent ballot being validated or any valid ballot
13 invalidated.

14 No evidence was presented of any Agilis errors or inaccuracies. No evidence was
15 presented that there is any indication of any error in Clark County's Agilis signature
16 match rate.

17 Registrar Gloria opined that if Clark County could not continue using Agilis the
18 county could not meet the canvass deadline which is November 15, 2020. The Court
19 finds that if Clark County is not allowed to continue using Agilis the county will not meet
20 the canvass deadline.

21 When the envelope containing mail-in ballots are opened the ballot and envelope
22 are separated and not kept in sequential order. Because they are not kept in sequential
23 order it would be difficult to identify a voter by matching a ballot with its envelope.

24 This is the first election in Registrar Gloria's 28 years of election experience in
25 Clark County that there are large numbers of persons wanting to observe the ballot
26 process.

1 Persons that observe the ballot process sign an acknowledgment and a memo
2 containing instructions to the observer. A copy of an acknowledgment and memo are
3 attached as Exhibit 3.

4 People hired by the Registrar to manage the people wanting to observe the ballot
5 process are called ambassadors. The observer acknowledgment states observers are
6 prohibited from talking to staff. The memo explains the role of ambassadors and invites
7 observers to inform their ambassador they have a question for election officials or the
8 observer may pose a question directly to an election official.

9 Registrar Gloria is not aware of any observer complaints.

10 Several witnesses supporting Petitioners and called by Petitioners testified: they
11 saw ballots that had been removed from the envelope left alone; runners handle ballots
12 in different ways, including taking the ballots into an office, taking ballots into “the
13 vault” and/or otherwise failing to follow procedure, but no procedure was identified;
14 inability to see some tables from the observation area; inability to see into some rooms;
15 inability to see all election staff monitors; inability to see names on monitors; saw a
16 signatures she thought did not match but admitted she had no signature comparison
17 training; and/or trouble getting to where they were supposed to go to observe and
18 trouble being admitted to act as observer at the scheduled time.

19 No evidence was presented that any party or witness wanted to challenge a vote
20 or voter, or had his or her vote challenged.

21 No evidence was presented that there was an error in matching a ballot signature,
22 that any election staff did anything that adversely affected a valid ballot or failed to take
23 appropriate action on an invalid ballot.

24 No evidence was presented that any election staff were biased or prejudiced for or
25 against any party or candidate.

1 One Petitioner witness did not raise issues regarding things she observed with an
2 ambassador but instead went to the Trump Campaign. No issue was ever raised as a
3 result of her observations or report to the Trump Campaign.

4 Washoe County is using cameras to photograph or videotape the ballot process.
5 No Nevada county hand-counts ballots.

7 LEGAL PRINCIPLES

9 **Standing**

10 Nevada law requires an actual justiciable controversy as a predicate to judicial
11 relief. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). For a controversy to
12 exist the petitioner must have suffered a personal injury and not merely a general
13 interest that is common to all members of the public. *Schwarz v. Lopez*, 132 Nev. 732,
14 743, 382 P.3d 886, 894 (2016).

16 **Mandamus and Prohibition**

17 A court may issue a writ of mandamus “to compel the performance of an act
18 which the law especially enjoins as a duty resulting from an office . . . ; or to compel the
19 admission of a party to the use and enjoyment of a right or office to which the party is
20 entitled and from which the party is unlawfully precluded by such . . . person.” NRS
21 34.160. A court may issue a writ of mandamus “when the respondent has a clear,
22 present legal duty to act.” *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637
23 P.2d 534 (1981). The flip side of that proposition is that a court cannot mandate a
24 person take action if the person has no clear, present legal duty to act. Generally,
25 mandamus will lie to enforce ministerial acts or duties and to require the exercise of
26 discretion, but it will not serve to control the discretion.” *Gragson v. Toco*, 90 Nev. 131,

1 133 (1974). There is an exception to the general rule: when discretion “is exercised
2 arbitrarily or through mere caprice.” *Id.*

3 “Petitioners carry the burden of demonstrating that extraordinary relief is
4 warranted.” *Pan v. Dist. Ct.*, 120 Nev. 222, 228 (2004).

5 The writ of prohibition is the counterpart of the writ of mandate. It arrests the
6 proceedings of any tribunal . . . or person exercising judicial functions, when such
7 proceedings are without or in excess of the jurisdiction of such tribunal . . . or person.
8 NRS 34.320.

9 A writ of prohibition “may be issued . . . to a person, in all cases where there is
10 not a plain, speedy and adequate remedy in the ordinary course of law.” NRS 34.330.

11 **Voting Statutes**

12 NRS 293B.353 provides in relevant part:

13 1. The county . . . shall allow members of the general public to observe the
14 counting of the ballots at the central counting place if those members do not
15 interfere with the counting of the ballots.

16 2. The county . . . may photograph or record or cause to be photographed
17 or recorded on audiotape or any other means of sound or video reproduction the
18 counting of the ballots at the central counting place.

19 3. A registered voter may submit a written request to the county . . . clerk
20 for any photograph or recording of the counting of the ballots prepared pursuant
21 to subsection 2. The county . . . clerk shall, upon receipt of the request, provide
22 the photograph or recording to the registered voter at no charge.

23 NRS 293B.354 provides in relevant part:

24 1. The county clerk shall, not later than April 15 of each year in which a
25 general election is held, submit to the Secretary of State for approval a written
26 plan for the accommodation of members of the general public who observe the
27 delivery, counting, handling and processing of ballots at a polling place, receiving
center or central counting place.

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3. Each plan must include:

- (a) The location of the central counting place and of each polling place and receiving center;
- (b) A procedure for the establishment of areas within each polling place and receiving center and the central counting place from which members of the general public may observe the activities set forth in subsections 1 and 2;
- (c) The requirements concerning the conduct of the members of the general public who observe the activities set forth in subsections 1 and 2; and
- (d) Any other provisions relating to the accommodation of members of the general public who observe the activities set forth in subsections 1 and 2 which the county . . . considers appropriate.

AB 4 section 22 provides in relevant part:

1. For any affected election, the county . . . clerk, shall establish procedures for the processing and counting of mail ballots.

2. The procedures established pursuant to subsection 1:

- (a) May authorize mail ballots to be processed and counted by electronic means; and
- (b) Must not conflict with the provisions of sections 2 to 27, inclusive, of this act.

AB 4 section 23 provides in relevant part:

1. . . . for any affected election, when a mail ballot is returned by or on behalf of a voter to the county . . . clerk . . . and a record of its return is made in the mail ballot record for the election, the clerk or an employee in the office of the clerk shall check the signature used for the mail ballot in accordance with the following procedure:

- a. The clerk or employee shall check the signature used for the mail ballot against all signatures of the voter available in the records of the clerk.

1 AB 4 section 25 provides in relevant part:

- 2 1. The counting procedures must be public.
- 3

4 **ANALYSIS**

5

6 **Petitioners failed to prove they have standing to bring their Agilis,**
7 **observation, ballot handling or secrecy claims.**

8 As set forth above for a justiciable controversy to exist the petitioner must have
9 suffered a personal injury and not merely a general interest that is common to all
10 members of the public. Petitioners provided no evidence of any injury, direct or indirect,
11 to themselves or any other person or organization. The evidence produced by Petitioners
12 shows concern over certain things these observers observed. There is no evidence that
13 any vote that should lawfully be counted has or will not be counted. There is no evidence
14 that any vote that should lawfully not be counted has been or will be counted. There is
15 no evidence that any election worker did anything outside of the law, policy, or
16 procedures. Petitioners do not have standing to maintain their mandamus claims.

17 Likewise, Petitioners provided no evidence of a personal injury and not merely a
18 general interest that is common to all members of the public regarding the differences
19 between the in-person and mail-in procedures. Petitioners provided no evidence of any
20 injury, direct or indirect, to themselves or any other person or organization as a result of
21 the different procedures. All Nevada voters have the right to choose to vote in-person or
22 by mail-in. Voting in person and voting by mailing in the ballot are different and so the
23 procedures differ. There is no evidence that anything the State or Clark County have
24 done or not done creates two different classes of voters. There is no evidence that
25 anything the State or Clark County has done values one voter's vote over another's.

26

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1 There is no evidence of any debasement or dilution of any citizen's vote. Petitioners do
2 not have standing to bring their equal protection claims.

3
4 **Petitioners failed to prove Registrar Gloria failed to meet his**
5 **statutory duty under NRS 293B.353(1) to allow members of the general**
6 **public to observe the counting of ballots?**

7
8 Petitioners argued they have a right to observers having meaningful observation
9 under NRS 293B.353(1) and AB 4 sec. 25. NRS 293B.353(1) provides in relevant part,
10 "[t]he county . . . shall allow members of the general public to observe the counting of
11 the ballots . . ." AB 4 sec. 25 provides in relevant part "[t]he counting procedure must
12 be public." The statutes do not use the modifier "meaningful."

13 The Nevada Legislature codified the right of the public to observe the ballot
14 counting procedure in NRS 293B.353 and 293B.354, and AB 4 section 25(1). NRS
15 293B.354(1) requires each county to annually submit a plan to the Secretary of State.
16 NRS 293B. 354(3) states the requirements of the plan. The statutory requirements of
17 the plan are very general. The legislature left to the election professionals, the Secretary
18 of State and the county elections officials, wide discretion in establishing the specifics of
19 the plan. Petitioners failed to prove either Secretary Cegavske or Registrar Gloria
20 exercised their discretion arbitrarily or through mere caprice.

21
22 The fact that Registrar failed to timely submit a plan was remedied by submitting
23 the plan late and the Secretary of State approving the plan.

24 Petitioners seem to request unlimited access to all areas of the ballot counting
25 area and observation of all information involved in the ballot counting process so they
26

1 can verify the validity of the ballot, creating in effect a second tier of ballot counters
2 and/or concurrent auditors of the ballot counting election workers. Petitioners failed to
3 cite any constitutional provision, statute, rule, or case that supports such a request. The
4 above-cited statutes created observers not counters, validators, or auditors. Allowing
5 such access creates a host of problems. Ballots and verification tools contain confidential
6 voter information that observers have not right to know. Creating a second tier of
7 counters, validators, or auditors would slow a process the Petitioners failed to prove is
8 flawed. The request if granted would result in an increase in the number of persons in
9 the ballot processing areas at a time when social distancing is so important because of
10 the COVID-19 pandemic.
11

12 Petitioners have failed to prove Registrar Gloria has interfered with any right they
13 or anyone else has as an observer.

14 Petitioners claim a right to have mail-in ballots and the envelopes the ballots are
15 mailed in to be kept in sequential order. Petitioners failed to cite Constitutional
16 provision, statute, rule, or case that creates a duty for Nevada registrars to keep ballots
17 and envelopes in sequential order. Because they failed to show a duty they cannot
18 prevail on a mandamus claim that requires proof a duty resulting from office. Because
19 there is no duty or right to sequential stacking the Court cannot mandate Registrar
20 Gloria to stack ballots and envelopes sequentially.
21

22 Because there is not right to sequential stacking the Court cannot mandate the use and
23 enjoyment of that "right."
24

25 Plaintiffs want the Court to mandate Registrar Gloria allow Petitioners to
26 photograph of videotape the ballot counting process. The legislature provided in NRS
27

1 293B.353(2) the procedure for photographing or videotaping the counting of ballots.

2 The county may photograph or videotape the counting and upon request provide a copy
3 of the photographs or videotapes.

4 Petitioners failed to cite any constitutional provision, statute, rule, or case that
5 gives the public the right to photograph or videotape ballot counting.

6 Petitioners failed to prove Secretary Cegavske or Registrar Gloria exercised her or
7 his discretion arbitrarily or through mere caprice in any manner. Therefore, the Court
8 cannot mandate Registrar Gloria to require sequential stacking of ballots and envelopes.
9

10 Petitioners requested the Court mandate Registrar Gloria provide additional
11 precautions to ensure the secrecy of ballots. Petitioners failed to prove that the secrecy
12 of any ballot was violated by anyone at any time. Petitioners failed to prove that the
13 procedures in place are inadequate to protect the secrecy of every ballot.

14 Petitioners also request the Court mandate Registrar Gloria stop using the Agilis
15 system. Petitioners failed to show any error or flaw in the Agilis results or any other
16 reason for such a mandate. Petitioners failed to show the use of Agilis caused or resulted
17 in any harm to any party, any voter, or any other person or organization. Petitioners
18 failed Registrar Gloria has a duty to stop using Agilis.
19

20 AB 4 passed by the legislature in August 2020 specifically authorized county
21 officials to process and count ballots by electronic means. AB 4, Sec. 22(2)(a).

22 Petitioners' argument that AB 4, Sec. 23(a) requires a clerk or employee check the
23 signature on a returned ballot means the check can only be done manually is meritless.

24 The ballot must certainly be checked but the statute does not prohibit the use of
25 electronic means to check the signature.
26

1
2 **Equal Protection**

3 There is no evidence that in-person voters are treated differently than mail-in
4 voters. All Nevada voters have the right to choose to vote in-person or by mail-in. Voting
5 in person and voting by mailing in the ballot are different and so the procedures differ.
6 Nothing the State or Clark County have done creates two different classes of voters.
7 Nothing the State or Clark County has done values one voter's vote over another's. There
8 is no evidence of debasement or dilution of a citizen's vote.
9

10
11
12 **CONCLUSIONS OF LAW**

13 Petitioners do not have standing to bring these claims.

14 Registrar Joseph P. Gloria has not failed to meet his statutory duty under NRS
15 293B.353(1) to allow members of the general public to observe the counting of ballots.

16 Registrar Gloria has not precluded Petitioners from the use and enjoyment of a
17 right to which Petitioners are entitled.

18 Registrar Gloria has not exercised discretion arbitrarily or through mere caprice.

19 Registrar Gloria has not acted without or in excess of authorized powers.

20 Secretary of State Barbara Cegavske has not failed to meet any statutory duty
21 under NRS 293B.353(1) to allow members of the general public to observe the counting
22 of ballots.

23 Secretary of State Barbara Cegavske has not unlawfully precluded Petitioners
24 from the use and enjoyment of a right to which Petitioners are entitled.

25 Secretary Cegavske has not exercised discretion arbitrarily or through mere
26 caprice.

1 Secretary Cegavske has not acted without or in excess of authorized powers.

2 Secretary of State Cegavske has not precluded Petitioners the use and/or
3 enjoyment of a right to which Petitioners are entitled.

4 Petitioners failed to prove they are entitled to a writ of mandamus on any of their
5 claims.

6
7 **ORDER**

8 The Petition for Writ of Mandamus or in the Alternative for Writ of Prohibition is
9 denied.
10

11 October 29, 2020.

12 
13 _____
14 James E. Wilson, Jr.
15 District Judge
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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an employee of the First Judicial District Court of Nevada; that
3 on the 2 day of November 2020, I served a copy of this document by placing a true
4 copy in an envelope addressed to:

| | |
|--|---|
| 5 Brian R. Hardy, Esq. 6 10001 Park Run Drive 7 Las Vegas, NV 89145 <u>bhardy@maclaw.com</u> | David O'Mara, Esq. 311 E. Liberty Street Reno, NV 89501 <u>david@omaralaw.net</u> |
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| 13 Daniel Bravo, Esq. 14 3556 E. Russell Road 15 Second Floor 16 Las Vegas, NV 89120 <u>dbravo@wrslawyers.com</u> | Gregory L. Zunino, Esq. Office of the Attorney General 100 North Carson Street Carson City, NV 89701 <u>Gzunino@ag.nv.gov</u> |

16 the envelope sealed and then deposited in the Court's central mailing basket in the court
17 clerk's office for delivery to the USPS at 1111 South Roop Street, Carson City, Nevada, for
18 mailing.

19
20
21 
22 Billie Shadron
23 Judicial Assistant
24
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27



Election Department

965 Trade Dr • Ste A • North Las Vegas NV 89030
Voter Registration (702) 455-8683 • Fax (702) 455-2793

Joseph Paul Gloria, Registrar of Voters
Lorena Portillo, Assistant Registrar of Voters

October 20, 2020

The Honorable Barbara K. Cegavske
Secretary of State
State of Nevada
101 N. Carson St., Suite 3
Carson City, Nevada 89701-4786

Attention: Wayne Thorley
Deputy Secretary of State for Elections

RE: Accommodation of Members of the General Public at Polling Places, Mail Ballot Processing, and at the Central Counting Place

Dear Secretary Cegavske:

In accordance with NRS 293B.354, I am forwarding to you the following guidelines which are provided to our polling place team leaders and our election staff to ensure we accommodate members of the general public who wish to observe activities within a polling place and/or at the central counting facilities.

Polling Places (Early Voting and Election Day)

Designated public viewing areas are established in each polling place, both early voting and Election Day vote centers, where individuals may quietly sit or stand and observe the activities within the polling place.

Observation guidelines:

- Observers may not wear or display political campaign items
- Observers may not photograph, or record by any other means, any activity at any early voting or Election Day polling place
- Use of cell phones is prohibited in the polling place
- Observers may not disrupt the voting process
- If observers have questions, they must direct them to the polling place team leader

Mail Ballot Processing (Warehouse & Flamingo-Greystone Facility)

The general public is allowed, according to the NRS, to observe the counting of mail ballots. In addition, as a courtesy, members of the general public are also being allowed to observe our mail ballot processing procedures, which occur prior to tabulation.

Due to space limitations we are processing our mail ballots in two different facilities:

- 965 Trade Dr., North Las Vegas, NV 89030
 - AGILIS mail ballot processing
 - Signature audit team
 - Tabulation
 - Ballot duplication
- 2030 E. Flamingo Road, Las Vegas, NV 89119
 - Counting Board
 - Ballot duplication

Observation guidelines:

- Observers may not wear or display political campaign items
- Observers may not photograph, or record by any other means, any activity at any early voting or Election Day polling place
- Use of cell phones is prohibited in the polling place
- Observers may not disrupt the voting process
- If observers have questions, they must direct them to the polling place team leader

Election Night (Warehouse Tabulating)

In front of our tabulation area an area is provided for any observer who wishes to observe our counting activity. Reports are provided after each update to the general public and are also available on our website for review. The general public may access the website through our free county wi-fi access on their personal devices should they choose to do so.

The public viewing area allows the general public to view the tabulation room, where the processing of election night results may be observed through windows that provide full view of all counting activity. Observers are not allowed inside the room because of congestion and COVID restrictions.

The Registrar is available to answer questions, although it should be noted that very few

Page 3
Secretary of State Barbara K. Cegavske
March 14, 2018

individuals from the public have been at the Election Center Warehouse on election night since 2000. This will probably be different this year due to increased interest in observing our activities.

In accordance with NRS 293B.354, at link provided here is a link to the vote center polling places that will be used in the General Election on November 3, 2020 in Clark County. <https://cms8.revize.com/revize/clarknv/Election%20Department/VC-Web-20G.pdf?t=1602940110601&t=1602940110601>. An electronic copy is also attached to the e-mail.

Sincerely,

A handwritten signature in black ink that reads "Joseph P. Gloria". The signature is written in a cursive style with a large initial "J" and a distinct "G".

Joseph P. Gloria
Registrar of Voters

Enclosures



OBSERVATION OF POLLING PLACE OR CLARK COUNTY ELECTION DEPARTMENT LOCATIONS ACKNOWLEDGEMENT

In accordance with NAC 293.245 (full text included in page 2):

I, VIRGINIA STEWART, by signing this form, hereby acknowledge that during the time I observe the conduct of voting or of any election related process, I am prohibited from the following activities:

1. Talking to voters or staff within the polling place or Election Department location;
2. Using any technical devices within the polling place or Election Department location;
3. Advocating for or against a candidate, political party or ballot question;
4. Arguing for or against or challenging any decisions of the county or city election personnel and;
5. Interfering with the conduct of voting or any election related process.

I further acknowledge that I may be removed from the polling place by the county or city clerk for violating any provisions of Title 24 of the Nevada Revised Statutes or any of the restrictions described herein.

Representing Group/Organization:

Republican Party

Contact Information:

6196568405

Signature:

[Handwritten Signature]

Print Name:

VIRGINIA STEWART

Date:

10/27/20

Polling Place or Election Department Location:

TRAD

October 21, 2020

Memo to Election Observers in the Greystone or County Election Department buildings:

Thank you for choosing to observe our voting process.

The department brought in additional staff to provide adequate supervision and security for observation areas. These staff, whom we call ambassadors, will accompany you while you are in our facilities.

Our ambassadors are not permanent Election Department employees and receive no training in our election processes, and so they are not able to accurately answer your questions about elections.

If you have any questions about the processes you are observing or other election-related questions, please inform the ambassador that you have a question for County Election Department officials. (The ambassador will create a list of questions from observers to relay to Election officials.) Or, you may choose to wait and pose their question to the Election official directly.

At this time, we plan to make Election Department officials available to observers around 9 a.m. and 3 p.m. daily to respond to any questions or concerns. These meetings will occur at both the Greystone and Election Department buildings

Thank you for our understanding.

Sincerely,

Joe Gloria

Clark County Registrar of Voters

BARBARA K. CEGAVSKE
Secretary of State

STATE OF NEVADA

SCOTT W. ANDERSON
Chief Deputy Secretary of State

MARK A. WLASCHIN
Deputy Secretary for Elections



**OFFICE OF THE
SECRETARY OF STATE**

October 22, 2020

Mr. Joe Gloria, Registrar of Voters
965 Trade Drive, Suite A
North Las Vegas, NV 89030-7802
jpg@ClarkCountyNV.gov
via Email

Re: Revision of Observation Plan

Mr. Gloria,

Over the last few days, a potential opportunity for improvement to your elections process observation plan have come to light that the Secretary of State believes to be worth considering. We have received Clark County's plan for accommodating election observers. In addition to the items detailed in your plan, we would request that you consider implementing the following:

Provide additional seating in the public viewing area for observing the signature verification process to the extent feasible while ensuring that no Personally Identifiable Information (PII) is observable to the public. This increase in seating should ensure meaningful observation.

If you have any questions regarding this letter and my determination in this matter, please contact me at (775) 684-5709.

Respectfully,

A handwritten signature in black ink that reads "Barbara K. Cegavske".

Barbara K. Cegavske
Secretary of State

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRED KRAUS, AN INDIVIDUAL
REGISTERED TO VOTE IN CLARK
COUNTY, NEVADA; DONALD J.
TRUMP FOR PRESIDENT, INC.; AND
NEVADA REPUBLICAN PARTY,
Appellants,

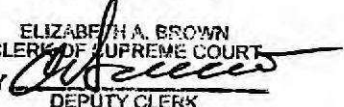
vs.

BARBARA K. CEGAVSKE, IN HER
OFFICIAL CAPACITY AS NEVADA
SECRETARY OF STATE; JOSEPH P.
GLORIA, IN HIS OFFICIAL CAPACITY
AS REGISTRAR OF VOTERS FOR
CLARK COUNTY, NEVADA;
DEMOCRATIC NATIONAL
COMMITTEE; AND NEVADA STATE
DEMOCRATIC PARTY,
Respondents.

No. 82018

FILED

NOV 03 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR STAY AND TO EXPEDITE APPEAL*

This appeal challenges a district court order denying a petition for a writ of mandamus or prohibition in an election matter.

Appellants have filed an emergency motion seeking immediate relief under NRAP 8, pending appeal, prohibiting the Clark County Registrar from continuing to duplicate mail ballots unless observers are granted an opportunity to meaningfully observe the process and from using artificial intelligence to authenticate ballot signatures. Appellants also seek to expedite this appeal.

As this matter involves the election process currently underway, we conclude that it should be expedited. Therefore, we grant the motion as to the request to expedite. Appellants shall have until tomorrow

at 4 p.m. to file and serve their transcript request form or certificate that no transcript will be requested. NRAP 9(a). Appellants shall have until 4 p.m. on Thursday, November 5, 2020, to file and serve the docketing statement, opening brief, and appendices. Respondents' answering brief shall be due on or before 4 p.m. on Monday, November 9, 2020. No extensions of time will be granted.¹

We have also considered appellants' request that we enjoin the registrar from duplicating ballots and using artificial intelligence to authenticate ballots. Under NRAP 8(c), in determining whether to grant a stay or injunction pending appeal, we look to whether the object of the appeal will be defeated absent a stay or injunction, whether the granting or denying of a stay or injunction will result in irreparable or serious injury to appellants and respondents, and whether appellants have demonstrated a likelihood of success on the merits.

Although some portions of the appeal may be defeated absent immediate relief, appellants have not demonstrated that the entire appeal will be defeated, and due to the urgent nature of the matter, we have granted their request to expedite. Moreover, appellants have not demonstrated a sufficient likelihood of success to merit a stay or injunction. The district court concluded that appellants' allegations lacked evidentiary support, and their request for relief to this court is not supported by

¹For purposes of this order, we suspend the provisions of NRAP 25(a)(2)(B)(ii), (iii), and (iv), which provide that a document is timely filed if, on or before its due date, it is mailed to this court, dispatched for delivery by a third party commercial carrier, or deposited in the Supreme Court drop box. See NRAP 2. Accordingly, all documents shall be filed personally or by facsimile or electronic transmission with the clerk of this court in Carson City.

affidavit or record materials supporting many of the factual statements made therein. See NRAP 8(2)(B)(ii), (iii). It is unclear from the motion how appellants are being prevented from observing the process or that the use of the Agilis machine is prohibited under AB 4. As the district court's order points out, mandamus relief is warranted only to compel performance of a mandatory statutory duty or to remedy a manifest abuse of discretion. *Round Hill General Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Appellants' motion, on its face, does not identify any mandatory statutory duty that respondents appear to have ignored. Further, appellants fail to address the district court's conclusion that they lack standing to pursue this relief. Thus, appellants have not shown that the NRAP 8(c) factors militate in favor of a stay or injunction, and the request for immediate relief is denied.

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Stiglich, J.
Stiglich

Cadish, J.
Cadish

Silver, J.
Silver

cc: Hon. James E. Wilson, District Judge
Hon. James E. Wilson, District Judge
Marquis Aurbach Coffing
O'Mara Law Firm, P.C.
Harvey & Binnall, PLLC
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Attorney General/Carson City
Perkins Coie, LLP/Washington DC
Clark County District Attorney/Civil Division
Carson City Clerk

EXHIBIT 3

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 09/15/2020

TIME: 01:59:00 PM

DEPT: 42

JUDICIAL OFFICER PRESIDING: Henry Walsh

CLERK: H McIntyre

REPORTER/ERM:

CASE NO: **56-2020-00540781-CU-MC-VTA**

CASE TITLE: **Election Integrity Project California Inc vs. Lunn**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Ruling on Submitted Matter

APPEARANCES

The Court, having previously taken the September 14, 2020 petition for preliminary injunction under submission, now rules as follows:

This matter came before the court on plaintiffs' petition for a preliminary injunction to require defendants to implement certain procedures to augment their existing procedures allowing observers access to the counting of mail election ballots. Testimony was taken, exhibits received and the matter was argued by counsel. The court thereupon took the matter under submission and now rules on the issues presented to it.

Plaintiffs are a public interest group whose purpose is to insure the integrity of the process by which mailed election ballots are counted. They are afforded certain access to the counting process by the authority of the Elections Code, and contend in this litigation that Mark Lunn, the Ventura County Clerk and Registrar of Voters is not providing the statutorily required access. Defendant Lunn contends that he is providing sufficient access, and that plaintiffs are asking for concessions that plaintiffs, as observers, are not entitled to claim.

The Elections Code at section 15104 authorizes the presence of observers for the ballot counting process. The language of the statute states that the purpose of election observers is to watch over the process of vote counting, and challenge whether the election workers handling the vote by mail ballots are "...following established procedures..." To comply with this, Lunn has established certain protocols which include having observers stay in certain designated areas in the ballot counting area, prohibiting observers from communicating with election workers, and requiring that observers request permission to move from one designated area to another. Plaintiffs concede that these protocols allow them to observe, but not sufficiently so that they can lodge a challenge if they believe that an election worker has made an error in accepting a mail ballot.

The vote counting process begins with an election worker validating a ballot by comparing the voter signature on the envelope of the mailed in ballot with the signature of the voter on file with his her affidavit to register as a voter (which may have been on file for decades). If the signatures match, the envelope is opened, and the ballot is further processed for counting. If the election worker concludes that the signatures do not match, the envelope is put aside for further examination. Plaintiffs' witnesses,

DATE: 09/15/2020

MINUTE ORDER

Page 1

DEPT: 42

VEN-FNR-10.03

who were acting as observers, have testified that the computer screens on which the signatures appear to the election worker (and which they were monitoring) were visible and the signatures recognizable, but were not sufficiently clear because of glare and/or the angle of viewing such that the observer could not determine if there was a match. The observers further contend that their inability to move about more freely in the ballot counting area further restricted their ability to effectively compare signatures for purpose of lodging a challenge to the decision by the election worker.

This is perhaps the real issue of the case. That is, is the function of the observer limited to verifying that appropriate procedures for counting ballots are being observed, or does the observer function extend to one where they have standing to contest decisions by the election workers regarding the validity of individual ballots. Plaintiffs argue the latter, defendant contends the former.

A preliminary injunction shall issue when the party requesting it is likely to prevail on the merits, and that irreparable harm will result if the injunction is not granted (Code of Civil Procedure section 526).

Here the court concludes that the plaintiffs are not likely to prevail on the present state of the evidence. The court finds that the defendant's procedures in place are reasonable considering the need to effectively conduct the business of counting ballots and the restrictions imposed by the distancing requirements of the Covid pandemic. Mr. Lunn has installed Zoom technology to allow for off site monitoring, and is expanding that for the November election. More to the point, however, the court finds that the role of the observer is observation of the process, and does not extend to challenging the decisions of the election workers. Plaintiffs make no contention that the process they have observed is faulty. The court finds additionally that plaintiffs are not at risk for suffering irreparable harm. The existing procedures provide them with reasonable access to be able to accomplish their function. The additions to those procedures which will be in place by Election Day will add to their ability to access and observe the process.

The request for a Preliminary Injunction is denied

Dated: September 15, 2020

Henry J. Walsh
Judge of the Superior Court

Unpublished Opinions

2020 WL 6252803

Only the Westlaw citation is currently available.
Supreme Court of Pennsylvania.

IN RE: NOVEMBER 3,
2020 **GENERAL ELECTION**

Petition of: Kathy Boockvar, Secretary
of the Commonwealth of Pennsylvania

No. 149 MM 2020

|
Submitted: October 16, 2020

|
Decided: October 23, 2020

Synopsis

Background: Secretary of the Commonwealth filed application with the Supreme Court, asking the Court to assume its King's Bench jurisdiction and to consider her request for declaratory relief regarding the meaning of election law.

[Holding:] The Supreme Court, No. 149 MM 2020, **Todd, J.**, held that county boards of elections are barred from rejecting absentee or mail-in ballots based on a signature comparison conducted by county election officials or employees or as result of third-party challenges based on signature analysis and comparisons.

Ordered accordingly.

West Headnotes (10)

[1] Courts  **Supervisory jurisdiction**

Supreme Court's King's Bench jurisdiction is generally invoked to review an issue of public importance which requires timely intervention by court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law. **Pa. Const. art. 5, § 2; 42 Pa. Cons. Stat. Ann. § 502.**

[2] Courts  **Supervisory jurisdiction**

Supreme Court may exercise power of review pursuant to its King's Bench jurisdiction even when no dispute is pending in a lower court of the Commonwealth. **Pa. Const. art. 5, § 2; 42 Pa. Cons. Stat. Ann. § 502.**


[3] Appeal and Error  **Statutory or legislative law**

Standard of review for questions of pure statutory interpretation is de novo, and the Supreme Court's scope of review is plenary.

[4] Statutes  **Intent**

In matters of statutory interpretation, court's objective is to ascertain and effectuate the intent of the General Assembly.

[5] Statutes  **Language and intent, will, purpose, or policy**

Statutes  **Plain Language; Plain, Ordinary, or Common Meaning**

Best indication of legislative intent is plain language of statute.

[6] Statutes  **Natural, obvious, or accepted meaning**

To ascertain the plain meaning of statutory language, courts consider it in context and give words and phrases their common and approved usage.

[7] Statutes  **Purpose and intent; unambiguously expressed intent**

When words of statute are free and clear of all ambiguity, court must accept them as the best indicator of legislative intent and cannot disregard the letter of the statute under the pretext of pursuing its spirit.

[8] **Election Law** 🔑 [Rejection of vote by election officers](#)

County boards of elections are barred from rejecting absentee or mail-in ballots based on a signature comparison conducted by county election officials or employees or as result of third-party challenges based on signature analysis and comparisons; in determining at canvassing whether a ballot declaration is “sufficient” for a mail-in or absentee ballot, county board is required only to ascertain whether the declaration on the return envelope has been filled out, dated and signed, and there is nothing in language of statute which allows or compels a county board, when assessing a declaration's sufficiency, to compare signatures. [25 Pa. Stat. Ann. § 3146.8\(g\)\(3\)](#).

[9] **Statutes** 🔑 [Absent terms; silence; omissions](#)

In interpreting statute, court may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.

[10] **Constitutional Law** 🔑 [Encroachment on Legislature](#)

Constitutional Law 🔑 [Judicial rewriting or revision](#)

It is not court's role to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein.

Attorneys and Law Firms

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[Sierra Club](#), Pro Se

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[Adam Craig Bonin](#), Esq., The Law Office of Adam C. Bonin, for Respondent Pennsylvania Alliance for Retired Americans

[Heather Lynn Bozovich](#), Esq., for Respondent Clearfield County Board of Elections

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[Keith Adam Button](#), Esq., Shafer Law Firm, P.C., for Respondent Crawford County Board of Elections

[Thomas M. Caffrey](#), Esq., Lehigh County Department of Law, for Respondent Lehigh County Board of Elections

[Molly Elizabeth Meacham](#), Esq., [Elizabeth A. Dupuis](#), Esq., Babst Calland Clements and Zomnir, PC, for Respondent Armstrong County Board of Elections

[Jonathan Paul Foster](#), Esq., BRADFORD COUNTY COMMISSIONERS, for Respondent Bradford County Board of Elections

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[Robert Eugene Grimm](#), Esq., for Respondent Greene County Board of Elections

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[Jennifer B. Hipp](#), Esq., Cumberland County Solicitor's Office, for Respondent Cumberland County Board of Elections

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[Kenneth Richard Levitzky](#), Esq., for Respondents Sullivan County Board of Elections, Wyoming County Board of Elections

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[H. William White III](#), Esq., Butler County Solicitor's Office, for Respondent Butler County Board of Elections

Citizens for Pennsylvania's Future, Pro Se

PA County Board of Elections, Pro Se

[SAYLOR](#), C.J., [BAER](#), [TODD](#), [DONOHUE](#), [DOUGHERTY](#), [WECHT](#), [MUNDY](#), JJ.

OPINION

JUSTICE [TODD](#)

*1 [1] [2] On October 14, 2020, our Court granted the application of the Secretary of the Commonwealth, Kathy Boockvar (“Secretary”), to assume King’s Bench jurisdiction¹ and consider her request for declaratory relief, limited to answering the following question: “Whether the Election Code^[2] authorizes or requires county election boards to reject voted absentee or mail-in ballots during pre-canvassing and canvassing^[3] based on signature analysis where there are alleged or perceived signature variances?” *In Re: November 3, 2020 General Election, Petition of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania*, 149 MM 2020, 2020 WL 6110774 (Pa. filed Oct. 14, 2020) (order). For the reasons that follow, we conclude that the Election Code does not authorize or require county election boards to reject absentee or mail-in ballots during the canvassing process based on an analysis of a voter’s signature on the “declaration”⁴ contained on the official ballot return envelope for the absentee or mail-in ballot. We, therefore, grant the Secretary’s petition for declarative relief, and direct the county boards of elections not to reject absentee or mail-in ballots for counting, computing, and tallying based on signature comparisons conducted by county election officials or employees, or as the result of third-party challenges based on such comparisons.

I. Facts and Procedural History

*2 As our Court has recently observed, “[i]n October 2019, the General Assembly of the Commonwealth of Pennsylvania enacted Act 77 of 2019,^[5] which, *inter alia*, created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day.” *Pennsylvania Democratic Party v. Boockvar*, — A.3d —, —, 2020 WL 5554644, at *1 (Pa. Sept. 17, 2020). Subsequently, in March 2020, the legislature made further revisions to the Election Code via the passage of Act 12 of 2020,⁶ which, among other things, authorized for the June 2, 2020 primary election,⁷ and for all subsequent elections, the mail-in voting procedures established by Act 77.⁸

Because of the substantial nature of the recent Code amendments, as well as the anticipated massive increase in the number of mail-in and absentee ballots which county boards of elections would be confronted with due to the COVID-19 pandemic, in order to ensure that the procedures set forth in

the Election Code regarding pre-canvassing and canvassing of absentee and mail-in ballots would be uniformly applied and implemented by county boards of elections, Secretary Boockvar issued two written guidance documents for those boards to follow when canvassing such ballots.

In the first guidance document issued on September 11, 2020 to all county boards, Secretary Boockvar set forth the procedure the boards were to follow upon receipt of an absentee or mail-in ballot. This guidance directed the county boards to examine the declaration contained on the ballot return envelope containing the absentee or mail-in ballot. It further directed the county board to “compare the information on the outer envelope, i.e., the voter’s name and address, with the information contained in the ‘Registered Absentee and Mail-In Voters File, the absentee voter’s list and/or the Military Veterans’ and Emergency Civilians Absentee Voters File.’ ” Pennsylvania Department of State, *Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes*, 9/11/20, at 3, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf>. The Secretary advised that, if the declaration is signed and the county board is satisfied that the declaration is sufficient, then the absentee or mail-in ballot should be approved for canvassing unless it is challenged in accordance with the Election Code. The Secretary specifically cautioned the county boards of elections in this regard that “[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” *Id.*

Subsequent to our Court’s decision in *Boockvar*, *supra*, the Secretary issued supplemental guidance to all county boards concerning, *inter alia*, matters addressed by our decision — i.e., the establishment by county boards of satellite offices, provision of drop boxes for voters to return absentee and mail-in ballots, and the mandatory requirements that such ballots be returned only by the voter and be enclosed in a secrecy envelope. In this supplemental guidance, the Secretary also directed the county boards to set aside ballots which were returned to them without the declaration envelope having been “filled out, dated and signed.” Pennsylvania Department of State, *Guidance Concerning Civilian Absentee And Mail-In Ballot Procedures*, 9/28/20, at 9, available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/DOS%20Guidance>

%20Civilian%20Absentee%20and%20Mail-In%20Ballot
%20Procedures.pdf. This guidance buttressed her earlier instruction, reiterating that “[t]he Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” *Id.*

*3 Meanwhile, Intervenors in the instant matter, Donald J. Trump for President, Inc., and the Republican National Committee, filed suit in the United States District Court for the Western District against the Secretary over several election issues.⁹ *See Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.). In response to the Secretary's guidance to the county boards, on September 23, 2020, Intervenors filed an amended complaint in that matter challenging Secretary Boockvar's interpretation of the Election Code as precluding county boards from rejecting absentee and mail-in ballots based on a signature comparison.

On October 1, 2020, Intervenors filed a motion for summary judgment in the federal action alleging, *inter alia*, that the Secretary's guidance was contrary to the Election Code and, thus, constituted an infringement on the “fundamental right to vote and to a free and fair election.” Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment filed in *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966 (W.D. Pa.) (Exhibit D to Secretary's Application for Extraordinary Relief), at 15-19, 45-50. Intervenors sought, as relief, the entry of an injunction directing the Secretary to withdraw her guidance, and, also, to require county boards of elections to compare signatures on applications for absentee and mail-in ballots, and the ballots themselves, with the voter's permanent registration record. *Id.*

The Honorable J. Nicholas Ranjan denied Intervenors' motion for summary judgment, and granted judgment in favor of the Secretary. *Donald J. Trump for President, Inc. v. Boockvar*, — F.Supp.3d —, 2020 WL 5997680 (W.D. Pa. filed Oct. 10, 2020) (hereinafter “*Trump*”). Relevant to the present dispute, in his scholarly and comprehensive supporting opinion, Judge Ranjan concluded that “the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.” *Trump* at —, 2020 WL 5997680, at *53. In reaching this conclusion, Judge Ranjan analyzed the provisions of the Election Code governing pre-canvassing and canvassing of absentee and mail-in votes returned by the elector, set forth in Section 3146.8(g), which provides:

§ 3146.8. Canvassing of official absentee ballots and mail-in ballots

* * *

(g)(1)(i) An absentee ballot cast by any absentee elector as defined in section 1301(a), (b), (c), (d), (e), (f), (g) and (h) shall be canvassed in accordance with this subsection if the ballot is cast, submitted and received in accordance with the provisions of 25 Pa.C.S. Ch. 35 (relating to uniform military and overseas voters).

(ii) An absentee ballot cast by any absentee elector as defined in section 1301(i), (j), (k), (l), (m) and (n), an absentee ballot under section 1302(a.3) or a mail-in ballot cast by a mail-in elector shall be canvassed in accordance with this subsection if the absentee ballot or mail-in ballot is received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election.

*4 (1.1) The county board of elections shall meet no earlier than seven o'clock A.M. on election day to pre-canvass all ballots received prior to the meeting. A county board of elections shall provide at least forty-eight hours' notice of a pre-canvass meeting by publicly posting a notice of a pre-canvass meeting on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed. No person observing, attending or participating in a pre-canvass meeting may disclose the results of any portion of any pre-canvass meeting prior to the close of the polls.

(2) The county board of elections shall meet no earlier than the close of polls on the day of the election and no later than the third day following the election to begin canvassing absentee ballots and mail-in ballots not included in the pre-canvass meeting. The meeting under this paragraph shall continue until all absentee ballots and mail-in ballots received prior to the close of the polls have been canvassed. The county board of elections shall not record or publish any votes reflected on the ballots prior to the close of the polls. The canvass process shall continue through the eighth day following the election for valid military-overseas ballots timely received under 25 Pa.C.S. § 3511 (relating to receipt of voted ballot). A county board of elections shall provide

at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website. One authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.

(3) When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots under paragraphs (1), (1.1) and (2), the board shall examine the declaration on the envelope of each ballot not set aside under subsection (d) and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

(4) All absentee ballots which have not been challenged under section 1302.2(c) and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district as follows:

(i) The county board shall open the envelope of every unchallenged absentee elector and mail-in elector in such manner as not to destroy the declaration executed thereon.

(ii) If any of the envelopes on which are printed, stamped or endorsed the words "Official Election Ballot" contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

(iii) The county board shall then break the seals of such envelopes, remove the ballots and count, compute and tally the votes.

*5 (iv) Following the close of the polls, the county board shall record and publish the votes reflected on the ballots.

(5) Ballots received whose applications have been challenged and ballots which have been challenged shall be placed unopened in a secure, safe and sealed container in the custody of the county board until it shall fix a time and place for a formal hearing of all such challenges, and notice shall be given where possible to all absentee electors and mail-in electors thus challenged and to every individual who made a challenge. The time for the hearing shall not be later than seven (7) days after the deadline for all challenges to be filed. On the day fixed for said hearing, the county board shall proceed without delay to hear said challenges, and, in hearing the testimony, the county board shall not be bound by the Pennsylvania Rules of Evidence. The testimony presented shall be stenographically recorded and made part of the record of the hearing.

(6) The decision of the county board in upholding or dismissing any challenge may be reviewed by the court of common pleas of the county upon a petition filed by any person aggrieved by the decision of the county board. The appeal shall be taken, within two (2) days after the decision was made, whether the decision was reduced to writing or not, to the court of common pleas setting forth the objections to the county board's decision and praying for an order reversing the decision.

(7) Pending the final determination of all appeals, the county board shall suspend any action in canvassing and computing all challenged ballots received under this subsection irrespective of whether or not appeal was taken from the county board's decision. Upon completion of the computation of the returns of the county, the votes cast upon the challenged official absentee ballots that have been finally determined to be valid shall be added to the other votes cast within the county.

25 P.S. § 3146.8(g) (footnotes omitted).

Judge Ranjan discerned nothing in the text of these provisions which requires county boards of elections to "verify" the signatures on mail-in and absentee ballots – that is, to examine the signatures to determine whether or not they were authentic, *Trump* at —, 2020 WL 5997680, at *53, and thus rejected Intervenors' argument that Section 3146.8(g)

(3) requires county boards of elections to engage in signature comparison and verification. In Judge Ranjan's view, the county board of elections is required under this statutory provision to verify only the proof of the voter's identification by examining the voter's driver's license number, the last four digits of his or her social security number, or other specifically approved form of identification which is required by Section 2602(z.5) of the Election Code.¹⁰ Indeed, Judge Ranjan noted that nowhere in Section 3146.8(g)(3) does the term "signature" appear. *Trump*, at —, 2020 WL 5997680, at *55.

*6 Judge Ranjan found that, while 25 P.S. §§ 3146.6(a) and 3150.16(a) require a voter submitting an absentee or mail-in ballot to "fill out and sign the declaration" printed on the ballot return envelope, the county board's duty under these sections is merely to examine the declaration and determine if these requirements have been comported with. Critically, in his view, this language did not require that a county board inquire into the authenticity of the signature; rather, the county boards were required to determine only that a voter had supplied his signature in the declaration.

Judge Ranjan observed that, by contrast, other provisions of the Election Code such as those governing in-person voting, see 25 P.S. § 3050(a.3)(2), allow a vote to be challenged where a voter's signature on the voting certificate executed at the polls is deemed not to be authentic when compared to the signature recorded in the district register of voters. Likewise, other sections of the Election Code allow boards of elections to reject provisional ballots based on an election official's conclusion that the voter's signature on the ballot envelope is not authentic, see 25 P.S. § 3050(a.4)(5)(i)-(ii), and allow election officials to reject nominating petitions based on the official's conclusion that the signatures contained therein are not authentic, see 25 P.S. § 2936. From Judge Ranjan's perspective, these provisions of the Code demonstrated that the Pennsylvania General Assembly knew how to require signature verification when they so desired, and the fact they did not do so in Section 3146.8(g)(3) indicated that signature verification was not a requirement for absentee or mail-in ballots.

Judge Ranjan also considered the effect of interpreting Section 3146.8(g)(3) to require signature comparison. In his view, doing so would create a risk that voters would be disenfranchised, given that mail-in and absentee ballots are kept securely stored until election day when the pre-canvassing process begins, and the Election Code contains

no requirement that voters whose ballots are deemed inadequately verified be apprised of this fact. Thus, unlike in-person voters, mail-in or absentee voters are not provided any opportunity to cure perceived defects in a timely manner.¹¹

In the instant matter, on October 4, 2020, just before Judge Ranjan issued his decision, Secretary Boockvar filed with this Court an application seeking invocation of our King's Bench authority, and seeking, *inter alia*, a declaration that, under the Election Code, county boards of elections are precluded from rejecting absentee or mail-in ballots at canvassing based upon signature comparisons, in accordance with her guidance to the county boards. Thereafter, the Secretary submitted a letter to our Court pursuant to Pa.R.A.P. 2501 apprising us of Judge Ranjan's decision. In this letter, the Secretary noted that Judge Ranjan's opinion concluded that her guidance to the county boards of elections was "uniform and non-discriminatory" and "informs the counties of the current state of the law as it relates to signature comparison." Secretary's Letter to Supreme Court Prothonotary, 10/11/20, at 2 (quoting *Trump* at —, 2020 WL 5997680, at *61). Nevertheless, recognizing that our Court is the final word on the interpretation of Pennsylvania law, the Secretary maintained her request for our Court to grant King's Bench review. *Id.* ("[T]he district court's opinion, while timely and persuasive, is not authoritative. Only this Court can render the ultimate determination concerning Pennsylvania law.").

*7 As indicated above, our Court granted the Secretary's application for invocation of our King's Bench authority because we determined the Secretary presented an issue of public importance that required our immediate intervention. See *supra* note 1. In our order granting review, we also granted the petitions to intervene of Donald J. Trump for President Inc., the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee ("Intervenors"). We denied the petitions for intervention of Elizabeth Radcliffe, a qualified elector, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives, Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader. However, these parties were granted leave to file *amicus* briefs.¹² We additionally granted leave for the Brennan Center for Justice, the Urban League of Pittsburgh, the Bucks, Chester, Montgomery and Philadelphia County Boards of Elections, and the Pennsylvania Alliance for Retired Persons to file *amicus* briefs.

II. Arguments of the Parties

The Secretary first highlights the fact that, when a voter applies for a mail-in ballot, Sections 3150.12(a) and (b)(1)-(2) of the Election Code require the voter to fill out an application form listing his name, address, date of birth, voting district, and the length of time he has resided in the voting district.¹³ According to the Secretary, the paper version of that form also requires a voter to sign a declaration that he or she is eligible to vote in the election for which he is requesting a ballot.¹⁴ Upon receipt of this application, a county board of elections confirms whether the applicant is qualified to receive a mail-in ballot under Section 3250.12b by verifying the proof of identification supplied with the application, such as the voter's drivers' license number or the last four digits of the voter's social security number, and the county board compares that information with the voter's permanent registration card. The Secretary contends that this comparison process is all that is required by the Election Code, and that there is no provision therein which requires county boards of elections to compare signatures for purposes of verification, which is why, the Secretary points out, the application can be completed and submitted electronically through a Commonwealth website.

Once this verification is completed, the Secretary proffers that the Code requires the application be marked approved and a ballot issued. *See* 25 P.S. § 3150.12b(a)(1). The Secretary emphasizes that the only permissible challenge to the ballot application under Section 3150.12b(a)(2) is that the applicant was not a qualified elector.

With regard to the pre-canvassing and canvassing procedures for absentee and mail-in ballots set forth in Section 3146.8 of the Election Code,¹⁵ the Secretary notes that the pre-canvassing process, which entails opening the ballot return envelopes, removing the ballots, and counting, computing and tallying them, can begin no earlier than 7:00 a.m. on election day. When the return envelope is opened during that process, according to the Secretary, the only examination which the county board may conduct under Section 3146.8(g)(3) and 3146.2c(c)¹⁶ is to compare “the ‘information’ on the envelope—i.e., the voter's name and address—with the names and addresses on the lists of approved absentee and mail-in voters.” Secretary's Application for Extraordinary Relief, 10/04/20, at 19. The Secretary stresses that no other examination is permitted under the plain terms of the Code.

*8 If the county board's examination determines that the declaration is sufficient, and the voter's name and address appears in the lists of approved absentee and mail-in voters, then, according to the Secretary, the Code requires the ballots to be counted. 25 P.S. § 3146.8(g)(3) and (4). The Secretary asserts that the only exception involves challenges to a voter's eligibility raised at the ballot application stage under Section 3150.12b(a)(2).¹⁷ The Secretary contends that such challenges must be made by 5:00 p.m. on the Friday before election day and, thus, cannot be made during the pre-canvassing procedure (which does not begin until election day).

The Secretary argues that there is no provision of the Election Code which allows or requires the county boards of elections to entertain challenges “based on perceived signature mismatches,” Secretary's Application for Extraordinary Relief, 10/04/20, at 20, or to reject absentee or mail-in ballots because of such an assessment. The Secretary notes that the General Assembly knows how to draft provisions requiring signature comparison, as it did for the in-person voting process governed by Section 3050(a.3)(2), which directs election officials to compare the signature of the voter signing the voter certificate at the polls with the district register, and then to make the determination of whether the signature on the voter certificate is genuine. Moreover, unlike for in-person voting, there is no provision in the Code which requires a voter to be notified that his signature has been challenged during the canvassing process; hence, a voter whose ballot is rejected during canvassing because of a perceived signature mismatch has no opportunity to respond to the challenge and have his ballot counted. In sum, the Secretary contends that requiring signature comparison during canvassing would improperly add a requirement to the Election Code which the legislature did not see fit to include.

Although the Secretary views the Election Code in this regard to be clear and unambiguous, she notes that, even if we were to find it to be ambiguous, we must still reject a signature comparison requirement, given that there are no standards or guidelines contained within the Code governing how an election official should perform such a comparison. In this vacuum, the Secretary asserts individual county boards will improvise “*ad hoc*” procedures, which would vary from county to county, creating a significant risk of error and uncertainty in the review of ballots. Secretary's Application for Extraordinary Relief, 10/04/20, at 24. In the Secretary's view, this would constitute a denial of equal protection to

voters whose ballots were challenged and rejected under such varying and imprecise standards. This process would also present an “unjustified risk of disenfranchisement,” *id.* at 25, given that a voter's ballot could be rejected without any opportunity to be heard on the issue.

Intervenors respond that the Election Code's use of the term “shall” in Sections 3146.6(a) and 3150.16(a) with respect to the requirement that electors sign the declaration on the outside of the ballot return envelope, together with the Code's companion requirement that county boards examine the declaration and determine if it is “sufficient,” mandates that county boards conduct signature verification. Intervenors Supplemental Brief at 6. Intervenors develop that, “because a voter's noncompliance with the signature mandate ‘renders the ballot invalid,’ that mandate necessarily contemplates the ‘enforcement mechanism’ of county boards engaging in—and invalidating ballots during the pre-canvass or canvass based upon—verification of the voter's signature.” *Id.* Intervenors maintain that the “mandate” established by these statutory provisions “authorizes and requires signature verification and invalidation of ballots based upon signature mismatch.” *Id.* Additionally, Intervenors maintain that, because Section 3148.8(g)(3) requires a determination of whether a declaration is “sufficient,” and establishes that a declaration will only be sufficient when signed by the elector, this “encompasses the enforcement mechanism of signature analysis and verification during the pre-canvass and canvass.” *Id.* Further, Intervenors insist that objections can be made at canvassing to ballots revealing signature mismatches.

*9 Although contending that these provisions of the Election Code are clear, Intervenors assert that principles of statutory construction also support their suggested interpretation. Specifically, Intervenors maintain that signature comparison is necessary to prevent fraud, and that prior decisions from lower courts of the Commonwealth have endorsed this practice to effectuate this purpose. *See id.* at 7-8 (citing *Appeal of Orsatti*, 143 Pa.Cmwlth. 12, 598 A.2d 1341 (1991); *In re Canvass of Absentee Ballots of Nov. 2, 1965, Gen. Election*, 39 Pa. D. & C.2d 429 (Montg. Cty. Common Pleas 1965); *Fogleman Appeal*, 36 Pa. D. & C.2d 426 (Juniata Cty. Common Pleas 1964); *In re City of Wilkes-Barre Election Appeals*, 44 Pa. D. & C.2d 535 (Luzerne Cty. Common Pleas 1967)). Intervenors also suggest the fact that, when a ballot return envelope is scanned upon receipt by a county board of elections, the voter's registration card, which includes his or her signature, as contained in the Commonwealth's “SURE” (“Statewide Uniform Registry of Electors”) system

appears on the election official's computer screen. Intervenors view this fact as indicating that even the Secretary believes signature verification is required.

Addressing the potential impacts of the competing interpretations, Intervenors suggest that the Secretary's interpretation implicates due process and equal protection concerns, given that voters who vote in person are subject to signature verification, whereas those who vote by mail-in or absentee ballots would not be. Intervenors contend we should avoid an interpretation of the Code that results in such potential constitutional violations.

Intervenors rebuff the practical difficulties of implementing a system of signature verification raised by the Secretary, asserting that Chester County has already promulgated and produced such a system.¹⁸ Intervenors further dispute that voters could be disenfranchised without their knowledge based on enforcement of a signature comparison requirement. They point to the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) for adjudicating ballot challenges, which they contend would allow a voter whose signature has been challenged during canvassing to have the challenge adjudicated and thereby preserve their right to vote.

III. Analysis

[3] [4] [5] [6] [7] As the issue on which we accepted King's Bench review is purely one of statutory interpretation, our standard of review is *de novo*, and our scope of review is plenary. *Danganan v. Guardian Protection Services*, 645 Pa. 181, 179 A.3d 9, 15 (2018). In matters of statutory interpretation, our objective is to ascertain and effectuate the intent of the General Assembly. *Id.*; *see also* 1 Pa.C.S. § 1921(a). As we have so oft observed, “[t]he best indication of legislative intent is the plain language of the statute.” *Crown Castle NG East v. Pennsylvania Public Utility Commission*, — Pa. —, 234 A.3d 665, 674 (2020). In ascertaining the plain meaning of statutory language, we consider it in context and give words and phrases their “common and approved usage.” *Commonwealth by Shapiro v. Golden Gate National Senior Care*, 648 Pa. 604, 194 A.3d 1010, 1027-28 (2017). When the words of a statute are free and clear of all ambiguity, they are the best indicator of legislative intent; hence, in such circumstances, “we cannot disregard the letter of the statute under the pretext of pursuing its spirit.” *Fletcher v. Pennsylvania Property & Casualty Insurance Guarantee*

Association, 603 Pa. 452, 985 A.2d 678, 684 (2009) (citing 1 Pa.C.S. § 1921(b)).

Turning to the text of the governing statutory provisions, Section 3146.8(g)(3) of the Election Code enumerates only three duties of the county boards of elections during the pre-canvassing and canvassing process:

(1) to “examine the declaration on the envelope of each ballot not set aside under subsection (d) [requiring rejection of ballots for deceased voters] and shall compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File,’ whichever is applicable”;

*10 (2) to verify “the proof of identification as required under this act,” and

(3) to be “satisfied that the declaration is sufficient and the information contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File’ verifies his right to vote.”

25 P.S. § 3146.8(g)(3).

If an absentee or mail-in ballot comports with these statutory requirements, and it has not been challenged under Section 3146.2b (providing for challenges to approval of absentee ballot application on the ground that the applicant was not a “qualified absentee elector,” or a “qualified elector”), or Section 3150.12b (providing that the exclusive means for challenging a mail-in ballot application is “on the grounds that the applicant was not a qualified elector”),¹⁹ then Section 3146.8(g)(4) requires the ballot to be considered “verified” and directs that it “shall be counted and included with the returns of the applicable election district.” 25 P.S. § 3146.8(g)(4)(a). The only exception is set forth in Section 3146.8(g)(4)(ii), which requires that, “[i]f any of the envelopes on which are printed, stamped or endorsed the words ‘Official Election Ballot,’ contain any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).

[8] To assess the signature analysis question before us, we review in turn each of the three canvassing duties set forth above from Section 3146.8(g)(3). First, as noted, the

county boards must examine the declaration on the ballot return envelope and then “compare the information thereon with that contained in the ‘Registered Absentee and Mail-in Voters File,’ the absentee voters’ list and/or the ‘Military Veterans and Emergency Civilians Absentee Voters File.’” *Id.* § 3146.8(g)(3).

Initially, we note that, with respect to the “Registered Absentee and Mail-in Voters File,” it seems this file, previously utilized, is now a virtually empty relic. Prior to the recent Code amendments, subsection (a) of Section 3146.2c specified that this file was to contain duplicate “voter’s temporary registration cards.”²⁰ See *id.* § 3146.2c(a) (effective to Oct. 30, 2019). Indeed, the provision provided that these registration cards “shall constitute” the file, indicating the file had no other content. *Id.* Critically, however, with the passage of Act 12, the legislature deleted subsection (a). Act 12, § 8 (deleting 25 P.S. § 3146.2c(a)). Thus, while the canvassing provisions of 25 P.S. § 3146.8(g)(3) still require a voter’s declaration to be compared against the file, that comparison would appear to be a meaningless exercise. The only informational remnant in the file, if it is still being maintained, is that set forth in Sections 3146.2(h) and 3150.12(e), requiring a voter’s absentee and mail-in ballot application number to be entered in the file. Manifestly, there is no present requirement that the file contain the type of signature information necessary to perform the signature comparison Intervenor’s contend is mandatory.

*11 With respect to a comparison of the declaration against the absentee voters’ list and the “Military Veterans and Emergency Civilians Absentee Voters File,” as highlighted by the Secretary, see Secretary’s Application for Extraordinary Relief, 10/04/20, at 19 n.14, the only lists against which such a comparison may be conducted are those which the county boards are required to keep under subsections (b) and (c) of Section 3146.2c. Those subsections provide:

(b) The county board of elections shall post in a conspicuous public place at its office a master list arranged in alphabetical order by election districts setting forth the name and residence, and at primaries, the party enrollment, of (1) every military elector to whom an absentee ballot is being sent, each such name to be prefixed with an “M”; (2) every bedridden or hospitalized veteran outside the county of his residence who is not registered and to whom an absentee ballot is being sent, each such name to be prefixed with a “V”; and (3) every registered elector who has filed

his application for an absentee ballot too late for the extraction of his original registration card and to whom a ballot is being sent and every qualified elector who has filed his application for an absentee ballot and is entitled, under provisions of the Permanent Registration Law as now or hereinafter enacted by the General Assembly, to absentee registration prior to or concurrently with the time of voting, each such name to be prefixed with a "C." This list shall be known as the Military, Veterans and Emergency Civilians Absentee Voters File for the Primary or Election of (date of primary or election) and shall be posted for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day on which the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations. This posted list shall not contain any military address or reference to any military organization. Upon written request, the county board shall furnish a copy of such list to any candidate or party county chairman.

(c) Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed "Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election)," and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

*12 25 P.S. § 3146.2c(b) and (c).

Notably, the only information required to be kept in these lists is, as the Secretary highlights, the names and addresses

of registered voters, and, in the case of voters serving in the military, even their addresses need not be disclosed. Consequently, in comparing a declaration against these lists, a county board may determine only whether the name and address information the voter has listed on the ballot envelope matches.²¹ There is no signature information in these lists for county election officials to compare against a voter's signature on his declaration; therefore, pursuant to the plain language of the Election Code, these lists cannot facilitate the signature comparison Intervenor maintain is required.

Next, in canvassing the ballots under [Section 3146.8\(g\)\(3\)](#), the county boards must verify "the proof of identification as required under this act." As indicated above, *see supra* note 9, Section 2602(z.5)(3)(i)-(iv) of the Election Code enumerates the various *types* of identification which a voter may utilize in completing a ballot application. Consequently, we conclude the county board's duty in this regard is to check the identification listed on the voter's mail-in or absentee ballot to see if it is of the *type* permitted by the Election Code, and to verify that it is valid. This duty does not, however, require or authorize county boards to go further and compare the signature on the voter's mail-in or absentee ballot to ensure that it is the same as that which appears on the form of identification the voter has listed on the application. Hence, this unambiguous provision likewise does not permit or require signature comparison.

Finally, a county board is required to determine if the ballot declaration is "sufficient." 25 P.S. § 3146.8(g)(3). The requirements for a ballot declaration are set forth in [Section 3146.6\(a\)](#) (absentee ballots) and [Section 3150.16\(a\)](#) (mail-in ballots). Both sections require that the elector "fill out, date and sign the declaration." *Id.* §§ 3146.6(a), 3150.16(a). Thus, in determining whether the declaration is "sufficient" for a mail-in or absentee ballot at canvassing, the county board is required to ascertain whether the declaration on the return envelope has been filled out, dated, and signed. This is the extent of the board's obligation in this regard. In assessing a declaration's sufficiency, there is nothing in this language which allows or compels a county board to compare signatures. Accordingly, we decline to read a signature comparison requirement into the plain and unambiguous language of the Election Code, as Intervenor urge us to do, inasmuch as the General Assembly has chosen not to include such a requirement at canvassing.

Even if there were any ambiguity with respect to these provisions, we observe that the General Assembly has

been explicit whenever it has desired to require election officials to undertake an inquiry into the authenticity of a voter's signature. *See, e.g., 25 P.S. § 3050(a.3)(2)* (governing procedures for in-person voting at polling places and requiring an “election officer” to “compare the elector's signature on his voter's certificate with his signature in the district register,” and based “upon such comparison ... if the signature on the voter's certificate, as compared with the signature as recorded in the district register, *shall not be deemed authentic by any of the election officers*, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity,” and requiring the voter to execute an affidavit and provide proof of his identity in order to vote (emphasis added)); *id. § 3050(a.4)(5) (i)* (“Except as provided in subclass (ii), if it is determined that [an individual who attempts to cast an in-person ballot at a polling place, but whose name did not appear on the district register of eligible voters] was registered and entitled to vote at the election district where the ballot was cast, the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form *and, if the signatures are determined to be genuine*, shall count the ballot if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election.” (emphasis added)).

*13 In this regard, we note that, when the Election Code was first promulgated by the General Assembly in 1937, it contained explicit signature comparison requirements for canvassing certain absentee ballots. *See Act of June 3, 1937, P.L. 1333, No. 320. Article XIII of that law, a precursor of the current mail-in ballot procedures, provided certain military service members the right to use mail-in ballots, referred to as “Detached Soldier's Ballots.” Similar to today's mail-in ballots, the service member was required to complete an affidavit on an outer envelope, along with the jurat of his witnessing officer, and then place his completed ballot inside that outer envelope. Id. § 1329. In canvassing such ballots, the county boards were instructed to “open such registered letter and after examining the affidavit and jurat, [to] compare the signature of such absent voter with his signature upon any register or other record in their possession. If the county board is satisfied that the signatures correspond and that the affidavit and jurat are sufficient, they shall announce the name of the elector and shall give any person present an opportunity to challenge the same” Id. § 1330 (emphasis added). Absent any challenge, such ballots were counted.*

Notably, in 1945, this signature comparison language was removed from the Code.²²

We draw two inferences from this early history. First, the legislature understands how to craft language requiring signature comparisons at canvassing when it chooses to do so, as it did in 1937. Second, in the 1937 Code, the legislature drew a clear distinction between assessing the *sufficiency* of the ballot affidavit (and jurat) and a *comparison* of the ballot signature. The legislature having subsequently stripped out the signature comparison language from the Code, we ought not to construe, as Intervenors suggest, the remaining sufficiency determination as incorporating a signature comparison.

Our conclusion that Section 3146.8(g)(3) of the Election Code does not impose a duty on county boards to compare signatures is also consistent with the recent evolution of the Election Code, wherein the legislature expanded the allowances for voting by mail. Notably, at the same time it liberalized voting by mail, the legislature first restricted, and then eliminated, the ability of third-parties to challenge ballots at canvassing.

Prior to the recent Code amendments, absentee ballots were the only permissible form of voting by mail. At that time, at canvassing, after a county board was satisfied that the declaration on an absentee ballot was sufficient, the Code provided that the board “shall announce the name of the elector and shall give any candidate representative or party representative present an opportunity to challenge any absentee elector” on specified grounds. *See 25 P.S. § 3146.8(g)(3)* (effective Nov. 9, 2006 to Mar. 13, 2012).²³ There were three permissible grounds for challenge: that the absentee elector was not a qualified elector; that the absentee elector, despite alleging otherwise, was present in his municipality of residence on election day; or that the absentee elector, despite alleging otherwise, was in fact able to appear at the polling place on election day. *Id.*

*14 However, when the legislature first allowed for no-excuse mail-in voting in 2019, the legislature simultaneously reduced the bases on which canvassing challenges could be made by eliminating the present-in-his-municipality objection (albeit while allowing the remaining challenges to be asserted against mail-in ballots). *See Act 77, § 7 (amending 25 P.S. § 3146.8(g)(3))*. Then, in 2020, the legislature eliminated time-of-canvassing challenges *entirely* from Section 3146.8(g)(3). *See Act 12, § 11*

(amending 25 P.S. § 3146.8(g)(3) to eliminate the challenging grounds and procedures, and amending Section 3146.8(g)(2) to eliminate the proviso that “Representatives shall be permitted to challenge any absentee elector or mail-in elector in accordance with the provisions of paragraph (3)”). Accordingly, the Election Code presently provides no mechanism for time-of-canvassing challenges by candidate or party representatives. See 25 P.S. § 3146.8(g)(4) (“All absentee ballots which have not been challenged under section 1302.2(c) [pertaining to absentee ballot applications] and all mail-in ballots which have not been challenged under section 1302.2-D(a)(2) [pertaining to mail-in ballot applications] and that have been verified under paragraph (3) shall be counted and included with the returns of the applicable election district”).²⁴ Moreover, as is plain from the above account, at no time did the Code provide for challenges to ballot signatures.²⁵

Presumably, in expanding voting by mail, the legislature sought to streamline the process for canvassing such ballots, perhaps to avoid undermining the expansion effort by eliminating the prospect that voters – including a potentially large number of new mail-in voters – would be brought before the board or the courts to answer third-party challenges. Regardless, Intervenor would have us interpret the Election Code, which now does not provide for time-of-canvassing ballot challenges, and which never allowed for signature challenges, as both requiring signature comparisons at canvassing, and allowing for challenges on that basis. We reject this invitation.

Footnotes

- 1 As we have recently explained, our Court's King's Bench jurisdiction is derived from Article V, § 2 of the Pennsylvania Constitution and 42 Pa.C.S. § 502, and “is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law.” *Friends of Danny DeVito v. Wolf*, — Pa. —, —, 227 A.3d 872, 884 (Pa. 2020). We may exercise this power of review even where, as here, no dispute is pending in a lower court of this Commonwealth. *Id.*
- 2 The Pennsylvania Election Code, 25 P.S. §§ 2600-3591 (“Election Code” or “Code”).
- 3 As defined by the Election Code, the process of “pre-canvassing” is “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots. The term does not include the recording or publishing of the votes reflected on the ballots.” 25 P.S. § 2602. The process of “canvassing” is “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* § 2602. At times herein, we refer to these two stages broadly as “canvassing.”
- 4 The voter's declaration is a pre-printed statement required to appear on the ballot return envelope containing a voter's absentee or mail-in ballot declaring: that the voter is qualified to vote the ballot enclosed in the envelope, and that the voter did not already vote in the election for which the ballot was issued. 25 P.S. § 3146.2. The declaration also contains lines for the voter to print his or her name and address, a space for the voter to sign his or her name or make a mark if unable to sign, and a space for the voter to enter the date on which he or she executed the declaration. *Id.* § 3146.6.

[9] [10] It is a well established principle of statutory interpretation that that we “may not supply omissions in the statute when it appears that the matter may have been intentionally omitted.” *Sivick v. State Ethics Commission*, — A.3d —, —, 2020 WL 5823822, at *10 (Pa. Oct. 1, 2020). It is not our role under our tripartite system of governance to engage in judicial legislation and to rewrite a statute in order to supply terms which are not present therein, and we will not do so in this instance.

IV. Conclusion

For all of the aforementioned reasons, we grant the Secretary's petition for declarative relief, and hold that county boards of elections are prohibited from rejecting absentee or mail-in ballots based on signature comparison conducted by county election officials or employees, or as the result of third-party challenges based on signature analysis and comparisons.

Chief Justice Saylor and Justices Baer, Donohue, Dougherty and Wecht join the opinion.

Justice Mundy concurs in the result.

All Citations

--- A.3d ----, 2020 WL 6252803

- 5 Act of October 31, 2019, P.L. 552, No. 77 (hereinafter, "Act 77").
- 6 Act of March 27, 2020, P.L. 41, No. 12 (hereinafter, "Act 12").
- 7 This election was rescheduled from May 17, 2020 due to the COVID-19 pandemic.
- 8 We collectively refer to Act 77 and Act 12 as the "recent Code amendments."
- 9 This lawsuit challenged, as an alleged violation of the due process and equal protection guarantees of the 14th Amendment to the United States Constitution, *inter alia*, the Secretary's allowance in the upcoming election of the use of drop boxes, satellite election offices for the collection of absentee and mail-in ballots, and the counting of ballots which were returned without a secrecy envelope, and the requirement in the Election Code that poll watchers reside in the county in which they sought to serve in this capacity.
- 10 This statutory section provides:
- The words "proof of identification" shall mean:
- (1) In the case of an elector who has a religious objection to being photographed, a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation.
- (2) For an elector who appears to vote under section 1210, a document that:
- (i) shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register;
- (ii) shows a photograph of the individual to whom the document was issued;
- (iii) includes an expiration date and is not expired, except:
- (A) for a document issued by the Department of Transportation which is not more than twelve (12) months past the expiration date; or
- (B) in the case of a document from an agency of the Armed forces of the United States or their reserve components, including the Pennsylvania National Guard, establishing that the elector is a current member of or a veteran of the United States Armed Forces or National Guard which does not designate a specific date on which the document expires, but includes a designation that the expiration date is indefinite; and
- (iv) was issued by one of the following:
- (A) The United States Government.
- (B) The Commonwealth of Pennsylvania.
- (C) A municipality of this Commonwealth to an employee of that municipality.
- (D) An accredited Pennsylvania public or private institution of higher learning.
- (E) A Pennsylvania care facility.
- (3) For a qualified absentee elector under section 1301 or a qualified mail-in elector under section 1301-D:
- (i) in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;
- (ii) in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;
- (iii) in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1); or
- (iv) in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2).
- 25 P.S. § 2602(z.5) (footnotes omitted).
- 11 Judge Ranjan additionally rejected Intervenor's claims that a lack of signature comparison requirements violated the guarantees of the United States Constitution to substantive due process and equal protection. Because the present issue which we have accepted for our King's Bench review concerns only a pure question of state law involving interpretation of our Commonwealth's Election Code, we need not discuss Judge Ranjan's resolution of those claims.
- 12 After the filing deadline set in our order, Senate President Pro Tempore Scarnati and Senate Majority Leader Corman filed an application for leave to file an *amicus* brief *nunc pro tunc*, alleging that technical difficulties with our electronic filing system prevented timely filing their *amicus* brief. We grant the application.
- 13 The Secretary argues that absentee ballot application and approval procedures set forth in 25 P.S. §§ 3146.2 and 3146.2b are similar and, hence, for the sake of convenience, discusses only the mail-in balloting provisions.
- 14 This form is available on the Secretary's website at https://www.votespa.com/Register-to-Vote/Documents/PADOS_MailInApplication.pdf.
- 15 Section 3146.8, by its title, "Canvassing of official absentee ballots and mail-in ballots," and its plain terms, governs both the pre-canvassing and canvassing of absentee and mail-in ballots.

16 Section 3146.2c(c) provides:

Not less than five days preceding the election, the chief clerk shall prepare a list for each election district showing the names and post office addresses of all voting residents thereof to whom official absentee or mail-in ballots shall have been issued. Each such list shall be prepared in duplicate, shall be headed "Persons in (give identity of election district) to whom absentee or mail-in ballots have been issued for the election of (date of election)," and shall be signed by him not less than four days preceding the election. He shall post the original of each such list in a conspicuous place in the office of the county election board and see that it is kept so posted until the close of the polls on election day. He shall cause the duplicate of each such list to be delivered to the judge of election in the election district in the same manner and at the same time as are provided in this act for the delivery of other election supplies, and it shall be the duty of such judge of election to post such duplicate list in a conspicuous place within the polling place of his district and see that it is kept so posted throughout the time that the polls are open. Upon written request, he shall furnish a copy of such list to any candidate or party county chairman.

25 P.S. § 3146.2c(c).

17 See also 25 P.S. § 3146.2b(b) and (c) (limiting challenges to approval of application for absentee ballots to the ground that the applicant was not a "qualified absentee elector" or a "qualified elector").

18 Notably, Chester County filed an *amicus* brief supporting the Secretary's position.

19 As the Secretary has argued, the plain text of these provisions requires challenges to applications for mail-in ballot applications to be brought no later than 5:00 p.m. on the Friday before the election. 25 P.S. § 3150.12b(a)(2). Likewise, challenges to absentee ballot applications of registered voters, except for those permanently registered, must be brought by that same deadline. *Id.* § 3146.2b(c). Finally, challenges which are brought to a registered voter who is on the permanent registration list must be brought by the deadline for receipt of absentee ballots. *Id.* § 3146.2b(b). Hence, none of these challenges may be brought during the canvassing process.

20 This provision then provided, in full:

The county board of elections shall maintain at its office a file containing the duplicate absentee voter's temporary registration cards of every registered elector to whom an absentee ballot has been sent. Such duplicate absentee voter's temporary registration cards shall be filed by election districts and within each election district in exact alphabetical order and indexed. The registration cards so filed shall constitute the Registered Absentee Voters File for the Primary or Election of (date of primary or election) and shall be kept on file for a period commencing the Tuesday prior to the day of the primary or election until the day following the primary or election or the day the county board of elections certifies the returns of the primary or election, whichever date is later. Such file shall be open to public inspection at all times subject to reasonable safeguards, rules and regulations.

25 P.S. § 3146.2c(a) (effective to Oct. 30, 2019).

21 This comparison process operates to eliminate ballots of voters who have provided a different name entirely than that which appears on these lists.

22 Act of March 9, 1945, P.L. 29, No. 17, §§ 9-10. Thereafter, as set forth in the 1945 amendment, the county board was required to maintain a "Military File" containing the names and addresses of service members sent absentee ballots, *id.* § 10 (reenacting Section 1305 of Act of 1937), something akin to the "Military Veterans and Emergency Civilians Absentee Voters File" in the present Election Code. Also, like the current Code, at canvassing, the board was required to review only the ballot affidavit (and jurat) to determine "[i]f the board is satisfied that the affidavit and jurat are sufficient and that the elector has qualified." *Id.* § 10 (reenacting Section 1307 of Act of 1937). Thus, signature comparison was no longer part of the county board's canvassing obligations.

23 A similar procedure was provided to allow poll watchers to challenge ballots. 25 P.S. § 3146.8(e) (effective Nov. 9, 2006 to Mar. 13, 2012). However, this procedure was deleted in its entirety in 2019. See Act 77, § 7 (deleting 25 P.S. § 3146.8(e)).

24 Admittedly, there are some vestiges remaining in the Election Code of the prior, now eliminated, system for time-of-canvassing ballot challenges. See, e.g., 25 P.S. § 3146.8(f) (requiring a \$10 deposit for each challenge to an absentee or mail-in ballot application or ballot); *id.* § 1308(g)(5) (discussing procedures for handling "[b]allots received whose applications have been challenged and ballots which have been challenged" (emphasis added)). Now untethered to a procedure for asserting time-of-canvassing challenges in Section 3146.8(g)(3), however, we view the references to ballots in these provisions to be the overlooked remnants of a prior, now eliminated, process.

25 For this reason, we reject Intervenors' contention that the notice, hearing, and judicial review provisions in Section 3146.8(g)(5)-(7) pertain to adjudicating signature challenges.

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KeyCite Blue Flag – Appeal Notification

Petition for Certiorari Docketed by [JOSEPH B. SCARNATI, III, ET AL. v. PENNSYLVANIA DEMOCRATIC PARTY, ET AL.](#), U.S., October 30, 2020

2020 WL 5554644

Only the Westlaw citation is currently available.
Supreme Court of Pennsylvania.

PENNSYLVANIA DEMOCRATIC PARTY,

Nilofer Nina Ahmad, [Danilo Burgos](#),
Austin Davis, [Dwight Evans](#), Isabella
Fitzgerald, Edward Gainey, Manuel M.
Guzman, Jr., Jordan A. Harris, Arthur
Haywood, Malcolm Kenyatta, Patty H.
Kim, Stephen Kinsey, Peter Schweyer,
Sharif Street, and Anthony H. Williams

v.

Kathy BOOCKVAR, in her Capacity
as Secretary of the Commonwealth of
Pennsylvania; Adams County Board
of Elections; Allegheny County Board
of Elections; Armstrong County Board
of Elections; Beaver County Board
of Elections; Bedford County Board
of Elections; Berks County Board of
Elections; Blair County Board of Elections;
Bradford County Board of Elections;
Bucks County Board of Elections; [Butler
County Board of Elections](#); Cambria
County Board of Elections; Cameron
County Board of Elections; Carbon County
Board of Elections; Centre County Board
of Elections; Chester County Board
of Elections; Clarion County Board of
Elections; Clearfield County Board of
Elections; [Clinton County Board of
Elections](#); Columbia County Board of
Elections; Crawford County Board of
Elections; [Cumberland County Board](#)

[of Elections](#); Dauphin County Board of
Elections; [Delaware County Board of
Elections](#); Elk County Board of Elections;
Erie County Board of Elections; Fayette
County Board of Elections; Forest County
Board of Elections; [Franklin County
Board of Elections](#); Fulton County Board
of Elections; [Greene County Board of
Elections](#); Huntingdon County Board
of Elections; Indiana County Board
of Elections; [Jefferson County Board
of Elections](#); Juniata County Board of
Elections; Lackawanna County Board
of Elections; Lancaster County Board
of Elections; [Lawrence County Board
of Elections](#); Lebanon County Board
of Elections; Lehigh County Board of
Elections; Luzerne County Board of
Elections; Lycoming County Board
of Elections; Mckean County Board
of Elections; Mercer County Board
of Elections; Mifflin County Board of
Elections; Monroe County Board of
Elections; [Montgomery County Board
of Elections](#); Montour County Board
of Elections; Northampton County
Board of Elections; Northumberland
County Board of Elections; Perry County
Board of Elections; Philadelphia County
Board of Elections; [Pike County Board
of Elections](#); Potter County Board of
Elections; Schuylkill County Board
of Elections; Snyder County Board of
Elections; Somerset County Board of
Elections; Sullivan County Board of
Elections; Susquehanna County Board of
Elections; Tioga County Board of Elections;
Union County Board of Elections;

Venango County Board of Elections;
 Warren County Board of Elections;
 Washington County Board of Elections;
 Wayne County Board of Elections;
 Westmoreland County Board of Elections;
 Wyoming County Board of Elections;
 and York County Board of Elections
 Petition of: Kathy Boockvar, in
 Her Capacity as Secretary of the
 Commonwealth of Pennsylvania

No. 133 MM 2020

Submitted: September 8, 2020

Decided: September 17, 2020

Synopsis

Background: Democratic party, elected officials, and congressional candidates petitioned for review against Secretary of the Commonwealth and county election boards, seeking declaratory and injunctive relief regarding various aspects of mail-in voting and the poll watcher residency requirement. Secretary's application for the Supreme Court to exercise extraordinary jurisdiction was granted, and applications to intervene by Republican party and elected officials were granted.

Holdings: The Supreme Court, No. 133 MM 2020, [Baer, J.](#), held that:

[1] Election Code permits county boards to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes;

[2] three-day extension of absentee and mail-in ballot received-by deadline was warranted;

[3] county boards were not required to provide opportunity to cure mail-in and absentee ballots that were filled out incompletely or incorrectly;

[4] an elector's failure to enclose mail-in ballot in the secrecy envelope renders the ballot invalid; and

[5] statute imposing residency requirement on being poll watcher did not violate due process, equal protection, free speech, and association rights.

Relief granted in part and denied in part.

[Wecht, J.](#), filed concurring opinion.

[Saylor](#), Chief Justice, filed concurring and dissenting opinion in which [Mundy, J.](#), joined.

[Donohue, J.](#), filed concurring and dissenting opinion in which [Saylor](#), Chief Justice, and [Mundy, J.](#), joined in part.

[Mundy, J.](#), filed dissenting opinion.

West Headnotes (22)

[1] **Appeal and Error** 🔑 Plenary, free, or independent review

Appeal and Error 🔑 De novo review

The Supreme Court's standard of review over a pure question of law is de novo and the scope of review is plenary.

[2] **Declaratory Judgment** 🔑 Liberal or strict construction

The Declaratory Judgments Act is to be liberally construed and administered. [42 Pa. Cons. Stat. Ann. § 7531 et seq.](#)

[3] **Election Law** 🔑 Liberal or strict construction

The Election Code should be liberally construed so as not to deprive, inter alia, electors of their right to elect a candidate of their choice. [25 Pa. Stat. Ann. § 2601 et seq.](#)

1 Cases that cite this headnote

[4] **Injunction** 🔑 Conduct of elections

Democratic party was not entitled to affirmative injunction requiring that county election boards evaluate particular facts and circumstances in

their jurisdictions and develop reasonable plan reflecting needs of citizens to ensure expedient return of mail-in ballots, where clear right to relief was required for injunction, and there was no legal authority that would have allowed Supreme Court to mandate that county boards take such action.

[5] **Election Law** 🔑 [Construction and Operation](#)

The policy in the Commonwealth, when construing election laws, is to protect the elective franchise.

[6] **Election Law** 🔑 [Liberal or strict construction](#)

Although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.

[7] **Election Law** 🔑 [Construction and Operation](#)

The goal in construing election laws is to enfranchise and not to disenfranchise the electorate.

[8] **Election Law** 🔑 [Application and delivery](#)

The Election Code permits county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes. [25 Pa. Stat. Ann. § 3150.16\(a\)](#).

[3 Cases that cite this headnote](#)

[9] **Election Law** 🔑 [Application and delivery](#)

Three-day extension of absentee and mail-in ballot received-by deadline, to allow for tabulation of ballots mailed by voters via United States Postal Service (USPS) and postmarked by 8:00 p.m. on election day, was warranted due to COVID-19 pandemic and USPS delays; pandemic equated to natural disaster, timeline built into Election Code could not be met by USPS's delivery standards, and extending deadline on statewide basis would prevent

disenfranchisement of voters and prevent chaos and confusion. [25 Pa. Stat. Ann. § 3150.16\(c\)](#).

[6 Cases that cite this headnote](#)

[10] **Constitutional Law** 🔑 [Elections in general](#)

Constitutional Law 🔑 [Voting rights and suffrage in general](#)

The Free and Equal Elections Clause of the Pennsylvania Constitution requires that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of the Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. [Pa. Const. art. 1, § 5](#).

[11] **Election Law** 🔑 [Power to Restrict or Extend Suffrage](#)

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.

[12] **Election Law** 🔑 [Scope of Inquiry and Powers of Court or Board](#)

Courts of common pleas have the power, on the day of an election, to decide matters pertaining to the election as may be necessary to carry out the intent of the Election Code, which includes providing an equal opportunity for all eligible electors to participate in the election process. [25 Pa. Stat. Ann. § 3046](#).

[1 Cases that cite this headnote](#)

[13] **Election Law** 🔑 [Rejection of vote by election officers](#)

County election boards were not required to implement a “notice and opportunity to cure” procedure for mail-in and absentee ballots that voters had filled out incompletely or incorrectly; even though state constitution

mandated elections be free and equal, Election Code did not provide for notice and opportunity to cure procedure, and decision to provide such a procedure was best suited for legislature. [Pa. Const. art. 1, § 5](#).

[1 Cases that cite this headnote](#)

[14] Election Law 🔑 [Mode of voting in general](#)

Election Law 🔑 [Application and delivery](#)

The secrecy provision language in the Election Code is mandatory and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid. [25 Pa. Stat. Ann. § 3150.16\(a\)](#).

[15] Constitutional Law 🔑 [Intent of and Considerations Influencing Legislature](#)

Legislative enactments enjoy the presumption that the General Assembly did not intend to violate constitutional norms, in part because there exists a judicial presumption that the sister branches take seriously their constitutional oaths. [1 Pa. Cons. Stat. Ann. § 1922\(3\)](#).

[16] Constitutional Law 🔑 [Presumptions and Construction as to Constitutionality](#)

A statute is presumed to be valid, and will be declared unconstitutional only if it is shown to be clearly, palpably, and plainly violative of the Constitution.

[17] Election Law 🔑 [Constitutionality and validity](#)

In analyzing whether a state election law violates the constitution, courts must first examine the extent to which a challenged regulation burdens one's constitutional rights; upon determining the extent to which rights are burdened, courts can then apply the appropriate level of scrutiny needed to examine the propriety of the regulation.

[18] Election Law 🔑 [Constitutionality and validity](#)

Where a state election regulation imposes a severe burden on a plaintiff's right to vote, strict scrutiny applies and requires that the regulation is narrowly drawn to advance a state interest of compelling importance.

[19] Constitutional Law 🔑 [Voting rights and suffrage in general](#)

When a state election law imposes only reasonable, nondiscriminatory restrictions upon the constitutional rights of voters, an intermediate level of scrutiny applies, and the state's important regulatory interests are generally sufficient to justify the restrictions.

[20] Election Law 🔑 [Constitutionality and validity](#)

Where a state election law does not regulate a suspect classification, such as race, alienage, or national origin, or burden a fundamental constitutional right, such as the right to vote, the state need only provide a rational basis for its imposition.

[21] Constitutional Law 🔑 [Elections in general](#)

Constitutional Law 🔑 [Polling places](#)

Constitutional Law 🔑 [Elections, Voting, and Political Rights](#)

Constitutional Law 🔑 [Voters, candidates, and elections](#)

Election Law 🔑 [Presence of representatives of candidates or parties](#)

Statute imposing residency requirement on being poll watcher imposed no burden on one's constitutional right to vote, and thus required only a showing that rational basis existed to validate law on claim that requirement violated due process, equal protection, free speech, and association rights; right to serve as poll watcher was conferred by statute rather than constitution, poll watching was not incidental to right of free

association, and poll watching did not implicate core political speech. *U.S. Const. Amends. 1, 14*; *25 Pa. Stat. Ann. § 2687(b)*.

[1 Cases that cite this headnote](#)

- [22]** [Constitutional Law](#) 🔑 Elections in general
- [Constitutional Law](#) 🔑 Polling places
- [Constitutional Law](#) 🔑 Elections, Voting, and Political Rights
- [Constitutional Law](#) 🔑 Voters, candidates, and elections
- [Election Law](#) 🔑 Presence of representatives of candidates or parties

Statute imposing residency requirement on being poll watcher did not violate due process, equal protection, free speech, and association rights, despite contention that poll watchers were vital to protect against voter fraud and residency requirement made it difficult to identify poll watchers in all precincts; General Assembly chose county-based scheme for conducting elections, making it reasonable to require poll watchers, who served within various counties of state, to be residents of counties in which they served, and there was no indication that there was heightened election fraud involving mail-in voting. *U.S. Const. Amends. 1, 14*; *25 Pa. Stat. Ann. § 2687(b)*.

[1 Cases that cite this headnote](#)

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Lawrence County Board of Elections, Mercer County Board of Elections, Montour County Board of Elections, Venango County Board of Elections, and York County Board of Elections.

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[Timothy Patrick Brennan](#), [Richard Eugene Santee](#), [Brian J. Taylor](#), Easton, for Respondent Northampton County Board of Elections.

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Board of Elections, Fayette County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Lackawanna County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Mercer County Board of Elections, Montour County Board of Elections, Northumberland County Board of Elections, Venango County Board of Elections, and York County Board of Elections.

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Tara Lynn Hazelwood, Pennsylvania House of Representatives, Harrisburg, Pennsylvania House of Representatives Democratic Caucus, Amicus Curiae.

[Lori A. Martin](#), Wilmer Cutler Pickering Hale and Dorr LLP, New York, Common Cause Pennsylvania, Patricia M. Demarco, League of Women Voters of Pennsylvania, Make the Road Pennsylvania, Robinson, [Danielle Graham](#), The Black Political Empowerment Project, Kathleen Wise, Amici Curiae, Common Cause Pennsylvania, Patricia M. DeMarco, League of Women Voters of Pennsylvania, Make the Road Pennsylvania, Danielle Graham Robinson, The Black Political Empowerment Project, Kathleen Wise, Possible Intervenors.

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[SAYLOR](#), C.J., [BAER](#), [TODD](#), [DONOHUE](#), [DOUGHERTY](#), [WECHT](#), [MUNDY](#), JJ.

OPINION

JUSTICE [BAER](#)

*1 In October 2019, the General Assembly of the Commonwealth of Pennsylvania enacted Act 77 of 2019, which, *inter alia*, created for the first time in Pennsylvania the opportunity for all qualified electors to vote by mail, without requiring the electors to demonstrate their absence from the voting district on Election Day, [25 P.S. §§ 3150.11-3150.17](#). The Pennsylvania Democratic Party and several Democratic elected officials and congressional candidates, some in their official capacity and/or as private citizens (collectively, “Petitioner”), filed the instant action, initially in the Commonwealth Court, in the form of a petition for review seeking declaratory and injunctive relief relating primarily to five issues of statutory interpretation involving Act 77 and the Election Code, [25 P.S. §§ 2600-3591](#).¹ This Court exercised Extraordinary Jurisdiction to address these issues and to clarify the law of this Commonwealth in time for the 2020 General Election.²

I. FACTS AND PROCEDURAL HISTORY

On July 10, 2020, Petitioner filed its petition for review in the Commonwealth Court against Secretary of the Commonwealth Kathy Boockvar (“Secretary”) and all 67 county election boards (“Boards”).³ In its petition, Petitioner requested that the Commonwealth Court issue declaratory and injunctive relief “so as to protect the franchise of absentee and mail-in voters.” Petition for Review (“Petition”), 7/10/2020, at 5.⁴

*2 Specifically, Petitioner raised several discrete issues for the Commonwealth Court’s consideration, which are discussed in more detail *infra*. Briefly, in Count 1, Petitioner requested declaratory relief to confirm that Act 77 permits Boards “to provide secure, easily accessible locations as the Board deems appropriate, including, where appropriate, mobile or temporary collection sites, and/or drop-boxes for the collection of mail-in ballots.” *Id.* at 47, ¶ 165. Additionally, Petitioner sought an injunction requiring the Boards to “evaluate the particular facts and circumstances in

their jurisdictions and develop a reasonable plan ... to ensure the expedient return of mail-in ballots.” *Id.* at ¶ 166.

In Count 2, Petitioner sought an injunction to “lift the deadline in the Election Code across the state to allow any ballot postmarked by 8:00 p.m. on Election Night to be counted if it is received by the Boards” by 5:00 p.m. on Tuesday, November 10, which is the deadline for ballots to be received under the Federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).⁵ *Id.* at 50, ¶ 178. In the alternative, Petitioner posited that the Commonwealth Court could, with a few caveats, “enjoin the Counties to extend a more tailored ballot extension deadline to the date that is 21 days after the particular voter's ballot is mailed by the county[.]” *Id.* at ¶ 179.

In Count 3, Petitioner highlighted that the “procedure for mail-in ballots often leads to minor errors, which result in many ballots being rejected and disenfranchising voters who believe they have exercised their right to vote.” *Id.* at 51, ¶ 186. In anticipation of these expected errors, Petitioner again sought an injunction requiring Boards that have knowledge of an incomplete or incorrectly filled out ballot and the elector's contact information to contact the elector and provide them “the opportunity to cure the facial defect until the UOCAVA deadline.” *Id.* at 52, ¶ 187.

In Count 4, Petitioner requested a declaration that there is no statutory authority to set aside an absentee or mail-in ballot solely for failure to place it into the official election ballot envelope (hereinafter referred to as the “secrecy envelope”), as well as an injunction prohibiting any “naked ballots,” which are otherwise without error, from being invalidated.⁶ *Id.* at 54, ¶ 198-199. A “naked ballot” refers to an official mail-in ballot that is not placed in the secrecy envelope before mailing.

Finally, in Count 5, Petitioner sought a declaration that the “Election Code's poll watcher residency requirement does not violate the United States Constitution's First and Fourteenth Amendments, its Equal Protection Clause, or the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.” *Id.* at 55, ¶ 207.

On August 13, 2020, the Secretary filed an Answer and New Matter to the petition. In addition, twenty of the named Boards filed answers with new matter, fourteen of the Boards filed answers, and nine of the Boards filed preliminary objections.⁷ Requests to intervene were filed by Donald J. Trump for President, Inc., the Republican Party of

Pennsylvania, and the RNC, as well as Joseph B. Scarnati III, President Pro Tempore, and Jake Corman, Majority Leader of the Pennsylvania Senate, in opposition to the petition. The Common Cause Pennsylvania, The League of Women Voters of Pennsylvania, The Black Political Empowerment Project (“B-PEP”), Make the Road Pennsylvania, a project of Make the Road States (“Make the Road PA”), Patricia M. DeMarco, Danielle Graham Robinson, and Kathleen Wise filed a joint application to intervene as co-petitioners.

*3 On August 16, 2020, the Secretary filed an application asking this Court to exercise extraordinary jurisdiction over Petitioner's petition for review.⁸ Highlighting, *inter alia*, the two major political parties’ “diametric positions” on the interpretation of several Act 77 provisions and the fast-approaching 2020 General Election, the Secretary asserted that “[t]he exercise of extraordinary jurisdiction by this Court is the only means available to resolve these disputes without disrupting the election.” Secretary's Application for Extraordinary Relief, 8/16/2020, at 14-16. On August 19, 2020, Petitioner filed an Answer to the Secretary's application, noting that it had no objection to this Court exercising its extraordinary jurisdiction.⁹

Faced with a national election scheduled to occur on November 3, 2020 and substantial legal issues that required the highest court of Pennsylvania's analysis and response to ensure a free and fair election, on September 1, 2020, this Court granted the Secretary's Application and set forth a schedule for supplemental briefing and filings.¹⁰ Later, on September 3, 2020, this Court filed an order granting the motions to intervene filed by the Republican Party of Pennsylvania (hereinafter, “Respondent”) and Joseph B. Scarnati III, Pennsylvania Senate President Pro Tempore, and Jake Corman, Senate Majority Leader, representing the Republican Senate Caucus (hereinafter, “Caucus”). Applications to intervene filed by Donald J. Trump for President, Inc., and the RNC; Common Cause of Pennsylvania, the League of Women Voters of Pennsylvania, B-PEP, Make the Road PA, Patricia M. DeMarco, Danielle Graham Robinson, and Kathleen Wise were denied without prejudice to the parties’ ability to file briefs as *amicus curiae* pursuant to Pa.R.A.P. 531.¹¹ The parties have submitted supplemental filings in support of their respective positions, and this matter is now ripe for disposition of the discrete five legal issues before us.

II. RELEVANT OVERARCHING PRINCIPLES OF LAW

*4 [1] Generally speaking, each of the five issues presented by Petitioner presents a pure question of law, over which our standard of review is *de novo* and our scope of review is plenary. *In re Vencil*, 638 Pa. 1, 152 A.3d 235, 241 (2017). Specifically, in large part, Petitioner requests relief in the form of declarations of law regarding Act 77 pursuant to the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541. Accordingly, we address the issues presented mindful of the following.

[2] The Declaratory Judgments Act, which is to be liberally construed and administered, was promulgated to “settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]” 42 Pa.C.S. § 7541(a). Pertinent to the instant matter, this Act provides, in relevant part, that “[a]ny person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder.” 42 Pa.C.S. § 7533.¹²

When presented with matters of statutory construction, this Court is guided by Pennsylvania's Statutory Construction Act, 1 Pa.C.S. § 1501-1991. Under this Act, “the object of all statutory construction is to ascertain and effectuate the General Assembly's intention.” *Sternlicht v. Sternlicht*, 583 Pa. 149, 876 A.2d 904, 909 (2005) (citing 1 Pa.C.S. § 1921(a) (“The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly”)). When the words of a statute are clear and unambiguous, “the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b); see also *Sternlicht*, *supra*. However, when the words of a statute are not explicit, the General Assembly's intent is to be ascertained by consulting a comprehensive list of specific factors set forth in 1 Pa.C.S. § 1921(c). See also *Pennsylvania Associated Builders & Contractors, Inc. v. Commonwealth Dep't of Gen. Servs.*, 593 Pa. 580, 932 A.2d 1271, 1278 (2007) (recognizing that when the “words of the statute are not explicit, the General Assembly's intent is to be ascertained by considering matters other than statutory language, like the occasion and necessity for the statute; the circumstances of its enactment; the object it seeks to attain; the mischief to be remedied; former laws; consequences

of a particular interpretation; contemporaneous legislative history; and legislative and administrative interpretations”).

Moreover, we recognize that in this Commonwealth, “[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 (hereinafter referred to as the “Free and Equal Elections Clause”). The broad text of this specific provision “mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be ‘free and equal.’ ” *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 804 (2018) (emphasis in original). Stated another way, this clause was “specifically intended to equalize the power of voters in our Commonwealth's election process[.]” *Id.* at 812.

*5 [3] Finally, this Court has previously observed that the purpose and objective of the Election Code, which contains Act 77, is “[t]o obtain freedom of choice, a fair election and an honest election return[.]” *Perles v. Hoffman*, 419 Pa. 400, 213 A.2d 781, 783 (1965). To that end, the Election Code should be liberally construed so as not to deprive, *inter alia*, electors of their right to elect a candidate of their choice. *Id.* at 784. With these general principles in mind, this Court will address in turn each of the five discrete issues presented by Petitioner.

III. ISSUES

A. COUNT I OF THE PETITION FOR REVIEW

Section 3150.16(a) of the Election Code, 25 P.S. § 3150.16(a), is part of Act 77 and pertinent to several issues in this matter. That statutory provision, which is entitled “Voting by mail-in electors,” states as follows:

(a) **General rule.**--At any time after receiving an official mail-in ballot, but on or before eight o'clock P.M. the day of the primary or election, the mail-in elector shall, in secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such

envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3150.16(a). The last sentence of this provision is the primary focus of the first question of law that we will address. The plain language of this sentence allows an elector to mail her securely sealed envelope containing the elector's "Official Election Ballot" to her "county board of election" or, more relevant to this issue, "deliver it in person to said county board of election." *Id.*

[4] In Count I of its petition for review, Petitioner seeks a declaration that a reasonable interpretation of Section 3150.16(a) of the Election Code permits county boards of election to provide electors with as many secure and easily accessible locations to deliver personally their mail-in ballots as each board deems appropriate.¹³ Petitioner suggests that these locations can consist of mobile or temporary collection sites and that county boards of election may utilize secure drop-boxes for the collection of hand-delivered mail-in ballots.

*6 Indeed, Petitioner contends that, by enacting Section 3150.16(a) of the Election Code, the General Assembly clearly and unambiguously intended to provide the various county boards of election with the option of accepting hand-delivered mail-in ballots at any location controlled by the boards, not just at the boards' central offices. In support of this position, Petitioner points out, *inter alia*, that pursuant to Section 3151 of the Election Code, the General Assembly empowered each county board of election to receive "ballot boxes and returns" in their offices or "in any such other place as has been designated by the board."¹⁴ 25 P.S. § 3151.

The Secretary builds on Petitioner's argument. In so doing, the Secretary highlights that, in construing Section 3150.16(a) of the Election Code, the Court should consider that the General Assembly defined "county board" or "board" as meaning "the county board of elections of any county herein provided for." 25 P.S. § 2602. According to the Secretary, this definition clarifies that, for purposes of Section 3150.16(a), "county board of election" refers to a municipal body, not a physical office or address. In other words, the Secretary believes that, when this definition is used for purposes of Section 3150.16(a), that Section unambiguously permits voters to deliver mail-in ballots in person to places designated by county boards of election, other than their respective office addresses.

In further support of this position, the Secretary asserts that the Election Code contemplates that county boards of election will operate out of multiple locations. *See* 25 P.S. § 2645(b) (stating, *inter alia*, that the "county commissioners or other appropriating authorities of the county shall provide the county board with suitable and adequate offices at the county seat, property furnished for keeping its records, holding its public sessions and otherwise performing its public duties, and shall also provide, such branch offices for the board in cities other than the county seat, as may be necessary"). Echoing Petitioner's argument, the Secretary further suggests that the Election Code anticipates that "ballot boxes and returns" may be received "in the office of the county elections board, or received in such other places as has been designated by the board." 25 P.S. § 3151.

The Secretary insists that the Election Code is devoid of any language limiting county boards of election from accepting delivery of mail-in votes solely at their primary office addresses. In fact, the Secretary takes the position that to hold otherwise would contravene the plain language of the Election Code. However, assuming *arguendo* that this Court deems the Election Code ambiguous on this point, the Secretary advocates that a reasonable interpretation of the Code nonetheless authorizes county boards of election to utilize multiple drop-off sites to accept hand-delivered mail-in ballots.

In this regard, the Secretary focuses on the statutory considerations to which this Court may refer when construing an ambiguous statute, 1 Pa.C.S. § 1921(c), as described *supra*. More specifically, the Secretary posits that the General Assembly enacted Act 77 with the object of increasing the electorate's participation in the electoral process by making it easier and more convenient to vote, providing all electors with the option to mail in their ballots. The Secretary opines that, consistent with this objective, the General Assembly intended to allow county boards of election to accept hand-delivered mail-in ballots at locations besides the boards' central office addresses. The Secretary takes the position that, if this Court deems reasonable the various parties' competing interpretations of the Election Code, then the Court should construe the Code in favor of the right to vote.

*7 Contrary to the contentions of the Secretary and Petitioner, Respondent submits that the Election Code prohibits county boards of election from designating locations other than their established county offices for hand delivery

of mail-in ballots. Rather, according to Respondent, Section 3150.16(a) of the Election Code unambiguously mandates that an elector must either mail her mail-in ballot to the office address of the county board of election or deliver that ballot in person to the same office address. Stated differently, Respondent takes the position that the Election Code requires electors either to place their mail-in ballots, addressed to their county boards of election, into the United States Postal Service's ["USPS"] system or personally to deliver their mail-in ballot to that office.

In further support of this position, Respondent highlights the Election Code's use of the word "office" in the "deadline" provision for mail-in votes, Section 3150.16(c), which states that "a completed mail-in ballot must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 P.S. § 3150.16(c). Respondent also points out that the Election Code requires that a secure envelope containing a mail-in ballot have printed upon it "the address of the elector's county board of election," so that "the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election." 25 P.S. § 3150.16(a). Thus, Respondent believes that, in sum, these statutory directives clearly indicate that the General Assembly intended that electors either mail or personally deliver mail-in ballots to the established office addresses of the county boards of election.

Next, Respondent reminds us that the Secretary and Petitioner are asking this Court to interpret the Election Code to allow voters to deliver their mail-in ballots to locations that will include unmanned drop-boxes. Respondent contends that Petitioner and the Secretary fail to articulate where the Election Code mentions "drop-boxes" or "satellite locations." Respondent then asserts that, if this Court were to interpret the Election Code as Petitioner and the Secretary propose, the Court would invalidate an alleged requirement of Act 77, *i.e.*, the need to deliver mail-in ballots to the established offices of county boards of election.

In addition, Respondent suggests that the preferred interpretation of the Election Code advocated by the Secretary and Petitioner permits the individual counties to implement differing ballot-return regimes. Respondent avers that this outcome would violate principles of equal protection. In support, Respondent quotes *Pierce v. Allegheny County Bd. of Elections*, 324 F.Supp.2d 684, 697 (W.D. Pa. 2003), for the proposition that "[a] state must impose uniform statewide standards in each county in order to protect the legality

of a citizen's vote. Anything less implicates constitutional problems under the equal protection clause of the Fourteenth Amendment." For these reasons, Respondent contends that the interpretation of the Election Code posited by Petitioner and the Secretary must fail.

*8 The primary argument of the Caucus largely tracks that of Respondent, particularly the contention that the relief proposed by Petitioner and the Secretary would create an equal protection problem. According to the Caucus, pursuant to the solution offered by Petitioner and the Secretary, some counties will provide more locations for voters to deliver their mail-in ballots, while other counties will allow voters to convey their mail-in ballots solely to the office addresses of the county boards of election. The Caucus views this possibility as a violation of equal protection.

Notably, in an apparent break from Respondent's position, subject to its equal protection argument, the Caucus seems to concede that Pennsylvania law allows county boards of election to provide for in person delivery of mail-in ballots at more than one county election board office located within the county's borders. However, the Caucus insists that additional offices must comply with various requirements, including those outlined in Section 2645(b) of the Election Code. *See* 25 P.S. § 2645(b) (explaining that "[t]he county commissioners or other appropriating authorities of the county shall provide the county board with suitable and adequate offices at the county seat, property furnished for keeping its records, holding its public sessions and otherwise performing its public duties, and shall also provide, such branch offices for the board in cities other than the county seat, as may be necessary"). In closing, the Caucus submits that unstaffed drop-boxes would not constitute a branch office of a county board of election and are otherwise not authorized by the Election Code as a method for collecting hand-delivered mail-in ballots.

Turning to our analysis, we observe that the question before us consists of the following two-part query regarding the Election Code: Does the Election Code allow a Pennsylvania voter to deliver her mail-in ballot in person to a location other than the established office address of her county's board of election, and if so, what means can county boards of election utilize to accept hand-delivered mail-in ballots? For the reasons that follow, we find that the parties' competing interpretations of the Election Code on this issue are reasonable, rendering the Code ambiguous as it relates to this query. *See A.S. v. Pennsylvania State Police*, 636

Pa. 403, 143 A.3d 896, 905-06 (2016) (explaining that a “statute is ambiguous when there are at least two reasonable interpretations of the text”).

In reaching this conclusion, we observe that Section 3150.16(a) of the Election Code explicitly allows an elector to deliver in person her securely sealed envelope containing her mail-in ballot “to said county board of election.” 25 P.S. § 3150.16(a). The Election Code simply defines “county board” or “board” to mean “the county board of elections of any county herein provided for.” 25 P.S. § 2602(c). Thus, the language used by the Legislature regarding where a mail-in ballot may be delivered in person is not solely limited to the official central office of the county board of election, and other sections of the Election Code permit a board of election to operate outside of its principal office. *See, e.g.,* 25 P.S. § 2645(b) (stating, *inter alia*, that the “county commissioners or other appropriating authorities of the county shall provide the county board with suitable and adequate offices at the county seat, property furnished for keeping its records, holding its public sessions and otherwise performing its public duties, and shall also provide, such branch offices for the board in cities other than the county seat, as may be necessary”). Therefore, on the one hand, these provisions tend to favor the view of Petitioner and the Secretary that the General Assembly did not intend to limit voters to delivering personally their mail-in ballots solely to the established office addresses of their county boards of election. Rather, as these parties rationally contend, when this definition is utilized for purposes of construing Section 3150.16(a), that exercise suggests that a voter can hand deliver her mail-in ballot to any location designated by the county board of election as a place where the board will accept these ballots.

*9 Alternatively, we recognize that Section 3150.16(a) of the Election Code directs that an elector may deliver her mail-in ballot in person only to “the county board of election.” 25 P.S. § 3150.16(a). As Respondent in particular understandably emphasizes, neither this statutory language nor any other provision of the Election Code explicitly empowers a county board of election to establish satellite mail-in ballot collection facilities or to utilize secure drop-boxes for purposes of accepting hand-delivered mail-in ballots. These observations, when viewed in the totality of the various arguments, lead us to conclude that the parties’ competing interpretations are reasonable.

[5] [6] [7] Accordingly, we turn to interpretive principles that govern ambiguous statutes generally and election matters specifically. In so doing, we are mindful of the “longstanding and overriding policy in this Commonwealth to protect the elective franchise.” *Shambach v. Bickhart*, 577 Pa. 384, 845 A.2d 793, 798 (2004) (citations omitted). Moreover, it is well-settled that, “although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote.” *Id.* (internal quotation marks omitted). Indeed, “[o]ur goal must be to enfranchise and not to disenfranchise [the electorate].” *In re Luzerne Cty. Return Bd.*, 447 Pa. 418, 290 A.2d 108, 109 (1972). Lastly, in resolving statutory ambiguity, we may consider, *inter alia*, the occasion and necessity for, the mischief to be remedied by, and the object to be obtained by the statute. 1 Pa.C.S. § 1921(c)(1), (3), and (4), respectively.

With all of that said, we need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes. This conclusion is largely the result of the clear legislative intent underlying Act 77, which animates much of this case, to provide electors with options to vote outside of traditional polling places. Section 3150.16(a) of the Election Code undeniably exemplifies this intent by granting the Pennsylvania electorate the right to vote by way of a mail-in ballot beyond the circumstances that ordinarily allow this alternative, such as voter absenteeism.

Accordingly, although both Respondent and the Caucus offer a reasonable interpretation of Section 3150.16(a) as it operates within the Election Code, their interpretation restricts voters’ rights, as opposed to the reasonable interpretation tendered by Petitioner and the Secretary. The law, therefore, militates in favor of this Court construing the Election Code in a manner consistent with the view of Petitioner and the Secretary, as this construction of the Code favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.

In light of this conclusion, we will briefly address the equal protection argument of Respondent and the Caucus. The premise of that argument, as detailed *supra*, is that, if this Court interprets the Election Code in a manner that is consistent with the position of Petitioner and the Secretary, which we have, then the county boards of election will employ myriad systems to accept hand-delivered mail-in ballots, which allegedly will be unconstitutionally disparate from one

another in so much as some systems will offer more legal protections to voters than others will provide. However, the exact manner in which each county board of election will accept these votes is entirely unknown at this point; thus, we have no metric by which to measure whether any one system offers more legal protection than another, making an equal protection analysis impossible at this time. Accordingly, the equal protection argument of Respondent and the Caucus does not alter our conclusion in this matter.

*10 [8] Thus, for these reasons, this Court declares that the Election Code permits county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.¹⁵

B. COUNT II OF THE PETITION FOR REVIEW

In its second count, Petitioner presents this Court with an as-applied challenge to the Election Code's deadline for receiving ballots ("received-by deadline"), which requires mail-in and absentee ballots to be returned to Boards no later than 8:00 p.m. on Election Day, 25 P.S. §§ 3146.6(c), 3150.16(c). It contends that strict enforcement of this deadline, in light of the current COVID-19 pandemic and alleged delays in mail delivery by the USPS, will result in extensive voter disenfranchisement in violation of the Pennsylvania Constitution's Free and Equal Elections Clause.

As noted above, 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 to suffrage." Pa. Const. art. I, § 5. Petitioner interprets this provision as forbidding the Boards from interfering with the right to vote by failing to act in a timely manner so as to allow electors to participate in the election through mail-in voting. Petition at 49, ¶ 176.

In support of its as-applied challenge in regard to the upcoming General Election, Petitioner recounts this Commonwealth's recent experience during the June Primary. It emphasizes that, during the Primary, the Boards were inundated with over 1.8 million requests for mail-in ballots, rather than the expected 80,000 - 100,000, due in large part to the COVID-19 pandemic, which caused many voters to be wary of congregating in polling places. Petitioner's Brief at 2, 51. Petitioner asserts that "[t]his crush of applications created massive disparities in the distribution and return of mail-in ballots." Petition at 24, ¶ 70.

It explains that, while some Boards were able to process the requests within the statutory requirements established by Act 77,¹⁶ other boards, especially those in areas hard-hit by the pandemic, were unable to provide electors with ballots in time for the electors to return their ballot in accord with the statutory deadline. Petition at 23, ¶ 66. Indeed, it avers that in Delaware County, thousands of ballots were "not mailed out until the night" of the Primary, making timely return impossible. Petition at 26, ¶ 77. Bucks County apparently experienced similar delays.

*11 To remedy this situation, the Election Boards of Bucks and Delaware Counties sought relief in their county courts.¹⁷ Recognizing that the Election Code "implicitly granted [the courts the] authority to provide relief when there is a natural disaster or emergency" that threatens to deprive electors of the opportunity to participate in the electoral process, the Courts of Common Pleas of Bucks and Delaware Counties extended the deadline for the return of mail-in ballots for seven days, so long as the ballot was postmarked by the date of the Primary. *In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No. 2020-02322-37 (C.P. Bucks) (McMaster, J.); *see also In re: Extension of Time for Absentee and Mail-In Ballots to be Received By Mail and Counted in the 2020 Primary Election*, No.-CV 2020-003416 (C.P. Delaware).

Petitioner also observes that voters in six counties received an extension to the return deadline pursuant to an executive order issued by Governor Wolf, invoking the Emergency Management Services Code, 35 Pa.C.S. § 7301(c).¹⁸ In Executive Order No. 2020-02, Governor Wolf addressed impediments to timely ballot return arising from the pandemic as well as civil unrest that had arisen immediately before the Primary in the specified counties following the killing of George Floyd by police officers. The impediments included road closures, public transportation disruptions, and curfews. To combat the potential disenfranchisement of voters, especially in light of the "unprecedented number" of mail-in ballots due to the pandemic, the Governor extended the received-by deadline for seven days, so long as the ballots were postmarked by the date of the Primary. Governor Wolf, Executive Order No. 2020-02 (June 1, 2020).

While voters in specified counties benefitted from extensions of time to return their ballots, Petitioner emphasizes that the Commonwealth Court rejected a request for a statewide extension of the ballot received-by deadline in *Delisle v. Boockvar*, 319 M.D. 2020 (Pa. Cmwlth. June 2, 2020)

(Memorandum Opinion), favoring instead a county-by-county remedy. Indeed, while not mentioned by Petitioner, this Court additionally denied relief to a petitioner seeking a statewide extension of the ballot received-by deadline weeks before the June Primary, where the petitioner similarly argued for the extension based upon the overwhelming number of mail-in ballot applications and delays in the USPS system. *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, — Pa. —, 2020 WL 2820467 (May 15, 2020).

In light of the lessons learned from the June Primary, Petitioner asserts that a statewide remedy is now necessary for the General Election. It suggests that the lack of a statewide remedy risks an equal protection challenge as only some voters would benefit from the extended deadline based on their county court's determination. Petition at 32-33, ¶ 105. Moreover, it emphasizes that a statewide order from this Court early in the election process would reduce voter confusion, as compared to the last-minute county-by-county relief granted during the Primary to address emergency situations. Petitioner's Brief at 26-27 n.9.

*12 Petitioner avers that the difficulties encountered by Boards processing the ballot applications prior to the June Primary will only be exacerbated in the November General Election. It emphasizes the continued grip of the pandemic, and a potential second wave of infections, which will result in more electors seeking to exercise their right to vote by mail. Petition at 49, ¶ 173-175. Additionally, it recognizes the undisputed fact that heavily contested Presidential elections involve substantially greater voter participation than largely uncontested primaries, further observing that “[i]t is normal in elections with significant public attention for there to be a flood of registrations received right before deadlines.” Petition at 26, ¶ 79. It highlights that the Secretary estimates that 3 million electors will seek mail-in or absentee ballots for the General Election in contrast to the 1.5 million votes cast by mail at the Primary, and the pre-pandemic assumption of 80,000 - 100,000 absentee and mail-in ballots. Petitioner's Brief at 51.

Petitioner asserts that the overwhelming demand on the Boards will be exacerbated by delays in the USPS mail delivery system. Petitioner observes that historically the law presumed that a document placed in a mail collection box would be delivered within three days of placement, rather than the current two to five day delivery expectation of the USPS. *Id.* at 50. Petitioner avers that substantial delivery delays have resulted from a combination of recent operational changes

at the USPS and decreased staffing caused by the pandemic. *Id.* at 20-21. It emphasizes that the USPS recently warned that there is a “significant risk” that Pennsylvania voters who submit timely ballot requests will not have sufficient time to complete and return their ballot to meet the Election Code's received-by deadline. *Id.* at 2-3 (quoting USPS General Counsel and Executive Vice President Thomas Marshall's July 29, 2020 letter to the Secretary (hereinafter “USPS General Counsel's Letter”)), discussed in detail *infra*.

Petitioner avers that this Court has the authority to act to protect electors' right to cast their ballot, as protected by Pennsylvania's Free and Equal Elections Clause. It emphasizes that “[c]ourt[s] possess broad authority to craft meaningful remedies’ when ‘regulations of law ... impair the right of suffrage.’ ” *Id.* at 48-49 (quoting *League of Women Voters of Pa.*, 178 A.3d at 809, 822) (alterations in original). It observes that courts have exercised that authority to provide equitable relief to voters faced with natural disasters that impede their right to vote. As an example, Petitioner highlights the Commonwealth Court's actions in *In re General Election-1985*, 109 Pa.Cmwlth. 604, 531 A.2d 836, 838-39 (1987), in which the court affirmed a two-week suspension in an election where severe flooding prevented electors from safely voting due to “circumstances beyond their control.” Petitioner asserts that Pennsylvania electors in the November General Election similarly face a threat to their ability to vote due to no fault of their own, but instead due to a perfect storm combining the dramatic increase in requested ballots due to the COVID-19 pandemic and the inability of the USPS to meet the delivery standards required by the Election Code.

Accordingly, Petitioner asks this Court to grant an injunction ordering the Respondent to “lift the deadline in the Election Code across the state in a uniform standard to allow any ballot postmarked by 8 p.m. on Election Night to be counted if it is received by the deadline for ballots to be received” under the UOCAVA, specifically by 5:00 p.m. on Tuesday, November 10.¹⁹ Petition at 50, ¶ 178. Recognizing that the Secretary recommends a three-day extension, as detailed below, Petitioner counters that “[a] 7-day extension to the ballot receipt deadline is consistent with the USPS's recommendation to the Secretary that voters should mail their ballots to Boards no later than October 27, 2020,” which is seven days prior to Election Day. Petitioner's Brief at 53 (referencing USPS General Counsel's Letter at 2). While it acknowledges that a seven-day extension could impact other post-election deadlines as discussed *infra*, it asserts that this

Court has the authority to alter those deadlines to be consistent with the relief granted in this case. *Id.* at 55.

*13 As noted, the Secretary sought extraordinary jurisdiction to allow this Court to resolve the various challenges to the mail-in ballot process in an orderly and timely fashion before the impending General Election, where she estimates more than three million Pennsylvanians will exercise their right to vote by mail. Secretary's Brief at 1. The Secretary observes that she previously advocated against a similar request for an extension of the received-by deadline for mail-in and absentee ballots in the *Crossey* case. She, however, reassessed her position following receipt of the USPS General Counsel's Letter, which she attaches to her Application. Secretary's Application at 10, Exhibit A.

Significantly, the USPS General Counsel's Letter opined that "certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," providing for 2-5 day delivery for domestic First Class Mail and 3-10 day delivery for domestic Marketing Mail. USPS General Counsel's Letter at 1. As the parties recognize, the Election Code designates October 27, 2020, as the last day for electors to request a mail-in ballot. 25 P.S. § 3150.12a(a) ("Applications for mail-in ballots shall be processed if received not later than five o'clock P.M. of the first Tuesday prior to the day of any primary or election."). Even if a county board were to process and mail a ballot the next day by First Class Mail on Wednesday, October 28th, according to the delivery standards of the USPS, the voter might not receive the ballot until five days later on Monday, November 2nd, resulting in the impossibility of returning the ballot by mail before Election Day, Tuesday November 3rd. The USPS General Counsel's Letter, instead, advised that voters should mail their ballots no later than October 27, 2020 in order to meet the received-by deadline. USPS General Counsel's Letter at 2. "This mismatch [between the USPS's delivery standards and the Election Code deadlines] creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under [Pennsylvania's Election Code]." *Id.* at 1.

In light of the information contained in the USPS General Counsel's Letter, the Secretary concludes that a temporary extension of the Election Code's received-by deadline is necessary for the upcoming General Election to ensure a free and equal election as protected by [Article I, Section 5 of the Pennsylvania Constitution](#). Secretary's Application at 27. The Secretary specifically asks that this Court order an extension

of the deadline to allow the counting of any ballot postmarked by Election Day and received on or before the third day after Election Day, which is November 6, 2020.²⁰ *Id.* at 27-28. The Secretary deems a three-day extension of the deadline, rather than the seven-day extension sought by Petitioner, to be sufficient to address the potential delay in mailing while also not disrupting other elements of election administration. *Id.* at 29.

*14 The Secretary emphasizes that the remedy sought here is not the invalidation of the Election Code's received-by deadline, but rather the grant of equitable relief to extend temporarily the deadline to address "mail-delivery delays during an on-going public health disaster." Secretary's Brief at 18. As no party is seeking the invalidation of the received-by deadline, the Secretary rejects the suggestion of Respondent and the Caucus that the remedy would trigger the nonseverability provision of Act 77, reasoning that the Court would be granting "a temporary short extension to address the exigencies of a natural disaster" rather than "the invalidation of a statutory deadline." *Id.* at 21 (referencing Section 11 of Act 77 set forth *infra*). She emphasizes that the statutory deadline would remain unchanged for future elections.

The Secretary observes that courts have previously granted temporary equitable relief to address natural disasters, given that neither the Election Code nor the Constitution "provides any procedure to follow when a natural disaster creates an emergency situation that interferes with an election." *Id.* at 19 (citing *In re General Election-1985*, 531 A.2d at 839).²¹ She argues that the current pandemic is equivalent to other natural disasters and that it necessitates the requested extension of the Election Code's received-by deadline for mail-in ballots.

In contrast, Respondent contends that Petitioner asks this Court to rewrite the plain language of Act 77 and to substitute its preferred ballot deadline for the statutory deadline that resulted from the legislative compromise during the bipartisan enactment of Act 77. It emphasizes that this Court "recently reaffirmed [that] the judiciary 'may not usurp the province of the legislature by rewriting [statutes].'" Respondent's Supplemental Brief at 16 (quoting *In re Fortieth Statewide Investigating Grand Jury*, 649 Pa. 574, 197 A.3d 712, 721 (2018)).

Judicial restraint, according to Respondent, is especially necessary in regard to election law, where this Court has long recognized that "[t]he power to regulate elections is a legislative one, and has been exercised by the General

Assembly since the foundation of the government.” *Id.* at 17 (quoting *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 522 (1914)). Indeed, it observes that the United States Constitution dictates that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof,” subject to directives of Congress, U.S. Const. art. I, § 4, cl. 1, and that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct,” electors for President and Vice President. U.S. Const. art. II, § 1, cl. 2.²² Respondent highlights special concerns relevant to Presidential elections, emphasizing that “[w]ith respect to a Presidential election, state courts must ‘be mindful of the legislature’s role under Article II in choosing the manner of appointing electors.’ ” Respondent’s Supplemental Brief at 20 (quoting *Bush v. Gore*, 531 U.S. 98, 114, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (Rehnquist, C.J., concurring)).

Respondent additionally warns that if this Court were to deem application of the deadline unconstitutional and substitute a judicially-determined deadline, it would trigger the nonseverability provision of Act 77, which would invalidate the entirety of the Act, including all provisions creating universal mail-in voting. Specifically, 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. It emphasizes that this Court has previously deemed nonseverability provisions to be constitutionally proper and additionally recognized that nonseverability provisions are crucial to the legislative process as they “may be essential to securing the support necessary to enact the legislation in the first place.” Respondent’s Supplemental Brief at 18 (citing *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 978 (2006)). Respondent asserts that it is clear that the severability provision in Act 77 “was intended to preserve the compromise struck” in the bipartisan enactment. *Id.* at 19.

*15 On the merits, Respondent asserts that the plain language of the Election Code setting the deadline for submission of ballots by 8:00 p.m. on Election Day does not violate the Free and Equal Elections Clause but instead provides “a neutral, evenhanded rule that applies to all Pennsylvania voters equally.” Respondent’s Answer to the Secretary’s Application at 21. It emphasizes that numerous courts, including this Court during the June Primary, have upheld the application of mail-in deadlines during the COVID-19 pandemic. Respondent’s Supplemental Brief at 24

(citing, *inter alia*, *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, — Pa. —, 2020 WL 2820467 (May 15, 2020)).

Respondent additionally rejects the Secretary’s assertion that the deadline should be extended based upon the threat of mail delays. It avers that these concerns are “speculative at best.” *Id.* at 25. Moreover, it contends that “given Pennsylvania’s unparalleled and generous absentee and mail-in voting period, any voter’s inability to cast a timely ballot is not caused by the Election Day received-by deadline but instead by their own failure to take timely steps to effect completion and return of their ballot.” *Id.* at 26-27 (internal citation and quotation marks omitted).

Respondent further supports its argument by attaching to its Supplemental Brief a declaration of USPS Vice President Angela Curtis, which in turn attaches the statement provided by Postmaster General Louis DeJoy to the Senate Committee on Homeland Security and Governmental Affairs on August 21, 2020 and his statement of August 24, 2020, to the House Committee on Oversight and Reform. In his statement, Postmaster General Louis DeJoy addressed public accusations that the implementation of various cost-saving reforms had allegedly resulted in delays in mail delivery that threatened the timely delivery of election mail.

While disputing the validity of the accusations, the Postmaster General provided the following commitments relating to the delivery of election mail:

[R]etail hours at Post Offices won’t be changed, and mail processing equipment and blue collection boxes won’t be removed during this period. No mail processing facilities will be closed and we have terminated the pilot program that began in July that expedited carrier departures to their delivery routes, without plans to extend or expand it. To clear up any confusion, overtime has, and will continue to be, approved as needed. Finally, effective October 1, 2020, we will engage standby resources in all areas of our operations, including transportation, to satisfy any unforeseen demand for the election.

Statement of Postmaster General Louis DeJoy provided to Senate Committee on Homeland Security and Governmental Affairs Hearing of Aug. 21, 2020, at 14; Statement of Postmaster General Louis DeJoy provided to House Committee on Oversight and Reform of Aug. 24, 2020, at 14. Respondent emphasizes that Postmaster General DeJoy also asserted that the “USPS has not changed [its] delivery standards, [its] processing, [its] rules, or [its] prices for Election Mail[.]” and that it “can, and will, handle the volume

of Election Mail [it] receive[s].” Respondent’s Supplemental Brief at 10.

Finally, Respondent argues that moving the received-by deadline until after Election Day would undermine the federal designation of a uniform Election Day, as set forth in three federal statutes, specifically [3 U.S.C. § 1](#) (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, every fourth year succeeding every election of a President and Vice President”); [2 U.S.C. § 7](#) (“The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.”); and [2 U.S.C. § 1](#) (“At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for a term commencing on the 3d day of January next thereafter.”).²³

*16 The Caucus also files a brief with this Court arguing against the extension of the deadline for mail-in votes. It asserts that “[t]here is no constitutional right to vote by mail” and that states have broad authority to enact regulations to ensure the integrity of its elections, including mail-in ballots, as was done in Act 77, including by setting a deadline for the receipt of ballots. Caucus’s Brief at 19.

The Caucus warns that granting an extension of the mail-in ballot received-by deadline in this case “would have a cascading effect on other election code deadlines, thereby causing chaos for election officials and confusion for voters.” *Id.* at 26. It observes that the Election Code requires that Boards begin canvassing absentee and mail-in ballots within three days of Election Day and shall continue through the eighth day following the Election. *Id.* at 28 (citing [25 P.S. § 3146.8\(g\)\(2\)](#)). Additionally, the Boards shall submit the unofficial returns to the Secretary on the Tuesday following the Election, and the Secretary must determine whether a recount is required within nine days of Election Day, citing [25 P.S. § 3154\(f\), \(g\)\(2\)](#), and the Boards must certify the final results to the Secretary no later than twenty days after Election Day, citing [25 P.S. § 2642\(k\)](#). It additionally asserts that federal law requires all state recounts and challenges to be “resolved at least 6 days prior to the meeting of electors,” which it asserts this year is December 14. Caucus’s Brief at

28 n.17 (citing [3 U.S.C. §§ 1, 5](#)). The Caucus therefore urges this Court to refrain from altering the received-by deadline for mail-in ballots, asserting that the “requested injunction would override the election deadlines which were fully debated and properly enacted by the peoples’ representatives in the Pennsylvania General Assembly.” *Id.* at 29.

[9] Unlike other provisions of Act 77 currently before this Court, we are not asked to interpret the statutory language establishing the received-by deadline for mail-in ballots. Indeed, there is no ambiguity regarding the deadline set by the General Assembly:

Deadline.--Except as provided under [25 Pa.C.S. § 3511](#)^[24] (relating to receipt of voted ballot), a completed mail-in ballot must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.

[25 P.S. § 3150.16\(c\)](#). Moreover, we are not asked to declare the language facially unconstitutional as there is nothing constitutionally infirm about a deadline of 8:00 p.m. on Election Day for the receipt of ballots. The parties, instead, question whether the application of the statutory language to the facts of the current unprecedented situation results in an as-applied infringement of electors’ right to vote.

*17 [10] [11] In considering this issue, we reiterate that the Free and Equal Elections Clause of the Pennsylvania Constitution requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” [League of Women Voters](#), [178 A.3d at 804](#). Nevertheless, we also recognize 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 v. Cortes](#), [631 Pa. 229, 110 A.3d 155, 176–77 \(2015\)](#) (internal citation and quotation marks omitted).

As we have recently seen, an orderly and efficient election process can be crucial to the protection of a voter’s participation in that process. Indeed, the struggles of our most populous counties to avoid disenfranchising voters while processing the overwhelming number of pandemic-fueled mail-in ballot applications during the 2020 Primary demonstrates that orderly and efficient election processes are

essential to safeguarding the right to vote. An elector cannot exercise the franchise while her ballot application is awaiting processing in a county election board nor when her ballot is sitting in a USPS facility after the deadline for ballots to be received.

We are fully cognizant that a balance must be struck between providing voters ample time to request mail-in ballots, while also building enough flexibility into the election timeline to guarantee that ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election. Moreover, we recognize that the determination of that balance is fully enshrined within the authority granted to the Legislature under the United States and Pennsylvania Constitutions. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2.

[12] Nevertheless, we find the Commonwealth Court's rationale in *In re General Election-1985* germane to the current challenge to the application of the ballot received-by deadline. In that case, the court recognized that, while neither the Constitution nor the Election Code specified “any procedure to follow when a natural disaster creates an emergency situation that interferes with an election,” courts could look to the direction of 25 P.S. § 3046. *In re General Election-1985*, 531 A.2d at 839. As noted, Section 3046 provides courts of common pleas the power, on the day of an election, to decide “matters pertaining to the election as may be necessary to carry out the intent” of the Election Code, which the Commonwealth Court properly deemed to include providing “an equal opportunity for all eligible electors to participate in the election process,” which in that case necessitated delaying the election during a flood. *Id.*

We have no hesitation in concluding that the ongoing COVID-19 pandemic equates to a natural disaster. *See Friends of Devito v. Wolf*, — Pa. —, 227 A.3d 872, 888 (2020) (agreeing “that the COVID-19 pandemic qualifies as a ‘natural disaster’ under the Emergency Code”). Moreover, the effects of the pandemic threatened the disenfranchisement of thousands of Pennsylvanians during the 2020 Primary, when several of the Commonwealth's county election boards struggled to process the flow of mail-in ballot applications for voters who sought to avoid exposure to the virus. *See, e.g.,* Delaware County Board of Elections’ Answer to Petition at 15, ¶ 77 (acknowledging that it “mailed out thousands of ballots in the twenty-four hour period preceding the election”). It is beyond cavil that the numbers of mail-in ballot requests for the Primary will be dwarfed by those applications

filed during the upcoming highly-contested Presidential Election in the midst of the pandemic where many voters are still wary of congregating in crowded locations such as polling places. We acknowledge that the Secretary has estimated that nearly three million Pennsylvanians will apply for mail-in applications, in contrast to the 1.5 million cast during the Primary. Secretary's Brief at 1.

*18 In light of these unprecedented numbers and the near-certain delays that will occur in Boards processing the mail-in applications, we conclude that the timeline built into the Election Code cannot be met by the USPS's current delivery standards, regardless of whether those delivery standards are due to recent changes in the USPS's logistical procedures or whether the standards are consistent with what the General Assembly expected when it enacted Act 77. In this regard, we place stock in the USPS's General Counsel's expression that his client could be unable to meet Pennsylvania's statutory election calendar. General Counsel's Letter at 2. The Legislature enacted an extremely condensed timeline, providing only seven days between the last date to request a mail-in ballot and the last day to return a completed ballot. While it may be feasible under normal conditions, it will unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters.

Under our Extraordinary Jurisdiction, this Court can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters. We have previously recognized that, in enforcing the Free and Equal Elections Clause, this “Court possesses broad authority to craft meaningful remedies when required.” *League of Women Voters*, 178 A.3d at 822 (citing Pa. Const., art. V, §§ 1, 2, 10; 42 Pa.C.S. § 726 (granting power to “enter a final order or otherwise cause right and justice to be done”)). We additionally conclude that voters’ rights are better protected by addressing the impending crisis at this point in the election cycle on a statewide basis rather than allowing the chaos to brew, creating voter confusion regarding whether extensions will be granted, for how long, and in what counties.²⁵ Instead, we act now to allow the Secretary, the county election boards, and most importantly, the voters in Pennsylvania to have clarity as to the timeline for the 2020 General Election mail-in ballot process.

After consideration, we adopt the Secretary's informed recommendation of a three-day extension of the absentee and mail-in ballot received-by deadline to allow for the tabulation

of ballots mailed by voters via the USPS and postmarked by 8:00 p.m. on Election Day to reduce voter disenfranchisement resulting from the conflict between the Election Code and the current USPS delivery standards, given the expected number of Pennsylvanians opting to use mail-in ballots during the pandemic.²⁶ We observe that this extension provides more time for the delivery of ballots while also not requiring alteration of the subsequent canvassing and reporting dates necessary for the Secretary's final reporting of the election results. In so doing, we emphasize that the Pennsylvania's election laws currently accommodate the receipt of certain ballots after Election Day, as it allows the tabulation of military and overseas ballots received up to seven days after Election Day. 25 Pa.C.S. § 3511. We conclude that this extension of the received-by deadline protects voters' rights while being least at variance with Pennsylvania's permanent election calendar, which we respect and do not alter lightly, even temporarily.

C. COUNT III OF THE PETITION FOR REVIEW

*19 In Count III of its petition, Petitioner seeks to require that the Boards contact qualified electors whose mail-in or absentee ballots contain minor facial defects resulting from their failure to comply with the statutory requirements for voting by mail, and provide them with an opportunity to cure those defects. More specifically, Petitioner submits that when the Boards have knowledge of an incomplete or incorrectly completed ballot as well as the elector's contact information, the Boards should be required to notify the elector using the most expeditious means possible and provide the elector a chance to cure the facial defect up until the UOCAVA deadline of November 10, 2020, discussed *supra*.

Petitioner bases this claim on its assertion that the multi-stepped process for voting by mail-in or absentee ballot inevitably leads to what it describes as minor errors, such as not completing the voter declaration or using an incorrect ink color to complete the ballot. See 25 P.S. § 3146.6(a) (explaining the process for voting by absentee ballot, which requires, *inter alia*, an elector to mark the ballot using only certain writing implements and ink; and to fill out, date, and sign the declaration printed on the outer envelope); *id.* § 3150.16(a) (explaining the process for voting by mail-in ballot, which imposes the same requirements). According to Petitioner, these minor oversights result in many ballots being rejected and disenfranchising voters who believe they have exercised their right to vote.

Petitioner submits that voters should not be disenfranchised by technical errors or incomplete ballots, and that the “notice and opportunity to cure” procedure ensures that all electors who desire to cast a ballot have the opportunity to do so, and for their ballot to be counted. Petitioner further claims there is no governmental interest in either: (1) requiring the formalities for the completion of the outside of the mailing envelope to be finalized prior to mailing as opposed to prior to counting, or (2) rejecting the counting of a ballot so long as ballots continue to arrive under federal law, which is the UOCAVA deadline of seven days after Election Day.

As legal support for its position, Petitioner relies upon the Free and Equal Elections Clause. Pa. Const. art. I, § 5 (“Elections 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.”); see also *Winston*, 91 A. at 523 (explaining that elections are “free and equal” for constitutional purposes when, *inter alia*, “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”). It further emphasizes that election laws should be construed liberally in favor of voters, and that “[t]echnicalities should not be used to make the right of the voter insecure.” *Appeal of James*, 377 Pa. 405, 105 A.2d 64, 65-66 (1954). Petitioner also asserts that ballots with minor irregularities should not be rejected, except for compelling reasons and in rare circumstances. *Id.* at 66. Based on these legal principles, as well as this Court’s “broad authority to craft meaningful remedies” when necessary, *League of Women Voters*, 178 A.3d at 822, Petitioner claims that the Pennsylvania Constitution and spirit of the Election Code require the Boards to provide a “notice and opportunity to cure” procedure, and that this Court has the authority to afford the relief it seeks.

Unlike the other claims asserted herein, the Secretary opposes Petitioner's request for relief in this regard. She counters that there is no statutory or constitutional basis for requiring the Boards to contact voters when faced with a defective ballot and afford them an opportunity to cure defects. The Secretary further notes that, while Petitioner relies upon the Free and Equal Elections Clause, that Clause cannot create statutory language that the General Assembly chose not to provide. See *Winston*, 91 A. at 522 (noting that “[t]he power to regulate elections is legislative”).

*20 The Secretary submits that so long as a voter follows the requisite voting procedures, he or she “will have an equally effective power to select the representative of his or her choice.” *League of Women Voters*, 178 A.3d at 809. Emphasizing that Petitioner presents no explanation as to how the Boards would notify voters or how the voters would correct the errors, the Secretary further claims that, while it may be good policy to implement a procedure that entails notice of defective ballots and an opportunity to cure them, logistical policy decisions like the ones implicated herein are more properly addressed by the Legislature, not the courts.

Respondent echoes the Secretary's opposition to Petitioner's request for relief.²⁷ Specifically, it reiterates that Petitioner has failed to assert a legal basis to support imposing a “notice and opportunity to cure” procedure, noting that the Free and Equal Elections Clause does not enable courts to rewrite the Election Code to align with a litigant's notion of good election policy. Respondent emphasizes that “ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522, and that to the extent restrictions are burdensome, relief should be sought in the Legislature. *Id.* at 525.

Respondent also discusses the practical implications of granting Petitioner's request, expressing concern that implementing a “notice and opportunity to cure” procedure would be a monumental undertaking requiring the expenditure of significant resources, particularly on the eve of an election. Respondent thus reiterates that the Legislature, not this Court, is the entity best suited to address the procedure proposed by Petitioner.

Respondent adds that the tardiness of Petitioner's request is alone a sufficient basis to deny it and that, in any event, Petitioner cannot show a “plain, palpable and clear abuse of the [legislative] power which actually infringes on the rights of the electors” with respect to this claim. *Patterson v. Barlow*, 60 Pa. 54, 75 (1869). Respondent notes that, to the contrary, a requirement that voters follow the appropriate procedures when filling out their ballots easily passes constitutional muster.

[13] Upon review, we conclude that the Boards are not required to implement a “notice and opportunity to cure” procedure for mail-in and absentee ballots that voters have filled out incompletely or incorrectly. Put simply, as argued by the parties in opposition to the requested relief, Petitioner has cited no constitutional or statutory basis that would

countenance imposing the procedure Petitioner seeks to require (*i.e.*, having the Boards contact those individuals whose ballots the Boards have reviewed and identified as including “minor” or “facial” defects—and for whom the Boards have contact information—and then afford those individuals the opportunity to cure defects until the UOCAVA deadline).

While the Pennsylvania Constitution mandates that elections be “free and equal,” it leaves the task of effectuating that mandate to the Legislature. *Winston*, 91 A. at 522. As noted herein, although the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the “notice and opportunity to cure” procedure sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a “notice and opportunity to cure” procedure to alleviate that risk is one best suited for the Legislature. We express this agreement particularly in light of the open policy questions attendant to that decision, including what the precise contours of the procedure would be, how the concomitant burdens would be addressed, and how the procedure would impact the confidentiality and counting of ballots, all of which are best left to the legislative branch of Pennsylvania's government. Thus, for the reasons stated, the Petitioner is not entitled to the relief it seeks in Count III of its petition.

D. COUNT IV OF THE PETITION FOR REVIEW

*21 In Count IV, Petitioner seeks a declaration that under Act 77, the Boards must “clothe and count naked ballots,” *i.e.*, place ballots that were returned without the secrecy envelope into a proper envelope and count them, rather than invalidate them. It further seeks a preliminary injunction prohibiting the Boards from excluding such ballots from the canvass.

To understand the nature of a “naked ballot,” as well as Petitioner's claim that such ballots are valid and should be counted, we examine the relevant provisions of Act 77. The Act directs Boards to send to the qualified mail-in elector an official mail-in ballot, the list of candidates when authorized, the uniform instructions as prescribed by the Secretary, and two envelopes to be returned to the Boards, as described in detail *infra*. 25 P.S. § 3150.14(c).

Section 3150.14(a) (“Envelopes for official mail-in ballots”) explains the nature of the envelopes sent to the mail-in voter. This provision directs the Boards to “provide two additional envelopes for each official mail-in ballot of a size and shape as

prescribed by the Secretary of the Commonwealth, in order to permit the placing of one within the other and both within the mailing envelope” addressed to the elector. *Id.* § 3150.14(a). On the smaller of the two envelopes to be returned to the Boards shall be printed only the words “Official Election Ballot.” *Id.* On the larger envelope shall be printed: (1) “the form of the declaration of the elector;” (2) the “name and address of the county board of election of the proper county;” and (3) “information indicating the local election district of the mail-in voter.” *Id.*

As noted, Section 3150.16(a) directs the mail-in elector to mark the ballot in secret with the enumerated ink or lead pencil and then fold the ballot, enclose it, and secure it in the smaller envelope on which is printed “Official Election Ballot.” 25 P.S. § 3150.16(a). The statute further directs the mail-in elector to place the smaller envelope into the second envelope on which is printed the form of declaration of the elector, the elector's local election district, and the address of the elector's county board of election. *Id.* The statute next directs the mail-in elector to fill out, date, and sign the declaration printed on the second envelope, and secure the ballot and send it by mail or deliver it in person to his or her county board of election. *Id.* A ballot is “naked” for purposes of this action if the mail-in elector fails to utilize the smaller envelope on which is printed “Official Election Ballot,” and, instead, places the official election ballot directly into the second envelope, upon which is printed the form of declaration of the elector and the address of the elector's county board of election.

Act 77 additionally sets forth the procedure by which mail-in ballots are canvassed. *See id.* § 3146.8(a) (providing that mail-in ballots “shall be canvassed in accordance with subsection (g)”). Relevant thereto, the Act directs that mail-in ballots cast by electors who died prior to Election Day shall be rejected and not counted. *Id.* § 3146.8(d). Additionally, the Act provides that mail-in ballots shall be counted as long as: (1) election officials verify the ballots by comparing the voter's declaration with the official voting list; and (2) the ballots are not challenged on the ground that the voter is unqualified to vote. *Id.* §§ 3146.8(g)(4); 3150.12b(a)(2). Notably, Section 3146.8(g)(4)(ii) provides that if any of the envelopes on which are printed “Official Election Ballot” “contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.” *Id.* § 3146.8(g)(4)(ii).

*22 The crux of Petitioner's position is that although Act 77 directs a mail-in voter to utilize the secrecy envelope in submitting the mail-in ballot, there is no provision in the Election Code authorizing the Boards to discard a ballot on grounds that the voter failed to insert the ballot into the secrecy envelope before returning it to the Boards. Rather, Petitioner asserts, the statute directs the Boards to reject mail-in ballots only if the mail-in elector died prior to Election Day, *id.* § 3146.8(d), the ballot is unverified or challenged on grounds that the mail-in voter was unqualified to vote, *id.* § 3146.8(g)(4), or the ballot is returned in an “Official Election Ballot” envelope that contains “any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference.” *Id.* § 3146.8(g)(4)(ii). Petitioner concludes that the failure to place the ballot in a secrecy envelope does not fall within these enumerated statutory grounds which would result in an invalid mail-in ballot.

Moreover, Petitioner emphasizes that the General Assembly was aware of how to invalidate ballots for lack of a secrecy envelope, as it expressly did so in another provision of the Election Code regarding provisional ballots. *See id.* § 3050(a.4)(5)(ii)(C) (providing that a “provisional ballot shall not be counted if: ... a provisional ballot envelope does not contain a secrecy envelope”).²⁸ Had the General Assembly intended to invalidate mail-in ballots on this basis, Petitioner submits, the Legislature would have included a similar provision in Act 77, but chose not to do so.

Absent statutory authority directing the Boards to invalidate a ballot based exclusively on the lack of a secrecy envelope, Petitioner contends that the refusal to canvass and count ballots cast without a secrecy envelope violates the Election Code, as well as the rights of electors to have their vote counted under the Free and Equal Elections Clause. It posits that rather than disenfranchising the voter in contravention of these edicts, the Boards could take corrective measures to protect privacy, such as placing the naked ballot inside a replacement secrecy envelope before canvassing.

Accordingly, Petitioner requests a declaration that naked ballots must be counted, as well as injunctive relief requiring Boards to undertake reasonable measures to protect the privacy of naked ballots cast by mail-in electors.

The Secretary's position aligns with Petitioner on this issue as she agrees that the counting of naked ballots is permitted

by the Election Code and furthers the right to vote under the Free and Equal Elections Clause and the First and Fourteenth Amendments to the United States Constitution.²⁹

The Secretary contends that the secrecy envelope procedure set forth in [Section 3150.16\(a\)](#) is merely directory, and that this Court's longstanding precedents establish that ballots should not be disqualified based upon the failure to follow directory provisions. *See Bickhart*, 845 A.2d at 803 (holding that although the Election Code provides that an elector may cast a write-in vote for any person not printed on the ballot, a write-in vote for a candidate whose name, in fact, appears on the ballot is not invalid where there is no evidence of fraud and the voter's intent is clear); *Weiskerger Appeal*, 447 Pa. 418, 290 A.2d 108, 109 (1972) (holding that the elector's failure to mark the ballot with the statutorily enumerated ink color does not render the ballot invalid unless there is a clear showing that the ink was used for the purpose of making the ballot identifiable or otherwise indicating fraud).

*23 The Secretary further opines that no fraud arises from counting naked ballots, considering that the naked ballot remains sealed in an envelope and the sealed ballot is certified by the elector. Accordingly, the Secretary concludes that no voter should be disenfranchised for failing to place his or her mail-in ballot in the secrecy envelope before returning it to the Boards.

In response, Respondent argues that the statutory language of [Section 3150.16\(a\)](#), providing that the mail-in elector “shall ... enclose and securely seal the [ballot] in the envelope on which is printed, stamped or endorsed ‘Official Election Ballot,’ ” is clear and constitutes a mandatory requisite to casting a mail-in ballot, and having that ballot counted. It relies on *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (“*Appeal of Pierce*”), where this Court held that the use of the term “shall” in [Section 3146.6\(a\)](#) of the Election Code, providing that the elector “shall” send an absentee ballot or deliver the ballot in person, carries a mandatory meaning, thereby precluding third parties from hand-delivering absentee ballots to county election boards, and invalidating those ballots that were hand-delivered by a third party. Respondent submits that [Section 3150.16\(a\)](#) requires the same invalidation of ballots where the mandatory statutory requisite of enclosing the ballot in a secrecy envelope is ignored.

Respondent observes that the Election Code further directs election officials to “set aside and declare[] void” a ballot

whose secrecy envelope contains “any text, mark, or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference.” [25 P.S. § 3146.8\(g\)\(4\)\(ii\)](#). Citing *Appeal of Weiskerger, supra*, it argues that the purpose of this provision is to prevent the disclosure of the elector's identity. Respondent posits that a ballot unclothed by a secrecy envelope and placed directly in the outer envelope also discloses the elector's identity because the outer envelope contains the elector's signed declaration. Thus, it concludes, [Section 3146.8\(g\)\(4\)\(ii\)](#) requires invalidation of any ballot contained in an envelope that reveals the identity of the voter, regardless of whether that envelope is a secrecy envelope or an outer envelope. To hold to the contrary, Respondent argues, would violate [Article VII, Section 4 of the Pennsylvania Constitution](#), which provides, in relevant part, that “secrecy in voting shall be preserved.” [Pa. Const. art. VII, § 4](#).³⁰

Respondent discounts the Secretary's suggestion that because there is no fraud involved in the submission of a naked ballot, the ballot should be counted. The secrecy envelope provision of the statute, in Respondent's view, advances the distinct constitutional interest of protecting the sanctity of the ballot by preventing the ballot from disclosing the elector's identity. The significance of this interest, it submits, distinguishes this matter from cases involving noncompliance with minor procedural demands set forth in the Election Code, such as the color of ink used to mark a ballot or the listing of a write-in candidate whose name already appears on the ballot. Accordingly, Respondent requests that we deny Petitioner's request for declaratory and injunctive relief.

*24 The Caucus reiterates all of the arguments expressed by Respondent. It contends that in addition to violating voter secrecy, the counting of naked ballots raises the concern of voter fraud. It contends that when a ballot arrives at the county election board without the protective shield of a sealed privacy envelope, the election official cannot guarantee that the ballot travelled from the voter's hand to the county election board without compromise. It argues that there is no way for the election official to verify that the vote was accurately recorded, because the mere act of ascertaining the voter's identity from the elector's declaration may violate the secrecy protections of [Article VII, Section 4](#). The Caucus concludes that the only way to be certain that no fraud has taken place is to reject all naked ballots.

Turning now to our analysis, we observe that, in determining the propriety of naked ballots, we must ascertain the General

Assembly's intention by examining the statutory text of the secrecy envelope provision to determine whether it is mandatory or directory, as that will govern the consequences for non-compliance. *See JPay, Inc. v. Dep't of Corr. & Governor's Office of Admin.*, 89 A.3d 756, 763 (Pa. Cmwlth. 2014) (internal citation omitted) (observing that “[w]hile both mandatory and directory provisions of the Legislature are meant to be followed, the difference between a mandatory and directory provision is the consequence for non-compliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved”).

Upon careful examination of the statutory text, we conclude that the Legislature intended for the secrecy envelope provision to be mandatory. We respectfully reject the contentions of Petitioner and the Secretary that because the General Assembly did not delineate a remedy narrowly linked to the mail-in elector's failure to utilize a secrecy envelope, the language of the Election Code is directory, and an elector's violation of the command inconsequential.

As noted, [Section 3150.16\(a\)](#) provides:

[The mail-in elector] shall, in secret, ... enclose and securely seal the [ballot] in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector.

Id.

This statutory text must be read *in pari materia*³¹ with Subsection 3146.8(g)(4)(ii), which also speaks directly to secrecy envelopes, providing:

If any of the envelopes on which are printed, stamped or endorsed the words ‘Official Election Ballot’ contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, the envelopes and the ballots contained therein shall be set aside and declared void.

[25 P.S. § 3146.8\(g\)\(4\)\(ii\)](#).

These provisions make clear the General Assembly's intention that, during the collection and canvassing processes, when the outer envelope in which the ballot arrived is unsealed and the sealed ballot removed, it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted. The secrecy

envelope properly unmarked and sealed ensures that result, unless it is marked with identifying information, in which case that goal is compromised. Whatever the wisdom of the requirement, the command that the mail-in elector utilize the secrecy envelope and leave it unblemished by identifying information is neither ambiguous nor unreasonable.

*25 As noted cogently by Respondent, this case is distinguishable from those cases relied upon by the Secretary, which deemed mandatory language merely directory and without consequence. For example, in *Bickhart*, 845 A.2d at 795, the Court declined to invalidate a write-in vote cast for a candidate who was named on the ballot proper. In reaching that conclusion, the Court observed that “ballots containing mere minor irregularities should only be stricken for compelling reasons,” noting that marking a ballot is an imprecise process, the focus of which is upon the “unmistakable registration of the voter's will in substantial conformity to the statutory requirements.” *Bickhart*, 845 A.2d at 798-99 (internal quotation marks and citations omitted).

Similarly, in *Appeal of Weiskerger*, *supra*, this Court declined to invalidate a ballot based upon the “minor irregularity” that it was completed in the wrong color of ink. The statute at issue provided: “Any ballot that is marked in blue, black or blue-black ink ... shall be valid and counted.” 290 A.2d at 109 (citing 25 P.S. § 3063). Thus, the only mandatory direction it provided was for the canvassers who receive the ballots, not the electors who prepared them. In providing that ballots completed in the right color must be counted, the Legislature neither stated nor implied that ballots completed in a different color must not be counted. Neither statutory provision at issue in *Bickhart* nor *Weiskerger* contained anything analogous to the directive at issue in this case, which involves secrecy in voting protected expressly by [Article VII, Section 4](#) of this Court's state charter.

As posited by Respondent, most analogous to the instant case is our decision in *Appeal of Pierce*. There, we held that the Election Code's “in-person” ballot delivery requirement, *see* 25 P.S. § 3146.6, was mandatory, and that votes delivered by third persons must not be counted. The provision in question unambiguously provided that “the elector shall send [the absentee ballot] by mail, postage [prepaid], except where franked, or deliver it in person to [said county] board of election.” *Appeal of Pierce*, 843 A.2d at 1231 (quoting 25 P.S. § 3146.6(a)). The parties seeking to ensure that votes delivered by third parties would be counted cited *Weiskerger* and its flexibility with respect to “minor irregularities.”

This Court, however, was unpersuaded and declined the invitation to interpret “shall” as anything less than mandatory. Moreover, the Court rejected precisely the same reasoning for interpreting “shall” as directory that Petitioner and the Secretary offer in this case. As in the instant case, the provision of the Election Code at issue in *Appeal of Pierce* did not expressly provide for voiding a ballot delivered by someone other than the voter. Nevertheless, we held that to construe the in-person requirement “as merely directory would render its limitation meaningless and, ultimately, absurd.” *Id.* at 1232. The Court further distinguished *Weiskerger* and its safe harbor for “minor irregularities,” noting that the in-person requirement served the salutary purpose of “limit[ing] the number of third persons who unnecessarily come in contact with the ballot[,] ... provid[ing] some safeguard that the ballot was filled out by the actual voter, ... and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it.” *Id.* The provision thus served the spirit of the Code, “which requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *Id.*

Petitioner and the Secretary attempt to distinguish *Appeal of Pierce* by emphasizing that there was no statutory provision in that case that was inconsistent with the judicially inferred remedy, such as the provisional ballot secrecy envelope provision in this case. They assert that here, by contrast, the Legislature has directed the disqualification of provisional ballots not enclosed in the secrecy envelope, and of mail-in ballots with certain markings on the secrecy envelope, rendering its silence with regard to omitted secrecy envelopes for mail-in ballots all the more conspicuous.

*26 The clear thrust of *Appeal of Pierce*, however, is that, even absent an express sanction, where legislative intent is clear and supported by a weighty interest like fraud prevention, it would be unreasonable to render such a concrete provision ineffective for want of deterrent or enforcement mechanism. What we learn from that decision is that violations of the mandatory statutory provisions that pertain to integral aspects of the election process should not be invalidated *sub silentio* for want of a detailed enumeration of consequences.

We must in all instances assume that the General Assembly does not intend a statute to be interpreted in a way that leads to an absurd or unreasonable result. *See* 1 Pa.C.S. § 1922(1) (“In ascertaining the intention of the General Assembly in the

enactment of a statute the following presumptions ... may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.”). The result proffered by Petitioner and the Secretary is no more reasonable than that which the Court in *Appeal of Pierce* found untenable. The Court in *Appeal of Pierce* viewed a textual mandate pertaining to fraud prevention and ballot secrecy as signaling the Legislature's intent that its violation would require voiding the ballot, notwithstanding no statutory provision to that effect. To avoid an absurd result, it inferred that intent from nothing more than the provision itself.

We reach the same result here. It is clear that the Legislature believed that an orderly canvass of mail-in ballots required the completion of two discrete steps before critical identifying information on the ballot could be revealed. The omission of a secrecy envelope defeats this intention. Moreover, in providing for the disqualification of mail-in ballots that arrive in secrecy envelopes that bear markings identifying the elector, the elector's party affiliation, or the elector's vote, all categories of information that appear on the ballot itself, the Legislature signaled beyond cavil that ballot confidentiality up to a certain point in the process is so essential as to require disqualification. Thus, we find that our holding in *Appeal of Pierce* leads to the inescapable conclusion that a mail-in ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.

[14] Accordingly, we hold that the secrecy provision language in Section 3150.16(a) is mandatory and the mail-in elector's failure to comply with such requisite by enclosing the ballot in the secrecy envelope renders the ballot invalid.

E. COUNT V OF THE PETITION FOR REVIEW

In Count V of its petition, Petitioner seeks a declaration specifying that the poll watcher residency requirement, found in Section 2687(b) of the Election Code, 25 P.S. § 2687(b), does not violate state or federal constitutional rights.³² Petition at 55, ¶ 207. The Secretary concurs with Petitioner in this regard.

The Election Code permits candidates and political parties to appoint “poll watchers” to monitor the integrity of the voting process.³³ “Each watcher so appointed must be a qualified registered elector of the county in which the election district for which the watcher was appointed is located.” 25 P.S. § 2687(b). This provision, in full, specifies:

*27 Each watcher so appointed must be a qualified registered elector of the county in which the election district for which the watcher was appointed is located. Each watcher so appointed shall be authorized to serve in the election district for which the watcher was appointed and, when the watcher is not serving in the election district for which the watcher was appointed, in any other election district in the county in which the watcher is a qualified registered elector: Provided, That only one watcher for each candidate at primaries, or for each party or political body at general, municipal or special elections, shall be present in the polling place at any one time from the time that the election officers meet prior to the opening of the polls under section 1208 until the time that the counting of votes is complete and the district register and voting check list is locked and sealed, and all watchers in the room shall remain outside the enclosed space. It shall not be a requirement that a watcher be a resident of the election district for which the watcher is appointed. After the close of the polls and while the ballots are being counted or voting machine canvassed, all the watchers shall be permitted to be in the polling place outside the enclosed space. Each watcher shall be provided with a certificate from the county board of elections, stating his name and the name of the candidate, party or political body he represents. Watchers shall be required to show their certificates when requested to do so. Watchers allowed in the polling place under the provisions of this act, shall be permitted to keep a list of voters and shall be entitled to challenge any person making application to vote and to require proof of his qualifications, as provided by this act. During those intervals when voters are not present in the polling place either voting or waiting to vote, the judge of elections shall permit watchers, upon request, to inspect the voting check list and either of the two numbered lists of voters maintained by the county board: Provided, That the watcher shall not mark upon or alter these official election records. The judge of elections shall supervise or delegate the inspection of any requested documents.

25 P.S. § 2687(b) (footnote omitted).

Petitioner observes that the General Assembly enacted the current poll watcher residency requirement in 2004 and that no changes were made to this requirement in Act 77. Petitioner asserts that this provision does not suffer from any constitutional infirmities and notes that the provision has been upheld as constitutional by the federal District Court for the Eastern District of Pennsylvania in *Republican Party of*

Pennsylvania v. Cortés, 218 F. Supp. 3d 396 (E.D. Pa. 2016), discussed further below.

The Secretary likewise maintains that the poll watcher residency requirement is constitutional. The Secretary notes that the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), recognized the importance of States in regulating elections. There, the Court stated,

We have recognized that, ‘as 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.’

Id. at 788, 103 S.Ct. 1564 (citing *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974)). In this regard, the Secretary observes that the Election Code provides a comprehensive scheme of regulations for voting and elections in the Commonwealth. The Secretary maintains that these regulatory interests are generally considered sufficient to justify reasonable, nondiscriminatory restrictions on elections. *Id.*; see also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (specifying that “[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder”).

Regarding the provisions in the Election Code requiring that poll watchers be qualified registered electors from the county in which they serve, like Petitioner, the Secretary observes that although this Court has not previously addressed the question of whether this requirement is constitutional, the federal District Court for the Eastern District of Pennsylvania has done so and rejected a constitutional challenge to the poll watcher residency requirement in *Cortés, supra*.

Specifically, there, the District Court considered a constitutional challenge to Section 2687(b) of the Election Code by the respondent here. Respondent claimed that the poll watcher residency requirement found at Section 2687(b), requiring poll watchers to reside in the county in which they serve, is violative of its Fourteenth Amendment rights to due process and equal protection and their rights to free speech and association under the First Amendment.

*28 The District Court rejected these claims, noting first, that the regulation does not violate due process or equal protection. The court observed that serving as a poll watcher does not implicate a fundamental constitutional right, like the right to vote, but rather, is a right conferred by statute.

Id. at 408. Additionally, the court found that because the state's regulation of the qualifications of who may serve as a poll watcher does not burden one's voting rights or any other constitutional right, the state imposing the regulation need only cite a rational basis for the regulation to be upheld. *Id.* (citing *Donatelli v. Mitchell*, 2 F.3d 508, 514 & n.10 (3d Cir. 1993) (declining to apply intermediate scrutiny standards because the plaintiffs' fundamental rights were not burdened by state law)); and *Voting for Am., Inc. v. Andrade*, 488 Fed.Appx. 890, 899 (5th Cir. 2012) (applying rational basis review as opposed to an intermediate balancing test because state election law did not implicate or burden specific constitutional rights). In this regard, the court concluded as follows:

There is a rational basis for Section 2678(b)'s requirement that poll watchers be qualified electors in the county in which they work. The Secretary notes that in 1937, the General Assembly enacted a county-based scheme to manage elections within the state, and consistent with that scheme the legislature endeavored to allow county election officials to oversee a manageable portion of the state in all aspects of the process, including in credentialing poll watchers. In short, Pennsylvania opted to design a county-by-county system of elections; in doing so it ensured as much coherency in this patchwork system as possible. To that end it ensured that participants in the election--voters and watchers alike--were qualified electors in the relevant county. The legislature's decision to allow county election officials to credential only poll watchers from their own county is rationally related to the state's interest in maintaining its county-run election system; each county election official is tasked with managing credentials for a discrete part of the state's population. As the Secretary's counsel noted at the hearing, the legislature chose to 'draw the lines' at the county level, something entirely rational in fashioning a scheme for a state as large as Pennsylvania.

Cortés, 218 F.Supp. 3d at 409.

The District Court, likewise, rejected Respondent's claims that Section 2687 violates the First Amendment. The court first noted that courts have found that "poll watching is not incidental to" the right of free association and has "no distinct First Amendment protection." *Id.* at 414 (citing *Cotz v. Mastroeni*, 476 F.Supp.2d 332, 364 (S.D. N.Y. 2007); and *Dailey v. Hands*, No. 14-00423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) ("[P]oll watching is not a fundamental right protected by the First Amendment.")). Moreover, the court found that poll watchers do not engage in core political speech while completing their duties. *Id.* at

415. Rather, the court observed that "when a poll watcher reports incidents of violations, he is performing a public function delegated by the state." *Id.* (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (stating that "[w]hile the Constitution protects private rights of association and advocacy with regard to the election of public officials, [the Supreme Court] cases make it clear that the conduct of the elections themselves is an [e]xclusively public function.")). Thus, the District Court found that the Commonwealth's county poll watcher residency requirement did not implicate poll watchers' private rights of association or advocacy and, therefore, did not violate the First Amendment.

Respondent again maintains that the poll watcher residency requirement set forth in the Election Code is unconstitutional.³⁴ First, Respondent maintains that *Cortés* is distinguishable from this matter because of the procedural posture and the timing of that case. Specifically, Respondent emphasizes the fact that in *Cortés* it sought a preliminary injunction eighteen days before the general election and that on this basis the court found the request for relief to be untimely. Thus, it contends that the court's further discussion of the constitutionality of the poll watcher residency requirement was *dicta*.

*29 Additionally, Respondent argues that the court in *Cortés*, like the Secretary here, gave short shrift to the Commonwealth's obligation to safeguard the electorate from voter fraud, noting that "every voter in a federal ... election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." Respondent's Brief at 45 (citing *Anderson v. United States*, 417 U.S. 211, 227, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974)). Respondent maintains that due to the distribution of voters throughout the Commonwealth, the county residency requirement makes it difficult for both political parties to identify poll watchers in all precincts. Thus, it asserts that, in the absence of poll watchers, "fraud can flourish." *Id.* at 46. Respondent further argues that with Pennsylvania moving to an entirely new election regime under Act 77, with alleged increased opportunities for ballot fraud and tampering, the need for poll watchers is heightened.

Turning to the merits, initially, regarding Respondent's assertion that the District Court's discussion of the constitutionality of the poll watcher residency requirement constitutes *dicta* because the court found the claims there

to be untimely, we note that although that court pointed out that the emergent nature of Respondent's claims amounted to a "judicial fire drill" based on their late filing, the court opined further that the relief sought "would be inappropriate for a number of reasons, not the least of which is that at this late hour courts should not disrupt an impending election 'absent a powerful reason for doing so.'" *Cortés*, 218 F.Supp.3d at 405 (citation omitted). The court then went on to analyze the merits of the constitutional claims asserted and denied relief. Accordingly, it appears the court made its decision on multiple bases, including the merits as well as the timing of the claims. Moreover, regardless of the status of the District Court's determination of the constitutional issues presented there, we find its analysis persuasive and agree with its reasoning in upholding the constitutionality of the poll watcher residency requirement.

The "times, places and manner" of conducting elections generally falls to the states. U.S. Const. art. I, § 4 (providing that "the Times, Places and Manner of holding Elections...shall be prescribed in each State by the Legislature thereof"). Pennsylvania has enacted a comprehensive code of election laws pursuant to its authority to regulate its elections. The General Assembly, in enacting its comprehensive scheme, has required that any person serving as a poll watcher for a particular candidate or party be a resident of the county in which she serves in her position. 25 P.S. § 2687(b).

[15] [16] This provision is a legislative enactment which enjoys the presumption that the General Assembly did not intend to violate constitutional norms, "in part because there exists a judicial presumption that our sister branches take seriously their constitutional oaths." *Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 938–39 (2006); see also 1 Pa.C.S. § 1922(3). Accordingly, a statute is presumed to be valid, and will be declared unconstitutional only if it is shown to be "clearly, palpably, and plainly [violative of] the Constitution." *West Mifflin Area School District v. Zahorchak*, 607 Pa. 153, 4 A.3d 1042, 1048 (2010).

[17] In analyzing whether a state election law violates the constitution, courts must first examine the extent to which a challenged regulation burdens one's constitutional rights. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Upon determining the extent to which rights are burdened, courts can then apply the appropriate level of scrutiny needed to examine the propriety of the regulation. See *id.* (indicating that "the rigorousness of our inquiry into the propriety of a state election law depends upon

the extent to which a challenged regulation burdens First and Fourteenth Amendment rights").

*30 [18] [19] [20] Where a state election regulation imposes a "severe" burden on a plaintiff's right to vote, strict scrutiny applies and requires that the regulation is "narrowly drawn to advance a state interest of compelling importance." *Id.* When a state election law imposes only "reasonable, nondiscriminatory restrictions," upon the constitutional rights of voters, an intermediate level of scrutiny applies, and "the State's important regulatory interests are generally sufficient to justify" the restrictions. See *Id.* (upholding Hawaii's ban on write-in voting in the primary where doing so places a minimal burden on one's voting right and supports the state's interest in supporting its ballot access scheme). Where, however, the law does not regulate a suspect classification (race, alienage, or national origin) or burden a fundamental constitutional right, such as the right to vote, the state need only provide a rational basis for its imposition. See *Donatelli*, 2 F.3d at 510 & 515.

[21] In examining the constitutionality of the poll watcher residency provision at issue here, we conclude, as the District Court in *Cortés* concluded, that it imposes no burden on one's constitutional right to vote and, accordingly, requires only a showing that a rational basis exists to be upheld. In this regard, as the District Court aptly noted, there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute. *Cortés*, 218 F.Supp.3d at 408. Additionally, courts have indicated that "poll watching is not incidental to" the right of free association and, thus, "has no distinct First Amendment protection." *Cotz*, 476 F.Supp.2d at 364. Finally, poll watching does not implicate core political speech. *Cortés*, 218 F.Supp.3d at 415.

[22] As the poll watcher county residency requirement does not burden one's constitutional voting rights, the regulation need only be shown to satisfy a rational basis for its imposition. Again, as the District Court aptly recounted, from its inception, Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth. Consistent therewith, the Legislature has endeavored to allow county election officials to oversee and manage their portion of the state in all aspects of the election process, including credentialing poll watchers. Given that Pennsylvania's General Assembly chose a county-based scheme for conducting elections, it is reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties

in which they serve. Thus, there is a clear rational basis for the county poll watcher residency requirement, and we determine, therefore, that this requirement should be upheld.

Respondent does not claim that poll watching involves a fundamental constitutional right or that a level of scrutiny other than rational basis needs to be shown regarding the regulation of poll watcher qualifications. Instead, Respondent claims that poll watchers are vital to protect against voter fraud and that because of the distribution of voters throughout Pennsylvania, the residency requirement makes it difficult to identify poll watchers in all precincts. While Respondent asserts the greater need for poll watchers because of heightened election fraud involving mail-in voting, these claims are unsubstantiated and are specifically belied by the Act 35 report issued by the Secretary on August 1, 2020, concerning mail in voting in the Primary Election, finding:

[D]ata provided by the counties reinforces numerous independent studies that conclude that mail ballot fraud is exceedingly rare, and it demonstrates that the errors that occurred [in the Primary Election] accounted for a very small fraction of the nearly 1.5 million absentee and mail-in ballots requested and cast by voters.

Pennsylvania 2020 Primary Election Act 35 of 2020 Report at 39; Appendix to Petitioner's Brief, Exhibit F. Moreover, Respondent's speculative claim that it is "difficult" for both parties to fill poll watcher positions in every precinct, even if true, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice.

*31 Based on the foregoing, we conclude that the poll watcher residency requirement does not violate the state or federal constitutions.³⁵ Accordingly, we grant the relief sought by Petitioner in their petition for review and declare the poll watcher residency requirement set forth in Section 2687(b) of the Election Code, 25 P.S. § 2687(b), to be constitutional.

IV. CONCLUSION

Based on our disposition of all of the claims set forth above, we grant relief on the claims set forth in Counts I, II, and V of the Democratic Party's petition for review as follows and hold that: (Count I) the Election Code permits county boards of election to collect hand-delivered mail-in ballots

at locations other than their office addresses including drop-boxes as indicated herein, *see supra* at — n. 15; (Count II) a three-day extension of the absentee and mail-in ballot received-by deadline is adopted such that ballots mailed by voters via the United States Postal Service and postmarked by 8:00 p.m. on Election Day, November 3, 2020, shall be counted if they are otherwise valid and received by the county boards of election on or before 5:00 p.m. on November 6, 2020; ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day; (Count V) the poll watcher residency requirement set forth in Section 2687(b) of the Election Code, 25 P.S. § 2687(b), is constitutional. Also, for the reasons set forth herein, we deny the relief sought in Count III and IV of the petition for review.

Justices [Todd](#), [Dougherty](#), and [Wecht](#) join the opinion.

Chief Justice [Saylor](#) and Justice [Mundy](#) join Parts I, II, and III(C), (D) and (E) of the opinion.

Justice [Donohue](#) joins Parts I, II, and III(A), III(C), III(D) and III(E) of the opinion.

Justice [Wecht](#) files a concurring opinion.

Chief Justice [Saylor](#) files a concurring and dissenting opinion in which Justice [Mundy](#) joins.

Justice [Donohue](#) files a concurring and dissenting opinion in which Chief Justice [Saylor](#) and Justice [Mundy](#) join Part II.

JUSTICE [WECHT](#), concurring

I join the learned Majority's Opinion in full. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."¹ As the Supreme Court of the United States has explained, the right to vote comprises not just "the right of qualified voters within a state to cast their ballots," but also the right "to have their ballots counted."² In our Commonwealth, the franchise is guaranteed by the Free and Equal Elections Clause of the Pennsylvania Constitution, which commands: "Elections 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."³ The history of that clause, which predates the

United States Constitution and has no federal counterpart, evinces the intent of its framers that it be given “the broadest interpretation, one which governs all aspects of the electoral process.”⁴

*32 Expounding upon the contours of the guarantee of free and equal suffrage contained within the Constitution of Kentucky, which was modeled on our own organic charter, the Kentucky Supreme Court observed that, “when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the Constitution.”⁵

[T]his constitutional provision admits of no evasions or exceptions. No amount of good intention or good faith can be allowed to defeat its purpose or its meaning. When the question arises, the single inquiry will be: Was the election free and equal, in the sense that no substantial number of persons entitled to vote and who offered to vote were denied the privilege?⁶

Although the conditions that might infringe the franchise are too manifold to enumerate, when we are satisfied that a violation of the right has occurred or is likely to occur, “our Court possesses broad authority to craft meaningful remedies when required.”⁷

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”⁸ To that end, we recognized in *League of Women Voters* that “[a] broad and robust interpretation” of the Free and Equal Elections Clause could restore the public's confidence in the redistricting process by “guard[ing] against the risk of unfairly rendering votes nugatory.”⁹ The same easily could be said of an election scheduled in the wake—or midst—of a natural disaster, civil unrest, or other emergency, where systemic disruptions in basic government services like mail delivery—upon which the machinery of our election system relies more than ever with the advent of broad mail-in voting—can be demonstrated or reasonably anticipated.¹⁰ Indeed, the “adverse consequences” occasioned by a dysfunctional electoral process that threatens to disenfranchise a broad swath of the electorate are no less pernicious than those of partisan gerrymandering. Left unabated, each threatens to “discourag[e] voters from participating in the electoral process because they have come to believe” that their vote will not count through no fault of their own.¹¹

In determining whether present systemic disruptions in government services are well-documented in this Commonwealth, we need look no further than the recent Congressional testimony of Postmaster General Louis DeJoy. Appearing before committees of the United States House and Senate, DeJoy acknowledged that “[a] substantial portion of [mail] delays are related to COVID.”¹² Highlighting the acute effects of the pandemic on mail delays within Pennsylvania, DeJoy explained:

*33 As the coronavirus cases throughout the country have expanded it has had an impact on our employee availability. And in the urban areas that are hotspots—the averages don't play out what the real picture is like in areas like Philadelphia, where employee availability is significantly below normal run rates.¹³

Lacking any materially contradictory evidence, we have no reason to doubt the accuracy of DeJoy's testimony on these points. While the Postal Service may be able to prioritize election mail to mitigate these concerns, they cannot alter the laws of time and space.

The extraordinary circumstances under which this year's quadrennial presidential election must be contested manifestly justify an equitable remedy modifying the received-by deadline for absentee and mail-in ballots to account for these exigencies and to ensure that no unnecessary impediments to each citizen's exercise of the franchise be interposed that reasonably can be avoided. Having determined that the convergence of a once-in-a-century pandemic and unprecedented operational delays in United States Postal Service delivery capacity threatens to undermine the integrity of our general election, this *force majeure* necessitates relief.

I endorse the Majority's narrowly-tailored remedy, which extends the received-by deadline by just three days to compensate for projected mail-delivery delays of similar duration. Extrapolating from the Department of State's primary election data, that timeframe should capture the vast majority of late-arriving ballots that were deposited with the Postal Service on or in the few days before Election Day. That approach also will minimize the number of voters denied the franchise simply for mailing their votes based upon long-trusted, but presently unrealistic expectations about the speed of the post, while minimizing any subsequent delay in the tallying of votes and avoiding any material disruption to the sequence of events that follow in the weeks following a national election.

While I join the Majority's resolution of Count III, I do so subject to the belief that it is limited to the particular concerns litigated and the lack of any proposal regarding a practicable manner of relieving the problem alleged. In my view, today's ruling should be understood to extend no farther than to ballot defects that are capable of objective assessment pursuant to uniform standards¹⁴—a qualification that captures all of the defects Petitioners seek the opportunity to cure in this case.

*34 For example, the failure to “fill out, date and sign the declaration printed on” the ballot return envelope, as required by 25 P.S. § 3150.16(a), is a deficiency that can be readily observed. Absent some proof that the enforcement of such a uniform, neutrally applicable election regulation will result in a constitutionally intolerable ratio of rejected ballots, I detect no offense to the Free and Equal Elections Clause. Moreover, Petitioners propose only an amorphous standard that would permit electors to cure “minor” defects and omissions; they supply no judicially manageable criteria for distinguishing “minor” defects from “major” ones that could be adopted on a statewide basis, nor do they propose a process to facilitate the opportunity to cure that they seek that can be implemented and fairly administered in every voting district in the Commonwealth in the weeks between now and the general election. So long as the Secretary and the county boards of elections provide electors with adequate instructions for completing the declaration of the elector—including conspicuous warnings regarding the consequences for failing strictly to adhere—pre-deprivation notice is unnecessary.

But I view these issues as distinct from circumstances in which a ballot's validity turns on subjective assessments, such as signature mismatches assessed by poll workers with no training or expertise in matching signatures. The enforcement of such requirements presents risks of inconsistency and arbitrariness that may implicate constitutional guarantees not raised in this case, including due process and equal protection principles. Signature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people.¹⁵ While this case offers no challenge to such inherently subjective bases for disqualifying ballots, I do not view today's Opinion as foreclosing the possibility of relief in a future case seeking the opportunity to address circumstances in which a subjective, lay assessment of voter requirements as to which reasonable minds might differ stands between the elector and the tabulating machine.

We would not write on a blank slate in this regard. These concerns have been recognized by numerous tribunals in recent years, and various courts have granted relief on similar grounds, including three federal courts in the last few weeks alone.¹⁶ Those courts have found that the administrative burden of a notice-and-cure remedy is outweighed by the threat to the fundamental rights of voters whose ballots otherwise would not be counted.

*35 While one might hope that the General Assembly would revisit the issue and consider furnishing such a procedure on its own initiative, this Court has the prerogative to address this problem if it proves worthy upon closer examination. As a “state court with the power to assure uniformity,” we have the authority, and indeed the obligation, to direct the canvassing of absentee and mail-in ballots in a manner that satisfies “the rudimentary requirements of equal treatment and fundamental fairness” when we find a palpable failure to meet those constitutional thresholds.¹⁷ Regardless, Petitioners do not bring a discrete challenge to the Commonwealth's prescribed processes for examining the validity of signatures on ballot envelopes, so resolution of that question must wait.¹⁸

Turning finally to Count IV, I agree wholeheartedly with the Majority's analysis. I write separately to underscore that this case illustrates most consequentially the potential for mischief, albeit well-meaning, when we are called upon to question the “true” meaning of the General Assembly's contextually ambiguous use of the word “shall.” In my view, there are times when this Court has done so gratuitously. But far more frequently, this unfortunate circumstance is foisted upon us by the choices made by the General Assembly during the often tortuous drafting process,

The difficulty inherent in that enterprise, and concomitantly the risk that we will misconstrue legislative intent, is clear. In searching for methods to remove the guesswork from such situations, Pennsylvania courts have labored mightily but in vain to fashion a coherent organizing principle for determining when the legislature meant “you may” when it said “you must.”

For example, the Superior Court once suggested that the distinction inheres in “the *effect* of non-compliance A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate

the proceedings.”¹⁹ But where the court considers the consequences of a failure to perform a task stated in mandatory language, this distinction is nonsensical: we cannot gauge the effect of non-compliance simply by asking what the effect of non-compliance is. In *Bell v. Powell*, we proposed an equally confounding alternative:

[Shall] may be construed to mean ‘may’ when no right or benefit to any one depends on its imperative use, when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction, or when it is absolutely necessary to prevent irreparable mischief, or to construe a direction so that it shall not interfere with vested rights, or conflict with the proper exercise of power by either of the fundamental branches of government²⁰

This impenetrable passage suggests nothing to me so much as that we are free to do whatever we want only when what we do does not matter.

*36 To be sure, there may be value in legislating in both mandatory and directory terms. But no benefit is served by, nor is there any excuse for, rendering the distinction opaque with critical omissions, such as the failure to specify a specific consequence for failing to adhere to a particular mandate—especially where, as in the case of naked ballots, the legislature did so for closely related, if not constructively identical, correlative statutory provisions. The General Assembly must endeavor always to distinguish between what it intends to be mandatory and what directory, in its words or by clear and necessary inference. When it fails to do so, courts are left to bend unclear texts toward whatever ends that they believe to be consonant with legislative intent, but with little or no contemporaneous insight into whether they have done so successfully. When the General Assembly does not choose its words carefully according to their intended effect, it leaves courts with no choice but to sharpen what the drafters made dull.

For this Court's part, if we are to maintain a principled approach to statutory interpretation that comports with the mandate of our Statutory Construction Act, if we are to maximize the likelihood that we interpret statutes faithfully to the drafters' intended effect, we must read mandatory language as it appears, and we must recognize that a mandate without consequence is no mandate at all. If the result, at times, is that the Court imposes a more doctrinaire result than the legislature intended, that body has the tools at its disposal to ensure that the same mistake does not recur.

CHIEF JUSTICE SAYLOR, concurring and dissenting
I join Parts I, II, and III(C), (D) and (E) of the majority opinion, and I respectfully dissent relative to Parts III(A) and (B), concerning the approval of unmanned drop boxes and the extension of the deadline for receiving mail-in ballots.

With regard to drop boxes, I agree with Respondent and the Caucus that the statutory option for a voter to deliver a mail-in ballot “in person to said county board of election” contemplates in-person delivery to a manned, office location. 25 P.S. § 3150.16(a). Although another provision of the Election Code contemplates receipt of “ballot boxes and returns ... in such other place as has been designated by the board” on Election Day, *id.* § 3151, no analogous provision applies to the submission by voters of individual ballots. Moreover, the legislative policy to restrain aggregated handling of mail-in ballots by third parties is manifest, *see, e.g., id.* § 3150.16(a) (requiring *the elector* to mail or deliver a ballot), and the enforceability of this policy is weakened by the use of non-statutory, unmanned drop boxes. This, to me, this suggests against a permissive interpretation of the Election Code.

Relative to the deadline for receiving mail-in ballots, I join Part II of Justice Donohue's concurring and dissenting opinion, as this most closely hews to the express legislative intent that the election be concluded by 8:00 p.m. on election night.

Finally, although the majority decision appears to be designed to accommodate only ballots actually mailed on Election Day or before, the majority does not so much as require a postmark. Particularly in combination with the allowance of drop boxes, this substantially increases the likelihood of confusion, as well as the possibility that votes will be cast after 8:00 p.m. on Election Day, thus greatly undermining a pervading objective of the General Assembly.

Justice Mundy joins this concurring and dissenting opinion.

JUSTICE DONOHUE, concurring and dissenting

I.

I join the Majority's opinion as to Parts I, II, and III(A), III(C), III(D) and III(E).

II.

With respect to Part III(B), I agree that Petitioners are entitled to relief, but I distance myself from the Majority's analysis to reach this conclusion as well as the specific relief granted. Petitioners base their request for relief on the infringement of the rights afforded by [Article 1, Section 5 of the Pennsylvania Constitution](#), our Free and Equal Elections Clause.¹ In my mind, the issue must be framed as an as-applied challenge, during the duration of the COVID-19 public health crisis and current USPS service standards, to the constitutionality of Sections 3150.12a(a) and 3150.16(c) of Act 77, which respectively set the last date on which voters may request mail-in ballots and the deadline for when ballots must be received by county boards of elections. With deference to my learned colleagues, I believe that this issue should have been decided in a case in this Court's original jurisdiction under Act 77, *Michael Crossey et al. v. Kathy Bookckvar, et al.*, No. 108 MM 2020, where the claims likewise were based on the Free and Equal Elections clause and in which this Court ordered the creation of a complete evidentiary record to determine whether the petitioners there had met their high burden to prove the existence of a constitutional injury entitling them to relief.

*37 Despite invoking an as-applied constitutional challenge in the present case, Petitioners and the Secretary (as in *Crossey*) seek equitable relief in the form of an order permitting non-compliance with the received-by provision in Act 77 ([Section 3150.16\(c\)](#)) during the COVID-19 pandemic. I am not as comfortable as the Majority with the ability of this Court to exercise equitable powers in election matters.² Because they are inherently political, elections are appropriately regulated by the political branch. *In re Guzzardi*, 627 Pa. 1, 99 A.3d 381, 385 (2014). As such, out of respect for legislatures and for the sake of regularity and orderliness in the election process, the supreme courts of our sister states have routinely held that courts cannot exercise equitable powers to mitigate harsh results in derogation of legislative requirements for strict compliance with election-related deadlines. *Butts v. Bysiewicz*, 298 Conn. 665, 5 A.3d 932, 947 (2010) (“Equity only applies in the absence of a specific statutory mandate.”); *see also Martin v. Secretary of State*, 482 Mich. 956, 755 N.W.2d 153, 154 (2008); *Smith v. Kiffmeyer*, 721 N.W.2d 912, 914–15 (Minn. 2006); *Andrews*

v. Secretary of State, 235 Md. 106, 200 A.2d 650, 651 (1964). Following the leads of these courts, in 2014, this Court denied equitable relief to a litigant in an election case, holding as follows:

[T]he judiciary should act with restraint, in the election arena, subordinate to express statutory directives. Subject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania. At least where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity.

Guzzardi, 99 A.3d at 385. The Court recently reaffirmed our decision in *Guzzardi. Reuther v. Delaware Cty. Bureau of Elections*, — Pa. —, 205 A.3d 302, 308-09 (2019).

Without the availability of equitable relief, it is my view that Petitioners are entitled to relief only in the context of an as-applied constitutional challenge. Specifically, Petitioners must prove that in light of the existing circumstances, the short seven-day timeframe established by Sections 3150.12a(a) and 3150.16(c) of Act 77 provides insufficient time for a voter to request a mail-in ballot (by October 27, 2020) and return it to a county board of elections by the statutorily set received-by date (8:00 p.m. on Election Day, November 3, 2020), so that the vote is counted. Such a constitutional challenge requires a plain showing of injury. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Yocum v. Commw. of Pennsylvania Gaming Control Bd.*, 639 Pa. 521, 161 A.3d 228, 238 (2017).

*38 In *Crossey*, the petitioners produced sufficient evidence to meet this high “clear, palpable and plain” burden of proof. Given the deadlines set for the request of and subsequent return of ballots, considered in light of the pandemic and current lagging USPS service standards (which are highly unlikely to improve significantly before Election Day), the evidence in *Crossey* established that there is a strong likelihood that voters who wait until the last day to apply for a mail-in or absentee ballot will be disenfranchised, as their mail-in ballots will not be delivered by Election Day and thus will not be counted. Thus, the short seven-day window set forth in Sections 3150.12a(a) and 3150.16(c)

of Act 77 constitutes an interference with the free exercise of the right to vote as guaranteed by our Free and Equal Elections Clause. The evidentiary linchpin for establishing the unconstitutionality of the seven-day time frame was correspondence from Thomas J. Marshall, General Counsel and Executive Vice President for the USPS, to Secretary Boockvar dated July 29, 2020 advising that the current service standards for delivery of First Class Mail is two to five days, and cautioning that Pennsylvania's application and return deadlines for mail-in ballots are such that despite prompt actions by voters, the ballots may “not be returned in time to be counted.” The letter was accepted into evidence in *Crossey*

and was further supported by the testimony of the Deputy Postmaster at the time the correspondence was crafted.

The existence of the constitutional injury suffered by virtue of adherence to the statutory deadlines for request and return of ballots is illustrated in the following chart, which incorporates the fact of receipt by the board of elections of an application on the statutory deadline of October 27, 2020. It also assumes that the application is immediately processed and a ballot mailed to the voter within forty-eight hours of receipt of the application.³ I further take into account that mail is processed by USPS but not delivered on Sundays. All computations are based on the use of First-Class Mail:

| DATE BALLOT MAILED BY BOARD | DELIVERY TIME (in days) | DATE BALLOT IS RECEIVED BY VOTER | DATE BALLOT IS MAILED BACK BY VOTER | DELIVERY TIME (in days) | DATE BALLOT IS RECEIVED BY BOARD | BALLOT RECEIVED IN TIME TO BE COUNTED? |
|-----------------------------|-------------------------|----------------------------------|-------------------------------------|-------------------------|----------------------------------|--|
| Thursday, 10/29/2020 | 2 | | Saturday, 10/31/2020 | 2 | Monday, 11/2/2020 | YES |
| | | | | 3 | Tuesday, 11/3/2020 | YES |
| | | Saturday, 10/31/2020 | | 4 | Wednesday, 11/4/2020 | NO |
| | | | | 5 | Thursday, 11/5/2020 | NO |
| | | | | 2 | Wednesday, 11/4/2020 | NO |
| | | Saturday, 10/31/2020 | Monday, 11/2/2020 | 3 | Thursday, 11/5/2020 | NO |
| | | | | 4 | Friday, 11/6/2020 | NO |
| | | | | 5 | Saturday, 11/7/2020 | NO |
| | | Monday, 11/2/2020 | | 2 | Wednesday, 11/4/2020 | NO |
| | 3-4 | Monday, 11/2/2020 | Monday, 11/2/2020 | 3 | Thursday, 11/5/2020 | NO |
| | | Monday, 11/2/2020 | 11/2/2020 | 4 | Friday, 11/6/2020 | NO |
| | | | | 5 | Saturday 11/7/2020 | NO |

| | | | | | |
|---|-----------|-------------------------|-----|----------------------|----|
| | | Tuesday, | 2-5 | (After Election Day) | NO |
| 5 | Tuesday, | 11/3/2020 | 2-5 | (After Election Day) | NO |
| | 11/3/2020 | Wednesday, 11/4/2020 | 2-5 | (After Election Day) | NO |

The only way the current statutory framework works is if the ballot is delivered by USPS in two days, the voter immediately returns the ballot, and it is received by the board of elections within three days. All other voters who comply with the statutory framework are disenfranchised, even though they complied with the statute.

The role of the judiciary when a meritorious constitutional challenge is brought “includes the obligation to vindicate” the constitutional rights at issue, and in doing so courts have wide latitude to craft an appropriate remedy.” *Robinson Twp. v. Commonwealth*, 623 Pa. 564, 83 A.3d 901, 953 (2013); see also *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 793 (2018) (“The Court possesses broad authority to craft meaningful remedies [for constitutional violations] when required.”). Where, as here, “a legislatively unforeseen constitutional problem requires modification of a statutory provision as applied,” the United States Supreme Court has admonished courts to look to legislative intent when devising a remedy. See *United States v. Booker*, 543 U.S. 220, 246-47, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (after ruling that federal sentencing statute that made guidelines mandatory was unconstitutional, the Court made an effort to determine what “ ‘Congress would have intended’ in light of the Court's constitutional holding.”) *Id.* at 246-47, 125 S.Ct. 738.

*39 In *Crossey* (and in the present case), Petitioners recommend that the “received by” date be moved from Election Day to seven days after Election Day, so long as the mailing is postmarked by Election Day. In *Crossey* (and here), Secretary Boockvar believes that moving the received-by day forward by three days is sufficient, and that Petitioners’ longer time period would in fact interfere with other important

functions that must take place after Election Day. In crafting a remedy for an as-applied constitutional violation, a court's duty is to effectuate the intent of the General Assembly to the extent possible and to otherwise not disrupt the statutory scheme. In light of these principles, I do not believe that either of the parties’ recommended remedies provide the appropriate solution.

There is no reasonable reading of the statute that would lead to the conclusion that the Tuesday before Election Day was of any institutional importance. Instead, the clear legislative intent was that all ballots were to be cast by 8:00 p.m. on Election Day, the termination of the balloting process. It cannot be viewed as a coincidence that the closing of the polls terminating in-person voting and the receipt of mail-in ballots were designated by the statute to be the same. The last date on which applications for ballots would be accepted was tied to an assumption that a timely vote could be cast before the only meaningful milestone, Election Day. As a result, the remedy to best effectuate the legislative intent before the intervening circumstances is to move back, i.e., make earlier, the final date on which applications for mail-in ballots may be submitted to the county boards of elections. I would accept Secretary Boockvar's opinion that three additional days will substantially correct the problem. However, moving back by three days the deadline for the receipt of applications by the boards of elections would result in that deadline falling on Saturday. Instead, to reflect normal business days, the deadline for receipt of the application by the boards of election should be moved to Friday, October 23, 2020. The received-by date for the ballot by the boards of elections, Election Day by 8:00 p.m., should remain unchanged.

For comparison, the following chart illustrates the new deadlines interfaced with current USPS delivery standards:

| DATE BALLOT MAILED BY BOARD | DELIVERY TIME (in days) | DATE BALLOT RECEIVED BY VOTER | DATE BALLOT MAILED BY VOTER | DELIVERY TIME (in days) | DATE BALLOT RECEIVED BY BOARD | BALLOT RECEIVED IN TIME TO BE COUNTED? |
|-----------------------------|-------------------------|-------------------------------|-----------------------------|-------------------------|-------------------------------|--|
| | 2 | | | | Friday, 10/30/2020 | YES |

| | | | | | |
|------------|------------|------------|-----|-----------------|-----|
| | Wednesday, | Wednesday, | 3 | Saturday, | YES |
| | 10/28/2020 | 10/28/2020 | 4 | Monday | YES |
| | | | 5 | Monday | YES |
| | Wednesday, | | 2 | Saturday, | YES |
| Monday, | 10/28/2020 | Thursday, | 3 | Monday, | YES |
| 10/26/2020 | Thursday, | 10/29/2020 | 4 | Monday, | YES |
| | 10/29/2020 | | 5 | Tuesday, | YES |
| 3 | Thursday, | Friday, | 2 | Monday, | YES |
| | 10/29/2020 | 10/30/2020 | | 11/2/2020 | |
| | | | 3 | Monday, | YES |
| | Friday, | | 4 | Tuesday, | YES |
| | 10/30/2020 | | 5 | Wednesday, | NO |
| 4 | Friday, | | 2 | Monday, | YES |
| | 10/30/2020 | Saturday, | 3 | Tuesday, | YES |
| | Saturday, | 10/31/2020 | 4 | Wednesday, | NO |
| 5 | 10/31/2020 | | 5 | Thursday, | NO |
| | Saturday, | Monday, | 2-5 | (After Election | NO |
| | 10/31/2020 | 11/2/2020 | | Day) | |

As with the previous illustration, I assume that county boards of elections will process **and** send out the ballots within forty-eight hours of receipt. Whether this is possible, likely or impossible is apparently immaterial, since Secretary Boockvar, with knowledge of the capacities of the county

boards of elections, recommended a three-day extension, so I assume that it accounted for this factor.

As required when remedying an as-applied constitutional defect, this remedy is the least disruptive to the enacted statutory scheme. The problem to be remedied here is that

the seven-day period to complete the mail-in vote process has been rendered unworkable by the current extraordinary circumstances. I have no doubt that the statute was intended to accommodate the realities as they existed when Act 77 was enacted. It is unconstitutional as applied to the November 2020 general election because of current realities.

*40 For these reasons, in connection with the November 2020 general election only, the deadline for requesting a ballot should be moved to Friday, October 23, 2020.⁴ The legislative choice of Election Day at 8:00 p.m. should remain intact.

In summary, I agree with the Majority that the received-by date for ballot applications in light of the deadline for submission of ballots to the county boards of election is unworkable under current circumstances. I dissent from the invocation of equitable powers to craft a remedy. In my view, this issue should have been decided on the evidentiary record developed in *Crossey* based on the analytical framework for an as-applied challenge to the constitutionality of the statutory provisions as violative of [Article 1, Section 5 of our Constitution](#), with the remedy crafted based upon the legislative intent in enacting the circumstantially defective statutes.

Chief Justice [Saylor](#) and Justice [Mundy](#) join Part II of this concurring and dissenting opinion.

Emergency Applications to Stay

JUSTICE [MUNDY](#), dissenting

In my view, Intervenor¹ make a substantial case on the merits that this Court should stay the portion of our opinion extending the deadline for receipt of mail-in ballots past 8:00

p.m. on November 3, 2020, Election Day.² In *Pennsylvania Democratic Party v. Boockvar*, — Pa. —, — A.3d —, 2020 WL 5554644 (2020), a majority of this Court held that all mail-in ballots postmarked by 8:00 on Election Day, and received by 5:00 p.m. November 6, 2020, even those lacking a postmark or bearing an illegible postmark, would be counted. *Id.* at —, 2020 WL 5554644, at *37. Without further explanation, the majority qualified that such ballots “will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day.” *Id.* The Republican Party of Pennsylvania Intervenor³ argue that virtually no evidence exists to overcome such a presumption, and “the Court’s presumption opens the door to illegally and untimely cast or mailed ballots being counted in, and tainting the results of, the imminent general election in which millions of Pennsylvanians will exercise their right to vote.” Republican Party of Pennsylvania Application for Partial Stay at 4.

*41 Intervenor³ assert that there is a substantial likelihood that they will be successful on the merits of the stay application and writ of certiorari to be filed in the United States Supreme Court. Citing to *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, — U.S. —, 140 S. Ct. 1205, 206 L.Ed.2d 452 (2020), Intervenor³ note that the United States Supreme Court stayed a judgment of a federal district Court in Wisconsin and held that “[e]xtending the date by which ballots may be cast by voters after the scheduled election day fundamentally alters the nature of the election.” *Id.* at 1207. It is reasonable that the United States Supreme Court may view this Court’s presumption regarding ballots lacking a postmark or bearing an illegible postmark in the same light. As a result, I would grant a stay to preserve the public confidence in the integrity of the upcoming election.

All Citations

--- A.3d ----, 2020 WL 5554644

Footnotes

- 1 The caption reflects the Secretary of the Commonwealth Kathy Boockvar as filing the petition before the Court based upon her application for extraordinary review, which this Court granted. Regardless, as noted, we now refer to the plaintiffs in the underlying lawsuit as “Petitioner” and, as noted *infra*, Secretary Boockvar as “Secretary.”
- 2 Pursuant to [42 Pa.C.S. § 726](#), this Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of the Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.
- 3 At the time Petitioner filed its petition, an action filed by Donald J. Trump for President, Inc., the Republican National Committee (“RNC”), and several Republican congressional candidates and electors (collectively, “Republican Party”)

against the Secretary and the Boards was pending in the U.S. District Court for the Western District of Pennsylvania. In that case, the Republican Party alleged federal and state constitutional violations stemming from the recent implementation of no excuse mail-in voting under Act 77. The specific issues raised by the Republican Party in the federal action are, to some extent, the mirror image of the issues raised by Petitioner in the case *sub judice*.

- 4 Concurrently, Petitioner filed both an Application for Special Relief in the Nature of an Expedited Motion for Alternative Service and an Application for an Expedited Discovery Schedule and Evidentiary Hearing, to which several responses were filed. On July 15, 2020, the Commonwealth Court denied Petitioner's request for alternative service. On July 30, 2020, the Commonwealth Court, *inter alia*, granted in part and denied in part Petitioner's application for an expedited discovery schedule and evidentiary hearing. In this order, the Commonwealth Court set forth specific deadlines for responsive pleadings.
- 5 The UOCAVA delineates, *inter alia*, the process and procedure in which overseas voters and voters in the uniformed services receive absentee ballots for federal elections. See *generally* 52 U.S.C. §§ 20301-20311.
- 6 As explained more fully below, upon receipt of an official mail-in ballot, the mail-in elector is to mark the ballot in secret, and then fold the ballot, enclose, and securely seal the same in the secrecy envelope provided. 25 P.S. § 3150.16(a). The secrecy envelope "shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector." *Id.*
- 7 On August 27, 2020, Petitioner filed its: (1) Answer to the Secretary's New Matter; (2) Answer to the new matter filed by various Boards; and (3) an omnibus memorandum of law opposing the preliminary objections filed by several Boards.
- 8 In her application, the Secretary informed this Court that she had filed a motion in the aforementioned federal action urging the District Court to abstain from rendering a decision pursuant to *R.R. Comm'n of Tex. v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) (explaining that, where appropriate, a federal court may abstain from deciding a case to permit a state court the opportunity to resolve a state law question). Secretary's Application for Extraordinary Relief, 8/16/2020, at 17. This motion was later granted. See *Trump for President, Inc. v. Boockvar*, — F.Supp.3d —, —, 2020 WL 4920952, at *21 (W.D. Pa. 2020).
- 9 In addition, on August 18, 2020, Bucks, Chester, Montgomery, and Philadelphia County Boards of Election filed an Answer in Support of the Secretary's application. Likewise, on August 19, 2020, Armstrong, Bedford, Blair, Centre, Columbia, Dauphin, Fayette, Huntingdon, Indiana, Lackawanna, Lawrence, Lebanon, Montour, Northumberland, Venango, and York County Boards of Election also filed an answer joining the Secretary's application. Several of the remaining 67 counties filed no answer letters. On August 20, 2020, answers were filed by the Republican proposed intervenors, as well as proposed co-petitioners, The Common Cause Pennsylvania, The League of Women Voters of Pennsylvania, B-PEP, Make the Road PA, Patricia M. DeMarco, Danielle Graham Robinson, and Kathleen Wise.
- 10 The Secretary highlighted in her application for extraordinary relief to this Court that there was insufficient time to engage in full pre-trial proceedings and discovery before applications for summary relief could be filed. See Secretary's Application for Extraordinary Relief, 8/16/2020, at 13-14. In fact, the Secretary explained that because of all the uncertainties surrounding the case, it was unclear "whether discovery, dispositive motions, and a hearing were even necessary." *Id.* at 14 n.3. She maintained that Petitioner's application to expedite discovery and a hearing in Commonwealth Court was premature. Thus, the Secretary sought extraordinary review of the discrete legal claims alleged in the lawsuit as if at the summary relief stage of the case. Cognizant of our authority when exercising extraordinary jurisdiction, this Court granted the Secretary's request. See Order dated 9/1/2020. Accordingly, because of the intense time pressure confronting this Court, we do not address the various procedural filings in the case and, rather, address only the five discrete legal claims before us. See 42 Pa.C.S. § 726 (this Court may "assume plenary jurisdiction of [any matter pending before any court] at any stage thereof and enter a final order or otherwise cause right and justice to be done").
- 11 After this Court granted the Secretary's application and set a schedule for supplemental filings, Bryan Cutler and Kerry Bennighoff, Speaker and Majority Leader of the Pennsylvania House of Representatives, respectively, filed an Application to Intervene, while State Senator Jay Costa, on behalf of the Senate Democratic Caucus filed an Application to Intervene, which was later amended to include State Representative Frank Dermody, on behalf of the House Democratic Caucus. Because of the necessary expediency of reaching a decision in this case, and given that adequate advocacy has been provided, these applications, submitted close to this Court's deadline for supplemental filings, are denied. In any case, the requests are moot given the issuance of our decision.
- 12 Notably, while Petitioner has styled its requested relief as "injunctive" in reality it seeks declaratory relief. We will treat its prayers for relief accordingly. In this regard, as noted, essentially, we are treating the matter as if it is at the summary relief stage. See *Hosp. & Healthsystem Ass'n of Pa. v. Com.*, 621 Pa. 260, 77 A.3d 587, 602 (2013) ("An application for summary relief may be granted if a party's right to judgment is clear and no material issues of fact are in dispute.") (citation

omitted). See also [Pa.R.A.P. 1532\(b\)](#) (providing that “[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter, the court may on application enter judgment if the right of the applicant thereto is clear.”).

13 Under Count I, Petitioner also sought relief “in the form of an affirmative injunction requiring that county Boards are required to evaluate the particular facts and circumstances in their jurisdictions and develop a reasonable plan reflecting the needs of the citizens of the county to ensure the expedient return of mail-in ballots.” Petition at 47, ¶ 166. Petitioner accurately concedes that it must establish a clear right to this relief. *Id.* at ¶ 167; see [Roberts v. Bd. of Directors of Sch. Dist. of City of Scranton](#), 462 Pa. 464, 341 A.2d 475, 478 (1975) (explaining that, “for a mandatory injunction to issue, it is essential that a clear right to relief in the plaintiff be established”). To the extent that Petitioner continues to seek injunctive relief in this form, we summarily decline the request, as there simply is no legal authority that would allow this Court to mandate that the county boards of election “evaluate the particular facts and circumstances in their jurisdictions and develop a reasonable plan reflecting the needs of the citizens of the county to ensure the expedient return of mail-in ballots.” In other words, Petitioner cannot establish a clear right to relief with regard to their request for a mandatory injunction.

14 Section 3151 of the Election Code states, in full, as follows:

Each county board of elections shall cause its office to remain open, in charge of one or more members of the board, during the entire duration of each primary and election, and after the close of the polls, until all the ballot boxes and returns have been received in the office of the county elections board, or received in such other place as has been designated by the board.

[25 P.S. § 3151.](#)

15 We note that the Secretary has issued guidelines in this regard specifying that the Boards “may provide voters with access to a secure ballot return receptacle.” See Secretary’s Post-Submission Communication dated 8/24/2020, setting forth the Secretary’s Absentee and Mail-in Ballot Return Guidance at 1.1. Additionally, and consistent with the requirement that all votes must be cast by Election Day, these guidelines specify that: “Authorized personnel should be present at ballot return sites immediately prior to 8:00 p.m. or at the time the polls should otherwise be closed”; “At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot sites, and drop-boxes must be closed and locked”; and “Staff must ensure that no ballots are returned to ballot return sites after the close of the polls.” *Id.* at 3.3.

16 Act 77, *inter alia*, requires Boards to verify an applicant’s submitted information to determine whether the applicant is “qualified to receive an official mail-in ballot.” [25 P.S. § 3150.12b\(a\)](#). After approving an application, the Election Code, as amended by Act 77, instructs that “the board shall deliver or mail official mail-in ballots to the additional electors within 48 hours.” [25 P.S. § 3150.15.](#)

17 The Election Code grants courts of common pleas the authority to address situations which arise on the day of a primary or general election, [25 P.S. § 3046](#). [Section 3046](#) entitled “Duties of common pleas court on days of primaries and elections,” provides:

During such period said court shall act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act.

[25 P.S. § 3046.](#)

18 The affected counties were Allegheny, Dauphin, Delaware, Erie, Montgomery, and Philadelphia.

19 As adopted in Pennsylvania, the UOCAVA provides that military and overseas ballots will be counted if received by the county board by “5:00 p.m. on the seventh day following the election,” which this year will be November 10, 2020. [25 Pa.C.S. § 3511.](#)

As an alternative remedy, Petitioner proposes that each ballot could have an individualized deadline twenty-one days after the specific ballot is mailed by the county, so long as it is received before the UOCAVA deadline. Petition at 50, ¶ 108, 179.

20 She specifically recommends that the Court “order that ballots mailed by voters by 8:00 p.m. on Election Day be counted if they are otherwise valid and received by the county boards of election by November 6, 2020. Ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible, should enjoy a presumption that they were mailed by Election Day.” Secretary’s Application at 29. We observe that this proposal therefore requires that all votes be cast by Election Day but does not disenfranchise a voter based upon the absence or illegibility of a USPS postmark that is beyond the control of the voter once she places her ballot in the USPS delivery system.

- 21 The Secretary observes that other jurisdictions have likewise granted temporary extensions when faced with natural disasters, such as hurricanes. Secretary's Application at 28 (citing *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016); *Georgia Coalition for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016)).
- 22 Respondent further observes that the Pennsylvania Constitution specifically directs the Legislature to "provide a manner in which, and the time and place at which" a qualified elector can submit an absentee ballot. *Pa. Const. art. VII, § 14(a)*.
- 23 In so arguing, Respondent seemingly ignores the fact that allowing the tabulation of ballots received after Election Day does not undermine the existence of a federal Election Day, where the proposal requires that ballots be cast by Election Day, similar to the procedure under federal and state law allowing for the tabulation of military and overseas ballots received after Election Day.
- 24 **Section 3511** addresses the timeline for the return of ballots of uniform military and overseas voters and provides for the counting of such votes if delivered to the county board by 5 p.m. on the seventh day after Election Day:
- § 3511. Receipt of voted ballot**
- (a) Delivery governs.**--A valid military-overseas ballot cast under section 3509 (relating to timely casting of ballot) shall be counted if it is delivered by 5 p.m. on the seventh day following the election to the address that the appropriate county election board has specified.
- (b) Rule regarding postmarks.**--If, at the time of completing a military-overseas ballot and balloting materials, the voter has declared under penalty of perjury that the ballot was timely submitted, the ballot may not be rejected on the basis that it has a late postmark, an unreadable postmark or no postmark.
- 25 *Pa.C.S. § 3511*.
- 25 We recognize that we rejected a very similar argument presented in *Disability Rights Pennsylvania* on May 15, 2020, weeks prior to the Primary. *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, — Pa. —, 2020 WL 2820467 (May 15, 2020). At that time, the potential of voter disenfranchisement was speculative as many unknowns existed relating to the magnitude of the pandemic, the extent to which voters would seek mail-in applications, and the ability of Boards to handle the increase. Those uncertainties no longer exist in light of our experience in the 2020 Primary where thousands of voters would have been disenfranchised but for the emergency actions of the courts of common pleas and the Governor.
- 26 We likewise incorporate the Secretary's recommendation addressing ballots received within this period that lack a postmark or other proof of mailing, or for which the postmark or other proof of mailing is illegible. Accordingly, in such cases, we conclude that a ballot received on or before 5:00 p.m. on November 6, 2020, will be presumed to have been mailed by Election Day unless a preponderance of the evidence demonstrates that it was mailed after Election Day. We emphasize that voters utilizing the USPS must cast their ballots prior to 8:00 p.m. on Election Day, like all voters, including those utilizing drop boxes, as set forth *supra*. We refuse, however, to disenfranchise voters for the lack or illegibility of a postmark resulting from the USPS processing system, which is undeniably outside the control of the individual voter.
- 27 The Caucus does not advance argument on the merits of this issue.
- 28 A provisional ballot is a ballot cast by an individual who claims to be properly registered and eligible to vote at the election district, but whose name does not appear on the district register and whose registration cannot be determined. *25 P.S. § 3050(a.4)(1)*.
- 29 The Secretary's position herein is consistent with the directive that the Department of State distributed to the counties on May 28, 2020, indicating that there is no statutory requirement nor any authority for setting aside an absentee or mail-in ballot exclusively because the voter forgot to insert it into the official election ballot envelope. See Exhibit B to Petition, Directive of Deputy Secretary for Elections and Commissions Jonathan M. Marks to the county election directors, May 28, 2020. The directive further indicated that "[t]o preserve the secrecy of such ballots, the board of elections in its discretion may develop a process by which the members of the pre-canvass or canvass boards insert these ballots into empty official ballot envelopes or privacy sleeves until such time as they are ready to be tabulated." *Id.* See also Exhibit J to Petition, Guidance for Missing Official Election Ballot Envelopes.
- 30 **Article VII, Section 4** ("Method of elections; secrecy in voting") states, in full, that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." *Pa Const. art. VII, § 4*.
- 31 Section 1932 of our Statutory Construction Act, "Statutes in pari materia," provides:
- (a) Statutes or parts of statutes are *in pari materia* when they relate to the same persons or things or to the same class of persons or things.
- (b) Statutes *in pari materia* shall be construed together, if possible, as one statute.

1 Pa.C.S. § 1932.

32 Specifically, Petitioner maintains that the poll watcher residency requirement does not violate the United States Constitution's First Amendment, the Fourteenth Amendment, the Equal Protection Clause, or the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

33 Section 2687(a) provides:

Each candidate for nomination or election at any election shall be entitled to appoint two watchers for each election district in which such candidate is voted for. Each political party and each political body which had nominated candidates in accordance with the provisions of this act, shall be entitled to appoint three watchers at any general, municipal or special election for each election district in which the candidates of such party or political body are to be voted for. Such watchers shall serve without expense to the county.

25 P.S. § 2687(a).

34 The Caucus does not advocate in favor of finding the poll watcher residency requirement unconstitutional.

35 Respondent has not asserted that the Pennsylvania Constitution offers greater protection under the circumstances presented. Thus, for purposes of our review, we treat them as co-extensive.

1 *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

2 *United States v. Classic*, 313 U.S. 299, 314, 315, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); accord *United States v. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 59 L.Ed. 1355 (1915).

3 Pa. Const. art. I, § V.

4 *League of Women Voters of Pa. v. Pa.*, 645 Pa. 1, 178 A.3d 737, 809 (2018); see *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 523 (1914).

5 *Wallbrecht v. Ingram*, 164 Ky. 463, 175 S.W. 1022, 1026 (1915).

6 *Id.* at 1027.

7 *League of Women Voters*, 178 A.3d at 822 (citing Pa. Const. art. V, §§ 1, 2, 10); see *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (“[A] denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.”).

8 *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006) (*per curiam*).

9 *League of Women Voters*, 178 A.3d at 814.

10 See *In re General Election-1985*, 109 Pa.Cmwlth. 604, 531 A.2d 836, 839 (1987) (“To permit an election to be conducted where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control ... would be inconsistent with the purpose of the election laws.”).

11 *League of Women Voters*, 178 A.3d at 814; cf. *Working Families Party v. Commonwealth*, — Pa. —, 209 A.3d 270, 306-07 (2019) (Wecht, J., concurring and dissenting) (“The Free and Equal Elections Clause is compromised where the regulatory approach adopted by the legislature has the well-documented effect of ... depressing voter enthusiasm and participation.”).

12 Examining the Finances and Operations of the United States Postal Service During COVID-19 and Upcoming Elections: Hearing Before the S. Homeland Security Comm., 116th Cong. (Aug. 21, 2020).

13 Protecting the Timely Delivery of Mail, Medicine, and Mail-in Ballots: Hearing Before the H. Oversight & Gov't Reform Comm., 116th Cong. (Aug. 24, 2020).

14 See Pa. Const. art. VII, § 6 (“All laws regulating the holding of elections by the citizens ... shall be uniform throughout the State.”); *Kuznik v. Westmoreland Cty. Bd. of Comm'rs*, 588 Pa. 95, 902 A.2d 476, 490 (2006) (“We have held that ‘to be uniform in the constitutional sense ... a law [regulating the holding of elections] must treat all persons in the same circumstances alike.’”) (quoting *Kerns v. Kane*, 363 Pa. 276, 69 A.2d 388, 393 (1949)).

15 Cf. *United States v. Starzecpyzel*, 880 F.Supp. 1027, 1046 (S.D.N.Y. 1995) (noting the risk of “natural variations” in handwriting and citing factors such as “disease, intoxication and the passage of time,” and citing a putative handwriting expert as observing that “[s]ome people have a lot of individuality present in their writing and other people do not”).

16 See, e.g., *Ariz. Dem. Party v. Hobbs*, CV-20-01143-PHX-DLR, — F.Supp.3d —, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020); *Richardson v. Tex. Sec. of State*, SA-19-cv-00963-OLG, — F.Supp.3d —, 2020 WL 5367216 (W.D. Tex. Sept. 8, 2020); *Frederick v. Lawson*, 1:19-cv-01959-SEB-MDJ, — F. Supp. 3d —, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020); see also *League of Un. Latin Am. Citizens of Iowa v. Pate*, Polk Cty. CVCV056403, 2018 WL 3946147, at *1 (Iowa Aug. 10, 2018) (enjoining use of signature-matching provisions in Iowa's Election Code); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018) (enjoining enforcement of Georgia statute permitting rejection of absentee ballots and ballot applications due to alleged signature mismatch), *emergency motion for stay of injunction pending appeal denied*, *Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262 (11th Cir. 2019); *Saucedo v. Gardner*, 335 F.

Supp. 3d 202, 222 (D. N.H. 2018) (holding that New Hampshire's signature-match requirement for absentee ballots was facially unconstitutional under the Fourteenth Amendment); *Florida Dem. Party v. Detzner*, 4:16cv607-MW/CAS, 2016 WL 6090943, at *9 (N.D. Fla. Oct. 16, 2016) (striking down Florida's mail-in ballot signature match law as violative of the Fourteenth Amendment); *Zessar v. Helander*, 05 C 1917, 2006 WL 642646, at *10 (N.D. Ill. 2006) (finding that the Illinois Election Code provisions requiring signature comparisons on absentee ballots violated voters' due process rights); *La Follette v. Padilla*, CPF-17-515931, 2018 WL 3953766, at *3 (Cal. Super. Ct. Mar. 5, 2018) (holding that California Election Code ballot signature-mismatch provision facially violates due process); cf. Susie Armitage, *Handwriting Disputes Cause Headaches for Some Absentee Voters*, ProPublica (Nov. 5, 2018), www.propublica.org/article/handwriting-disputes-cause-headaches-for-some-absentee-voters (discussing legal challenges to signature-match laws).

17 *Bush v. Gore*, 531 U.S. 98, 109, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (*per curiam*).

18 During the pendency of this appeal, Secretary Boockvar issued a guidance document that, in furtherance of "consistency across the 67 counties," instructs election officials that "[t]he Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections." Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes at 3 (Sept. 11, 2020) www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/Examination%20of%20Absentee%20and%20Mail-In%20Ballot%20Return%20Envelopes.pdf.

19 *Borough of Pleasant Hills v. Carroll*, 182 Pa.Super. 102, 125 A.2d 466, 469 (1956) (*en banc*) (emphasis in original).

20 *Commonwealth ex rel. Bell v. Powell*, 249 Pa. 144, 94 A. 746, 748 (1915) (cleaned up).

1 Article I, Section 5 of the Pennsylvania Constitution provides as follows:

Elections 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. 1, § 5.

2 Section 3046 of the Election Code provides courts of common pleas with authority, with some latitude, to make rulings on Election Day to secure compliance with the election laws. 25 P.S. § 6046. Specifically, a judge or judges from each county will remain in session on Election Day to "act as a committing magistrate for any violation of the election laws; shall settle summarily controversies that may arise with respect to the conduct of the election; shall issue process, if necessary, to enforce and secure compliance with the election laws; and shall decide such other matters pertaining to the election as may be necessary to carry out the intent of this act." *Id.* The Commonwealth Court relied on Section 3046 in deciding *In re General Election-1985*, 109 Pa.Cmwlth. 604, 531 A.2d 836 (1987) (in light of a flood occurring on election day, the court of common pleas had the authority to suspend voting in certain districts until the emergency was over), *appeal denied*, 518 Pa. 653, 544 A.2d 963 (1988).

The Majority relies on *In re General Election-1985* to support our broad equitable powers to act in this case despite the limitations in Section 3046.

3 In this regard, we note that 25 P.S. § 3150.15 provides that county boards of elections must deliver the ballots to the voters within forty-eight hours **after** approval of the application. See 25 P.S. § 3150.15 ("As additional applications are received and approved, the board shall deliver or mail official mail-in ballots to the additional electors within 48 hours.").

4 To the extent that the non-severability clause in Section 11 of Act 77, 1 Pa.C.S. § 1925 is enforceable, I do not view the election specific remedies at issue here as-applied constitutional violation as triggering the draconian consequence. In the context of the COVID-19 pandemic, applying the non-severability provision to void Act 77 in its entirety would itself be unconstitutional, as it would disenfranchise a massive number of Pennsylvanians from the right to vote in the upcoming election.

More broadly, in *Stilp v. Commonwealth*, [588 Pa. 539], 905 A.2d 918, 978 ([Pa.] 2006), this Court declined to apply an identically worded non-severability provision, *id.* at 973, refusing to allow the General Assembly to "dictate the effect of a judicial finding that a provision in an act is 'invalid.'" *Id.* at 976. Here, as in *Stilp*, Act 77's boilerplate non-severability provision "sets forth no standard for measuring non-severability, but instead simply purports to dictate to the courts how they must decide severability." *Id.* at 973.

1 Intervenors refers to the Republican Party of Pennsylvania and Joseph B. Scarnati III, President Pro Tempore, Jake Corman, Majority Leader of the Pennsylvania Senate, Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives.

2 A stay may be granted where Petitioners, "make a substantial case on the merits and show that without the stay, irreparable injury will be suffered. Additionally, before granting a request for a stay, the court must be satisfied the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest." *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*, 573 A.2d 1001, 1003 (1990).

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DONALD J. TRUMP FOR
PRESIDENT, INC., et al., Plaintiffs

v.

Kathy BOOCKVAR, in her capacity
as Secretary of the Commonwealth
of Pennsylvania, et al., Defendants.

No. 2:20-cv-966

|
Signed 10/10/2020

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OPINION

[J. Nicholas Ranjan](#), United States District Judge

*1 Plaintiffs in this case are President Trump's reelection campaign, the Republican National Committee, and several other Republican congressional candidates and electors. They originally filed this suit, alleging federal and state constitutional violations stemming from Pennsylvania's

implementation of a mail-in voting plan for the upcoming general election.

Since then, the Pennsylvania Supreme Court issued a decision involving similar claims, which substantially narrowed the focus of this case. And Secretary of the Commonwealth, Kathy Boockvar, issued additional election “guidance,” which further narrowed certain of the claims.

Therefore, as this case presently stands, only three claims remain. First, whether the use of so-called “drop boxes”¹ for mail-in ballots is unconstitutional, given the lack of guidance or mandates that those drop boxes have security guards to man them. Second, whether the Secretary's guidance as to mail-in ballots—specifically, her guidance that county election boards should not reject mail-in ballots where the voter's signature does not match the one on file—is unconstitutional. Third, whether Pennsylvania's restriction that poll watchers be residents in the county for which they are assigned, as applied to the facts of this case, is unconstitutional.

In order to present these claims to the Court on a complete record, the parties engaged in extensive fact and expert discovery, and have filed cross-motions for summary judgment. No party has raised a genuine dispute of material fact that would require a trial, and the Court has found none. As such, the parties' cross-motions for summary judgment are ready for disposition.

After a careful review of the parties' submissions and the extensive evidentiary record, the Court will enter judgment in favor of Defendants on all of Plaintiffs' federal-constitutional claims, decline to exercise supplemental jurisdiction over the state-constitutional claims, and dismiss this case. This is so for two main reasons.

First, the Court concludes that Plaintiffs lack Article III standing to pursue their claims. Standing, of course, is a necessary requirement to cross the threshold into federal court. Federal courts adjudicate cases and controversies, where a plaintiff's injury is concrete and particularized. Here, however, Plaintiffs have not presented a concrete injury to warrant federal-court review. All of Plaintiffs' remaining claims have the same theory of injury—one of “vote dilution.” Plaintiffs fear that absent implementation of the security measures that they seek (guards by drop boxes, signature comparison of mail-in ballots, and poll watchers), there is a risk of voter fraud by other voters. If another person engages

in voter fraud, Plaintiffs assert that their own lawfully cast vote will, by comparison, count for less, or be diluted.

*2 The problem with this theory of harm is that it is speculative, and thus Plaintiffs' injury is not “concrete”—a critical element to have standing in federal court. While Plaintiffs may not need to prove actual voter fraud, they must at least prove that such fraud is “certainly impending.” They haven't met that burden. At most, they have pieced together a sequence of uncertain assumptions: (1) they assume potential fraudsters may attempt to commit election fraud through the use of drop boxes or forged ballots, or due to a potential shortage of poll watchers; (2) they assume the numerous election-security measures used by county election officials may not work; and (3) they assume their own security measures may have prevented that fraud.

All of these assumptions could end up being true, and these events could theoretically happen. But so could many things. The relevant question here is: are they “certainly impending”? At least based on the evidence presented, the answer to that is “no.” And that is the legal standard that Plaintiffs must meet. As the Supreme Court has held, this Court cannot “endorse standing theories that rest on speculation about the decisions of independent actors.” See *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013).

Second, even if Plaintiffs had standing, their claims fail on the merits. Plaintiffs essentially ask this Court to second-guess the judgment of the Pennsylvania General Assembly and election officials, who are experts in creating and implementing an election plan. Perhaps Plaintiffs are right that guards should be placed near drop boxes, signature-analysis experts should examine every mail-in ballot, poll watchers should be able to man any poll regardless of location, and other security improvements should be made. But the job of an unelected federal judge isn't to suggest election improvements, especially when those improvements contradict the reasoned judgment of democratically elected officials. See *Andino v. Middleton*, — U.S. —, — S.Ct. —, —, — L.Ed.2d —, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J. concurring) (state legislatures should not be subject to “second-guessing by an unelected federal judiciary,” which is “not accountable to the people”) (cleaned up).

Put differently, “[f]ederal judges can have a lot of power—especially when issuing injunctions. And sometimes we may even have a good idea or two. But the Constitution sets out our

sphere of decision-making, and that sphere does not extend to second-guessing and interfering with a State's reasonable, nondiscriminatory election rules.” *New Georgia Project v. Raffensperger*, — F.3d —, —, 2020 WL 5877588, at *4 (11th Cir. Oct. 2, 2020).

As discussed below, the Court finds that the election regulations put in place by the General Assembly and implemented by Defendants do not significantly burden any right to vote. They are rational. They further important state interests. They align with the Commonwealth's elaborate election-security measures. They do not run afoul of the United States Constitution. They will not otherwise be second-guessed by this Court.

BACKGROUND

I. Procedural Background

A. Plaintiffs' original claims.

On June 29, 2020, Plaintiffs filed their original complaint in this case against Defendants, who are the Secretary of the Commonwealth and the 67 county boards of elections. [ECF 4]. With their lawsuit, Plaintiffs challenged a number of Pennsylvania's procedures with respect to mail-in voting—in particular, the use of drop boxes and the counting of mail-in ballots that contained certain procedural defects. *See [id.]*. Shortly after filing their original complaint, Plaintiffs moved for expedited discovery and an expedited declaratory-judgment hearing. [ECF 6]. Defendants opposed the motion. The Court partially granted the motion, scheduled a speedy hearing, and ordered expedited discovery before that hearing. [ECF 123; ECF 124].

*3 After Plaintiffs filed the original complaint, many non-parties sought to intervene in the action, including several organizations.² The Court granted all intervention motions. [ECF 309].

Defendants and Intervenors moved to dismiss the original complaint. In response, Plaintiffs filed an amended complaint. [ECF 234]. The amended complaint maintained the gist of the original, but added two new counts and made a variety of other drafting changes. *See* [ECF 242]. Defendants and Intervenors moved to dismiss the first amended complaint, too, primarily asking the Court to abstain and stay the case.

Plaintiffs' first amended complaint asserted nine separate counts, but they could be sorted into three overarching categories.

1. Claims alleging vote dilution due to unlawful ballot collection and counting procedures.

The first category covered claims related to allegedly unlawful procedures implemented by some Defendants for the collection and counting of mail-in and absentee ballots. Those included claims related to (1) Defendants' uneven use of drop boxes and other satellite ballot-collection sites, (2) procedures for verifying the qualifications of voters applying in person for mail-in or absentee ballots, and (3) rules for counting non-compliant ballots (such as ballots submitted without a secrecy envelope, without an elector declaration, or that contained stray marks on the envelope).

In Count I, Plaintiffs alleged violations of the Elections Clause and the related Presidential Electors Clause of the U.S. Constitution. [ECF 234, ¶¶ 193-205]. Plaintiffs asserted that, under these provisions, only the state legislature may set the time, place, and manner of congressional elections and determine how the state chooses electors for the presidency. [*Id.* at ¶ 196].

In support of this claim, Plaintiffs alleged that Secretary Boockvar's guidance concerning the use of mail-in ballot drop boxes, whether county boards of elections must independently verify mail-in ballot applications, and the counting of non-compliant mail-in ballots, was an executive overreach—in that the Secretary's guidance allegedly violated certain provisions of the Election Code enacted by the Pennsylvania General Assembly. [*Id.* at ¶ 201]. Plaintiffs also claimed that the Secretary's “unlawful guidance” increased the risk of fraudulent or unlawful voting and infringed on the right to vote, which, they said, amounted to additional violations of the 1st and 14th Amendments to the U.S. Constitution. [*Id.* at ¶¶ 202-03].

In Count II, Plaintiffs alleged a violation of the Equal-Protection Clause under the 14th Amendment. [*Id.* at ¶¶ 206-15]. Plaintiffs asserted that the implementation of the foregoing (*i.e.*, mail-in ballot drop boxes, the verification of mail-in ballot applications, and the counting of non-compliant ballots) was different in different counties, thereby treating voters across the state in an unequal fashion. [*Id.* at ¶¶ 211-13].

*4 In Count III, Plaintiffs asserted a violation of the Pennsylvania State Constitution. [*Id.* at ¶¶ 216-22]. Plaintiffs alleged that the same actions and conduct that comprised Counts I and II also violated similar provisions of the Pennsylvania Constitution. [*Id.* at ¶ 220].

Finally, in Counts VI and VII, Plaintiffs alleged that Defendants violated provisions of the federal and state constitutions by disregarding the Election Code's notice and selection requirements applicable to “polling places.” [*Id.* at ¶¶ 237-52]. Plaintiffs alleged that drop boxes are “polling places,” and thus subject to certain criteria for site selection and the requirement that county election boards provide 20 days’ public notice. [*Id.* at ¶¶ 239-42]. Plaintiffs asserted that Defendants’ failure to provide this notice or select appropriate “polling places” in the primary election, if repeated in the general election, would create the risk of voter fraud and vote dilution. [*Id.* at ¶¶ 243-246].

2. Poll-watcher claims.

The second category of claims in the first amended complaint consisted of challenges to the constitutionality of Election-Code provisions related to poll watchers.

In Count IV, Plaintiffs alleged violations of the 1st and 14th Amendments. These claims had both a facial and an as-applied component. [ECF 234, ¶ 230 (“On its face and as applied to the 2020 General Election ...”).].

First, Plaintiffs alleged that 25 P.S. § 2687 was facially unconstitutional because it “arbitrarily and unreasonably” limits poll watchers to serving only in their county of residence and to monitoring only in-person voting at the polling place on election day. [*Id.* at ¶ 226]. Second, Plaintiffs alleged that the same provision was unconstitutional as applied in the context of Pennsylvania's new vote-by-mail system, because these poll-watcher restrictions, combined with insecure voting procedures, create unacceptable risks of fraud and vote dilution. [*Id.* at ¶ 228]. Plaintiffs contended that these limitations make it “functionally impracticable” for candidates to ensure that they have poll watchers present where ballots are deposited and collected, given the widespread use of remote drop boxes and other satellite collection sites. [*Id.*].

Count V was the same as Count IV, but alleged that the same poll-watching restrictions violated the Pennsylvania Constitution, too. [*Id.* at ¶ 234].

3. In-person voting claims.

The third category of claims consisted of challenges to the procedures for allowing electors to vote in person after requesting a mail-in ballot.

That is, in Counts VIII and IX, Plaintiffs asserted that the Election Code permits an elector that has requested a mail-in ballot to still vote in person so long as he remits his spoiled ballot. [ECF 234, ¶¶ 253-267]. Plaintiffs asserted that during the primary, some counties allowed such electors to vote in person, while others did not, and they fear the same will happen in the general election. [*Id.* at ¶¶ 255, 259]. Plaintiffs also asserted that some counties allowed electors who had voted by mail to vote in person, in violation of the Election Code. [*Id.* at ¶¶ 257-58]. Plaintiffs alleged that this conduct also violates the federal and state constitutional provisions concerning the right to vote and equal protection. [*Id.* at ¶¶ 261, 265].

B. The Court's decision to abstain.

*5 Upon consideration of Defendants’ and Intervenors’ motions to dismiss the first amended complaint, on August 23, 2020, the Court issued an opinion abstaining under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and temporarily staying the case. [ECF 409, 410].

In doing so, the Court determined that the three requisite prongs for *Pullman* abstention were met, and that the discretionary considerations weighed in favor of abstention. [ECF 409, p. 3 (“[Under *Pullman*, federal courts abstain] if (1) doing so requires interpretation of ‘unsettled questions of state law’; (2) permitting resolution of the unsettled state-law questions by state courts would ‘obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims’; and (3) an ‘erroneous construction of state law would be disruptive of important state policies[.]’” (citing *Chez Sez III Corp. v. Township of Union*, 945 F.2d 628, 631 (3d Cir. 1991))]; *id.* at p. 30 (explaining that after the three prongs of *Pullman* abstention are met, the court must “make a discretionary determination of whether abstention is appropriate given the particular facts

of this case,” which requires weighing “such factors as the availability of an adequate state remedy, the length of time the litigation has been pending, and the impact of delay on the litigants.” (cleaned up)].

The Court found that abstaining under *Pullman* was appropriate because of several unresolved ambiguities in Pennsylvania's Election Code. Specifically, the Court found that there were significant ambiguities as to whether the Election Code (1) permitted delivery of ballots to locations other than the county election board's headquarters, such as drop boxes, (2) permitted counties to count ballots that were not placed within the “secrecy envelope” (*i.e.*, “naked ballots”), (3) considered drop boxes and other ballot-collection sites as “polling places,” as defined in the Election Code, and (4) required counties to automatically verify ballot applications for mail-in ballots (where the person applied for the ballot in person), even if there was no “bona fide objection” to the application. [ECF 409, pp. 17-23].

The Court explained that each of these ambiguities, if settled, would significantly narrow—or even resolve—some of Plaintiffs’ claims. As the Court explained, for example, if a state court interpreted the Election Code to disallow drop boxes, Plaintiffs would obtain their requested relief (*i.e.*, no drop boxes); alternatively, if drop boxes were authorized by the Election Code, then Plaintiffs’ allegations that drop boxes were illegal would be eliminated, which would, in turn, significantly affect the constitutional analysis of Plaintiffs’ claims. [*Id.* at pp. 25-28]. The same held true for “naked ballots,” the breadth of coverage of “polling places,” and the requisite verification for personal ballot applications.

The Court then explained that it was appropriate for it to abstain until a state court could interpret the ambiguous state law. [*Id.* at pp. 28-30]. The Court concluded that if it interpreted the ambiguous state law, there was a sufficient chance that a state court could disagree with the interpretation, which would render this Court's interpretation not only advisory, but disruptive to state policies. The Court noted that especially in the election context, states have considerable discretion to implement their own policies without federal intervention. Accordingly, because these were questions of uninterpreted state law that were sufficiently ambiguous, federalism and comity demanded that a state court, not this Court, be the first interpreter.

*6 Finally, the Court explained that, despite the imminence of the election, abstention was still proper. [*Id.* at pp.

30-33]. The Court noted that state-court litigation was already pending that would resolve some of the statutory ambiguities at issue. [*Id.* at p. 31]. Further, the Court highlighted three courses Plaintiffs could immediately take to resolve the statutory ambiguities: intervene in the pending state-court litigation; file their own state-court case; or appeal this Court's abstention decision to the Third Circuit, and then seek certification of the unsettled state-law issues in the Pennsylvania Supreme Court. [*Id.* at pp. 31-33].

Additionally, the Court explained that it would stay the entire case, despite several of Plaintiffs’ claims not being subject to *Pullman* abstention as they were not based on ambiguous state law. [*Id.* at pp. 34-37]. That's because, in its discretion, the Court determined it would be more efficient for this case to progress as a single proceeding, rather than in piecemeal fashion. [*Id.*]. However, the Court allowed any party to move to lift the stay as to the few claims not subject to *Pullman* abstention, if no state-court decision had been issued by October 5, 2020. [*Id.*].

On August 28, 2020, five days after the Court abstained, Plaintiffs moved to modify the Court's stay, and moved for a preliminary injunction. [ECF 414]. Plaintiffs requested, among other things, that the Court order Defendants to segregate, and not pre-canvass or canvass, all ballots that were returned in drop boxes, lacked a secrecy envelope, or were delivered by a third party. [*Id.*]. Plaintiffs also requested that the Court lift the stay by September 14, 2020, instead of October 5, 2020. [*Id.*].

The Court denied Plaintiffs’ motion for preliminary injunctive relief, finding that Plaintiffs failed to show they would be irreparably harmed. [ECF 444; ECF 445]. The Court also declined to move up the date when the stay would be lifted. [*Id.*]. The Court noted that, at the request of Secretary Boockvar, the Pennsylvania Supreme Court had already exercised its extraordinary jurisdiction to consider five discrete issues and clarify Pennsylvania law in time for the general election. [*Id.* at p. 1]. Since that case appeared to be on track, the Court denied Plaintiffs’ motion without prejudice, and the Court's abstention opinion and order remained in effect.

C. The Pennsylvania Supreme Court's decision.

On September 17, 2020, the Pennsylvania Supreme Court issued its decision in *Pennsylvania Democratic Party v. Boockvar*, — Pa. —, — A.3d —, 2020 WL 5554644

(Sept. 17, 2020). The court clarified three issues of state election law that are directly relevant to this case.

1. Counties are permitted under the Election Code to establish alternate ballot-collection sites beyond just their main county office locations.

The Pennsylvania Supreme Court first considered whether the Election Code allowed a Pennsylvania voter to deliver his or her mail-in ballot in person to a location other than the established office address of the county's board of election. *Boockvar*, — A.3d at —, 2020 WL 5554644, at *8. The court further considered the means by which county boards of election could accept hand-delivered mail-in ballots. *Id.*

Consistent with this Court's abstention opinion, the court found that “the parties’ competing interpretations of the Election Code on [these questions] are reasonable, rendering the Code ambiguous” on these questions. *Id.* After applying traditional principles of statutory interpretation, the court held that “the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.” *Id.* at —, 2020 WL 5554644, at *9. The court reached this conclusion due to “the clear legislative intent underlying Act 77 ... to provide electors with options to vote outside of traditional polling places.” *Id.*

*7 The respondents in that case further argued that this interpretation would cause county boards of election to “employ myriad systems to accept hand-delivered mail-in ballots,” which would “be unconstitutionally disparate from one another in so much as some systems will offer more legal protections to voters than others will provide” and violate the Equal-Protection Clause. *Id.* The court rejected this argument. It found that “the exact manner in which each county board of election will accept these votes is entirely unknown at this point; thus, we have no metric by which to measure whether any one system offers more legal protection than another, making an equal protection analysis impossible at this time.” *Id.*

2. Ballots lacking inner secrecy envelopes should not be counted.

The court next considered whether the boards of elections “must ‘clothe and count naked ballots,’ *i.e.*, place ballots

that were returned without the secrecy envelope into a proper envelope and count them, rather than invalidate them.” *Boockvar*, — A.3d at —, 2020 WL 5554644, at *21. The court concluded that they should not.

The court held that “the Legislature intended for the secrecy envelope provision [in the Election Code] to be mandatory.” *Id.* at —, 2020 WL 5554644, at *24. In other words, the relevant provisions “make clear the General Assembly's intention that, during the collection and canvassing processes, when the outer envelope in which the ballot arrived is unsealed and the sealed ballot removed, it should not be readily apparent who the elector is, with what party he or she affiliates, or for whom the elector has voted.” *Id.* The secrecy envelope “properly unmarked and sealed ensures that result,” and “[w]hatever the wisdom of the requirement, the command that the mail-in elector utilize the secrecy envelope and leave it unblemished by identifying information is neither ambiguous nor unreasonable.” *Id.*

As a result, the court ultimately concluded, “a mail-ballot that is not enclosed in the statutorily-mandated secrecy envelope must be disqualified.” *Id.* at —, 2020 WL 5554644, at *26

3. Pennsylvania's county-residency requirement for poll watchers is constitutional.

The final relevant issue the court considered was whether the poll-watcher residency requirement found in 25 P.S. § 2687(b) violates state or federal constitutional rights. *Boockvar*, — A.3d at —, 2020 WL 5554644, at *26. Relying on *Republican Party of Pennsylvania v. Cortés*, 218 F. Supp. 3d 396 (E.D. Pa. 2016), the court concluded that the poll-watcher residency provision “impose[d] no burden on one's constitutional right to vote and, accordingly, requires only a showing that a rational basis exists to be upheld.” *Id.* at —, 2020 WL 5554644, at *30. The court found rational-basis review was appropriate for three reasons.

First, “there is no individual constitutional right to serve as a poll watcher; rather, the right to do so is conferred by statute.” *Id.* (citation omitted). Second, “poll watching is not incidental to the right of free association and, thus, has no distinct First Amendment protection.” *Id.* (cleaned up). Third, “poll watching does not implicate core political speech.” *Id.* (citation omitted).

The court went on to find that there was a “clear rational basis for the county poll watcher residency requirement[.]” *Id.* That is, given “Pennsylvania has envisioned a county-based scheme for managing elections within the Commonwealth,” it is “reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve.” *Id.*

In upholding the constitutionality of the “county poll watcher residency requirement,” the court rejected the claim that “poll watchers are vital to protect against voter fraud and that because of the distribution of voters throughout Pennsylvania, the residency requirement makes it difficult to identify poll watchers in all precincts.” *Id.* The court concluded that the claims of “heightened election fraud involving mail-in voting” were “unsubstantiated” and “specifically belied by the Act 35 report issued by [Secretary Boockvar] on August 1, 2020.” *Id.* Moreover, the court held that the “speculative claim that it is ‘difficult’ for both parties to fill poll watcher positions in every precinct, even if true, is insufficient to transform the Commonwealth’s uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice.” *Id.*

*8 Based on the foregoing, the court declared “that the poll-watcher residency requirement does not violate the state or federal constitutions.” *Id.* at —, 2020 WL 5554644, at *31.

D. Plaintiffs’ notice of remaining claims.

Following the Pennsylvania Supreme Court’s decision, this Court lifted the stay it had imposed pursuant to the *Pullman* abstention doctrine and ordered the parties to identify the remaining viable claims and defenses in the case. [ECF 447].

In their notice, Plaintiffs took the position that nearly all their claims remained viable, with a few discrete exceptions. Plaintiffs conceded that their “federal and state constitutional claims of voter dilution solely on the basis that drop boxes and other collection sites are not statutorily authorized by the Pennsylvania Election Code [were] no longer viable.” [ECF 448, p. 4]. They also stated that their “facial challenge to the county residency requirement under 25 P.S. § 2687 is no longer a viable claim.” [*Id.* at p. 10]. Plaintiffs also moved for leave to amend their complaint a second time to add new allegations and a new claim relating to Secretary Boockvar’s recent signature-comparison guidance. [ECF 451].

Defendants and Intervenors, for their part, suggested that Plaintiffs’ claims had been substantially narrowed, if not outright mooted, by the Pennsylvania Supreme Court’s decision, and reminded the Court that their arguments for dismissal remained outstanding.

E. The Court’s September 23, 2020, memorandum orders.

In response to the notices filed by the parties and Plaintiffs’ motion for leave to amend the first amended complaint, the Court issued an order granting Plaintiffs’ motion, narrowing the scope of the lawsuit, and establishing the procedure for resolving the remaining claims. [ECF 459].

As to Plaintiffs’ proposed amendment to their complaint, the Court found that the new claim and allegations were relatively narrow, and thus amendment wouldn’t prejudice Defendants and Intervenors. [*Id.* at pp. 3-4]. As a result, the Court granted the motion. [*Id.* at p. 4].

The Court, however, did inform the parties that it would “continue to abstain under *Pullman* as to Plaintiffs’ claim pertaining to the notice of drop box locations and, more generally, whether the “polling place” requirements under the Election Code apply to drop-box locations.” [*Id.* at p. 5]. This was so because those claims involve still-unsettled issues of state law. The Court explained that the “fact that the Pennsylvania Supreme Court did not address this issue in its recent decision is immaterial” because the “propriety of *Pullman* abstention does not depend on the existence of parallel state-court proceedings.” [*Id.* (citing *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006))]. Moreover, Plaintiffs had several other avenues to pursue prompt interpretation of state law after this Court abstained. [*Id.* at p. 6].

The Court also informed the parties, for similar reasons, that it would continue to abstain with respect to Plaintiffs’ claims regarding Secretary Boockvar’s guidance that personal applications for mail-in ballots shall be accepted absent a “bona fide objection.” [ECF 460].

The Court found that “no Article III ‘case or controversy’ remain[ed] with respect to the claims on which the Pennsylvania Supreme Court effectively ruled in Plaintiffs’ favor on state-law grounds (*e.g.*, illegality of third-party ballot delivery; excluding ‘naked ballots’ submitted without inner-secrecy envelopes).” [ECF 459, p. 6]. Because there was “no reason to believe Defendants plan to violate what they themselves now agree the law requires,” the Court held that

Plaintiffs' claims were premature and speculative. [*Id.* at p. 7]. The Court therefore dismissed those claims as falling outside of its Article III power to adjudicate. [*Id.* (citations omitted)].

*9 To resolve the remaining claims, the Court directed the parties to file cross-motions for summary judgment presenting all arguments for dismissal or judgment under [Federal Rule of Civil Procedure 56](#). [*Id.* at pp. 8-10]. Before briefing on those motions, the Court authorized additional expedited discovery. [*Id.* at pp. 4-5]. The parties completed discovery and timely filed their motions; they identified no material disputes of fact; and therefore, the motions are now fully briefed and ready for disposition.

F. The claims now at issue.

Based on the Pennsylvania Supreme Court's prior ruling, this Court's prior decisions, Plaintiffs' nine-count Second Amended Complaint, and recent guidance issued by Secretary Boockvar, the claims remaining in this case are narrow and substantially different than those asserted at the outset of the case.

Drop Boxes (Counts I-III). Plaintiffs still advance a claim that drop boxes are unconstitutional, but in a different way. Now that the Pennsylvania Supreme Court has expressly held that drop boxes are authorized under the Election Code, Plaintiffs now assert that the use of "unmanned" drop boxes is unconstitutional under the federal and state constitutions, for reasons discussed in more detail below.

Signature Comparison (Counts I-III). Plaintiffs' newly added claim relates to signature comparison. Secretary Boockvar's September 2020 guidance informs the county boards that they are not to engage in a signature analysis of mail-in ballots and applications, and they must count those ballots, even if the signature on the ballot does not match the voter's signature on file. Plaintiffs assert that this guidance is unconstitutional under the federal and state constitutions.

Poll Watching (Counts IV, V). The Pennsylvania Supreme Court already declared that Pennsylvania's county-residency requirement for poll watchers is *facially* constitutional. Plaintiffs now only assert that the requirement, *as applied*, is unconstitutional under the federal and state constitutions.

The counts that remain in the Second Amended Complaint, but which are *not* at issue, are the counts related to where poll watchers can be located. That is implicated mostly by Counts VI and VII, and by certain allegations in Counts IV

and V. The Court continues to abstain from reaching that issue. Plaintiffs have filed a separate state lawsuit that would appear to address many of those issues, in any event. [ECF 549-22; ECF 573-1]. Counts VIII and IX concern challenges related to voters that have requested mail-in ballots, but that instead seek to vote in person. The Secretary issued recent guidance, effectively mooted those claims, and, based on Plaintiffs' positions taken in the course of this litigation, the Court deems Plaintiffs to have withdrawn Counts VIII and IX. [ECF 509, p. 15 n.4 ("[I]n the September 28 guidance memo, the Secretary corrected [her] earlier guidance to conform to the Election Code and states that any mail-in voter who spoils his/her ballot and the accompanying envelopes and signs a declaration that they did not vote by mail-in ballot will be allowed to vote a regular ballot. Therefore, Plaintiffs agree to withdraw this claim from those that still are being pursued.")].

II. Factual Background

A. Pennsylvania's Election Code, and the adoption of Act 77.

1. The county-based election system.

Pennsylvania's Election Code, first enacted in 1937, established a county-based system for administering elections. *See* [25 P.S. § 2641\(a\)](#) ("There shall be a county board of elections in and for each county of this Commonwealth, which shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code]."). The Election Code vests county boards of elections with discretion to conduct elections and implement procedures intended to ensure the honesty, efficiency, and uniformity of Pennsylvania's elections. *Id.* §§ [2641\(a\)](#), [2642\(g\)](#).

2. The adoption of Act 77.

*10 On October 31, 2019, the Pennsylvania General Assembly passed "Act 77," a bipartisan reform of Pennsylvania's Election Code. *See* [ECF 461, ¶¶ 91]; 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421).

Among other things, by passing Act 77, Pennsylvania joined 34 other states in authorizing "no excuse" mail-in voting by all qualified electors. *See* [ECF 461, ¶¶ 92]; [25 P.S. §§](#)

3150.11-3150.17; [ECF 549-11, p. 5 (“The largest number of states (34), practice no-excuse mail-in voting, allowing any persons to vote by mail regardless of whether they have a reason or whether they will be out of their jurisdiction on Election Day.”)]. Previously, a voter could only cast an “absentee” ballot if certain criteria were met, such as that the voter would be away from the election district on election day. *See* 1998 Pa. Legis. Serv. Act. 1998-18 (H.B. 1760), § 14.

Like the previous absentee voting system, Pennsylvania's mail-in voting system requires voters to “opt-in” by requesting a ballot from either the Secretary or the voter's county board of elections. *See* 25 P.S. §§ 3146.2(a), 3150.12(a). When requesting a ballot, the voter must provide, among other things, his or her name, date of birth, voting district, length of time residing in the voting district, and party choice for primary elections. *See* 25 P.S. §§ 3146.2(b), 3150.12(b). A voter must also provide proof of identification; namely, either a driver's license number or, in the case of a voter who does not have a driver's license, the last four digits of the voter's Social Security number, or, in the case of a voter who has neither a driver's license nor a Social Security number, another form of approved identification. 25 P.S. § 2602(z.5)(3). In this respect, Pennsylvania differs from states that automatically mail each registered voter a ballot—a practice known as “universal mail-in voting.” [ECF 549-11, p. 6] (“[N]ine states conduct universal vote-by-mail elections in which the state (or a local entity, such [as] a county or municipality) mails all registered voters a ballot before each election without voters’ [sic] having to request them.”).

3. The COVID-19 pandemic.

Since early 2020, the United States, and Pennsylvania, have been engulfed in a viral pandemic of unprecedented scope and scale. [ECF 549-8, ¶ 31]. In that time, COVID-19 has spread to every corner of the globe, including Pennsylvania, and jeopardized the safety and health of many people. [*Id.* at ¶¶ 31, 38-39, 54-55, 66]. As of this date, more than 200,000 Americans have died, including more than 8,000 Pennsylvanians. *See* Covid in the U.S.: Latest Map and Case Count, The New York Times, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Oct. 10, 2020); COVID-19 Data for Pennsylvania, Pennsylvania Department of Health, available at <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (last visited Oct. 10, 2020).

There have been many safety precautions that Pennsylvanians have been either required or urged to take, such as limiting participation in large gatherings, maintaining social distance, and wearing face coverings. [ECF 549-8, ¶¶ 58, 63-65]. The threat of COVID-19 is likely to persist through the November general election. [*Id.* at ¶¶ 53-56, 66-68].

B. Facts relevant to drop boxes.

*11 Pennsylvania's county-based election system vests county boards of elections with “jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions” of the Election Code. 25 P.S. § 2641(a). The Election Code further empowers the county boards to “make and issue such rules, regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” *Id.* at § 2642(f). The counties are also charged with the responsibility to “purchase, preserve, store and maintain primary and election equipment of all kinds, including voting booths, ballot boxes and voting machines.” *Id.* at § 2642(c).

As noted above, in *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court interpreted the Election Code, which allows for mail-in and absentee ballots to be returned to the “county board of election,” to “permit[] county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.” — A.3d at —, 2020 WL 5554644, at *10.

Thus, it is now settled that the Election Code permits (but does not require) counties to authorize drop boxes and other satellite-collection locations for mailed ballots. 25 P.S. § 3150.16(a). Pennsylvania is not alone in this regard—as many as 34 other states and the District of Columbia authorize the use of drop boxes or satellite ballot collection sites to one degree or another. [ECF 549-11, p. 8, fig. 4]. Indeed, Secretary Boockvar stated that as many as 16% of voters nationwide had cast their ballots using drop boxes in the 2016 general election, including the majority of voters in Colorado (75%) and Washington (56.9%). [ECF 547, p. 18 (citing ECF 549-16)].

1. Secretary Boockvar's guidance with respect to drop boxes.

Since the passage of Act 77, Secretary Boockvar has issued several guidance documents to the counties regarding the counties' implementation of mail-in voting, including guidance with respect to the use of drop boxes. [ECF 504-21; 504-22; 504-23; 504-24; 504-25; 571-1, Ex. E]. In general terms, the Secretary's guidance as to drop boxes informed the counties that the use of drop boxes was authorized by the Election Code and recommended "best practices" for their use. Her latest guidance offered standards for (1) where drop boxes should be located, [ECF 504-23, § 1.2], (2) how drop boxes should be designed and what signage should accompany them, [*id.* at §§ 2.2-2.3], (3) what security measures should be employed, [*id.* at § 2.5], and (4) what procedures should be implemented for collecting and returning ballots to the county election office, [*id.* at §§ 3.1-3.3, 4].

As to the location of drop boxes, the Secretary recommended that counties consider the following criteria, [*id.* at § 1.2]:

- Locations that serve heavily populated urban/suburban areas, as well as rural areas;
- Locations near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes;
- Locations that are easily recognizable and accessible within the community;
- Locations in areas in which there have historically been delays at existing polling locations, and areas with historically low turnout;
- Proximity to communities with historically low vote by mail usage;
- Proximity to language minority communities;
- Proximity to voters with disabilities;
- Proximity to communities with low rates of household vehicle ownership;
- Proximity to low-income communities;
- Access to accessible and free parking; and
- The distance and time a voter must travel by car or public transportation.

With respect to drop-box design criteria, the Secretary recommended to counties, [*id.* at § 2.2]:

- *12 • Hardware should be operable without any tight grasping, pinching, or twisting of the wrist;
- Hardware should require no more than 5 lbs. of pressure for the voter to operate;
- Receptacle should be operable within reach-range of 15 to 48 inches from the floor or ground for a person utilizing a wheelchair;
- The drop-box should provide specific points identifying the slot where ballots are inserted;
- The drop-box may have more than one ballot slot (e.g. one for drive-by ballot return and one for walk-up returns);
- To ensure that only ballot material can be deposited and not be removed by anyone but designated county board of election officials, the opening slot of a drop-box should be too small to allow tampering or removal of ballots; and
- The opening slot should also minimize the ability for liquid to be poured into the drop-box or rainwater to seep in.

The Secretary's guidance as to signage recommended, [*id.* at § 2.3]:

- Signage should be in all languages required under the federal Voting Rights Act of 1965 ([52 U.S.C. Sec. 10503](#));
- Signage should display language stating that counterfeiting, forging, tampering with, or destroying ballots is a second-degree misdemeanor pursuant to sections 1816 and 1817 of the Pennsylvania Election Code ([25 P.S. §§ 3516 and 3517](#));
- Signage should also provide a statement that third-party return of ballots is prohibited unless the person returning the ballot is rendering assistance to a disabled voter or an emergency absentee voter. Such assistance requires a declaration signed by the voter and the person rendering assistance; and
- Signage should provide a statement requesting that the designated county elections official should be notified immediately in the event the receptacle is full, not

functioning, or is damaged in any fashion, and should provide a phone number and email address for such purpose.

With respect to ballot security, the Secretary stated that county boards should implement the following security measures, [*id.* at § 2.5]:

- Only personnel authorized by the county board of elections should have access to the ballots inside of a drop-box;
 - Drop-boxes should be secured in a manner to prevent their unauthorized removal;
 - All drop-boxes should be secured by a lock and sealed with a tamper-evident seal. Only authorized election officials designated by the county board of elections may access the keys and/or combination of the lock;
 - Drop-boxes should be securely fastened in a manner as to prevent moving or tampering, such as fastening the drop-box to concrete or an immovable object;
 - During the hours when the staffed return site is closed or staff is unavailable, the drop-box should be placed in a secure area that is inaccessible to the public and/or otherwise safeguarded;
 - The county boards of election should ensure adequate lighting is provided at all ballot return sites when the site is in use;
 - When feasible, ballot return sites should be monitored by a video security surveillance system, or an internal camera that can capture digital images and/or video. A video security surveillance system can include existing systems on county, city, municipal, or private buildings. Video surveillance should be retained by the county election office through 60 days following the deadline to certify the election; and
- *13 • To prevent physical damage and unauthorized entry, the drop-box at a ballot return site located outdoors should be constructed of durable material able to withstand vandalism, removal, and inclement weather.

With respect to ballot collection and “chain of custody” procedures, the Secretary stated that counties should adhere to the following standards, [*id.* at §§ 3.1-3.2]:

- Ballots should be collected from ballot return sites only by personnel authorized by the county board of elections and at times determined by the board of elections, at least every 24 hours, excluding Saturdays and Sundays;
- The county board of elections should designate at least two election officials to collect voted ballots from a ballot return site. Each designated election official should carry identification or an official designation that identifies them as an election official authorized to collect voted ballots;
- Election officials designated to collect voted ballots by the board of elections should sign a declaration declaring that he or she will timely and securely collect and return voted ballots, will not permit any person to tamper with a ballot return site or its contents, and that he or she will faithfully and securely perform his or her duties;
- The designated election officials should retrieve the voted ballots from the ballot return site and place the voted ballots in a secure ballot transfer container;
- The designated election officials should note on *Ballot Return Site Collection Forms* the site and unique identification number of the ballot return site and the date and time of retrieval;
- Ballots collected from any ballot return site should be immediately transported to the county board of elections;
- Upon arrival at the office of the county board of elections, the county board of elections, or their designee(s), should note the time of arrival on the same form, as described above;
- The seal number should be verified by a county election official or a designated representative;
- The county board of elections, or their designee(s), should inspect the drop-box or secure ballot transfer container for evidence of tampering and should receive the retrieved ballots by signing the retrieval form and including the date and time of receipt. In the event tampering is evident, that fact must be noted on the retrieval form;
- The completed collection form should be maintained in a manner proscribed by the board of elections to ensure

that the form is traceable to its respective secure ballot container; and

- The county elections official at the county election office or central count location should note the number of ballots delivered on the retrieval form.

And finally, as to election day and post-election day procedures with respect to drop boxes, the Secretary provided as follows, [*id.* at §§ 3.3, 4]:

- The county board of elections should arrange for authorized personnel to retrieve ballots on election night and transport them to the county board of elections for canvassing of the ballots;
- Authorized personnel should be present at ballot return sites immediately prior to 8:00 p.m. or at the time the polls should otherwise be closed;
- At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot return sites and drop-boxes must be closed and locked;
- *14 • Staff must ensure that no ballots are returned to the ballot return site after the close of polls;
- After the final retrieval after the closing of the polls, the drop-box must be removed or locked and/or covered to prevent any further ballots from being deposited, and a sign shall be posted indicating that polling is closed for the election; and
- Any ballots collected from a return site should be processed in the same manner as mail-in ballots personally delivered to the central office of the county board of elections official by the voter and ballots received via the United States Postal Service or any other delivery service.

The Secretary and her staff developed this guidance in consultation with subject-matter experts within her Department and after review of the policies, practices, and laws in other states where drop boxes have been used. [ECF 549-6, pp. 23:14-22]. The evidence reflects at least one instance in which the Secretary's deputies reiterated that these "best practices" should be followed in response to inquiries from county officials considering whether to use drop boxes. [ECF 549-32 ("Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.")].

Approximately 24 counties plan to use drop boxes during the November general election, to varying degrees. [ECF 549-28; ECF 504-1]. Of these, about nine counties intend to staff the drop boxes with county officials, while about 17 counties intend to use video surveillance in lieu of having staff present. [ECF 549-28].

2. Defendants' and Intervenors' evidence of the benefits and low risks associated with drop boxes.

Secretary Boockvar advocates for the use of drop boxes as a "direct and convenient way" for voters to deliver cast ballots to their county boards of elections, "thereby increasing turnout." [ECF 547, p. 22 ¶ 54 (citing 549-11 at pp. 10-11)]. The Secretary also touts the special benefits of expanding drop-box use in the ongoing COVID-19 pandemic. Specifically, she asserts that drop boxes reduce health risks and inspire voter confidence because "many voters understandably do not wish to cast their votes in person at their polling place on Election Day" due to COVID-19. [*Id.* at ¶¶ 55, 57 (citing ECF 549-2 ¶ 39; ECF 549-11 at p. 10; 549-8, ¶ 95)]. Drop boxes, she says, allow voters to vote in person without coming into "close proximity to other members of the public, compared to in-person voting or personally delivering a mail-in ballot to a public office building." [*Id.* at ¶ 57].

Secretary Boockvar also states that drop boxes are highly convenient, and cost-saving, for both counties and voters. For counties, she notes that "24-hour secure ballot drop boxes" are "cost-effective measures ... as they do not have to be staffed by election judges." [*Id.* at p. 24 ¶ 62 (citing ECF 549-11 at p. 11); ECF 549-9 at ¶ 34]. As for voters, the Secretary explains that, in a state where "ten counties ... cover more than 1,000 square miles" and "two-thirds" of counties "cover more than 500 square miles," many Pennsylvania voters "could be required to drive dozens of miles (and perhaps in excess of 100 miles) if he or she wished to deposit his or her mail-in ballot in person at the main county board of elections office." [*Id.* at ¶ 58 (citing ECF 549-29)].

*15 In addition to any tangible benefit drop boxes may have for voter access and turnout, Secretary Boockvar also states that drop boxes have a positive impact on voter confidence. In particular, she cites a recent news article, and a letter sent by the General Counsel of the U.S. Postal Service regarding Pennsylvania's absentee and mail-in ballot deadline, which

have raised concerns over the timeliness and reliability of the U.S. Postal Service. [*Id.* at ¶¶ 60-61 (citing ECF 549-13; ECF 549-14); ECF 549-17; ECF 549-2 ¶¶ 42-43]. Voters' fears that votes returned by mail will not be timely counted could, the Secretary worries, "justifiably dissuade voters from wanting to rely upon the Postal Service for return of their mail-in or absentee ballot." [ECF 547, ¶ 61]. Drop boxes, she says, can address this concern by allowing voters to safely return mail-in ballots to an in-person location.

In exchange for these benefits, the Secretary insists that any potential security risk associated with drop boxes is low. She notes that the federal Department of Homeland Security has released guidance affirming that a "ballot drop box provides a secure and convenient means for voters to return their mail ballot," and recommending that states deploy one drop box for every 15,000 to 20,000 registered voters. [*Id.* at ¶¶ 63-65 (citing ECF 549-24, p. 1)]. She also points to a purported lack of evidence of systemic ballot harvesting or any attempts to tamper with, destroy, or otherwise commit voter fraud using drop boxes, either in Pennsylvania's recent primary election, or in other states that have used drop boxes for many years. [*Id.* at ¶¶ 68-74 (citations omitted)]. And she asserts that "[i]n the last 20 years in the entire state of Pennsylvania, there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots" among the many millions of votes cast during that time period. [*Id.* at ¶ 70 (citing ECF 549-10, pp. 3-4)].

Finally, the Secretary, and other Defendants and Intervenors, argue that Pennsylvania already has robust measures in place to prevent fraud, including its criminal laws, voter registration system, mail-in ballot application requirement, and canvassing procedures. [*Id.* at ¶¶ 66-67 (citing 25 P.S. §§ 3516 - 3518)]; [ECF 549-9, p. 15, ¶¶ 46-47 ("These allegations are not consistent with my experience with drop box security, particularly given the strong voter verification procedures that are followed by elections officials throughout the country and in Pennsylvania. Specifically, the eligibility and identity of the voter to cast a ballot is examined by an election judge who reviews and confirms all the personal identity information provided on the outside envelope. Once voter eligibility is confirmed, the ballot is extracted and separated from the outside envelope to ensure the ballot remains secret. During this step, election judges confirm that there is only one ballot in the envelope and checks for potential defects, such as tears in the ballot.... Regardless of the receptacle used for acceptance of the ballot (drop box versus USPS mailbox), ballot validation occurs when

the ballot is received by the county board of elections. The validation is the same regardless of how the ballots are collected or who delivers the ballot, even where that delivery contravenes state law.")].

Defendants and Intervenors also point to several expert reports expressing the view that drop boxes are both low risk and beneficial. These experts include:

Professor Matthew A. Barreto, a Professor of Political Science and Chicana/o Studies at UCLA. [ECF 549-7]. Professor Barreto offers the opinion that ballot drop boxes are an important tool in facilitating voting in Black and Latino communities. Specifically, he discusses research showing that Black and Latino voters are "particularly concerned about the USPS delivering their ballots." [*Id.* at ¶ 22]. And he opines that ballot drop boxes help to reassure these voters that their vote will count, because "there is no intermediary step between the voters and the county officials who collect the ballot." [*Id.* at ¶ 24].

***16 Professor Donald S. Burke**, a medical doctor and Distinguished University Professor of Health Science and Policy, Jonas Salk Chair in Population Health, and Professor of Epidemiology at the University of Pittsburgh. [ECF 549-8]. Professor Burke details the "significant risk of exposure" to COVID-19 in "enclosed areas like polling places." [*Id.* at ¶ 69]. He opines that "depositing a ballot in a mailbox and depositing a ballot in a drop-box are potential methods of voting that impart the least health risk to individual voters, and the least public health risk to the community." [*Id.* at ¶ 95].

Amber McReynolds, the CEO of the National Vote at Home Institute, with 13 years of experience administering elections as an Elections Director, Deputy Director, and Operations Manager for the City and County of Denver, Colorado. [ECF 549-9]. Ms. McReynolds opines that "[b]allot drop-boxes can be an important component of implementing expanded mail-in voting" that are "generally more secure than putting a ballot in post office boxes." [*Id.* at ¶ 16 (a)]. She notes that "[d]rop boxes are managed by election officials ... delivered to election officials more quickly than delivery through the U.S. postal system, and are secure." [*Id.*].

Ms. McReynolds also opines that Secretary Boockvar's guidance with respect to drop boxes is "consistent with best practices and advice that NVAHI has provided across jurisdictions." [*Id.* at ¶ 35]. But she also notes that "[b]est practices will vary by county based on the county's available

resources, population, needs, and assessment of risk.” [*Id.* at ¶ 52].

More generally, Ms. McReynolds argues that “[d]rop-boxes do not create an increased opportunity for fraud” as compared to postal boxes. [*Id.* at ¶ 44]. She also suggests that Pennsylvania guards against such fraud through other “strong voter verification procedures,” including “ballot validation [that] occurs when the ballot is received by the county board of elections” and “[r]econciliation procedures adopted by election officials ... [to] protect against the potential risk of double voting.” [*Id.* at ¶¶ 46-48]. She notes that “Pennsylvania’s balloting system requires that those who request a mail-in vote and do not return the ballot (or spoil the mail-in ballot at their polling place), can only vote a provisional ballot” and “[i]f a mail-in or absentee ballot was submitted by an individual, their provisional ballot is not counted.” [*Id.* at ¶ 48].

Professor Lorraine C. Minnite, an Associate Professor and Chair of the Department of Public Policy and Administration at Rutgers University-Camden. [ECF 549-10]. Professor Minnite opines that “the incidence of voter fraud in contemporary U.S. elections is exceedingly rare, including the incidence of voter impersonation fraud committed through the use of mail-in absentee ballots.” [*Id.* at p. 3]. In Pennsylvania specifically, she notes that “[i]n the last 20 years ... there have been fewer than a dozen confirmed cases of fraud involving a handful of absentee ballots, and most of them were perpetrated by insiders rather than ordinary voters.” [*Id.* at pp. 3-4]. As a “point of reference,” she notes that 1,459,555 mail-in and absentee ballots were cast in Pennsylvania’s 2020 primary election alone. [*Id.* at 4].

Professor Robert M. Stein, a Professor of Political Science at Rice University and a fellow in urban politics at the Baker Institute. [ECF 549-11]. Professor Stein opines that “the Commonwealth’s use of drop boxes provides a number of benefits without increasing the risk of mail-in or absentee voter fraud that existed before drop boxes were implemented because (manned or unmanned) they are at least as secure as U.S. Postal Service (‘USPS’) mailboxes, which have been successfully used to return mail-in ballots for decades in the Commonwealth and elsewhere around the U.S.” [*Id.* at p. 3]. According to Professor Stein, the use of drop boxes “has been shown to increase turnout,” which he suggests is particularly important “during a global pandemic and where research has shown that natural and manmade disasters have historically had a depressive effect on voter turnout.” [*Id.* at

p. 4]. Professor Stein notes that “[d]rop boxes are widely used across a majority of states as a means to return mail-in ballots” and he is “not aware of any studies or research that suggest that drop boxes (manned or unmanned) are a source for voter fraud.” [*Id.*]. Nor is he aware “of any evidence that drop boxes have been tampered with or led to the destruction of ballots.” [*Id.*].

***17 Professor Paul Gronke**, a Professor of Political Science at Reed College and Director of the Early Voting Information Center. [ECF 545-7]. Professor Gronke recommends that “drop boxes should be provided in every jurisdiction that has significant (20% or more) percentage[] of voters casting a ballot by mail, which includes Pennsylvania” for the general election. [*Id.* at ¶ 6]. He avers that “[s]cientific research shows that drop boxes raise voter turnout and enhance voter confidence in the elections process.” [*Id.* at ¶ 7]. Voters, he explains, “utilize drop boxes heavily—forty to seventy percent of voters in vote by mail states and twenty-five percent or more in no-excuse absentee states.” [*Id.*]. Professor Gronke further states that he is “not aware of any reports that drop boxes are a source for voter fraud” despite having “been in use for years all over the country.” [*Id.* at ¶ 8]. And he suggests that the use of drop boxes is “especially important” in an election “that will be conducted under the cloud of the COVID-19 pandemic, and for a state like Pennsylvania that is going to experience an enormous increase in the number of by-mail ballots cast by the citizenry of the state.” [*Id.* at ¶ 9].

Based on this evidence, and the purported lack of any contrary evidence showing great risks of fraud associated with the use of drop boxes, Defendants and Intervenors argue that Pennsylvania’s authorization of drop boxes, and the counties’ specific implementation of them, furthers important state interests at little cost to the integrity of the election system.

3. Plaintiffs’ evidence of the risks of fraud and vote dilution associated with drop boxes.

Plaintiffs, on the other hand, argue that the drop boxes allow for an unacceptable risk of voter fraud and “illegal delivery or ballot harvesting” that, when it occurs, will “dilute” the votes of all lawful voters who comply with the Election Code. *See, e.g.*, [ECF 461, ¶¶ 127-128]. As evidence of the dilutive impact of drop boxes, Plaintiffs offer a combination of anecdotal and expert evidence.

Foremost among this evidence is the expert report of Greg Riddlemoser, the former Director of Elections and General Registrar for Stafford County, Virginia from 2011 until 2019. [ECF 504-19]. According to Mr. Riddlemoser, “voter fraud exists.” [*Id.* at p. 2]. He defines the term “voter fraud” to mean any “casting and/or counting of ballots in violation of a state’s election code.” [*Id.*]. Examples he gives include: “Voting twice yourself—even if in multiple jurisdictions,” “voting someone else’s ballot,” and “[e]lection officials giving ballots to or counting ballots from people who were not entitled to vote for various reasons.” [*Id.* at pp. 2-3]. All of these things, he asserts, are “against the law and therefore fraudulent.” [*Id.*].³

Mr. Riddlemoser argues that “ballot harvesting” (which is the term Plaintiffs use to refer to situations in which an individual returns the ballots of other people) “persists in Pennsylvania.” [*Id.* at p. 3]. He points to the following evidence to support this opinion:

- Admissions by Pennsylvania’s Deputy Secretary for Elections and Commissions, Jonathan Marks, that “several Pennsylvania counties permitted ballot harvesting by counting ballots that were delivered in violation of Pennsylvania law” during the recent primary election, [*Id.*];
- “[S]everal instances captured by the media where voters in the June 2020 Primary deposited multiple ballots into unstaffed ballot drop boxes,” [*Id.* at p. 4];
- “Other photographs and video footage of at least one county’s drop box (Elk County) on Primary Election day” which “revealed additional instances of third-party delivery,” [*Id.*]; and
- “Documents produced by Montgomery County” which “reveal that despite signs warning that ballot harvesting is not permitted, people during the 2020 Primary attempted to deposit into the five drop boxes used by that county ballots that were not theirs,” [*Id.*].

*18 With respect to the use of “unstaffed” or “unmanned” ballot drop boxes, Mr. Riddlemoser expresses the opinion that “the use of unmanned drop boxes presents the easiest opportunity for voter fraud” and “certain steps must be taken to make drop boxes ‘secure’ and ‘monitored.’ ” [*Id.* at p. 16].

He states that, to be “secure,” drop boxes must be “attended” by “sworn election officials” at all times (*i.e.*, “never left

unattended at any time they are open for ballot drop-off.”). [*Id.*]. He further suggests that officials stationed at drop boxes must be empowered, and required, to “verify the person seeking to drop off a ballot is the one who voted it and is not dropping off someone else’s ballot.” [*Id.*]. Doing so, he says, would, in addition to providing better security, also “allow the election official to ask the voter if they followed the instructions they were provided ... and assist them in doing so to remediate any errors, where possible, before ballot submission.” [*Id.*].

In addition to being “manned,” Mr. Riddlemoser suggests that certain procedures with respect to ballot collection are necessary to ensure the integrity of votes cast in drop boxes. For example, he suggests that, at the end of each day, drop boxes, which should themselves be “tamperproof,” should “be verifiably completely emptied into fireproof/tamperproof receptacles, which are then sealed and labeled by affidavit as to whom, where, when, etc.” [*Id.*]. Once sealed, the containers “must then be transported by sworn officials in a county owned vehicle (preferably marked law enforcement) back to the county board where they are properly receipted and safeguarded.” [*Id.*]. Emptied drop boxes should also be sealed at the end of each day “such that they are not able to accept any additional ballots until they are ‘open’ again[.]” [*Id.*]. And boxes should be “examined to ensure no ballots are in the box, that nothing else is inside the box, and that the structural integrity and any security associated with the box remains intact.” [*Id.*]. All of this, he suggests, should also be “available for monitoring by poll watchers.” [*Id.*].

According to Mr. Riddlemoser, anything short of these robust procedures won’t do. In particular, “video cameras would not prevent anyone from engaging in activity that could or is designed to spoil the ballots inside the box; such as dumping liquids into the box, lighting the ballots on fire by using gasoline and matches, or even removing the box itself.” [*Id.* at p. 17]. Even if the “identity of the person responsible may be determined ... the ballots themselves would be destroyed—effectively disenfranchising numerous voters.” [*Id.*]. And given “recent footage of toppled statues and damage to government buildings” in the news, Mr. Riddlemoser finds the “forcible removal of ballot drop boxes” to be “a distinct possibility.” [*Id.*]. In addition to increasing the risk of ballot destruction, Mr. Riddlemoser notes that reliance on video cameras would also “not prohibit someone from engaging in ballot harvesting by depositing more than one ballot in the drop box[.]” [*Id.*].

Beyond Mr. Riddlemoser's expert testimony, Plaintiffs proffer several other pieces of evidence to support their claims that drop boxes pose a dilutive threat to the ballots of lawful voters. Most notably, they present photographs and video stills of, by the Court's count, approximately seven individuals returning more than one ballot to drop boxes in Philadelphia and Elk County (the same photographs referenced by Mr. Riddlemoser). [ECF 504-19, PDF pp. 49-71].

*19 Those photographs depict the following:

- An unidentified woman holding what appear to be two ballots at a Philadelphia drop box.



- Instagram user “thefoodiebarrister” posing for a selfie with two ballots in Philadelphia; captioned, in part, “dropping of [sic] my votes in a designated ballot drop box.”



- A photograph posted to social media showing a hand placing two ballots in a drop box; captioned, in part, “Cory and I voted!”



Li Kramer Halpern
Monday at 12:53 PM · One Montgomery Plaza · 🌐

Cory and I voted! I miss my sticker. If you're using the drop box in Norristown, walk through the construction the building is open. Closed at noon today but other days open 7am - 8pm through June 2nd. <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/5177>

- A photograph of an unidentified man wearing a “Philadelphia Water” sweater and hat, placing two ballots in a Philadelphia drop box.



- Several video stills that, according to Plaintiffs, show voters depositing more than one ballot in an Elk County drop box.



In addition to these photographs and video stills, Plaintiffs also provide a May 24, 2020, email sent by an official in Montgomery County (which placed security guards to monitor its drop boxes) observing that security “have turned people away yesterday and today without incident who had ballots other than their own.” [ECF 504-28].

Separate and apart from this evidence specific to the use of drop boxes, Plaintiffs and their expert also provide evidence of instances of election fraud, voter fraud, and illegal voting generally. These include, for example:

- A case in which a New Jersey court ordered a new municipal election after a city councilman and councilman-elect were charged with fraud involving mail-in ballots. [ECF 504-19, p. 3].
- A New York Post article written by an anonymous fraudster who claimed to be a “master at fixing mail-in ballots” and detailed his methods. [Id.].
- Philadelphia officials’ admission that approximately 40 people were permitted to vote twice during the 2020 primary elections. [Id.].
- A YouTube video purporting to show Philadelphia election officials approving the counting of mail-in

ballots that lacked a completed certification on the outside of the envelope. [*Id.* (citation omitted)].

- The recent guilty plea of the former Judge of Elections in South Philadelphia, Domenick J. DeMuro, to adding fraudulent votes to voting machines on election day. [ECF 461, ¶ 61]; *see United States v. DeMuro*, No. 20-cr-112 (E.D. Pa. May 21, 2020).
- The 2014 guilty plea of Harmar Township police chief Richard Allen Toney to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council, [ECF 461, ¶ 69];
- The 2015 guilty plea of Eugene Gallagher for unlawfully persuading residents and non-residents of Taylor, in Lackawanna County, Pennsylvania, to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election, [*Id.*];
- *20 • The 1999 indictment of Representative Austin J. Murphy in Fayette County for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge, [*Id.*];
- The 1994 Eastern District of Pennsylvania and Third Circuit case *Marks v. Stinson*, which involved an alleged incident of extensive absentee ballot fraud by a candidate for the Pennsylvania State Senate, *see Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994); *Marks v. Stinson*, No. 93-6157, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994), [ECF 461, ¶ 78]; and
- A report from the bipartisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which observed that absentee voting is “the largest source of potential voter fraud” and proposed that states “reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” [ECF 461, ¶¶ 66-67, 80].

C. Facts relevant to signature comparison.

Many of the facts relevant to Plaintiffs’ signature-comparison claim relate to the verification procedures for mail-in and absentee ballots, on one hand, and those procedures for in-person voting, on the other. These are described below.

1. Mail-in and absentee ballot verification.

As noted above, Pennsylvania does not distribute unsolicited mail-in and absentee ballots. Rather, a voter must apply for the ballot (and any voter can). [ECF 549-2, ¶ 64]. As part of the application for a mail-in ballot,⁴ an applicant must provide certain identifying information, including name, date of birth, length of time as a resident of the voting district, voting district if known, party choice in the primary, and address where the ballot should be sent. 25 P.S. § 3150.12(b). In applying for a mail-in ballot, the applicant must also provide “proof of identification,” which is defined by statute as that person’s driver’s license number, last four digits of Social Security number, or another specifically approved form of identification. [ECF 549-2, ¶ 64; ECF 549-27]; 25 P.S. § 2602(z.5)(3). A signature is not mentioned in the definition of “proof of identification.” 25 P.S. § 2602(z.5)(3). However, if physically capable, the applicant must sign the application. *Id.* at § 3150.12(c)-(d).

Upon receiving the mail-in ballot application, the county board of elections determines if the applicant is qualified by “verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant’s permanent registration card.” 25 P.S. § 3150.12b(a). The county board of elections then either approves the application⁵ or “immediately” notifies the applicant if the application is not approved. *Id.* at § 3150.12b(a), (c). Upon approval, the county mails the voter the mail-in ballot.

*21 After receiving the ballot, the mail-in voter must “mark the ballot” with his or her vote, insert the ballot into the “secrecy” envelope, and place the “secrecy” envelope into a larger envelope. *Id.* at § 3150.16(a). Then, the voter must “fill out, date and sign the declaration printed on [the larger] envelope. [The larger] envelope shall then be securely sealed and the elector shall send [it] by mail ... or deliver it in person to said county board of election.” *Id.* The declaration on the larger envelope must be signed, unless the voter is physically unable to do so. *Id.* at § 3150.16(a)-(a.1).

Once the voter mails or delivers the completed mail-in ballot to the appropriate county board of elections, the ballot is kept “in sealed or locked containers until they are to be canvassed by the county board of elections.” *Id.* at § 3146.8(a). The county boards of elections can begin pre-canvassing and

canvassing the mail-in ballots no earlier than election day. *Id.* at § 3146.8(g)(1.1).

When pre-canvassing and canvassing the mail-in ballots, the county boards of elections must “examine the declaration on the [larger] envelope of each ballot ... and shall compare the information thereon with that contained in the ... Voters File.” *Id.* at § 3146.8(g)(3). The board shall then verify the “proof of identification” and shall determine if “the declaration [on the larger envelope] is sufficient.” *Id.* If the information in the “Voters File ... verifies [the elector’s] right to vote,” the ballot shall be counted. *Id.*

2. In-person voting verification.

When a voter decides to vote in-person on election day, rather than vote by mail, the procedures are different. There is no application to vote in person. Rather, on election day, the in-person voter arrives at the polling place and “present[s] to an election officer proof of identification,” which the election officer “shall examine.” *Id.* at § 3050(a). The in-person voter shall then sign a voter’s certificate” and give it to “the election officer in charge of the district register.” *Id.* at § 3050(a.3) (1). Next, the election officer shall “announce the elector’s name” and “shall compare the elector’s signature on his voter’s certificate with his signature in the district register.” *Id.* at § 3050(a.3)(2). If the election officer believes the signature to be “genuine,” the in-person voter may vote. *Id.* But if the election officer does not deem the signature “authentic,” the in-person voter may still cast a provisional ballot and is given the opportunity to remedy the deficiency. *Id.*

3. The September 11, 2020, and September 28, 2020, sets of guidance.

In September 2020, Secretary Boockvar issued two new sets of guidance related to signature comparisons of mail-in and absentee ballots and applications. The first, issued on September 11, 2020, was titled “Guidance Concerning Examination of Absentee and Mail-In Ballot Return Envelopes.” [ECF 504-24]. The guidance stated, in relevant part, the “Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” [*Id.* at p. 3]. The second set of guidance, issued on September 28, 2020, was titled, “Guidance Concerning Civilian Absentee and Mail-

In Ballot Procedures.” [ECF 504-25]. This September 28, 2020, guidance stated, in relevant part, “The Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” [*Id.* at p. 9]. Thus, as evidenced by these two sets of guidance, Secretary Boockvar advised the county boards of elections not to engage in a signature-comparison analysis of voters’ signatures on ballots and applications for ballots.

*22 Most of the counties intend to follow the Secretary’s guidance and will not compare signatures on mail-in ballots and applications for the upcoming general election. *E.g.*, [ECF 504-1]. A few counties, however, stated their intent to not comply with the guidance, and instead would compare and verify the authenticity of signatures. *E.g.*, [*id.* (noting the counties of Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming, as not intending to follow Secretary Boockvar’s guidance to not compare signatures)].

According to Defendants, there are valid reasons to not require signature comparisons for mail-in and absentee ballots. For example, Secretary Boockvar notes that signature verification is a technical practice, and election officers are not “handwriting experts.” [ECF 549-2, p. 19, ¶ 68]. Secretary Boockvar also notes that voters’ signatures can change over time, and various medical conditions (*e.g.*, [arthritis](#)) can impact a person’s signature. [*Id.*] Defendants’ expert, Amber McReynolds, also finds that “signature verification” involves “inherent subjectivity.” [ECF 549-9, p. 20, ¶ 64]. Ms. McReynolds further notes the “inherent variability of individuals’ signatures over time.” [*Id.*] And according to Secretary Boockvar, these are just some reasons Pennsylvania implements verification procedures other than signature comparisons for mail-in voters, who, unlike in-person voters, are not present when their signature would be verified. [ECF 549-2, p. 20, ¶ 69].

Plaintiffs’ expert, Greg Riddlemoser, on the other hand, states that signature comparison is “a crucial security aspect of vote-by-mail” and failing to verify signatures on mail-in ballots would “undermine voter confidence and would increase the possibility of voter fraud.” [ECF 504-19, pp. 10-11]. Mr. Riddlemoser asserts that Secretary Boockvar’s September 11, 2020, and September 28, 2020, guidance “encourage, rather than prevent, voter fraud.” [*Id.* at p. 12]. As such, Mr. Riddlemoser explains that mail-in voters should be subject

to the same signature-comparison requirement as in-person voters. [*Id.* at pp. 13-14].

4. Secretary Boockvar's King's Bench petition.

In light of this case and the parties' disagreement over whether the Election Code mandates signature comparison for mail-in ballots, Secretary Boockvar filed a "King's Bench" petition with the Pennsylvania Supreme Court on October 4, 2020. In that petition, she asked the Pennsylvania Supreme Court to exercise its extraordinary jurisdiction, in light of the impending election, to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557].

On October 7, 2020, several groups, including Donald J. Trump for President, Inc. and the Republican National Committee—who are Plaintiffs in this case—moved to intervene as Respondents in the Pennsylvania Supreme Court case. [ECF 571-1]. The Pennsylvania Supreme Court has not yet decided the motion to intervene or whether to accept the case. The petition remains pending.

D. Facts relevant to poll-watcher claims.

The position of "poll watcher" is a creation of state statute. *See* 25 P.S. § 2687. As such, the Election Code defines how a poll watcher may be appointed, what a poll watcher may do, and where a poll watcher may serve.

1. The county-residency requirement for poll watchers.

*23 The Election Code permits candidates to appoint two poll watchers for each election district. 25 P.S. § 2687(a). The Election Code permits political parties and bodies to appoint three poll watchers for each election district. *Id.*

For many years, the Pennsylvania Election Code required that poll watchers serve only within their "election district," which the Code defines as "a district, division or precinct, ... within which all qualified electors vote at one polling place." 25 P.S. § 2687(b) (eff. to May 15, 2002) (watchers "shall serve in only one district and must be qualified registered electors of the municipality or township in which the district where they are authorized to act is located"); 25 P.S. § 2602(g). Thus, originally, poll watching was confined to a

more limited geographic reach than one's county, as counties are themselves made up of many election districts.

Then, in 2004, the General Assembly amended the relevant poll-watcher statute to provide that a poll watcher "shall be authorized to serve in the election district for which the watcher was appointed and, when the watcher is not serving in the election district for which the watcher was appointed, in any other election district in the county in which the watcher is a qualified registered elector." 25 P.S. § 2687(b) (eff. Oct. 8, 2004).

This county-residency requirement is in line with (or is, in some cases, more permissive than) the laws of at least eight other states, which similarly require prospective poll watchers to reside in the county in which they wish to serve as a watcher or (similar to the pre-2004 Pennsylvania statute) limit poll watchers to a sub-division of the county. *See, e.g.,* Fla. Stat. Ann. § 101.131(1) (Florida); Ind. Code Ann. § 3-6-8-2.5 (Indiana); Ky. Rev. Stat. Ann. § 117.315(1) (Kentucky); N.Y. Elec. Law § 8-500(5) (New York); N.C. Gen. Stat. Ann. § 163-45(a) (North Carolina); Tex. Elec. Code Ann. § 33.031(a) (Texas); S.C. Code Ann. § 7-13-860 (South Carolina); Wyo. Stat. Ann. § 22-15-109(b) (Wyoming). However, at least one state (West Virginia) does not provide for poll watchers at all. *See* W. Va. Code Ann. § 3-1-37; W. Va. Code Ann. § 3-1-41

The General Assembly has not amended the poll-watcher statute since 2004, even though some lawmakers have advocated for the repeal of the residency requirement. *See Cortés*, 218 F. Supp. 3d at 402 (observing that legislative efforts to repeal the poll-watcher residency requirement have been unsuccessful).

As part of its September 17, 2020, decision, the Pennsylvania Supreme Court found that the county-residency requirement does not violate the U.S. or Pennsylvania constitutions. *Boockvar*, — A.3d at —, 2020 WL 5554644, at *31.

2. Where and when poll watchers can be present during the election.

The Pennsylvania Election Code sets forth the rules for where and when poll watchers are permitted to be present.

The Election Code provides that poll watchers may be present "at any public session or sessions of the county board of elections, and at any computation and canvassing

of returns of any primary or election and recount of ballots or recanvass of voting machines under” the Code. [25 P.S. § 2650](#). Additionally, one poll watcher for each candidate, political party, or political body may “be present in the polling place ... from the time that the election officers meet prior to the opening of the polls ... until the time that the counting of votes is complete and the district register and voting check list is locked and sealed.” [25 P.S. § 2687\(b\)](#).

*24 During this time, poll watchers may raise objections to “challenge any person making application to vote.” *Id.* Poll watchers also may raise challenges regarding the voters’ identity, continued residence in the election district, or registration status. [25 P.S. § 3050\(d\)](#).

Although Pennsylvania has historically allowed absentee ballots to be returned by U.S. Postal Service or by in-person delivery to a county board of elections office, the Election Code does not provide (and has never provided for) any right to have poll watchers in locations where absentee voters fill out their ballots (which may include their home, office, or myriad other locations), nor where those votes are mailed (which may include their own mailbox, an official U.S. Postal Service collection box, a work mailroom, or other places U.S. Postal Service mail is collected), nor at county board of elections offices. [ECF 549-2, ¶¶ 86-90].

Before Act 77, absentee ballots were held in election districts rather than centralized at the county board of elections. *See* [25 P.S. § 3146.8](#) (eff. Mar. 14, 2012 to Oct. 30, 2019) (“In all election districts in which electronic voting systems are used, absentee ballots shall be opened at the election district, checked for write-in votes in accordance with section 1113-A and then either hand-counted or counted by means of the automatic tabulation equipment, whatever the case may be.”).

At such time (again, before Act 77), poll workers opened those absentee ballots at each polling place after the close of the polls. *Id.* (“Except as provided in section 1302.1(a.2), the county board of elections shall then distribute the absentee ballots, unopened, to the absentee voter’s respective election district concurrently with the distribution of the other election supplies. Absentee ballots shall be canvassed immediately and continuously without interruption until completed after the close of the polls on the day of the election in each election district. The results of the canvass of the absentee ballots shall then be included in and returned to the county board with the returns of that district.” (footnote omitted)).

With the enactment of Act 77, processing and counting of mail-in and absentee ballots is now centralized in each county board of elections, with all mail-in and absentee ballots in such county held and counted at the county board of elections (or such other site as the county board may choose) without regard to which election district those ballots originated from. [25 P.S. § 3146.8\(a\)](#) (eff. Mar. 27, 2020); [ECF 549-2, ¶ 81].

Under Act 12, counties are permitted to “pre-canvass” mail-in or absentee ballots received before Election Day beginning at 7:00 a.m. on Election Day. [25 P.S. § 3146.8\(g\)\(1.1\)](#). Counties are further permitted to “canvass” ballots received after that time beginning “no earlier than the close of the polls on the day of the election and no later than the third day following the election.” *Id.* [§ 3146.8\(g\)\(2\)](#).

The Election Code permits “[o]ne authorized representative of each candidate” and “one representative from each political party” to “remain in the room in which the absentee ballots and mail-in ballots are pre-canvassed.” [25 P.S. § 3146.8\(g\)\(1.1\)](#). Similarly, during canvassing, the Election Code permits “[o]ne authorized representative of each candidate” and “one representative from each political party” to “remain in the room in which the absentee ballots and mail-in ballots are canvassed.” [25 P.S. § 3146.8\(g\)\(2\)](#).

*25 The Election Code provisions pertaining to the “pre-canvass” and “canvass” do not make any separate reference to poll watchers, instead referring only to the “authorized representatives” of parties and candidates. *See* [25 P.S. § 3146.8](#).

On October 6, 2020, Secretary Boockvar issued guidance concerning poll watchers and authorized representatives. [ECF 571-1]. The guidance states that poll watchers “have no legal right to observe or be present at ... ballot return sites,” such as drop-box locations. [ECF 571-1, Ex. E, p. 5]. The guidance also states that while a candidate’s authorized representative may be present when mail-in ballots are opened (including during pre-canvass and canvass), the representative cannot challenge those ballots. [*Id.* at Ex. E, p. 4].

On October 9, 2020, in a separate lawsuit brought by the Trump Campaign in the Philadelphia County Court of Common Pleas, the state court there confirmed Secretary Boockvar’s guidance. Specifically, the state court held that satellite ballot-collection locations, such as drop-box locations, are not “polling places,” and therefore poll watchers

are not authorized to be present in those places. [ECF 573-1, p. 12 (“It is clear from a reading of the above sections [of the Election Code] that the satellite offices where these activities, and only these activities, occur are true ‘offices of the Board of Elections’ and are not polling places, nor public sessions of the Board of Elections, at which watchers have a right to be present under the Election Code.”)]. Immediately after issuance of this decision, the Trump Campaign filed a notice of appeal, indicating its intention to appeal the decision to the Commonwealth Court of Pennsylvania. Having just been noticed, that appeal remains in its infancy as of the date of this Opinion.

3. Plaintiffs’ efforts to recruit poll watchers for the upcoming general election.

In order to become a certified poll watcher, a candidate must meet certain criteria. [ECF 504-20, ¶ 9]. That is, a poll watcher needs to be “willing to accept token remuneration, which is capped at \$120 under Pennsylvania state law” and must be able to take off work or otherwise make arrangements to be at the polling place during its open hours on Election Day, which can mean working more than 14 hours in a single day. [*Id.*].

The Pennsylvania Director for Election Day Operations for the Trump Campaign, James J. Fitzpatrick, stated that the Trump Campaign wants to recruit poll watchers for every county in Pennsylvania. [ECF 504-2, ¶ 30]. To that end, the RNC and the Trump Campaign have initiated poll-watcher recruitment efforts for the general election by using a website called DefendYourBallot.com. [ECF 528-14, 265:2-15, 326:14-329-7]. That website permits qualified electors to volunteer to be a poll watcher. [*Id.*]. In addition, Plaintiffs have called qualified individuals to volunteer to be poll watchers, and worked with county chairs and conservative activists to identify potential poll watchers. [*Id.*].

Despite these efforts, the Trump Campaign claims it “is concerned that due to the residency restriction, it will not have enough poll watchers in certain counties.” [ECF 504-2, ¶ 25]. Mr. Fitzpatrick, however, could not identify a specific county where the Trump Campaign has been unable to obtain full coverage of poll watchers or any county where they have tried and failed to recruit poll watchers for the General Election. [ECF 528-14, 261:21-262:3, 263:8-19, 265:2-266:3].

*26 In his declaration, Representative Reschenthaler shared Mr. Fitzpatrick's concern, stating that he does not believe that

he will “be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County.” [ECF 504-6, ¶ 12]. But Representative Reschenthaler did not provide any information regarding his efforts to recruit poll watchers to date, or what he plans to do in the future to attempt to address his concern. *See generally* [*id.*].

Representative Kelly stated in his declaration that he was “likely to have difficulty getting enough poll watchers from within Erie County to watch all polls within that county on election day.” [ECF 504-5, ¶ 16]. Representative Kelly never detailed his efforts (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), and he never explained why those efforts aren't likely to succeed in the future. *See generally* [*id.*].

In his declaration, Representative Thompson only stated that based on his experience, “parties and campaigns cannot always find enough volunteers to serve as poll watchers in each precinct.” [ECF 504-4, ¶ 20].

According to statistics collected and disseminated by the Pennsylvania Department of State, there is a gap between the number of voters registered as Democrats and Republicans in some Pennsylvania counties. [ECF 504-34]. Plaintiffs’ expert, Professor Lockerbie, believes this puts the party with less than a majority of voters in that county at a disadvantage in recruiting poll watchers. [ECF 504-20, ¶ 15]. However, despite this disadvantage, Professor Lockerbie states that “the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirement[].” [*Id.* at ¶ 16].

Additionally, Professor Lockerbie finds the gap in registered voters in various counties to be especially problematic for minor political parties. [*Id.* at ¶ 16]. As just one example, according to Professor Lockerbie, even if one were to assume that all third-party voters were members of the same minor party, then in Philadelphia County it would require “every 7th registrant” to be a poll watcher in order for the third party to have a poll watcher observing each precinct.” [*Id.*].

Professor Lockerbie believes that disruptions to public life caused by the COVID-19 pandemic “magnified” the difficulties in securing sufficient poll watchers. [*Id.* at ¶ 10].

Nothing in the Election Code limits parties from recruiting only registered voters from their own party. [ECF 528-14,

267:23-268:1]. For example, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].

4. Rationale for the county-residency requirement.

Defendants have advanced several reasons to explain the rationale behind county-residency requirement for poll watchers.

Secretary Boockvar has submitted a declaration, in which she has set forth the reasons for and interests supporting the county-residency requirement. Secretary Boockvar states that the residency requirement “aligns with Pennsylvania’s county-based election scheme[.]” [ECF 549-2, p. 22, ¶ 77]. “By restricting poll watchers’ service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district.” [*Id.* at p. 22, ¶ 78].

*27 In a similar vein, Intervenor’s expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that “they know” and are “familiar with ... from their community.” [ECF 524-1, p. 14, ¶ 40]. That’s because when poll watchers come from the community, “there is increased trust in government, faith in elections, and voter turnout[.]” [*Id.*].

At his deposition, Representative Kelly agreed with this idea: “Yeah, I think – again, depending how the districts are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area.” [ECF 524-23, 111:21-25].

LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(a)*. At summary judgment, the Court must ask whether the evidence presents “a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In making that determination, the Court must “consider all evidence in the light most favorable to the party

opposing the motion.” *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 794 (3d Cir. 2007).

The summary-judgment stage “is essentially ‘put up or shut up’ time for the non-moving party,” which “must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument.” *Berkeley Inv. Grp. Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006). If the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden at trial,” summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

“The rule is no different where there are cross-motions for summary judgment.” *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). The parties’ filing of cross-motions “does not constitute an agreement that if one is rejected the other is necessarily justified[.]” *Id.* But the Court may “resolve cross-motions for summary judgment concurrently.” *Hawkins v. Switchback MX, LLC*, 339 F. Supp. 3d 543, 547 (W.D. Pa. 2018). When doing so, the Court views the evidence “in the light most favorable to the non-moving party with respect to each motion.” *Id.*

DISCUSSION & ANALYSIS

Plaintiffs, Defendants, and Intervenor all cross-move for summary judgment on all three of Plaintiffs’ remaining claims, which the Court refers to, in the short-hand, as (1) the drop-box claim, (2) the signature-comparison claim, and (3) the poll-watching claim. The common constitutional theory behind each of these claims is vote dilution. Absent the security measures that Plaintiffs seek, they fear that others will commit voter fraud, which will, in turn, dilute their lawfully cast votes. They assert that this violates the federal and Pennsylvania constitutions.

The Court will address only the federal-constitutional claims. For the reasons that follow, the Court finds that Plaintiffs lack standing to bring their federal-constitutional claims because Plaintiffs’ injury of vote dilution is not “concrete” for Article III purposes.

But even assuming Plaintiffs had standing, the Court also concludes that Defendants’ regulations, conduct, and election guidance here do not infringe on any right to

vote, and if they do, the burden is slight and outweighed by the Commonwealth's interests—interests inherent in the Commonwealth's other various procedures to police fraud, as well as its overall election scheme.

*28 Finally, because the Court will be dismissing all federal-constitutional claims, it will decline to exercise supplemental jurisdiction over any of the state-constitutional claims and will thus dismiss those claims without prejudice.

I. Defendants' procedural and jurisdictional challenges.

At the outset, Defendants and Intervenors raise a number of jurisdictional, justiciability, and procedural arguments, which they assert preclude review of the merits of Plaintiffs' claims. Specifically, they assert (1) the claims are not ripe and are moot, (2) there is a lack of evidence against certain county boards, and those boards are not otherwise necessary parties, and (3) Plaintiffs lack standing. The Court addresses each argument, in turn.

A. Plaintiffs' claims are ripe and not moot.

Several Defendants have argued that Plaintiffs' claims in the Second Amended Complaint are not ripe and are moot. The Court disagrees.

1. Plaintiffs' claims are ripe.

The ripeness doctrine seeks to “prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1246-47 (3d Cir. 1996) (cleaned up). The ripeness inquiry involves various considerations including whether there is a “sufficiently adversarial posture,” the facts are “sufficiently developed,” and a party is “genuinely aggrieved.” *Peachlum v. City of York*, 333 F.3d 429, 433-34 (3d Cir. 2003). Ripeness requires the case to “have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.” *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (quoting *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 97 L.Ed. 291 (1952)). “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.” *Id.*

Ultimately, “[r]ipeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review.” *Artway*, 81 F.3d at 1247. Unlike standing, ripeness is assessed at the time of the court's decision (rather than the time the complaint was filed). See *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 139-40, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

The Court finds that Plaintiffs' claims are ripe. Applying the two-factor test here, the Court first concludes that the parties would face significant hardship if the Court were to hold that the case was unripe (assuming it was otherwise justiciable). The general election is less than one month away, and Plaintiffs assert claims that could significantly affect the implementation of Pennsylvania's electoral procedures. Further, if the Court were to find that Plaintiffs' claims were not ripe, Plaintiffs would be burdened. This is because Plaintiffs would then have to either wait until after the election occurred—and thus after the alleged harms occurred—or Plaintiffs would have to bring suit on the very eve of the election, and thus there would be insufficient time for the Court to address the issues. This hardship makes judicial review at this time appropriate. The first factor is met.

*29 Some Defendants argue that because some of the Secretary's guidance was issued after the 2020 primary election, Plaintiffs' claims that rely on such guidance are not ripe because the guidance has not been implemented in an election yet. The Court disagrees. Both the allegations in the Second Amended Complaint, and the evidence presented on summary judgment, reveal that the guidance issued after the primary election will apply to the upcoming general election. This is sufficient to make this a properly ripe controversy.⁶

The second factor the Court must consider in determining ripeness is “the fitness of the issues for judicial review.” *Artway*, 81 F.3d at 1247. “The principal consideration [for this factor] is whether the record is factually adequate to enable the court to make the necessary legal determinations. The more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa.” *Id.* at 1249.

Under this framework, the Court concludes that the issues are fit for review. The parties have engaged in extensive discovery, creating a developed factual record for the Court to review. Further, as shown below, the Court finds it can assess Plaintiffs' claims based on the current factual record and can adequately address the remaining legal questions that

predominate this lawsuit. As such, the Court finds Plaintiffs' claims fit for judicial review.

Thus, Plaintiffs' claims are presently ripe.

2. Plaintiffs' claims are not moot.

Some Defendants also assert that Plaintiffs' claims are moot because Plaintiffs reference allegations of harm that occurred during the primary election, and since then, Secretary Boockvar has issued new guidance and the Pennsylvania Supreme Court has interpreted the Election Code to clarify several ambiguities. The Court, however, concludes that Plaintiffs' remaining claims are not moot.

Mootness stems from the same principle as ripeness, but is stated in the inverse: courts "lack jurisdiction when 'the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Merle v. U.S.*, 351 F.3d 92, 94 (3d Cir. 2003) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). Like ripeness and unlike standing, mootness is determined at the time of the court's decision (rather than at the time the complaint is filed). See *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). When assessing mootness, the Court may assume (for purposes of the mootness analysis) that standing exists. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citation omitted).

*30 Here, the Court finds that Plaintiffs' claims are not moot, as the claims Plaintiffs are proceeding with are "live." First, Plaintiffs' claims are based on guidance that issued after the primary election and are to be applied in the upcoming general election. As such, the *harms* alleged are not solely dependent on the already-passed primary election. Second, Defendants, by and large, have made clear that they intend to abide by guidance that Plaintiffs assert is unlawful or unconstitutional. Third, Plaintiffs sufficiently show that certain Defendants intend to engage in the conduct (e.g., use unmanned drop-boxes) that Plaintiffs say infringes their constitutional rights. Thus, these issues are presently "live" and are not affected by the completion of the primary election.⁷ Plaintiffs' claims are not moot.

3. All named Defendants are necessary parties to this lawsuit.

Many of the county boards of elections that are Defendants in this case argue that the claims against them should be dismissed because Plaintiffs did not specifically allege or prove sufficient violative facts against them. Plaintiffs argue in response that all county boards have been joined because they are necessary parties, and the Court cannot afford relief without their presence in this case. The Court agrees with Plaintiffs, and declines to dismiss the county boards from the case. They are necessary parties.

Federal Rule of Civil Procedure 19(a) states that a party is a necessary party that must be joined in the lawsuit if, "in that [party's] absence, the court cannot accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A).

Here, if the county boards were not named defendants in this case, the Court would not be able to provide Plaintiffs complete relief should Plaintiffs prove their case. That's because the Court could not enjoin the county boards if they were not parties. See Fed. R. Civ. P. 65(d)(2).⁸ This is important because each individual county board of elections manages the electoral process within its county lines. As one court previously summarized, "Election procedures and processes are managed by each of the Commonwealth's sixty-seven counties. Each county has a board of elections, which oversees the conduct of all elections within the county." *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2641(a)). "The county board of elections selects, fixes and at times alters the polling locations of new election districts. Individual counties are also tasked with the preservation of all ballots cast in that county, and have the authority to investigate fraud and report irregularities or any other issues to the district attorney[.]" *Id.* (citing 25 P.S. §§ 2726, 2649, and 2642). The county boards of elections may also make rules and regulations "as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." 25 P.S. § 2642(f).

*31 Indeed, Defendants' own arguments suggest that they must be joined in this case. As just one example, a handful of counties assert in their summary-judgment brief that the "[Election] Code permits Boards to exercise discretion in certain areas when administering elections, to administer the election in a manner that is both legally-compliant and meets the unique needs of each County's citizens." [ECF 518, p. 6]. Thus, because of each county's discretionary authority, if

county boards engage in unconstitutional conduct, the Court would not be able to remedy the violation by enjoining only Secretary Boockvar.⁹

To grant Plaintiffs relief, if warranted, the Court would need to enter an order affecting all county boards of elections—which the Court could not do if some county boards were not joined in this case. Otherwise, the Court could only enjoin violative conduct in some counties but not others. As a result, inconsistent rules and procedures would be in effect throughout the Commonwealth. While some counties can pledge to follow orders issued by this Court, the judicial system cannot rely on pledges and promises, regardless of the county boards' good intent. The only way to ensure that any illegal or unconstitutional conduct is uniformly remedied, permanently, is to include all county boards in this case.

Thus, because the county boards are necessary parties, the Court cannot dismiss them.

4. Plaintiffs lack Article III standing to raise their claims of vote dilution because they cannot establish a “concrete” injury-in-fact.

While Plaintiffs can clear the foregoing procedural hurdles, they cannot clear the final one—Article III standing.

Federal courts must determine that they have jurisdiction before proceeding to the merits of any claim. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.” One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of (1) injury in fact, (2) causation, and (3) redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Standing is particularly important in the context of election-law cases, including a case like this one, that challenge the laws, regulations, and guidance issued by elected and appointed state officials through the democratic processes. As the Supreme Court has explained, the standing “doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood.” *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (cleaned up). The doctrine “limits

the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.” *Id.* In this way, “Article III standing serves to prevent the judicial process from being used to usurp the powers of the political branches.” *Id.* Nowhere is that concern more acute than in a case that challenges a state's exercise of its core constitutional authority to regulate the most deeply political arena of all—elections.

*32 Here, Defendants and Intervenors claim that Plaintiffs lack standing, largely arguing that Plaintiffs' injury is too speculative. [ECF 547, pp. 43-50]. The Court agrees and finds that Plaintiffs lack Article III standing for this reason.

Initially, to frame the standing inquiry, understanding the specific claims at issue is important. As discussed above, there are essentially three claims remaining in this case: (1) a challenge to Secretary Boockvar's guidance that does not require all drop boxes to have manned security personnel; (2) a challenge to Secretary Boockvar's guidance that counties should not perform a signature comparison for mail-in ballots; and (3) a challenge to Pennsylvania's county-residency restriction for poll-watchers. See [ECF 509, pp. 4-5]. The theory behind all of these claims and the asserted injury is one of vote dilution due to the heightened risk of fraud; that is, without the above measures in place, there is an imminent risk of voter fraud (primarily by mail-in voters); and if that fraud occurs, it will dilute the votes of many of Plaintiffs, who intend to vote in person in the upcoming election. [ECF 551, p. 12 (“As qualified electors who will be voting in the November election, Plaintiffs will suffer an injury through their non-equal treatment and/or the dilution or debasement of their legitimately case votes by absentee and mail-in votes that have not been properly verified by matching the voters' signatures on their applications and ballots to the permanent voter registration record and/or that have been improperly delivered by others to drop boxes or other mobile collection sites in manners that are different[] from those offered or being used in their counties of residence.”)].

Turning to the familiar elements of Article III standing, the first and, in the Supreme Court's estimation, “foremost” element—*injury-in-fact*—is dispositive. See *Gill v. Whitford*, — U.S. —, 138 S. Ct. 1916, 1929, 201 L.Ed.2d 313 (2018). Specifically, the Court finds that Plaintiffs' theory of vote dilution, based on the evidence presented, is insufficient to establish standing because Plaintiffs' *injury-in-fact* is not sufficiently “concrete.”

With respect to injury-in-fact, the Supreme Court has made clear that an injury must be “concrete” and “particularized.” *See Spokeo*, 136 S. Ct. at 1548. Defendants argue that the claimed injury of vote dilution caused by possible voter fraud here is too speculative to be concrete. The Court agrees.

To establish a “concrete” injury, Plaintiffs rely on a chain of theoretical events. They first argue that Defendants’ lack of election safeguards (poll watchers, drop-box guards, and signature-comparison procedures) creates a risk of voter fraud or illegal voting. *See* [ECF 461, ¶¶ 230-31, 240, 256]. That risk, they say, will lead to potential fraudsters committing voter fraud or ballot destruction. [*Id.*]. And if that happens, each vote cast in contravention of the Election Code will, in Plaintiffs’ view, dilute Plaintiffs’ lawfully cast votes, resulting in a constitutional violation.

The problem with this theory of harm is that this fraud hasn’t yet occurred, and there is insufficient evidence that the harm is “certainly impending.”

To be clear, Plaintiffs need not establish actual fraud at this stage; but they must establish that fraud is “certainly impending,” and not just a “possible future injury.” *See Clapper*, 568 U.S. at 409, 133 S.Ct. 1138 (“Thus, we have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.”) (cleaned up).

***33** This case is well past the pleading stage. Extensive fact and expert discovery are complete. [ECF 462]. Nearly 300 exhibits have been submitted on cross-motions for summary judgment (including 68 by Plaintiffs alone). Plaintiffs bear the burden of proof on this issue, and unlike on a motion to dismiss, on summary judgment, they must come forward with proof of injury, taken as true, that will prove standing, including a concrete injury-in-fact. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (1992) (“At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice ... In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts ... which for purposes of the summary judgment motion will be taken to be true.”) (cleaned up).

Based on the evidence presented by Plaintiffs, accepted as true, Plaintiffs have only proven the “possibility of future injury” based on a series of speculative events—which falls short of the requirement to establish a concrete injury. For

example, Plaintiffs’ expert, Mr. Riddlemoser, opines that the use of “unstaffed or unmanned” drop boxes merely “increases the *possibility* for voter fraud (and vote destruction)[.]” [ECF 504-19, p. 20 (emphasis added)]. That’s because, according to him (and Plaintiffs’ other witnesses), theoretical bad actors *might* intentionally “target” a drop box as the “easiest opportunity for voter fraud” or with the malicious “intent to destroy as many votes ... as possible.” [*Id.* at pp. 16-18; *see also* ECF 504-2, ¶ 12 (declaring that drop boxes “*may* serve as a target for bad actors that may wish to tamper with lawfully case ballots before such ballots are counted”) (emphasis added)]. But there’s no way of knowing whether these independent actors will ever surface, and if they do, whether they will act as Mr. Riddlemoser and Plaintiffs predict.

Similarly, Mr. Riddlemoser concludes that, at most, not conducting signature analysis for mail-in and absentee ballots “open[s] the door to the potential for massive fraud through a mechanism already susceptible to voter fraud.” [ECF 504-19, p. 20].

This increased susceptibility to fraud and ballot destruction is the impetus for Plaintiffs, in their various capacities, to express their concerns that vote dilution might occur and disrupt their right to a “free and fair election.” *See, e.g.*, [504-3, ¶ 6; 504-4, ¶ 7; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9]. But these concerns, as outlined above, are based solely on a chain of unknown events that may never come to pass.

In addition to Plaintiffs’ expert report, Plaintiffs’ evidence consists of instances of voter fraud in the past, including an article in the N.Y. Post purporting to detail the strategies of an anonymous fraudster, as well as pointing to certain prior cases of voter fraud and election irregularities (*e.g.*, Philadelphia inadvertently allowing 40 people to vote twice in the 2020 primary election; some counties counting ballots that did not have a completed declaration in the 2020 primary election). [ECF 461, ¶¶ 63-82; ECF 504-19, p. 3 & Ex. D]. Initially, with one exception noted directly below, none of this evidence is tied to individuals using drop boxes, submitting forged mail-in ballots, or being unable to poll watch in another county—and thus it is unclear how this can serve as evidence of a concrete harm in the upcoming election as to the specific claims in this case.

***34** Perhaps the best evidence Plaintiffs present are the several photographs and video stills, which are depicted above, and which are of individuals who appear to be

delivering more than one ballot to a drop box during the primary election. It is undisputed that during the primary election, some county boards believed it be appropriate to allow voters to deliver ballots on behalf of third parties. [ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; ECF 504-49].

But this evidence of past injury is also speculative. Initially, the evidence is scant. But even assuming the evidence were more substantial, it would still be speculative to find that third-party ballot delivery will also occur in the general election. It may; it may not. Indeed, it may be less likely to occur now that the Secretary issued her September 28, 2020, guidance, which made clear to all county boards that for the general election, third-party ballot delivery is prohibited. [ECF 504-25 (“Third-person delivery of absentee or mail-in ballots is not permitted, and any ballots delivered by someone other than the voter are required to be set aside. The only exceptions are voters with a disability, who have designated in writing an agent to deliver their ballot for them.”)]. It may also be less likely to occur in light of the Secretary's other guidance, which recommends that county boards place signs near drop boxes, warning voters that third-party delivery is prohibited.

It is difficult—and ultimately speculative—to predict future injury from evidence of past injury. This is why the Supreme Court has recognized that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects.” *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130 (cleaned up).

In fact, based on Plaintiffs’ theory of harm in this case, it is almost impossible for them to present anything other than speculative evidence of injury. That is, they would have to establish evidence of a certainly impending illegal practice that is likely to be prevented by the precautions they seek. All of this sounds in “possible future injury,” not “certainly impending” injury. In that way, this case is very much like the Supreme Court's decision in *Clapper*.

In *Clapper*, plaintiffs-respondents were attorneys, other advocates, and media groups who communicated with clients overseas whom they feared would be subject to government surveillance under a FISA statute. 568 U.S. at 406, 133 S.Ct. 1138. The plaintiffs there alleged that the FISA statute at issue created a risk of possible government surveillance, which prevented them from communicating in confidence with their clients and compelled them to travel overseas instead and

incur additional costs. *Id.* at 406-07, 133 S.Ct. 1138. Based on these asserted injuries, the plaintiffs filed suit, seeking to invalidate provisions of FISA. *Id.* at 407, 133 S.Ct. 1138.

The Supreme Court held that plaintiffs there lacked standing because their risk of harm was not concrete—rather, it was attenuated and based on a series of speculative events that may or may not ever occur. *Id.* at 410, 133 S.Ct. 1138 (finding that “respondents’ argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents’ contacts; and (5) respondents will be parties to the particular communications that the Government intercepts).

*35 In the end, the Court found that it would not “endorse standing theories that rest on speculation about the decisions of independent actors.” *Id.* at 414, 133 S.Ct. 1138.

Like *Clapper*, here, Plaintiffs’ theory of harm rests on speculation about the decisions of independent actors. For drop boxes, that speculation includes that unknown individuals will utilize drop boxes to commit fraud or other illegal activity; for signature comparison, that fraudsters will submit forged ballots by mail; for poll watchers, that illegal votes will not be sufficiently challenged; and for all these claims, that other security measures in place to monitor drop boxes, to verify ballot information, and to challenge ballots will not work.

All of this may occur and may result in some of Plaintiffs’ votes being diluted; but the question is whether these events are “certainly impending.” The evidence outlined above and presented by Plaintiffs simply fails to meet that standard.

This is not to say that claims of vote dilution or voter fraud never give rise to a concrete injury. A plaintiff can have standing to bring a vote-dilution claim—typically, in a malapportionment case—by putting forth statistical evidence and computer simulations of dilution and establishing that he or she is in a packed or cracked district. See *Gill*, 138 S.

Ct. at 1936 (Kagan, J., concurring). And a plaintiff can have standing to bring a voter-fraud claim, but the proof of injury there is evidence of actual fraud in the election and thus the suit will be brought after the election has occurred. *See, e.g., Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994). But, at least based on the evidence presented here, a claim of vote dilution brought in advance of an election on the theory of the risk of potential fraud fails to establish the requisite concrete injury for purposes of Article III standing.

Plaintiffs advance three other theories of harm here, in order to establish standing—none of which establish a concrete injury-in-fact.

First, Plaintiffs assert that since some of them are Republican candidates and that Republicans are more likely to vote in person and Democrats more likely to vote by mail, that their injury here is a competitive disadvantage in the electoral process. [ECF 551, pp. 16-18 (“The challenged guidance will further harm the RNC through the institutional prioritization of voting by mail and the potential disenfranchisement of Republican voters, who prefer to vote in person in the upcoming General Election.”)]. This too is a speculative, non-concrete injury. There is nothing in the record to establish that potential voter fraud and dilution will impact Republicans more than Democrats.

*36 To be sure, the information that Plaintiffs present shows that more Democrats are likely to use mail-in ballots. [ECF 551, p. 31 (“[I]n Pennsylvania, of the 1.9 million absentee or mail-in ballots that have been requested for the November 3, 2020 General Election, ‘nearly 1.5 million Democrats have requested a mail-in ballot—nearly three times the requests from Republicans.’ ”) (quoting L. Broadwater, “Both Parties Fret as More Democrats Request Mail Ballots in Key States,” *New York Times* (Sept. 30, 2020), available at <https://www.nytimes.com/2020/09/30/us/mail-voting-democrats-republicans-turnout.html>)]. But it doesn't necessarily follow that more Democrats will commit voter fraud, such as through the destruction of drop boxes or third-party ballot harvesting, and thus more Republicans' votes will be diluted.

In fact, as Plaintiffs' expert, Mr. Riddlemoser, explains, fraudsters from either party could target drop boxes in specific areas in order to destroy ballots, depending on who may be the predominant party in the area. [ECF 504-19, at pp. 17-18 (“In short, nothing would prevent someone from intentionally targeting a drop box in a predominantly Republican or

predominantly Democratic area with an intent to destroy as many votes for that political party or that party's candidate(s) as possible.”)]. Indeed, the more important fact for this theory of harm is not the party of the voter, but the party of the fraudster—and, on this, Plaintiffs present no evidence that one party over the other is likely to commit voter fraud.

Second, Plaintiffs also argue that the RNC, the Congressional Plaintiffs, and the Trump Campaign have organizational standing because they “have and will continue to devote their time and resources to ensure that their Pennsylvania supporters, who might otherwise be discouraged by the Secretary's guidance memos favoring mail-in and absentee voting and Defendants' implementation thereof, get out to the polls and vote on Election Day.” [ECF 551, p. 19]. This is a similar argument raised by the plaintiffs in *Clapper*, and rejected there by the Supreme Court. Because Plaintiffs' harm is not “certainly impending,” as discussed above, spending money in response to that speculative harm cannot establish a concrete injury. *Clapper*, 568 U.S. at 416, 133 S.Ct. 1138 (“Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.”); *see also Donald J. Trump for President, Inc. v. Cegavske*, — F. Supp. 3d —, —, 2020 WL 5626974, at *5 (D. Nev. Sept. 18, 2020) (“Outside of stating ‘confusion’ and ‘discouragement’ in a conclusory manner, plaintiffs make no indication of how AB 4 will discourage their member voters from voting. If plaintiffs did not expend any resources on educating their voters on AB4, their voters would proceed to vote in-person as they overwhelmingly have in prior elections.”).

Third, with respect to the poll-watching claim, Plaintiffs argue that at least one of the Plaintiffs, Ms. Patterson, is a prospective poll watcher who is being denied the right to poll watch based on the county-residency restriction, and thus she meets the Article III requirements. [ECF 551, p. 34 (citing ECF 551-3, ¶¶ 9-10)]. However, Ms. Patterson cannot establish standing because, by Plaintiffs' own concession, the theory of harm in this case is not the denial of the right to poll watch, but instead dilution of votes from fraud caused from the failure to have sufficient poll watchers. [ECF 509, p. 67 (“But, the core of the as-applied challenge here is not that the Plaintiffs cannot staff a particular polling place, it is that a candidate and his or her party is presented with the Hobson's

choice of selecting limited polling places to observe due to the residency requirement and accept that unobserved polling places must exist due to the inability to recruit a sufficient force of poll watchers due to the necessity that candidates be county residents.”)].

*37 And the remedy sought here is much broader than simply allowing Ms. Patterson to poll watch in a certain county, but is tied to the broader harm of vote dilution that Plaintiffs assert. [ECF 503-1, p. 3, ¶ 3 (“Plaintiffs shall be permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections.”)]. Standing is measured based on the theory of harm and the specific relief requested. *See Gill*, 138 S. Ct. at 1934 (“We caution, however, that ‘standing is not dispensed in gross’: A plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury.”). As with all of the claims, the poll-watching claim rests on evidence of vote dilution that does not rise to the level of a concrete harm.

In sum, Plaintiffs here, based on the evidence presented, lack Article III standing to assert their claims. Because they lack standing, the Court will enter judgment in Defendants’ favor and dismiss all claims.¹⁰ However, because of the novelty of Plaintiffs’ claims and theories, a potential appeal in this case, and the short time before the general election, out of an abundance of caution, the Court will, in the alternative, proceed to examine the claims on the merits.

II. Defendants and Intervenors are entitled to summary judgment on Plaintiffs’ claim that drop boxes violate the U.S. Constitution.

Plaintiffs’ drop-box claim has materially changed since the Pennsylvania Supreme Court’s decision authorizing the use of drop boxes. Plaintiffs now allege that drop boxes effectively allow third parties to return the ballots of voters other than themselves because, they say, no one is there to stop them. Absent an in-person guard or poll worker to monitor the drop boxes and prevent the return of ballots cast in a manner contrary to what the Election Code permits, Plaintiffs assert that they face an unacceptable risk of vote dilution, which burdens their right to vote. Plaintiffs also argue that the “uneven” use of drop boxes in Pennsylvania, by some counties but not others, violates equal protection by subjecting voters in different counties to different amounts

of dilutive risk, and perhaps by diluting lawful votes cast by individuals who failed to comply with the Election Code.

The evidence relevant to these claims is undisputed. *See* [ECF 509, p. 45 (“After the completion of extensive discovery, including numerous depositions and responses to discovery requests, no genuine dispute of material fact exists regarding Plaintiffs’ constitutional claims.”)]. Viewed in the light most favorable to Plaintiffs, the Court could conclude from this evidence, and will assume for purposes of this decision, that (1) drop boxes allow for greater risk of third-party ballot delivery in violation of the Election Code than in-person polling locations or manned drop boxes, and (2) that the use of drop boxes is “uneven” across Pennsylvania due to its county-based election system—*i.e.*, some counties are using “unmanned” drop boxes with varying security measures, some are using “manned” drop boxes, some are using dozens of drop boxes in a variety of locations, some are using one drop box in a county office building, and some are not using drop boxes at all. The question before the Court is whether this state of affairs violates equal protection or due process.

*38 The Court finds that it does not. The uneven use of drop boxes across counties does not produce dilution as between voters in different counties, or between “lawful” and “unlawful” voters, and therefore does not present an equal-protection violation. But even if it did, the guidelines provided by Secretary Boockvar are rational, and weighing the relative burdens and benefits, the Commonwealth’s interests here outweigh any burden on Plaintiffs’ right to vote.

A. Pennsylvania’s “uneven” use of drop boxes does not violate federal equal-protection rights.

Plaintiffs’ primary claim concerns the uneven use of drop boxes across the Commonwealth, which they contend violates the Equal-Protection Clause of the 14th Amendment.

The 14th Amendment’s Equal-Protection Clause commands that “no State shall ... deny to any person within its jurisdiction the equal protection of laws.” U.S. Const. amend. XIV, § 1. This broad and simple promise is “an essential part of the concept of a government of laws and not men.” *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

But while the Constitution demands equal protection, that does not mean all forms of differential treatment are forbidden. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (“Of course, most laws

differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications.”). Instead, equal protection “simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Id.* (citation omitted). What’s more, “unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.” *Id.* (citations omitted).

Of course, the right of every citizen to vote is a fundamental right. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (“[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.”) (citations omitted). Indeed, it is a foundational right “that helps to preserve all other rights.” *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”). And its scope is broad enough to encompass not only the right of each voter to cast a ballot, but also the right to have those votes “counted without dilution as compared to the votes of others.” *Minn. Voters Alliance v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (cleaned up).

As a result, Plaintiffs are quite correct when they suggest that a state election procedure that burdens the right to vote, including by diluting the value of votes compared to others, must “comport with equal protection and all other constitutional requirements.” *Cortés*, 218 F. Supp. 3d at 407. That much, at least, is not in dispute.

At the same time, however, the Constitution “confers on the states broad authority to regulate the conduct of elections, including federal ones.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (citing U.S. Const. Art. I, § 4, cl. 1). This authority includes “broad powers to determine the conditions under which the right of suffrage may be exercised.” *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 543, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013) (cleaned up). Indeed, “[c]ommon sense, as well as constitutional law, compels the conclusion” that states must be free to engage in “substantial regulation of elections” if “some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)

(cleaned up). And all “[e]lection laws will invariably impose some burden upon individual voters.” *Id.*

*39 If the courts were “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest,” it “would tie the hands of States seeking to assure that elections are operated equitably and efficiently.” *Id.* The “machinery of government would not work if it were not allowed a little play in its joints.” *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501, 51 S.Ct. 228, 75 L.Ed. 482 (1931). Thus, when faced with a constitutional challenge to a state election law, or to the actions of state officials responsible for regulating elections, a federal court must weigh these competing constitutional considerations and “make the ‘hard judgment’ that our adversary system demands.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008).

The Supreme Court has supplied lower courts guidance as to how to make these hard judgments, by “forg[ing]” the “flexible standard” for assessing the constitutionality of election regulations into “something resembling an administrable rule.” *Id.* at 205, 128 S.Ct. 1610 (Scalia, J. concurring) (citing *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059).

Under this standard, first articulated in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) and then refined in *Burdick*, the fact “[t]hat a law or state action imposes some burden on the right to vote does not make it subject to strict scrutiny.” *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993); *see also Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585 (6th Cir. 2006) (“[V]oting regulations are not automatically subjected to heightened scrutiny.”). Instead, any “law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process,” is subjected to “a deferential ‘important regulatory interests’ standard for nonsevere, nondiscriminatory restrictions, reserving strict scrutiny for laws that severely restrict the right to vote.” *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610 (Scalia, J. concurring).

In practice, this means that courts must weigh the “character and magnitude of the burden the State’s rule imposes” on the right to vote “against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make that burden necessary.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (cleaned up). If the state

imposes a “severe” burden on the right to vote, strict scrutiny applies—the rule may survive only if it is “narrowly tailored” and only if the state advances a “compelling interest.” *Id.* But if the state imposes only “reasonable, nondiscriminatory restrictions,” its “important regulatory interests will usually be enough” to justify it. *Id.* Indeed, where state regulations are “minimally burdensome and nondiscriminatory” a level of scrutiny “closer to rational basis applies[.]” *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). And where the state imposes no burden on the “right to vote” at all, true rational basis review applies. *See Biener v. Calio*, 361 F.3d 206, 215 (3d Cir. 2004) (“Biener also cannot establish an infringement on the fundamental right to vote ... As the [election] filing fee does not infringe upon a fundamental right, nor is Biener in a suspect class, we consider the claims under a rational basis test.”) (citation omitted); *Common Cause/New York v. Brehm*, 432 F. Supp. 3d 285, 310 (S.D.N.Y. 2020) (“Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.”).

*40 This operates as a “sliding scale”—the “more severe the burden imposed, the more exacting our scrutiny; the less severe, the more relaxed our scrutiny.” *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1090 (9th Cir. 2019); *see also Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020) (“We, and our sister circuits and commentators, have referred to this as a ‘sliding scale’ test.”); *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011) (“We review all of the First and Fourteenth Amendment claims under the sliding scale approach announced by the Supreme Court in *Anderson ... and Burdick*[.]”); *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”).

Against that backdrop, the Court now turns to Plaintiffs’ claim that the use of unmanned drop boxes by some Pennsylvania counties, but not others, violates equal protection. As will be discussed, Plaintiffs’ equal-protection claim fails at the threshold, without even reaching *Anderson-Burdick*, because Plaintiffs have not alleged or shown that Pennsylvania’s system will result in the dilution of votes in certain counties and not others. Furthermore, even if the Court applies *Anderson-Burdick*, the attenuated “burden” Plaintiffs have identified—an increased risk of vote dilution created by the use of unmanned drop boxes—is more than justified

by Defendants’ important and precise interests in regulating elections.

1. Plaintiffs have not shown that Pennsylvania treats equivalent votes in different counties differently.

Plaintiffs’ equal-protection claim asserts differential treatment on a theory of vote dilution. As far as the Court can discern, this claim has two dimensions.

First, the main thrust concerns differential treatment as between counties. Plaintiffs assert that some counties will use drop boxes in certain ways (specifically, without in-person guards or in varying number and locations), while others will not—resulting in differential treatment. *See, e.g.*, [ECF 551, p. 44 (“Plaintiffs assert (and have proven) that Defendants have adopted, and intend to implement in the General Election, an election regime that applies Pennsylvania’s Election Code in a way that treats the citizens of Pennsylvania unequally depending on ... the location where they happen to live: in some counties, voters will have around-the-clock access to ‘satellite election offices’ at which they can deposit their vote, but in other counties, voters will have no access at all to such drop boxes; in some counties those drop boxes will be staffed and secure, but in other counties drop boxes will be unmonitored and open to tampering[.]”)]; [*Id.* at p. 46 (“Defendants’ ongoing actions and stated intentions ensure that votes will not be counted the same as those voting in other counties, and in some instances, in the same Congressional district. For instance, the harm flowing from those actions will fall disproportionately on the Republican candidates that bring suit here because many Democrat-heavy counties have stated intentions to implement the Secretary’s unconstitutional ... ballot collection guidance, and many Republican-heavy counties have stated intentions to follow the Election Code as it is written.”)].

*41 Second, although less clear, Plaintiffs’ equal-protection claim may also concern broader differential treatment between law-abiders and scofflaws. In other words, Plaintiffs appear to suggest that Pennsylvania discriminates against all law-abiding voters by adopting policies which tolerate an unacceptable risk of a lawfully cast votes being diluted by each unlawfully cast vote anywhere in Pennsylvania. *See, e.g.*, [ECF 509, p. 55 (“The use of unstaffed drop boxes ... not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.”) (emphasis in original)]; [ECF 509 p. 68 (“There will be no

protection of one-person, one-vote in Pennsylvania, because her policies ... allowing inconsistently located/used drop boxes will result in illegal ballots being cast and counted with legitimate votes[.]”].

As discussed below, both of these species of equal protection fail because there is, in fact, no differential treatment here—a necessary predicate for an equal-protection claim.

Initially, Plaintiffs “have to identify a burden before we can weigh it.” *Crawford*, 553 U.S. at 205, 128 S.Ct. 1610 (Scalia, J. concurring). In the equal-protection context, this means the plaintiff “must present evidence that s/he has been treated differently from persons who are similarly situated.” *Renchenski v. Williams*, 622 F.3d 315, 337 (3d Cir. 2010) (cleaned up). And not just any differential treatment will do. As discussed above, differences in treatment raise equal-protection concerns, and necessitate heightened scrutiny of governmental interests, only if they burden a fundamental right (such as the right to vote) or involve a suspect classification based on a protected class. See *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (“If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.”).

Plaintiffs argue that equal protection is implicated because Pennsylvania has permitted counties to use drop boxes to varying extents, and with varying degrees of security. Some, like Delaware County, intend to use dozens of drop boxes. See generally [ECF 549-28]. Many others will not use drop boxes at all. See generally [ECF 504-1]. And among the counties that *do* use drop boxes, some will staff them with county officials, while others will monitor them only with video surveillance or not at all. See generally [ECF 549-28].

In this respect, Plaintiffs argue that they suffer an equal-protection harm similar to that found by the Supreme Court in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). There, the Supreme Court held that the Florida Supreme Court violated equal protection when it “ratified” election recount procedures that allowed different counties to use “varying standards to determine what was a legal vote.” *Id.* at 107, 121 S.Ct. 525. This meant that entirely equivalent votes might be counted in one county but discounted in another. See, e.g., *id.* (“Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly

disproportionate to the difference in population between the counties.”). Given the absence of uniform, statewide rules or standards to determine which votes counted, the Court concluded that the patchwork recount scheme failed to “satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right [to vote].” *Id.*

*42 While the Supreme Court expressly limited its holding in *Bush* “to the present circumstances” of a standardless “statewide recount under the authority of a single state judicial officer,” *id.* at 109, 121 S.Ct. 525, a few courts have found its reasoning to be persuasive as a broader principle of equal protection. See *Stewart v. Blackwell*, 444 F.3d 843, 859 (6th Cir. 2006) (“Somewhat more recently decided is *Bush v. Gore*, ... which reiterated long established Equal Protection principles.”); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012) (“We agree with all of the parties and the district court that the consent decree likely violates the equal protection principle recognized in *Bush v. Gore*.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 705 (W.D. Pa. 2003) (Conti, J.) (“As noted above, the court finds that the facts presented raise a serious equal protection claim under a theory similar to that espoused by the United States Supreme Court in *Bush v. Gore*, *supra*.”); *Black v. McGuffage*, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (“The Court is certainly mindful of the limited holding of *Bush*. However, we believe that situation presented by this case is sufficiently related to the situation presented in *Bush* that the holding should be the same.”).

Indeed, *Bush’s* core proposition—that a state may not take the votes of two voters, similarly situated in all respects, and, for no good reason, count the vote of one but not the other—seems uncontroversial. It also seems reasonable (or at least defensible) that this proposition should be extended to situations where a state takes two equivalent votes and, for no good reason, adopts procedures that greatly increase the risk that one of them will not be counted—or perhaps gives more weight to one over the other. See, e.g., *Black*, 209 F. Supp. 2d at 899 (“Plaintiffs in this case allege that the resulting vote dilution, which was found to be unacceptable in *Bush* without any evidence of a disproportionate impact on any group delineated by traditional suspect criteria, is impacting African American and Hispanic groups disproportionately.... Any voting system that arbitrarily and unnecessarily values some votes over others cannot be constitutional.”); see also *Reynolds*, 377 U.S. at 555, 84 S.Ct. 1362 (“[T]he right of suffrage can be denied by a debasement or dilution of the

weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

That is the sort of equal-protection claim Plaintiffs purport to be asserting—a claim that voters in counties that use drop boxes are subjected to a much higher risk of vote dilution than those in other counties that do not. But that characterization falls apart under scrutiny. Indeed, despite their assertions, Plaintiffs have not actually alleged, let alone proven, that votes cast in some counties are diluted by a greater amount relative to votes cast in others. Rather, they have, at best, shown only that events causing dilution are more likely to occur in counties that use drop boxes. But, importantly, the effect of those events will, by Plaintiffs’ own admission, be felt by every voter across all of Pennsylvania. [ECF 509, p. 55. (“The use of unstaffed drop boxes places the security of unknown hundreds (if not thousands) of ballots in jeopardy of theft, destruction, and manipulation. This not only dilutes the weight of *all* qualified Pennsylvanian electors, it curtails a sense of security in the voting process.”) (citations omitted) (emphasis in original)]. Such dilution impacts the entire electorate equally; not just voters in the county where it occurs.

To illustrate this distinction, consider, for example, a presidential election. The Court agrees with Plaintiffs that the relevant electoral unit in such an election is “the entire Commonwealth of Pennsylvania.” [ECF 551, p. 55 (“The electoral unit in this election is the entire Commonwealth of Pennsylvania.”)]. Indeed, on election night, votes cast in each of Pennsylvania's 67 counties will be canvassed, counted, and ultimately added to a statewide vote total that decides who wins Pennsylvania's 20 electoral votes. So, ask: what is the dilutive impact of a hypothetical illegal vote cast in Philadelphia during that election? Does it cause, in any sense, an “unequal evaluation of ballots” cast in different counties, *Bush*, 531 U.S. at 106, 121 S.Ct. 525, such that lawful ballots cast in Philadelphia will be less likely to count, worth less if they do, or otherwise disfavored when compared to votes cast in other counties? The answer is evident—it does not. Rather, the hypothetical illegal vote cast in Philadelphia dilutes *all lawful votes* cast in the election *anywhere* in the Commonwealth by the exact same amount.

*43 The same reasoning holds in elections that occur within part of a state, rather than statewide. For example, consider a hypothetical legislative district covering two counties—one that uses drop boxes and one that does not. There may well be a greater risk that illegal voting will occur in the county that

uses drop boxes. But any dilutive impact of those votes will be felt equally by voters in *both* counties.

This is categorically different from the harm at issue in *Bush* and cases like it. In *Bush*, Florida's arbitrary use of different recount standards in different counties meant that the state was counting equivalent ballots differently in different counties, meaning that voters in some counties were more likely to have their votes counted than those in others.

In *Black v. McGuffage*, an Illinois district-court case on which Plaintiffs heavily rely, the plaintiffs alleged that the type of voting machines used in some Illinois counties were statistically much more likely to result in equivalent votes being discounted at a much higher frequency in some counties than others, and that the worst machines were those being used in counties with high populations of minority groups. 209 F. Supp. 2d at 899. As a result, voters (and, specifically, minority voters) were much more likely to have their votes discounted, based just on the county in which they lived. *See id.* (“As a result, voters in some counties are statistically less likely to have their votes counted than voters in other counties in the same state in the same election for the same office. Similarly situated persons are treated differently in an arbitrary manner.... In addition, the Plaintiffs in this case allege that the resulting vote dilution ... is impacting African American and Hispanic groups disproportionately.”).

Finally, *Stewart v. Blackwell*, another case cited by Plaintiffs, was the same as *Black*—voters in counties that used punch-card voting were “approximately four times as likely not to have their votes counted” as a voter in a different county “using reliable electronic voting equipment.” 444 F.3d at 848.

What ties these cases together is that each of them involves a state arbitrarily “valu[ing] one person's vote over that of another,” *Bush*, 531 U.S. at 104-05, 121 S.Ct. 525, by permitting counties to either apply different standards to decide what votes count (*Bush*) or use different voting technologies that create a great risk of votes being discounted in one county that does not exist in others (*Black* and *Stewart*). It is this sort of “differential treatment ... burden[ing] a fundamental right” that forms the bedrock of equal protection. *Sullivan v. Benningfield*, 920 F.3d 401, 409 (6th Cir. 2019).

Plaintiffs, in contrast, have shown no constitutionally significant differential treatment at all.

Instead, as discussed, if Plaintiffs are correct that the use of drop boxes increases the risk of vote dilution, all votes in the relevant electoral unit—whether that is statewide, a subset of the state, or a single county—face the same degree of increased risk and dilution, regardless of which county is most at fault for elevating that risk.

What Plaintiffs have really identified, then, are not uneven **risks of vote dilution**—affecting voters in some counties more than equivalent voters in others—but merely different voting procedures in different counties that may contribute different amounts of vote dilution **distributed equally across the electorate as a whole**. The Court finds that this is not an equal-protection issue.

*44 To be clear, the reason that there is no differential treatment is solely based on Plaintiffs’ theory of harm in this case. In the more “routine” vote-dilution cases, the state imposes some restriction or direct impact on the plaintiff’s right to vote—that results in his or her vote being weighed less (*i.e.*, diluted) compared to those in other counties or election districts. See *Gill*, 138 S. Ct. at 1930, (explaining that “the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were individual and personal in nature, because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals”) (cleaned up). In this case, though, Plaintiffs complain that the state is **not** imposing a restriction on **someone else’s** right to vote, which, they say, raises the risk of fraud, which, if it occurs, could dilute the value of Plaintiffs’ vote. The consequence of this inverted theory of vote dilution is that all other votes are diluted in the same way; all feel the same effect.

Finally, the Court’s ruling in this regard is consistent with the many courts that have recognized that counties may, consistent with equal protection, employ entirely different election procedures and voting systems within a single state. See, e.g., *Wexler v. Anderson*, 452 F.3d 1226, 1231-33 (11th Cir. 2006) (“Plaintiffs do not contend that equal protection requires a state to employ a single kind of voting system throughout the state. Indeed, local variety in voting systems can be justified by concerns about cost, the potential value of innovation, and so on.”) (cleaned up); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) (“A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.”); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (“[T]he appellants’ reading of the Supreme Court’s

voting cases would essentially bar a state from implementing any pilot program to increase voter turnout. Under their theory, unless California foists a new system on all fifty-eight counties at once, it creates ‘unconstitutional vote-dilution’ in counties that do not participate in the pilot plan. Nothing in the Constitution, the Supreme Court’s controlling precedent, or our case law suggests that we can micromanage a state’s election process to this degree.”); *Fla. State Conference of N.A.A.C.P. v. Browning*, 569 F. Supp. 2d 1237, 1258 (N.D. Fla. 2008) (“[A]s with countless public services delivered through Florida’s political subdivisions—such as law enforcement and education—resource disparities are to some degree inevitable. They are not, however, unconstitutional.”); *Green Party of State of New York v. Weiner*, 216 F. Supp. 2d 176, 192 (S.D.N.Y. 2002) (“Even in that situation, [*Bush v. Gore*] did not challenge, and the Court did not question, the use of entirely different technologies of voting in different parts of the state, even in the same election.”); *Paher v. Cegavske*, No. 20-243, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) (“[I]t cannot be contested that Clark County, which contains most of Nevada’s population—and likewise voters (69% of all registered voters [])—is differently situated than other counties. Acknowledging this as a matter of generally known (or judicially noticeable) fact and commonsense makes it more than rational for Clark County to provide additional accommodations to assist eligible voters.”); *Ron Barber for Cong. v. Bennett*, No. 14-2489, 2014 WL 6694451, at *5 (D. Ariz. Nov. 27, 2014) (“[T]he [*Bush v. Gore*] Court did not invalidate different county systems regarding implementation of election procedures.”); *Tex. Democratic Party v. Williams*, No. 07-115, 2007 WL 9710211, at n.4 (W.D. Tex. Aug. 16, 2007) (“In *Bush v. Gore*, the Supreme Court specifically noted: ‘The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.’”).

*45 Equal protection does not demand the imposition of “mechanical compartments of law all exactly alike.” *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107 (1922). Rather, “the Constitution is sufficiently flexible to permit its requirements to be considered in relation to the ... contexts in which they are invoked.” *Merchants Nat’l Bank of Mobile v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338, 1343 (5th Cir. 1981). And in this context, “few (if any) electoral systems could survive constitutional scrutiny if the use of different voting mechanisms by counties offended the Equal Protection Clause.” *Trump v. Bullock*, — F.3d —, —, 2020 WL 5810556, at *14 (D. Mont. Sept. 30, 2020).

The distinction—between differences in county election procedures and differences in the treatment of votes or voters between counties—is reflected in *Bush* itself. There, the Supreme Court took pains to clarify that the question before it was “not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Bush*, 531 U.S. at 109, 121 S.Ct. 525; see also *id.* at 134, 121 S.Ct. 525 (Souter, J. dissenting) (“It is true that the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms will have different levels of effectiveness in recording voters’ intentions; local variety can be justified by concerns about cost, the potential value of innovation, and so on.”); *Bullock*, — F.3d at —, 2020 WL 5810556, at *14 (“[T]he Supreme Court was clear in *Bush v. Gore* that the question was not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.”) (cleaned up).

Thus, coming back to the theory of Plaintiffs’ case, Plaintiffs contend that Secretary Boockvar’s drop-box guidance will result in differences between counties and differing risks of fraud. But the result of that uneven implementation will not be votes in certain counties being valued less than others. And the result won’t be that voters who vote in person will have their votes valued less, either. Instead, if Plaintiffs are right, any unlawful votes will dilute all other lawful votes in the same way. While certainly voter fraud and illegal voting are bad, as a matter of equal protection, there is no unequal treatment here, and thus no burden on Plaintiffs’ rights under the Equal Protection Clause.

In addition to their equal-protection claim based on county differences, Plaintiffs also appear to allude to a more general type of equal-protection violation. They assert that Pennsylvania comprises a single election unit. [ECF 551, p. 55 (“The electoral unit in this election is the entire Commonwealth of Pennsylvania.”)]. They assert that they intend to cast their ballots lawfully. See, e.g., [ECF 504-3, ¶ 4 (“As a Pennsylvania qualified registered elector, I have always voted in-person at primary and general elections, and I intend to vote in-person at the upcoming November 3, 2020 General Election.”)]. And they assert that unmanned drop boxes across the Commonwealth (regardless of the county) will, on a statewide basis, dilute their votes. See, e.g., [*id.* at ¶ 6 (“As a Pennsylvania qualified registered elector who votes in-person, I do not want my in-person vote diluted or cancelled by votes that are cast in a manner contrary

to the requirements enacted by the Pennsylvania General Assembly.”)]. For example, if one “qualified elector” casts a lawful ballot, but a fraudulent voter casts ten ballots, then that elector’s vote will, under Plaintiffs’ theory, be diluted by a magnitude of ten—resulting in differential treatment.

*46 The problem with this theory is that there does not appear to be any law to support it. Indeed, if this were a true equal-protection problem, then it would transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government’s “interest” in failing to do more to stop illegal activity. This is not the law. To the contrary, it is well-established that even violations of state election laws by state officials, let alone violations by unidentified third parties, do not give rise to federal constitutional claims except in unusual circumstances. See *Shipley v. Chicago Bd. of Election Commissioners*, 947 F.3d 1056, 1062 (7th Cir. 2020) (“A violation of state law does not state a claim under § 1983, and, more specifically, a deliberate violation of state election laws by state election officials does not transgress against the Constitution.”) (cleaned up); *Martinez v. Colon*, 54 F.3d 980, 989 (1st Cir. 1995) (“[T]he Constitution is not an empty ledger awaiting the entry of an aggrieved litigant’s recitation of alleged state law violations—no matter how egregious those violations may appear within the local legal framework.”).

Thus, this type of equal-protection claim fails as a matter of law, as well.

2. If Pennsylvania’s “uneven” use of drop boxes indirectly burdens the right to vote at all, that burden is slight, and justified by important state interests.

Even assuming that Plaintiffs could establish unequal treatment to state an equal-protection claim, their claim nonetheless fails because the governmental interests here outweigh any burden on the right to vote.

Initially, the Court finds that the appropriate level of scrutiny is rational basis. Defendants’ failure to implement a mandatory requirement to “man” drop boxes doesn’t directly infringe or burden Plaintiffs’ rights to vote at all. Indeed, as discussed above in the context of standing, what Plaintiffs characterize as the burden or harm here is really just an ancillary ‘increased risk’ of a theoretical harm, the degree of which has not been established with any empirical precision.

See *Obama*, 697 F.3d at 429 (“If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.”); *Brehm*, 432 F. Supp. 3d at 310 (“Under this framework, election laws that impose no burden on the right to vote are subject to rational-basis review.”).

On rational-basis review, the Secretary's guidance here passes constitutional muster. Her guidance certainly provides some flexibility in how counties may use drop boxes, but the guidance overall is rationally related to a legitimate governmental interest—namely, the implementation of drop boxes in a secure manner, taking into account specific county differences. That Plaintiffs feel the decisions and actions of the Pennsylvania General Assembly, Secretary Boockvar, and the county Defendants are insufficient to prevent fraud or illegal voting is of no significance. “[R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

As detailed above, Secretary Boockvar's guidance provides lawful, comprehensive, and reasonable standards with respect to (1) selecting the location of drop boxes, (2) drop-box design criteria, (3) signage, (4) drop-box security measures, and (5) drop-box ballot collection and chain of custody procedures. Of particular note, with respect to ballot security, the Secretary's guidance calls for the use of reasonably robust measures like video surveillance, durable and tamperproof design features, regular ballot collection every 24 hours, chain-of-custody procedures to maintain ballot traceability, and signage advising voters that third-party delivery is prohibited, among other things.

To be sure, the Secretary's guidance doesn't insist on the use of security personnel—though some counties have decided to post security guards outside of drop boxes on their own. But the Court can't say that either the Secretary's failure to provide that requirement, or the decision of some counties to proceed with drop boxes “unmanned,” is irrational. For example, the evidence presented demonstrates that placing a security guard outside of a drop box at all times is costly, particularly for cash-strapped counties—at least \$13 per hour or about \$104 (8 hours) to \$312 (24 hours) per day, according to Defendants' expert, Professor Robert McNair. [ECF 549-11, p. 11] In the context of a broader election system that detects and deters fraud at many other stages of the voting process, and given

that there are also no equivalent security measures present at U.S. postal mailboxes (which constitute an arguably more tempting vehicle for the would-be ballot harvester), the Court finds that the lack of any statewide requirement that all drop boxes be manned or otherwise surveilled is reasonable, and certainly rational.

*47 But even assuming Plaintiffs are right that their right to vote here has been burdened (and thus a heightened level of scrutiny must apply), that burden is slight and cannot overcome Defendants' important state interests under the *Anderson-Burdick* framework. Indeed, courts routinely find attenuated or ancillary burdens on the right to vote to be “slight” or insignificant, even burdens considerably *less* attenuated or ancillary than any burden arguably shown here. See, e.g., *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003) (“Under *Burdick*, the use of touchscreen voting systems is not subject to strict scrutiny simply because this particular balloting system may make the possibility of some kinds of fraud more difficult to detect.”).¹¹

To begin with, application of the *Anderson-Burdick* framework here presents something of a “square peg, round hole” dilemma. After all, that test assumes there is some constitutional injury to “weigh” against the state's “important” regulatory interests in the first place. And without differential treatment of votes or voters, there isn't any equal-protection injury for the Court to balance.

The *Anderson-Burdick* test is also ill-fitted to Plaintiffs' claims for another reason. Typically, *Anderson-Burdick* is invoked where the government takes some direct action to burden or restrict a plaintiff's right to vote. Here, in contrast, Plaintiffs complain that Pennsylvania has indirectly burdened the right to vote through *inaction*—*i.e.*, by not imposing *enough* regulation to secure the voting process it has adopted, which, Plaintiffs say, will allow third parties to vote in an unlawful way, which, if it happens, will dilute (and thus burden) the right to vote.

*48 This unusual causal daisy-chain makes it difficult to apply *Anderson-Burdick*'s balancing approach. After all, it is one thing to assess the government's interest in taking a specific action that imposed burdens on the right to vote. It is much less natural for a court to evaluate whether the government had a good reason for not doing something differently, or for failing to do more to prevent (or reduce the risk of) misconduct by third parties that could burden the right to vote.

To the extent *Anderson-Burdick* applies in such circumstances, the appropriate course would, in this Court's view, be to weigh any burden stemming from the government's alleged failures against the government's interest in enacting the broader election scheme it has erected, of which the challenged piece is usually only one part. Focusing solely on the allegedly inadequate procedure being challenged, such as the state's authorization of "drop boxes" here, would ignore the fact that Election Code provisions and regulations operate as part of a single, complex organism balancing many competing interests, all of which are "important" for purposes of the *Anderson-Burdick* analysis. See, e.g., *Crawford*, 553 U.S. at 184, 128 S.Ct. 1610 ("detering and detecting voter fraud"); *Tedards v. Ducey*, 951 F.3d 1041, 1067 (9th Cir. 2020) ("voter turnout"); *Lunde v. Schultz*, 221 F. Supp. 3d 1095, 1106 (S.D. Iowa 2014) ("expanding ballot access to nonparty candidates"); *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 671 (D.S.C. 2011) ("promoting voter participation in the electoral process"); *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020) ("orderly administration of elections"); *Dudum*, 640 F.3d at 1115 ("orderly administration of ... elections"); *Paher v. Cegavske*, 457 F.Supp.3d 919, —, 2020 WL 2089813, at *7 (2020) ("protect[ing] the health and safety of ... voters" and "safeguard[ing] the voting franchise"); *Nemes*, — F. Supp. 3d at —, 2020 WL 3402345, at *13 ("implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19").

Thus, on the "burden" side of the equation is Plaintiffs' harm of vote dilution predicated on a risk of fraud. As discussed above in the context of lack of standing, that burden is slight, factually, because it is based on largely speculative evidence of voter fraud generally, anecdotal evidence of the mis-use of certain drop boxes during the primary election, and worries that the counties will not implement a "best practice" of having poll workers or guards man the drop boxes. See [ECF 461, ¶¶ 63-82; ECF 504-2, ¶ 12; 504-3, ¶ 6; 504-4, ¶7; ECF 504-6, ¶¶ 6-8; ECF 504-7, ¶¶ 5-9; ECF 504-9, 92:4-10; ECF 504-10, 60:3-61:10; 504-19, pp. 3, 16-18, 20 & Ex. D; ECF 504-25; ECF 504-49; ECF 509, p. 67; ECF 551, p. 34].

This somewhat scant evidence demonstrates, at most, an increased risk of some election irregularities—which, as many courts have held, does not impose a meaningful burden under *Anderson-Burdick*. "Elections are, regrettably, not always free from error," *Hutchinson v. Miller*, 797 F.2d

1279, 1286–87 (4th Cir. 1986), let alone the "risk" of error. In just about every election, votes are counted, or discounted, when the state election code says they should not be. But the Constitution "d[oes] not authorize federal courts to be state election monitors." *Gamza v. Aguirre*, 619 F.2d 449, 454 (5th Cir. 1980). It is "not an empty ledger awaiting the entry of an aggrieved litigant's recitation of alleged state law violations." *Fournier v. Reardon*, 160 F.3d 754, 757 (1st Cir. 1998). Nor is it "an election fraud statute." *Minnesota Voters*, 720 F.3d at 1031.

*49 "Garden variety" election irregularities, let alone the "risk" of such irregularities, are simply not a matter of federal constitutional concern "even if they control the outcome of the vote or election." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998). And as discussed above, most often, even "a deliberate violation of state election laws by state election officials does not transgress against the Constitution." *Shipley*, 947 F.3d at 1062. see, e.g., *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 919 (E.D. Va. 2018) ("[E]ven assuming the Fredericksburg officials' failure to provide provisional ballots amounted to a violation of state law, it would not rise to the level of an equal protection violation.").

Compared, then, to Plaintiffs' slight burden, the Commonwealth has put forward reasonable, precise, and sufficiently weighty interests that are undisputed and that can be distilled into three general categories: (1) the benefits of drop boxes, (2) the Commonwealth's interests in furthering its overall election-security plan concerning drop boxes, and (3) the interests inherent in the Commonwealth's general mail-in ballot scheme.

The first category concerns the benefits of drop boxes generally. Secretary Boockvar has pointed out the Commonwealth's interests generally in using drop boxes—including, (1) the increase of voter turnout, (2) the protection of voters' health in the midst of the ongoing pandemic, (3) the increase of voter satisfaction, in light of ongoing U.S. Postal Service issues, and (4) the reduction of costs for counties. [ECF No. 547, at pp. 22-25; ECF No. 549-2, ¶¶ 36-39, 42-44]. Plaintiffs do not dispute any of these interests.

The second category of interests concerns the Commonwealth's interests in implementing drop boxes with appropriate and effective safety measures and protocols in place. That is, Secretary Boockvar has, in her capacity as the chief state official charged with overseeing elections,

issued uniform guidance to all counties regarding the use of drop boxes, which is noted above. That guidance includes (1) advising counties that the Election Code permits the use of drop boxes, and (2) setting forth best practices that the counties should “consider” with respect to their use. Among other things, the Secretary advised that counties should maintain a traceable chain of custody for mail-in and absentee ballots retrieved from drop boxes; utilize drop boxes with various security features (e.g., anti-tampering features, locks, video surveillance, and removal when the site is closed or cannot be monitored); and designate sworn county personnel to remove ballots from drop boxes. And evidence suggests that the Secretary’s deputies have emphasized these best practices when queried by county officials. [ECF 549-32 (“Per our conversation, the list of items are things the county must keep in mind if you are going to provide a box for voters to return their ballots in person.”)].

This guidance is lawful, reasonable, and non-discriminatory, and so does not create any constitutional issue in its own right. With this guidance, the Secretary has diminished the risks tolerated by the legislature in adopting mail-in voting and authorizing drop-boxes, by encouraging the counties to adopt rather comprehensive security and chain-of-custody procedures if they do elect to use drop boxes. Conversely, the legislature’s decision to leave the counties with ultimate discretion when it comes to how, and to what extent, to use drop boxes (as opposed to adopting a scheme in which the Secretary could enforce compliance with her guidance) is also reasonable, and justified by sufficiently weighty governmental interests, given the many variations in population, geography, local political culture, crime rates, and resources. [ECF 549-9 (“There is no logical reason why ballot receptacles such as drop boxes must be uniform across different counties; particularly because the verification of the voter is determined by election officials upon receipt of the ballot. Counties vary in size and need. Across the country, best practices dictate that counties determine what type of box and size works for them. The needs of a large county are very different from the needs of a smaller county.”); ECF 549-11, p. 9 (“Such variation between counties even within a state makes sense, since the needs of different counties vary and their use of drop boxes reflects those considerations (e.g., the geographic size of a county, the population of the county, and the ease with which voters in the county can access other locations to return mail-in ballots).”)].

*50 The third category of interests is, more generally, the interests of the Commonwealth in administering its overall

mail-in ballot regime, including the various security and accountability measures inherent in that legislative plan.

Pennsylvania did not authorize drop boxes in a vacuum. Last year, the Pennsylvania legislature “weigh[ed] the pros and cons,” *Weber*, 347 F.3d at 1107, and adopted a broader system of “no excuse” mail-in voting as part of the Commonwealth’s Election Code. As the Pennsylvania Supreme Court has now confirmed, that system left room for counties to authorize drop boxes and other satellite locations for returning ballots to the county boards of elections. See *Boockvar*, — A.3d at —, 2020 WL 5554644, at *9 (“[W]e need not belabor our ultimate conclusion that the Election Code should be interpreted to allow county boards of election to accept hand-delivered mail-in ballots at locations other than their office addresses including drop-boxes.”).

Inherent in any mail-in or absentee voting system is some degree of increased risk of votes being cast in violation of other provisions of the Election Code, regardless of whether those ballots are returned to drop boxes, mailboxes, or some other location. For example, there is simply no practical way to police third party delivery of ballots to any mailbox anywhere in the Commonwealth, where Plaintiffs do not dispute that such ballots can be lawfully returned. It is also likely that more (and perhaps many more) voters than usual will be disenfranchised by technicalities this year, for failing to comply with the procedural requirements associated with mail-in ballots, such as the requirement that such ballots be placed in “inner secrecy envelopes.”

But in enacting the “no excuse” mail-in voting system that it did, the Pennsylvania legislature chose to tolerate the risks inherent in that approach. And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many other safeguards in place to catch or deter fraud and other illegal voting practices. These safeguards include voter registration; a mail-in ballot application and identity verification process, 25 P.S. §§ 3146.2, 3150.12; a system for tracking receipt of mail-in ballots, 25 P.S. §§ 3146.3(a), 3150.13(a); and, perhaps most important of all, a pre-canvassing and canvassing process during which mail-in ballots are validated before being counted. In addition, Pennsylvania law also seeks to deter and punish fraud by imposing criminal penalties for unlawful voting, 25 P.S. § 3533; voting twice in one election, 25 P.S. § 3535; forging or destroying ballots, 25 P.S. § 3517; unlawful possession or

counterfeiting of ballots 25 P.S. § 3516; and much more of the conduct Plaintiffs fear, *see* 25 P.S. § 3501, *et seq.*

In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not “sufficiently weighty to justify,” *Crawford*, 553 U.S. at 191, 128 S.Ct. 1610, whatever ancillary risks may be associated with the use of drop boxes, or with allowing counties to exercise discretion in that regard. Pennsylvania may balance the many important and often contradictory interests at play in the democratic process however it wishes, and it must be free to do so “without worrying that a rogue district judge might later accuse it of drawing lines unwisely.” *Abbott*, 961 F.3d at 407.

*51 Thus, balancing the slight burden of Plaintiffs’ claim of dilution against the categories of interests above, the Court finds that the Commonwealth and Defendants’ interests in administering a comprehensive county-based mail-in ballot plan, while both promoting voting and minimizing fraud, are sufficiently “weighty,” reasonable, and justified. Notably, in weighing the burdens and interests at issue, the Court is mindful of its limited role, and careful to not intrude on what is “quintessentially a legislative judgment.” *Griffin*, 385 F.3d at 1131. “[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems.” *Weber*, 347 F.3d at 1106. “So long as their choice is reasonable and neutral, it is free from judicial second-guessing.” *Id.*; *see also Abbott*, 961 at 407, (“That the line might have been drawn differently ... is a matter for legislative, rather than judicial, consideration.”) (cleaned up); *Trinsey v. Com. of Pa.*, 941 F.2d 224, 235 (3d Cir. 1991) (“We take no position on the balancing of the respective interests in this situation. That is a function for which the legislature is uniquely fitted.”).

Thus, even under the *Anderson-Burdick* framework, the Court finds that Plaintiffs’ constitutional challenge fails as a matter of law.

B. Pennsylvania's use of drop boxes does not violate federal due process.

In addition to their equal-protection challenge to the use of drop boxes, Plaintiffs also appear to argue that the use of unmanned drop boxes violates substantive due process protected by the 14th Amendment. This argument is just a variation on their equal-protection argument—*i.e.*, the uneven use of drop boxes will work a “patent and fundamental unfairness” in violation of substantive due process principles. *See Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978)

(substantive due process rights are violated “[i]f the election process itself reaches the point of patent and fundamental unfairness[.]”). The analysis for this claim is the same as that for equal protection, and thus it fails for the same reasons.

But beyond that, this claim demands even stricter proof. Such a claim exists in only the most extraordinary circumstances. *See Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 898 (8th Cir. 2008) (“A canvass of substantive due process cases related to voting rights reveals that voters can challenge a state election procedure in federal court only in limited circumstances, such as when the complained of conduct discriminates against a discrete group of voters, when election officials refuse to hold an election though required by state law, resulting in a complete disenfranchisement, or when the willful and illegal conduct of election officials results in fraudulently obtained or fundamentally unfair voting results.”) (cleaned up); *Yoshina*, 140 F.3d at 1226 (“We have drawn a distinction between ‘garden variety’ election irregularities and a pervasive error that undermines the integrity of the vote. In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.”) (citation omitted); *Bennett v. Mollis*, 590 F. Supp. 2d 273, 278 (D.R.I. 2008) (“Before an election error becomes a key that unlocks the restraints on the federal court’s authority to act, the Plaintiffs must demonstrate either an intentional election fraud or an unintentional error resulting in broad-gauge unfairness.”).

Indeed, “only the most egregious official conduct can be said to be arbitrary in the constitutional sense”—the “executive action must be so ill-conceived or malicious that it ‘shocks the conscience.’” *Miller v. City of Phila.*, 174 F.3d 368, 375 (3d Cir. 1999) (cleaned up).

Based on the slight burden imposed here, and the Commonwealth’s interests in their overall county specific voting regime, which includes a host of other fraud-prevention measures, the Court finds that the drop-box claim falls short of the standard of substantive due process.

III. Defendants and Intervenors are entitled to summary judgment on Plaintiffs’ signature-comparison claims.

*52 Plaintiffs’ next claim concerns whether the Secretary’s recent guidance on signature comparison violates the federal Constitution. Plaintiffs frame their claims pertaining to signature comparison in two ways—one based on due process and the other based on equal protection.

Plaintiffs initially assert that the Election Code requires a signature comparison for mail-in and absentee applications and ballots. Thus, according to Plaintiffs, Secretary Boockvar's guidance, which says the opposite, is creating unconstitutional vote dilution, in violation of due-process principles—*i.e.*, certain unlawful, unverified ballots will now be counted, thereby diluting the lawful ones cast by other voters (such as in-person voters, whose signatures are verified). Plaintiffs also appear to argue more generally that absent signature comparison, there is a heightened risk of voter fraud, and therefore a heightened risk of vote dilution of lawful votes.

In addition to due process, Plaintiffs argue that the guidance violates equal-protection principles—first, by counties engaging in a patchwork of procedures (where some counties intend to do a signature comparison for mail-in ballots, while others do not); and second, by implementing different standards between mail-in ballots and in-person ones.

In contrast, Defendants and Intervenors take the position that state law does not require signature comparison, and for good reason. According to them, requiring such comparisons is fraught with trouble, as signatures change over time and elections officials are not signature-analysis experts. This leaves open the possibility for arbitrary and discriminatory application that could result in the disenfranchisement of valid voters.

For the reasons that follow, the Court will dismiss the signature-comparison claims and enter judgment in favor of Defendants. A plain reading of the Election Code demonstrates that it does not impose a signature-comparison requirement for mail-in ballots and applications, and thus Plaintiffs' vote-dilution claim sounding in due process fails at the outset. Further, the heightened risk of fraud resulting from a lack of signature comparison, alone, does not rise to the level of a federal constitutional violation. Finally, the equal-protection claims fail because there are sound reasons for the different treatment of in-person ballots versus mail-in ballots; and any potential burdens on the right to vote are outweighed by the state's interests in their various election security measures.

A. The Election Code does not require signature comparison for mail-in and absentee ballots or ballot applications.

Plaintiffs' federal-constitutional claims in Count I of their Second Amended Complaint are partially based on the Secretary's guidance violating state law. That is, Plaintiffs' first theory is that by the Secretary violating state law, unlawful votes are counted and thus lawfully cast votes are diluted. According to Plaintiffs, this violates the 1st and 14th Amendments, as well as the Elections Clause (the latter of which requires the legislature, not an executive, to issue election laws).¹²

*53 Thus, a necessary predicate for these constitutional claims is whether the Election Code mandates signature comparison for mail-in and absentee ballots. If it doesn't, as the Secretary's guidance advises, then there can be no vote dilution as between lawful and unlawful votes, nor a usurpation of the legislature's authority in violation of the Elections Clause.

After carefully considering the parties' arguments and the relevant law, the Court finds that the plain language of the Election Code imposes no requirement for signature comparison for mail-in and absentee ballots and applications.¹³ In other words, the Secretary's guidance is consistent with the Election Code, and creates no vote-dilution problems.¹⁴

Plaintiffs, in advancing their claim, rely on section 3146.8(g)(3)-(7) of the Election Code to assert that the Code requires counties to "verify" the signatures on mail-in and absentee ballots (*i.e.*, examine the signatures to determine whether they are authentic). Plaintiffs specifically point to [section 3146.8\(g\)\(3\)](#) as requiring this signature verification. [ECF 509, pp. 17-18].

[Section 3146.8\(g\)\(3\)](#) states:

When the county board meets to pre-canvass or canvass absentee ballots and mail-in ballots ... the board shall examine the declaration on the envelope of each ballot ... and shall compare the information thereon with that contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File," whichever is applicable. If the county board has verified the proof of identification as required under this act and is satisfied that the declaration is sufficient and the information contained in the "Registered Absentee and Mail-in Voters File," the absentee voters' list and/or the "Military Veterans and Emergency Civilians Absentee Voters File" verifies his

right to vote, the county board shall provide a list of the names of electors whose absentee ballots or mail-in ballots are to be pre-canvassed or canvassed.

*54 25 P.S. § 3146.8(g)(3).

According to Plaintiffs, Section 3146.8(g)(3)'s requirement to verify the proof of identification, and compare the information on the declaration, is tantamount to signature comparison. The Court disagrees, for at least three reasons.

First, nowhere does the plain language of the statute require signature comparison as part of the verification analysis of the ballots.

When interpreting a statute enacted by the Pennsylvania General Assembly, courts apply Pennsylvania's Statutory Construction Act, 1 Pa. C.S. §§ 1501-1991. And as the Act instructs, the "object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). If the words of the statute are clear and unambiguous, the letter of the law applies. *Id.* at § 1921(b). Otherwise, courts may consider a variety of factors to determine the legislature's intent, including "other statutes upon the same or similar subjects" and "[t]he consequences of a particular interpretation." *Id.* at § 1921(c)(5)-(6).

Section 3146.8(g)(3) does not expressly require any signature verification or signature comparison. 25 P.S. § 3146.8(g)(3). It instead requires election officials to (1) "examine the declaration on the envelope of each ballot," (2) "compare the information thereon with that contained in the ... 'Voters file' [or] the absentee voters' list," and (3) if "the county board has [a] verified the proof of identification as required under this act and [b] is satisfied that the declaration is sufficient and the information contained in the [Voter's file] ... verifies his right to vote," the election official shall include the ballot to be counted. *Id.*

Under the express terms of the statute, then, the information to be "verified" is the "proof of identification." *Id.* The Election Code defines "proof of identification" as the mail-in/absentee voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. 25 P.S. § 2602(z.5)(3)(i)-(iv).¹⁵ The only other "verification" the election official must conduct is to determine whether "the information contained in the [Voter's file] ... verifies his right to vote."

*55 Nowhere does this provision require the election official to compare and verify the authenticity of the elector's signature. In fact, the word "signature" is absent from the provision. It is true that the elector must fill out and sign the declaration included on the ballot. 25 P.S. §§ 3146.6(a), 3150.16(a). However, while section 3146.8(g)(3) instructs the election official to "examine the declaration ... and compare the information thereon with that contained in the [Voter's file]," the provision clarifies that this is so the election official can be "satisfied that the declaration is sufficient." 25 P.S. § 3146.8(g)(3). In other words, the election official must be "satisfied" that the declaration is "fill[ed] out, date[d] and sign[ed]," as required by sections 3150.16(a) and 3146.6(a) of the Election Code. Notably absent is any instruction to verify the signature and set aside the ballot if the election official believes the signature to be non-genuine. There is an obvious difference between checking to see if a signature was provided at all, and checking to see if the provided signature is sufficiently authentic. Only the former is referred to in section 3146.8(g)(3).

Second, beyond the plain language of the statute, other canons of construction compel the Court's interpretation. When interpreting statutes passed by the General Assembly, Pennsylvania law instructs courts to look at other aspects of the statute for context. *See* 1 Pa. C.S. § 1921(c)(5) ("When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering ... other statutes upon the same or similar subjects."); *O'Rourke v. Commonwealth*, 566 Pa. 161, 778 A.2d 1194, 1201 (2001) ("The cardinal rule of all statutory construction is to ascertain and effectuate the intent of the Legislature. To accomplish that goal, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." (citation omitted)).

Context here is important because the General Assembly mandated signature comparison for in-person voting elsewhere in the Election Code—thus evidencing its intention not to require such comparison for mail-in ballots. *See Fonner v. Shandon, Inc.*, 555 Pa. 370, 724 A.2d 903, 907 (1999) ("[W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.") (citation omitted).

In addressing in-person voting, the General Assembly explicitly instructs that the election official shall, after receiving the in-person elector's voter certificate, immediately

“*compare the elector's signature* on his voter's certificate with his signature in the district register. If, upon such comparison, the signature upon the voter's certificate appears to be genuine, the elector who has signed the certificate shall, if otherwise qualified, be permitted to vote: Provided, That *if the signature on the voter's certificate, as compared with the signature as recorded in the district register, shall not be deemed authentic* by any of the election officers, such elector shall not be denied the right to vote for that reason, but shall be considered challenged as to identity and required to [cure the deficiency].” 25 P.S. § 3050(a.3)(2) (emphasis added).

Elsewhere, the General Assembly also explicitly accounts for signature comparison of in-person voters: “[I]f it is determined that the individual was registered and entitled to vote at the election district where the ballot was cast, *the county board of elections shall compare the signature on the provisional ballot envelope with the signature on the elector's registration form and, if the signatures are determined to be genuine, shall count the ballot* if the county board of elections confirms that the individual did not cast any other ballot, including an absentee ballot, in the election. ... [But a] provisional ballot shall not be counted if ... the signature[s] required ... are either not genuine or are not executed by the same individual ...” 25 P.S. § 3050(a.4)(5)(i)-(ii) (emphasis added); *see also* 25 P.S. § 2936 (“[When reviewing nomination papers], the Secretary of the Commonwealth or the county board of elections, although not hereby required so to do, *may question the genuineness of any signature or signatures appearing thereon*, and if he or it shall thereupon find that any such signature or signatures are not genuine, such signature or signatures shall be disregarded[.]” (emphasis added)).

*56 Clearly then, the General Assembly, in enacting the Election Code, knew that it could impose a signature-comparison requirement that requires an analysis to determine whether a signature is “genuine.” And when that was its intent, the General Assembly explicitly and unequivocally imposed that requirement. It is thus telling, from a statutory construction standpoint, that no such explicit requirement is imposed for returned mail-in or absentee ballots. Indeed, the General Assembly is aware—and in fact, requires—that a voter must sign their application for an absentee or mail-in ballot, and must sign the declaration on their returned ballot. 25 P.S. §§ 3146.2(d) (absentee-ballot application), 3150.12(c) (mail-in-ballot application), 3146.6(a) (absentee-voter declaration), 3150.16(a) (mail-in voter declaration). Despite this, the General Assembly did

not mention a signature-comparison requirement for returned absentee and mail-in ballots.

The Court concludes from this context that this is because the General Assembly did not intend for such a requirement. *See, e.g., Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1155 (2003) (“In arriving at our conclusion that the foregoing language does not provide for the right to a jury trial, we relied on three criteria. First, we put *substantial emphasis* on the fact that the PHRA was silent regarding the right to a jury trial. As we explained, ‘the General Assembly is well aware of its ability to grant a jury trial in its legislative pronouncements,’ and therefore, ‘we can presume that the General Assembly's express granting of trial by jury in some enactments means that it did not intend to permit for a jury trial under the PHRA.’” (cleaned up) (emphasis added)); *Holland v. Marcy*, 584 Pa. 195, 883 A.2d 449, 456, n.15 (2005) (“We additionally note that the legislature, in fact, did specify clearly when it intended the choice of one individual to bind others. In every other category addressed by Section 1705(a) other than (a)(5) which addressed uninsured owners, the General Assembly specifically referenced the fact that the decision of the named insured ... binds other household members... Similar reference to the ability of the uninsured owner's deemed choice to affect the rights of household members is conspicuously missing from Section 1705(a)(5).”).

Accordingly, the Court finds that the General Assembly's decision not to expressly refer to signature comparisons for mail-in ballots, when it did so elsewhere, is significant.

Third, this Court is mindful that Pennsylvania's election statutes are to be construed in a manner that does not risk disenfranchising voters. *See, e.g., 1 Pa. C.S. § 1922(3)* (“In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: ... That the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth.”); *id.* at § 1921(c)(6) (in interpreting a statute, the court may consider “[t]he consequences of a particular interpretation”).

As the Pennsylvania Supreme Court emphasized last month, “[I]t is well-settled that, although election laws must be strictly construed to prevent fraud, they ordinarily will be construed liberally in favor of the right to vote. Indeed, our goal must be to enfranchise and not to disenfranchise the electorate.” *Boockvar*, — A.3d at —, 2020 WL 5554644, at *9 (cleaned up); *see also id.* (“[A]lthough both

Respondent and the Caucus offer a reasonable interpretation of [Section 3150.16\(a\)](#) as it operates within the Election Code, their interpretation restricts voters' rights, as opposed to the reasonable interpretation tendered by Petitioner and the Secretary. The law, therefore, militates in favor of this Court construing the Election Code in a manner consistent with the view of Petitioner and the Secretary, as this construction of the Code favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate.”).

*57 Here, imposing a signature-comparison requirement as to mail-in and absentee ballots runs the risk of restricting voters' rights. This is so because election officials, unstudied and untested in signature verification, would have to subjectively analyze and compare signatures, which as discussed in greater detail below, is potentially problematic.¹⁶ [ECF 549-2, p. 19, ¶ 68]; [ECF 549-9, p. 20, ¶ 64]. And perhaps more importantly, even assuming an adequate, universal standard is implemented, mail-in and absentee voters whose signatures were “rejected” would, unlike in-person voters, be unable to cure the purported error. *See* [25 P.S. § 3146.8\(a\)](#) (stating that in-person and absentee ballots “shall [be safely kept] in sealed or locked containers until they are to be canvassed by the county board of elections,” which [§ 3146.8\(g\)\(1.1\)-\(2\)](#) states is no earlier than election day); *Boockvar*, — A.3d at —, 2020 WL 5554644, at *20 (“[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the ‘notice and opportunity to cure’ procedure sought by Petitioner. To the extent that a voter is at risk for having his or her ballot rejected due to minor errors made in contravention of those requirements, we agree that the decision to provide a ‘notice and opportunity to cure’ procedure to alleviate that risk is one best suited for the Legislature.”). As discussed in more detail below, unlike in-person voters, whose signatures are verified in their presence, mail-in and absentee voters' signatures would be verified at a later date outside the presence of the voter. *See generally* [25 P.S. § 3146.8\(a\), \(g\)](#) (requiring mail-in and absentee ballots to be kept secured in a sealed container until Election Day). Unbeknownst to the voter, then, and without an opportunity to remedy the purported error, these mail-in and absentee voters may not have their votes counted. Based on this risk of disenfranchisement, which the Court must consider in interpreting the statute, the Court cannot conclude that this was the General Assembly's intention.

The Court is not persuaded by Plaintiffs' arguments to the contrary.

Plaintiffs argue that [section 3146.8\(g\)\(5\)-\(7\)](#) provides a voter, whose ballot-signature was rejected, notice and an opportunity to cure the signature deficiency. [ECF 509, pp. 13, 18, 50]. That section, however, refers to when a person raises a specific challenge to a specific ballot or application on the grounds that the elector is not a “qualified elector.” [25 P.S. § 3146.8\(g\)\(4\)](#) (stating that mail-in and absentee ballots shall be counted unless they were challenged under [§§ 3146.2b](#) or [3150.12b](#), which allow challenges on the grounds that the elector applying for a mail-in or absentee ballot wasn't qualified). Thus, the “challenges” referenced in [§ 3146.8\(g\)\(5\)-\(7\)](#) refer to a voter's qualifications to vote, not a signature verification.

Plaintiffs similarly argue that [section 3146.8\(h\)](#) provides mail-in voters notice and opportunity to cure signature deficiencies. [ECF 552, p. 60]. But that section relates to “those absentee ballots or mail-in ballots for which proof of identification has not been received or could not be verified.” [25 P.S. § 3146.8\(h\)](#). As discussed above, “proof of identification” is a defined term, and includes the voter's driver's license number, last four digits of their Social Security number, or a specifically approved form of identification. [25 P.S. § 2602\(z.5\)\(3\)\(i\)-\(iv\)](#). Not included is the voter's signature.¹⁷

*58 At bottom, Plaintiffs request this Court to impose a requirement—signature comparison—that the General Assembly chose not to impose. [Section 3146.8\(g\)\(3\)](#) does not mention or require signature comparison. The Court will not write it into the statute.

For the same reasons that the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballots, the Election Code does not impose a signature-comparison requirement for mail-in and absentee ballot *applications*. While the General Assembly imposed a requirement that the application be signed, there is no mention of a requirement that the signature be verified, much less that the application be rejected based solely on such verification. [25 P.S. §§ 3146.2\(d\)](#) (absentee-ballot application), [3150.12\(c\)](#) (mail-in-ballot application). Again, finding no explicit instructions for signature comparison here (unlike elsewhere in the Code), the Court concludes that the General Assembly chose not to include a signature-comparison requirement for ballot applications.

The Court again finds Plaintiffs' arguments to the contrary unavailing. Plaintiffs argue that "there is no other proof of identification required to be submitted with the ballot applications," and thus, a signature comparison must be required. [ECF 509, p. 16].

But the Election Code expressly requires the applicant to include several pieces of identifying information, including their name, mailing address, and date of birth. 25 P.S. §§ 3146.2(b), 3150.12(b). And after receiving the applicant's application, the election official must "verify[] the proof of identification [a defined term as discussed above] and compar[e] the information provided on the application with the information contained on the applicant's permanent registration card."¹⁸ *Id.* at §§ 3146.2b(c), 3150.12b(a). Thus, contrary to Plaintiffs' argument, the General Assembly provided for certain methods of identification as to ballot applications. Signature verification isn't one of them.

For these reasons, the Court concludes that the Election Code does not impose a signature-comparison requirement for absentee and mail-in ballots and applications. As such, the Secretary's September 11, 2020, and September 28, 2020, guidance is consistent with the Election Code. Plaintiffs' claims of vote dilution based on this guidance will therefore be dismissed.

B. The lack of a signature comparison does not violate substantive due process.

In addition to alleging that the Secretary's guidance violates the Election Code, Plaintiffs appear to also argue that their right to vote is unconstitutionally burdened and diluted due to a risk of fraud. That is, regardless of what the Election Code requires, Plaintiffs assert that absent signature comparison, mail-in and absentee ballots will be prone to fraud, thereby diluting other lawful ballots. [ECF 509, pp. 45-50; 504-19, pp. 10-15]. Plaintiffs argue that this significantly burdens their fundamental right to vote, resulting in a due-process violation, and thus strict scrutiny applies. The Court disagrees.

*59 As discussed above in the context of Plaintiffs' drop-box claim, Plaintiffs' claim here simply does not rise to the high level for a substantive due process claim. To violate substantive due process in the voting-rights context, the infringements are much more severe. Only in extraordinary circumstances will there be "patent and fundamental unfairness" that causes a constitutional harm. See *Bonas v. Town of North Smithfield*, 265 F.3d 69, 74 (1st

Cir. 2001); *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2d Cir. 2005).

Here, Plaintiffs' signature-comparison claim does not meet this high standard. This isn't a situation of malapportionment, disenfranchisement, or intentional discrimination. And the risk of voter fraud generally without signature comparison—as a matter of fact and law—does not rise to "patent and fundamental unfairness."

Indeed, as discussed above, Plaintiffs' evidence of potential voter fraud here is insufficient to establish "patent and fundamental unfairness." In their summary-judgment brief, Plaintiffs argue that "the Secretary's September 2020 guidance memos promote voter fraud." [ECF 509, p. 48]. Plaintiffs then offer a hypothetical where a parent signs a ballot application on their child's behalf because the child is out-of-state. [ECF 509, p. 48]. Plaintiffs assert that without signature comparisons, such "fraud" could proceed unchecked. [*Id.*]. Plaintiffs continue, arguing that the "fraud" would "snowball," so that "spouses, neighbors, acquaintances, strangers, and others" were signing applications and ballots on others' behalf. [*Id.* at pp. 48-49]. To prevent such fraud, Plaintiffs' expert, Mr. Riddlemoser, asserts that signature comparison is needed. [ECF 504-19, p. 10 ("Not only does enforcing the Election Code's requirement of a completed and signed declaration ensure uniformity, which increases voter confidence, it also functions to reduce fraud possibilities by allowing signature verification.")].

Mr. Riddlemoser first highlights that in Philadelphia in the primary, ballots were counted "that lacked a completed declaration." [*Id.* at p. 11]. Mr. Riddlemoser further opines that the September 11, 2020, guidance and September 28, 2020, guidance, in instructing that signature comparison is not required for mail-in and absentee ballots and applications, "encourage[s], rather than prevent[s], voter fraud." [*Id.* at pp. 12-13]. Mr. Riddlemoser also notes that signature comparison is "the most common method" to verify ballots and that the Secretary's guidance "leave the absentee/mail-in ballots subject to the potential for unfettered fraud." [*Id.* at p. 14]. He concludes that the guidance "invites the dilution of legitimately cast votes." [*Id.*].

Based on this evidentiary record, construed in Plaintiffs' favor, the Court cannot conclude that there exists "patent and fundamental unfairness." Rather, Plaintiffs present only the possibility and potential for voter fraud. In their briefing, Plaintiffs relied on hypotheticals, rather than actual events.

[ECF 509, p. 48]. Mr. Riddlemoser admits that failing to verify signatures only creates “the potential” for fraud and “invites” vote dilution. [ECF 504-19, pp. 14, 15]. Even assuming an absence of signature comparison does indeed invite the potential for fraud, the nondiscriminatory, uniform practice and guidance does not give rise to “patent and fundamental unfairness” simply because of a “potential” for fraud. Plaintiffs have not presented evidence to establish a sufficient burden on their constitutional right to vote.

*60 Indeed, even if the Court assumed some “forged” applications or ballots were approved or counted, this is insufficient to establish substantial, widespread fraud that undermines the electoral process. Rather, limited instances of “forged” ballots—which according to Plaintiffs’ definition, includes an individual signing for their spouse or child—amount to what the law refers to as “garden variety” disputes of limited harm. As has long been understood, federal courts should not intervene in such “garden variety” disputes. *Hutchinson*, 797 F.2d at 1283 (“[C]ourts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities.”) (cleaned up); *Yoshina*, 140 F.3d at 1226 (“In general, garden variety election irregularities do not violate the Due Process Clause, even if they control the outcome of the vote or election.” (collecting cases)); *Curry v. Baker*, 802 F.2d 1302, 1314-15 (11th Cir. 1986) (“[I]f the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order. Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots.” (cleaned up)).

To be clear, the Court does not take Plaintiffs’ allegations and evidence lightly. Election fraud is serious and disruptive. And Plaintiffs could be right that the safer course would be to mandate signature comparison for all ballots. But what Plaintiffs essentially complain of here is whether the procedures employed by the Commonwealth are sufficient to prevent that fraud. That is a decision left to the General Assembly, not to the meddling of a federal judge. *Crawford*, 553 U.S. at 208, 128 S.Ct. 1610 (Scalia, J. concurring) (“It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class.”). *Griffin*, 385 F.3d at 1131-32 (“[S]triking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment

with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.”).

C. Plaintiffs’ federal equal-protection claims based on signature comparison fail.

Plaintiffs present two federal equal-protection claims. The Court will address each in turn.

1. County differences over signature comparison do not violate federal equal-protection rights.

Plaintiffs’ first federal equal-protection claim is based on some county boards of elections intending to verify the signatures on mail-in and absentee ballots and applications, while others do not intend to do so. To that end, Plaintiffs have presented evidence that some, but not all, counties do intend to verify signatures. *E.g.*, [ECF 504-1].¹⁹ According to Plaintiffs, this arbitrary and differential treatment of mail-in and absentee ballots among counties—purportedly caused by the Secretary’s September 11, 2020, and September 28, 2020, guidance—violates the Equal-Protection Clause because voters will be treated differently simply because of the county in which they reside. The Court, however, finds no equal-protection violation in this context.

The Secretary’s guidance about which Plaintiffs complain is uniform and nondiscriminatory. It was issued to all counties and applies equally to all counties, and by extension, voters. Because the uniform, nondiscriminatory guidance is rational, it is sound under the Equal-Protection Clause. *See Gamza*, 619 F.2d at 453 (5th Cir. 1980) (“We must, therefore, recognize a distinction between state laws and patterns of state action that systematically deny equality in voting, and episodic events that, despite non-discriminatory laws, may result in the dilution of an individual’s vote. Unlike systematically discriminatory laws, isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause.”) (citation omitted). Indeed, the guidance merely instructs counties to abide by the Election Code—an instruction to follow the law is certainly rational and related to an obviously rational government interest.

*61 In fact, if there is any unequal application now, it is caused by those counties that are *not* following the guidance and are going above and beyond the Election Code to impose a signature-comparison requirement. That claim, though, is

not before the Court, as Plaintiffs here do not assert that imposing a signature-comparison requirement violates the Constitution (they allege the opposite).

In any event, to the extent there was uncertainty before, this decision informs the counties of the current state of the law as it relates to signature comparison. If any county still imposes a signature-comparison requirement in order to disallow ballots, it does so without support from the Secretary's guidance or the Election Code. Further, counties that impose this signature-comparison requirement to reject ballots may be creating a different potential constitutional claim for voters whose ballots are rejected. *Boockvar*, — A.3d at —, 2020 WL 5554644, at *34, n.16 (Wecht, J. concurring) (noting that courts around the country have found due process issues with signature-comparison requirements; and collecting cases).

For these reasons, Plaintiffs' equal-protection claim falls short.

2. Different treatment between in-person ballots and mail-in ballots also does not violate federal equal-protection rights.

Plaintiffs also assert a second federal equal-protection claim on the grounds that the Election Code, by not requiring signature comparison for mail-in and absentee ballots, treats such ballots differently than in-person ballots (which require signature comparisons). Plaintiffs argue that this is an unconstitutionally arbitrary and unequal treatment. The Court disagrees.

It is well-settled that states may employ in-person voting, absentee voting, and mail-in voting and each method need not be implemented in exactly the same way. *See Hendon*, 710 F.2d at 181 (“A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state.”)

“Absentee voting is a fundamentally different process from in-person voting, and is governed by procedures entirely distinct from in-person voting procedures.” *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1320 (10th Cir. 2008) (citations omitted). It is an “obvious fact that absentee voting is an inherently different procedure from in-person voting.” *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 830-31 (S.D. Ind. 2006). Because in-person voting

is “inherently different” from mail-in and absentee voting, the procedures for each need not be the same. *See, e.g., Santillanes*, 546 F.3d at 1320-21 (“[B]ecause there are clear differences between the two types of voting procedures, the law's distinction is proper.”); *Rokita*, 458 F. Supp. 2d at 831 (“[I]t is axiomatic that a state which allows for both in-person and absentee voting must therefore apply different requirements to these two groups of voters.”); *Billups*, 439 F. Supp. 2d at 1356-57 (“[A]bsentee voting and in-person voting are inherently different processes, and both processes use different standards, practices, and procedures.”).

Plaintiffs argue that while absentee and mail-in voting “is a fundamentally different process from in-person voting,” Defendants have “no justification in this instance to create such an arbitrary and disparate rule between absentee/mail-in voters and in-person voters.” [ECF 509, p. 51]. Not so.

*62 Because of the “inherent” differences between in-person voting and mail-in and absentee voting, Pennsylvania's requirement for signature comparison for in-person ballots, but not mail-in and absentee ballots, is not arbitrary. By way of example, Secretary Boockvar articulated several valid reasons why Pennsylvania implements different verification procedures for mail-in and absentee voters versus in-person voters. [ECF 504-12; ECF 549-2].

In her deposition, Secretary Boockvar explained that for in-person voters, the only possible verification is signature comparison and verification. [ECF 504-12, 55:19-56:19]. This is because, unlike mail-in and absentee voters who must apply for a ballot, in-person voters may simply show up at the polls on Election Day and vote. In contrast, for mail-in and absentee voters, there are several verification steps implemented before the voter's mail-in/absentee ballot is counted, such as checking their application and their drivers' license number or social security number. [*Id.* at 56:8-19]. Thus, counties don't need to resort to a signature comparison to identify and verify the mail-in or absentee voter.

This is important, as Defendants and Intervenors present valid concerns about the uniformity and equality of signature comparisons, in part, due to the technical nature of signature analysis, the subjective underpinnings of signature analysis, and the variety of reasons that signatures can naturally change over time. [ECF 549-2, pp. 19-20, ¶ 68; ECF 549-9, p. 20, ¶¶ 63-64]. Such factors can reasonably justify not requiring a signature comparison when the elector is not physically present.

For example, Secretary Boockvar notes the concern with non-handwriting-expert election officials comparing signatures, without uniform standards. [ECF 549-2, pp. 19-20, ¶ 68]. She also notes that people's signatures can change over time, due to natural and unavoidable occurrences, like injuries, arthritis, or the simple passage of time. [*Id.*]. Such reasons are valid and reasonable. See *Boockvar*, — A.3d at —, 2020 WL 5554644, at *34 (Wecht, J. concurring) (“Signature comparison is a process fraught with the risk of error and inconsistent application, especially when conducted by lay people.”).

Secretary Boockvar further asserts that signature comparison is justified for in-person voting, but not mail-in or absentee voting, because the in-person voter is notified of his or her signature deficiency, and afforded an opportunity to cure. [ECF 549-2, pp. 19-20, ¶¶ 66-68 (explaining that in-person voters can be immediately notified of the signature deficiency, but mail-in/absentee voters cannot)]. Secretary Boockvar's justifications are consistent with the Election Code's framework.

When a voter votes in person, he or she signs the voter's certificate, and the election official immediately, in the voter's presence, verifies the signature. 25 P.S. § 3050(a.3)(1)-(2). If the election official finds the signature to be problematic, the in-person voter is told as such. *Id.* at § 3050(a.3)(2). Notably, however, the in-person voter may still cast a ballot. *Id.* (“[I]f the signature on the voter's certificate ... shall not be deemed authentic by any of the election officers, such elector shall not be denied the right to vote for that reason[.]”). The in-person voter whose signature is questioned must, after casting the ballot, “produce at least one qualified elector of the election district as a witness, who shall make affidavit of his identity or continued residence in the election district.” *Id.* at § 3050(d). Thus, the in-person voter whose signature is not verified is immediately notified, is still allowed to cast a ballot, and is given the opportunity to remedy the signature-deficiency.

*63 In contrast, a voter who casts a mail-in or absentee ballot cannot be afforded this opportunity. Absentee and mail-in ballots are kept in “sealed or locked containers” until they are “canvassed by the county board of elections.” 25 P.S. § 3146.8(a). The pre-canvassing and canvassing cannot begin until Election Day. *Id.* at § 3146.8(g)(1.1)-(2). As such, the absentee and mail-in ballots cannot be verified until Election Day, regardless of when the voter mails the ballot. Further, even if there were sufficient time, a voter cannot cure these

types of deficiencies on their mail-in or absentee ballot. *Boockvar*, — A.3d at —, 2020 WL 5554644, at *20 (“[A]lthough the Election Code provides the procedures for casting and counting a vote by mail, it does not provide for the “notice and opportunity to cure” procedure sought by Petitioner.”).

Therefore, if mail-in and absentee ballots were subject to signature comparison, an election official—who is unstudied in the technical aspects of signature comparison—could deem a voter's signature problematic and not count the ballot, which would effectively disenfranchise that voter. Unlike the in-person voter, the mail-in or absentee voter may not know that his or her signature was deemed inauthentic, and thus may be unable to promptly cure the deficiency even if he or she were aware.

Accordingly, the Court concludes that the inherent differences and opportunities afforded to in-person voters compared to mail-in and absentee voters provides sufficient reason to treat such voters differently regarding signature comparison. The Court concludes that the lack of signature comparison for mail-in and absentee ballots is neither arbitrary, nor burdens Plaintiffs' equal-protection rights.

For these reasons, the Court will dismiss Plaintiffs' federal equal-protection claims related to signature comparison.

3. The Election Code provisions related to signature comparison satisfy *Anderson-Burdick*.

Finally, even assuming the Election Code's absence of a signature-comparison requirement imposes some burden on Plaintiffs' constitutional rights, Plaintiffs' constitutional claims still fail.

As discussed above with respect to Defendants' drop-box implementation, *Anderson-Burdick* does not apply neatly to this claim either. This is because Plaintiffs aren't challenging a specific regulation affecting their right to vote, but are instead challenging the *lack* of a restriction on someone else's right to vote. This makes both the burden difficult to assess and also the state's interests in *not* doing something more abstract. As such, the Court finds that the proper application of the *Anderson-Burdick* framework here includes weighing the burden involving Plaintiffs' risk of vote dilution against the state's interests and overall plan in preventing against voter fraud, including with respect to forged mail-in ballots.

Weighing these considerations compels a conclusion that there is no constitutional violation here. With respect to any burden on Plaintiffs' right to vote, that burden is slight, at best. A failure to engage in a signature comparison may, crediting Plaintiffs' evidence, increase the risk of voter fraud. But even then, this remains a largely speculative concern. This burden too is lessened by the numerous other regulations imposed by the Election Code, including the detailed verification procedure as to the information on mail-in ballots (discussed above), and the deterrence furthered by criminal sanctions for those engaging in such voter fraud.

Against these burdens, the Commonwealth has precise and weighty interests in verifying ballot applications and ballots in an appropriate manner to ensure that they are accurate. As discussed above, the Commonwealth determined that the risk of disenfranchising mail-in and absentee voters, did not justify signature comparison for those voters. [ECF 549-2, pp. 19-20, ¶¶ 66-69]. Unlike for in-person voters, there are other means of identifying and verifying mail-in and absentee voters, such as having to specifically apply for a mail-in or absentee ballot and provide various categories of identifying information. [ECF 504-12, 55:19-56:19]; 25 P.S. §§ 3146.2(b), 3150.12(b). And ultimately, due to the slight burden imposed on Plaintiffs, Pennsylvania's regulatory interests in a uniform election pursuant to established procedures is sufficient to withstand scrutiny. *Timmons*, 520 U.S. at 358, 117 S.Ct. 1364.

*64 The General Assembly opted not to require signature comparisons for mail-in and absentee ballots and applications. And as previously discussed, absent extraordinary reasons to, the Court is not to second-guess the legislature.

IV. Defendants and Intervenors are entitled to summary judgment on Plaintiffs' as-applied, federal constitutional challenge to the county-residency requirement for poll watchers.

Plaintiffs next take exception with the provision of the Election Code that restricts a registered voter from serving as a poll watcher outside the county of his or her residence. [ECF 461, ¶ 217].

Plaintiffs argue that “[a]s applied to the 2020 General Election, during the midst of the COVID-19 pandemic, Pennsylvania's residency requirement for watchers violates equal protection.” [ECF 509, p. 58]. That's because, according

to Plaintiffs, the “current pandemic severely challenges the ability of parties to staff watchers[.]” [*Id.* at p. 60]. And not having enough poll watchers in place “puts into danger the constitutionally-guaranteed right to a transparent and undiluted vote,” [*id.* at p. 68], by “fostering an environment that encourages ballot fraud or tampering,” [ECF 461, ¶ 256]. As such, Plaintiffs believe that the county residency requirement “is not rationally connected or reasonably related to any interest presented by the Commonwealth.” [ECF 509, p. 63].

Defendants and Intervenors have a markedly different view.

As an initial matter, the Democratic Intervenors argue that Plaintiffs “are precluded from relitigating their claim that the Commonwealth lacks a constitutionally recognized basis for imposing a county-residence restriction for poll watchers” based on the doctrine articulated in *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). [ECF 529, p. 16]. That doctrine requires that after a federal court has abstained under *Pullman*, the plaintiff must expressly reserve the right to litigate any federal claims in federal court while litigating state-law issues in state court. *England*, 375 U.S. at 419, 421-22, 84 S.Ct. 461. Defendants and Intervenors contend that Plaintiffs (specifically, the Trump Campaign, the RNC, and the Republican Party) failed to do so in the proceedings before the Pennsylvania Supreme Court.

And if the *England* doctrine doesn't bar this claim, Defendants and Intervenors argue that “Plaintiffs' as-applied challenge simply fails to state a constitutional claim.” *See, e.g.*, [ECF 547, p. 65]. They believe that the county-residency requirement does not infringe on a fundamental right or regulate a suspect classification (such as race, sex, or national origin). [*Id.*]. As a result, the Commonwealth need only provide a rational basis for the requirement, which Defendants and Intervenors believe the Commonwealth has done. [*Id.*].

After carefully reviewing the record and considering the parties' arguments and evidence, the Court finds that the *England* doctrine does not bar Plaintiffs' ability to bring this claim. Even so, after fully crediting Plaintiffs' evidence, the Court agrees with Defendants and Intervenors that Plaintiffs' as-applied challenge fails on the merits.

A. The *England* doctrine does not bar Plaintiffs' federal challenge to the county-residency requirement.

*65 In *England*, the Supreme Court established that after a federal court abstains under *Pullman*, “if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then ... he has elected to forgo his right to return to the District Court.” 375 U.S. at 419, 84 S.Ct. 461. To reserve those rights, a plaintiff forced into state court by way of abstention must inform the state court that he is exposing the federal claims there only to provide the proper context for considering the state-law questions. *Id.* at 421, 84 S.Ct. 461. And that “he intends, should the state court[] hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.” *Id.* Essentially, in *England*, the Supreme Court created a special doctrine of *res judicata* for *Pullman* abstention cases.

The Democratic Intervenors argue that because none of the three Plaintiffs who participated in the Pennsylvania Supreme Court case as either intervenors or *amici* “reserved the right to relitigate [Plaintiffs’ poll-watcher claim] in federal court,” they are now “precluded” from doing so. [ECF 529, p. 17]. The Court is not convinced that this doctrine bars Plaintiffs’ claim for at least two reasons.

First, in its original abstention decision, the Court noted that “[n]one of Plaintiffs’ poll-watching claims directly ask the Court to construe an ambiguous state statute.” [ECF 409, p. 24]. Instead, these claims resided in a *Pullman* gray area, because they were only indirectly affected by other unsettled state-law issues. In light of that, the Court finds that the *England* doctrine was not “triggered,” such that Plaintiffs needed to reserve their right to return to federal court to litigate the specific as-applied claim at issue here.

Second, even if it were triggered, not all of the Plaintiffs here were parties in the Pennsylvania Supreme Court case, and only one (the Republican Party) was even given intervenor status. But even the Republican Party, acting as an intervenor, did not have an opportunity to develop the record or present evidence relevant to its as-applied challenge. Thus, this claim wasn’t “fully litigated” by any of the Plaintiffs, which is a necessary condition for the claim to be barred under the *England* doctrine. *Cf. Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1073 (3d Cir. 1990) (explaining that a litigant “may not relitigate an issue s/he fully and unreservedly litigated in state court”).

Thus, Plaintiffs are not precluded by the *England* doctrine from bringing their remaining as applied poll-watcher claim. The Court will now address the claim on the merits.

B. The county-residency requirement, as applied to the facts presented and the upcoming general election, does not violate the U.S. Constitution.

Originally, Plaintiffs raised a facial challenge to the county-residency requirement under 25 P.S. § 2687. That is, Plaintiffs first took the position that there was no conceivable constitutional application of the requirement that an elector be a resident of the county in which he or she seeks to serve. But, as Plaintiffs’ concede, that facial challenge is no longer viable in light of the Pennsylvania Supreme Court’s recent decision. [ECF 448, p. 10]. As a result, Plaintiffs now focus solely on raising an as-applied challenge to the county-residency requirement.

“[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

At a fundamental level, a “facial attack tests a law’s constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010). By contrast, an “as-applied attack” on a statute “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.” *Id.* The distinction between facial and an as-applied attack, then, “goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.” *Citizens United*, 558 U.S. at 331, 130 S.Ct. 876; *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 362 (3d Cir. 2016) (“The distinction between facial and as-applied constitutional challenges, then, is of critical importance in determining the remedy to be provided).

*66 Because the distinction is focused on the available remedies, not the substantive pleading requirements, “[t]he substantive rule of law is the same for both challenges.” *Edwards v. D.C.*, 755 F.3d 996, 1001 (D.C. Cir. 2014); *see also Pursuing Am.’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 509, n.5 (D.C. Cir. 2016) (“Indeed, the substantive rule of law is the same for both as-applied and facial First Amendment challenges.”) (cleaned up); *Legal Aid Servs. of*

Or. v. Legal Servs. Corp., 608 F.3d 1084, 1096 (9th Cir. 2010) (“The underlying constitutional standard, however, is no different [in an as-applied challenge] th[a]n in a facial challenge.”).

“In other words, *how* one must demonstrate the statute's invalidity remains the same for both type of challenges, namely, by showing that a specific rule of law, usually a constitutional rule of law, invalidates the statute, whether in a personal application or to all.” *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 228 (2d Cir. 2006), *abrogated on other grounds by Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011).

In determining whether a state election law violates the U.S. Constitution, the Court must “first examine whether the challenged law burdens rights protected by the First and Fourteenth Amendments.” *Patriot Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 95 F.3d 253, 258 (3d Cir. 1996). “Where the right to vote is not burdened by a state's regulation on the election process, ... the state need only provide a rational basis for the statute.” *Cortés*, 218 F. Supp. 3d at 408. The same is true under an equal protection analysis. “If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used.” *Obama*, 697 F.3d at 428 (6th Cir. 2012); *see also Biener*, 361 F.3d at 214-15 (applying rational basis where there was no showing of an “infringement on the fundamental right to vote.”); *Donatelli*, 2 F.3d at 515 (“A legislative classification that does not affect a suspect category or infringe on a fundamental constitutional right must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” (cleaned up)).

But where the law imposes at least some burden on protected rights, the court “must gauge the character and magnitude of the burden on the plaintiff and weigh it against the importance of the interests that the state proffers to justify the burden.” *Patriot Party*, 95 F.3d at 258 (citations omitted).

Consistent with the Pennsylvania Supreme Court's recent decision, but now based on a complete record, this Court finds that the county-residency requirement for poll watching does not, as applied to the particular circumstances of this election, burden any of Plaintiffs' fundamental constitutional rights, and so a deferential standard of review should apply.

See Boockvar, — A.3d at —, 2020 WL 5554644, at *30. Under a rational-basis review and considering all the relevant evidence before the Court, the county-residency requirement is rational, and thus constitutional. But even if the requirement burdened the right to vote, that burden is slight—and under the *Anderson-Burdick* test, the Commonwealth's interests in a county-specific voting system, viewed in the context of its overall polling-place security measures, outweigh any slight burden imposed by the county-residency restriction.

1. The county-residency requirement neither burdens a fundamental right, including the right to vote, nor discriminates based on a suspect classification.

*67 At the outset, “there is no individual constitutional right to serve as a poll watcher[.]” *Boockvar*, — A.3d at —, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 408); *see also Dailey v. Hands*, No. 14-423, 2015 WL 1293188, at *5 (S.D. Ala. Mar. 23, 2015) (“[P]oll watching is not a fundamental right protected by the First Amendment.”); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) (“Plaintiffs have cited no authority ..., nor have we found any, that supports the proposition that [the plaintiff] had a first amendment right to act as a poll watcher.”).

“State law, not the Federal Constitution, grants individuals the ability to serve as poll watchers and parties and candidates the authority to select those individuals.” *Cortés*, 218 F. Supp. 3d at 414; *see also Boockvar*, — A.3d at —, 2020 WL 5554644, at *30 (the right to serve as a poll watcher “is conferred by statute”); *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (“The number of poll-watchers allowed, the manner of their appointment, their location within the polling place, the activities permitted and the amount of compensation allowed are all dictated by [25 P.S. § 2687].”). Given the nature of the right, “[i]t is at least arguable that the [Commonwealth of Pennsylvania] could eliminate the position of poll watcher” without offending the constitution. *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007). In fact, one neighboring state—West Virginia—has eliminated poll watchers. *W. Va. Code Ann. § 3-1-37*; *W. Va. Code Ann. § 3-1-41*.

Nor does the county-residency requirement hinder the “exercise of the franchise.” *Cortés*, 218 F. Supp. 3d at 408. It doesn't in any way limit voters' “range of choices in the voting booth”—voters can still “cast ballots for whomever they wish[.]” *Id.* And, as Plaintiffs admit, the county-residency

requirement doesn't make the actual act of casting a vote any harder. *See* [ECF 524-24, 67:1-6]. Indeed, at least one of the plaintiffs here, Representative Joyce, testified that he was unaware of anyone unable to cast his ballot because of the county-residency requirement for poll watchers [*Id.*].

Finally, Plaintiffs' claim that Pennsylvania's "poll watching system" denies them "equal access" to the ability to observe polling places in the upcoming election does not, on its own, require the Court to apply anything other than rational-basis scrutiny. [ECF 551, p. 75]. To the extent Plaintiffs are denied equal access (which discussed below, as a matter of evidence, is very much in doubt), it isn't based on their membership in any suspect classification.

For a state law to be subject to strict scrutiny, it must not only make a distinction among groups, but the distinction must be based on inherently suspect classes such as race, gender, alienage, or national origin. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Political parties are not such a suspect class. *Greenville Republican Party*, 824 F. Supp. 2d at 669 ("[T]his court is unfamiliar with, and Plaintiffs have not cited, any authority categorizing political parties as an inherently suspect class.") Likewise, "[c]ounty of residence is not a suspect classification warranting heightened scrutiny[.]" *Short*, 893 F.3d at 679.

Plaintiffs don't dispute this. [ECF 509, p. 65 ("To be clear, the right at issue here is the right of **candidates** and **political parties** to participate in an election where the process is transparent and open to observation and the right of the **voters** to participate in such election." (emphasis in original))]. Rather, Plaintiffs' theory as to how the county-residency requirement burdens the right to vote is based on the same threat of vote dilution by fraud that they have advanced with their other claims. In other words, Plaintiffs' claim that the county-residency requirement for poll watchers limits the ability to find poll watchers, which, in turn, limits the ability for poll watchers to detect fraud and ballot tampering. [ECF 461, ¶¶ 256-57]. The resulting fraudulent or destroyed ballots cause the dilution of lawfully cast ballots. [ECF 509, pp. 64-68].

*68 Thus, based on this theory, to establish the burden flowing from the county-residency restriction, Plaintiffs must show (1) the county-residency requirement prevents them from recruiting enough registered Republican poll watchers in every county, (2) the absence of these Republican poll

watchers creates a material risk of increased fraud and ballot tampering, and (3) this risk of fraud and ballot tampering will dilute the value of honestly cast votes.

There are both factual and legal problems fatal to Plaintiffs' vote-dilution theory in this context. Factually, Plaintiffs' evidence, accepted as true, fails to establish that they cannot find enough poll watchers because of the county-residency requirement. But even if they made that factual showing, the inability to find poll watchers still does not burden any recognized constitutional right in a way that would necessitate anything more than deferential review.

2. Plaintiffs' evidence does not establish any factual predicate for their theory.

Even accepting as true Plaintiffs' version of events, Plaintiffs have not established that the county-residency requirement is responsible for an inability to find enough poll watchers for at least two reasons.

First, Plaintiffs' evidence stops short of demonstrating any actual shortfall of desired poll watchers.

For example, in his declaration, James J. Fitzpatrick, the Pennsylvania Director for Election Day Operations for the Trump Campaign, stated only that the "Trump Campaign is **concerned** that due to the residency restriction, it will not have enough poll watchers in certain counties." [ECF 504-2, ¶ 25 (emphasis added)]. Notably, however, Mr. Fitzpatrick, even when specifically asked during his deposition, never identified a single county where the Trump Campaign has **actually** tried and failed to recruit a poll watcher because of the county-residency requirement. *See, e.g.*, [ECF 528-14, 261:21-25] ("Q: Which counties does the Trump campaign or the RNC contend that they will not be able to obtain what you refer to as full coverage of poll watchers for the November 2020 election? A: I'm not sure. I couldn't tell you a list.").

Nor do any of Plaintiffs' other witness declarations establish an actual, inability to recruit poll watchers in any specific county. Representative Reschenthaler stated only that he was "concerned" that he "will not be able to recruit enough volunteers from Greene County to watch the necessary polls in Greene County." [ECF 504-6, ¶ 12].

Representative Kelly stated that he was "likely to have difficulty getting enough poll watchers from within Erie

County to watch all polls within that county on election day.” [ECF 504-5, ¶ 16]. “Likely difficulty” isn’t the same as an “actual inability.” That aside, the declaration doesn’t provide any basis for Representative Kelly’s assessment of this “likely difficulty.” Nowhere does he detail the efforts he took (*e.g.*, the outreach he tried, prospective candidates he unsuccessfully recruited, and the like), nor did he explain why those efforts aren’t likely to succeed in the future.

The same goes for Representative Thompson’s declaration. Representative Thompson stated that during some unspecified prior elections, unidentified parties and campaigns did not “always find enough volunteers to serve as poll watchers in each precinct.” [ECF 504-4, ¶ 20]. But this undetailed statement doesn’t help Plaintiffs’ cause, because it doesn’t identify the elections during which this was a problem, the parties and campaigns affected by a lack of poll watchers, or the precincts for which no poll watcher could be found.

*69 Representative Joyce’s declaration doesn’t even express a “concern” about “likely difficulty” in recruiting poll watchers. He simply stated his belief that “[p]oll watchers play a very important role in terms of protecting the integrity of the election process[.]” [ECF 504-7, ¶ 11]. While he may be right, it has no bearing on whether Plaintiffs can find enough people to play that “very important role.”

Indeed, Plaintiffs’ prediction that they will “likely” have difficulty finding poll watchers is belied by the uncontested Pennsylvania voter registration statistics for 2019 that they included as an exhibit to their summary-judgment brief. [ECF 504-34]. Those statistics suggest that there is no shortage of registered Republican voters who are qualified to serve as poll watchers. [*Id.*]. Even in the three specific counties in which Plaintiffs warn that “Democratic registered voters outnumber ... their Republican counterparts” (*i.e.*, Philadelphia, Delaware, and Centre), there are still significant numbers of registered Republicans. *See* [ECF 504-34 (Philadelphia – 118,003; Delaware – 156,867; and Centre – 42,903)]. And only a very small percentage of the registered Republicans would be needed to fill all the necessary poll watcher positions in those allegedly problematic counties. *See, e.g., Cortés, 218 F. Supp. 3d at 410* (noting that, in 2016, the Republican Party “could staff the entirety of the poll watcher allotment in Philadelphia county with just 4.1% of the registered Republicans in the county.”). While Plaintiffs argue that these statistics don’t show the number of registered Republicans *willing* to serve as a poll watcher, the Court is hard pressed to see, nor do Plaintiffs show, how among the

tens—or hundreds—of thousands of registered Republicans in these counties, Plaintiffs are unable to find enough poll workers.²⁰

Plaintiffs have not presented any evidence that would explain how, despite these numbers, they will have a hard time finding enough poll watchers. In fact, Plaintiffs’ own expert, Professor Lockerbie, admits that “the Democratic and Republican parties might be able to meet the relevant criteria and recruit a sufficient population of qualified poll watchers who meet the residency requirements[.]” [ECF 504-20, ¶ 16].

Professor Lockerbie’s report makes clear, and Plaintiffs appear to agree, that the county-residency requirement only potentially burdens other, “minor” political parties’ ability to recruit enough poll watchers. [ECF 509, p. 61 (citing ECF 504-20, ¶¶ 16-17)]. Regardless, any burden on these third parties is not properly before the Court. They are not parties to this litigation, and so the Court doesn’t know their precise identities, whether they have, in fact, experienced any difficulty in recruiting poll watchers, or, more fundamentally, whether they even want to recruit poll watchers at all.²¹

*70 Additionally, Plaintiffs failed to present evidence that connects the county-residency requirement to their inability to find enough poll watchers. To succeed on their theory Plaintiffs cannot just point to difficulty recruiting poll watchers, they need to also show that “Section 2687(b) is responsible for their purported staffing woes.” *Cortés, 218 F. Supp. 3d at 410*. Plaintiffs fail to show this, too.

Plaintiffs argue that the ongoing COVID-19 pandemic greatly reduces the number of people who would be willing to serve as a poll watcher, which further exacerbates the alleged problem caused by the county-residency requirement. [ECF 509, p. 60]. The primary problem with this argument, though, is that Plaintiffs have not presented any evidence to support it. Plaintiffs have not put forward a statement from a single registered voter who says they are unwilling to serve as a poll watcher due to concerns about contracting COVID-19.

Despite this shortcoming, the Court also acknowledges that COVID-19 generally has made it more difficult to do anything in person, and it is entirely plausible that the current pandemic will limit Plaintiffs from recruiting poll watchers to man polling places on election day. But that is likely true for just about every type of election rule and regulation. For example, the effects of the ongoing pandemic coupled with the requirement that the poll watcher be a registered voter

(a requirement that unquestionably narrows the pool of potential candidates) would also make it harder to recruit poll watchers. There is no basis to find that the current public-health conditions, standing alone, render the county-residency requirement irrational or unconstitutional.

To bolster their concerns over COVID-19, Plaintiffs point to *Democratic Nat'l Committee v. Bostelmann*, No. 20-249, --- F.Supp.3d ---, 2020 WL 5627186 (W.D. Wis. Sept. 21, 2020), where the court there enjoined Wisconsin's statute that requires that each election official (*i.e.*, poll worker) be an elector of the county in which the municipality is located. That case is distinguishable in at least two important ways.

First, *Bostelmann* concerned poll *workers*, not poll *watchers*. *Id.* at ---, 2020 WL 5627186, at *7. The difference between the two is significant. Poll workers are a more fundamental and essential aspect of the voting process. Without poll workers, counties cannot even open polling sites, which creates the possibility that voters will be completely disenfranchised. In fact, in *Bostelmann*, the plaintiffs presented evidence that Milwaukee was only able to open 5 of its normal 180 polling places. *Id.* A failure to provide voters a place to vote is a much more direct and established constitutional harm than the one Plaintiffs allege here.

Second, the plaintiffs in *Bostelmann* actually presented evidence that they were unable to find the poll workers they needed due to the confluence of the COVID-19 pandemic and the challenged restriction. *Id.* As discussed above, Plaintiffs here have presented no such evidence.

To succeed on summary judgment, Plaintiffs need to move beyond the speculative concerns they offer and into the realm of proven facts. But they haven't done so on two critical fronts—they haven't shown an actual inability to find the necessary poll watchers, or that such an inability is caused by the county-residency requirement. Because Plaintiffs have not pointed to any specific “polling place that Section 2687(b) prevents [them] from staffing with poll watchers,” Plaintiffs’ theory of burden is doomed at launch. *Cortés*, 218 F. Supp. 3d at 409.

3. Even if Plaintiffs could establish a factual predicate for their theory, it would fail as a matter of law.

*71 As the Pennsylvania Supreme Court concluded last month, Plaintiffs’ “speculative claim that it is ‘difficult’ for

both parties to fill poll watcher positions in every precinct, *even if true*, is insufficient to transform the Commonwealth's uniform and reasonable regulation requiring that poll watchers be residents of the counties they serve into a non-rational policy choice.” *Boockvar*, --- A.3d at ---, 2020 WL 5554644, at *30 (emphasis added).²² The fundamental constitutional principles undergirding this finding are sound.

Plaintiffs’ only alleged burden on the right to vote is that Defendants’ lawful imposition of a county-residency requirement on poll watching will result in an increased risk of voter irregularities (*i.e.*, ballot fraud or tampering) that will, in turn, potentially cause voter dilution. While vote dilution is a recognized burden on the right to vote in certain contexts, such as when laws are crafted that structurally devalue one community's or group of people's votes over another's, there is no authority to support a finding of burden based solely on a speculative, future possibility that election irregularities might occur. *See, e.g., Minnesota Voters*, 720 F.3d at 1033 (affirming dismissal of claims “premised on potential harm in the form of vote dilution caused by insufficient pre-election verification of EDRs’ voting eligibility and the absence of post-election ballot rescission procedures”); *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020) (rejecting the claim that a ballot witness signature requirement should not be enjoined during a pandemic because it would allegedly increase the risk of voter fraud and put Republican candidates at risk); *Cook Cnty. Rep. Party v. Pritzker*, No. 20-4676, 2020 WL 5573059, at *4 (N.D. Ill. Sept. 17, 2020) (denying a motion to enjoin a law expanding the deadline to cure votes because plaintiffs did not show how voter fraud would dilute the plaintiffs’ votes).

Without a recognized burden on the right to vote, Plaintiffs’ “argument that the defendants did not present an adequate justification is immaterial.” *Green Party of Tennessee v. Hargett*, No. 16-6299, 2017 WL 4011854, at *4 (6th Cir. May 11, 2017). That's because the Court need not apply the *Anderson-Burdick* framework, and its intermediate standards, in this situation. *See Donatelli*, 2 F.3d at 514 & n.10. Instead, just as the Pennsylvania Supreme Court held, the Commonwealth here need only show “that a rational basis exists [for the county-residency requirement] to be upheld. *Boockvar*, --- A.3d at ---, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 408); *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 899 (5th Cir. 2012) (applying rational basis review as opposed to the *Anderson-Burdick* balancing test because state election law did not implicate or burden specific constitutional rights);

McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1227 (4th Cir. 1995) (concluding that a ballot access law “fails the *Anderson* balancing test only if it also does in fact burden protected rights”).

*72 “Under rational-basis review, the challenged classification must be upheld ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’ ” *Donatelli*, 2 F.3d at 513 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). “This standard of review is a paradigm of judicial restraint.” *FCC*, 508 U.S. at 314, 113 S.Ct. 2096. It “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Id.* at 313, 113 S.Ct. 2096. Nor is it the Court's “place to determine whether the [General Assembly's decisions] were the best decisions or even whether they were good ones.” *Donatelli*, 2 F.3d at 518.

Applying this deferential standard of review, the Pennsylvania Supreme Court found that given Pennsylvania's “county-based scheme for conducting elections, it is reasonable that the Legislature would require poll watchers, who serve within the various counties of the state, to be residents of the counties in which they serve.” *Boockvar*, — A.3d at —, 2020 WL 5554644, at *30 (citing *Cortés*, 218 F. Supp. 3d at 409). The Court agrees.

There are multiple reasons for this. As Secretary Boockvar advises, “[b]y restricting poll watchers’ service to the counties in which they actually reside, the law ensures that poll watchers should have some degree of familiarity with the voters they are observing in a given election district.” [ECF 549-2, p. 22, ¶ 78]. In a similar vein, Intervenors’ expert, Dr. Barreto, in his report, states that, voters are more likely to be comfortable with poll watchers that “they know and they recognize from their area.” [ECF 524-1, ¶40 (“Research in political science suggests that voters are much more comfortable and trusting of the process when they know or are familiar with poll workers who are from their community.”)]. When poll watchers come from the community, “there is increased trust in government, faith in elections, and voter turnout[.]” [*Id.*].

At his deposition, Representative Kelly agreed with this idea: “Yeah, I think – again, depending how the districts are established, I think people are probably even more comfortable with people that they – that they know and they recognize from their area.” [ECF 524-23, 111:21-25].

Whether requiring poll watchers to be residents of the county in which they will serve is the best or wisest rule is not the issue before the Court. The issue is whether that rule is *reasonable* and rationally advances Pennsylvania's legitimate interests. This Court, like multiple courts before it, finds that it does.

4. Plaintiffs’ poll-watcher claim fails under the *Anderson-Burdick* framework.

Even if rational-basis review did not apply and Plaintiffs had established a burden on their right to vote, their claim nonetheless fails under the *Anderson-Burdick* framework.

Viewing Plaintiffs’ evidence in the best possible light, at most, the county-residency requirement for poll watching places only an indirect, ancillary burden on the right to vote through an elevated risk of vote dilution.

Against this slight burden, the Commonwealth has sound interests in imposing a county-residency requirement, including, as noted above, local familiarity with rules, regulations, procedures, and the voters. Beyond this, in assessing the Commonwealth's interest in imposing the county-based restriction, that interest must be viewed in the overall context of the Commonwealth's security measures involving polling places that are designed to prevent against fraud and vote dilution.

As the court in *Cortés* recognized, “while poll watchers may help guard the integrity of the vote, they are not the Election Code's only, or even best, means of doing so.” 218 F. Supp. 3d at 404.

*73 Each county has the authority to investigate fraud and report irregularities to the district attorney. 25 P.S. § 2642(i). Elections in each district are conducted by a multimember election board, which is comprised of an election judge, a majority inspector, and a minor inspector. 25 P.S. § 2671. Each voting district may also use two overseers of election, who are appointed from different political parties by the Pennsylvania Courts of Common Pleas, and “carry greater authority than poll watchers.” *Cortés*, 218 F. Supp. 3d at 403 (citing 25 P.S. § 2685). “Election overseers have the right to be present with the officers of an election ‘within the enclosed space during the entire time the ... election is held.’ ” *Id.* “Poll watchers have no such right,” they must “remain ‘outside the enclosed space’ where ballots are counted or

voting machines canvassed.” *Id.* (citing 25 P.S. § 2687(b)). Election overseers can also challenge any person offering to vote, while poll watchers have no such authority. 25 P.S. § 2687. For these reasons, concerns “over potential voter fraud—whether perpetrated by putative electors or poll workers themselves—appear more effectively addressed by election overseers than poll watchers[.]” *Id.* at 406.

Plaintiffs complain that poll watchers may not be present during the pre-canvass and canvass meetings for absentee and mail-in ballots. But the Election Code provides that “authorized representatives” of each party *and* each candidate can attend such canvassing. 25 P.S. § 3146.8(g)(1.1), (2). That means if, for example, 15 Republican candidates appear on ballots within a particular county (between both the state and federal elections), there could be up to 16 “authorized representatives” related to the Republican Party (one for each candidate and one for the party as a whole) present during canvassing. Adding poll watchers to that mix would just be forcing unnecessary cooks into an already crowded kitchen.²³ *See* [ECF 549-2, p. 23, ¶ 83 (“If every certified poll watcher within a county was permitted to attend the pre-canvass meeting, the elections staff could be overwhelmed by the vast numbers of poll watchers, and the pre-canvassing process could become chaotic and compromised.”)].

*74 Further, Secretary Boockvar testified that Pennsylvania has adopted new voting systems that will provide an additional layer of security. [ECF 524-27, 237:21-238:11]. That is, there will now be a paper trail in the form of verifiable paper ballots that will allow voters to confirm their choice, and the state recently piloted a new program that will help ensure that votes can be properly verified. [*Id.*].

On balance, then, it is clear that to the extent any burden on the right to vote exists, it is minimal. On the other hand, the Commonwealth’s interest in a county-specific voting system, including with county-resident poll watchers, is rational and weighty, particularly when viewed in the context of the measures that the Commonwealth has implemented to prevent against election fraud at the polls. As such, under the flexible *Anderson-Burdick* standard, Plaintiffs have failed to establish that the county-residency requirement is unconstitutional.

5. The Court will continue to abstain from deciding where the Election Code permits poll watching to occur.

Plaintiffs also appear to challenge any attempts to limit poll watching to “monitoring only in-person voting at the polling place on Election Day.” [ECF 461, ¶ 254]. That is, in their proposed order accompanying their Motion for Summary Judgement, Plaintiffs seek a declaration that they are “permitted to have watchers present at all locations where voters are registering to vote, applying for absentee or mail-in ballots, voting absentee or mail-in ballots, and/or returning or collecting absentee or mail-in ballots, including without limitation any satellite or early voting sites established by any county board of elections.” [ECF 503-1, ¶ 3].

Plaintiffs also argue that Secretary Boockvar’s October 6, 2020, guidance expressly, and unlawfully, prohibits poll watchers from being present at county election offices, satellite offices, and designated ballot-return sites. [ECF 571].

This challenge, however, is directly related to the unsettled state-law question of whether drop boxes and other satellite locations are “polling places” as envisioned under the Election Code. If they are, then Plaintiffs may be right in that poll watchers must be allowed to be present. However, the Court previously abstained under *Pullman* in addressing this “location” claim due to the unsettled nature of the state-law issues; and it will continue to do so. [ECF 459, p. 5 (“The Court will continue to abstain under *Pullman* as to Plaintiffs’ claim pertaining to the notice of drop box locations and, more generally, whether the ‘polling place’ requirements under the Election Code apply to drop-box locations. As discussed in the Court’s prior opinion, this claim involves unsettled issues of state law.”)].

Moreover, Plaintiffs have filed a lawsuit in the Court of Common Pleas of Philadelphia to secure access to drop box locations for poll watchers. The state court held that satellite ballot-collection locations, such as drop-box locations, are not “polling places,” and therefore poll watchers are not authorized to be present in those places. [ECF 573-1, at p. 12]. The Trump Campaign immediately filed a notice of appeal of that decision. Regardless of what happens on appeal, Plaintiffs appear to be on track to obtain resolution of that claim in state court. [ECF 549-22]. Although this isn’t dispositive, it does give the Court comfort that Plaintiffs will be able to seek timely resolution of these issues, which appear to be largely matters of state law. *See Barr v. Galvin*, 626 F.3d 99, 108 n.3 (1st Cir. 2010) (“Though the existence of a pending state court action is sometimes considered as a factor in favor of abstention, the lack of such pending proceedings does not necessarily prevent abstention by a federal court.”).

V. The Court will decline to exercise supplemental jurisdiction over Plaintiffs' state-constitutional claims.

*75 In addition to the federal-constitutional claims addressed above, Plaintiffs assert violations of the Pennsylvania Constitution in Counts III, V, VII, and IX of the Second Amended Complaint. Because the Court will be dismissing all federal-constitutional claims in this case, it will decline to exercise supplemental jurisdiction over these state-law claims.

Under 28 U.S.C. § 1367(c)(3), a court “may decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it has original jurisdiction[.]” *Stone v. Martin*, 720 F. App'x 132, 136 (3d Cir. 2017) (cleaned up). “It ‘must decline’ to exercise supplemental jurisdiction in such circumstances ‘unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for [exercising supplemental jurisdiction].’” *Id.* (quoting *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000) (emphasis in original)).

Courts have specifically applied this principle in cases raising federal and state constitutional challenges to provisions of the state's election code. *See, e.g., Silberberg v. Bd. of Elections of New York*, 272 F. Supp. 3d 454, 480–81 (S.D.N.Y. 2017) (“Having dismissed plaintiffs’ First and Fourteenth Amendment claims, the Court declines to exercise supplemental jurisdiction over plaintiffs’ state law claims.”); *Bishop v. Bartlett*, No. 06-462, 2007 WL 9718438, at *10 (E.D.N.C. Aug. 18, 2007) (declining “to exercise supplemental jurisdiction over the state constitutional claim” following dismissal of all federal claims and recognizing “the limited role of the federal judiciary in matters of state elections” and that North Carolina's administrative, judicial, and political processes provide a better forum for plaintiffs to seek vindication of their state constitutional claim), *aff'd*, 575 F.3d 419 (4th Cir. 2009).

Beyond these usual reasons to decline to exercise supplemental jurisdiction over the state-constitutional claims, there are two additional reasons to do so here.

First, the parties do not meaningfully address the state-constitutional claims in their cross-motions for summary judgment, effectively treating them as coextensive with

the federal-constitutional claims here. The Pennsylvania Supreme Court, however, has held that Pennsylvania's “Free and Equal Elections” Clause is not necessarily coextensive with the 14th Amendment. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737, 812-813 (2018) (referring to the Pennsylvania Free and Equal Elections Clause as employing a “separate and distinct standard” than that under the 14th Amendment to the U.S. Constitution). Given the lack of briefing on this issue and out of deference to the state courts to interpret their own state constitution, the Court declines to exercise supplemental jurisdiction.

Second, several Defendants have asserted a defense of sovereign immunity in this case. That defense does not apply to Plaintiffs’ federal-constitutional claims under the *Ex parte Young* doctrine. *See Acosta v. Democratic City Comm.*, 288 F. Supp. 3d 597, 627 (E.D. Pa. 2018) (“Here, the doctrine of *Ex parte Young* applies to Plaintiffs’ constitutional claims for prospective injunctive and declaratory relief, and therefore the First and Fourteenth Amendment claims are not barred by the Eleventh Amendment. Secretary Cortés, as an officer of the Pennsylvania Department of State, may be sued in his individual and official capacities ‘for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law.’”). But sovereign immunity may apply to the state-law claims, at least those against Secretary Boockvar. The possibility of sovereign immunity potentially applying here counsels in favor of declining supplemental jurisdiction to decide the state-law claims.

*76 As such, all state-constitutional claims will be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court will enter judgment in favor of Defendants and against Plaintiffs on all federal-constitutional claims, decline to exercise supplemental jurisdiction over the remaining state-law claims, and dismiss all claims in this case. Because there is no just reason for delay, the Court will also direct entry of final judgment under *Federal Rule of Civil Procedure 54(b)*. An appropriate order follows.

All Citations

--- F.Supp.3d ----, 2020 WL 5997680

Footnotes

- 1 “Drop boxes” are receptacles similar to U.S. Postal Service mailboxes. They are made of metal, and have a locking mechanism, storage compartment, and an insert or slot into which a voter can insert a ballot. *See generally* [ECF 549-9].
- 2 Intervenors include the Pennsylvania State Democratic Party, the League of Women Voters, the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, Citizens for Pennsylvania's Future, the Sierra Club, the Pennsylvania Alliance for Retired Americans, and several affiliated individuals of these organizations.
- 3 As noted above, Plaintiffs and Mr. Riddlemoser use the term “voter fraud” to mean “illegal voting”—*i.e.*, voter fraud is any practice that violates the Election Code. For purposes of the Court’s decision and analysis of Plaintiffs’ vote-dilution claims, the Court accepts this definition.
- 4 The procedure for absentee ballots and applications largely resembles the procedure for mail-in ballots and applications.
- 5 If the application is approved, the approval is “final and binding,” subject only to challenges “on the grounds that the applicant was not a qualified elector.” 25 P.S. § 3150.12b(a)(2). An unqualified elector would be, for example, an individual who has not “been a citizen of the United States at least one month.” Pa. Const. Art. 7, § 1; *see also* 25 P.S. § 2602(t) (defining “qualified elector” as “any person who shall possess all of the qualifications for voting now or hereafter prescribed by the Constitution of this Commonwealth, or who, being otherwise qualified by continued residence in his election district, shall obtain such qualifications before the next ensuing election”).
- 6 In her summary-judgment brief, Secretary Boockvar argues that Plaintiffs’ as-applied challenge to Pennsylvania’s county-residency requirement is unripe. [ECF 547, pp. 60-63]. The Secretary reasons that Plaintiffs have not shown sufficient evidence that they are harmed by the county-residency requirement. This argument is directed more towards a lack of standing and a lack of evidence to support the claim on the merits. As the sufficiency of the evidence of harm is a separate issue from ripeness (which is more concerned with timing), the Court does not find Plaintiffs’ as-applied challenge to the county-residency requirement unripe. *See Progressive Mountain Ins. Co. v. Middlebrooks*, 805 F. App’x 731, 734 (11th Cir. 2020) (“The question of ripeness frequently boils down to the same question as questions of Article III standing, but the distinction between the two is that standing focuses [on] whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff has personally suffered that harm, whereas ripeness centers on whether that injury has occurred yet.” (cleaned up) (citations omitted)).
- 7 In their briefing, the parties focused on the “capable of repetition yet evading review” exception to the mootness doctrine. The Court, however, does not find that it needs to rely on this exception. Nearing the eve of the election, it is clear that Defendants intend to engage in the conduct that Plaintiffs assert is illegal and unconstitutional. Thus, the claims are presently live, and are not “evading review” in this circumstance.
- 8 While Rule 65(d)(2)(C) states that an injunction binds “[non-parties] who are in active concert or participation” with the parties or the parties’ agents, the Court does not find that Rule 65(d) helps the county boards. As discussed, the county boards manage the elections and implement the electoral procedures. While the Court could enjoin Secretary Boockvar, for example, from using unmanned drop boxes, each individual county election board could still use unmanned drop boxes on their own. Doing so would not result in the counties being in “active concert or participation” with Secretary Boockvar, as each county is independently managing the electoral process within their county lines. *See Marshak v. Treadwell*, 595 F.3d 478, 486 (3d Cir. 2009) (“[N]on-parties guilty of aiding or abetting or acting in concert with a named defendant or his privy in violating the injunction may be held in contempt.” (cleaned up) (citations omitted)). In other words, each county elections board would not be “aiding or abetting” Secretary Boockvar in violating the injunction (which would implicate Rule 65(d)(2)(C)); rather, the counties would be utilizing their independent statutory authority to manage elections within their county lines.
- 9 As evidence of the county boards’ indispensability, one court recently found that the failure to join local election officials in an election case can make the harm alleged not “redressable.” It would be a catch-22 to say that county boards cannot be joined to this case as necessary parties, but then dismiss the case for lack of standing due to the boards’ absence. *Cf. Jacobson v. Florida Secretary of States*, 974 F.3d 1236, ———, 2020 WL 5289377, at *11-12 (11th Cir. Sept. 3, 2020) (“The problem for the [plaintiffs] is that Florida law tasks the [county] Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute. ... The Secretary is responsible only for certifying to the supervisor of elections of each county the names of persons nominated ... Because the Secretary didn’t do (or fail to do) anything that contributed to [plaintiffs’] harm, the voters and organizations cannot meet Article III’s traceability requirement.” (cleaned up)).
- 10 The organizational Plaintiffs also raise certain associational and organizational standing arguments, asserting that they represent their members’ interests. The associational standing arguments are derivative of their members’ interests. That

is, because the Court has found no concrete injury suffered by the individual voters, which would include the members of the organizational Plaintiffs, there are no separate grounds to establish standing for these organizations. See *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1997) (an organization only has standing to sue on behalf of its members when “its members would otherwise have standing to sue in their own right”) (citation omitted).

11 See, also, e.g., *Dudum v. Arntz*, 640 F.3d 1098, 1117 (9th Cir. 2011) (“If the aspects of the City’s restricted IRV scheme Dudum challenges impose any burdens on voters’ constitutional rights to vote, they are minimal at best.”); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354–55 (11th Cir. 2009) (“The district court determined that the burden imposed on Georgia voters who lack photo identification was not undue or significant, and we agree.... The NAACP and voters are unable to direct this Court to any admissible and reliable evidence that quantifies the extent and scope of the burden imposed by the Georgia statute.”); *Soules v. Kauaians for Nukoolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988) (“Appellants claim that Hawaii’s absentee voting law fails to prohibit ‘the solicitation, examination and delivery of absentee ballots by persons other than the voters’ and that such activities occurred during the special election ... We agree with the district court that the Hawaii absentee ballot statute and the regulations adopted under it adequately protect the secrecy and integrity of the ballot. Although Hawaii has not adopted a regulation to prevent the delivery of ballots by persons other than the voter, the Hawaii regulations go into great detail in their elaboration of procedures to prevent tampering with the ballots.”); *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (“[A]lthough ballot format has an effect on the fundamental right to vote, the effect is somewhat attenuated.”); *Nemes v. Bensinger*, — F. Supp. 3d —, —, 2020 WL 3402345, at *13 (W.D. Ky. June 18, 2020) (“The burden imposed by the contraction to one polling place is modest, and the identified groups are afforded various other means under the voting plans to easily and effectively avoid disenfranchisement. As already discussed, Defendants have offered evidence of the substantial government interest in implementing voting plans that provide for a free and fair election while attempting to minimize the spread of COVID-19.”); *Paralyzed Veterans of Am. v. McPherson*, No. 06-4670, 2008 WL 4183981, at *22 (N.D. Cal. Sept. 9, 2008) (“Plaintiff Bohlke’s listed burdens rely on speculative risk or the ancillary effects of third party assistance, but not on evidence of any concrete harm. Such speculations or effects are insufficient under Supreme Court and Ninth Circuit precedent to demonstrate a severe burden on the fundamental right to vote.”).

12 The parties do not specifically brief the elements of an Elections-Clause claim. This is typically a claim brought by a state legislature, and the Court has doubts that this is a viable theory for Plaintiffs to assert. See *Lance v. Coffman*, 549 U.S. 437, 442, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). Regardless, if state law does not require signature comparison, then there is no difference between the Secretary’s guidance and the Election Code, and the Elections-Clause claim necessarily fails.

13 Several Defendants and Intervenors have asked this Court to abstain from deciding this issue on the basis of *Pullman*. As this Court previously discussed, a court can abstain under *Pullman* if three factors are met: “(1) [the dispute] requires interpretation of ‘unsettled questions of state law,’; (2) permitting resolution of the unsettled state-law questions by state courts would ‘obviate the need for, or substantially narrow the scope of adjudication of the constitutional claims’; and (3) an ‘erroneous construction of state law would be disruptive of important state policies[.]’ ” [ECF 409, p. 3 (quoting *Chez Sez*, 945 F.2d at 631)]. But if, on the other hand, the answer to the state law dispute is “clear and unmistakable,” abstention is not warranted. [*Id.* at p. 15 (citing *Chez Sez*, 945 F.2d at 632)]. Here, the Court concludes (as discussed below) that the Election Code is clear that signature comparison is not required and further, that Plaintiffs’ competing interpretation is not plausible. As such, the Court cannot abstain under *Pullman*.

The *Pullman* analysis does not change simply because Secretary Boockvar has filed a “King’s Bench” petition with the Pennsylvania Supreme Court, requesting that court to clarify whether the Election Code mandates signature comparison of mail-in and absentee ballots and applications. [ECF 556, p. 11; ECF 557]. The fact that such a petition was filed does not change this Court’s conclusion that the Election Code is clear. The *Pullman* factors remain the same. And they are not met here.

14 The Secretary’s September 11, 2020, guidance, stated that the “Pennsylvania Election Code does not authorize the county board of elections to set aside returned absentee or mail-in ballots based solely on signature analysis by the county board of elections.” [ECF 504-24, p. 3, § 3]. Similarly, the Secretary’s September 28, 2020, guidance stated that “Election Code does not permit county election officials to reject applications or voted ballots based solely on signature analysis. ... No challenges may be made to mail-in and absentee ballots at any time based on signature analysis.” [ECF 504-25, p. 9, § 5.2].

15 The Election Code’s definition of “proof of identification” in full provides:

The words “proof of identification” shall mean ... For a qualified absentee elector ... or a qualified mail-in elector ...:

- i. in the case of an elector who has been issued a current and valid driver's license, the elector's driver's license number;
- ii. in the case of an elector who has not been issued a current and valid driver's license, the last four digits of the elector's Social Security number;
- iii. in the case of an elector who has a religious objection to being photographed, a copy of a document that satisfies paragraph (1) [*i.e.*, "a valid-without-photo driver's license or a valid-without-photo identification card issued by the Department of Transportation"]; or
- iv. in the case of an elector who has not been issued a current and valid driver's license or Social Security number, a copy of a document that satisfies paragraph (2) [*i.e.*, "a document that shows the name of the individual to whom the document was issued and the name substantially conforms to the name of the individual as it appears in the district register; shows a photograph of the individual to whom the document was issued; includes an expiration date and is not expired, except (A) ... or (B) ...; and was issued by" the federal, state, or municipal government, or an "accredited Pennsylvania public or private institution of higher learning [or] "a Pennsylvania are facility."].

25 P.S. § 2602(z.5)(3).

- 16 While election officials must engage in signature comparison for in-person voters, that requirement is explicitly required by the Election Code, unlike for mail-in ballots. 25 P.S. § 3050(a.3)(2). And as discussed below, in-person voters, unlike mail-in voters, are immediately notified if their signatures are deficient.
- 17 Plaintiffs also argue that signature comparison for mail-in and absentee ballots is supported by historical case law. [ECF 552, pp. 58-59]. Plaintiffs cite to two cases from the 1960s that the Court of Common Pleas decided. [*Id.*]. The first, *Appeal of Fogleman*, concluded that under the then-applicable election law, an absentee voter had to sign a declaration to show that he was a proper resident who had not already voted in that election. 36 Pa. D. & C.2d 426, 427 (Pa. Ct. Comm. Pl. 1964). Regarding the voter's signature, the court simply stated, "[i]f the elector fails or refuses to attach his or her signature, then such elector has not completed the declaration as required by law of all voters." *Id.* Thus, no signature comparison or verification was implicated there; rather, the court simply stated that the declaration must be signed (*i.e.*, completed). The second case Plaintiffs cite, *In re Canvass of Absentee Ballots of Gen. Election* [ECF 552, pp. 58-59], arose from individual, post-election challenges to 46 individual absentee ballots. 39 Pa. D. & C.2d 429, 430 (Pa. Ct. Comm. Pl. 1965). Thus, a universal and mandatory signature-comparison requirement was not at issue there, unlike what Plaintiffs contest here. This Court finds neither case persuasive.
- 18 This identifying information on a ballot application includes much of the same information expressly listed for what a voter must provide in initially registering to vote. 25 Pa. C.S.A. § 1327(a) (stating that the "official voter registration application" shall request the applicant's: full name, address of residence (and mailing address if different), and date of birth).
- 19 The counties that intend to compare and verify signatures in the upcoming election include at least the following counties: Cambria, Elk, Franklin, Juniata, Mifflin, Sullivan, Susquehanna, and Wyoming. [ECF 504-1].
- 20 Plus, these figures do not even tell the whole story because they do not take into account the hundreds of thousands of voters who are registered to other parties who could also conceivably serve as poll watchers for the Trump Campaign and the candidate Plaintiffs. [504-34]. While that may not be the ideal scenario for Plaintiffs, they concede there's nothing in the Election Code that limits them to recruiting only registered voters from the Republican Party. [ECF 528-14, 267:23-268:1 (Q: And you don't have to be a registered Republican to serve as a poll watcher for the Trump campaign, do you? A: No.)]. To that point, the Trump Campaign utilized at least two Democrats among the poll watchers it registered in the primary. [ECF 528-15, P001648].
- 21 To the extent that Plaintiffs are attempting to bring their claim on behalf of these third parties (which is unclear), they would lack standing to do so. Ordinarily, "a litigant must assert his or her own legal rights and interests and cannot rest a claim of relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The only time a litigant can bring an action on behalf of a third party is when "three important criteria are satisfied." *Id.* "The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interest." *Id.* at 410-11, 111 S.Ct. 1364 (cleaned up). Plaintiffs cannot satisfy the second or third criteria.
- Plaintiffs claim that they "have a close relationship with these minor parties such that it will act as an effective advocate for the minor parties." [ECF 551, p. 30]. It is hard to see how Plaintiffs can be said to have a close relationship with rival political parties who are their direct adversaries in the upcoming election.
- Plaintiffs also argue that these "minor parties" are hindered from protecting their own interests, particularly in this action when there are no minor party intervenors." [*Id.*]. But that doesn't hold water either. Just because these other parties have not asked to intervene, it does not mean they were incapable of intervening or seeking relief elsewhere. Indeed,

these parties and their candidates have demonstrated time and again that they can raise their own challenges to election laws when they so desire, including by filing suit in federal district court. See, e.g., *Stein v. Cortés*, 223 F. Supp. 3d 423 (E.D. Pa. 2016) (Green Party Presidential candidate Jill Stein seeking recount); *Libertarian Party of Conn. v. Merrill*, No. 20-467, 2020 WL 3526922 (D. Conn. June 27, 2020) (seeking to enjoin Connecticut's ballot access rules that required minor party candidates to petition their way onto the ballot); *Green Party of Ark. v. Martin*, 649 F.3d 675 (8th Cir. 2011) (challenging Arkansas' ballot access laws).

22 The Sierra Club Intervenors argue this should end the analysis. [ECF 542, p. 14 (“Even ‘as applied,’ Plaintiffs’ claim has already been rejected”)]. While the Court finds the Pennsylvania Supreme Court’s apparent ruling on Plaintiffs’ as-applied challenge instructive, it is not outcome determinative. That is because the Pennsylvania Supreme Court did not have the benefit of the full evidentiary record that the Court has here.

23 After the briefing on the cross-motions for summary judgment had closed, on October 6, 2020, Secretary Boockvar issued additional guidance, which Plaintiffs then raised with the Court the following day. [ECF 571]. This new guidance confirms that poll watchers cannot be present during the pre-canvassing and canvassing of mail-in ballots. It also makes clear that while the authorized representative can be present, the representative cannot make any challenges to the ballots. The Court finds that this new guidance has minimal relevance to the current disputes at issue here. The scope of duties of a representative is not before the Court. Of sole relevance here is whether this new guidance changes how this Court weighs the burdens and benefits of the county-residency restriction for poll watchers. The Court finds that the representative’s inability to challenge mail-in ballots does appear to provide less protection to Plaintiffs; but in the grand election scheme, particularly in light of the role of the election overseers, the Court does not find the new guidance to materially upset the Commonwealth’s interests in its overall election-monitoring plan.

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