

IN THE SUPREME COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas,
Irvin Weinreich, Brenda Weinreich, and
the Pennsylvania Alliance for Retired
Americans,

Petitioners/Appellants,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis,
Director of the Bureau of Election
Services and Notaries,

Respondents/Appellees.

No. 320 MAP 2020

APPELLANTS' EMERGENCY MOTION TO EXPEDITE

Appellants respectfully move the Court for an expedited schedule for the briefing and argument of their appeal of the Commonwealth Court's denial of their Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review in Commonwealth Court case number 266 MD 2020.

Appellants are challenging the Commonwealth's failure to provide sufficiently safe, reliable paths to voting in the fast approaching primary election on June 2 that is only days away, and seek emergency relief to protect voters' constitutional rights. Because the urgency of this matter and the need for expedited relief, Appellants respectfully submit that the interests of all parties as well as the

general public will be best served by a schedule that allows for the timely implementation of the Court's decision.

Accordingly, Appellants request that this Honorable Court set an expedited schedule as follows:

Appellants' Brief Due: May 30, 2020 (concurrently with this motion)

Appellees' Brief Due: June 1, 2020

Oral argument to be scheduled at the Court's convenience if the Court deems it necessary.

Dated: May 30, 2020

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IN THE SUPREME COURT OF PENNSYLVANIA

No. 32 MAP 2020

MICHAEL CROSSEY, DWAYNE THOMAS, IRVIN WEINREICH, BRENDA
WEINREICH, AND THE PENNSYLVANIA ALLIANCE FOR RETIRED
AMERICANS

Appellants,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH, AND
JESSICA MATHIS, DIRECTOR OF THE BUREAU OF ELECTION SERVICES
AND NOTARIES

Appellees.

BRIEF OF APPELLANTS

Appeal from May 28, 2020 Order of the Commonwealth Court of Pennsylvania at
Docket No. 266 MD 2020

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I. STATEMENT OF JURISDICTION

This is an appeal from the Commonwealth Court's order denying Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review, issued on May 28, 2020. That opinion is attached as Addendum A.

The Supreme Court has exclusive jurisdiction of appeals from final orders of the Commonwealth Court entered in any matter which was originally commenced in the Commonwealth Court, 42 Pa.C.S. § 723; Pa. R.A.P. 1101, and of appeals from orders of the Commonwealth Court denying an injunction, Pa. R.A.P. 311(a)(4); *see also* 42 Pa.C.S. § 5105(c). Appellants commenced this matter in the Commonwealth Court pursuant to its original jurisdiction under 42 Pa.C.S. §§ 761(a), 764(2).

II. ORDER OR OTHER DETERMINATION IN QUESTION

On May 28, 2020, Commonwealth Court of Pennsylvania (Leavitt, J.) entered the following order under docket No. 266 MD 2020:

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.

MARY HANNAH LEAVITT, President Judge

A complete copy of the Memorandum Opinion and Order on Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction

and for Expedited Review are attached as Addendum A. Appellants seek review of the entire order and opinion.

III. STATEMENT OF STANDARD AND SCOPE OF REVIEW

This Court reviews an order of the Commonwealth Court denying a preliminary injunction for abuse of discretion or error of law. *Weeks v. Dep't of Human Servs.*, 222 A.3d 722, 726, 730 (Pa. 2019). The scope of this Court's "review in preliminary injunction matters is plenary." *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501 n.7 (Pa. 2014) (citing *Warehime v. Warehime*, 860 A.2d 41, 46 n.7 (Pa. 2004)). The Court will reverse the denial of a preliminary injunction if there appear to be no apparently reasonable grounds for the Commonwealth Court's decision. *Brayman Constr. Corp. v. Com., Dep't of Transp.*, 13 A.3d 925, 936 (Pa. 2011). The Court also will reverse the denial of a preliminary injunction when the Commonwealth Court misapplied the law or relied on palpably erroneous law. *Id.*

When examining conclusions of law or application of the law to a set of facts, the standard of review is de novo. *Laird v. Dep't of Pub. Welfare*, 23 A.3d 1015, 1024 (Pa. 2011); *see also City of Phila. v. Int'l Ass'n. of Firefighters, Local 22*, 999 A.2d 555, 565 n.11 (Pa. 2010). Further, the Commonwealth Court's factual findings must be supported by substantial evidence. *In re Nomination Petition of Gales*, 54

A. 3d 855, 857 (Pa. 2012); *Bell v. Thornburgh*, 420 A.2d 443, 450 (Pa. 1980); *see also Parker v. City of Philadelphia*, 137 A.2d 343, 346 (Pa. 1958).

IV. STATEMENT OF THE QUESTIONS INVOLVED

Did the Commonwealth Court err in denying Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review?

Suggested Answer: Yes.

In the alternative, upon finding that it lacked jurisdiction to grant the Application, did the Commonwealth Court err in failing to transfer Appellants' Petition and/or Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review to the Supreme Court, pursuant to 42 Pa.C.S. §5103(a)?

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

A. Procedural History

The Appellants are several Pennsylvania voters who, because of their advanced age, are especially vulnerable to severe illness from COVID-19, R. 6a-9a ¶¶ 12–15, and the organization to which they belong, The Pennsylvania Alliance for Retired Americans (“the Alliance”), which has over 335,000 members across the Commonwealth. R. 9a ¶ 16. Appellants filed a Petition for Declaratory and Injunctive Relief in the Commonwealth Court of Pennsylvania on April 22, 2020.

On May 8, Appellants filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (“Emergency Application”) with the Commonwealth Court. Appellants’ Emergency Application requested an order requiring Appellees to adopt emergency procedures that would: (1) provide for the distribution of emergency write-in ballots to all voters who requested absentee ballots or mail-in ballots (collectively, “mail ballots”); (2) allow election officials to count mail ballots if postmarked by Election Day and delivered by June 9, 2020, seven days after Election Day; and (3) allow third parties to assist voters in delivering their mail ballots.

Between May 11-14, several individuals and entities applied for leave to intervene. The Court held a pre-hearing conference on May 19, and, at the Court’s suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Emergency Application from the merits thereof. On May 28, President Judge Mary Hannah Leavitt issued a memorandum opinion concluding that the Commonwealth Court lacks jurisdiction to grant the Emergency Application, finding that “[t]he Secretary’s arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court,” and “[a]s such, the Court . . . lacks jurisdiction to grant the Preliminary Injunction Application.”

B. Prior determinations in this case

The only prior determination in this case is the Memorandum Opinion and Order on Appellants' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review issued on May 28, 2020, attached hereto as Addendum A.

C. Name of official whose determination is to be reviewed

The Honorable Mary Hannah Leavitt, President Judge of Commonwealth Court, issued the determination to be reviewed by this Court.

D. Factual chronology

In the June 2 primary election, for the first time, all eligible Pennsylvanians will have the opportunity to vote by mail. That access could not have come at a more important time: the COVID-19 pandemic has upended virtually all aspects of daily life. Schools and businesses are closed; most people are sheltering in their homes; more than 40 million Americans have lost their jobs; and more than 102,000 have died. The Commonwealth has not been spared. The virus has infected more than 70,000 Pennsylvanians and has claimed at least 5,373 lives. To stem the spread of the disease, the Governor has encouraged residents to stay at home, practice social distancing, and vote by mail. R. 4a-5a ¶ 7. To date, over 1.8 million Pennsylvanians, including Appellants, have decided to vote absentee or through mail-in voting (collectively, "mail voting") in the June 2 primary. R. 971a ¶ 12. But as unprecedented numbers of Pennsylvania voters seek to cast their ballots by mail, the

effects of the COVID-19 pandemic threaten to obstruct—and in some cases, entirely deny—access to the franchise. To ensure that Pennsylvanians can exercise their constitutional right to vote, Appellants requested that the Commonwealth Court enter a preliminary injunction that would: (1) allow election officials to count mail ballots (or emergency write-in ballots) delivered up to seven days after Election Day provided that the ballots were postmarked by Election Day; and (2) allow third parties to assist voters in delivering their mail ballots.¹ R. 45a.

1. The Commonwealth has not taken adequate measures to ensure that voters' mail ballots will be counted in the primary.

The pandemic has caused U.S. Postal Service delivery delays and county backlogs in processing ballot requests, the devastating combination of which has resulted in many voters not receiving their mail ballots in a timely manner, let alone with enough time for their ballots to be delivered by 8 p.m. on Election Day. R. 10a-17a §§ 19–33; R. 65a-67a; R. 932a-33a. The backlogs are astounding: on May 22, nearly 173,000 applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. R. 674a §§ 6, 7. The following week, counties witnessed a surge in mail ballot requests, including at least

¹ The term “postmark” refers to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day. R. 45a.

501,117 between May 17 and 26 and at least 73,019 submitted on May 26 alone. R. 971a-972a ¶ 13.

Pennsylvania is poised to find itself repeating the disastrous experience of voters in Wisconsin in its recent April 7 primary. That election demonstrated the consequences of the State's failure to implement safeguards to ensure access to reliable, safe voting options, including vote by mail, in response to the COVID-19 pandemic. R. 68a-70a. According to statistics from the Wisconsin Elections Commission, on the day of their April election, there were 1,282,762 absentee ballot applications but only 1,273,374 absentee ballots issued—meaning 9,388 absentee ballots may not have even *been mailed* to the requesting voters by the time the voters were required to *return them*. R. 337a-45a. Had the Supreme Court of the United States not approved of a federal court's decision to extend the deadline for which ballots could be received and counted by elections officials, *see Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19-1016, 2020 WL 1672702, at *2 (U.S. Apr. 6, 2020), tens of thousands—and possibly more than 100,000—ballots that were ultimately counted would have been rejected. R. 454a ¶ 50.

Two weeks out from Tuesday's election, Pennsylvania counties were *behind* where Wisconsin's counties were at the same point in time (two weeks out from its April election). R. 966a ¶ 5. Considering how things have unfolded over the course of the last nine days, there is no reason to believe that Pennsylvania counties are

going to make some miraculous comeback that Wisconsin counties were unable to accomplish. R. 971a-72a ¶¶ 12-13.

The U.S. Postal Service delays are equally alarming. Delivery is taking up to ten days in *each direction*. In Montgomery County, the Department of State (“DOS”) reports that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes” and “these delays may make it more difficult for voters who requested ballots *well in advance* of the application deadline to return those ballots on time.” R. 675a ¶ 12 (emphasis added). Montgomery County election officials attribute these delays to mail delivery and stated in their Petition that “the United States Post Office confirmed that absentee and mail-in ballots . . . could take up to ten days to be delivered.” R. 1009a ¶ 11; *see also* R. 955a ¶ 6. Secretary Boockvar, at a town hall meeting earlier this month, acknowledged that delivery is taking twice as long in the Commonwealth. R. 62a-63a. Indeed, Appellant Dwayne Thomas waited almost two weeks before receiving his ballot on May 26, mailed his ballot on May 27, and now has less than one week for his ballot to be received by election officials by the June 2 deadline, but mail delivery in the Commonwealth may take up to 10 days. R. 952a-53a ¶ 3-4; R. 955a ¶ 6; R. 1009a ¶ 11.

Multiple counties have confirmed that they will not be able to surmount their backlogs in time for ballots to be delivered and returned by the deadline of 8 p.m.

on Tuesday, June 2. R. 932a-33a. Delaware County has publicly stated that voters will not even be receiving their requested ballots until close to or even on Election Day. R. 990a-95a. In Bucks County, some mail ballots are still being mailed out today. Emergency Pet. ¶ 14, *In re Extension of Time for Absentee and Mail-in Ballots to be Received and Counted in the 2020 Primary Election*, No. 2020-02322 (Bucks Cty. Ct. Com. Pl. May 28, 2020) (“Bucks County Emergency Pet.”). Best case scenario, those voters will *receive* their ballots on June 5—days after the election. R. 955a ¶¶ 6-7. But some may not receive their ballot until June 10, a full eight days *after*. Two counties—Montgomery and Bucks—have taken the extraordinary step of filing emergency petitions requesting permission to count ballots received by June 9, 2020.² R. 1009a ¶ 17. Montgomery County’s Petition, which was filed at the behest of the DOS, was dismissed by its Court of Common Pleas on Wednesday. R. 1016a. The Bucks County’s Petition is being held until Tuesday. Bucks County Emergency Pet.

It is no wonder that these counties are pleading for relief. These backlogs have accumulated despite county officials working back-breaking hours. In Bucks County, the Board of Elections has solicited help from other county departments,

² Not only is Montgomery County facing backlogs and delays, but now hundreds of ballots have been returned to the Board of Elections because of a glitch in the SURE system. R. 1008a ¶ 17. All of the wrongly returned ballots were from addresses that included apartment or unit numbers, disproportionately affecting renters who are often lower income voters. *Id.*; R. 1015a.

worked more than twelve hours every day—including on weekends and holidays—and has processed approximately 2,000 applications per day. Bucks County Emergency Pet. ¶ 12. Despite these heroic efforts, county officials have been clear that the backlogs mean that many voters will not be able to receive a ballot and send it back in time to arrive on June 2. R. 1018-1023a; *see also id.* 990a-994a (Delaware County Commissioner stating she is “very worried that people are going to be disenfranchised”).

2. The Commonwealth has not taken measures to ensure safe alternatives for voters who cannot deliver their ballots by mail in time to be counted.

Voters who seek to avoid the vagaries of mail delivery must risk their health and visit their local county board of elections (“county board”) office to deliver their ballots in person because Pennsylvania law prohibits them from seeking delivery assistance from third parties. R. 20a-24a §§ 42–51; R. 74a-75a. The counties that have publicly advised of their inability to keep up with the surge of mail ballot requests are located in areas where the prevalence of COVID-19 is highest. R. 674a ¶ 4. Voters who do not receive a ballot in time, or who are concerned that their ballot will not arrive at the county by June 2 (and, at this rate, that is likely for any voter who mailed their ballot on or after May 26) will be forced to physically visit a county board of elections office, potentially putting their health at risk. For the elderly and medically vulnerable, this choice is unconscionable. Voting in person poses similar

dangers and then some: many counties have drastically consolidated polling place locations—some by the 60 percent permitted under Act 12, and some by nearly 90 percent with authorization from the Secretary. R. 978a.

Efforts to consolidate, though meant to aid counties in administering an election when many poll workers are unwilling to staff polling places during the pandemic, severely limit access to in-person voting both because there are fewer locations packing more voters into fewer sites creates additional health risks. The General Assembly’s House Leaders even acknowledged that significantly reducing the number of polling places “threatens public health” and “artificially concentrates voters” into fewer locations, which “is completely at odds with the recommendation of social distancing,” and “undermines the core of our Republic—free and fair elections.” R. 984a-85a. Several counties, including Montgomery and Fayette, believe that “polling places will be inadequately staffed or not staffed at all” simply because it “will not have enough people who are eligible and willing to do it.” R. 103a-108a, 111a-117a.

Many of the issues associated with in-person voting and mail delivery delays could be avoided if voters could seek assistance in delivering their ballots on Tuesday. But alas, the Commonwealth will not bend, even during a global pandemic. For example, the Pennsylvania Alliance for Retired Americans, whose members are among the most vulnerable to COVID-19, would organize to aid its members who

require assistance getting their ballots returned by June 2 but who cannot trust their mail service. R. 9a ¶ 16; *see also* R. 953a ¶ 5. But the Commonwealth prohibits any such assistance. Voters are therefore caught in a catch-22: voting by mail imposes a significant risk of disenfranchisement, while voting in person imposes significant health risks, especially given the consolidation of polling places. Absent judicial intervention, tens of thousands of Pennsylvania voters (and perhaps even more) will be left without a safe, reliable option to exercise their constitutional right to vote and to participate in a free and equal election.

E. Statement of the determination under review

The determination under review is the Commonwealth Court’s Memorandum Opinion and Order on Appellants’ Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review issued on May 28, 2020, attached hereto as Addendum A. The Commonwealth Court listed the six elements of the test that courts apply in determining whether to issue a preliminary injunction, but did not evaluate the Emergency Application under those six elements. Instead, the court’s denial of the Emergency Application was based on its agreement with the Secretary’s argument that Appellants raised a challenge concerning the constitutionality of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§ 3146.6, 3150.16; that Section 13(2) of Act of Oct. 31, 2019, P.L. 552. No. 77 (“Act 77”) vests the Supreme Court with exclusive jurisdiction over such claims; and, as a

result, the Commonwealth Court lacked jurisdiction to grant the Emergency Application. Addendum A at 4-9.

The Commonwealth Court also found that the Secretary “presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.” *Id.* at 8-9.

VI. SUMMARY OF THE ARGUMENT

The court below committed several legal errors in finding that the “Secretary’s arguments on the issue of subject matter jurisdiction are compelling” and concluding that it lacked jurisdiction to grant Appellants’ Emergency Application. First, the Commonwealth Court misapplied Act 77’s exclusive jurisdiction requirement by reading the clause in isolation and interpreting it to apply to *all* constitutional claims that implicate provisions in Act 77. The Commonwealth Court’s broad interpretation of the exclusive jurisdiction clause, Act 77, § 13(2), is irreconcilable with accompanying provisions that impose a 180-day deadline (which fell on April 28, 2020) to bring any such claims before the Supreme Court, *id.* § 13(3). This interpretation would render the Act unreviewable after April 28, thus violating separation of powers.

Second, the Commonwealth Court erred in applying Act 77’s exclusive jurisdiction clause to Appellants’ claims concerning the ban against third-party ballot delivery assistance, even though the law pre-dates Act 77.

Third, to the extent the Commonwealth Court determined that county boards of elections were indispensable parties, its ruling is contrary to well-established precedent, including several voting rights-related matters in which this or other courts of the Commonwealth have granted relief without the involvement of all 67 county boards of elections. Appellants' requested relief implicates only ministerial acts of county boards that are mandated by statute, over which they have no discretion.

Even if the Commonwealth Court did in fact lack jurisdiction to grant Appellants' Emergency Application, the court abused its discretion in failing to transfer the matter to this Court immediately under 42 Pa.C.S. § 5103(a). Pa. R. App. P. 751(a). The record provides ample basis, based on undisputed facts, for a preliminary injunction. This Court should therefore reverse the Commonwealth Court's ruling and remand with instructions to enter Appellants' requested injunction, or exercise its exclusive and original jurisdiction and grant Appellants' Emergency Application.³

VII. ARGUMENT

Appellants seek expedited review of the Commonwealth Court's denial of their Emergency Application on two main grounds. First, the Commonwealth Court

³ As Appellants explain below, *see infra* § VII.B, their requested relief does not require this Court to apply Act 77's non-severability clause. To the extent the Court determines that any of Appellants' claims or requests for relief would indeed require the Court to apply Act 77's non-severability clause, Appellants withdraw that claim or request.

abused its discretion in concluding that it lacked jurisdiction to grant Appellants' request for preliminary injunction and in denying the Emergency Application. If this Court agrees, however, that the Commonwealth Court lacked jurisdiction under Section 13(2) of Act 77, then the Supreme Court has original jurisdiction over the claims asserted in Appellants' Emergency Application and those claims should have been transferred to the Supreme Court pursuant to 42 Pa.C.S. § 5103(a).

A. The Commonwealth Court erred in finding that Appellants were unlikely to succeed on the merits, based on its determination that it lacked jurisdiction to grant Appellants' Emergency Application.

1. The Commonwealth Court misread Act 77's exclusive jurisdiction clause by ignoring its context, and misapplied it to Appellants' Emergency Application.

The Commonwealth Court held that Appellants "raised a challenge 'concerning the constitutionality' of Sections 1306 and 1306-D of the Election Code," Addendum A at 8, and thus concluded that it lacked jurisdiction over the Emergency Application. But in doing so the court improperly read Act 77's exclusive jurisdiction clause in isolation, without reference to the context in which it appears—including accompanying provisions that impose a 180-day deadline on claims asserted under the Supreme Court's exclusive jurisdiction—and adopted an interpretation that led to an absurd result and raises serious constitutional questions.

Section 13(2) of Act 77 does indeed confer exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions of the Act,

but reading that provision in isolation, as the lower court did, tells only part of the story. A court’s analysis cannot end there because the very next subsection, Section 13(3), states that an “action under paragraph (2)” (the exclusive jurisdiction clause) “must be commenced within 180 days of the effective date of this section.” Reading those clauses together suggests that the reference to “constitutional challenges” was limited to facial attacks and not the emergency, election-specific relief that Appellants seek here. *See Clearwater Constr., Inc. v. Northampton Cty. Gen. Purpose Auth.*, 166 A.3d 513, 517-18 (Pa. Commw. Ct. 2017). If the Court interprets the exclusive jurisdiction clause (and its accompanying deadline) to apply to Applications seeking election-specific relief or as-applied claims, it would bar all future challenges now that the 180 days have expired, invoking a result which is not only absurd but plainly unconstitutional. *See, e.g., William Penn Sch. Dist.*, 170 A.3d at 418 (“The idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions.”) (alterations in original); *Robinson Twp., Wash. Cty. v. Commonwealth*, 83 A.3d 901, 927 (Pa. 2013) (“[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.”).

The broader statutory structure and the timeline imposed for implementing Act 77 reveal the General Assembly’s intent and further illustrate this point:

October 31, 2019: Act 77 was enacted but *could not be applied to any election held before April 28, 2020.*

April 28, 2020: The deadline to assert constitutional challenges to Act 77 before the Supreme Court under the exclusive jurisdiction clause.

April 28, 2020: The original primary election date (as scheduled when the General Assembly passed Act 77), and the first date by which Act 77 could be applied to any election.⁴

As the above timeline shows, the General Assembly’s deadline ensured that the exclusive jurisdiction clause would run its course and expire before a single election was *completed* under Act 77’s voting procedures, which would only make sense if the clause were limited to facial challenges to permanently invalidate provisions of the Act. As this Court recognized, “as-applied challenges require application of the ordinance to be ripe,” and “facial challenges are . . . *ripe upon mere enactment.*” *Phila. Entm’t & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392 n.7 (Pa. 2007) (emphasis added). Thus, the exclusive jurisdiction clause’s litigation deadline necessarily limited the scope of claims that could be asserted under Section 13(2) to facial challenges—the type of claim that could (1) be asserted well before any

⁴ This timeline did not materialize, of course, as the General Assembly, in response to the COVID-19 pandemic, enacted legislation moving the primary election to June 2.

election, (2) result in the permanent invalidation of an Act 77 provision, and (3) disturb its legislative compromise. If the exclusive jurisdiction clause applied to claims for temporary relief or as-applied challenges, however, no court would have jurisdiction to consider any constitutional challenge to Act 77's provisions after the April 28 deadline. This would leave voters without a forum to vindicate their constitutional rights, especially in instances where the effects of statewide emergencies threaten to deny them access to a free and equal election, and the General Assembly will have rendered its legislative enactments unreviewable, indefinitely. *See* 1 Pa.C.S. § 1922(1) (requiring presumption “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable”); *id.* § 1922(3) (requiring presumption “[t]hat the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth”). Pennsylvania law not only counsels against interpreting statutes to achieve such unlawful ends, but also requires that the Commonwealth Court strictly construe provisions decreasing its jurisdiction. 1 Pa.C.S. § 1928(7). The court failed to do either.

This Court has recognized that Section 13(2) cannot plausibly apply to all constitutional claims. In denying the Petition for Review in *Delisle, et al., v. Boockvar, et al.*, No. 95 MM 2020 (Pa. May 29, 2020), which asserted a constitutional challenge to the ballot receipt deadline introduced through Act 77, this

Court transferred the Petition to the Commonwealth Court rather than dismiss it entirely, even though the statutory deadline for asserting “challenges to . . . the constitutionality of a provision” of Act 77 had expired. Act 77, § 13(3) (stating such claims must be commenced by April 28, 2020). Interpreting Section 13(2) to address only the types of facial challenges that would permanently void a provision within Act 77 and upset the General Assembly’s “grand bargain” is consistent with later provisions setting a deadline for actions under Section 13(2), Act 77, §§ 13(3), 14, and gives effect to all provisions within Section 13.⁵ *See In re Tr. Under Deed of David P. Kulig Dated Jan. 12, 2001*, 175 A.3d 222, 234 (Pa. 2017) (noting courts must consider “the object to be attained” by the statute and “the consequences of a particular interpretation”). For as-applied challenges, the Commonwealth Court remains the appropriate forum in the first instance to resolve fact intensive claims “that generally lie outside the [Supreme] Court’s purview.” *Delisle, et al., v. Boockvar, et al.*, No. 95 MM 2020 (Pa. May 29, 2020) (Wecht, J., concurring).

Finally, to the extent the Commonwealth Court found that Appellants’ claims were facial constitutional challenges to Act 77—a position that even Appellees did not advance—that, too, is legal error. Appellants’ Petition and Emergency Application made clear, repeatedly, that Appellants did not seek to invalidate

⁵ This is not to say, and Appellants do not suggest, that a deadline or date limitation on facial constitutional challenges would be lawful either. However, that question is not currently before the Court.

permanently any provisions in Act 77, but instead requested temporary relief to ensure access to a free and equal election during the COVID-19 pandemic, and even then the requested relief is limited to those voters who submit their ballots by mail; voters who submit ballots in person would be subject to the same rules. *See Watt v. W.C.A.B. (Boyd Bros. Transp.)*, 123 A.3d 1155, 1164-65 (Pa. Commw. Ct. 2015) (noting as-applied challenges seek to prevent application of a law “under the factual circumstances before the Court”). Even assuming Appellants raised a constitutional challenge to a provision in Act 77—a point which Appellants dispute—that challenge and the Emergency Application sought to address the effects of the COVID-19 pandemic on the electoral process and cannot be considered a facial challenge much less a claim to permanently invalidate a provision of Act 77. *See also* R. 628a (“Petitioners make . . . narrow as-applied, rather than facial, challenge[s]”).

2. The Commonwealth Court misapplied Act 77’s exclusive jurisdiction clause to laws that pre-date the Act.

The Commonwealth Court also erred in finding that Appellants’ claims triggered Act 77’s exclusive jurisdiction clause because it ignored the distinction between provisions that were enacted through Act 77 and those that pre-date the Act. This was legal error because Section 13(2) of Act 77 (the exclusive jurisdiction clause) is expressly limited to “amendment[s] or addition[s]” to specific sections of the Election Code. By extending the jurisdictional clause to all portions of Sections

1306 and 1306-D, the Commonwealth Court disregarded long-standing rules of statutory construction and failed to adhere to the Act's plain language.

By its terms, the jurisdictional clause is quite limited in scope. It applies only to “amendment[s]” or “addition[s]” to certain portions of the Election Code, including Sections 1306 and 1306-D. Act 77, § 13(1); *see also* 25 P.S. §§ 3146.6, 3150.16. In other words, rather than extend exclusive jurisdiction to all regulations that appear in Sections 1306 or 1306-D, the express language of Act 77 makes clear that the Supreme Court's exclusive jurisdiction is tethered only to the portions of the law that were added or amended.

In determining which portions of Sections 1306 or 1306-D are “amendment[s]” or “addition[s],” Pennsylvania's Statutory Construction Act guides the Court's interpretation of the statute. *See Clearwater Constr., Inc.*, 166 A.3d at 517 (“Because this matter involves an issue of statutory interpretation, our analysis is guided by the principles of the Statutory Construction Act . . .”). It states that “[w]henver a section or part of a statute is amended . . . the portions of the statute which were not altered by the amendment shall be construed as effective from the time of their original enactment . . .” 1 Pa.C.S. § 1953. Section 1961 further clarifies that “[w]henver a statute reenacts a former statute, the provisions common to both statutes shall date from their first adoption.” And, when a “statute is repealed” but its provisions “are at the same time reenacted in the same or substantially the same

terms by the repealing statute, the earlier statute shall be construed as continued in active operation,” and “[a]ll rights and liabilities incurred under such earlier statute are preserved and may be enforced.” 1 Pa.C.S. § 1962.

All of these provisions make clear that courts must look to the substance of the enactment and distinguish between portions of the statute that were altered and the portions that were left unchanged. Only the altered portions are considered to have been amended or newly-enacted. These rules of construction are also consistent with the plain language of the exclusive jurisdiction clause, which distinguishes between newly-enacted and pre-existing laws. Act 77, § 13(1) (“This section applies to the amendment or addition . . .”), and further confirms that the jurisdiction clause does not apply to the delivery assistance ban or any other pre-existing election law.

Section 1306 of the Election Code has long required voters to submit their own ballots to their county boards of elections, *see* Art. XIII, § 1306 of Act of Jun. 3, 1937, P.L. 1333, No. 320. And the statutory language imposing this ban remains unaltered:

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. § 3146.6(a) (emphasis added). Act 77 amended Section 1306 in several ways, to be sure, including by expanding the deadline for receipt of absentee ballots from

5 p.m. on the Friday before the election to 8 p.m. on Election Day. But because language imposing the delivery assistance ban appears in Section 1306 without alteration, Pennsylvania law requires the Court to interpret the ban—a “portion[] of the statute which w[as] not altered by the amendment”—in its original form and to treat it as if it were “effective from the time of [its] original enactment.” 1 Pa.C.S. § 1953. Act 77 may have relocated or re-codified existing statutory language, but such technical alterations are neither “amendments” nor “additions” under Pennsylvania law. *See, e.g., Com. v. MacDonald*, 347 A.2d 290, 294 (Pa. 1975) (“Section 5903(a) of the Crimes Code was derived, without any pertinent changes, from section 524 of the Penal Code. Thus it is presumed that the General Assembly intended to retain the prior law except as it was explicitly altered.”). It is indeed telling that if a court were to enjoin Act 77 in its entirety, the delivery assistance ban would still exist in exactly the same form, which further demonstrates that the ban was not enacted by Act 77. *See Wygant v. Gen. Elec. Co.*, 113 A.3d 310, 313 (Pa. 2015) (voiding of repealing statute revives the original).⁶

The same rules of construction apply to Section 1306-D, which introduces new procedures allowing voters to cast mail-in ballots, and in doing so restates verbatim the long-standing delivery assistance ban among other pre-existing laws.

⁶ Even if the Commonwealth Court had determined that the ban on ballot delivery assistance was subject to the exclusive jurisdiction requirement, the court still had authority to consider such claims and provide relief for voters who cast *absentee* ballots.

Section 1306-D effectively relocates, or at most, re-enacts portions of Section 1306, and its continuation of prior law, applied to a new category of voters, is nonetheless effective as of the date of its original enactment—which was well before Act 77. This is consistent with Pennsylvania Supreme Court precedent recognizing that when a new statute incorporates pre-existing law, those rules “continue in active operation, so that all rights and liabilities incurred thereunder are preserved and may be enforced.” *Bell v. Abraham*, 22 A.2d 753, 755 (Pa. 1941) (holding provisions of 1933 Banking Code expressly incorporating pre-existing shareholder liability rules continued the operation of those rules from original enactment, including the rights and liabilities incurred thereunder).

Section 1306-D’s restatement of the long-standing ban on ballot delivery assistance could just as easily have been expressed by cross-referencing the pre-existing law in 25 P.S. § 3146.6, or by adding the term “mail-in ballot” to the previously-enacted statute, neither of which would have altered or amended the delivery assistance ban. *See* 1 Pa.C.S. § 1953. That is effectively what the General Assembly did in enacting Section 1306-D and re-stating provisions from a different section of the Election Code.⁷ Because Pennsylvania law requires that provisions

⁷ The legislature’s decision to copy the full text of Section 1306’s long-standing ballot delivery assistance ban into Section 1306-D is also a technical alteration which reveals little about its intent, and, indeed, may have been compelled by Pennsylvania’s Constitution. Article III, section 6 states that “[n]o law shall be revived, amended, or the provisions thereof extended or conferred, by

pertaining to the same subject matter should be construed as one, 1 Pa.C.S. § 1932, and the language of the pre-existing ban on ballot delivery assistance was not altered by Act 77, the ban pre-dates Act 77 and thus is not subject to the exclusive jurisdiction clause regardless of where it appears. It would be an absurd result to subject the same statutory language to different jurisdictional requirements. *See Royal Indemn. Co. v. Adams*, 455 A.2d 135, 141 (Pa. Super. Ct. 1983) (citing *Girard Sch. Dist. v. Pittenger*, 392 A.2d 261 (Pa. 1978)). Thus, even if the Commonwealth Court lacked jurisdiction to provide any relief that would extend the ballot receipt deadline, that is not the case for the ban on ballot delivery assistance which has been the law in Pennsylvania for many years.

3. The Commonwealth Court erred in determining that the case for treating county boards as indispensable parties was compelling.

To the extent the Commonwealth Court's ruling was grounded on the failure to add indispensable parties, it breaks from longstanding precedent and misapplies the relevant standards. Neither Appellees nor even the court below, were able to identify a single Pennsylvania authority that has ever held that all county elections boards are indispensable parties in any lawsuit seeking statewide relief to enforce the constitutional right to vote. The court's ruling cites allegations from the Petition

reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." Pa. Const. Art. III § 6.

that reference several non-discretionary duties of county boards of elections—i.e., processing mail ballot applications and receiving and counting ballots—and also points to measures that were not included in Appellants’ narrow Emergency Application (i.e., pre-paid postage and training on signature verification to be provided by the Secretary). The court engaged in no further analysis to explain the import of these observations, concluding instead that the Secretary presented a compelling case that the county boards have a direct interest in the Petition and are indispensable. Addendum A at 9.

The Commonwealth Court thus concluded that the involvement of county boards in enforcing Appellants’ requested relief potentially required their participation in this matter, but that is not the appropriate standard for determining whether a party is indispensable. If that were the case, every county board would be indispensable in every case that potentially affects the conduct of elections. *But see League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (implementing court-draw reapportionment plan without county boards); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Jan. 17, 2014) (addressing challenge to voter ID law without county boards). The court listed but failed to apply any of the four factors that guide this decision: (1) whether absent parties have a right or an interest related to the claim, (2) the nature of that right or interest, (3) whether the right or interest is essential to the merits of

the issue, and (4) whether there is prejudice to the absent party or justice can be afforded without violating the due process rights of absent parties. *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981). None are applicable here.

a. County boards do not have interests essential to the merits of Appellants' Emergency Application.

When a lawsuit affects only ministerial duties of government officials, those officials are not indispensable to its resolution. *Miguel v. McCarl*, 291 U.S. 442, 455 (1934) (holding that, “although he might have been joined as a proper[] party,” a disbursing officer was not an indispensable party to a lawsuit against a superior officer because his duty was “plainly prescribed” and “ministerial”). Appellants do not allege that county election officials have abused authority delegated to them. Far from it. Rather, Appellants allege that the counties are acting within their statutorily prescribed power, but that the Commonwealth’s failure to provide for additional safeguards during a global pandemic—namely, by counting mail ballots received after 8 p.m. on Election Day and permitting voters to rely on the assistance of others in delivering mail ballots—will deny citizens access to free and equal elections.

Appellants’ requested relief will only incidentally affect the performance of the county boards’ duties that are mandated by statute and over which they have no discretion, *see* 25 P.S. §§ 3146.6(c); 3150.16(c) (requiring county election officials to receive absentee and mail-in ballots and accept or discard ballots that come in right at or right after 8 p.m.), which does not rise to the level of being indispensable

to this case. While county election officials may be required to distinguish between late ballots and timely ballots based on postmarks, canvass more ballots, and hear more challenges, those are all tasks which county election officials are already required to perform. Pennsylvania law, moreover, already requires county election officials to accept military-overseas ballots “if the voter has declared under penalty of perjury that the ballot was timely submitted,” even if the postmark is unreadable. 25 Pa.C.S. § 3511(a). And it permits some voters to designate an agent of their choice to deliver their mail ballot. *See DiPietrae*, 666 A.2d at 1135. But such incidental effects on the rights or interests of a nonincluded party are not enough to render the party indispensable. Rather, “the time honored presumption that public officials will perform their duties properly” eliminates the need for their participation in this case. *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Commw. Ct. 1985); *see also Wudkwyeh v. Borough of Canonsburg*, 533 A.2d 1104, 1108 (Pa. Commw. Ct. 1987).

To be sure, county election officials also have some discretionary duties in administering elections, *see Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952), but that discretionary power is limited by both the Election Code and the guidance of the Secretary and DOS. For instance, county election officials are charged with determining which absentee ballots count. 25 P.S. §§ 3150.16(b)(1), 3146.6(c), 3150.16(c), § 3146.2a(a.3). But the Secretary and DOS advise counties on how to

make that determination. *Id.* § 1222(f) (requiring Secretary to “promulgate regulations necessary to establish, implement and administer the SURE system”); R. 745a-833a (directing county boards on how to record absentee ballot applications, mail absentee ballots, and count absentee ballots); *see also* R. 834a-40a (instructing counties on the implementation of Act 77). Although county election boards are responsible for investigating violations of the Election Code, 25 P.S. § 2642(i), those investigations are guided by the Secretary and DOS’s interpretation of what constitutes a vote. *Id.* § 2624(h)(1) (“[The Voting Standards Board] shall have the power and duty to develop uniform and nondiscriminatory standards that define what constitutes a valid vote cast through a paper ballot and what constitutes a valid vote through each type of electronic voting system used in the Commonwealth.”); *see also id.* § 2624(c) (“The Secretary of the Commonwealth shall serve as chair of the Board.”). Similarly, county election officials have the discretion to make and issue “rules, regulations and instructions . . . as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” *Id.* § 2642(f)-(g). But that duty, too, extends only as far as the election code permits. *Id.* (“[N]ot inconsistent with law. . . .”). The Secretary and DOS also derive broad authority to administer elections from the National Voter Registration Act, 52 U.S.C. § 20509 (“NVRA”), and the Help America Vote Act, 52 U.S.C. § 21081 (“HAVA”). Those laws require each state’s chief election official to carry out the state’s election

responsibilities in a uniform and nondiscriminatory manner, which includes instructing county officials on election administration issues.

The Secretary and DOS have not only exercised their authority to direct and guide county election officials, they have defended their ability to do so in court. During the 2008 primary election, several county election officials prohibited voters from entering polling locations because they were wearing t-shirts endorsing candidates. R. 725a. In response, the Secretary and DOS sent a letter to county election officials advising them that the election code permits voters to passively electioneer. R. 857a-59a. When two election judges filed a lawsuit alleging that the Secretary and DOS were “without jurisdiction or authority to interpret [provisions of the election code] and then broadcast that position to election officials as if it is the settled law of this Commonwealth,” R. 877a, the Secretary and DOS argued that HAVA and the NVRA, as well as decisions of the Supreme Court of Pennsylvania, require them to “earnestly endeavor to provide the counties with [their] advice and opinion so they can act uniformly and without discrimination.” R. 911a. The court agreed. R. 841a-56a. These laws make clear that county election officials are no more indispensable to this lawsuit than county prosecutors are to a constitutional challenge involving provisions of the criminal code.

b. Granting Appellants’ requested relief would not prejudice the county boards, nor would it violate their due process rights.

Because the relief requested in Appellants’ Emergency Application would at most have incidental effects on statutory duties that are subject to the guidance of superior officers, granting such relief in the county boards’ absence would not offend Due Process. *See Banfield v. Cortés*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007) (overruling preliminary objection claiming that the case should be dismissed for failure to join the 56 counties operating direct recording electronic voting systems). As noted above, the relief sought in the Emergency Application implicates only statutory duties over which county boards have no discretion. *See Pa. Sch. Bds. Ass’n, Inc. v. Com. Ass’n of Sch. Adm’rs, Teamsters Local 502*, 696 A.2d 859, 868 (Pa. Commw. Ct. 1997) (holding Governor was an indispensable party to claim alleging that he violated his statutory and constitutional duties by approving challenged act **but not** to claims that merely implicated his final approval authority); *id.* (“Were we to hold otherwise, the Governor would become an indispensable party to every action challenging the constitutionality of legislation.”).

The Commonwealth Court’s analysis failed to address any of these factors, which clearly demonstrate, consistent with long-standing precedent, that it can grant statewide relief in voting rights claims without inviting all 67 county boards of elections to participate in the lawsuit.

4. Appellants clearly established all required elements for a preliminary injunction and are entitled to relief.

Appellants met all six of the required elements for preliminary injunctive relief: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 104 A. 3d 495, 502 (Pa. 2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 209–10 (2004)). Evidence presented by Appellants, much of which was later corroborated by Appellees and county boards, demonstrates that thousands of voters will be disenfranchised absent an injunction and Appellants, thus, have a clear right to relief.

a. Appellants presented evidence demonstrating a serious risk of imminent widespread disenfranchisement and a clear right to relief.

When Appellants filed their Emergency Application over three weeks ago, counties had warned that their limited resources would be no match for the surge of

mail ballot applications. It was already clear that COVID-19's impact on the U.S. Postal Service threatened to delay the subsequent delivery of mail ballots—both from county boards to voters and then back to the counties. Statements from Appellees and county boards since then have only corroborated that, unless the Court acts and does so swiftly, a substantial number of voters stand to be disenfranchised, facts that firmly establish that Appellants are entitled to relief.

b. Delays in processing mail ballot applications.

First, Appellees have admitted that some counties will not be able to fulfill all mail ballot applications with sufficient time to reach voters and allow voters to mail them back before 8 p.m. on Election Day. According to Appellees, on May 22, nearly 173,000 applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. R. 674a ¶¶ 6, 7. And as of May 27, the number of voters who have applied for absentee ballots has grown to nearly 1.8 million. R. 971a ¶ 12.

If there was any doubt that this backlog was insurmountable under current conditions, some counties have expressly confirmed that they will not be able to deliver ballots to voters in time for them to be counted on June 2. In Mercer County, officials warned “[a]s fast as we can put them out, they’re coming in even faster,” R. 985a-88a, and predicted that requests for mail ballots will double immediately before the deadline. *Id.*; R. 989a-94a (counties across the state expected a surge of

requests before the deadline). Between May 17 and 26, at least 501,117 new mail ballot requests were submitted, with at least 73,019 submitted on May 26 alone. R. 971a-72a ¶ 13; *see also* R. 989a-94a (tens of thousands of voters have been applying for mail ballots every day leading up to the deadline); R. 676a ¶ 15 (Philadelphia County faced almost 20,000 outstanding ballot applications to process, and almost 17,000 approved applications for which ballots still had to be sent to voters).

Both Montgomery County and Bucks County took the extraordinary step of filing emergency petitions, apparently based on the recommendation of the Department of State (“DOS”), in their respective Court of Common Pleas requesting permission to count ballots received up to June 9, 2020. R.1003a-1012a ¶ 17. Bucks County was still mailing ballots two days after the deadline for mail ballot applications and predicts that voters may not receive their ballots until June 1. Bucks County Emergency Petition ¶¶ 10, 14. Montgomery County was not only facing backlogs and delays in processing applications and mail service, but hundreds of ballots had been returned to the Board of Elections because of a glitch in the Statewide Uniform Registry of Electors (“SURE”) system. *Id.* Neither Court of Common Pleas has yet to grant relief. R. 1015a-16a.

County officials have been clear that these backlogs mean that many voters will not be able to receive a ballot and send it back in time to arrive on June 2. R. 1018a-23a; *see also* R. 991-95 (Delaware County Commissioner stating she is “very

worried that people are going to be disenfranchised”); R. 955a-56a ¶ 7. Worse still, some of the counties that have come forward are located in areas where the prevalence of COVID-19 is highest. R. 674a ¶ 4. Voters are therefore caught in a Catch 22: voting by mail imposes a significant risk of disenfranchisement, while voting in person imposes significant health risks, especially given the consolidation of polling places. Absent the Court’s intervention, tens of thousands of Pennsylvania voters (and perhaps even more) will be left without a safe, reliable means of exercising their right to vote and to a free and equal election.

c. Mail delivery delays.

Even in an alternate reality where all counties were able to keep up with mail ballot requests, Appellees have also conceded that mail delivery delays have prevented voters from receiving their mail ballots in a timely manner. In Montgomery County, the DOS reports that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes” and “these delays make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” R. 675a ¶ 12. Montgomery County election officials attribute these delays to mail delivery and stated in their Petition that “the United States Post Office confirmed that absentee and mail-in ballots . . . could take up to ten days to be delivered.” R. 1009a ¶ 11; *see also* R. 955a ¶ 6.

These statements not only corroborate Appellants' claims, but they also mirror remarks made by Secretary Boockvar at a town hall meeting earlier this month where she claimed that mail delivery is taking twice as long as usual in the Commonwealth.⁸ Indeed, Appellant Dwayne Thomas waited almost two weeks before receiving his ballot on May 26; Mr. Thomas has less than one week for his ballot to be received by June 2, but mail delivery in the Commonwealth may take up to 10 days. R.428a-29a ¶ 3-4; R. 955a ¶ 6; R. 1009a ¶ 11.

The effects of delayed mail delivery and mail ballot application backlogs on voters' access to the franchise cannot be reasonably disputed. As the application deadline neared, counties witnessed a large surge in mail ballot requests, including at least 501,117 between May 17 and 26 and at least 73,019 submitted on May 26 alone. R. 437a ¶ 13. Already at capacity, the counties and the U.S. Postal Service cannot process these applications and get them to the voters in time for the voters to then mail them back so that the counties will receive them by June 2. R. 955a-56a ¶ 7. Tens of thousands of voters (including Appellant Thomas), and potentially more, are at risk of disenfranchisement absent relief from this Court. Appellants and many other Pennsylvania voters do not have reasonable access to in-person voting, nor do they have any reasonable assurance that their mail ballots will be delivered to their

⁸ May 6 Town Hall, Secretary Boockvar remarks at 12:10, <https://www.senatorhughes.com/newsroom/audio/>

county boards on time in light of the current mail service disruptions. *See, e.g.*, R. 429a ¶ 4; R. 477a ¶ 4. Their only other alternative, to seek assistance from others in submitting their ballots, is prohibited by Pennsylvania law. 25 P.S. §§ 3146.6(a); 3150.16(a). At every turn, Pennsylvania voters will encounter barriers to the franchise that, collectively, “amount to a denial” of the right to vote. *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914).

d. Appellants are likely to succeed on their Free and Equal Elections Clause Claims.

Pennsylvania’s Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that *all* elections are “free and equal.” *League of Women Voters of Pa. v. Commonwealth*, 178 A. 3d 737, 803 (Pa. 2018); Pa. Const. art. I, § 5. This affirmative right, which “has no federal counterpart” and outstrips the protections in the federal constitution, protects voters against “regulation[s] of the right to exercise the franchise [that] *deny the franchise itself, or make it so difficult as to amount to a denial.*” *League of Women Voters of Pa.* 178 A.3d at 810 (quoting *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914)) (emphasis added). Elections are “free and equal” only when “no constitutional right of the qualified elector is subverted or denied him.” *Winston*, 91 A. 520 at 523. The guarantee of a “free and equal” election also requires that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 91 A. 520 at 523; *see also League of Women Voters*, 178 A.3d at 811. And it applies with equal force even if voting

rights are denied or impeded “by inadvertence.” *League of Women Voters*, 178 A.3d at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)).

The Pennsylvania Supreme Court has further recognized that the Free and Equal Elections Clause reaches “all aspects of the electoral process, to the greatest degree possible.” *Id.* at 804. Courts, thus, have broad authority when enforcing its provisions because the Clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quotation and citation omitted); *see also id.* at 822 (“[O]ur Court possesses broad authority to craft meaningful remedies when required.”). The COVID-19 related disruptions to daily life in the Commonwealth, and to the electoral process specifically, have left Pennsylvanians with a dearth of reasonably accessible options for voting in the upcoming election. And if the Free and Equal Elections Clause is to have any meaning, it must require, at the very least, that state officials adopt reasonable safeguards to prevent large-scale disenfranchisement in the midst of the current public health emergency. *Applewhite*, 2014 WL 184988 at *23 (“Disenfranchising voters ‘through [no] fault of the voter himself’ is plainly unconstitutional.” (quoting *Appeal of Norwood*, 116 A.2d 547, 553 (Pa. 1955))).

In order to provide the free and equal election mandated by the Pennsylvania Constitution, election officials must implement safeguards, in advance, to ensure

that voters are able to cast mail ballots and minimize the risk of arbitrary disenfranchisement for reasons outside the voters' control.

e. Appellants are likely to succeed on their Equal Protection Clause claims.

Because many Pennsylvanians currently lack any reliable and safe means of delivering their mail ballot by the fast approaching Election Day deadline, and may not seek assistance of a third party whom they trust to deliver their ballot for them, the absence of any safeguards to ensure their ability to cast an effective ballot during the COVID-19 pandemic imposes a severe burden on the right to vote in violation of the equal protection provisions of the Pennsylvania Constitution. This burden, which falls most heavily on the most vulnerable members of the electorate, triggers the highest levels of scrutiny and cannot be justified by any sufficient governmental interest.

Two separate provisions of the Pennsylvania Constitution address Appellants' right to equal protection of the law. Article I, Section 1 states that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." And Article I, Section 26 provides that neither the Commonwealth nor any other political subdivision can deny to any person "the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

Burdens on fundamental rights implicate the equal protection clauses and in reviewing whether such burdens rise to a constitutional violation, courts in the Commonwealth apply the same standards adopted by “the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (Pa. 1984)). This analysis, commonly referred to as the *Anderson-Burdick* test, requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But all burdens, “[h]owever slight” they may appear, “must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation.”

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

The Commonwealth’s ban on third-party delivery assistance leaves voters with little choice but to submit their ballots to the vagaries of mail delivery during the COVID-19 pandemic and imposes a severe burden on the right to vote. Recent admissions from DOS and county boards of elections establish that the delays in delivery mail ballots to voters, and the still ongoing backlog in processing mail ballot requests, have prevented some voters from receiving their ballots even to this day, which means tens of thousands of voters will not receive their ballots in time to mail them back by the Election Day deadline and are at risk of disenfranchisement. *See supra* Part II.B.1; *see also Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1034 (9th Cir. 2020) (en banc) (concluding that a ballot collection and delivery ban posed an undue hardship on voters—even before the rise of the current health crisis); R. 952a-54a ¶¶ 3-4. Courts confronted with laws that threaten complete disenfranchisement, even when those laws affected far fewer voters than will be the case in Pennsylvania, have held that such laws impose a severe burden on the right to vote. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted “substantial” burden on voters); *Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden

where 3,141 individuals ineligible to register); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding severe burden when fewer than 100 qualified voters were disenfranchised). That tens of thousands of Pennsylvanians could be denied the right to vote in the June 2 primary is undoubtedly a severe burden on their constitutional rights.

The Commonwealth’s failure to provide additional safeguards for voters by permitting ballot delivery assistance or additional time to have their ballots delivered to election officials under these circumstances is subject to strict scrutiny and ultimately fails this test because it is not narrowly tailored to advance a compelling interest. *See, e.g., Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”). But even if the Court found that the burdens at issue are less than severe, they nonetheless must be accompanied by state interests “sufficiently weighty” to justify the restriction. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1215–16 (N.D. Fla. 2018) (“However slight that burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”). In this case, under either standard, the failure to implement procedures that allow election officials to count ballots postmarked by

Election Day and delivered up to seven days after the Election, and the failure to allow voters to seek assistance from third-parties to deliver their ballots cannot survive any level of scrutiny.

The safeguards that Appellants seek are already fixtures of Pennsylvania's electoral process which are currently being applied to a subset of voters, and have been for years, so the justifications for not extending them more broadly are not credible. The Commonwealth already allows military-overseas voters to submit ballots up to seven days after Election Day as long as they are mailed by a certain date, *see* 25 Pa.C.S. § 3511(a), and even when a ballot's postmark is unreadable, the Commonwealth already has a solution for that, too: election officials must accept the ballot if the voter declares under penalty of perjury that the ballot was timely submitted. *Id.* § 3511(b). Pennsylvania election officials also allow disabled voters to designate an agent of their choice to deliver their mail ballots. *DiPietrae*, 666 A.2d at 1135. None of these measures have upended the electoral process, nor will they undermine any legitimate government interest.

There is nothing sacrosanct about the ballot receipt deadline. County boards have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). Pennsylvania officials have 20 days to certify election results to the Secretary. 25 P.S. § 2642(k). And, to date, at least two county

boards of elections have filed lawsuits in their Court of Common Pleas seeking extensions of the ballot receipt deadline because they have determined that they will not be able to get mail ballots to voters in time for those voters to return them by Election Day. Bucks County Emergency Petition; R. 1007a-11a. There is no evidence that Appellants' requested relief will upend post-election procedures, and the statements from county boards themselves requesting extensions demonstrate that such relief is entirely feasible and necessary to protect the right to vote. *Id.*

To the extent the Commonwealth cites fraud prevention to justify the ban on ballot delivery assistance, that rationale fails here because the Commonwealth cannot demonstrate a sufficient connection between the regulation—a ban on delivering voted, sealed mail ballots—and the fraud it seeks to address because delivering ballots that are already voted and sealed is several steps removed from most fraudulent acts (i.e., forging ballots or voting unlawfully); thus, it is an ineffective fraud-prevention tool. *See Applewhite*, 2014 WL 184988, at *21 (noting absence of “a nexus between photo identification . . . and the integrity of elections[] when prior elections accepted a number of types of proof to verify identity”). Pennsylvania voters, for instance, can submit their ballots by mail, or, in some counties, in a drop box without anyone knowing who physically delivered the ballot. Indeed, that is how the perpetrators of the fraudulent scheme in North Carolina's Ninth Congressional District race avoided detection: they delivered ballots through

the post office or returned them “back to the voter for hand-delivery to the local Board of Elections.” R. 1061a ¶ 65. It defies logic to suggest that a ban on obtaining ballot delivery assistance (even from immediate family members), which would be undetectable in many cases, would deter individuals who plan to forge ballots and commit fraud. Instead, the requirement unduly burdens and punishes those who attempt to follow the letter of the law and are least likely to be engaged in misconduct. In any event, courts across the country have found assertions of voter fraud that rely on isolated incidents to be insufficient to support laws suppressing ballot delivery assistance. *Democratic Nat’l Comm.*, 948 F.3d at 1007 (rejecting the argument that a single incident in North Carolina established that Arizona had a legitimate interest in outlawing non-fraudulent ballot collection); R.1035a (Conclusions of Law ¶ 4, *Driscoll et al. v. Stapleton*, No. DV 20-408, (Mt. Dist. Ct. May 22, 2020)); *cf.* R. 1089a-1143 (*Priorities USA et al. v. Nessel*, No. 19-13341 (E.D. Mich. May 22, 2020) (noting that vague assertions of voter fraud were not a state interest sufficient to support a motion to dismiss).

Almost by the hour, undisputed, corroborating evidence is mounting to show that the threat of disenfranchisement that Appellants sought to address in their Emergency Application is no longer just highly likely, but plainly and undeniably imminent. Voters should not be forced to choose between risking their health by casting a ballot in-person, or their constitutional right to vote by turning their ballot

over to the vagaries of mail delivery, and the failure to provide adequate safeguards to ensure access to the franchise violates the Pennsylvania Constitution's Equal Protection Clauses.

f. Absent an injunction, Appellants and other Pennsylvania voters will suffer irreparable harm.

Absent an injunction, tens of thousands of eligible votes (and perhaps more) will be discarded after 8 p.m. on June 2. The Appellants in this case, and thousands of other voters, are facing real, irreparable harm of the severest degree. *See Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). Appellant Thomas, for instance, mailed his ballot only six days before Election Day, R. 953. ¶ 4, but given the mail delivery delays that have been confirmed by county boards, his ballot may not arrive before the deadline.

Furthermore, it is now clear that thousands of applications, including those of Alliance's members, were still being processed and ballots had yet to be sent as of May 28, and completing that process may take the counties up to Election Day or the day before. R. 674a-76a ¶¶ 6, 12, 13, 15-16; R. 971a ¶ 12; R. 955a ¶ 6; R. 990a-95a. Countless Pennsylvanians who receive their ballots late and believe that they have run out of time will simply not vote. "[O]nce the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 247 (4th Cir. 2014). Thus, the injury that Appellants and other Pennsylvania voters will face absent an injunction is irreparable.

g. Appellants' requested injunction is reasonably suited to abate the elevated threat of disenfranchisement in the upcoming elections and is not factually impossible.

Appellants are not asking this Court to upend the electoral process; quite the opposite. The Emergency Application seeks safeguards that are already built into the Pennsylvania's law and are currently being implemented for certain categories of voters (and have been for years). *See, e.g.*, 25 Pa.C.S. § 3511(a) (election officials must count military-overseas ballots delivered by the seventh day after the election); *id.* § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); *DiPietrae*, 666 A.2d at 1135 (allowing disabled voters to designate an agent of their choice to deliver their mail ballot). The requested relief protects the franchise using already-existing procedures to minimize the risk of large-scale disenfranchisement from mail service disruptions and ballot processing delays during the COVID-19 pandemic, which have also been upheld by other courts. *See Republican Nat'l Comm.*, 2020 WL 1672702 at *1 (granting stay but leaving intact district court order extending the received-by deadline for ballots submitted by Election Day). The Deputy Secretary for the DOS's Elections Commission acknowledges that this relief will allow more Pennsylvanians to vote

during the pandemic. R. 669a ¶ 49 (“I also agree that in the event of significant backlogs in application processing due to COVID-19, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline . . . might be necessary to avoid an undue burden on the right to vote.”). Appellants seek no more than what is required to ensure access to the franchise.

Any relief, moreover, must be granted statewide because COVID-19 does not recognize county lines or municipal boundaries, nor are the U.S. Postal Service’s well-recognized problems limited to a single locality. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1258 (extending relief to entire state).⁹ And a seven-day window to ensure that delayed mail ballots can be counted is appropriate to prevent the specific harm that is resulting from the COVID-19 pandemic. R.966a-67a ¶ 6. Far more expansive relief has been granted to protect the right to vote when unforeseen conditions interfere with the electoral process. *See, e.g., In re General Election-1985*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (affirming the suspension of an election after extreme weather forced Washington County to declare a state of emergency).

⁹ A piecemeal approach that attempts to target specific counties subjects voters elsewhere, who are similarly affected by the disruptions in the electoral process, to varying standards, depending on where they live and the willingness of their county boards of elections to file suit or publicize their difficulties. *See Bush v. Gore*, 531 U.S. 98, 105-06 (2000).

h. Greater injury will result from refusing, as opposed to granting, Appellants' requested injunction.

The evidence discussed above, which details the injuries Appellants and countless Pennsylvania voters will face absent an injunction, weighs heavily in Appellants' favor. *Marcellus Shale Coal. v. Dep't of Env'tl. Prot. of Commonwealth*, 185 A.3d 985, 1014 (2018) (Donohue, J., concurring and dissenting); *see also Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016). The ballot receipt deadline will not upend or complicate the electoral process, and, tellingly, the county election boards that have weighed in publicly do not suggest as much. Their concern is the denial of the franchise that will occur absent relief from the Court. Any potential burden to the Commonwealth is far outweighed by the potential widespread disenfranchisement that will result absent injunctive relief.

Appellants' requested remedy also presents no risk of voter confusion and would not disrupt the "status quo," which already has been upended—not by any judicial order, but by the COVID-19 pandemic and the consequent delays in processing mail ballot requests and delivering ballots. To the extent that voters believe that the ballot receipt deadline still applies and return their ballots accordingly, their votes will, of course, still be counted. Ultimately, Appellants' requested relief will result in more voters being able to cast their ballots and ensures those ballots will be counted.

i. Granting Appellants’ requested injunction would serve the public interest.

The public interest “favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d at 437. Indeed, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (quotation marks omitted). The Pennsylvania Supreme Court has recognized that the right to vote is “pervasive of other basic civil and political rights” and that voting rights are “the bedrock of our free political system.” *Bergdoll v. Kane*, 731 A. 2d 1261, 1269 (Pa. 1999) (quotation omitted). Therefore, an injunction requiring Appellees to conduct elections in compliance with Pennsylvania’s Constitution “so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.” *U.S. v. Berks Cty., Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003).

B. Appellants’ requested relief does not implicate Act 77’s non-severability clause.

Pennsylvania Supreme Court precedent and long-held rules of statutory construction have made clear that non-severability clauses are not “inexorable commands.” *Stilp v. Commonwealth*, 905 A.2d 918, 972 (Pa. 2006); *see also* 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable.”). Severance is presumed where “a statute can stand alone absent the invalid provision.” *Stilp*, 905

A.2d at 970. Ultimately, the court does not “deem[] nonseverability clauses to be controlling in all circumstances . . . but instead [it] will effectuate [its] independent judgment concerning severability.” *Id.* at 980. By including the non-severability provision, Act 77 purports to bind a broad range of Election Code provisions and its enforcement would only exacerbate (exponentially) constitutional harm identified in Appellants’ Emergency Application. If the Court were to extend the deadline for the receipt of mail ballots and permit voters to seek assistance from others in delivering their ballots, the rest of Act 77, including the provisions addressing no-excuse mail-in voting, could easily “stand alone,” and applying the non-severability provision would lead to an absurd and unconscionable result. *Id.* at 970. That is, in finding unconstitutional the failure to count mail ballots delivered after Election Day, or the failure to permit ballot delivery assistance, the Court would be required as a remedy to eliminate mail-in ballots (or no-excuse absentee voting) entirely, making the cure significantly worse than the disease and contravening the statute’s overarching purpose. The Commonwealth’s long-held rules of statutory interpretation and Pennsylvania Supreme Court precedent counsel against enforcing a non-severability provision that would strip the right to vote from over 1.8 million Pennsylvanians who have already requested a mail ballot, many of whom have already received their ballots, or to void the registrations of those voters who registered during the additional two weeks provided by Act 77. In all cases, the Court’s “goal must be to

enfranchise and not to disenfranchise.” *In re Luzerne Cty. Return Bd.*, 290 A.2d 108, 109 (Pa. 1972) (citing *Appeal of James*, 105 A.2d 64 (Pa. 1954)).

C. The Commonwealth Court, upon finding that it lacked jurisdiction to grant Appellants’ Emergency Application, should have immediately transferred the matter to the Supreme Court as required by law.

If this Court agrees that the Commonwealth Court lacked subject matter jurisdiction to grant Appellants’ Emergency Application, and that this Court has exclusive jurisdiction over Appellants’ claims under Section 13(2) of Act 77, then the matter should have been transferred to this Court, which, pursuant to its original jurisdiction, may grant Appellants’ Emergency Application. Pennsylvania law required the Commonwealth Court, upon its jurisdictional ruling, to transfer the record to the Supreme Court where it shall be treated as if originally filed on April 22, 2020—the date Appellants filed their lawsuit. 42 Pa.C.S. § 5103(a).¹⁰

Specifically, 42 Pa.C.S. § 5103(a) states:

A matter which is within the exclusive jurisdiction of a court or magisterial district judge of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court . . . **where it shall be treated as originally filed in the transferee court . . . on the date when first filed in the other tribunal.**

¹⁰ In fact, Appellants requested such relief in the event that the Commonwealth Court determined that it lacked jurisdiction over Appellants’ Emergency Application. *See* R. 731a-32a.

Id. (emphasis added). Any further court action by the Commonwealth Court is “null and void” if it lacks subject matter jurisdiction. *See Grimm v. Grimm*, 149 A.3d 77, 84 (Pa. Super. Ct. 2016).

That the court made its finding in the context of Appellants’ Emergency Application, and not in granting the Secretary’s preliminary objections, does not permit the court to retain the matter for further proceedings either. The “issue of subject matter jurisdiction may be raised by the parties at any stage of the proceedings or by the court *sua sponte*.” *Mastrocola v. Se. Pa. Transp. Auth.*, 941 A.2d 81, 88 (Pa. Commw. Ct. 2008). The Secretary challenged the court’s subject matter jurisdiction in response to Appellants’ Emergency Application, R. 582a, and the court, relying on those arguments, concluded that it lacked jurisdiction to grant the Emergency Application. Addendum A at 9. The court, therefore, should have transferred the claims addressed in the Emergency Application to the Supreme Court under 42 Pa.C.S. § 5103(a), and could have retained jurisdiction over the remaining claims. *Sinwell v. Com., Pa. Bd. of Prob. & Parole*, 406 A.2d 597, 600 (Pa. Commw. Ct. 1979) (transferring a portion of a matter “to the appropriate court pursuant to 42 Pa.C.S. § 5103(a)” but “retain[ing] jurisdiction as to the petitioner’s claim that” fell within court’s jurisdiction). In failing to do so, the Commonwealth Court abused its discretion (which effectively denied Appellants the ability to seek relief from another forum), and this Court should, in turn, exercise original jurisdiction over

Appellants' Emergency Application and grant their requested relief. In the alternative, the Court should reverse the Commonwealth Court's denial of the Emergency Application and enter a preliminary injunction in Appellants' favor.

VIII. CONCLUSION

An election will take place in just a few days, and the fundamental right to vote is at stake. There is virtually no dispute among the parties that potentially thousands of voters will not receive their mail ballots in time to submit them before the Election Day deadline. Several different groups, including county boards of elections, have sought relief in various forums to prevent this widespread disenfranchisement to no avail. Appellants in this case have established a clear right to relief based on evidence that is largely undisputed by Appellees. This Court should therefore reverse the Commonwealth Court's denial of Appellants' Emergency Application with instructions to enter their requested preliminary injunction, or, in the alternative, if the Court agrees that it has exclusive jurisdiction, the evidence in the record provides more than sufficient basis for this Court to grant Appellants' Emergency Application and order Appellees to direct county boards of elections to: (1) allow voters who requested mail ballots to submit emergency write-in ballots; (2) treat all mail-in ballots and absentee ballots postmarked by Election Day and delivered by June 9, 2020, as timely submitted and count all such ballots if

they are otherwise valid; and (3) allow third parties to assist voters in delivering mail-in and absentee ballots.¹¹

Dated: May 30, 2020

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¹¹ The term “postmark” is defined above. *See supra* note 1. Officials may alternatively apply the same procedures for determining the postmark date on military-overseas ballots. *See* 25 Pa.C.S. § 3511(b) (requiring election officials to accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted).

ADDENDUM A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
and the Pennsylvania Alliance :
for Retired Americans, :
Petitioners :

v. :

No. 266 M.D. 2020

Kathy Boockvar, Secretary of the :
Commonwealth, and Jessica Mathis :
Director of the Bureau of Election :
Services and Notaries, :
Respondents :

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY PRESIDENT JUDGE LEAVITT

FILED: May 28, 2020

On April 22, 2020, the Pennsylvania Alliance for Retired Americans and four individuals, two of whom are members of the Alliance (collectively, Alliance), filed a Petition for Declaratory and Injunctive Relief (Petition) in this Court's original jurisdiction against the Secretary of the Commonwealth, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries, Jessica Mathis (collectively, Secretary). Alleging disruptions to the June 2, 2020, primary election from the COVID-19 pandemic, the Alliance raises constitutional claims about provisions of the Pennsylvania Election Code (Election Code)¹ related to mail-in ballots, which is a method of voting that was added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). On May 8, 2020, the Alliance

¹ Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§2600-3591.

filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (Preliminary Injunction Application). For the following reasons, the Court denies the Preliminary Injunction Application.

In the Petition, the Alliance challenges the Election Code's requirement that a voter's absentee or mail-in ballot must be received by the county board of elections by 8:00 p.m. on Election Day. It also challenges the Election Code's prohibition against third parties assisting voters in the delivery of their absentee and mail-in ballots and, relatedly, alleges the potential disenfranchisement of voters who are unable to provide their own postage to return their mail ballots. Finally, the Alliance alleges that the Secretary's failure to provide any guidance to county boards of elections on how to verify signatures on mail-in ballots will result in the arbitrary rejection of some ballots.

The four individual petitioners allege they are at risk of being disenfranchised because the county boards of elections may fall behind in processing absentee and mail-in ballot applications. The individual petitioners do not want to vote in person due to health concerns related to the COVID-19 pandemic. Alleging budgetary and staffing issues with the United States Postal Service, the individual petitioners fear their ballots may not be received by the 8:00 p.m. Election Day deadline. They believe they will need third-party assistance in returning their ballots.

The Alliance seeks an order declaring unconstitutional the Commonwealth's failure to: provide prepaid postage for absentee and mail-in ballots; allow for counting of mail-in ballots delivered after 8:00 p.m. on Election Day (to the extent that this does not trigger Act 77's non-severability clause); allow for third-party assistance in the collection of ballots; and establish standards for

signature verification by the county boards of elections. The Alliance also seeks an injunction to require an extension of the ballot return deadline; prepaid postage on all absentee and mail-in ballots; third-party collection of absentee and mail-in ballots; and training in signature matching for the county boards of elections.

On May 8, 2020, the Alliance filed a Preliminary Injunction Application to direct the Secretary to adopt procedures for emergency write-in ballots for all voters who request mail-in ballots; to designate all ballots as emergency ballots; and to count all such ballots if postmarked by Election Day and received within seven days thereof. The Alliance also seeks to enjoin the enforcement of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16,² to the extent that they prohibit third parties from delivering any voter's ballot to a local board of elections.

The Court held a pre-hearing conference on May 19, 2020. At the conference, the Secretary confirmed the statement in her answer to the Preliminary Injunction Application that she intended to file preliminary objections to challenge this Court's jurisdiction over the Petition. At the Court's suggestion, the parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits thereof. The Court provided the parties and proposed intervenors³ an opportunity to file memoranda of law on their respective positions regarding jurisdiction.⁴ Having reviewed the memoranda of law, the Court now

² Added by the Act of October 31, 2019, P.L. 552, No. 77.

³ Proposed intervenors include President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the State Senate Jake Corman; Speaker of the House of Representatives Mike Turzai and Majority Leader of the House Bryan Cutler; and the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee.

⁴ The Court deferred briefing of Respondents other preliminary objections.

considers the two bases upon which the Secretary asserts this Court lacks jurisdiction over the Petition and, by extension, the Preliminary Injunction Application.

Preliminary Injunction Standards

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order was made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Twp. From Decision of Zoning Hearing Board of Little Britain Twp., Lancaster County, Pa.*, 651 A.2d 606, 611 (Pa. Cmwlth. 1994). A preliminary injunction is a temporary remedy granted until the parties’ dispute can be fully resolved. *Id.* A party seeking a preliminary injunction bears a heavy burden of proof and must establish all of the following criteria:

- (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages;
- (2) greater injury will occur from refusing to grant the injunction than from granting it;
- (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct;
- (4) the petitioner is likely to prevail on the merits;
- (5) the injunction is reasonably suited to abate the offending activity; and
- (6) the public interest will not be harmed if the injunction is granted.

Brayman Construction Corp. v. Department of Transportation, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*,

828 A.2d 995, 1001 (Pa. 2003)). Because the grant of an injunction is such a harsh and extraordinary remedy, each criterion must be satisfied. *Pennsylvania ALF-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996). “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the positions of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. School District of the City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

In its request for a preliminary injunction, the Alliance seeks the performance of positive acts by the Secretary and the county boards of elections. The requested preliminary injunction will require the Secretary to adopt procedures for emergency write-in ballots for all voters who request them. Those procedures must designate all ballots as emergency ballots, and the county boards of elections must count them if postmarked by Election Day and received within seven days thereafter. The requested preliminary injunction will also enjoin enforcement of Sections 1306 and 1306-D of the Election Code so that third parties may collect ballots.

Jurisdiction and Act 77

The threshold issue is whether the Court has jurisdiction to order the relief requested and, for preliminary injunction purposes, whether the Alliance is likely to prevail on the merits. A court must have subject matter jurisdiction over the controversy because, without it, any judgment rendered would be void. *Stedman v. Lancaster County Board of Commissioners*, 221 A.3d 747, 755 (Pa. Cmwlth. 2019). Subject matter jurisdiction is conferred solely by the Pennsylvania Constitution and its laws; the test for whether a court has subject matter jurisdiction is whether the court has the ability to determine controversies in the same general

class as the controversy at issue. *Id.* at 755-56 (quoting *Commonwealth v. Locust Township*, 968 A.2d 1263, 1268-69 (Pa. 2009)).

When it enacted Act 77, the General Assembly included specific provisions on jurisdiction to decide constitutional challenges arising under the act. More specifically, Section 13(2) of Act 77 provides:

The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite final judgment in connection with such a challenge or request for declaratory relief.

Section 13(2) of Act 77. In short, the legislature has vested exclusive jurisdiction in our Supreme Court to hear challenges to certain sections of the Election Code, delineated in subsection (1) of Section 13 of Act 77. Relevant here, subsection (1) provides that “[t]his section applies to the amendment or addition of the following provisions of the act: ... (xix) Section 1306 ... [and] (xxi) Article XIII-D.” Section 13(1) of Act 77.

Section 1306 of the Election Code, 25 P.S. §3146.6, relates to voting by absentee ballots. It provides a deadline for receipt of absentee ballots as follows: “a completed absentee 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. §3146.6(c). Article XIII-D of the Election Code includes Section 1306-D. It similarly provides a deadline for receipt of mail-in ballots as follows: “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).

The Petition challenges, *inter alia*, the received-by deadlines found in Sections 1306 and 1306-D. The Alliance stresses that it has lodged an as-applied challenge to avoid the risk of disenfranchisement.⁵ However, it seeks a statewide injunction to extend the received-by deadline set forth in Sections 1306 and 1306-D of the Election Code, arguing that it cannot be constitutionally applied anywhere in the Commonwealth. The Alliance’s claim that the absence of its proposed safeguards renders Act 77 unconstitutional is no different from a facial challenge to the statute as unconstitutional.

The relief sought by the Alliance would not merely supplement, but supplant, provisions set forth in Act 77. Those provisions impose an 8:00 p.m. Election Day deadline for the receipt of absentee and mail-in ballots and preclude a third party from assisting in the delivery of ballots. The Alliance seeks to modify

⁵ See Petition ¶63 (“Pennsylvania’s failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county boards of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. ... Thus, Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.”); ¶64 (“many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.”); ¶66 (“Pennsylvania’s failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Protection Clause.”); ¶71 (“Pennsylvania’s rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide [prepaid] postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear[s] heavily on certain groups of voters without sufficient justification.”); and ¶77 (“Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurances that they will be delivered in time, even when submitted well in advance of Election Day.”).

these provisions of the Election Code on the theory that they may disenfranchise voters in violation of their constitutional right to vote.

Because the Alliance has raised a challenge “concerning the constitutionality” of Sections 1306 and 1306-D of the Election Code, 25 P.S. §§3146.6, 3150.16, the Secretary’s assertion that the Supreme Court has exclusive jurisdiction over the Petition under Section 13(2) of Act 77 appears meritorious.

Indispensable Parties

Indispensable parties are those whose rights are so directly connected with and affected by the litigation that they must be a party to the action to protect their rights; their absence renders void any court order or decree for lack of jurisdiction. *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (quoting *Scherbick v. Community College of Allegheny County*, 387 A.2d 1301, 1303 (Pa. 1978)). In *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 956 (Pa. 1981), the Supreme Court determined that consideration of indispensable parties should involve consideration of at least the following:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

The Petition alleges that the county boards of elections are falling behind in processing mail-in ballot applications; unconstitutionally omitting prepaid postage for ballot return; and will be employing “arbitrary” standards to match voter signatures. Petition ¶59. The Alliance seeks a mandatory injunction to compel county boards of elections to adopt new standards and procedures for counting

ballots. Specifically, the Alliance seeks to require the county boards of elections to: provide prepaid postage for mail-in ballots; receive and count ballots after the 8:00 p.m. deadline; train election board officials on signature verification; and allow for a cure where there are mismatched signatures.

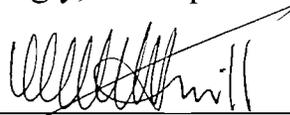
The Secretary contends that the Petition's accusations against the county boards of elections makes them indispensable parties. She further contends that this Court cannot order the county boards of elections to provide postage and to implement emergency procedures without being allowed to defend. Without the presence of indispensable parties, the Court lacks jurisdiction. *Powell v. Shepard*, 113 A.2d, 261, 264-65 (Pa. 1955).

The Secretary has presented a compelling case that the county boards of elections have a direct interest in the Petition and as such are indispensable parties.

Conclusion

The Secretary's arguments on the issue of jurisdiction are compelling and when considered by the full Court may result in a transfer of the Petition to the Supreme Court. The Court does not believe the Alliance is likely to prevail on the question of this Court's jurisdiction over the subject matter of the Petition.

As such, the Court concludes it lacks jurisdiction to grant the Preliminary Injunction Application. Accordingly, the request will be denied.



MARY HANNAH LEAVITT, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, :
Irvin Weinreich, Brenda Weinreich, :
for Retired Americans, :
Petitioners :

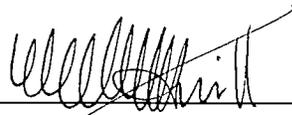
v. :

No. 266 M.D. 2020

Kathy Boockvar, Secretary of the :
Commonwealth, and Jessica Mathis :
Director of the Bureau of Election :
Services and Notaries, :
Respondents :

ORDER

AND NOW, this 28th day of May, 2020, Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review is **DENIED**.



MARY HANNAH LEAVITT, President Judge

IN THE SUPREME COURT OF PENNSYLVANIA

No. 32 MAP 2020

MICHAEL CROSSEY, DWAYNE THOMAS, IRVIN WEINREICH, BRENDA WEINREICH,
AND THE PENNSYLVANIA ALLIANCE FOR RETIRED AMERICANS

Appellants,

v.

KATHY BOOCKVAR, SECRETARY OF THE COMMONWEALTH, AND JESSICA
MATHIS, DIRECTOR OF THE BUREAU OF ELECTION SERVICES AND NOTARIES

Appellees.

REPRODUCED RECORD

Appeal from May 28, 2020 Order of the Commonwealth Court of Pennsylvania at Docket
No. 266 MD 2020

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. _____

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans file this Petition for Declaratory and Injunctive Relief against Defendants Kathy Boockvar in her official capacity as Secretary of the Commonwealth and Jessica Mathis in her official capacity as the Director of the Bureau of Election Services and Notaries, and allege as follows:

NATURE OF ACTION

1. The United States is in the midst of an unprecedented pandemic. The highly infectious coronavirus (“COVID-19”) is rapidly spreading throughout the country. As of April 22, 2020, there are 34,528 confirmed cases of COVID-19 in Pennsylvania, and 1,564 deaths. These numbers are rapidly increasing and projections from the federal government indicate that the virus will persist at least into the fall, if not longer. Indeed, the Director of the Centers for Disease Control and Prevention recently cautioned that the country may encounter a second, more deadly

wave of COVID-19, which will “be even more difficult than the one we just went through.”¹ This means that Pennsylvania’s upcoming elections will occur in the middle or immediate aftermath of a severe public health crisis. If the recent primary election in Wisconsin is any guide, it illustrates that advance planning and proactive measures to ensure that voters have sufficient access to vote by mail are essential to protect the right to vote and prevent large-scale disenfranchisement.²

2. Petitioners bring this lawsuit because the primary and general elections are fast approaching, yet the Commonwealth has failed to implement adequate safeguards to ensure a free and fair election, in which all citizens have a meaningful opportunity to vote as required by the Pennsylvania Constitution. County election officials have already indicated that in-person voting will be severely compromised in upcoming elections and have encountered some of the same election administration challenges that plagued the Wisconsin primary: some institutions, including retirement communities and nursing homes, are refusing to serve as polling locations and others will likely follow suit, which has led to the consolidation of polling places; poll workers, many of whom are elderly, are already refusing to report to duty; elections staff responsible for processing voter registration and absentee ballot applications were sent home; and county officials have expressed concern that the existing infrastructure is ill-suited to conduct in-person voting while complying with social distancing guidelines. At the same time, Pennsylvania voters are already requesting absentee and mail-in ballots (collectively, “mail ballots”) at record rates, even though the June primary election is still several weeks away.

¹ Zack Budryk, *CDC director warns second wave of coronavirus might be ‘more difficult’*, THE HILL (Apr. 21, 2020), <https://thehill.com/policy/healthcare/493973-cdc-director-warns-second-wave-of-coronavirus-might-be-more-difficult>

² Peter Baker & Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html>.

3. As Pennsylvanians are increasingly forced to turn to absentee or mail-in voting—made possible by new legislation that expanded vote by mail to all eligible voters (“Act 77”)—they will encounter numerous obstacles that, unless enjoined, will disenfranchise significant numbers of voters and violate state law, including the constitutional guarantee to a free and fair election. For instance, Pennsylvania law requires that all mail ballots must be *delivered* to election officials by 8:00 p.m. on Election Day (“Election Day Receipt Deadline”). While Petitioners do not currently challenge this rule’s validity as a general matter—nor do they seek any relief that would trigger Act 77’s non-severability clause—the challenges faced by the U.S. Postal Service during this pandemic, and the resulting disruptions in mail delivery, require additional protections for voters whose ballots are delayed through no fault of their own. At the very least, Pennsylvania should be required to count ballots received for up to seven days following Election Day, on an emergency basis during the current pandemic, in order to account for the delivery of delayed mail ballots. This would ensure that all Pennsylvania voters have an equal chance to vote by mail during this difficult and unprecedented crisis, aligning the receipt deadline for everyone with the current deadline imposed for overseas and military voters to submit their ballots.

4. Making matters worse, Pennsylvania law prohibits voters from obtaining assistance from third parties in mailing or submitting ballots in person, and requires that ballots be returned by mail or delivered *by the voter*, unless the voter is disabled. 25 P.S. §§ 3146.6(a); 3150.16(a). This restriction burdens the franchise for countless Pennsylvanians who lack access to reliable mail service and cannot safely deliver their ballots in person, and denies historically disadvantaged communities—along with those attempting to navigate the mail-in voting process for the first time—the necessary assistance required to ensure timely delivery of their ballots.

5. Voting by mail further requires payment of postage, which creates an unnecessary burden that threatens to disenfranchise the most vulnerable members of the electorate. It imposes a monetary cost on the voting process at a time when many Pennsylvanians are suffering from the devastating economic impact of COVID-19, and it requires voters who do not have ready access to postage to subject themselves to public health risks in order to visit a post office or return their ballots in-person.

6. Removing these barriers is only the first step to ensuring a meaningful opportunity to vote; the Pennsylvania Constitution also guarantees voters the right to have their properly submitted ballots counted. But in addition to the obstacles posed above, outdated and highly error-prone signature verification procedures threaten to disenfranchise eligible voters. It is unclear what, if any, standards election officials follow in verifying signatures on mail ballots; election officials are not required by law to engage in signature verification training, nor are they required to provide voters any prior notice or an opportunity to cure a perceived signature defect. The current mail ballot system thus subjects voters in some counties to an impermissible risk of arbitrary disenfranchisement.

7. To be sure, the Commonwealth's officials have recognized the disrupting effect of the COVID-19 pandemic and have taken some action, but much is left to do in order to guarantee a free and fair election. On March 27, Governor Tom Wolf signed Senate Bill 422 (Act 12 of 2020), which, among other provisions, moved the 2020 primary election from April 28 to June 2. But the Commonwealth is currently under a stay-at-home order, which requires residents "to stay at home except as needed to access, support, or provide life-sustaining business, emergency, or government services." The order also requires residents to practice social distancing and prohibits gatherings of individuals outside of the home except to access, support, or provide life-sustaining

services. While the order as it is currently written expires on May 8, the Governor has not indicated that he is ready to ease safety restrictions.³

8. Even assuming the Governor's order is lifted, the number of confirmed COVID-19 cases will rise, and efforts to minimize the spread of the virus or the risk of infection will continue to disrupt day-to-day life. As Governor Wolf has cautioned, Pennsylvanians will not return to business as usual with the snap of a finger. Election officials will continue to encounter difficulty in securing and staffing polling places, and voters will be deterred by the public health risks created by packing more precincts or divisions—and, by extension, more people—into fewer, crowded polling locations. That is why Commonwealth officials have been actively promoting voting by mail, according to a Department of State spokesperson.

9. By all accounts, Pennsylvanians have heeded this warning and are applying to vote by mail in record numbers for the upcoming June and November elections. As of this week, Pennsylvania counties have received approximately 600,000 applications for mail ballots for the June 2 election, a contest still several weeks away. In comparison, approximately 84,000 absentee ballots were cast in the 2016 primary election.⁴ To protect the right to vote and ensure a meaningful, free, and fair election in the midst of the current pandemic, as required by the Pennsylvania Constitution, the Commonwealth must implement safeguards to ensure that all voters have an opportunity to submit mail ballots and to have those ballots counted.

10. Petitioners therefore request that the Court issue an Order requiring Defendants to: adopt additional procedures to ensure that ballots delivered after the Election Day Receipt

³ See Governor's Remarks of April 17, 2020, <https://www.governor.pa.gov/newsroom/governor-tom-wolf-covid-19-remarks-april-17-2020/> (“Unfortunately, we cannot flip a switch and reopen the commonwealth. There won't be one big day. We need to make smart, data driven decisions.”).

⁴ Mark Scolforo & Michael Rubinkam, *Mail-in, absentee ballot applications surge for June primary*, Pittsburgh Post-Gazette (Apr. 15, 2020), <https://www.post-gazette.com/news/politics-state/2020/04/15/Mail-in-absentee-ballot-applications-surge-for-June-primary-pennsylvania/stories/202004150076>.

Deadline due to mail delivery delays or disruptions are counted if received within seven days of Election Day—to the extent that such procedures do not trigger Act 77’s non-severability clause; permit third parties to assist voters in submitting their sealed mail ballots; provide pre-paid postage for all mail ballots; and impose uniform guidelines for mail ballot verification that mandates training for election officials engaged in signature matching, and requires officials to provide voters with notice and a reasonable opportunity to cure before rejecting mail ballots for any signature-related defect. With the primary and general elections fast approaching, the time to act is now, to prevent widespread disenfranchisement and ensure that voters have a meaningful opportunity to participate in the electoral process.

JURISDICTION AND VENUE

11. This Court possesses original and exclusive jurisdiction over Petitioners’ claims against the Secretary and Director, statewide officers of the “Commonwealth government.” 42 Pa. C.S. § 761(a)(1), (b).

PARTIES

12. Petitioner Michael Crossey is a duly registered Pennsylvania voter and resident of Allegheny County. Mr. Crossey is 69 years old and is a retired schoolteacher and former president of the Pennsylvania State Education Association. He is currently the treasurer for the Pennsylvania Alliance for Retired Americans. Mr. Crossey has always voted in-person at the polls on election day in Pennsylvania but due to arthritis in his knees, he will face a hardship if forced to stand in line for extended periods of time. Because of the current spread of COVID-19 throughout Pennsylvania, and because he knows that the disease is particularly harmful to voters his age, Mr. Crossey requested a mail-in ballot this year so that he would not need to vote in public on election day. Mr. Crossey is concerned that, because of mail delivery delays, he may need to personally deliver his ballot to ensure it arrives on time. Not only does this present health concerns—due to

COVID-19's effect on the 65 and older population—but Mr. Crossey is also concerned that he will need to stand in line for long periods of time to submit his mail ballot, exacerbating his injuries. Mr. Crossey would seek assistance in returning his ballot if a third party were permitted to assist him. Finally, Mr. Crossey is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

13. Petitioner Dwayne Thomas is a duly registered Pennsylvania voter and resident of Fayette County. He is 70 years old and is a retired mineworker. Mr. Thomas is the current president of the Pennsylvania Alliance for Retired Americans. Mr. Thomas usually votes in-person at the polls on election day and often encounters long lines at his polling site. This year, Mr. Thomas requested an absentee ballot as a precautionary measure to avoid high-trafficked public places in light of the spread of COVID-19 across the state. Mr. Thomas has consistently had issues sending and receiving mail through the U.S. Postal Service: his letters and packages rarely arrive on time at their desired locations; he often receives returned mail even when he has correctly addressed envelopes and packages; and he often fails to receive letters and packages sent to him through the postal service. Knowing this, Mr. Thomas is concerned that he will need to personally deliver his absentee ballot but is also concerned that this will expose him to COVID-19. He would seek assistance in returning his ballot if a third party were permitted to assist to him. Mr. Thomas is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

14. Petitioner Irvin Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Mr. Weinreich is a disabled war veteran and retired maintenance worker. He has never missed an opportunity to vote in person on election day. Mr. Weinreich frequently has trouble navigating his polling site because it is difficult for him to ascend steps or steep ramps at

his polling site, and he struggles to walk the distance from the street and through the building to reach the voting area. Mr. Weinreich has heart issues and diabetes; even before the spread of COVID-19, Mr. Weinreich was afforded limited public interactions because the common cold could render him incapacitated. For the first time in his life, Mr. Weinreich requested a mail-in ballot this year due to the hardships he faces when voting in-person at his polling site. But he is concerned that his ballot may not arrive in time for the Election Day Receipt Deadline and therefore he may be forced to personally deliver his mail ballot. If permitted, Mr. Weinreich would rely on a third party to assist him in delivering his ballot to the proper location. Because this is his first time voting by mail, Mr. Weinreich is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

15. Petitioner Brenda Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Ms. Weinreich is a retired textile factory worker. She has never missed an opportunity to vote in person on election day. Ms. Weinreich frequently has trouble navigating her polling site because, due to a knee replacement, it is difficult for her to ascend steps or steep ramps at the polling site, and she struggles to walk the distance from the street and through the building to reach the voting area. Ms. Weinreich is a caretaker for her husband and would be unable to push him up the steep ramp at the polling site if he needed to be in a wheelchair or scooter. Because she is his caretaker, Ms. Weinreich is frequently required to do tasks that require public exposure, such as grocery shopping. But at 70, Ms. Weinreich is within the age group of people who are vulnerable to the more dire consequences of COVID-19. Therefore, limiting her exposure to the public is both necessary for her own health and her ability to care for her husband. Ms. Weinreich is voting by mail this year but is concerned that her ballot may not arrive to the proper polling location in time to meet the Election Day Receipt Deadline, and therefore she is concerned that she will need to

risk both the public exposure and the physical hardships of delivering her ballot in person. If permitted, Ms. Weinreich would rely on a third party to assist her in delivering her ballot. Finally, Ms. Weinreich is concerned about the risk that her ballot may not be counted due to the mail ballot verification procedures and potential variations in her signature.

16. The Pennsylvania Alliance for Retired Americans (“the Alliance”) is incorporated in Pennsylvania as a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. The Alliance has 335,389 members, composed of retirees from public and private sector unions, community organizations and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance’s mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Election Day Receipt Deadline, the prohibition on third party mail ballot collection assistance, the lack of pre-paid postage for mail ballots, and the mail ballot verification process which allows election officials to engage in an arbitrary signature matching and erroneously reject mail ballots frustrates the Alliance’s mission because it deprives individual members of the right to vote and to have their votes counted, threatens the electoral prospects of progressive candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. The Alliance and its individual members intend to engage in voter assistance programs. These programs would, but do not currently, include voter education and awareness campaigns and returning mail ballots for those electors who require assistance. The Alliance cannot further these activities because of Pennsylvania’s prohibitions.

17. Defendant Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity. As Secretary, she is Pennsylvania’s Chief Election Official and a member of

the Governor's Executive Board. The Secretary is charged with the general supervision and administration of Pennsylvania's elections and election laws. Among her numerous responsibilities in administering elections, including ballots cast by mail, she is charged with tabulating, computing, and canvassing all votes cast as well as certifying and filing the votes' tabulation, 25 P.S. § 3159, and ordering county boards to conduct recounts and recanvasses, *id.* §2621(f.2).

18. Defendant Jessica Mathis is the Director of the Bureau of Election Services and Notaries ("Bureau"). The Bureau is responsible for planning, developing, and coordinating the statewide implementation of the Election Code, voter registration process, and notaries public.

GENERAL ALLEGATIONS

A. The COVID-19 pandemic has upended Pennsylvania's electoral processes.

19. Virtually all aspects of life in our country today are affected by the unprecedented Covid-19 pandemic. Schools and businesses are closed; a majority of people in the country are sheltering in their homes; more than 20 million people have lost their jobs; and approximately 45,000 people have lost their lives. The dangerous virus that has already infected 34,528 Pennsylvanians and resulted in 1,564 deaths has begun to wreak havoc on Pennsylvania's voting systems. And the crisis has no clear end in sight.

20. On April 1, Governor Wolf issued a state-wide stay-at-home order and urged residents to maintain social distancing guidelines in order to combat the virus's spread. Counties across the state have reported difficulty recruiting and retaining poll workers, and venues that have typically served as polling locations—i.e., senior centers, schools, and churches—are unwilling to do so in upcoming elections because of the attendant public health risks. For the limited group of poll workers who agree to staff polling places on Election Day, and the few locations that agree to

open their doors to the public, county election officials have struggled to provide sufficient sanitary supplies and protective equipment to keep voters and election workers safe during in-person voting. This may prove especially problematic for those counties employing touchscreen voting machines, which may require sanitizing after every voter.

21. At the same time, some counties are still in the early stages of the rollout for Pennsylvania's new voting machines, which will require in-person training before Election Day. Because of the current state of the public health emergency, some of those trainings either have been canceled or have not been scheduled at all, sparking concerns of Election Day confusion, and prompting some local officials to question the Commonwealth's Election Day readiness.⁵

22. The Commonwealth is also likely to see a significant reduction in the number of polling places offered for voting. Not only has the public health emergency restricted available sites, the Pennsylvania General Assembly passed emergency legislation earlier this month to postpone the primary election to June 2, and to loosen restrictions on polling place consolidation, among other last-minute changes. As a result, counties may now consolidate polling locations without a court order in the June primary, and if this policy is extended to the November general election, it will allow counties to pack more voters into fewer polling places, which could spell disaster both from a public health and an election administration standpoint.

23. Because of the pandemic, mail ballots—without additional assurances—will not provide an adequate alternative means for Pennsylvanians to vote. The U.S. Postal Service is

⁵ See Jonathan Lai, "Officials in three Southeastern Pa. counties cast doubt on primary voting methods." PHILA. INQUIRER (April 10, 2020), <https://www.inquirer.com/politics/election/coronavirus-covid19-election-pennsylvania-20200410.html>.

experiencing difficulties, delays, and budget shortfalls.⁶ These pressures threaten to shutter the entire agency by this summer.⁷

24. As the pandemic continues to spread, postal workers have increasingly been infected. As of mid-April, nearly 500 postal workers across the country have tested positive for the coronavirus, 19 have died, and more than 6,000 are in self-quarantine because of exposure.⁸ Postal workers in Pennsylvania are no different. Reports of the virus infecting and, unfortunately, killing Postal Service employees throughout the state abound.⁹

25. And as it attempts to deliver an unprecedented number of absentee ballots across the country—both from county elections officials to voters, and then back again—the system will be under increasing pressure, causing delays and, ultimately, some number of ballots that are not received by voters in time.

26. The Postal Service’s budget and personnel struggles have harsh implications for Pennsylvanians’ voting rights. In the past, when the U.S. Postal Service has faced a budget crisis, it has responded by closing hundreds of processing centers.¹⁰ Moving forward, it is likely that the

⁶ The Postal Service is experiencing dramatic decreases in mail volume compared to last year and, as a result, is projecting a \$13 billion revenue shortfall this fiscal year because of the pandemic and another \$54 billion in losses over 10 years.” Nicholas Fandos & Jim Tankersley, *Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html>.

⁷ Kyle Cheney, *House panel warns coronavirus could destroy Postal Service by June*, POLITICO (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>.

⁸ Jacob Bogage, *White House rejects bailout for U.S. Postal Service battered by coronavirus*, WASH. POST (Apr. 11, 2020), <https://www.washingtonpost.com/business/2020/04/11/post-office-bailout-trump/>.

⁹ See, e.g., *Two United States Postal Service employees test positive for COVID-19 in Harrisburg*, CBS 21 News (Apr. 15, 2020), <https://local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg>; Bill Rettew, *Exton postal employee dies from coronavirus complications*, DAILY LOCAL NEWS (Apr. 12, 2020), https://www.dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html; CBS3 Staff, *Northeast Philadelphia Postal Worker Tests Positive For COVID-19*, CBS 3 PHILLY (Mar. 30, 2020), <https://philadelphia.cbslocal.com/2020/03/30/coronavirus-bustleton-station-postal-worker-positive-covid-19/>; John Luciew, *U.S. Postal Service employee in Pa. has coronavirus: ‘Risk is low’*, PA. PATRIOT-NEWS (Mar. 24, 2020), <https://www.pennlive.com/coronavirus/2020/03/us-postal-service-employee-in-pa-has-coronavirus-risk-is-low.html>.

¹⁰ See U.S. Postal Service Office of Inspector General, *Area Mail Processing Consolidations* (June 5, 2015), <https://www.uspsoidg.gov/sites/default/files/document-library-files/2015/no-ar-15-007.pdf>.

USPS will need to make cuts to routes, processing centers, or staff—any of which is likely to increase mail processing delays. Pennsylvania voters casting mail ballots and facing the Election Day Receipt Deadline will bear the brunt of these cuts because of the recent introduction of no-excuse mail-in ballots—already surging in demand for a primary election weeks away—and safety measures needed to slow the spread of COVID-19, such as Governor Wolf’s stay-at-home order.

27. The recent primary election in Wisconsin should serve as a cautionary tale because election officials there encountered many of the same issues leading up to election day. Like here, “the extent of the risk of holding [the] election ha[d] become increasingly clear” well before Election Day. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Election officials were facing a huge backlog of requests for absentee ballots and questions about voting absentee, including how to satisfy certain registration requirements, how to properly request an absentee ballot, and how to return it in time to be considered. *Id.* Election officials were also dealing with the loss of poll workers due to age, fears of illness, or actual illness. *Id.* The likely consequences of holding an election in that context were clear:

(1) a dramatic shortfall in the number of voters on election day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19.

Id.

28. When Wisconsin proceeded to hold an election without sufficiently addressing these issues, chaos and widespread disenfranchisement ensued. The Postal Service struggled to deliver absentee ballots to voters. Some ballots were delayed, but others did not arrive at all. In

response, both of Wisconsin's U.S. Senators wrote to the Inspector General for the U.S. Postal Service seeking an investigation into "absentee ballots not being delivered in a timely manner" and the Postal Service's failure to deliver in this regard.¹¹ There were similar delays returning ballots to elections officials. In total, approximately 107,871 absentee ballots were received by elections officials after the day of the election.

29. Additionally, cities in Wisconsin were forced to close polling locations. In Milwaukee, a city with twice the population of Pittsburgh, 18,803 voters cast their ballots in person at only five polling locations. The result was crowds, long lines, and excessive wait times—in the middle of a global pandemic:



Source: David D. Haynes, Haynes: *Wisconsin's Election May Have Been 'Ridiculous' but Those Who Braved Coronavirus to Vote Were Anything but*, MILWAUKEE J. SENTINEL (Apr. 8, 2020), <http://www.jsonline.com/story/news/solutions/2020/04/08/wisconsin-election-ridiculous-voters-who-braved-coronavirus-lines-inspiring->

¹¹ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.



Source: Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election->

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Source: *Coronavirus Wisconsin: Scenes from Election Day*, April 7, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.



Source: *Coronavirus Wisconsin: Scenes from Election Day*, April 7, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.

30. Reports of COVID-19 cases resulting from voters who turned out to vote in Wisconsin's election have already emerged.¹²

31. Without adequate safeguards to ensure access to vote by mail options, Pennsylvania could suffer the same fate. To their credit, Commonwealth and local officials have been encouraging voters to cast ballots by mail, and early indications from mail ballot applications suggest that voters will do so in record numbers. As of today, still six weeks away from the June 2 election, Pennsylvania counties have received approximately 600,000 applications for mail-in and absentee ballots. By contrast, only around 84,000 absentee ballots were cast in the 2016 primary election.

32. But the current mail voting process in Pennsylvania is not equally accessible to all eligible citizens—particularly those in disadvantaged communities, the poor, the elderly, and other vulnerable populations. Many of these individuals have historically relied on in-person voting, which will be severely restricted (and may pose significant health risks) in upcoming elections. In order to ensure that all citizens have reasonable and equal access to the electoral process, the Commonwealth must remove unnecessary restrictions on mail voting that will otherwise deny its citizens the free and equal election guaranteed by the Pennsylvania Constitution.

B. Election Day Receipt Deadline

33. In the 2018 general election, according to data from the Election Administration and Voting Survey, approximately, 8,162 absentee ballots—3.7% of all absentee ballots cast—were rejected because they were delivered to election officials after 5:00 p.m. on the Friday before Election Day.

¹² Alison Dirr, *At least 7 new coronavirus cases appear to be related to Wisconsin's election, Milwaukee health commissioner says*, MILWAUKEE J. SENTINEL (April 20, 2020), <https://www.jsonline.com/story/news/local/milwaukee/2020/04/20/coronavirus-milwaukee-7-new-cases-may-tied-april-7-election/5168669002/>.

34. Since then, the Pennsylvania General Assembly enacted legislation to allow all eligible voters to vote by mail and extended the deadline for election officials to receive mail ballots: now, to be counted, all absentee and mail-in ballots must be received by 8:00 p.m. on Election Day in the county board of elections office. 25 P.S. §§ 3146.6(c), 3150.16(c). Petitioners do not challenge the validity of this law, nor do they seek any relief that would trigger Act 77's non-severability clause. However, the disruptions in the voting process caused by the COVID-19 pandemic require the Commonwealth to implement additional voting procedures that would allow election officials to count mail ballots that arrive after 8:00 p.m. on Election Day due to mail service delays or disruptions.

35. As detailed above, the ability to process mail ballot applications and deliver ballots on time has been compromised by the public health crisis. The demand for mail ballots is already testing the limits of some counties: in Delaware County, for example, election officials have begun "falling behind on processing mail-in ballot requests."¹³ And as the number of self-quarantined and infected postal workers increase nationally and locally, the more likely it is the U.S. Postal Service will continue to face severe staffing shortages, thereby slowing the delivery and receipt of a rapidly increasing volume of election mail.

36. Because mail ballots must be received by 8:00 p.m. on Election Day, voters must mail them several days before Election Day to ensure timely delivery. This date operates as a shadow pre-election cutoff date. But in a post-COVID-19 world, where the Postal Service's regular mail functions have been disrupted, the pre-election cutoff date by which voters should mail their

¹³ Jonathan Tamari & Jonathan Lai, *Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco*, PHILA. INQUIRER (Apr. 12, 2020), <https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html>.

ballots to ensure timely delivery is entirely unclear, subjecting voters to arbitrary disenfranchisement.

37. For instance, Pennsylvania voters can apply for absentee and mail-in ballots if their applications are received by 5:00 p.m. on the Tuesday before Election Day. *See* 25 P.S. §§ 3146.2a(a), 3150.12a(a). But it is anyone's guess whether voters who request absentee ballots on this day will receive their ballots in time to submit them before the Election Day Receipt Deadline. Pennsylvania officials must mail absentee and mail-in ballots to a qualified absentee or mail-in voter "within forty-eight hours after approval of their application." 25 P.S. §§ 3146.5(a), 3150.15. It is even less predictable now when that ballot will arrive. Even assuming the ballot arrives before Election Day, the voter may not have time to fill it out and mail it back to ensure timely delivery.

38. Although Pennsylvania may have an interest in the finality of elections, the Commonwealth can continue to enforce its Election Day Receipt Deadline while providing separate, temporary procedures to allow voters who submit their mail ballots well in advance of Election Day, but are affected by mail service disruptions, to cast an effective ballot. And doing so can still serve the Commonwealth's interest. Pennsylvania currently counts military-overseas ballots so long as they are received "by 5 p.m. on the seventh day following the election." *Id.* at § 3511(a). County boards of elections have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not certify election results to the Secretary until 20 days after Election Day. 25 P.S. § 2642(k).

39. There is nothing sacrosanct about the receipt deadline as past (and current) exemptions indicate. Shortly after Hurricane Sandy struck parts of Pennsylvania in 2012, the Governor extended the deadline for absentee ballots returns in Philadelphia, Bucks, Montgomery,

and Chester Counties from 5:00 p.m. on the Friday before Election Day to 5:00 p.m. on the Monday before Election Day.¹⁴ In 2016, a Montgomery County Court judge extended the Deadline from the Friday before the election to 8:00 p.m. on Election Day after elections officials received “unprecedented demand” for absentee ballots and voters “complain[ed] that they had not yet received their ballots” with the Friday deadline impending.¹⁵

40. Adopting such emergency procedures, moreover, does not trigger the non-severability clause added to recent legislation, Act 77, that expanded mail voting to all eligible voters and moved the mail ballot receipt deadline to 8:00 p.m. on Election Day. Petitioners’ requested relief does not render the Election Day Receipt Deadline invalid. Rather, it would implement additional, emergency procedures to count mail ballots delayed by postal service disruptions in light of the COVID-19 pandemic.

41. Rejecting all mail ballots that arrive after 8:00 p.m. on Election Day, notwithstanding the current public health emergency, the unprecedented increase in requests for absentee ballots, and the budgetary crisis at the U.S. Postal Service, disenfranchises Pennsylvania voters—many of whom already lack reasonable access to safe, in-person voting options—for reasons entirely out of their control.

C. Third-Party Ballot Collection Assistance

42. Pennsylvania’s failure to safeguard the rights of voters affected by mail service disruptions is compounded by the fact that Pennsylvania law in most cases prohibits third parties from assisting voters in delivering mail ballots. Thus, to avoid the uncertainty of mail delivery,

¹⁴ *Absentee ballot deadline extended in some Pa. counties*, WHYY (Nov. 5, 2012), <https://whyy.org/articles/absentee-ballot-deadline-extended-in-aome-pa-counties/>.

¹⁵ Laura McCrystal, *Montco judge extends deadline for absentee ballots*, PHILA. INQUIRER (Nov. 3, 2016), https://www.inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html.

voters will be forced to submit their ballots in person, potentially subjecting themselves to health risks.

43. For example, Petitioner Dwayne Thomas usually votes in-person on election day but has applied to vote absentee this year as a precautionary measure due to the current health crisis. Relatedly, Mr. Thomas has struggled for years with having his mail arrive promptly—or at all—using his local postal service. Because the current pandemic exacerbates postal service delays and creates further uncertainty in the timing of mail delivery, Mr. Thomas will be forced to deliver his ballot in-person this year to ensure his vote is counted, or subject himself to the risk of arbitrary disenfranchisement. The benefits he gains from voting by mail—avoiding crowded polling locations or waiting in line to vote—are lost if he must nevertheless wait in crowded lines for prolonged periods just to deliver his ballot on time. If the state permitted, Mr. Thomas would designate a third party to safely deliver his ballot on time.

44. The burden caused by the prohibition on third party ballot collection is particularly pronounced this year because many Pennsylvanians, like Mr. Thomas, will be voting by mail for the first time—in light of Act 77’s recent expansion of mail voting—and will have to navigate the public health risks posed by the COVID-19 pandemic.

45. Mr. Thomas’s predicament, moreover, is far from an isolated incident. Pennsylvania has an aging population, ranking fifth among the 50 states by the size of its population over the age of 65 in 2017. Seniors, especially those living in community homes or nursing homes, are particularly vulnerable to the current health risks and have expressed concern that they have no reliable way to deliver their ballots to the proper polling site; they cannot trust that the ballot will be delivered on time through the postal service and they cannot personally deliver the ballot due to health concerns.

46. The prohibition on third party ballot collection also disproportionately burdens poor, minority, and rural communities who generally have less access to postal services, live in areas that lack reliable access to public transportation, and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person. Voters in rural communities, moreover, face longer travel distances to their county board of elections office and even less reliable mail service.

47. Absentee and mail-in ballots are a positive step for Pennsylvania. But, as shown above, voters who opt for these ballots still require assistance in returning their ballots to the appropriate election officials. Pennsylvania allows third party ballot collection in very limited circumstances where someone is disabled or hospitalized but prohibits third party ballot collection in every other instance. This prohibition presents an undue burden on voters generally and will operate to disenfranchise a large swath of Pennsylvania's eligible voters during the current pandemic.

D. Pre-Paid Postage

48. In Pennsylvania, most voters who choose to return their ballots by mail must also provide their own postage. 25 P. S. §§ 3146.6(a); 3150.16(a). This requirement imposes both monetary and transaction costs that bear most heavily on individuals who are least likely to be able to overcome them.

49. In this digital era, many voters do not regularly keep postage stamps in their homes, and therefore must visit a post office or other essential business to obtain the correct postage. Purchasing a book of 20 stamps online will cost voters \$11—an unnecessary expense that could be cost prohibitive for individuals with lower incomes, along with those whose employment and source of income were eradicated due to the devastating economic impact of COVID-19 and the Governor's ensuing stay-at-home order. A trip to the post office or any other establishment that

sells stamps, during a public health crisis in which individuals have been instructed to maintain social distancing guidelines, forces voters to expose themselves to health risks in order to vote. This is especially true for elderly voters, as well as voters who lack access to vehicles and must rely on public transportation.¹⁶

50. Providing postage to allow citizens to complete important government-related functions is a common practice that has been adopted by federal, state, and county governments in other contexts. For instance, the United States Census Bureau sends census surveys with postage-prepaid return envelopes. Pennsylvania provides, as the National Voter Registration Act requires, a postage-prepaid return envelope when it asks voters to verify their address for the purpose of voter registration. Counties in Pennsylvania send juror questionnaires with postage-prepaid envelopes. Recently, Allegheny County Executive Rich Fitzgerald announced that the county will send mail-in ballot applications to all registered voters with prepaid postage.¹⁷ And in its coronavirus stimulus package, Congress allocated \$400 million for elections, which can be used to cover the cost of prepaying postage, among other expenses.

51. Studies have shown that sending absentee ballots in postage-prepaid envelopes increases mail voting turnout. When King County, Washington launched prepaid postage pilot programs during the 2017 and 2018 primary elections, the county found that voters returned their absentee ballots via USPS at higher rates when they received return envelopes with postage prepaid. In the 2016 general election, 48% of the tested group of voters returned their absentee

¹⁶ In Southeastern Pennsylvania, public transportation has been radically reduced in light of the COVID-19 pandemic. Dozens of bus, train, and trolley routes have been cancelled; many subway stations have been shuttered; and those routes which are operating are doing so on a significantly lessened schedule. See Se. Pa. Trans. Auth., *New Lifeline Service Schedules Effective Thursday, April 9, 2020*, <http://septa.org/covid-19/>, (last visited Apr. 22, 2020).

¹⁷ Ryan Deto, *Allegheny County is sending all county voters mail-in ballot applications with prepaid postage*, PITTSBURGH CITY PAPER (April 17, 2020), <https://www.pghcitypaper.com/pittsburgh/allegheny-county-is-sending-all-county-voters-mail-in-ballot-applications-with-prepaid-postage/Content?oid=17142631>.

ballots via USPS. In 2017, 81% of those same voters did. Voters were not only more likely to return their ballots by mail, they were also more likely to *vote*. In the 2017 primary, turnout rose 10%. In the 2018 primary, it rose 6%. Following these pilot programs, King County sent all absentee ballots with postage-prepaid return envelopes. And shortly after that, the Governor and Secretary of State of Washington funded prepaid postage for every county in the state.

52. While Allegheny County’s efforts to provide prepaid postage are laudable, such safeguards should be extended to all voters and not left to the counties’ discretion. Beaver County, for instance, had provided postage-prepaid envelope in its absentee ballot mailing in prior elections, but county officials announced in January of this year that they will no longer cover the cost of postage.¹⁸ Thus some voters in Beaver County and other parts of the state that do not have access to mail ballots with prepaid postage will be forced to put their health at risk—either to obtain postage or stand in line at potentially crowded, consolidated polling places—or incur additional expense in order to exercise their right to vote.

E. Signature Matching

53. Submitting a ballot by mail is only part of the battle; once the ballot is delivered, county election officials must then engage in an opaque verification process, which in some counties involves signature matching, conducted without any identifiable standards or guidelines, by officials who are untrained in signature or handwriting examination.

54. Under Pennsylvania law, county boards, as part of the canvassing process, must “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s]

¹⁸ Daveen Rae Kurutz, *No stamp: Beaver County to cease providing postage for absentee ballots*, ELDWOOD CITY LEDGER (Jan. 20, 2020), <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cess-providing-postage-for-absentee-ballots>.

right to vote.” 25 Pa. Stat. Ann. § 3146.8(g)(3). And some counties, on information and belief, rely on signature matching to determine whether mail ballots should be counted.

55. The statute does not set forth any guidelines for conducting this comparison, nor does Pennsylvania law require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process.¹⁹ Indeed, the General Assembly failed to act on proposed legislation in 2019 which would have required election boards to provide notice of signature mismatches and set forth procedures for curing rejected ballots. Thus, counties are left to their own devices in determining whether the information on a voter’s declaration and the applicable voter file verifies their right to vote, or whether the signature on the declaration is sufficiently similar to the information on file to allow the mail ballot to be counted.

56. This lack of guidance or identifiable standards is problematic because signature matching, as one federal court put it, is inherently “a questionable practice” and “may lead to unconstitutional disenfranchisement.” *Democratic Exec. Comm. of Fla. v. Lee*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018). Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification conducted without adequate standards and training is unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries.

57. Even when conducted by experts, signature matching can lead to erroneous results in the ballot verification context because handwriting can change quickly for a variety of reasons entirely unrelated to fraud, including the signer’s age, medical condition, psychological state of mind, pen type, writing surface, or writing position. It is, thus, inevitable that election officials will

¹⁹ Pennsylvania law requires election officials to provide notice to the voter and a formal hearing only when a ballot or application has been challenged, and sets forth procedures for conducting hearings and adjudicating challenges, none of which are at issue here. *See* 25 Pa. Stat. Ann. § 3146.8 (5), (6).

erroneously reject legitimate ballots due to misperceived signature mismatches, which, without notice and a reasonable opportunity to cure, will result in the disenfranchisement of eligible voters.

58. Furthermore, the absence of any clear guidance in the statute—and the Department of State’s willingness to allow counties to adopt their own verification procedures—means that voters will encounter varying and conflicting signature matching practices depending on the county in which they reside. Voters in some counties may receive notice of a potential signature mismatch and an opportunity to cure before the ballots are canvassed, while others may not. Indeed, voters in some counties may avoid signature matching entirely while others will have their ballots rejected. These diverging procedures all but ensure that voters across all counties will not have an equal opportunity to cast an effective mail ballot.

59. In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.

COUNT I

Violation of Pennsylvania Constitution, Article I, Section 5 Free and Equal Elections Clause

60. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

61. “Elections shall be free and equal” in Pennsylvania. Pa. Const. art. I, § 5. Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (1914). The Free and Equal Elections Clause is “specifically intended to equalize the power of voters in

our Commonwealth's election process," *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 812 (2018), and protects voting rights even if they are denied or impeded "by inadvertence." *Id.* at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (1929)).

62. The Commonwealth's failure to implement adequate safeguards to protect the right to vote and ensure access to vote by mail, in the midst of a public health emergency, severely burdens the right to vote and violates the Free and Equal Elections Clause in several ways.

63. Pennsylvania's failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county board of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. In the 2018 general election alone, 3.7% of all absentee ballots were not counted because they arrived after the deadline and, as a result, 8,162 voters were denied the franchise. "The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted); *see also Stein v. Cortes*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016) ("The right to vote necessarily includes the right to have the vote fairly counted."). In light of Act 77's expansion of mail voting, and the barriers to in-person voting posed by COVID-19, the number of Pennsylvanians voting by mail will increase dramatically in upcoming elections; but their ballots will be subject to the vagaries of the U.S. Postal Service, an agency facing grave difficulties because of the ongoing global pandemic. Thus Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.

64. Pennsylvania's prohibition on third party ballot collection assistance further denies voters their right to a free and fair election. Many Pennsylvanians will vote by mail for the first time in upcoming elections, in part because the health risks posed by COVID-19 has limited access

to polling places and precludes in-person voting for vulnerable individuals. The U.S. Postal service is facing increased demands from the spike in absentee and mail-in ballots while simultaneously confronting a devastating budgetary and resource crisis. Therefore, many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.

65. The prohibition also presents an undue burden on poor, rural, and other disadvantaged communities that do not have access to reliable mail service, lack of access to reliable transportation, and will be forced to incur significant burdens and health risks to submit their ballots in person. Voters in these groups are less likely to vote without third party assistance to safely collect and deliver their ballots on time to the appropriate county board office. Pennsylvania's prohibition on this practice denies voters access to the electoral process.

66. Pennsylvania's failure to provide pre-paid postage for mail ballots imposes monetary costs on the only safe alternative to voting for individuals who would otherwise have to subject themselves to the health risks of waiting to vote at the few consolidated and potentially crowded polling locations available. These costs bear most heavily on those who are affected by the devastating economic impact of the ongoing public health emergency. Even for voters able to withstand the economic costs, the postage requirement imposes practical burdens—i.e., traveling to a post office to purchase stamps—that will dissuade voters in light of the attendant health risks. Thus, Pennsylvania's failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Elections Clause.

67. Finally, Pennsylvania's signature-matching process for absentee ballots subjects Pennsylvanians who vote by mail to an arbitrary and error-prone verification process that can result in the rejection of their ballots without notice or an opportunity to cure. By empowering county

boards to “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s] right to vote,” 25 P.S. § 3146.8(g)(3), and conduct signature matching without any guidelines, Pennsylvania law ensures that some voters will have their ballots rejected erroneously, which violates their right to have their ballots counted, and fails to “equalize the power of voters in [the] Commonwealth’s election process.” *League of Women Voters of Pa.*, 645 Pa. at 113.

COUNT II

Violation of Pennsylvania Constitution, Article I, Sections 1, 26 Equal Protection

68. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

69. The Pennsylvania Constitution states that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. It also prohibits the Commonwealth and any other political subdivision from denying to any person “the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. art. I, § 26. These equal protection provisions are analyzed “under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (1984)).

70. Those standards are best understood under the *Anderson-Burdick* balancing test, which commands courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as

justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs' rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, "'the regulation must be narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Reed*, 502 U.S. at 289). "However slight th[e] burden [on voting] may appear, ... it must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

71. Pennsylvania's rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide pre-paid postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear heavily on certain groups of voters without sufficient justification. This includes voters who are over the age of 65 or who have underlying health conditions that make them vulnerable to COVID-19, minority voters, individuals with limited financial means, and voters who live in rural areas, among others. Pennsylvania has no interest of sufficient importance that outweighs the burdens on otherwise eligible members of the electorate, who will also be denied the opportunity participate in the electoral process on an equal basis with other voters.

COUNT III

Violation of Pennsylvania Constitution, Article I, Section 1 Due Process

72. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

73. “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Due process rights “emanate” from this section of Pennsylvania’s Constitution. *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 229 n.4 (1995). The requirements of Article I, Section I “are not distinguishable from those of the 14th Amendment . . . [and courts] may apply the same analysis to both claims.” *Id.* at 229 n.6. Pennsylvania courts have adopted the U.S. Supreme Court’s methodology in reviewing procedural due process claims. *R. v. Dep’t of Public Welfare*, 636 A.2d 142, 153 (1994) (adopting the federal procedural due process analysis expressed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for assessing due process claims under Article I, Section 1). The Commonwealth, having created processes for voting with absentee or mail-in ballots, “must administer it in accordance with the Constitution,” including with “adequate due process protection.” *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018).

74. What process is due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *Mathews*, 424 U.S. at 334–35. Courts must first consider the nature of the interest that will be affected by the government’s actions as well as the “degree of potential deprivation that may be created” by existing procedures. *Id.* at 341. Second, courts consider the “fairness and reliability” of the existing procedures “and the probable value, if any, of additional procedural safeguards.” *Id.* at 343. Finally, courts consider the public interest, which

“includes the administrative burden and other societal costs that would be associated with” additional or substitute safeguards. *Id.* at 347. Overall, due process is a “flexible notion which calls for such protections as demanded by the individual situation.” *Dep’t of Transp., Bureau of Licensing v. Clayton*, 546 Pa. 342, 351 (1996).

75. “Having induced voters to vote by absentee ballot,” the Due Process Clause requires the Commonwealth to “provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.” *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

76. The nature of interest at stake in this case—the right to vote and to have that vote count—is “the most treasured prerogative of citizenship in this nation and this Commonwealth.” *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303, 308 (1974).

77. Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to the postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots delivered after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurance that they will be delivered in time, even when submitted well in advance of Election Day.

78. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania’s absentee and mail-in voters are both meaningfully cast and actually counted is readily apparent. For instance, accepting absentee and mail-in ballots that arrive within seven days after Election Day, if they contain any indicia, such as a postmark or barcode, made by the U.S. Postal Service to track or record the time that a ballot entered the postal system on or before

Election Day alleviates the risk of arbitrary deprivation that Pennsylvania's Election Day Receipt Deadline currently inflicts on voters affected by mail delivery disruptions.

79. Further, Pennsylvania officials do not need to certify election results to the Secretary until 20 days after Election Day, and the Commonwealth currently accepts mail ballots from overseas and military voters that arrive up to seven days after Election Day. Extending this allowance to voters affected by mail service disruptions would place minimal administrative burden on the state, if any.

80. Pennsylvania's signature-matching process also violates the Due Process Clause. During the canvassing process, county boards must "examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information" on the declaration with the applicable voter file in order to "verify [the individual's] right to vote." 25 P.S. § 3146.8(g)(3). The statute does not set forth any guidelines for conducting this comparison, and some counties engage in signature matching as part of the verification process. Signature matching, however, is highly error-prone, and Pennsylvania law does not require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process for a signature mismatch. Thus, Pennsylvania's ballot verification process allows for the erroneous rejection of mail ballots and arbitrary disenfranchisement of Pennsylvania voters.

81. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania's absentee and mail-in voters are not rejected for a mismatched signature is clear. Providing an opportunity to contest or cure signature mismatch determinations will reduce the risk of erroneous deprivation of the right to vote. Moreover, providing these adequate safeguards to will impose a minimal burden on the Commonwealth and advances the public's interest in counting validly-cast ballots.

82. Having induced voters to cast mail ballots—made all the more necessary and urgent in light of the ongoing public health crisis—Pennsylvania must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to submit their mail ballots and to have those ballots counted. Pennsylvania’s failure to provide safeguards to voters whose ballots are delayed due to mail service disruptions, or voters whose ballots may be rejected under an error-prone signature-matching process, violates Petitioners’ and other Pennsylvania voters’ procedural due process rights.

PRAYER FOR RELIEF

Wherefore, Petitioners respectfully request that this Honorable Court enter judgment in their favor against Defendants, and:

a) Declare unconstitutional the Commonwealth’s failure to: (i) provide prepaid postage on absentee and mail-in ballots; (ii) provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted—to the extent such declaration does not trigger Act 77’s non-severability provision; (iii) allow third party mail ballot collection assistance; and (iv) provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch.

b) Issue an order requiring that Defendants:

- a. Provide prepaid postage on all absentee and mail-in ballots;
- b. Implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail service delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause;

- c. Allow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots and ensure that all such ballots are counted if otherwise eligible; and
- d. Provide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.

c) Maintain jurisdiction over this dispute to ensure that the Defendants comply with their obligations under the Pennsylvania Constitution.

d) Provide such other and further relief as the Court may deem just and proper.

Dated: April 22, 2020

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v.

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Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Application For Special Relief In The Nature Of A Preliminary Injunction and Brief in Support Thereof, within the time set by order of the court, of service hereof or a judgment may be entered against you.

Dated: May 8, 2020

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No. 266 MD 2020

**PETITIONERS' EMERGENCY APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION AND FOR EXPEDITED REVIEW**

Petitioners, by counsel, hereby move under Rule 1531(a) of the Pennsylvania Rules of Civil Procedure for relief in the form of a preliminary injunction requiring Respondents Secretary of the Commonwealth Kathy Boockvar and Director of the Bureau of Election Services and Notaries Jessica Mathis to adopt emergency procedures for Pennsylvania's June 2 primary election that would allow voters to submit ballots by mail up to Election Day, provided that such ballots are received by the seventh day after the election; and enjoining Respondents from enforcing Pennsylvania laws that prohibit third parties from assisting voters in delivering absentee or mail-in ballots. 25 P.S. §§ 3146.6(a); 3150.16(a).

In light of the fast approaching primary election, and the pressing legal issues Petitioners have raised, which will have significant implications on Petitioners and other Pennsylvanians' ability to participate in the June 2 primary, Petitioners further request that the Court issue an expedited briefing schedule requiring Respondents to file their opposition by Monday, May 18, 2020 and Petitioners to file their Reply, if any, by Thursday, May 21, 2020.

Counsel for Petitioners has conferred with counsel for Respondents, who have indicated that they do not oppose Petitioners' proposed briefing schedule.

In support of their application for preliminary injunction, Petitioners hereby incorporate the Verified Petition for Declaratory and Injunctive Relief filed in this action on April 22, 2020, and the accompanying Memorandum. Petitioners further state the following:

BACKGROUND

1. As set forth more fully in the Verified Petition for Declaratory and Injunctive Relief filed in this action on April 22, 2020, Petitioners allege that Pennsylvania's failure to adopt emergency procedures or safeguards to provide voters a reliable, safe vote-by-mail option, and its prohibition on third-party mail ballot delivery assistance, constitute violations of the Pennsylvania Constitution.

2. COVID-19 has upended Pennsylvania’s electoral system, including its in-person and absentee or mail-in voting procedures, as described in more detail in the Verified Petition for Declaratory and Injunctive Relief and the Memorandum filed in support of this application. In person voting will be severely restricted in the June 2 primary due to a significant reduction in polling places, election workers, and the risk of COVID-19 infection. The absentee or mail-in voting (collectively, “mail-in voting”) system is also severely strained due to the rapid expansion of mail ballot requests, which county boards are struggling to fulfill, and the USPS’s ongoing operational and budgetary crisis, which has resulted in reduced staff and significant delays in mail delivery services. These factors, caused in large part by COVID-19, will delay the issuance of mail ballots to voters, and the return of those ballots from voters to county boards, making it nearly impossible for many Pennsylvanians to vote by mail and submit their ballots with enough time to ensure that county officials receive them by 8:00 p.m. on Election Day as required by law. Making matters worse, Pennsylvania law prohibits most voters from obtaining assistance from third-parties to deliver their mail ballots by the Election Day deadline.

3. Indeed, the experiences in both Wisconsin and Ohio—two states that have conducted primary elections during the pandemic—confirm that the current challenges facing the vote-by-mail system could result in widespread disenfranchisement. In Wisconsin, tens of thousands of mail ballots, and potentially upwards of 100,000, failed to arrive by Election Day due to disruptions to USPS. In light of the severe restrictions to the in-person and mail-in voting process, and the risks posed by each, the Commonwealth has failed to provide Petitioners and other Pennsylvania voters with a safe, reliable, and accessible option for voting, thus denying them their constitutional right to a free and equal election. Pa. Const. art. I, §§ 1, 5, 26. Absent this Court’s intervention, the lack of any safeguards to ensure that Pennsylvanians can vote by mail during the

COVID-19 pandemic without undue risk of arbitrary disenfranchisement and undue burden will result in the rejection of thousands of ballots for reasons outside the voters' control.

INJUNCTIVE RELIEF

4. Petitioners move this Court for an Order (1) requiring Respondents to adopt emergency procedures that provide emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all such ballots if postmarked by Election Day and received by the seventh day after the election, and (2) preliminarily enjoining the enforcement of 25 P.S. §§ 3146.6(a) and 3150.16(a) to the extent that each prohibits third-parties from delivering any voter's ballot to their respective county board of elections.

5. This court may order such relief, pursuant to Pennsylvania Rule of Civil Procedure 1531(a), when the moving party can establish the following factors: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 628 Pa. 573, 578 (2014).

6. Petitioners are likely to succeed on the merits of the claims they advance in this application. Pennsylvania's Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that all elections are "free and equal." *League of Women Voters v. Commonwealth*, 645 Pa. 1, 100 (2018); Pa. Const. art. I, § 5. Yet election officials have failed to

provide safe, reliable, and accessible voting opportunities for the June 2 primary election, as the severe limitations on in-person and mail voting during the COVID-19 pandemic force voters to choose between casting a ballot in person and subjecting themselves to the risk of COVID-19 infection, or submitting their ballots to the vagaries of a mail delivery service with limited capacity, and subject themselves to risk of arbitrary disenfranchisement. Furthermore, by prohibiting voters from obtaining assistance from others to deliver their mail ballots, Pennsylvania law imposes a severe burden on the franchise that disproportionately affects senior voters, such as the individual Petitioners here, who are vulnerable to severe illness from COVID-19, among other disadvantaged groups. These burdens, moreover, are not justified by any sufficiently weighty, let alone compelling, state interest. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1215–16 (N.D. Fla. 2018).

7. An injunction is necessary to prevent the violation of Petitioners' and other Pennsylvanians' constitutional rights, and the potential disenfranchisement of thousands of voters in the June 2 primary, which imposes immediate and irreparable harm that cannot be adequately compensated by damages.

8. Greater injury will result from allowing the challenged conduct to continue than from issuing the requested injunctive relief. Neither the Court nor Respondents need to speculate about this point having witnessed the effects of similar electoral-system breakdowns in Wisconsin's primary election. Here, Pennsylvanians will be forced into a catch-22 whereby they must risk their health to submit a ballot in person and avoid the vagaries of unpredictable mail delivery during a global pandemic, or mail their ballots from the safety of their own homes and subject themselves to a significant risk of disenfranchisement. Neither administrative convenience nor unsupported fears of fraudulent activity can justify either result.

9. The status quo has been upended by the COVID-19 pandemic and the resulting disruptions to daily life both in Pennsylvania and across the country. Petitioners' requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, and to exercise their right to vote—and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 5, 26.

10. Petitioners' requested relief is reasonably tailored to provide Pennsylvanians with safe, accessible, and reliable voting opportunities, while minimizing the risk of arbitrary disenfranchisement and ensuring access to a free and equal election. The administrative burden to election officials, on the other hand, is minimal, because much of the relief Petitioners seek has already been implemented for certain categories of voters and election officials have until 20 days after Election Day to certify the results. 25 P.S. §§ 2642(k).

11. The public interest favors procedures that protect the constitutional rights to vote and to participate in a free and equal election. *Bergdoll v. Kane*, 557 Pa. 72, 85 (1999) (quotation omitted).

12. Finally, neither Petitioners' claims nor request for relief require application of Act 77's non-severability clause. Petitioners do not challenge the validity of the ballot receipt deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), nor do they seek to prevent its enforcement, particularly for ballots delivered in person. Instead, Petitioners requested for injunctive relief seeks temporary, emergency measures for Pennsylvanians voting by mail to supplement, rather than supplant, existing procedures.

13. For these reasons and those set forth in their accompanying Memorandum, Petitioners request that the Court grant their application for preliminary injunction in the nature of a preliminary injunction and enter an Order:

- a. Requiring Respondents to adopt emergency procedures that provide for the distribution of emergency write-in ballots to all voters who request mail ballots, designate as emergency ballots all ballots submitted *by mail*, and count all emergency or emergency write-in ballots if: (i) postmarked by Election Day, June 2, 2020, and (ii) received by the seventh day after the election, June 9, 2020. The term “postmark” shall refer to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.
- b. Enjoining the enforcement of Pennsylvania laws that prohibit third parties from assisting in voters in delivering absentee or mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a).

14. In light of the fast approaching June 2 primary election, and the limited time remaining to implement relief to protect Petitioners’ and Pennsylvania voters’ constitutional rights, Petitioners’ request that the Court issue an expedited briefing schedule that requires Respondents to file their opposition to Petitioner’s application by **Monday, May 18**, and Petitioners to file their Reply, if necessary, by **Thursday, May 21**. Respondents do not oppose Petitioners’ proposed briefing schedule.

Dated: May 8, 2020

By: 

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No. 266 MD 2020

**ORDER GRANTING APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A
PRELIMINARY INJUNCTION**

AND NOW, this day of , 2020, upon consideration of Petitioners' Petition for Review and Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondents and their agents, servants, and officers and others are hereby **ENJOINED** from enforcing Pennsylvania laws that prohibit third parties from assisting in voters in delivering absentee or mail-in ballots, 25 P.S. §§ 3146.6(a); 3150.16(a), and **ORDERED** to adopt the following emergency procedures:

- (1) Provide for the distribution of emergency write-in ballots to all voters who request mail ballots; designate as emergency ballots all ballots submitted *by mail*; and count all emergency or emergency write-in ballots if they are:
 - a) Postmarked by Election Day, June 2, 2020, and
 - b) Received by the seventh day after the election, June 9, 2020.

(2) The term “postmark,” for the purposes of this Order, shall refer to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before Election Day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

BY THE COURT:

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 266 MD 2020

**ORDER GRANTING APPLICATION FOR EXPEDITE BRIEFING
SCHEDULE AND CONSIDERATION**

AND NOW, this day of , 2020, upon consideration of Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction, it is hereby **ORDERED** that Respondents shall file their response to Petitioners' application and supporting Memorandum by **Monday, May 18, 2020**, and Petitioners shall file their reply, if any, by **Thursday, May 21, 2020**.

BY THE COURT:

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No. 266 MD 2020

**MEMORANDUM IN SUPPORT OF PETITIONERS' APPLICATION FOR
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I. INTRODUCTION

With less than a month remaining before the June 2 primary, county boards of elections (“county boards”) across the Commonwealth are sounding the alarm with increasing urgency. As election officials prepare to conduct the Commonwealth’s first major election in the midst of the global pandemic, poll workers are quitting in droves and leaving little time to hire replacements. *See* Exs. A-D. Polling locations are in short supply as fewer senior centers, churches, and schools are willing to open their doors to crowds of voters and poll workers during a public health crisis, and some locations that previously agreed to serve as polling sites are reconsidering. *See id.* The primary solution advanced to facilitate in-person voting is to consolidate polling places—packing more voters into fewer, more crowded venues—and some local officials have rightfully questioned the wisdom and public health ramifications of this strategy. *See* Ex. A.¹ At least a dozen counties have proposed conducting the primary entirely by mail, signaling that they may not be prepared to handle in-person voting, Exs. A-E, while others have said so explicitly, Ex. C. At the same time, the coronavirus continues to spread through the Commonwealth: as of this filing, more than 52,000 Pennsylvanians have been infected and 3,416 have died. Needless to say, in-person voting will be severely restricted or entirely inaccessible for many Pennsylvanians in the upcoming election.

The alternative, vote-by-mail, has not fared much better in the COVID-19 pandemic. Mail voting currently operates through a network of county board staff and mail service providers—in most cases the United States Postal Service (“USPS”)—which is beginning to unravel. Pennsylvanians have already requested nearly 1,000,000 mail ballots—a number that is certain to rise over the next several weeks and is significantly more than the short-staffed county boards are prepared to handle—and the USPS is facing an unprecedented budgetary and operational crisis,

¹ All citations to Exhibits are materials attached to the Declaration of Adam C. Bonin.

which has resulted in reduced staff, limited capacity, and significant delays in mail delivery. To make matters worse, all mail ballots must be received at the county board offices no later than 8:00 p.m. on Election Day in order to be counted (“ballot receipt deadline”), and outside of a few rare exceptions, Pennsylvania law prohibits voters from seeking assistance from others, including family members and caregivers, in delivering their mail ballots (“delivery assistance ban”). 25 P.S. §§ 3146.6(c), 3150.16(c). The chances that a voter who seeks to cast a mail ballot will be disenfranchised by inevitable delays in the mail voting cycle—either in county boards processing their ballot request or in USPS’s delivery of their ballot—is exceedingly high given the absence of adequate safeguards to protect their right to vote.²

If this story sounds familiar, it is because the nation watched a similar scenario unfold last month during Wisconsin’s April 7 primary election. Voters congregated in seemingly never-ending lines at consolidated polling places, and tens of thousands of delayed ballots—and potentially more by some estimates—were delivered to election officials after Election Day. Thousands more never even made it from the local clerks to the voters who had requested them. If not for a federal court ruling extending the ballot receipt deadline for ballots post-marked by Election Day—a remedy which the U.S. Supreme Court left intact—those tens of thousands of ballots would have been rejected, and the voters disenfranchised. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020).

Wisconsin’s experience illustrates that the glaring holes and systemic defects in the vote-by-mail system will not resolve themselves; and in-person voting *by itself* is not the answer—

² Petitioners do not challenge the ballot receipt deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), nor do they seek any relief that would require application of Act 77’s non-severability clause. *See infra* Part IV.A.5. To the extent the Court determines that any portion of Petitioners’ requested relief would indeed require it to apply the non-severability clause, Petitioners withdraw that request.

indeed, dozens of voters and poll workers who participated in the Wisconsin primary have since tested positive for the coronavirus. *See* Ex. F. Governor Tom Wolf, to his credit, has urged residents to stay home, practice social distancing, and, come June 2, to vote by mail. *See* Ex. G. But neither the Governor's encouragement nor Pennsylvanians' enthusiasm for mail ballots will be enough to protect the right to vote. The Commonwealth, even in times of emergency, has a constitutional obligation to ensure that all citizens have access to a free and equal election, yet the June 2 primary will be anything but that.

Petitioners filed this lawsuit and now seek emergency injunctive relief because the Commonwealth has failed to provide sufficiently safe, reliable paths to voting in the upcoming election, as required by the Pennsylvania Constitution. Instead, Petitioners and many other Pennsylvanians must pick their poison: cast a ballot in person and subject themselves to the risk of COVID-19 infection, or submit their ballots to the vagaries of a mail delivery service which is currently under siege, and subject themselves to risk of arbitrary disenfranchisement. *But see Bergdoll v. Kane*, 557 Pa. 72, 85 (1999) ("The right [to vote] is pervasive of other basic civil and political rights, and is the bed-rock of our free political system."). Because neither option is acceptable under the Pennsylvania Constitution, Petitioners ask this Court to grant their request for injunctive relief and order Respondents to implement the following procedures, much of which are already in place for certain categories of Pennsylvania voters living overseas: (1) provide emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all emergency ballots if postmarked by Election Day and

received by the seventh day after the election; and (2) preliminarily enjoin 25 P.S. §§ 3146.6(a), 3150.16(a) to the extent that it prohibits third-parties from delivering any voter's ballot.³

Just as overseas voters may deliver ballots to Pennsylvania officials up to seven days after Election Day, 25 P.S. § 3511(a), and may submit write-in ballots when they do not receive their mail ballots in a timely manner, 52 U.S.C. § 20303, Petitioners and Pennsylvanians living stateside are entitled at the very least to the same allowances, during a global pandemic no less.⁴

II. BACKGROUND

The COVID-19 pandemic has upended virtually all aspects of daily life. Schools and businesses are closed; most people are sheltering in their homes; more than 22 million Americans have lost their jobs; and more than 75,000 have died.⁵ The Commonwealth has not been spared. The virus has infected more than 52,000 Pennsylvanians and has claimed at least 3,416 lives. Amid the crisis, Governor Wolf issued a state-wide stay-at-home order, which remains in place at the time of this motion.⁶ But even after the order is lifted, COVID-19's devastation will not subside any time soon and certainly not before the June 2 primary election; to the contrary, infections are projected to rise steadily over the next several weeks, reaching about 3,000 daily deaths nationally by June 1. Ex. J.

³ The term "postmark" refers to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before election day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

⁴ Petitioners do not challenge the constitutionality of 52 U.S.C. § 20303, 25 P.S. § 3511(a), or any other federal or state law setting forth voting procedures for military or overseas voters.

⁵ Center for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Cases in the U.S. (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁶ The stay-at-home order is set to expire on June 4, 2020. Ex. H. The state will gradually reopen in three phases with the third phase operating as a "return to a 'new normal.'" Ex. I.

A. In-person voting will be severely restricted because of COVID-19.

On March 27, citing the “best interests of voters, poll workers and county election officials,” Governor Wolf signed Senate Bill 422 (“Act 12”) into law. 25 P.S. § 3584(a); Ex. G. Act 12 postponed the Commonwealth’s primary election from April 28 to June 2, and introduced emergency measures that authorized counties to consolidate polling places, and eased rules regarding the relocation and staffing of polling places in light of the COVID-19 pandemic. 25 P.S. § 3582. Noting counties’ concerns about “a potential shortage of poll workers and appropriate polling place locations,” the Governor has proactively encouraged Pennsylvania voters to vote by mail. Ex. G.

But neither Act 12 nor the Governor’s encouragement has alleviated the concerns of many counties across the Commonwealth. At least a dozen counties, including Montgomery County, Chester County, Fayette County, Union County, and Huntingdon County, have asked Governor Wolf to transition the primary into an all-mail election. Exs. A, C, E. These counties and others have highlighted several concerns about their ability to conduct in-person voting in the June 2 primary.

1. *Loss of poll workers.*

Counties across the Commonwealth are rapidly losing their poll workers, most of whom are elderly and vulnerable to severe COVID-19 symptoms. Many of Montgomery County’s poll workers have informed the county that “they will not work on Election Day in any capacity.” Ex. A. Huntingdon County, similarly, has “already lost most of [its] poll workers,” but does not yet know the full scope of their staffing shortage for the June 2 primary. Ex. B. That uncertainty “makes it impossible” for the county to plan because it does not know just how many vacancies it will have to fill. Ex. B. The elections directors of Fayette and Allegheny Counties have also had poll workers cancel or express concerns about their health. Exs. C, D.

Although Act 12 and subsequent guidance from the Department of State attempt to solve this problem by allowing fewer poll workers to staff polling locations, the emergency legislation does not (and could not) reduce the number of poll workers *necessary* to operate a polling place safely and efficiently. Even if counties consolidated polling locations as Act 12 permits, operating those consolidated sites “will still require the use of a substantial number of . . . poll workers.” Ex. A. In fact, combining polling locations increases the “potential for confusion” and introduces “greater . . . logistical challenges” in “ensuring that people are being directed to the correct precinct to sign in, are given the proper ballot, and are casting that ballot in the correct scanner.” Ex. A. Thus, even with the increase flexibility under Act 12 to deploy poll workers to locations across the county, Montgomery County believes its “polling places will be inadequately staffed or not staffed at all” simply because it “will not have enough people who are eligible and willing to do it.” Ex. A. And the elections director of Fayette County has said that his county, too, is not prepared to host in-person elections in part because the county does not have a sufficient number of commitments from poll workers. Ex. C.

These shortages would be alarming as it is, but this is also the first election where many counties are transitioning to new voting machines, which will require more in-person training than usual. Huntingdon County cancelled six training sessions it had scheduled during the month of March. Ex. B. Fayette County has also been forced to cancel trainings for new voting equipment. Ex. C. And even if election officials were able to begin training poll workers now, and could somehow complete that training before June 2, they also have “logic and accuracy testing to complete, supplies to pack, equipment to deliver to polling places, 300 poll workers to train, and . . . vendors who are flying in from other states to provide support for [their] equipment at each stage of the process.” Ex. B.

2. Loss of polling locations.

Counties also lack access to the space needed to facilitate standard in-person voting. Montgomery County is “already hearing from established polling places that they do not wish to participate in this election” and believes “[t]he probability of convincing new locations to volunteer is slim.” Ex. A. In Huntingdon County, “many of [its] polling sites are considering asking [the county] to find a new place to host the election.” Ex. B. Those polling locations include “many churches and senior centers” that are “rightfully concerned about the health and safety of their own staff and patrons.” Ex. B. Fayette County has also complained of a lack of access to polling locations. Ex. C.

Consolidating polling places will not solve this problem. For Montgomery County, consolidating within the bounds of what Act 12 permits still requires the county to find 170 polling sites. Ex. A. “Buildings suitable for housing multiple polling locations are limited,” and even fewer are willing to host crowds of voters during a public health crisis. Ex. A. Even if the counties were able to find suitable locations, it raises questions about the wisdom of this practice during a global pandemic, and some counties are struggling to “justify[] a decision to concentrate larger numbers of poll workers and voters into fewer spaces.” Ex. A. Huntingdon County officials have expressed fears that combining polling locations “jeopardize[s] the lives of [its] residents by asking them to congregate in large numbers.” Ex. B.

3. Risk of infection.

Perhaps most importantly, county boards are concerned about the safety of their voters and their poll workers. Exs. A, C, K. Montgomery County officials have expressed reservations about “[i]nviting millions of voters to what would amount to thousands of mass gatherings across the state.” Ex. A. The elections director of Lycoming County is concerned about “the moral implications” of asking poll workers, “knowing their age, and their vulnerability,” to serve during

the COVID-19 pandemic. Ex. C. Some counties are even struggling to obtain the tools necessary to mitigate the risk of infection: the Fayette County Elections Director “can’t locate hand sanitizer anywhere.” Ex. C.

But the risk of infection is not limited to voters and poll workers. As Montgomery County noted in its letter to Governor Wolf, hosting in-person voting risks contributing to the spread of COVID-19 “in every step of the process.” Ex. A. Election staff will interact with voting machine vendors; delivery truck drivers will spend hours at 352 separate locations, potentially including senior living communities and schools, setting up voting equipment; additional county staff will be called in to address issues that arise on Election Day, including traveling to polling locations across the county to troubleshoot; and, of course, approximately 2,500 poll workers will interact with voters. Ex. A. “A positive test for any of the people involved in any step of this process could cause a ripple effect that would require quarantines and would effectively cripple our ability to function.” Ex. A.

Because of these concerns, a few counties have taken matters into their own hands to encourage the widespread transition to vote by mail. In Lycoming County, for instance, the County Elections Director took out a full-page newspaper ad urging all residents to vote by mail. Ex. C. And Allegheny County has announced that it will send mail-in ballot applications to all registered voters with prepaid postage. Ex. D.

B. Voting by mail will also present serious challenges during the pandemic.

As a result of recent election reforms, Act 77 of 2019, the June 2 primary will be the first election in which all Pennsylvania voters have the option to vote by mail. 25 P.S. § 3150.11(a). In the 2016 general election, 96 percent of voters cast their ballots in person. Ex. L. Election officials transmitted only 292,191 absentee ballots statewide—but that number could be ten times larger this year. Meredith Decl. ¶ 24. Nearly 1,000,000 eligible voters have already requested mail ballots

with the election several weeks away, and the remaining millions of registered voters still have 18 days to do so. *See* Exs. M, N.

1. *United States Postal Service delays*

The inevitable surge of voting by mail will put an unprecedented strain on a postal system currently hampered by severe budgetary shortfalls, staffing shortages, and reduced capacity. Meredith Decl. ¶¶ 29-35; Ex. O. To be clear, USPS has struggled for some time with budget shortages and downsizing. McCool Decl. ¶¶ 29-31; Ex. P. In 2009, USPS identified 677 post offices for possible closure, and in 2012 USPS began closing offices in Pennsylvania. McCool Decl. ¶ 30; Ex. Q. The closures have brought increased mail delays to many Pennsylvanians, especially those living in rural communities whose mail now travels hundreds of miles to the closest processing facility, only to boomerang back to the intended recipient. McCool Decl. ¶ 29; Thomas Decl. ¶ 6. But USPS's past struggles pale in comparison to the devastation that COVID-19 has brought onto the agency. Ex. R. The virus has ravaged USPS's workforce, with more than 1,600 confirmed cases among postal workers, and another 9,000 workers quarantined. *See* Exs. S, T, U; Meredith Decl. ¶ 30. These disruptions come at a critical time when USPS is facing unprecedented demand, and the agency is no longer able to deliver mail within its normal two-to-three-day timeline. Ex. V. Worse still, agency officials and members of Congress have warned that the agency may be forced to shutter in a matter of months due to the coronavirus's effects. Exs. O, W; Meredith Decl. ¶ 30.

Mail delivery delays will lead to disenfranchisement for Pennsylvania voters who, by no fault of their own, will be unable to receive, cast, and mail their ballot and guarantee its receipt by Election Day. The process of voting by mail necessarily touches USPS several times: a voter may request a mail ballot by mailing an application, a county responds by mailing the voter a ballot, the voter can then mail the ballot back to the county board office. But the pandemic's effects on

USPS means that each step in this process is inordinately delayed: Counties are receiving a significantly increased volume of mail-in ballot applications later, adding to a processing bottleneck that appears almost impossible to clear, and further delaying the process of merely approving a voter's mail ballot application. Exs. M, N; Meredith Decl. ¶ 35. For example, Montgomery County officials are facing delays in distributing mail ballots because of the length of time USPS is taking in processing routine requests. Sisler Decl. ¶ 6. As more completed ballots return, they expect delivery times to lengthen. *Id.*

For any applications that the county can process, the county must then mail the voter a ballot with enough time for the voter to complete the ballot and then mail it back to the county board for counting. But, as already evidenced in Wisconsin, USPS's delays have meant that voters are not receiving ballots until just days before Election Day, *if at all*. Meredith Decl. ¶¶ 31-21 (explaining that Wisconsin voters who were issued ballots more than 10 days prior to the election never received those ballots, and reports confirm that entire batches of ballots were never delivered).⁷ There is no doubt that voters who receive their ballots on or after Election Day are disenfranchised in Pennsylvania, *see* 25 P.S. 3146.6(c), 3150.16(c), but voters who receive their ballot too close to Election Day are equally at risk because USPS's operational difficulties mean that ballots may take *more than ten days* to reach the county board. Meredith Decl. ¶ 51. Thus, a process that pre-pandemic would have taken a week may now take several weeks, ensuring that potentially tens if not hundreds of thousands of Pennsylvanians could be disenfranchised this year if forced to rely on USPS to deliver their ballots by Election Day. McCool Decl. ¶ 30 (states

⁷ *See, e.g.*, Daphne Chen, Marcia Robiou, Elizabeth Mulvey, Kacey Cherry and June Cross, *Voter Suppression at its finest: Wisconsin citizens say missing ballots kept them from being counted in election*, MILWAUKEE JOURNAL SENTINEL (Apr. 13, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/13/wisconsin-election-missing-ballots-long-lines-kept-many-voting/2979975001/>.

experiencing similar restructuring acknowledge mail delays have operated to disenfranchise their electorate).

2. County board delays

Election officials are struggling to manage the unprecedented volume of absentee and mail-in ballot requests, and this will likely lead to unfulfilled requests and voters scrambling to reassess their options to vote on Election Day. Meredith Decl. ¶¶ 25-28. Nearly 1,000,000 eligible voters have already requested mail ballots for an election that is still several weeks away. Ex. M. Requests are expected to continue, especially as counties like Allegheny are sending mail ballot request forms to all eligible voters. Meredith Decl. ¶ 23. This is in sharp contrast to the 2016 elections where only 84,000 absentee ballots were cast statewide for the primary and fewer than 300,000 absentee ballots were cast for the general election. Meredith Decl. ¶¶ 23-24.

Some counties have indicated that they are not equipped to handle the crushing load of mail ballot requests in part due to staffing shortages created by the pandemic, but also because of shrinking budgets. Exs. A, K. These shortages will eventually lead to endless backlogs of mail ballot requests during a time when counties must *also* start preparing for in-person Election Day voting. Meredith Decl. ¶¶ 25-28. The Chairwoman of the Philadelphia Board of Elections has observed that while elections officials are working to process the “mountain of requests,” the “rules were not designed to handle ten times the number of applications that we typically see in a presidential general election.” Ex. K. Indeed, Philadelphia has been forced to reassign staff and bring back a greater number of employees to process the nearly 70,000 requests that had arrived as of April 30, a third of which are still pending. Exs. K, X. Delaware County election officials began falling behind processing absentee and mail-in ballot requests seven weeks before the June 2 primary. Ex. L. Montgomery County officials are working on the weekends and evenings to keep up with the demand for absentee and mail-in ballots even as their office faces serious staffing

challenges. Sisler Decl. ¶¶ 3–4. Already, they have received 83,000 applications for mail ballots and expect to receive 120,000 by the May 26 deadline. *Id.* ¶ 3. And the election director for Mercer County has warned that the spike in mail-in voting is creating problems. Ex. M. Although the counties anticipated “some difficulty and some hiccups,” administering elections this year during the COVID-19 pandemic is going to be like “expecting 30 inches of snow,” when what you get is “the equivalent of 10 feet.” Ex. M. Several county officials have acknowledged that they “miscalculated the fallout from massive scaling up of mail voting because there was one bottle neck we couldn’t avoid—processing applications.” Ex. Y. And they are understandably concerned about the coming weeks when mail ballot requests will multiply. Ex. Y.

C. Recent elections in Wisconsin and Ohio foreshadow the problems Pennsylvania voters will encounter unless Respondents implement additional safeguards.

Wisconsin’s April 7 election demonstrates the consequences of the State’s failure to implement safeguards to ensure access to reliable, safe voting options, including vote by mail, in response to the COVID-19 pandemic. Last month, the nation was horrified by images of thousands of Wisconsin citizens forced to stand in long lines for hours in order to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote. Ex. Z. Those lines were due in large part to severe poll worker shortages—the same shortages Pennsylvania now faces—which required cities across the state to consolidate their usual polling locations on Election Day. Exs. AA, BB.

Equally alarming was the breakdown in Wisconsin’s absentee-voting process. The system unraveled largely because of delays in processing and delivering absentee ballots. *First*, Wisconsin election officials were confronted with a surge of absentee ballots requests and were unable to fulfill them all even with employees in some jurisdiction working almost around the clock. Ex. CC. Madison staffers, for instance, were working 110 hours a week “but still had a week’s worth

of backlogs by mid-March.” *Id. Second*, USPS struggled to deliver ballots to voters, resulting in some ballots being delayed or, even worse, never arriving at all. *Id.*; Ex. DD. As described above, Pennsylvania election officials are facing these same issues.

As a result of that breakdown, thousands of Wisconsin voters did not receive their requested ballots in time to vote. That is because Wisconsin—like Pennsylvania—requires voters to return mail ballots by 8 p.m. on Election Day. Wisc. Stat. § 6.87(6). According to statistics from the Wisconsin Election Commissions, as of April 7, there were 1,282,762 absentee ballot applications but only 1,273,374 absentee ballots issued—meaning 9,388 absentee ballots may not have been mailed to the requesting voters by the time the voters were required to return them. Ex. EE.

Because of judicial intervention, and with the approval of the U.S. Supreme Court, Wisconsin’s absentee ballot receipt deadline was extended. Five days before the election, a federal district court judge in Wisconsin enjoined the state “from enforcing the requirement . . . that absentee ballots must be received by 8:00 p.m. on election day to be counted,” and extended that deadline by six days, provided that such ballots were mailed and postmarked on or before election day. *See Democratic Nat’l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1638374, at *5 (W.D. Wis. Apr. 2, 2020), *stayed in part sub nom. Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). A few days later, the United States Supreme Court approved the receipt deadline extension, *see Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 2020 WL 1672702, at *2, resulting in tens of thousands, and possibly more than 100,000, ballots being counted that would otherwise have been rejected and, by extension, voters who would have been disenfranchised. Meredith Decl. ¶ 50.

But those were the lucky Wisconsin voters. Because the State failed to act sooner, other voters were either forced to go to the polls during the pandemic and risk exposure to COVID-19 or were disenfranchised altogether. One political scientist estimates that the City of Milwaukee “saw nearly 16,000 fewer votes than it should have.” Ex. FF. Similarly, in the City of Green Bay, voter turnout was reportedly down 50 percent from the 2016 presidential primary election and down 25 percent from a 2019 mayoral race. Ex. GG. Even worse, the Wisconsin Department of Health Services has reported that 52 people who voted in person or worked the polls on April 7 have tested positive for COVID-19 thus far. Ex. F.

Ohio’s April 28 election reveals that what happened in Wisconsin was no anomaly. The Ohio Secretary of State reported that election officials in the state were experiencing “missed mail deliveries” as well as delivery times “in excess of ten days” for first class mail. Ex. HH. The fact that Ohio experienced delays similar those voters experienced in Wisconsin further highlights the systemic issues affecting USPS’s ability to meet its service commitments. Meredith Decl. ¶ 33. And the same issues are likely to plague Pennsylvania’s upcoming primary election.

Through all the confusion about how to proceed with the June 2 primary, one thing is clear: Pennsylvania must act now to implement safeguards before the election to avoid the large-scale disenfranchisement observed in the Wisconsin primary, and to ensure that all voters have access to a free and equal election.

III. LEGAL STANDARD

Violations to fundamental rights, including the right to vote, constitute immediate and irreparable harm and merit a preliminary injunction. *See Pa. State Educ. Ass’n ex rel. Wilson v. Commonwealth, Dep’t of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 386 (Pa. Commw. Ct. 2009) (granting preliminary injunction to prevent public disclosure of employee’s

home addresses, a threat to constitutionally protected privacy rights), *aff'd*, 606 Pa. 638 (2010). Such relief is appropriate when the moving party can establish the following factors: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 628 Pa. 573, 578 (2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 209–10 (2004)). As demonstrated below, Petitioners have established each of these factors and are entitled to a preliminary injunction.

IV. ARGUMENT

A. Petitioners are likely to succeed on the merits of their Free and Equal Elections Clause and Equal Protection Clause claims.

Pennsylvania's Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that *all* elections are "free and equal." *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 100 (2018); Pa. Const. art. I, § 5. This affirmative right, which "has no federal counterpart" and outstrips the protections in the federal constitution, protects voters against "regulation[s] of the right to exercise the franchise [that] deny the franchise itself, or make it so difficult as to amount to a denial." Elections are "free and equal" only when "no constitutional right of the qualified elector is subverted or denied him." *Winston v. Moore*, 244 Pa. 447, 457 (1914). The guarantee of a "free and equal" election also requires that "inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances." *Winston*, 244 Pa.

at 457; *see also League of Women Voters*, 645 Pa. at 113. And it applies with equal force even if voting rights are denied or impeded “by inadvertence.” *Id.* at 111 (citing *In re New Britain Borough Sch. Dist.*, 295 Ps. 478, 485 (1929)).

The Pennsylvania Supreme Court has further recognized that the Free and Equal Elections Clause reaches “all aspects of the electoral process, to the greatest degree possible.” *Id.* at 100. Courts, thus, have broad authority when enforcing its provisions because the Clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 108–09 (quotation and citation omitted); *see also id.* at 130 (“[O]ur Court possesses broad authority to craft meaningful remedies when required.”). The COVID-19 related disruptions to daily life in the Commonwealth, and to the electoral process specifically, have left Pennsylvanians with a dearth of reasonably accessible options for voting in the upcoming primary. And if the Free and Equal Elections Clause is to have any meaning, it must require, at the very least, that state officials adopt reasonable safeguards to prevent large-scale disenfranchisement in the midst of the current public health emergency. *Applewhite v. Commonwealth*, 2014 WL 184988, at *23 (Pa. Commw. Ct. Jan. 17, 2014) (“Disenfranchising voters ‘through [no] fault of the voter himself’ is plainly unconstitutional.” (quoting *Appeal of Norwood*, 382 Pa. 547, 549 (1955))).

1. *Both in-person voting and vote by mail will be severely compromised in the upcoming election.*

Notwithstanding the Commonwealth’s constitutional obligations, Pennsylvania’s election officials have all but acknowledged that in-person voting will be severely restricted in the June 2 primary, and mail-in voters may not fare much better. To date, at least a dozen counties, which serve more than a third of the Commonwealth’s registered voters, have asked Governor Wolf to transition the June primary into an all-mail election, effectively conceding that they lack the

resources to administer in-person elections successfully given the challenges of preparing for an election during a public health crisis. Ex. A, B, C, E. While Petitioners do not seek relief that would eliminate in-person voting,⁸ the counties' requests reflect serious concerns about the Commonwealth's ability to ensure sufficient access to the franchise. *See supra* Part II.A.

The Commonwealth's current mail-in voting system has its own troubles, which threaten to disenfranchise untold numbers of Pennsylvanians—many of whom are voting by mail for the first time in response to the Governor's and county officials' recommendations. *See supra* Part II.B.2. All eligible Pennsylvanians are now entitled to vote by mail—following Act 77's recent sweeping reforms—but in the COVID-19 pandemic, many voters have no reliable, safe means by which they can obtain and submit a mail ballot with reasonable assurance that it will be counted. As explained above, counties have struggled to respond to the unprecedented number of absentee and mail-in ballot requests, *see supra* Part II.B.2, and the USPS's operations and capacity to deliver mail in a timely manner have been decimated by COVID-19, *see supra* Part II.B.1; Meredith Decl. ¶¶ 29-35; McCool Decl. ¶¶ 29-30; Ex. DD. The rapid expansion of mail ballots, which would have clogged Pennsylvania's mail system under normal circumstances could potentially bring the agency to a halt. Ex. U; Meredith Decl. ¶ 30.

Thus, while Pennsylvania law requires that all mail-in or absentee ballots must be received in the office of the county board by 8:00 p.m. on Election Day, 25 P.S. §§ 3146.6(c), 3150.16(c), neither election officials (who must send ballots to voters) nor voters (who must return ballots to county boards to be counted) have any reasonable assurance that the ballots mailed via USPS will be delivered with enough time to allow voters to meet this deadline. Thomas Decl. ¶ 6, Crossey

⁸ Indeed, Petitioners are not advocating for an all-mail election in Pennsylvania because Pennsylvania must provide for both mail and in-person voting options for its electorate.

Decl. ¶ 4.⁹ And the failure to address these systemic breakdowns could spell disaster as an unprecedented number of Pennsylvanians will rely on mail delivery to exercise their right to vote.

Beyond mail delivery, the only other option for returning mail ballots is in-person delivery at a local board of elections office, which is neither an accessible nor safe alternative for many voters. The Governor has urged Pennsylvanians, and correctly so, to stay home and observe social distancing guidelines. Ex. II. Voters venturing out *en masse* to deliver mail ballots introduces the same health risks that the stay-at-home order seeks to avoid, particularly for seniors and other voters who are vulnerable to serious illness from COVID-19, and for voters who must rely on public transportation to reach a county board office that, in some instances, is located dozens of miles farther than the voters' usual polling place. McCool Decl. ¶ 21. As Drs. McCool and Meredith explain in their expert reports, even small changes to polling places—including changes related to consolidation and increased distance—can increase the cost of voting and reduce turnout. McCool Decl. ¶¶ 10, 26-27, Meredith Decl. ¶¶ 13-17.

2. *Compounding the barriers to in-person and mail voting, Pennsylvania prohibits voters from obtaining assistance to deliver their ballots.*

What would have been a safer, reliable alternative for Petitioners and other vulnerable members of the population to submit their ballots—seeking assistance from a third party—is foreclosed by the Election Code. Pennsylvania law allows only *voters* to submit their ballots by mail or in person to the county board, 25 P.S. §§ 3146.6(a); 3150.16(a), unless the voter is disabled or hospitalized. *DiPietrae v. City of Phila.*, 666 A.2d 1132 (Pa. Commw. Ct. 1995). Thus, in all but the rarest cases, voters must rely on a beleaguered postal service or risk their health to venture out and return their ballots in person. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen.*

⁹ Petitioner Michael Crossey requested his absentee ballot weeks ago and has yet to receive it. Crossey Decl. ¶ 4.

Election, 577 Pa. 231 (2004) (interpreting the Election Code to prohibit third party hand delivery of absentee ballots). Any election conducted under these circumstances, without adequate safeguards for the hundreds of thousands of Pennsylvanians who must vote by mail to participate in the political process, will violate their most basic and fundamental constitutional right to a free and equal election.

3. *The failure to provide safe, reliable means to exercise the right to vote denies Petitioners and many other Pennsylvanians their constitutional right to a free and equal election.*

Despite COVID-19's impact on preparations for the primary, the Commonwealth nonetheless must provide its citizens with a free and equal election. Its "regulation[s] of the right to exercise the franchise" should not "deny the franchise itself, or make it so difficult as to amount to a denial," nor should any "constitutional right of the [voter be] subverted or denied." *Winston*, 244 Pa. at 457. The pandemic does not exempt the Commonwealth from these constitutional mandates; to the contrary, the Commonwealth has the duty, and courts have the authority, to enforce the Free and Equal Elections Clause and all other constitutional rights that protect the franchise, even when it requires election officials to depart from standard procedures and implement emergency measures in response to unforeseen events.

For instance, when rain "caused flooding along the Monongahela River" during a statewide general election, prompting the Washington County commissioners to declare a state of emergency, the Court of Common Pleas of Washington County suspended the election, forcing polling places to close with voting at those locations to resume two weeks later. *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987). In affirming the polling place closures and election rescheduling, this Court reasoned that permitting an election to go on under these extreme circumstances, "where members of the electorate could be deprived of their opportunity

to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.” *Id.* at 839.

Years later, approximately a week before the 2008 presidential election, the U.S. District Court for the Eastern District of Pennsylvania issued an injunction that forced election officials to adopt appropriate contingency plans in advance in case electronic voting machines malfunctioned. *NAACP of Pa. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008). The Court’s Order required the Secretary of the Commonwealth to direct all county boards to distribute paper ballots if 50 percent of electronic voting machines in any given precinct became inoperable in the upcoming election. *Id.* At the time the order issued, no precincts had reported machine failures—because the election was still a week away—yet the court held that at least some machines “undoubtedly fail” on Election Day, and “this is not a matter we can decide through hindsight after the election has concluded.” *Id.* at 765. Faced with “a real danger that a significant number of machines [would] malfunction” and create unacceptably long lines, the court recognized that the constitutional right to vote required the Commonwealth to implement safeguards to ensure that voters have a viable alternative, explaining that “we cannot allow our decision to be based on hope.” *Id.*

Then, in 2016, when thousands of voters in Montgomery County had not received their absentee ballots within days of the election because election officials faced “unprecedented demand” and “problems with the postal service,” a Pennsylvania court extended the absentee ballot receipt deadline by four days and instructed the Montgomery County Board of Elections to accept all absentee ballots that were received by the new deadline. Exs. JJ, KK.

Pennsylvania courts are not alone in crafting remedies to protect voting rights in response to emergencies or unforeseen events that disrupt elections. Recently, a federal district court in Wisconsin granted relief enabling tens of thousands of voters to cast their absentee ballots by

extending the deadline for their receipt to six days after Election Day, as long as the ballots were mailed or postmarked on or before the election. *See Bostelmann*, 2020 WL 1638374, at *22. Notably, the U.S. Supreme Court approved the extension of the ballot receipt deadline and left that portion of the remedy intact, even after issuing a stay of other portions of the district court's injunction that would have allowed election officials to count ballots that were mailed or postmarked after Election Day. *Democratic Nat'l Comm.*, 2020 WL 1672702, at *4.

Other courts have granted similar relief in the face of extreme weather events and delivery delays that upended the smooth functioning of electoral processes. When Hurricane Matthew swept through Florida and Georgia, disrupting voter registration processes in the middle of the 2016 general election, federal courts crafted remedies to extend registration deadlines to protect “the right of aspiring eligible voters to register and to have their votes counted.” *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) In Florida, the court ordered the Secretary of State to direct supervisors of elections to extend the voter registration deadline. *Id.*; *see also Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (ordering Governor and Secretary of State to extend voter registration deadline). Similarly, a court ordered several county boards of elections to extend precinct operating hours after unexpected severe weather and ballot shortages prevented voters from reaching the polls and, once there, casting their ballots. *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008), ECF No. 6. Another court extended the receipt deadline for overseas ballots by 10 days after considering evidence that officials had sent many ballots too late for timely delivery and return to meet the statutory deadline. *Doe v. Walker*, 746 F. Supp. 2d 667, 681–83 (D. Md. 2010). The court ordered the state board of elections to count those late-arrived ballots as validly cast and to direct local boards to accept and canvass them. *Id.* at 683. And when an election

official's "miscalculation" resulted in absentee ballots arriving after the statutory deadline, a Michigan court affirmed a lower court's order that the ballots were entitled to be counted to prevent disenfranchisement. *Stamos v. Genesee Cty. Bd. of Canvassers*, 46 Mich. App. 636, 645–46 (1973).

Because of the COVID-19 pandemic, Petitioners and many other Pennsylvania voters do not have reasonable access to in-person voting, nor do they have any reasonable assurance that their mail ballots will be delivered to their county boards on time in light of the current mail service disruptions. *See, e.g.*, Thomas Decl. ¶ 4; Crossey Decl. ¶ 4. Their only other alternative, to seek assistance from others in submitting their ballots, is prohibited by Pennsylvania law. 25 P.S. §§ 3146.6(a); 3150.16(a). At every turn, Pennsylvania voters will encounter barriers to the franchise that, collectively, "amount to a denial" of the right to vote. *Winston*, 244 Pa. 455.

4. *The Commonwealth's failure to adopt adequate safeguards for in-person and mail voting imposes unequal burdens on voters.*

Equally problematic under the Free and Equal Elections Clause is the fact that these barriers—and the Commonwealth's failure to implement adequate safeguards—impose disproportionate costs and heightened burdens on certain demographic groups. The health risks of in-person voting or personal delivery of mail ballots bear most heavily on medically vulnerable individuals, including Pennsylvania's senior population, which is one of the State's largest voting blocs, comprising approximately 24 percent of all eligible voters. The Centers for Disease Control and Prevention ("CDC"), among others, recommends that people who are over the age of 65 or who have underlying health conditions avoid crowded areas where social distancing is not possible. Indeed, after Wisconsin held its primary election, at least 52 new cases of COVID-19 were reported among poll workers or individuals who voted in person. Ex. F.

For voters who opt to cast mail ballots, the severe burdens imposed by delayed mail delivery and the lack of access to third-party delivery assistance fall disproportionately on poor, minority, and rural communities. These populations generally have even less access to reliable postal services, live in areas with limited access to public transportation, and are less able to bear the costs of traveling to a county board office, or the increased risk of exposure to COVID-19 in order to submit a mail ballot in person. McCool Decl. ¶ 21. Low-income voters or voters in rural areas, in particular, tend to face longer travel distances to their county board office. *Id.* Ballot delivery assistance is essential to equalize the disadvantages of relying on a vote-by-mail process plagued with systemic defects. *Id.*

The Pennsylvania Constitution requires election officials to address these glaring disparities in access. Faithful adherence to the Free and Equal Elections Clause mandates that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 244 Pa. at 457; *see also League of Women Voters*, 645 Pa. at 113 (Free and Equal Elections Clause “equalize[s] the power of voters in our Commonwealth’s election process”). Far from equalizing access, the current voting procedures are ill-suited to address the election administration challenges posed by COVID-19, and, as a result, they impose severe burdens on the franchise that fall most heavily on voters who are least equipped to overcome them.

In order to provide the free and equal election mandated by the Pennsylvania Constitution, election officials must implement safeguards, in advance, to ensure that voters are able to cast mail ballots and minimize the risk of arbitrary disenfranchisement for reasons outside the voters’ control.

5. *Petitioners' requested relief does not require application of Act 77's non-severability clause.*

To be clear, Petitioners do not challenge the deadline for the receipt of absentee or mail-in ballots as set forth under Act 77. *See* 25 P.S. §§ 3146.6(c), 3150.16(c). While Act 77 expanded the right to vote by mail to all eligible voters, 25 P.S. § 3150.12(a), and extended the deadline by which mail ballots must be received (from 5:00 p.m. on the Friday before Election Day under the prior law to 8:00 p.m. on Election Day) the non-severability clause that the Act attaches to these provisions is neither triggered nor enforceable in this action. *See* 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Petitioners have not sought an injunction of the receipt deadline, nor would their requested relief prevent election officials from enforcing the deadline on any ballots delivered in-person, or on all mail ballots in elections that occur outside of the pandemic. What Petitioners seek here is a temporary, emergency ballot for Pennsylvanians who are voting by mail that supplements, rather than supplants, existing procedures.

Moreover, the current public health emergency and its demonstrated impact on USPS's operational capacity warrants such relief. Absent this Court's intervention, Pennsylvanians will be forced to choose between subjecting themselves to the health risks of COVID-19 or submitting their ballot to the vagaries of a decimated mail delivery service, leaving no reliable, safe option to vote in violation of the Pennsylvania Constitution. Indeed, courts have implemented comparable relief in response to election-related emergencies. *See supra* Part IV.A.3. And just as an emergency extension of a precinct's hours does not render the statutory voting hours void, *Obama for Am.*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008), ECF No. 6, and the temporary cessation of voting on Election Day, to be rescheduled weeks later, does not invalidate Election Day as we know it, *In re General Election-1985*, 531 A.2d at 838, Petitioners' claims do not render any portion of Act 77 invalid. Instead, Petitioners ask this Court to enforce the Free and Equal Election Clause, which

demands that the Commonwealth provide its citizens, who are impacted by an extraordinary public health emergency, with a reasonably accessible and reliable voting option—even if it must create one.

Finally, even if Petitioners sought to enjoin the ballot receipt deadline, Pennsylvania Supreme Court precedent and long-held rules of statutory construction have made clear that non-severability clauses are not “inexorable commands.” *Stilp v. Commonwealth*, 588 Pa. 539, 629 (2006); *see also* 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable.”). Severance is presumed where “a statute can stand alone absent the invalid provision.” *Stilp*, 588 Pa. at 626. Ultimately, the court does not “deem[] nonseverability clauses to be controlling in all circumstances . . . but instead [it] will effectuate [its] independent judgment concerning severability.” *Id.* at 642. By including the non-severability provision, Act 77 purports to bind the ballot receipt deadline to independent provisions that do not rely in any way on the deadline’s enforcement. The rest of Act 77, including the provisions addressing no-excuse mail-in voting, “can stand alone absent” the ballot receipt deadline, which is illustrated by the fact that applying the non-severability provision would lead to an absurd and unconscionable result. *Id.* at 626. That is, in finding unconstitutional the failure to count mail ballots delivered after Election Day, the Court would be required as a remedy to eliminate mail-in ballots (or no-excuse absentee voting) entirely, making the cure significantly worse than the disease, and contravening the statute’s overarching purpose. The Commonwealth’s long-held rules of statutory interpretation and Pennsylvania Supreme Court precedent counsel against enforcing a non-severability provision that would strip the right to vote from nearly a million Pennsylvanians who have already requested, received, or perhaps even returned a mail ballot under Act 77’s no-excuse mail-in ballot

provisions. In all cases, the Court’s “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne Cty. Return Bd.*, 447 Pa. 418, 420 (1972) (citing *Appeal of James*, 377 Pa. 405 (1954)).

6. *The prohibition on third-party mail ballot delivery assistance violates the Equal Protection Clauses of the Pennsylvania Constitution.*

Pennsylvania’s prohibition on third-party ballot delivery assistance is unconstitutional for the independent reason that it imposes an undue burden on the right to vote during the COVID-19 pandemic in violation of the equal protection provisions of the Pennsylvania Constitution. This burden, which falls most heavily on the most vulnerable members of the electorate, is not only severe, thus triggering strict scrutiny, but it also cannot be justified by any sufficient State interest.

Two separate provisions of the Pennsylvania Constitution protect the right to equal protection of the law. Article I, section 1 states that “[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” And Article I, section 26 provides that neither the Commonwealth nor any other political subdivision can deny to any person “the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

In considering constitutional challenges to laws affecting the right to vote, Commonwealth courts apply the same standards adopted by “the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 528 Pa. 320, 325 (1991) (citing *James v. Se. Pa. Transp. Auth.*, 505 Pa. 137 (1984)). This analysis, commonly referred to as the *Anderson-Burdick* test, requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it

necessary to burden the plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But all burdens, “[h]owever slight” they may appear, “must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

The Commonwealth’s ban on third-party delivery assistance leaves voters with little choice but to submit their ballots to the vagaries of mail delivery during the COVID-19 pandemic, which, given the USPS’s well-documented operational difficulties, subjects voters to an impermissible risk of arbitrary disenfranchisement. See *supra* Part II.B.1; see also *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1034 (9th Cir. 2020) (en banc) (concluding that a ballot collection and delivery ban posed an undue hardship on voters—even before the rise of the current health crisis); Thomas Decl. at ¶¶ 5–6. Recent elections in other jurisdictions, and prior elections in Pennsylvania, demonstrate that thousands of voters, if not more, stand to have their ballots rejected if forced to rely on mail delivery. In the 2018 general election alone, before the expansion of mail-in voting to all eligible citizens and before COVID-19, 8,162 mail ballots were delivered after Election Day, a number that will most certainly multiply in the upcoming election, just as it did in Wisconsin. And courts have repeatedly found that laws affecting far fewer voters than the number of Pennsylvanians that stand to be disenfranchised during the pandemic nonetheless imposed a severe burden on the franchise. See, e.g., *Ne. Ohio Coal. for the Homeless (“NEOCH”) v. Husted*,

696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted “substantial” burden on voters); *Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals ineligible to register); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding severe burden when less than 100 qualified voters were disenfranchised).

This burden is severe, as “[t]he right to vote necessarily includes the right to have the vote fairly counted,” and denying voters ballot delivery assistance during a pandemic will naturally result in the rejection of late-delivered ballots or in some voters abstaining from the electoral process entirely. *Stein v. Cortes*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). Making matters worse, the denial of delivery assistance also falls heavily and disproportionately on certain members of the electorate. This includes seniors, who in addition to being medically vulnerable to the effects of COVID-19, often lack access to reliable transportation or mail service, particularly those residing in community homes or assisted living communities, and rural voters who typically live in communities that are farther away from county board offices or have even less access to reliable mail service or public transportation.

The delivery assistance ban also imposes heightened barriers for financially vulnerable and minority voters who, in addition to lacking reliable mail service or transportation, are especially burdened by the postage fee associated with submitting mail ballots through USPS. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216-20 (N.D. Fla. 2018) (explaining that disparate impact “matters” in the balancing test to evaluate whether the effects of law are unevenly distributed across identifiable groups). For voters who do not already possess stamps,

the cost of mailing a ballot is not simply limited to the \$0.55 single stamp fee; these voters must either venture out in search of a retailer that will sell a single stamp, or purchase stamps online at the USPS retail store, which currently sells stamps only in units of 20 or more—that translates to a minimum purchase of \$11.00. Meredith Decl. ¶ 63.¹⁰ And even after navigating these procedural and monetary barriers, the USPS’s operational difficulties and service delays may prevent timely delivery by Election Day, resulting in the ballots’ rejection. *See, e.g., Serv. Emps. Int’l Union, Local 1 v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio 2012) (“To disenfranchise a single voter is a matter for grave concern.”).

Because disenfranchisement is unquestionably a severe burden on the right to vote, the restriction on third-party mail ballot delivery assistance is subject to strict scrutiny, and ultimately fails this test because it is not narrowly tailored to advance a compelling interest. *See, e.g., Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”). But even if the Court found that the burdens at issue are less than severe, they nonetheless must be justified by “sufficiently weighty” state interests to justify the restriction. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc.*, 314 F. Supp. 3d at 1215–16 (“However slight that burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”). And here, too, the delivery assistance ban falls short as no governmental interest can justify its continued enforcement during a public health emergency.

¹⁰ Although the Petition for Declaratory and Injunctive Relief challenges the Commonwealth’s failure to provide pre-paid postage for mail ballots, Petitioners’ application for preliminary injunction does not seek relief on these grounds.

The only conceivable rationale—preventing voting fraud—is a canard: there is no evidence that ballot delivery assistance in Pennsylvania, which is already permitted for certain categories of voters, has opened the door to fraud. Prior expansive research efforts to measure the incidence of fraud confirm this. When the Heritage Foundation, a conservative think tank, created a compendium of notable voter fraud cases around the country, including in Pennsylvania, arising out of any local, state, and national elections from 1998 to 2018, it found an exceedingly small number of isolated incidents. McCool Decl. ¶ 16. Out of the 55 million votes cast over these 11 election cycles—including even minute, private home-owners association elections—the Foundation uncovered only 22 cases of fraud, *none* of the which involved illegal absentee ballot delivery. *Id.*

States that allow delivery assistance have the same or fewer cases of voter fraud than states that prohibit the practice. For example, Alabama instituted a ban on third party mail ballot collection assistance, *see, e.g.*, Ala. Code § 17-11-18, and still reported 19 cases of voter fraud. McCool Decl. ¶ 18. On the other hand, Mississippi, Michigan, and Wyoming allow ballot delivery assistance and reported only 31, 11, and 3 cases of voter fraud, respectively. *Id.* Notably, these are the *total* cases of voter fraud across all races statewide for several election cycles, which means that allowing or prohibiting mail ballot delivery assistance makes no appreciable difference in the amount of voter fraud cases. There is simply no data to suggest that easing the burden on voters to assist them in returning their mail ballots on time will result in fraud.

Recognizing the risks of in-person voting, the Governor and local election officials were correct to encourage Pennsylvanians to vote by mail, as opposed to congregating in fewer, consolidated polling places. Yet the right to vote is unconstitutionally impaired by defects in the mail voting system. Voters should not be forced to choose between risking their health by casting

a ballot in-person, or their constitutional right to vote by turning their ballot over to the vagaries of mail delivery during the COVID-19 pandemic. The Commonwealth's unreasonable ban on delivery assistance imposes a significant burden on the franchise that cannot be justified by any sufficient state interest, and thus violates the Pennsylvania Constitution's Equal Protection Clauses.

B. Absent an injunction, Petitioners and other Pennsylvania voters will suffer irreparable harm that would significantly outweigh any harm to the Commonwealth.

It is well settled that the denial of constitutional rights, including disenfranchisement, constitutes irreparable injury. *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (infringement on voting rights “cannot be alleviated after the election”); *see also Obama for Am.*, 697 F.3d at 436; *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (voters “would certainly suffer irreparable harm if their right to vote were impinged upon”); *Marks v. Stinson*, No. Civ. A. 93-6157, 1994 WL 47710, at *13–14 (E.D. Pa. Feb. 18, 1994) (violation of right to vote in free and fair election constituted irreparable harm), *rev'd in part on other grounds*, 19 F.3d 873 (3d Cir. 1994); *Applewhite v. Commonwealth*, 617 Pa. 563, 572 (2012) (Todd, J., dissenting) (explaining that “the disenfranchisement of a substantial number of eligible, qualified, registered voters, many of whom, have been proudly voting for decades” is “irreparable harm of constitutional magnitude”). The failure to implement adequate safeguards to protect the right to vote and ensure a free and equal election threatens to disenfranchise Petitioners and untold numbers of Pennsylvania voters.

Furthermore, the severe burdens imposed on voters, and the potential disenfranchisement of Petitioners and thousands like them across Pennsylvania, far outweigh any potential injury to Respondents or any other interested parties. *See supra* Part IV.A.6. And enjoining provisions “that are seemingly incapable of being administered without resulting in *de facto* disenfranchisement

preserves the integrity of our elections.” *Applewhite*, 2014 WL 184988, at *26. Here, thousands of ballots are likely to arrive after the ballot receipt deadline in light of USPS’s operational difficulties, forcing Pennsylvanians into a catch-22 whereby they must risk their health to submit a ballot in person and avoid unpredictable mail delivery during a global pandemic, or mail their ballots from the safety of their own homes and subject themselves to a significant risk of disenfranchisement. Neither administrative convenience nor unsupported fears of fraudulent activity can justify either result. *See supra* II.B.1; *see also Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (“administrative convenience” cannot justify practices that impinge upon fundamental rights); *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (“Although these reforms may result in some administrative expenses for Defendants, such expenses are likely to be minimal and are far outweighed by the fundamental right at issue.”).

C. An injunction will restore the parties to their status as it existed before the COVID-19 pandemic upended Pennsylvania’s elections.

The ongoing COVID-19 pandemic has wreaked havoc on Pennsylvania’s electoral infrastructure. *Supra* Part II.B.2. There is currently no end in sight. According to Governor Wolf, “We cannot flip a switch and reopen the commonwealth.” Ex. LL. The status quo has been upended by the COVID-19 pandemic and the resulting disruptions to daily life both in Pennsylvania and across the country. Petitioners’ requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, and to exercise their right to vote—and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 26.

D. Petitioners’ requested injunction is reasonably suited to abate the elevated threat of disenfranchisement in the upcoming elections.

Petitioners’ requested relief is reasonably tailored to ensure access to a free and equal election and to protect the constitutional right to vote. First, Petitioners seek an injunction requiring

election officials to provide emergency write-in ballots to all voters who request a mail ballot, to designate all ballots submitted by mail as emergency ballots, and to count all emergency ballots if postmarked by Election Day and received by the county board office within seven days after Election Day. The requested relief provides an opportunity to vote for those affected by the delayed delivery of mail ballots—from local election officials to voters, and from voters back to the county boards—and minimizes the risk of large-scale disenfranchisement from mail service disruptions and ballot processing delays during the COVID-19 pandemic. It also aligns with the relief currently available to Pennsylvania voters submitting ballots from overseas. *See* 52 U.S.C. § 20303, 25 P.S. § 3511(a).

The administrative burden to election officials, on the other hand, is minimal, as Pennsylvania law, under normal circumstances, requires election officials to accept and count mail ballots from overseas voters up to seven days after Election Day. 25 P.S. § 3511(a). Petitioners' requested relief would, at most, require county boards to count more ballots, *see* Sisler Decl. ¶ 7, and the prospect of enfranchising more voters, which in this case is a constitutional obligation, counsels in favor of, not against, granting relief. It also leaves election officials with sufficient time to complete all post-election duties. County boards have seven days after Election Day to examine provisional ballots. *Id.* § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* a § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not certify election results to the Secretary until 20 days after Election Day. *Id.* § 2642(k). Thus, the requested seven-day window would simply grant voters in Pennsylvania the same allowance provided to voters overseas, while imposing a cut-off date well in advance of the canvassing deadlines.

Petitioners also seek to enjoin the enforcement of Pennsylvania law prohibiting third-party assistance in delivering mail ballots. 25 P.S. §§ 3146.6(a), 3150.16(a). Such relief is reasonably

tailored to provide voters, particularly those who are most vulnerable to severe illness caused by COVID-19, a safe alternative to delivering ballots in person, without risking their health or subjecting their votes to the uncertainty of USPS delivery. *See, e.g.*, Thomas Decl. ¶ 7; Crossey Decl. ¶ 6; McCool Decl. ¶ 21. Given the dearth of identifiable instances of fraud involving the *delivery* of sealed absentee ballots on behalf of voters who require assistance, the requested injunction imposes minimal burdens, if any, on the Commonwealth, while expanding a method of delivering mail ballots that is already currently available to limited categories of voters. *DiPietrae*, 666 A.2d at 1135 (holding that disabled voters may appoint a person of their choosing to deliver their completed absentee ballot).

E. A preliminary injunction will promote the public interest.

Finally, the public interest favors procedures that protect the constitutional rights to vote and to participate in a free and equal election. The Pennsylvania Supreme Court has recognized that the right to vote is “pervasive of other basic civil and political rights” and that voting rights are “the bedrock of our free political system.” *Bergdoll*, 557 Pa. at 85 (quotation omitted). Therefore, an injunction requiring Respondents to conduct elections in compliance with Pennsylvania’s Constitution “so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.” *Berks Cty., Pa.*, 250 F. Supp. 2d at 541.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant their motion for preliminary injunction, and issue an Order instructing Respondents to: (1) provide emergency write-in ballots to all voters who request a mail ballot, designate all ballots submitted by mail as emergency ballots, and require that all emergency ballots shall be counted if they are postmarked by Election Day and received up to seven days after the election; and (2) permit voters to obtain

assistance from third-parties in mailing and delivering their *sealed* mail ballots to county boards, and require that all such ballots delivered by third parties shall be counted if otherwise eligible.

Dated: May 8, 2020

By:  _____

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*Not admitted in Pennsylvania. Pro hac vice applications pending.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

266 MD 2020

**DECLARATION OF ADAM BONIN IN SUPPORT OF PETITIONERS' APPLICATION
FOR PRELIMINARY INJUNCTION**

I, Adam C. Bonin, declare as follows:

1. I am over the age of 18 and competent to testify as to the matters set forth herein.
2. I am the founder of The Law Office of Adam C. Bonin, located at 121 S. Broad Street, Suite 400, Philadelphia, PA 19107.
3. I submit this declaration in support of Petitioners' Application for Preliminary Injunction.
4. Attached as **Exhibit A** is a true and correct copy of a letter from Chair of the Montgomery County Board of Commissioners, Dr. Valerie A. Arkoosh, and Vice Chair of the Montgomery County Board of Commissioners, Kenneth E. Lawrence, addressed to Pennsylvania Governor, Tom Wolf, regarding the Pennsylvania 2020 Primary Election. Petitioners' counsel received a copy of this letter from John Marlatt, Senior Assistant Solicitor for Montgomery County, on May 1, 2020. It has not been altered in any way.

5. Attached as **Exhibit B** is a true and correct copy of a letter from Chairman of the Huntingdon County Commissioners, Mark Sather, Vice Chairman of the Huntingdon County Commissioners, Scott Walls, and Secretary of the Huntingdon County Commissioners, Jeffrey Thomas, addressed to Pennsylvania Governor Tom Wolf, Senator Judy Ward, Senator Jake Corman, Representative Richard Irvin, and Lisa Schafer and Joseph Kantz of the County Commissioners Association of Pennsylvania. The letter has been made publicly available online by several media outlets. Petitioners' counsel obtained the letter from the PA Post, and it remains publicly available through the PA Post at <https://drive.google.com/file/d/1FL6HWSqeEMnvId15R1EQUM9N9JJvUlp/view>.

6. Attached as **Exhibit C** is a true and correct copy of an article titled "Counties home to more than a third of Pennsylvania voters calling for mail-only primary," written by Emily Previti and published by the PA Post on April 17, 2020. The article is publicly available at <https://papost.org/2020/04/17/counties-home-to-more-than-a-third-of-pennsylvania-voters-calling-for-mail-only-primary/>.

7. Attached as **Exhibit D** is a true and correct copy of article titled "Allegheny County is sending all county voters mail-in ballot applications with prepaid postage," written by Ryan Deto and published by Pittsburgh City Paper on April 17, 2020. The article is publicly available at <https://www.pghcitypaper.com/pittsburgh/allegheny-county-is-sending-all-county-voters-mail-in-ballot-applications-with-prepaid-postage/Content?oid=17142631>.

8. Attached as **Exhibit E** is a true and correct copy of an article titled "Officials in three Southeastern Pa. counties cast doubt on in-person primary voting," written by Jonathan Lai and published by The Philadelphia Inquirer on April 10, 2020. The article is publicly available at

<https://www.inquirer.com/politics/election/coronavirus-covid19-election-pennsylvania-20200410.html>.

9. Attached as **Exhibit F** is a true and correct copy of an article titled “52 people who worked or voted in Wisconsin election have COVID-19,” written by Scott Bauer and published by PBS News Hour on April 29, 2020. The article is publicly available at <https://www.pbs.org/newshour/health/52-people-who-worked-or-voted-in-wisconsin-election-have-covid-19>.

10. Attached as **Exhibit G** is a true and correct copy of a press release titled “Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election,” published by the Office of the Governor of the Commonwealth of Pennsylvania on March 27, 2020. The press release is publicly available at <https://www.governor.pa.gov/newsroom/gov-wolf-signs-covid-19-response-bills-to-bolster-health-care-system-workers-and-education-and-reschedule-the-primary-election/>.

11. Attached as **Exhibit H** is a true and correct copy of the Amendment to Order of the Governor of the Commonwealth of Pennsylvania for Individual to Stay at Home. The Amendment is publicly available at <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-Stay-at-Home-Order-Amendment.pdf>.

12. Attached as **Exhibit I** is a true and correct copy of a press release titled “Process to Reopen Pennsylvania,” published by the Office of the Governor of the Commonwealth of Pennsylvania on May 1, 2020. The press release is publicly available at <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>.

13. Attached as **Exhibit J** is a true and correct copy of an article titled “Coronavirus Live Updates: Daily Death Toll Will Nearly Double by June, Trump Administration Model

Predicts,” published by the New York Times on May 7, 2020. The article is publicly available at <https://www.nytimes.com/2020/05/04/us/coronavirus-live-updates.html#link-7b42d0f5>.

14. Attached as **Exhibit K** is a true and correct copy of remarks made by Lisa M. Deeley, Chairwoman of the Philadelphia Board of Elections, made during a Senate Hearing on primary election issues related to the COVID-19 restrictions. The hearing was held on April 30, 2020. The remarks are publicly available at <https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2020/04/commissoner-deely.pdf>.

15. Attached as **Exhibit L** is a true and correct copy of an article titled “Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco,” written by Jonathan Tamari and Jonathan Lai and published by The Philadelphia Inquirer on April 12, 2020. The article is publicly available at <https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html>.

16. Attached as **Exhibit M** is a true and correct copy of a press release titled, “Nearly 1 Million Pennsylvanians Have Applied for a Mail-In Ballot for June 2 Primary Election,” published by the Office of the Governor of the Commonwealth of Pennsylvania on May 4, 2020. The press release is publicly available at <https://www.governor.pa.gov/newsroom/nearly-1-million-pennsylvanians-have-applied-for-a-mail-in-ballot-for-june-2-primary-election/>.

17. Attached as **Exhibit N** is a true and correct copy of voter data published by the Pennsylvania Department of State on May 4, 2020. The data is publicly available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/currentvotestats.xls>.

18. Attached as **Exhibit O** is a true and correct copy of an article titled “As U.S. Postal Service suffers, Gillibrand proposes it adds banking,” written by Emilie Munson and published by

the Times Union on April 28, 2020. The article is publicly available at <https://www.timesunion.com/news/article/As-U-S-Postal-Service-suffers-Gillibrand-15231928.php>.

19. Attached as **Exhibit P** is a true and correct copy of an article titled “United States Postal Service Branches Identified for Full Study,” published by The Washington Post. The article is publicly available at <https://www.washingtonpost.com/wp-srv/politics/documents/post-offices.html>.

20. Attached as **Exhibit Q** is a true and correct copy of an article titled “Hundred of Post Offices Could Soon Close,” written by Ed O’Keefe and published by The Washington Post on July 30, 2009. The article is publicly available at http://voices.washingtonpost.com/federal-eye/2009/07/hundreds_of_post_offices_could.html.

21. Attached as **Exhibit R** is a true and correct copy of an article titled “Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail,” written by Nicholas Fandos and published by The New York Times on April 9, 2020. The article is publicly available at <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-stadiest-services-the-mail.html>.

22. Attached as **Exhibit S** is a true and correct copy of an article titled “Two United States Postal Service employees test positive for COVID-19 in Harrisburg,” published by CBS 21 News on April 15, 2020. The article is publicly available at <https://local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg>.

23. Attached as **Exhibit T** is a true and correct copy of an article titled “Exton postal employee dies from coronavirus complications,” written by Bill Rettew and published by Daily

Local News on April 12, 2020. The article is publicly available at https://www.dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html.

24. Attached as **Exhibit U** is a true and correct copy of an article titled “The supervisor coughed in a coworker’s direction as a joke: As coronavirus cases at the US Postal Service surpass 1,200, employees say a lack of supplies and care is putting them at risk,” written by Alanis King and published by Business Insider on April 25, 2020. The article is publicly available at <https://www.businessinsider.com/postal-workers-usps-worry-for-their-safety-amid-coronavirus-pandemic-2020-4>.

25. Attached as **Exhibit V** is a true and correct copy of a United States Postal Service Industry Alert, titled “COVID-19 Continuity of Operations Update: Expected Delivery Changes for Priority Mail and First-Class Package Services,” published on April 17, 2020. The alert is publicly available at <https://about.usps.com/newsroom/service-alerts/pdf/expected-delivery-changes-april-17.pdf>.

26. Attached as **Exhibit W** is a true and correct copy of an article titled “House panel warns coronavirus could destroy Postal Service by June,” written by Kyle Cheney and published by Politico on March 23, 2020. The article is publicly available at <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>.

27. Attached as **Exhibit X** is a true and correct copy of an article titled “How hard will it be to vote during the coronavirus? It depends on where you live,” written by Jonathan Tamari and Jonathan Lai and published by The Philadelphia Inquirer on April 21, 2020. The article is publicly available at <https://www.inquirer.com/news/voting-by-mail-pennsylvania-new-jersey-coronavirus-20200421.html>.

28. Attached as **Exhibit Y** is a true and correct copy of the notes of county election officials from Mercer, Lehigh, and Lawrence Counties for an April 30, 2020, Senate Hearing. The notes are publicly available at <https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2020/04/tioga-county.pdf>.

29. Attached as **Exhibit Z** are true and correct copies of seven articles related to Wisconsin's April 7, 2020, election. The articles include:

- a. Ned Foley, *Worrying about Wisconsin, While Waiting for Its Election Returns*, Medium (Apr. 12, 2020), <https://medium.com/@Nedfoley/worrying-about-wisconsin-while-waiting-for-its-election-returns-9dc94334c8a6>;
- b. The Editorial Board, *You Shouldn't Have to Risk Your Life to Vote*, N.Y. Times (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/opinion/wisconsin-primary-coronavirus.html>;
- c. Zak Cheney-Rice, *Wisconsin Supreme Court Justices Voted Absentee Before Making Everyone Else Vote in Person*, New York Magazine (Apr. 14, 2020), <https://nymag.com/intelligencer/2020/04/wisconsin-voters-braved-covid-while-justices-voted-absentee.html>;
- d. Ed Gilgore, *After Its Disturbing Election Day, What Happens Next in Wisconsin?*, New York Magazine (Apr. 8, 2020), <https://nymag.com/intelligencer/2020/04/after-a-disturbing-election-day-now-what-in-wisconsin.html>.
- e. Miela Fetaw, *'I Could Get the Virus If I Vote': Wisconsin's Terrifying Election Day*, The Daily Beast (Apr. 7, 2020), <https://www.thedailybeast.com/people-are>

[going-to-die-in-this-election-wisconsin-votes-amid-coronavirus-pandemic-1-t-in-wisconsin.html](https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html);

f. Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html>;

g. Sherrilyn Ifill, *Never Forget Wisconsin*, Slate (Apr. 8, 2020, 6:46 PM), <https://slate.com/news-and-politics/2020/04/never-forget-wisconsin.html>.

30. Attached as **Exhibit AA** is a true and correct copy of an article titled “Wisconsin polling places are closing because there’s not enough people to work the April 7 election,” written by Patrick Marley and Craig Gilbert and published by the Milwaukee Journal Sentinel on March 31, 2020. The article is publicly available at <https://www.jsonline.com/story/news/politics/elections/2020/03/31/wisconsin-voting-sites-closing-due-coronavirus-poll-worker-shortage/5090003002/>.

31. Attached as **Exhibit BB** is a true and correct copy of an article titled “Madison has 66 polling sites on Election Day, Milwaukee has five. What’s the deal?” written by Briana Reilly and published by The Cap Times on April 7, 2020. The article is publicly available at https://madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html.

32. Attached as **Exhibit CC** is a true and correct copy of an article titled “They should have done something: Broad failures fueled Wisconsin’s absentee ballot crisis, investigation shows,” written by Daphne Chen, Catharina Felke, Elizabeth Mulvey and Stephen Stirling and published by the Milwaukee Journal Sentinel on April 21, 2020. The article is publicly available

at <https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002/>.

33. Attached as **Exhibit DD** is a true and correct copy of an article titled “Tammy Baldwin, Ron Johnson call for Postal Service to investigate undelivered absentee ballots,” written by Scott Bauer and published by the Wisconsin State Journal on April 10, 2020. The article is publicly available at https://madison.com/wsj/news/local/govt-and-politics/elections/tammy-baldwin-ron-johnson-call-for-postal-service-to-investigate-undelivered-absentee-ballots/article_bc2e459f-f7b1-51ac-b5be-ec846a1f9c20.html.

34. Attached as **Exhibit EE** is a true and correct copy of absentee ballot data published by the Wisconsin Elections Commission on April 7, 2020. The data is publicly available at <https://elections.wi.gov/node/6825>.

35. Attached as **Exhibit FF** is a true and correct copy of an article titled “Important lessons from the Wisconsin Primary,” written by Charles Stewart, Professor of Political Science at Massachusetts Institute of Technology and Director of the MIT Election Data and Science Lab and Co-Director of the Caltech/MIT Voting Technology Project, on April 17, 2020. The article is publicly available at <https://www.mischiefsoffaction.com/post/important-lessons-from-the-wisconsin-primary>.

36. Attached as **Exhibit GG** is a true and correct copy of an article titled “Voter turnout in Green Bay down more than 50% compared to 2016 spring election,” published by Fox 11 News on April 14, 2020. The article is publicly available at <https://fox11online.com/news/election/voter-turnout-in-green-bay-down-more-than-50-compared-to-2016-spring-election>.

37. Attached as **Exhibit HH** is a true and correct copy of a letter from Ohio Secretary of State Frank LaRose to the Ohio Congressional Delegation dated April 23, 2020. The letter is publicly available at <https://www.dispatch.com/assets/pdf/OH35713424.pdf>.

38. Attached as **Exhibit II** is a true and correct copy of information published by the Office of the Governor of the Commonwealth of Pennsylvania regarding the Commonwealth's response to COVID-19. The information was last updated on May 7, 2020. It is publicly available at <https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder>.

39. Attached as **Exhibit JJ** is a true and correct copy of an article titled "Montco judge extends deadline for absentee ballots," written by Laura McCrystal and published by The Philadelphia Inquirer on November 3, 2016. The article is publicly available at https://www.inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html.

40. Attached as **Exhibit KK** is a true and correct copy of an Order in the Court of Common Pleas of Montgomery County, dated November 3, 2016, in the matter of *In re Extension of Time for Absentee Ballots to be Received and Counted in the 2016 General Election*, No. 2016-26326.

41. Attached as **Exhibit LL** is a true and correct copy of an article titled "Gov. Tom Wolf outlines plan for reopening Pa. but offers no dates: 'We cannot flip a switch,'" written by Ron Southwick and published by PennLive.com on April 17, 2020. The article is publicly available at <https://www.pennlive.com/coronavirus/2020/04/gov-tom-wolf-gives-update-on-coronavirus-in-pa-watch-live.html>.

I declare under penalty of perjury that the foregoing is true and correct. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed on May 8, 2020

Respectfully submitted,



Adam C. Bonin

8

EXHIBIT A



The Honorable Tom Wolf
Governor, Commonwealth of Pennsylvania
508 Main Capitol Building
Harrisburg, PA 17120

Re: Pennsylvania 2020 Primary Election

Dear Governor Wolf,

This letter is being sent on behalf of Montgomery County, but is intended to benefit the residents of the entire Commonwealth. In the interest of protecting the health and wellbeing of our communities, we implore you to take an additional important step beyond moving the 2020 Primary Election to June 2nd. We ask that you order an all-mail election in Pennsylvania. Inviting millions of voters to what would amount to thousands of mass gatherings across the state a mere two months from today is something that should be avoided at all costs.

Based on the evidence indicating that some combination of social distancing and shelter-in-place measures will likely still be needed by the time the June date arrives, and based on feedback we have received from voters, poll workers, and polling locations, we have arrived at the conclusion that an all-mail election is the only responsible option to ensure a safe, fair, and successful Primary in 2020.

We find ourselves in truly unprecedented times. We are in the very early stages of a serious pandemic. In order to properly manage what is sure to become an increasingly dire situation, experts are estimating that “measures – most notably, large scale social distancing – will need to be in place for many months, perhaps until a vaccine becomes available.”¹ Government officials across the United States are anticipating that strict restrictions on their communities and further social distancing measures will continue for at least two to three more months.

All evidence shows we are dealing with a situation that is highly unlikely to improve prior to the newly postponed date of the Primary Election on June 2nd. In addition to many logistical concerns, conducting an in person election would be the antithesis of the action we should be taking to properly address the effects of this virus on our population.

To properly appreciate the dangers of conducting an in person election, it is important to acknowledge the process a typical county undertakes to prepare for and conduct a successful election.

¹ <https://www.imperial.ac.uk/news/196234/covid-19-imperial-researchers-model-likely-impact/>

The Process

While the election is not scheduled to occur until June 2nd, we will only be able to properly prepare for that date by bringing in a large number of county employees and contracted workers to engage with members of the general public all over the county while we are currently under an order to shelter in place and conduct only life essential operations. The Montgomery County Office of Voter Services employs a full staff of close to 30 people. The office is currently operating with a fraction of that number, as we are only allowing four to five employees to work on any given day to properly comply with existing orders from the Governor. If we are to administer a “normal” election where we would prepare to conduct in-person voting over our 426 precincts on June 2nd, we would have no choice but to bring in our full complement of employees to work in close quarters preparing for the election almost immediately.

At our warehouse, we would have approximately five staff members working in close proximity to representatives from our voting machine vendor – who will have flown in from various locations around the country – to program and prepare ADA devices, printers, and scanners for all of our precincts. Those staff members will then interact with 10 to 15 delivery truck drivers who will spend four or five days driving around the county delivering this equipment to 352 separate locations including senior centers, schools, houses of worship, libraries, community centers, and municipal buildings, all of which are currently closed as they are not permitted to operate under the order from the Governor’s Office. At each of these locations, it will be necessary for the delivery crew to interact closely with the staff to ensure the equipment is delivered and properly secured.

This brings us to Election Day where a population of approximately 2500 poll workers, most of them elderly, are needed to administer the election to hundreds of thousands of registered voters around the county. As this is being done, our Office of Voters Services brings in additional county staff from a variety of different departments to work from 6:00 a.m. until 10:00 p.m. answering phone calls from voters and poll workers, and addressing any issues that may come up in regards to the election. This constitutes a group of close to 50 people working in an environment that cannot accommodate proper social distancing over the course of an entire day. In addition to this group of people we have approximately 12 rovers who drive around the county and troubleshoot machine and supply issues at all of our polling locations, interacting closely with poll workers and voters at every place they visit.

At the end of the evening we have teams of employees that staff five satellite locations where Judges of Elections hand-off materials that they are mandated by law to return that evening. These staff members then transport these materials to the voter services warehouse where they are collected by a group of approximately 15 staff members and stored until the official tabulation begins. Tabulation occurs over the next seven to ten days, conducted by a group of close to 30 tabulators, all of whom are over the age of 50. While tabulation is being conducted the trucking company is collecting voting equipment from around the county and returning it to the staff at the warehouse where it is unloaded and stored.

There is great risk of exposure involved in every step of the process we follow in preparing for and conducting our elections. A positive test for any of the people involved in any step of this process could cause a ripple effect that would require quarantines and would effectively cripple our ability to function.

At a time when strict social distancing measures are being employed to help stem the spread of a highly contagious virus, asking all of the people in the above scenario to take part in the process of administering and voting in the June 2nd election as it is currently anticipated would be irresponsible from a policy and planning perspective and potentially catastrophic from a public health perspective.

Efforts to address the problem

The steps you and the General Assembly have taken to address the numerous problems with conducting a “normal” election were well intentioned and are appreciated. However, now that the Commonwealth is four weeks into this pandemic, we know that, even by June, we will not be able to safely conduct an in person election. Now is the time to acknowledge the logistical and operational difficulties we are confronted with, and mitigate the risks we are now facing. Make no mistake, asking counties in Pennsylvania to administer an in person election on any scale, is putting everyone in a position where failure is the most likely outcome.

In addition to postponing the election, Act 12 of 2020 eases restrictions on spaces that may be used as polling locations, consolidation of polling places, and requirements of poll workers. These are helpful steps on their face, but when practically scrutinized they do little to actually solve any of the anticipated problems. Allowing for the use of previously prohibited space assumes that any of these facilities would be cooperative partners. We are already hearing from established polling places that they do not wish to participate in this election. The probability of convincing new locations to volunteer is slim.

Consolidation of polling places would seem to address this issue, but buildings suitable for housing multiple polling places are limited, and again there is the strong likelihood that they would not choose to participate. If we were to find suitable facilities that allowed us to reduce our polling places by anywhere up to 170 locations (the maximum 60% that would be allowed by the amendments to the Code), we would still have to supply them with an adequate amount of poll workers. Consolidation may appear to be a benefit in greatly reducing the amount of poll workers needed. Realistically, the more polling places that are consolidated, the greater the potential for confusion and the greater the logistical challenges of ensuring that people are being directed to the correct precinct to sign in, are given the proper ballot, and are casting that ballot in the correct scanner become. Implementing consolidated polling places will still require the use of a substantial number of our poll workers. Consolidation would put the county in the position of justifying a decision to concentrate larger numbers of poll workers and voters into fewer spaces to a population that we are actively telling to stay home and distance from each other. We cannot credibly justify such a risk.

Many of our poll workers are informing us that they will not work on Election Day in any capacity due to their fear of exposure, which is understandable as the majority of them are elderly and are more vulnerable than most members of the population. Even with the ability to deploy poll workers to any election district in the county, we will most likely find ourselves in a situation where polling places will be inadequately staffed or not staffed at all simply because we will not have enough people who are eligible and willing to do it.

The solution

The safest solution with the best chance for success for the upcoming primary is to move as soon as is possible to an all-mail election, and to allow for the canvassing of ballots to begin well in advance of the newly established time of 7:00 a.m. on Election Day. We are already seeing an increase in the number of applications for mail-in and absentee ballots. As of this date, Montgomery County has received close to 30,000 absentee and mail-in ballot applications.

We realize that there is hesitancy around making this decision, namely in the ability of counties to acquire the necessary paper supplies and to meet the demand of distributing, collecting, and canvassing these ballots. The fact of the matter is that the counties should already be taking the steps to deal with these issues. Mail-in and absentee ballot requests have increased statewide, and as we move closer to the election more people will inevitably opt for voting by mail either for convenience or for concern for their health. Counties are going to find themselves in a position where they need to have adequate supplies and procedures in place to handle large amounts of mail-in ballots. To ensure a timely reporting of results, counties will also need to canvass these ballots well in advance of Election Day.

The earlier this decision is made, and the more organized and involved the Department of State and State Government as a whole can be, the easier it will be to accomplish this goal. Assistance from the State in the costs and processes necessary for acquiring needed supplies and distributing them would be of great benefit. In making sure an all-mail election properly safeguards the rights of voters, the General Assembly should focus on ensuring that envelopes are free to mail or are prepaid, that ballots postmarked by Election Day can be counted, and that signature matching laws properly protect voters.

The longer we wait to institute necessary reforms, the more time and money is wasted on planning for an unworkable system that if followed will result in the needless exposure of large numbers of people and the disenfranchisement of voters who can't go to their polling place because they are following the advice of their government and public health officials to stay home, the polling location is closed, or the location is inadequately staffed.

We are in the midst of an unprecedented public health emergency. I urge you to take a practical assessment of the situation and seriously consider moving to implement an all-mail election for the 2020 Primary.

Sincerely,



Valerie A. Arkoosh, MD, MPH
Chair



Kenneth E. Lawrence, Jr.
Vice Chair

cc: Kathy Boockvar, Secretary of the Commonwealth
Hon. Mike Turzai, Speaker of the PA House of Representatives
Hon. Bryan Cutler, Majority Leader of the PA House of Representatives
Hon. Frank Dermody, Minority Leader of the PA House of Representatives
Hon. Joe Scarnati, President Pro Tempore of the PA State Senate
Hon. Jake Corman, Majority Leader of the PA State Senate
Hon. Jay Costa, Minority Leader of the PA State Senate
Members of the Montgomery County State Senate Delegation
Members of the Montgomery County State House Delegation
Lisa Schaefer, Executive Director of the County Commissioners Association of Pennsylvania

EXHIBIT B

MARK A. SATHER
SCOTT WALLS
JEFF THOMAS

HEATHER N. FELLMAN
Chief Clerk



PETER McMANAMON
Solicitor

MEETING DAY
TUESDAY--9:30 A.M.

PHONE: 814-643-3091
FAX: 814-643-8152

Huntingdon County, Pennsylvania

OFFICE OF

COUNTY COMMISSIONERS

HUNTINGDON, PENNSYLVANIA 16652

7 April 2020

Governor Tom Wolf
Senator Judy Ward
Senator Jake Corman
Representative Richard Irvin
Lisa Schafer, CCAP
Joseph Kantz, CCAP

To whom it may concern:

We are writing today to bring your attention to an urgent matter concerning administration of elections in the Commonwealth of Pennsylvania. We are very concerned about how the COVID-19 outbreak will continue to impact county governments in the months to come. With the infection rate continuing to climb, we are unsure of when we may be able to open our doors and gather in large groups again. As a result we are asking that you consider vote by mail as an alternative to in person voting for the 2020 Primary.

Counties across the Commonwealth are using new election equipment. For many of us, this will be the very first time our new equipment is used in an election. Our poll workers have not been trained either on the new equipment, or on the changes to the laws that will be impacting how elections are run in the 2020 Primary. We had six trainings scheduled during the month of March which all had to be cancelled. Even if we are able to reopen on May 1st we have logic and accuracy testing to complete, supplies to pack, equipment to deliver to polling places, 300 poll workers to train, and we have vendors who are flying in from other states to provide support for our equipment at each stage in the process. Four weeks does not provide adequate time to accomplish all of the things involved in running an election, and we cannot be sure that we will even have that.

In addition to timing concerns, we have already lost most of our poll workers. As I am sure you are aware, poll workers tend to be the same older citizens that are at the greatest risk during this viral outbreak. Many of the poll workers that have not officially given notice have communicated that they are not willing to commit to working at this time. That makes it impossible for us to plan because we do not know how many vacancies we will have to fill.

Similarly, many of our polling sites are considering asking us to find a new place to host the election. We use many churches and senior centers as polling sites and these locations are rightfully concerned about the health and safety of their own staff and patrons. While we are looking into the possibility of combining polling locations as permitted by Senate Bill 422, we are concerned that in so doing we are jeopardizing the lives of our residents by asking them to congregate in large numbers in a presidential election year during a deadly viral outbreak.

We understand the difficulties in making decisions that impact access to elections for citizens of Pennsylvania. We feel that moving to an all mail-in system is the only way that we can adequately preserve the right to vote for citizens of the Commonwealth under our jurisdiction. Please take this suggestion under consideration and take action quickly in order to allow counties ample time to prepare.

Sincerely,


Mark Sather, Chairman


Scott Walls, Vice Chairman

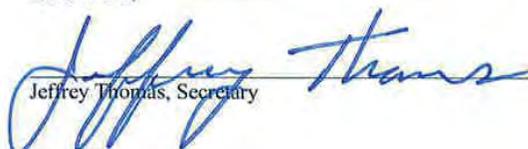

Jeffrey Thomas, Secretary

EXHIBIT C

Counties home to more than a third of Pennsylvania voters calling for mail-only primary

papost.org/2020/04/17/counties-home-to-more-than-a-third-of-pennsylvania-voters-calling-for-mail-only-primary/

April 17,
2020



Politics & Policy

April 17, 2020 | 2:01 PM

Officials in more than a dozen Pennsylvania counties home to nearly 3 million voters are calling for an all-mail primary election.

These officials, who serve more than a third of the state's registered voters, say they know there's a chance that a June 2 primary with in-person voting will be a problem if coronavirus restrictions are still in place. So they want the state to decide soon whether the election will proceed normally, be switched to mail-only, or be postponed again.

On one side are election officials who believe voting entirely by mail would be safest and most practical. Right away, it would resolve problems some counties say they're having in recruiting and retaining enough poll workers to staff voting locations. Counties also report that venues that host polling places are declining to open their doors for the primary.

On the other side are officials who say their counties are happy to proceed with in-person voting, but any change to an all-mail election should happen as soon as possible to avoid last-minute chaos.

Then there's the fact that in-person voting during a pandemic demands that poll workers be provided with sanitary supplies and personal protective equipment, or PPE, such as gloves and masks. Already, counties report they're struggling to obtain such items.

Even before the coronavirus outbreak, counties were facing significant challenges in organizing this year's primary, given the high turnout presidential election is happening at the same time that Pennsylvania is rolling out historic election code reforms and new voting machines. Adding the need to plan for in-person or all-mail voting while the coronavirus outbreak continues multiplies the challenge facing elections directors.

"That is the real kick in the teeth," said Lycoming County Elections Director Forrest Lehman. "Our attention and resources are divided. We are having to run two election paradigms at the same time."

Lehman and some of his counterparts across the state say absentee and mailed ballot requests are up. That was anticipated with state laws changing to allow voters to request one for any reason; now, election directors are encouraging that option (even if they aren't pushing for an all-mail contest) — and many voters are leaning that way — due to the public health crisis.

In Lycoming County, Lehman says his office recently took out a full-page newspaper ad urging people to vote by mail.

"We got 100 or more calls in response that day from people who wanted us to mail them an application. Older folks who might not have internet access," Lehman said.

He said he's considering another ad that's simply a blank mailed ballot application.



Emily Previti / PA Post

Allegheny County Council, meanwhile, is set to consider an ordinance today that would send mailed ballot applications with prepaid return postage to all registered voters, Pittsburgh City Paper reports.

The vote on the ordinance comes after an Allegheny commissioner called for an all-mail primary last week. On the other side of the state, Chester and Montgomery counties also sent a letter asking for an all-mail primary to Gov. Tom Wolf and their state legislators.

Union County Director Greg Katherman says he wants an all-mail vote but would need a month's notice to make it happen. Katherman acknowledged the mixed opinion among his counterparts across the state, but dismissed concerns voiced by President Trump and other elected officials that vote-by-mail elections are susceptible to high levels of fraud.

"It just makes sense at this point: you weigh [voter] fraud or you weigh the potential death. Where does that fall on your scale? To me, that's a no-brainer," Katherman says.

Huntingdon County officials last week fired off a letter telling Wolf and Huntingdon's legislative delegation that an "all mail-in system is the only way that we can adequately preserve the right to vote for citizens under our jurisdiction." They urged state leaders to "take action quickly to allow counties ample time to prepare."

Most of Huntingdon's poll workers won't commit to staffing the June 2 primary, says Election Director Tammy Thompson.

The county also had to cancel training for new voting equipment slated, since "getting people together to do that is impossible right now," Thompson said.

"Some people have talked about doing video and video training, but many of our poll workers are elderly and most won't have access to a computer or don't feel comfortable with that kind of training," she said.

More than 20 counties – including Allegheny and Delaware – face the same challenge of introducing new voting machines to poll workers and voters alike.

Fayette County Elections Director Larry Blosser said his county isn't prepared to host in-person voting, lacking enough supplies and sufficient commitments from poll workers and location hosts.

"We had to cancel training. I can't locate hand sanitizer anywhere, other than maybe as part of a kit. But those cost an arm and a leg," Blosser said. "They're going to have to change the date."

Sabrina Backer, chief clerk and elections director in Venango County, says the state should hold off on any major decisions.

"We should wait until closer to the election and find out what status of coronavirus is, and then get a recommendation from [state Health Secretary] Dr. [Rachel] Levine and go with that," Backer said.

Backer also acknowledged that Venango's population is relatively small, making it easier for the county to adapt to last-minute changes in election plans.

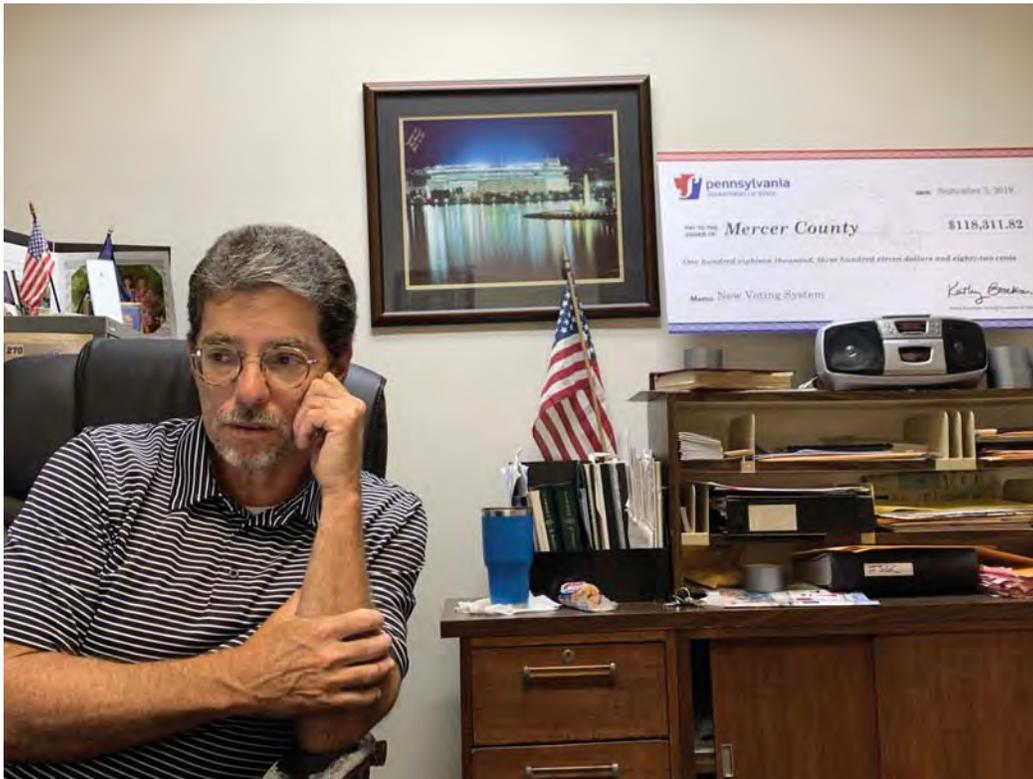
Many county officials interviewed for this story, however, say any action by state officials needs to happen soon, whether it's Wolf taking unilateral action to change the format of the election or postponing it again (he said earlier this week he hadn't been considering a further delay), or the Department of State firming up its tentative commitment to provide gloves, masks, hand sanitizer and other supplies to counties to use at the polls.

But some also realize the state might have to adjust at the last minute if public health warrants it.

"If ... it's too dangerous on June 2 and that social distancing requirements must continue, then as difficult as it would be for counties to administer we've got to figure out a way to conduct an all-mail election with some vote centers to accommodate voters who don't get a ballot or who have accessibility needs," Mercer County election director Jeff Greenburg wrote in an email.

In that event, Greenburg says, Wolf should order school districts to serve as voting centers.

"It would be easy to let voters know they're voting at the high school gym instead of the current plan that would require us to send voters who knows where," Greenburg wrote. "Those locations have sufficient parking, accessibility and space to ensure as much social distancing as possible."



Emily Previti / PA Post

Mercer County Elections Director Jeff Greenburg talks about preparing for implementing a new voting system and many other changes to the elections process. To his right, an oversized check for election expenses. Mercer and other counties are in line for more money to help defray their costs for voting machine acquisitions.

Northampton County Voting Registrar Amy Cozze says “switching gears now ... would be another massive procedural change for our county, which has already implemented several new changes this cycle.”

But if that’s the direction dictated by the pandemic, state officials need to heed that with a “decision this week so that we could adequately prepare,” Cozze wrote in an email Thursday afternoon.

“Other states that have shifted to this type of voting took several years to implement it properly – just over a month’s time would make it difficult for any county to implement flawlessly,” she wrote.

A few hours later, Northampton County council members echoed Cozze’s sentiments as part of an extremely brief discussion during their meeting. They noted that the public push by some counties for an all-mail primary has continued discussion of the possibility among state officials in Harrisburg.

“Yeah, well, they’re all talk out there,” said council president Ron Heckman. “Who knows where it will end up.”

Heckman, who's in his 60s, joked at one point that "it's no secret" he is in the age group most vulnerable to the coronavirus. But he said he intends to vote in person June 2.

For now, county elections officials are waiting for a signal from Gov. Tom Wolf, who so far hasn't tipped his hand about whether the primary will go ahead per usual.

Earlier this week, Wolf said he "doesn't know what it would take" for him to ask for an all-mail election, but he said he's "considering it very seriously."

For Lehman in Lycoming County, that decision is a heavy one.

"What is an in-person election even going to look like in Pennsylvania, given the losses that counties have suffered of facilities and poll workers? And how would it be in the interests of the electorate and in the interest of public health to do it that way?" Lehman said. "I'm also starting to think about the moral implications of asking our poll workers to serve under these circumstances knowing their age, and their vulnerability. That is starting to weigh heavily on my conscience."

Tags

coronaviruselectionvoting

Categories

Politics & Policy

PA Post Picks

EXHIBIT D

Allegheny County is sending all county voters mail-in ballot applications with prepaid postage

pghcitypaper.com/pittsburgh/allegheny-county-is-sending-all-county-voters-mail-in-ballot-applications-with-prepaid-postage/Content

Ryan Deto

[click to enlarge](#)



UPDATE: 3:40 p.m., April 17:

Allegheny County Executive Rich Fitzgerald announced today that the county election division is finalizing mailings, and will send no-excuse mail-in ballot applications to every registered voter in the county who has not already applied for a mail-in or absentee ballot. The mailings will include prepaid postage.

On April 13, Fitzgerald called for an expansion of Pennsylvania's emergency declaration to allow Allegheny County to mail a ballot to all registered voters, but Republicans in the state legislature rejected that request. So Fitzgerald said he would move forward with what he could do, which is send ballot applications.

"Without that authority, we're moving forward with our plans to mail the mail-in ballot applications," said Fitzgerald in a press release.

Allegheny County has 1,323 polling places which require more than 6,600 poll workers to run those sites. Most of the workers are elderly, and many of them have been cancelling or expressing concerns about their health given coronavirus, according to a press release.

As such, Fitzgerald said getting as many people as possible to vote by mail is the safest way to conduct June 2 primary election.

"We hope that voters will continue to seek mail-in ballots as it is the safest option for them, and for all of our residents, during this pandemic," said Fitzgerald.

Original story posted on April 16:

Given the ongoing coronavirus pandemic, gatherings of just about any kind have been prohibited and discouraged as much as humanly possible. With that in mind, and a primary election upcoming, Allegheny County Council could be taking action shortly to encourage voters to avoid the in-person polls, and vote by mail instead.

Allegheny County Councilor Bethany Hallam (D-Ross) drafted an ordinance that will be introduced tomorrow that would require Allegheny County election officials to send mail-in ballot applications to every registered voter in the county who has not already applied for a mail-in ballot.

[PDF — DRAFT Mailed Ballot Ord.pdf](#)

Last year, Pennsylvania reformed its election laws to allow all registered voters to vote by mail without an excuse.

Hallam's legislation would require that the county send mail-in ballot applications to registered voters by May 8 at the latest. The deadline to fill out a mail-in ballot application is May 26. The ordinance would also require the mail-in ballot applications sent out by county officials to include prepaid postage.

Hallam says Allegheny County residents should not have to endanger their health or well-being in order to exercise their right to vote.

"Even during normal times, people face lots of obstacles to voting, such as non-traditional work schedules, childcare needs, and a lack of access to transportation," said Hallam in a statement. "This legislation not only ensures every registered voter in Allegheny County will be sent a mail-in ballot application, but also that they will be provided prepaid postage for the return of both the ballot application and the ballot itself."

Allegheny County would incur the cost of sending out mail-in ballot applications, but the ordinance does not state how much that would be.

Allegheny County Executive Rich Fitzgerald is supportive of the ordinance. His spokesperson Amie Downs says he's glad to see county council backing his mail-in voting efforts.

On April 13, Fitzgerald called for an expansion of Pennsylvania's emergency declaration to allow Allegheny County to mail a ballot to all registered voters. His hope is that the Pennsylvania primary election on June 2 will be conducted all by mail-in ballot, as a way to ensure safety during the pandemic.

Downs says that Fitzgerald already started directing the election office to begin finalizing mail-in ballot applications a few weeks ago, and the office is currently finalizing mailings that include self-addressed envelopes to be sent to registered voters who haven't already applied for ballots. She also mentioned the county's efforts at marketing the state's new no-excuse mail-in ballot rules. The county Board of Elections has been informed of all these efforts.

"We hope that voters will continue to seek mail-in ballots as it is the safest option for them during this pandemic," said Downs in a statement.

No co-sponsors have been listed yet for the ordinance, but support from Fitzgerald, a Democrat, brings considerable sway. Not only is the current make-up of the council 12 Democrats to three Republicans, but Fitzgerald has seen about 92% of the bills he has supported pass, according to the Pittsburgh Post-Gazette.

Hallam's ordinance would not send a ballot to every voter, just a ballot application. Voters would still have to fill out the application, and be approved by the county, before county election officials would then send voters the ballot. (*City Paper* wrote a guide on how to apply for a mail-in ballot earlier this month.)

According to the ordinance, Allegheny County had 56,335 total mail-in and absentee ballot application submitted through April 13, which reflects only about 16% of the number of ballots cast in the 2016 presidential primary. Though just a fraction of typical ballots during a presidential year, Downs says these figures still lead all Pennsylvania counties in number of applications.

Hallam says she hopes this ordinance will encourage future efforts in all elections, even those not taking place during a pandemic, to include robust mail-in ballot plans from county election offices.

"Not just during this time of a global pandemic, but during all times, it is so important to protect our most vulnerable populations in every way possible," says Hallam.

EXHIBIT E

Officials in three Southeastern Pa. counties cast doubt on in-person primary voting

 [msn.com/en-us/news/politics/officials-in-three-southeastern-pa-counties-cast-doubt-on-in-person-primary-voting/ar-BB12sojz](https://www.msn.com/en-us/news/politics/officials-in-three-southeastern-pa-counties-cast-doubt-on-in-person-primary-voting/ar-BB12sojz)

By Jonathan Lai, The Philadelphia Inquirer

Officials in two Southeastern Pennsylvania counties are calling for the state to make the June 2 primary an all-mail election to protect the safety of voters in the state's most populous region and the epicenter of its coronavirus cases.

And officials in a third county, not going so far as to call for a mail-in election, say they might have to defy an order from Gov. Tom Wolf and not use new voting machines because they lack the training time and staff to prepare them.

Coronavirus Coverage

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[COVID-19 GUIDE](#)

[VIRUS TRACKER](#)

"Make no mistake, asking counties in Pennsylvania to administer an in-person election on any scale is putting everyone in a position where failure is the most likely outcome," Montgomery County's two Democratic commissioners, Valerie A. Arkoosh and Kenneth E. Lawrence, Jr., wrote in a letter sent this week to Wolf, legislative leaders, and the county's state lawmakers.

Chester County's commissioners said Friday for the first time that they believe ballots should be mailed to every voter.

In neighboring Delaware County, officials worry they cannot comply with the governor's order to use new voting machines and protect public health. Instead of using the new systems that scan paper ballots at the polls, the county may simply collect the ballots and scan them all at the county courthouse.

The actions come as the counties face limited time to prepare for an election during the nation's largest public-health emergency in a century, and after an April 7 primary in Wisconsin turned into a fiasco, with thousands of voters unable to receive absentee ballots in time, shuttered polling places, and hours-long lines to vote in Milwaukee and other urban areas.

Like counterparts across the state, officials in the suburban Philadelphia counties say they face a variety of challenges, including poll workers who are dropping out and polling places that aren't available.

And, of course, in-person elections mean people congregate in central locations, contrary to social distancing guidelines.

"In addition to many logistical concerns, conducting an in-person election would be the antithesis of the action we should be taking to properly address the effects of this virus on our population," the Montgomery County commissioners wrote in their letter.

It described an in-person election as "irresponsible from a policy and planning perspective and potentially catastrophic from a public health perspective." (The third commissioner, Republican Joe Gale, declined to sign.)

Chester County's commissioners, two Democrats and a Republican, said in a statement Friday that "the unprecedented challenges we are currently facing with COVID-19" made mailing ballots to all voters "the best option for the health and safety of our community."

However, commissioners Marian Moskowitz, Josh Maxwell, and Michelle Kichline wrote, a limited number of polling places would still be required to ensure access for voters who need them, such as those who are homeless or have disabilities.

Similarly, Philadelphia City Commissioner Omar Sabir supports a mail-in election if there are a small number of traditional voting stations "open for senior citizens and individuals with disabilities."

Fellow Democrat Lisa Deeley, chair of the commissioners, "does not want to rule any options out," her deputy commissioner said. The third commissioner, Republican Al Schmidt, did not respond to a request for comment.

In Delaware County, officials are hoping to avoid an entirely mail-in election, said county councilwoman Christine Reuther, a Democrat.

But if the county can't complete training and preparations by mid-May, she said, it will not use the new machines and will "deal with whatever the fallout is."

» ASK US: [Do you have a question about the coronavirus and how it affects your health, work and life? Ask our reporters.](#)

The county's new voting system uses hand-marked paper ballots that are fed into a scanner.

One option, Reuther said, is to collect all the paper ballots at the polls and take them to the courthouse to be tabulated.

"It is not what I want to do. Certainly, if we did it without the governor's blessing, we would be looking at possible repercussions," she said. "But I can assure you, the only reason we would do that is if we did not feel we could both respect the public health emergency restrictions and deploy the machines."

Major changes would require the Republican-controlled state legislature to pass a bill. While there was consensus on postponing the primary, GOP leaders oppose expanded mail voting and counties are split.

Should the Pennsylvania primary be all vote-by-mail because of the coronavirus? Elections officials are divided. State Sen. Jake Corman (R., Centre) said last month that an entirely vote-by-mail election was off the table.

"We're not going to get to an all-mail situation, at least not for this year," he said. "That's something that takes a lot more discussing."

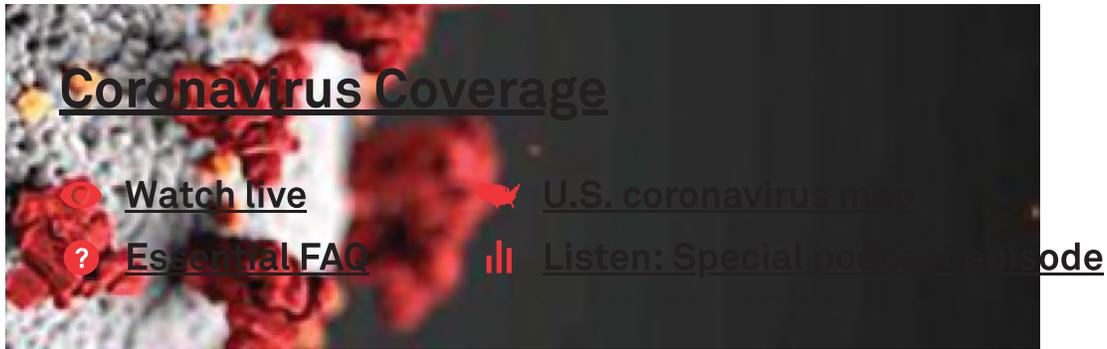
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EXHIBIT F



52 people who worked or voted in Wisconsin election have COVID-19

Health Apr 29, 2020 1:41 PM EDT

MADISON, Wis. — There are no plans to postpone or otherwise alter a special congressional election in Wisconsin that is less than two weeks away, even though more than 50 people who voted in person or worked the polls during the state's presidential primary this month have tested positive for COVID-19.

Democratic Gov. Tony Evers tried to change the April 7 election so that it would be conducted entirely by mail, but he was blocked by the Republican-led Legislature and conservative Wisconsin Supreme Court. Evers and others had warned that allowing in-person voting would cause a spike in coronavirus cases, but so far the impact appears to be limited.

Several of the 52 people who have tested positive and were at the polls on April 7 also reported other ways they may have been exposed to the virus, the Wisconsin Department of Health Services said Tuesday. Because of that, it's unclear if those people contracted the virus at the polls.

The 52 positive cases were in people who tested positive in the two weeks after the election, so by April 21. Most people show symptoms within 14 days of exposure, though

some people who have the virus don't show symptoms.

READ MORE: Record absentee ballots sustain turnout in Wisconsin primary

After next week, the state will no longer ask people who test positive for the virus whether they were at the polls on April 7 because of how much time has passed, said Julie Willems Van Dijk, who heads the state health agency.

"We're getting to the point where the door will be closing on those," she said.

Most of the positive cases were in Milwaukee County. The city's health commissioner has said the data was being analyzed and an update was expected next week.

Statewide, there have been more than 6,200 confirmed cases and 300 deaths since the outbreak began.

Although voters had to wait in long lines on April 7, primarily in Milwaukee, that likely won't happen with the May 12 special congressional election, where the largest city in the 7th Congressional District is Wausau, which is home to about 40,000 people. That House race is the only one on the ballot, unlike in this month's election, which featured the presidential primary and a state Supreme Court race.

Election clerks in the district have said they're ready for the election after they managed to make it through this month's election despite the difficulties posed by the pandemic. There's also a push to encourage absentee voting. About 71% of all voters in the April 7 election cast absentee ballots.

Evers has made no move to alter the special election even though as it currently stands, it would occur while his stay-at-home order is still in effect. The order is scheduled to run until May 26, but Republicans have asked the state Supreme Court to block it.

READ MORE: 'We've got to get going.' States under pressure to plan for the general election amid a pandemic

The 7th Congressional District covers all or parts of 26 northern and northwestern Wisconsin counties and is the state's largest congressional district, geographically.

The race pits Democrat Tricia Zunker, president of the Wausau school board, against Republican state Sen. Tom Tiffany, who has been endorsed by President Donald Trump. Trump carried the heavily Republican district by 20 percentage points in 2016.

By – **Scott Bauer, Associated Press**

More states lift restrictions, as small businesses struggle to secure relief

Health Apr 28

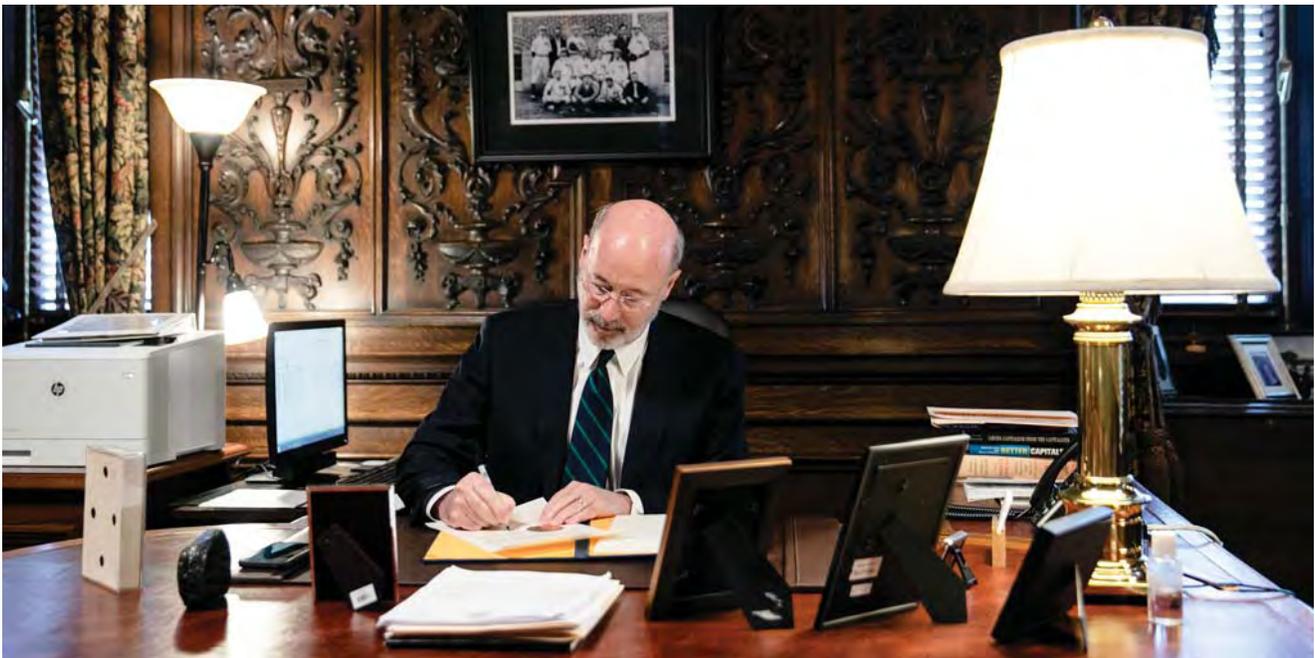
EXHIBIT G

Gov. Wolf Signs COVID-19 Response Bills to Bolster Health Care System, Workers, and Education and Reschedule the Primary Election

governor.pa.gov/newsroom/gov-wolf-signs-covid-19-response-bills-to-bolster-health-care-system-workers-and-education-and-reschedule-the-primary-election/

March 27,
2020

March 27, 2020



[Bill Signing](#), [Press Release](#), [Public Health](#)

Governor Tom Wolf signed four bills today to fight the COVID-19 pandemic in Pennsylvania that bolster the health care system, benefit workers and schools, and reschedule the 2020 primary election for June 2.

The governor signed [House Bill 1232](#), which provides \$50 million for the Wolf administration to purchase medical equipment and supplies for hospitals, nursing facilities and emergency medical services to meet the urgent needs by patients and staff.

“This funding will allow Pennsylvania to get more beds, ventilators, and other personal protective equipment that our health care system needs for a surge in patients,” said Governor Wolf. “The state and our health care system are mobilizing as fast as possible to provide medical workers with the equipment they need to care for patients.”

The governor also signed, [Senate Bill 751](#), which waives the requirement for schools to be in session at least 180 days, provides for continuity of education plans, ensures school employees are paid during the closure, and provides the Secretary of Education with authority to waive student teacher and standardized assessments. The Department of Education [previously announced](#) the cancellation of all PSSA testing, Keystone exams and the Pennsylvania Alternate System of Assessment for the 2019-20 school year.

The governor signed [Senate Bill 422](#), which reschedules the 2020 primary election from April 28 to June 2. and makes other election process changes, including some due to the COVID-19 emergency. The bill provides process improvements to Act 77 of 2019, to allow counties to begin processing and tabulating mail ballots beginning at 7 a.m. on election day, rather than after the polls close at 8 p.m. Additionally, the measure allows counties to temporarily consolidate polling places without court approval and eases other rules regarding location and staffing of polling places for the primary to respond to county concerns about a potential shortage of poll workers and appropriate polling place locations.

“Delaying this year’s primary election as several other states have done is in the best interests of voters, poll workers and county election officials,” said Governor Wolf. “I commend the General Assembly for acting quickly on this critical legislation. The Department of State will continue to work with local election officials to ensure Pennsylvania has a fair and accessible election.”

The governor reminded voters of the new option to vote by mail-in ballot rather than going to a polling place on election day. Already more than 215,000 registered voters have signed up for either a mail-in or absentee ballot, with nearly 78 percent using the commonwealth’s [new online application](#). Those voters do not need to file new applications despite the change in primary date.

The governor also signed [House Bill 68](#), which makes applying for unemployment compensation easier for workers affected by the COVID-19 pandemic. The bill requires the Department of Labor & Industry to waive the [one week waiting period and job search and work registration requirements](#) for claimants under the disaster emergency, provides automatic relief from benefit charges for employers whose account would otherwise be charged during the disaster emergency, increases timeframes and allows for interest-free payment plans, and provides the secretary with the ability to adopt temporary regulations to ensure compliance with federal law.

The governor signed [House Bill 1578](#) which makes technical changes to the disclosure of fees in declarations and in public offering statements of planned communities, cooperatives, and condominiums and to permit corrective amendments to the bylaws of planned communities, cooperatives, and condominiums by utilizing the current procedure used to make corrective amendments to declarations.

The governor vetoed House Bill 1100.

Visit the commonwealth's Responding to COVID-19 guide for the latest guidance and resources for Pennsylvanians or the Pennsylvania Department of Health's dedicated coronavirus webpage for the most up-to-date information regarding COVID-19.

View this information in Spanish here.

EXHIBIT H



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF THE GOVERNOR

**AMENDMENT TO ORDER OF
THE GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA
FOR INDIVIDUALS TO STAY AT HOME**

WHEREAS, as the COVID-19 disaster emergency in the Commonwealth continues, my Administration has developed a measured and strategic approach to allowing Pennsylvanians to return to work safely in a manner designed to prevent a resurgence of the virus; and

WHEREAS, this strategic phased reopening of the Commonwealth will be done in the most effective, efficient, and risk-averse method possible to balance our return to economic stability, while at the same time continuing to keep Pennsylvanians safe by controlling the spread of disease; and

WHEREAS, it is necessary to extend the requirements in my Stay At Home Order during the phased reopening process, with the recognition that such requirements may be suspended for specific counties as part of the gradual and strategic approach to reopening the Commonwealth; and

WHEREAS, as of May 7, 2020, the Commonwealth of Pennsylvania has 52,915 persons who have tested positive or meet the requirements as probable cases for COVID-19 in all sixty-seven counties and reports 3,416 deaths from the virus.

NOW THEREFORE, I hereby amend my Order directing "Individuals to Stay at Home" dated April 1, 2020, as amended.

The first sentence of Section 2 is amended to read as follows:

This Order is effective immediately and will remain in effect through June 4, 2020.

The Order remains unchanged in every other respect.



GIVEN under my hand and the Seal of the Governor, at the city of Harrisburg, on this seventh day of May two thousand twenty, the year of the commonwealth the two hundred and forty-fourth.

Tom Wolf
TOM WOLF
Governor

EXHIBIT I

Process to Reopen Pennsylvania

 governor.pa.gov/process-to-reopen-pennsylvania

Last updated: 3:04 p.m., May 1, 2020

The 2019 Novel Coronavirus (COVID-19) pandemic is an unprecedented event that has impacted every part of the globe. Pennsylvania has seen a similar unprecedented burden of COVID-19 and has taken equally unprecedented measures to save lives and reduce morbidity of the COVID-19 virus.

The commonwealth has responded aggressively to the spread of COVID-19, first by working to contain the virus through contact tracing and quarantines for residents who came in contact with someone who tested positive for the virus to slow sustained community spread. When sustained community spread was established, the commonwealth moved to mitigation efforts early in the response by issuing orders to close schools and non-life-sustaining businesses; and to restrict large gatherings. This decision to respond aggressively has proven to be an essential and effective measure to reduce the spread of COVID-19 and ultimately save an unrealized number of Pennsylvanians' lives.

Mitigation efforts have helped to curtail the spread of COVID-19 so our hospitals can treat patients without overwhelming our limited supplies of personal protective equipment (PPE), ventilators, or beds. Throughout the pandemic, we have closely monitored our hospital system capacity through the [creation of a public dashboard](#), and we have built and distributed millions of goods and materials to help our health care system manage the influx of patients.

PA DOH and PEMA have worked together to develop plans and stand up alternative care sites in the northeast and southeast so when our health care system becomes overwhelmed, we can load balance patients and supplies by keeping patient safety top of mind. At this point, alternative care sites have been identified in other areas of the commonwealth and can quickly stand up should there be a surge in other areas of the state.

As the situation stabilizes, we are planning a measured and strategic approach to allowing Pennsylvanians to return to work safely to prevent a resurgence of the virus. This must be done in the most effective, efficient, and risk-adverse method possible to balance our return to economic stability, while at the same time continuing to keep Pennsylvanians safe by controlling the spread of disease.

We are planning for the days and weeks ahead when we will not only safely return Pennsylvanians to work but return to a different and more resilient Pennsylvania. While we cannot be certain of the future path of this disease, our decisions will be driven first by prioritizing the health and safety of all Pennsylvanians.

To that end, the commonwealth is partnering with Carnegie Mellon University (CMU) to create a data-driven decision support tool that will enable a balance between maximizing the results of our economy while minimizing public health risks. This tool will help better understand the current health and economic status, as well as the inherent risks and benefits to easing restrictions by sector and region.

In consultation with Team PA, PA DOH, PEMA, the Department of Community and Economic Development, the Department of Labor & Industry, and others, the administration will develop guidance for businesses, local governments, workers, and customers with the goal of guiding a safe and iterative reopening process.

Pennsylvania plans to proceed with returning to work cautiously. Broad reopenings or reopenings that are not structured around ongoing social distancing, universal masking, or other public health guidance would likely result in a spike of cases and new stay-at-home and closure orders.

Throughout this process, the administration will have guidance in place to support best public health practices. This guidance will reinforce and build on existing worker and building safety orders. It will also be able to adapt to the changing nature of the pandemic, as well as lessons learned from communities that return to work strategically.

Discussed in greater detail below, the administration will utilize a three-phase matrix to determine when counties and/or regions are ready to begin easing some restrictions on work, congregate settings, and social interactions.

The red phase, which currently applies to the whole state, has the sole purpose of minimizing the spread of COVID-19 through strict social distancing, non-life sustaining business, school closures, and building safety protocols.

Red Phase

Work & Congregate Setting Restrictions

- Life Sustaining Businesses Only
 - Congregate Care and Prison Restrictions in Place
 - Schools (for in-person instruction) and Most Child Care Facilities Closed
-

Social Restrictions

-
- Stay at Home Orders in Place
 - Large Gatherings Prohibited
 - Restaurants and Bars Limited to Carry-Out and Delivery Only
 - Only Travel for Life-Sustaining Purposes Encouraged

- Reiterate and reinforce safety guidance for businesses, workers, individuals, facilities, update if necessary
- Monitor public health indicators, adjust orders and restrictions as necessary

As regions or counties move into the yellow phase, some restrictions on work and social interaction will ease while others, such as closures of schools, gyms, and other indoor recreation centers, hair and nail salons, as well as limitations around large gatherings, remain in place. For example, retail locations will be able to open with forthcoming guidance in place that is substantially similar to the worker safety and building safety order. Otherwise retail will be able to allow for curbside pickup. The purpose of this phase is to begin to power back up the economy while keeping a close eye on the public health data to ensure the spread of disease remains contained to the greatest extent possible.

Yellow Phase

Work & Congregate Setting Restrictions

- Telework Must Continue Where Feasible
- Businesses with In-Person Operations Must Follow Business and Building Safety Orders
- Child Care Open Complying with Guidance
- Congregate Care and Prison Restrictions in Place
- Schools Remain Closed for In-Person Instruction

Social Restrictions

- Stay at Home Order Lifted for Aggressive Mitigation
- Large Gatherings of More Than 25 Prohibited
- In-Person Retail Allowable, Curbside and Delivery Preferable
- Indoor Recreation, Health and Wellness Facilities and Personal Care Services (such as gyms, spas, hair salons, nail salons and other entities that provide massage therapy), and all Entertainment (such as casinos, theaters) Remain Closed
- Restaurants and Bars Limited to Carry-Out and Delivery Only

- All businesses must follow CDC and DOH guidance for social distancing and cleaning
- Monitor public health indicators, adjust orders and restrictions as necessary

The green phase eases most restrictions by lifting the stay at home and business closure orders to allow the economy to strategically reopen while continuing to prioritize public health. While this phase will facilitate a return to a “new normal,” it will be equally important to continue to monitor public health indicators and adjust orders and restrictions as necessary to ensure the spread of disease remains at a minimum.

Green Phase

Work & Congregate Setting Restrictions

All Businesses Must Follow CDC and PA Department of Health Guidelines

Social Restrictions

- Aggressive Mitigation Lifted
- All Individuals Must Follow CDC and PA Department of Health Guidelines

Monitor public health indicators, adjust orders and restrictions as necessary

History

The first confirmed case of the 2019 novel coronavirus in the United States was reported in Washington state on January 21; on January 30, the World Health Organization declared the virus a global health emergency.

The Pennsylvania Department of Health (PA DOH) began daily leadership meetings on January 26, to carefully track the disease, prepare a response, and coordinate with federal and hospital partners.

On February 1, PA DOH stood up its DOC, or Department Operations Center, on a 12 hour, 7 days a week activation status at the Pennsylvania Emergency Management Agency (PEMA). Staffed by PA DOH epidemiologists, public health nurses, physicians, logistical, planning and communication support, the Pennsylvania Department of Human Services and PEMA to closely monitor the spread of the disease, and begin containment strategies in furtherance of the state’s preparedness plans.

On March 4, due to the continued spread of the virus throughout the United States, PEMA partially activated its Commonwealth Response Coordination Center (CRCC) to provide planning and logistical support for PA DOH and to coordinate situational awareness across state agencies and all 67 counties within the commonwealth.

On March 6, Pennsylvania recorded its first two cases of COVID-19 and Governor Tom Wolf signed a Disaster Declaration to ensure the state had the resources and authority to plan the process of containment and mitigation in Pennsylvania, assuring Pennsylvanians that the commonwealth was prepared to face this crisis.

On March 7, PEMA elevated the activation level of its CRCC to a full activation during daylight hours to provide for additional support for PA DOH and to coordinate planning and response operations across state agencies and federal, state, and local jurisdictions.

From the beginning of the pandemic, the administration undertook a measured, regional strategy to mitigation and containment, and protecting Pennsylvanians with the assurance that they could receive testing and treatment for COVID-19 without any financial burden. Decisions and actions were taken on a state, county, and regional basis in coordination with local elected officials, public health experts, and other stakeholders.

On March 10, PEMA, with assistance from PA DOH, conducted a COVID-19 planning workshop and tabletop exercise for all state agencies to discuss preparations, potential impacts, and agency Continuity of Operations Plans (COOP) related to operations during a pandemic.

On March 12, with cases rising in Montgomery County, Governor Wolf closed schools and adult day centers there for 14 days, requesting that non-essential businesses close and county residents limit travel. He also imposed limited visitation in nursing homes and correctional facilities. The mitigations would prove to be vital as cases increased in the Southeast over the next week.

On March 13, Governor Wolf announced that mitigation efforts would be extended to Delaware County and all Pennsylvania schools would be closed for 10 days beginning March 16. Additionally, on March 13 the President of the United States issued a National Emergency, which included Emergency Disaster Declarations for all 50 states for emergency protective measures for COVID-19 response operations that was retroactive to January 20.

On March 14, with cases in Pennsylvania nearing 50, Governor Wolf announced additional closures in Bucks and Chester counties.

On March 16, because of the continued spread of the virus across the commonwealth and increasing case counts, PEMA began 24/7 operations of its CRCC in support of PA DOH and to maintain situational awareness, coordinate resource support, and provide planning support across the state agencies and federal, state, and local jurisdictions.

Under guidance from Health Secretary Dr. Rachel Levine, Governor Wolf ordered all Allegheny, Bucks, Chester, Delaware, and Montgomery county bars and restaurants to cease dine-in operations beginning March 16 for 14 days.

On March 18, PA DOH announced the first death from COVID-19 in the state.

On March 19, Governor Wolf ordered all non-life-sustaining businesses to close across the commonwealth to help stop the spread of the virus. The administration provided guidance, refined parameters, and designed an exemption process that could allow some businesses to remain open under strict guidance from the state. Additionally, on March 19 the governor received notification of approval of his request for a Small Business Administration (SBA) disaster declaration for the Economic Injury Disaster Loan (EIDL) program to provide much-needed aid to businesses impacted by the COVID-19 mitigation procedures.

On March 23, Governor Wolf and Dr. Levine began the process of issuing additional stay-at-home orders based on county cases and modeling of the possible spread.

Timeline of County Stay-at-Home Orders:

- March 23 Allegheny, Bucks, Chester, Delaware, Monroe, Montgomery, and Philadelphia counties;
- March 24 Erie County;
- March 25 Lehigh and Northampton counties;
- March 27 Berks, Butler, Lackawanna, Lancaster, Luzerne, Pike, Wayne, Westmoreland and York counties;
- March 28 Beaver, Centre, Washington counties;
- March 30 Carbon, Cumberland, Dauphin and Schuylkill counties;
- March 31 Cameron, Crawford, Forest, Franklin, Lawrence, Lebanon, Somerset counties; and
- April 1 Statewide Stay-at-Home Order.

As the administration issued stay-at-home orders, it also moved to make more materials available to health care systems by working with the legislature to invest \$50 million in support for hospitals and health systems. The administration also worked with the legislature to move the primary election from April 28 to June 2.

Federal support and aid have been critical in the state's response. On March 29, to seek all available aid, Governor Wolf requested a federal major disaster declaration. On March 31, the federal government granted approval. Beginning with early assurances that COVID-19 testing and treatment would be covered for all Pennsylvanians at no cost, Governor Wolf took additional steps to ensure everyone in the state was treated fairly and without discrimination amid the pandemic.

On April 3, to reinforce mitigation and safety surrounding the COVID-19 pandemic,

Governor Wolf called for universal masking and requested that religious leaders consider alternate forms of worship.

Additionally, on April 3, Pennsylvania was one of the first states to receive statewide approval from the Federal Emergency Management Agency (FEMA) to conduct non-congregate sheltering in response to the COVID-19 emergency in the commonwealth.

On April 5, Governor Wolf announced that Dr. Levine issued an Order to make the buildings Pennsylvanians work in safer.

To successfully mitigate a surge that could overwhelm the state's health care system, the administration sought information, capabilities, and needs from manufacturers that could ramp up to supply necessary personal protective equipment (PPE) and others supplies. In addition, health care facilities began the process of transferring supplies to help secure preparedness for those areas with greater needs. The state issued an order for the ability to transfer supplies around the commonwealth, as necessary to load balance the system.

On April 9, Governor Wolf announced the closure of schools through the end of the academic year and a temporary reprieve program for non-violent state correctional facility inmates amid Department of Corrections plans to keep inmates safe while incarcerated.

Communication and collaboration with other states have been vital as people typically travel between neighboring states for work, to visit family, and to vacation under non-pandemic circumstances. On April 13, Governor Wolf joined six other governors (NY, NJ, CT, RI, DE, MA) in a council to plan how states can work together to safely reopen and begin the process of recovery.

On April 15, the Secretary of Health issued an Order requiring safety measures in all businesses permitted to maintain in-person, physical operations except for health care providers. These measures included standards for cleaning and disinfecting high-touch areas, establishing protocols for businesses exposed to a probable or confirmed case of COVID-19, limiting the numbers of employees and customers on the premises, ensuring that employees have access to soap, sanitizer, and face masks, and that patrons wear face masks.

On April 17, Pennsylvania was the first state to have a Memorandum of Understanding (MOU) accepted by FEMA for purchasing and distributing food through established Food Banks in the commonwealth.

Also, on April 17, Governor Wolf outlined the standards the administration will use for reopening and on April 20, Governor Wolf announced a target date of May 8 for the beginning of phased reopening and easing of restrictions.

Standards

- Our approach will be data driven and reliant upon quantifiable criteria to drive a targeted, evidence-based, regional approach to reopenings in Pennsylvania.
- We will put forth guidance and recommendations for employers, individuals, and health care facilities and providers for assured accountability as we reopen.
- Reopening necessitates that adequate personal protective equipment and diagnostic testing are available.
- Reopening requires a monitoring and surveillance program that allows the commonwealth to deploy swift actions for containment or mitigation.
- Protections for vulnerable populations must remain steadfast throughout the reopening process, such as limitations on visitors to congregate care facilities and prisons.
- Limitations on large gatherings unrelated to occupations should remain in place for the duration of the reopening process.

Our approach will be data driven and reliant upon quantifiable criteria to drive a targeted, evidence-based, regional approach to reopenings in Pennsylvania.

To make decisions about what regions to reopen, and on what timeline, the commonwealth has partnered with Carnegie Mellon University and other institutions of higher education, to develop a data dashboard which will help inform decisions. This dashboard, as well as demographic and health criteria described further below, such as population density, and mobility, availability of testing, and health care resources will inform formal recommendations made jointly by the Secretary of Health, the PEMA Director, and the Secretary of the Department of Community and Economic Development to the Governor regarding when a region may safely move from one phase of reopening to the next. In preparing recommendations, the Secretaries and PEMA Director will meet to review the data sources described more fully below, balance risks to public health, and benefits to the economy, and agree unanimously as to the phase in which each region will safely be categorized.

First, PA DOH in coordination with PEMA, other commonwealth agencies, and stakeholders in the areas of public health, economics, and emergency management has developed criteria that will help guide decisions about reopenings and the easing of restrictions.

A target goal for reopening has been set at having fewer than 50 new confirmed cases per 100,000 population reported to the department in the previous 14 days. So, for example, an area with a population of 800,000 people would need to have fewer than 400 new

confirmed cases reported in the past 14 days to meet the target. An assessment will determine if the target goal has been met. The administration will work closely with county and local governments to enable the communities to reopen and transition back to work.

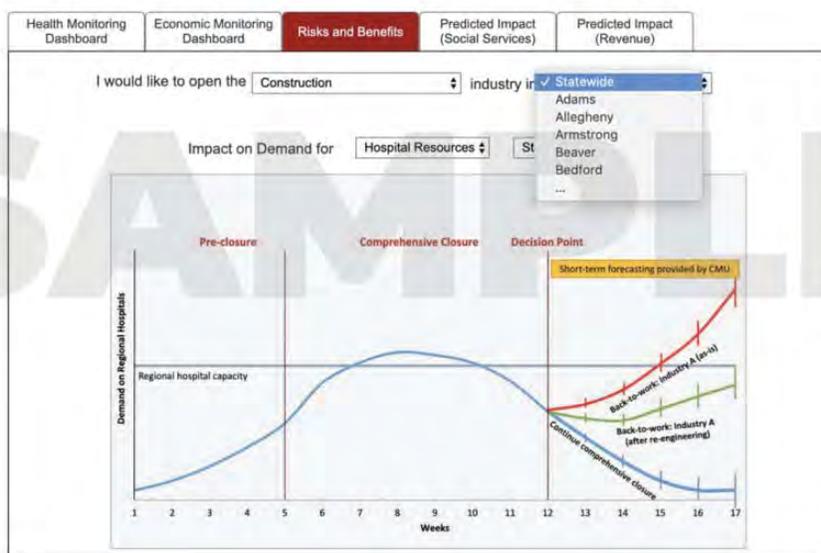
The target data goal is not the only metric to be met before reopening a region. Additionally, the commonwealth must ensure there is:

- Enough testing available for individuals with symptoms and target populations such as those at high risk, health care personnel, and first responders.
- Robust case investigation and contact tracing infrastructure is in place to facilitate early identification of cluster outbreaks and to issue proper isolation and quarantine orders.
- Identification of area's high-risk settings including correctional institutions, personal care homes, skilled nursing facilities, and other congregate care settings, and assurance that facilities have adequate safeguards in place such as staff training, employee screening, visitor procedures and screening, and adequate supplies of PPE to support continued operations.



Carnegie Mellon University

Decision Support Tool to Support Safely Re-Engaging the Economy



Second, the commonwealth will use a modeling dashboard under development and evaluation by Carnegie Mellon University to take a regional and sector-based approach to reopenings, the easing of restrictions, and response.

The administration will use this data-driven decision support tool to better understand the current health and economic status, as well as the inherent risks and benefits to reopening certain businesses and industry areas. Using data that considers worker exposure and

spread risks, health care capacity, economic impact, and supply chain impact, we will prioritize reopening where it has the potential for the most positive impact on the economy for workers and businesses while mitigating risk to public health and safety.

In order to arrive at results through this dashboard, the Commonwealth of Pennsylvania is providing access to data from several commonwealth agencies including the Departments of Labor & Industry, Human Services, Community and Economic Development, Revenue, and Health.

The dashboard will help with questions such as: What will be the likely public health and economic implications associated with opening an industry? What impact might reopening have on vulnerable workers and businesses? The data from the dashboard will also provide insights and recommendations at the industry and county level to inform state policy decisions.

The analysis will link data sources together to build an understanding of the current and real time state of Pennsylvania's economy and the impact of the spread of COVID-19. The model will help to predict and understand what types of individuals, businesses, and industries will be more at risk, most vulnerable, and impacted by COVID-19. The model will apply what-if scenarios that will allow the state to understand the impact of potential re-opening decisions. The analysis will allow the commonwealth to monitor changes over time and the impact of decisions. The purpose is not to make decisions but rather to inform decision makers. For example, all indicators could point to opening a specific county, but other factors such as population density around a hotspot, availability of supplies to ensure workers are protected, either PA DOH criteria or proximity to a hotspot in another county could make the county unfit to open.

Regions

Just as the administration took a measured, county-by-county approach to the Stay at Home order before expanding the order statewide, it will do the same to ease restrictions and reopen the state.

As regions meet the measures described earlier, the commonwealth will ease restrictions with the goal of broad reopenings as soon and as safely as possible. Certain regions have seen less case density than others. In these regions, it is important to account for hospital capacity as reopenings and the easing of restrictions begin. This information is part of the data and modeling project. For example, in the north central region there is less population density and fewer cases, but there is less hospital capacity if cases and hospitalizations were to surge. These factors will be considered on an ongoing basis and employers will be responsible for developing and demonstrating compliance with criteria in consultation with PA DOH and other relevant state agencies. At any point, the Governor, in consultation with PA DOH and PEMA may revise reopening standards to adjust for the spread of disease.

Bureau of Community Health Systems



Industries

The reopening and the easing of restriction approach will primarily focus on regions, however certain industries are more susceptible to the spread of COVID-19. Other industries are more vulnerable to changing economic conditions. These factors are also part of the data and modeling project and will be closely considered as part of the reopening and the easing of restriction process. The first or “Yellow” phase of reopening will focus on businesses with low and moderate risk profiles, including those with low worker density, those that take place in outdoor settings, and those that can successfully implement the Governor and Secretary of Health’s Worker Safety and Building Safety Orders, while encouraging those who can telework to continue to do so (see later section on “Phases”). When reopened, these businesses will have to adhere to strict guidelines for density and procedures. The administration will work with stakeholders in various industry sectors, as well as labor representatives and health professionals to craft guidance with tailored and appropriate safeguards in place.

We will put forth guidance and recommendations for employers, individuals, and health care facilities and providers for assured accountability as we reopen.

Since the beginning of the pandemic, the Wolf Administration has provided general safety guidance for businesses, organizations, and individuals. As the administration begins the reopening and the easing of restriction process, this guidance will be refined and strengthened so businesses and organizations can continue to prioritize public health and safety while attracting new business and getting the economy back on track.

All Pennsylvanians should continue to maintain social distancing even as the reopening and easing of restriction process begins. With few exceptions, Pennsylvanians should maintain a distance of six feet from each other, gatherings of more than 25 people will be prohibited, and non-essential travel should be avoided. In addition, individuals should engage in frequent hand washing and sanitizing, and surfaces should be disinfected as often as possible.

For employers, remote or telework should be the primary option if possible. Employers should expand technology where possible to provide remote or telework options. If remote or telework are not possible, employers must follow the guidance developed by the commonwealth in order to reduce the risk of coronavirus spread and to ensure workers are kept safe.

Guidance

Working across agencies, the commonwealth will provide broad guidance for businesses and individuals that will enable employers to use their own expertise to decide what is best for their business while reporting on outcomes to the commonwealth. This guidance will re-emphasize and build on existing orders previously issued to protect employees and customers, specifically the building safety and workers' safety orders. The guidance will formalize and build on CDC recommendations and other best practices in states across the country.

Communicating COVID-19 Safety Procedures to Employees and Customers

Organizations will be required to make employees and customers aware of the guidance provided by the commonwealth to keep people at their establishment safe. Similar to Workers' Compensation or OSHA regulations, the commonwealth will require commonwealth-created "COVID-19 Safety Procedures for Businesses" flyer to be clearly displayed at workplaces, along with publicly posted acknowledgement by the employer that the guidance is being followed. There is also a requirement to name a "Pandemic Safety Officer" who would be in charge of carrying out the COVID-19 safety procedures set forth in this guidance.

The business reopening guidance will provide more information about expectations for communicating safety procedures to employees and customers.

Supplier Directory

The administration recognizes the difficulty of procuring materials businesses need to safely resume operations. In order to address this concern, the Department of Community and Economic Development created a supplier directory for protective materials.

To [view the supplier directory](#).

Reopening necessitates that adequate personal protective equipment and diagnostic testing are available.

Personal Protective Materials and Hospital Stockpiles

Ensuring adequate supplies of Personal Protective Equipment (PPE) and other supplies needed to conduct diagnostic testing, care for COVID-19 patients, and support other normal health care functions is critical to resuming normal operations. The global nature of the COVID-19 pandemic has adversely impacted the normal supply chain for these materials as the demand has significantly outpaced the ability to produce or acquire the PPE and supplies needed. Since early March the Wolf Administration has worked tirelessly to procure and distribute PPE and other supplies to hospital systems, long-term care facilities, first responders and emergency management agencies throughout the commonwealth to respond to the COVID-19 crisis

As of April 22, the Wolf Administration has distributed 3 million N95 masks, approximately 231,000 gowns, approximately 1.36 million procedure masks, more than 1.32 million gloves, more than 68,000 face shields, and more than 5,300 coveralls to more than 900 unique places.

The Wolf Administration continues to monitor PPE and stockpile levels at our health systems, and takes that information into consideration as it makes decisions.

Diagnostic Testing

As of April 21, 2020, over 163,000 Pennsylvanians have been tested for COVID-19 at 67 unique testing sites, including our own State Public Health laboratory and two county public health labs. Over 700 tests a day can be done at the PA DOH State Public Health laboratory and PA DOH has deployed 14 rapid testing machines to vulnerable congregate settings including correctional facilities and health care and state hospitals. Additionally, during the course of the pandemic, the Wolf Administration supported the establishment of three community-based testing sites which were located in Montgomery, Philadelphia, and Luzerne counties. The Luzerne County site is currently open and can test up to 250 people per day.

As the administration takes steps toward reopenings and the easing of restrictions, diagnostic testing capacity will be a critical factor in early identification of new infections or cluster outbreaks, changes in the spread of the virus, the extent of virus spread throughout the commonwealth, and whether healthy individuals who were previously exposed to the virus have developed immunity.

The commonwealth's testing plan consist of a multilayered approach comprised of the following components:

1. Community based testing available through:
 - a. Existing health care institutions;
 - b. State managed, locally executed community based or mass testing sites; and,
 - c. Corporate managed and supported testing sites such as those available through commercial pharmacies and other providers.
2. Point of Care (POC) testing available through:
 - a. Primary Care Physicians (PCP);
 - b. Hospital Emergency Departments, urgent care, or other acute care centers;
 - c. County health departments;
 - d. Institutions with congregate care settings that have their own health care capability; and,
 - e. Outbreak response teams responding to congregate care settings to identify spread of virus within institutions.
3. Serology testing as it becomes commercially available to determine the extent of the population that may have been exposed to COVID-19 and have developed antibodies to the virus and potentially have immunity.

The testing strategy also includes a plan to test underserved populations and those that have limited availability of transportation by employing a mobile community-based testing strategy as applicable.

[More information about current coronavirus testing in the commonwealth can be found here.](#)

Reopening requires a monitoring and surveillance program that allows the commonwealth to deploy swift actions for containment or mitigation.

The administration will use the data and modeling tools available as well as other indicators to determine if changes in the reopening and the easing of restriction process must take place.

Robust surveillance, case investigation, contact tracing, and isolation of positive cases or quarantine of close contacts can slow and stop the transmission of COVID-19. Pennsylvania's public health infrastructure of epidemiologists, community health nurses, and county and municipal health departments are the backbone of this work. These public health professionals are supported by surveillance and case management technology tools to track, manage, and evaluate efforts.

To scale our surveillance and monitoring infrastructure the commonwealth has:

- Partnered with Department of Human Service's eHealth Authority and the regional Health Information Exchange to monitor rate of emergency department visits and inpatient admissions.
- Established alerts from EpiCenter, Pennsylvania's syndromic surveillance system, for early identification of an increase in disease activity.
- Provided county-level and zip code level data through a public facing dashboard.
- Daily detailed analysis of surveillance data related to cases and test results, analysis of geospatial clusters of cases.
- Twice weekly reconciliation with surveillance data and electronic death data to provide more accurate counting of deaths related to COVID-19.
- Improving access to testing and timeliness for reporting for symptomatic close contacts in regions where this containment strategy is being implemented.

As counties return to work the department will use these tools and the complete case investigation and contact tracing plan of positive cases to stamp out disease transmission. Positive cases will be isolated, and their close contacts counseled and quarantined. The department will continue to conduct investigations of outbreaks at businesses, correctional facilities, and long-term or other congregate care facilities. This work will be done in partnership with local health departments and other health care infrastructure in the region. Existing public health systems and new technology tools will be utilized to support these boots on the ground efforts.

Protections for vulnerable populations must remain steadfast throughout the reopening process, such as limitations on visitors to congregate care facilities and prisons.

Pennsylvanians in congregate care and prisons are especially vulnerable to outbreaks. Until the pandemic is controlled, the commonwealth must continue measures designed to protect outbreaks in facilities like nursing homes, long-term care facilities, residential treatment facilities, and prisons. As the commonwealth reopens and eases restrictions on a regional basis, restrictions on visitors in congregate care settings and prisons will remain in place. These restrictions will be among the last restrictions eased to ensure resident health and safety. We are committed to alternative means of communication for residents with their family, friends, community members, and advocates while we take necessary health and safety precautions.

While the administration has needed to take unprecedented action in limiting visitation for vulnerable populations in congregate care settings, we are doing all we can to create new opportunities for social connectedness. For example, the Department of Aging through its Office of the Long-Term Care Ombudsman has developed a strategic partnership with the AARP to re-establish lines of communication with nursing home residents in targeted

facilities throughout the commonwealth. As this disaster emergency continues over the next weeks and months, this critical technology, when strategically placed, will help meet the psychosocial needs of these already vulnerable individuals.

Congregate Care Facilities

On March 16, the Department of Human Services closed LIFE day centers to avoid congregate settings and to practice social distancing. The closure applies to the day center portion only. LIFE Provider Organizations should continue to use discretion when utilizing the clinic and therapy areas to see participants. [FAQs are provided here.](#)

On March 18, PA DOH issued guidance for nursing facilities on COVID-19 mitigation. This guidance required visitor limitations, personnel restrictions, and other measures to reduce the spread of COVID-19 in nursing facilities. [This guidance will continue.](#)

On March 29, the Department of Human Services issued guidance restricting all visitations in Personal Care Homes and Assisted Living Residences except for medically necessary visits and compassionate care situations, such as end-of-life situations. [This guidance will continue.](#)

On March 31, the Department of Human Services issued guidance for residential providers under the Office of Mental Health and Substance Abuse Services including Long-Term Structured Residences, Community Residential Rehabilitation Services, Residential Treatment Facilities, and Crisis Residences recommending all providers develop temporary modifications to their visitation policies that prohibit all non-employee visitors unless it is a medical necessity, required by court order, adult protective services or older adult protective services staff as outlined in guidance issued under applicable protective services laws. At the discretion of the facility director, additional exceptions may be made where a visit is deemed to be necessary. [This guidance will continue.](#)

On April 4, the Department of Human Services temporarily suspended all transfers to state-run juvenile justice facilities. This step was taken to allow staff to create two ten-bed intake units to mitigate risk of spread at the state-run facilities. Youth awaiting transfer to the state-run juvenile justice system will be admitted to the intake unit on the same day and remain in the unit for 14 days until they are cleared for entry into their designated program. If any youth test positive for COVID-19 during this 14-day period, they will be moved into isolation and the youth who are in the intake unit will restart their 14 days in the unit to make sure that they do not develop symptoms of COVID-19. Youth in the intake unit will have access to a counselor, psychological and medical services, physical activity, and other individualized recreational activities. Social distancing will be enforced, and youth will be able to maintain contact with their family through phone calls, video conferencing, and letters. The previously issued [guidance will continue.](#)

On April 7, the Department of Human Services issued procedures that must be followed for admission of an individual to one of the department's state facilities. Requirements include individuals be screened for COVID-19 prior to admission to state operated psychiatric hospitals, the long-term care facility (South Mountain Restoration Center), state centers, and Youth Development Centers or Youth Forestry Camps. Any individual who meets screening criteria for indication of infection but does not have documentation of a negative test result for COVID-19, may not be admitted. A medical clearance attestation from a physician within 72 hours prior to the requested admission date is acceptable for admission if the individual was screened with a negative result. If there was a positive screening, regardless of a COVID-19 test result, the individual must not be admitted until 7 days have passed since symptom onset, and 3 days (72 hours) after the resolution of fever without fever reducing medicines and improvement of other symptoms. If an individual has had a close contact with someone suspected to have, or diagnosed with, COVID-19, the individual should quarantine for 14 days from the last admission to a facility should not occur until after the 14-day quarantine is complete. This guidance will continue.

State Correction Institutions

On March 12, the DOC started their mitigation efforts by screening all staff across the state and canceled in person visitation before statewide mitigation was ordered. On March 28, the DOC shifted all new inmate intakes to one centralized location at SCI Retreat to allow for a period of quarantine before assigning their home institution.

At 10 p.m. on March 29, the DOC began a statewide inmate quarantine in response to the COVID-19 pandemic.

Since the quarantine began, inmates have been fed in their cells, and afforded out-of-cell time only for video visits, phone calls, access to the law library, as well as in-cell programming. All inmate movement is controlled to conform to social distancing recommendations. This guidance will continue.

To expand inmate interaction with their loved ones, video visits are being held seven days a week. To date, DOC has conducted almost 16,000 video visits with more scheduled every day. This number will continue to increase due to daily scheduling happening at state prisons. In addition, DOC officials have begun reducing the population where they can. Steps taken include:

- Furloughing paroled individuals from centers to home plans;
- Working with the parole board to maximize parole releases; and,
- Reviewing parole detainers for individuals in county jails and state prisons.

On April 10th, the governor issued reprieves for inmates who met criteria for the Temporary Program to Repeive Sentences of Incarceration.

[Learn more about the comprehensive mitigation efforts in state correction institutions.](#)

Limitations on large gatherings unrelated to occupations should remain in place for the duration of the reopening process.

At this time, the commonwealth continues to follow federal guidance on restrictions on large gatherings. The CDC continues to recommend against larger gatherings of people, particularly gatherings where vulnerable populations may be present. This guidance will stay in place for the duration of the reopening process until there is robust testing, community-wide surveillance, contact tracing, or other means to mitigate the spread of the virus.

Support Systems

As reopenings and easing of restrictions begin, we need to provide adequate support systems for workers. That includes reopening of programs that support individuals' ability to return to work such as schools, child care facilities, adult day facilities, summer camps and afterschool programs, community recreational facilities, and more.

Child Care

The COVID-19 related school closure has created a gap in child care that may not have existed just a few months ago. We know this gap may potentially be a barrier for many Pennsylvanians preparing to transition back to work outside of the home. To address this barrier, the Departments of Education and Human Services are working with stakeholders to identify child care and school age care needs across the commonwealth. A primary focus will be exploring and creating options that will work best for families within their community. We will also look to our many partners to help us design a realistic plan that not only re-opens and expands these services if necessary, but also creates a restored sense of confidence in these environments as safe and healthy options when caregivers return to work.

K-12 Schools

On April 9, Governor Wolf and the Pennsylvania Department of Education announced that school buildings would be closed for the remainder of the 2019-2020 academic year. The Department of Education worked with Intermediate Units (IUs) and the Pennsylvania Training and Technical Assistance Network (PATTAN) to develop guidance and evidence-based resources around continuity of education to ensure all schools provide continuity of education for all students in the most accessible and appropriate ways possible. Working with the General Assembly, the Governor signed Act 13 of 2020 to waive the School Code

requirement for a minimum 180-day school term, an action that builds on the administration's earlier commitment that no district or school would be penalized for falling short of the 180-day school term requirement.

In addition, Pennsylvania sought and received approvals from the federal government to allow schools the option to distribute meals to children age 18 and under at no cost while schools are closed. Although not required, participating schools are strongly encouraged to continue distributing and/or delivering school meals during breaks.

Higher Education

On April 9, the Governor and the Pennsylvania Department of Education announced that all postsecondary institutions in Pennsylvania must suspend in-person instruction at least through the end of the spring 2020 term. Postsecondary institutions may not resume in-person instruction until the governor permits them to open or lifts the closure of non-life-sustaining businesses.

Government Services

Local Government

Since the beginning of the COVID-19 outbreak, the Governor's Office has been in close collaboration with local leadership at the county and municipal level. Early on, the Governor's Office consulted with and informed county commissioners and municipal leadership about starting mitigation efforts in their jurisdictions. The Governor's Office shared public health concerns and information and took local feedback into account when making decisions around mitigation. This collaboration led to a strong, coordinated effort to prevent the spread of COVID-19 across the commonwealth.

As we look to reopen regions of the commonwealth, the Governor's Office will be undertaking that same coordinated approach to relaxing the governor's mitigation efforts. Local feedback, knowledge, and expertise will be critical as we move through all phases of reopening. The Governor's Office will continue to coordinate with local officials directly, when appropriate, and through their statewide representative organizations.

In the 10 jurisdictions with local county or municipal health departments, PA DOH will continue to coordinate closely with local health officials to ensure that there is a shared understanding of the public health rationale behind reopening decisions. In the remaining areas without countywide health departments, PA DOH will continue to discuss public health realities directly with county commissioners.

The shared goal of the state and local governments is, and should continue to be, a united front in which all levels of government are prepared to lead the citizens of Pennsylvania through this pandemic and to a safe, efficient, and effective reopening.

State Government

The COVID-19 global pandemic has created an unprecedented situation within our workforce. The Commonwealth is not excluded from this as it is the second-largest employer in the state. Throughout the COVID-19 crisis, state workers have continued to provide essential services to ensure public safety and the public health of all Pennsylvanians, specifically our most vulnerable populations. Roughly 43,000 employees continue to report onsite daily to perform vital work while roughly 18,000 employees remain teleworking in a full-time capacity.

As the state looks to reopen, it will do so in a phased approach in consultation with PA DOH. Bringing back our workforce and reopening public-facing offices at the appropriate time will be done through cooperation with state agencies, employees, and our unions. The staff that is already teleworking will be encouraged to do so where appropriate. Social distancing and facility cleaning measures will be in place to protect both staff and customers. Staff working onsite will be required to wear a mask.

Phases

As we progress through the process of reopening and the easing of restrictions, we will work in phases, taking a regional approach, with the expectation that this will not necessarily be a linear process. If indicators and criteria point to a spike in cases, the commonwealth, in coordination with local officials, will need to revert to previous restrictions and orders. Throughout all phases, there must be strict guidance in place to encourage social distancing.

Throughout this process, the commonwealth will remain flexible and respond to the conditions on the ground in specific areas. The commonwealth will work with local governments to help inform and make decisions that are best for their communities.

The phases were developed through the commonwealth's six standards for reopening as well as the federal government's [Opening Up America Guidelines](#). The phases are intentionally expansive to allow for flexibility and decisions will be driven by health indicators as well as the Carnegie Mellon University data tool and metrics from the Department of Health to determine safety for regions and industries taking into account economic vulnerability. *Within each of these phases there could be additional actions, orders, or guidance depending on the public health and economic conditions facing regions or counties.*

Red Phase

Work & Congregate Setting Restrictions

- Life Sustaining Businesses Only
 - Congregate Care and Prison Restrictions in Place
 - Schools (for in-person instruction) and Most Child Care Facilities Closed
-

Social Restrictions

- Stay at Home Orders in Place
 - Large Gatherings Prohibited
 - Restaurants and Bars Limited to Carry-Out and Delivery Only
 - Only Travel for Life-Sustaining Purposes Encouraged
-
- Reiterate and reinforce safety guidance for businesses, workers, individuals, facilities, update if necessary
 - Monitor public health indicators, adjust orders and restrictions as necessary
-

Yellow Phase

Work & Congregate Setting Restrictions

- Telework Must Continue Where Feasible
 - Businesses with In-Person Operations Must Follow Business and Building Safety Orders
 - Child Care Open Complying with Guidance
 - Congregate Care and Prison Restrictions in Place
 - Schools Remain Closed for In-Person Instruction
-

Social Restrictions

-
- Stay at Home Order Lifted for Aggressive Mitigation
 - Large Gatherings of More Than 25 Prohibited
 - In-Person Retail Allowable, Curbside and Delivery Preferable
 - Indoor Recreation, Health and Wellness Facilities and Personal Care Services (such as gyms, spas, hair salons, nail salons and other entities that provide massage therapy), and all Entertainment (such as casinos, theaters) Remain Closed
 - Restaurants and Bars Limited to Carry-Out and Delivery Only

- All businesses must follow CDC and DOH guidance for social distancing and cleaning
- Monitor public health indicators, adjust orders and restrictions as necessary

Green Phase

Work & Congregate Setting Restrictions

All Businesses Must Follow CDC and PA Department of Health Guidelines

Social Restrictions

- Aggressive Mitigation Lifted
- All Individuals Must Follow CDC and PA Department of Health Guidelines

Monitor public health indicators, adjust orders and restrictions as necessary

EXHIBIT J

Coronavirus Live Updates: Daily Death Toll Will Nearly Double by June, Trump Administration Models Predict

[nytimes.com/2020/05/04/us/coronavirus-updates.html](https://www.nytimes.com/2020/05/04/us/coronavirus-updates.html)

May 4,
2020

Image



Guests are seated at a restaurant in San Antonio amid the first day of a rollback of shelter in place mandates on Friday. Credit... Christopher Lee for The New York Times

The Trump administration projects about 3,000 daily deaths by early June.

As President Trump presses for states to reopen their economies, his administration is privately projecting a steady rise in the number of coronavirus cases and deaths over the next several weeks. The daily death toll will reach about 3,000 on June 1, according to an internal document obtained by The New York Times, nearly double the current number of about 1,750.

The projections, based on government modeling pulled together in chart form by the Federal Emergency Management Agency, forecast about 200,000 new cases each day by the end of the month, up from about 25,000 cases now.

The numbers underscore a sobering reality: While the United States has been hunkered down for the past seven weeks, significant risks remain. And the reopening to the economy will make matters worse.

“There remains a large number of counties whose burden continues to grow,” the Centers for Disease Control warned.

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The projections confirm the primary fear of public health experts: that a reopening of the economy will put the nation back where it was in mid-March, when cases were rising so rapidly in some parts of the country that patients were dying on gurneys in hospital hallways as the health care system was overloaded.

DOCUMENTS

See the [internal report](#).

“While mitigation didn’t fail, I think it’s fair to say that it didn’t work as well as we expected,” Scott Gottlieb, Mr. Trump’s former commissioner of food and drugs, said Sunday on the CBS program [Face the Nation](#). “We expected that we would start seeing more significant declines in new cases and deaths around the nation at this point. And we’re just not seeing that.”

On Sunday, Mr. Trump said deaths in the United States could reach 100,000, twice as many as he had forecast just two weeks ago. But his new estimate still underestimates what his own administration is now predicting to be the total death toll by the end of May — much less in the months that follow. It follows a pattern for Mr. Trump, who has frequently understated the impact of the disease.

“We’re going to lose anywhere from 75, 80 to 100,000 people,” he said in a virtual town hall on Fox News. “That’s a horrible thing. We shouldn’t lose one person over this.”

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The White House responded that the new projections had not been vetted.

“This is not a White House document nor has it been presented to the Coronavirus Task Force or gone through interagency vetting,” said Judd Deere, a White House spokesman. “This data is not reflective of any of the modeling done by the task force or data that the task force has analyzed.”

“The president’s phased guidelines to open up America again are a scientific driven approach that the top health and infectious disease experts in the federal government agreed with,” he said.

Mr. Gottlieb said Americans “may be facing the prospect that 20,000, 30,000 new cases a day diagnosed becomes the new normal.”

Some states that have partially reopened are still seeing an increase in cases, including Iowa, Minnesota, Tennessee and Texas, according to Times data. Indiana, Kansas and Nebraska also are seeing an increase in cases and reopened some businesses on Monday. Alaska has also reopened and is seeing a small number of increasing cases.

While the country has stabilized, it has not really improved, as shown by data collected by The Times. Case and death numbers remain stuck on a numbing, tragic plateau that is tilting only slightly downward.

At least 1,000 people with the virus, and sometimes more than 2,000, have died every day for the last month. On a near-daily basis, at least 25,000 new cases of the virus are being identified across the country. And even as New York City, New Orleans and Detroit have shown improvement, other urban centers, including Chicago and Los Angeles, are reporting steady growth in cases.

The situation has devolved most dramatically in parts of rural America that were largely spared in the early stages of the pandemic. As food processing facilities and prisons have emerged as some of the country’s largest case clusters, the counties that include Logansport, Ind., South Sioux City, Neb., and Marion, Ohio, have surpassed New York City in cases per capita.

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The Supreme Court heard the first arguments via phone.

Chief Justice John G. Roberts Jr. played traffic cop. Justice Clarence Thomas asked his first questions in more than a year. Justice Sonia Sotomayor disappeared for a few moments, apparently having failed to unmute her phone.

On the whole, the Supreme Court’s first argument held by telephone went smoothly, with the justices asking short bursts of quick questions, one by one, in order of seniority, as the world, also for the first time, listened in.

The argument Monday morning began with the traditional chant. “Oyez! Oyez! Oyez!” said Pamela Talkin, the marshal of the court. But that was almost the only traditional thing about it.

Chief Justice Roberts asked the first questions and then called on his colleagues. When lawyers gave extended answers, he cut them off and asked the next justice to ask questions.

The question before the court was whether an online hotel reservation company, Booking.com, may trademark its name. Generic terms cannot be trademarked, and all concerned agreed that “booking,” standing alone, is generic. The question for the justices was whether the addition of “.com” changed the analysis.

The court will hear 10 cases by phone over the next two weeks, including three on May 12 about subpoenas from prosecutors and Congress seeking President Trump’s financial records, which could yield a politically explosive decision this summer as the presidential campaign enters high gear.

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The justices may not return to the bench in October if the virus is still a threat, as several of them are in the demographic group thought to be most at risk. Justice Ruth Bader Ginsburg is 87, and Justice Stephen G. Breyer is 81. Four additional members of the court — Chief Justice Roberts and Justices Thomas, Samuel A. Alito Jr. and Sonia Sotomayor — are 65 or older.

While the Supreme Court went remote, the top House Republicans pushed back on Monday against efforts by Democratic leaders to move the chamber toward remote legislating and teleworking amid the pandemic.

With the House in an extended recess on the advice of Congress’s top doctor, Representative Kevin McCarthy, Republican of California and minority leader, and two of his deputies, urged caution on adopting new rules being proposed by Democrats to allow House members to vote by proxy from outside of Washington and committees to meet virtually.

The Senate, after weeks of sporadic meetings and curtailed operations, returned at 3 p.m. on Monday for the first time in a month to restart the process of confirming federal judges and Trump administration nominees, with new social distancing and other health precautions in place.

Carnival, which was criticized after outbreaks at sea, plans to restart cruises in August.

The cruise giant Carnival Corporation said on Monday that it planned to reopen cruising on eight of its ships before the end of the summer.

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While it has canceled service on some of its cruise lines through September, Carnival said it would offer cruises from ports in Miami, Galveston and Port Canaveral, Fla., on Aug. 1. Carnival has more than 100 ships across its various brands.

Carnival, the world's largest cruise line, has been at the center of the coronavirus pandemic since the beginning, widely blamed for a series of major outbreaks that spread the disease across the world. Last week, Congress began investigating the company's handling of the virus, asking it to turn over internal communications related to the pandemic.

It is unclear how the outbreak will look in August. The day the company announced its plans to restart some cruises, some federal agencies were privately projecting a steady rise in cases and deaths over the next several weeks, reaching about 3,000 daily deaths on June 1.

In its statement on Monday, Carnival said that all North American cruises set to depart between June 27 and July 31 would be canceled.

"We will use this additional time to continue to engage experts, government officials and stakeholders on additional protocols and procedures to protect the health and safety of our guests, crew and the communities we serve," the company said.

As daily deaths fall in New York, Cuomo outlines criteria for reopening.

Cuomo Describes Framework for Reopening Businesses

Gov. Andrew M. Cuomo of New York provided details about which businesses will open first.

You open businesses first that are most essential, and pose the lowest risk, OK — most essential and the lowest risk. Phase 1, we're talking about construction, manufacturing and select retail with curbside pickup. They are the most essential with the lowest risk. Second phase: professional services, retail, administrative support, real estate. Third phase: restaurant, food services, accommodation. Fourth: arts, entertainment, recreation, education. Remember, density is not your friend here. Large gatherings are not your friend. That's where the virus tends to spread. That's why those situations would be down at the end. And then we need businesses to also reimagine how they're going to do business, and get ready to protect their workforce, to change their physical environment to the extent they need to and to change their processes to make sure people can socially distance, people remain at a safe — in a safe environment. And that's going to be up to businesses to come up with ways to reconfigure their workplace and their processes.

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1:31

1:31 Cuomo Describes Framework for Reopening Businesses

Gov. Andrew M. Cuomo of New York provided details about which businesses will open first. CreditCredit...Victor J. Blue for The New York Times

Gov. Andrew M. Cuomo of New York listed seven requirements that each of the state's 10 regions would need to meet before restrictions meant to slow the virus's spread could be eased:

A 14-day decline in hospitalizations, or fewer than 15 hospitalizations a day.

A 14-day decline in virus-related hospital deaths, or under five a day.

A rate of new hospitalizations below 2 per 100,000 residents per day.

A hospital-bed vacancy rate of at least 30 percent.

- At least 30 percent of I.C.U. beds available.
- At least 30 virus tests per 1,000 residents per month.

At least 30 contract tracers per 100,000 residents.

He said that some parts of the state would probably meet those thresholds a lot sooner than others. Some areas, including central New York and the sparsely populated North Country section of the state, are already meeting five of the seven requirements, he said.

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New York City is meeting only three: Hospital deaths and new hospitalizations are declining steadily, and the city is conducting the appropriate number of tests each month.

The governor reported 226 more deaths in the state — the lowest one-day figure since March 28 and down more than 70 percent from early April, when nearly 800 people per day were dying of the virus. The number of hospitalized patients with the virus and the number of new admissions to hospitals also continued to fall, though much more gradually than they had increased.

In New Jersey, all public and private schools will remain closed for the rest of the academic year, Gov. Philip D. Murphy announced on Twitter on Monday, a week after saying there was “a chance” they would reopen. His decision followed similar steps by [New York](#) and [Pennsylvania](#).

The F.D.A. says companies selling antibody tests must prove accuracy within 10 days.

The Food and Drug Administration announced on Monday that companies selling coronavirus antibody tests [must submit data proving accuracy](#) within the next 10 days or face removal from the market.

The antibody tests are an effort to detect whether a person had been infected with the virus, but results have been widely varied and little is known about whether those who became ill will develop immunity and, if so, for how long.

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Since mid-March, the agency has permitted dozens of manufacturers to sell the tests without providing evidence that they are accurate — and many are wildly off the mark.

The F.D.A.’s action follows [a report](#) by more than 50 scientists, which found that only three out of 14 antibody tests gave consistently reliable results, and even the best had flaws. An evaluation by the National Institutes of Health has also found “a concerning number” of commercial tests that are performing poorly, the agency said.

Around the globe, government and health officials have hoped that antibody tests would be a critical tool to help determine when it would be safe to lift stay-at-home restrictions and reopen businesses. The highly infectious Covid-19 disease has now killed nearly 70,000 people and sickened more than 1.1 million in the United States alone.

While 11 companies have been given F.D.A. clearance to sell the antibody tests, many other products do not have agency authorization. The result has been a confusing landscape in which tests by established companies such as Abbott Laboratories, Cellex and most recently, Roche Diagnostics, are competing with unapproved tests made by unknown companies and sold by U.S. distributors with spotty track records.

In a statement on Monday, Dr. Anand Shah, the F.D.A. deputy commissioner for medical and scientific affairs, and Dr. Jeffrey Shuren, director of the Center for Devices and Radiological Health, defended the agency's initial policy saying the tests were never intended to be used as the sole basis for determining whether anyone had been infected.

Sign up to receive an email when we publish a new story about the coronavirus outbreak. "We unfortunately see unscrupulous actors marketing fraudulent test kits and using the pandemic as an opportunity to take advantage of Americans' anxiety," they said in the statement. "Some test developers have falsely claimed their serology tests are F.D.A. approved or authorized. Others have false claimed that their tests can diagnose Covid-19 or that they are for at-home testing."

Dr. Shah and Dr. Shuren also pointed to the N.I.H. evaluation that showed a number of tests producing faulty results. The F.D.A. declined to provide details on the number of tests that were studied, or how many did not work. They also said that the F.D.A. is reviewing more than 200 antibody tests to determine whether they work well enough to get the agency's go-ahead.

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Intelligence officials back Trump's assertion that they downplayed the virus threat in January.

The intelligence agencies sought on Monday to back President Trump's assertions that he was given only minimal warnings about the threat of the coronavirus early in the year, singling out their own lapses without noting that around the same time, scientists, public health officials and national security officials were sounding alarms.

Mr. Trump was first briefed by intelligence agencies about the novel coronavirus on Jan. 23, said Susan Miller, the spokeswoman for the Office of the Director of National Intelligence. But she acknowledged that the initial briefing downplayed its threat. Mr. Trump was "told that the good news was the virus did not appear that deadly," Ms. Miller said. As the world has painfully learned, that assessment was wrong.

Ms. Miller's statement came after weeks of Mr. Trump and administration officials railing at what they have called inaccurate accounts in the news media that intelligence agencies put multiple warnings about the virus in the president's daily intelligence briefing. On Sunday, Mr. Trump said the intelligence agencies in January had told him the virus was "not a big deal."

Though information about the virus in late January was imperfect, the warnings from other officials were stark enough to prompt the Trump administration to decide by the end of January to restrict travel from China.

Some intelligence officials have said that the pandemic's spread has never been fundamentally an intelligence issue and that the warnings of scientists have always been far more important. When the warnings that intelligence agencies did give to officials were combined with what public health and bio-defense officials were learning, a clearer picture of a global threat emerged early.

By focusing on what Mr. Trump was told in January, administration officials are also able to distract from the timeline of events in February. It was during that month that critical missteps by the Trump administration led to wasted time and delays in responding to the virus.

Three hospital workers gave out masks. Weeks later, they all were dead.

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They did not treat patients, but Wayne Edwards, Derik Braswell and Priscilla Carrow held some of the most vital jobs at Elmhurst Hospital Center in Queens.

As the virus tore through the neighborhood, their department managed the masks, gloves and other protective gear inside Elmhurst, a public hospital at the center of the city's outbreak. They ordered the inventory, replenished the stockroom and handed out supplies, keeping count as the number of available masks began to dwindle.

By April 12, they were all dead.

The pandemic has taken an undisputed toll on doctors, nurses and other front-line health care workers. But it has also ravaged the often-invisible army of nonmedical workers in hospitals, many of whom have fallen ill or died with little public recognition of their roles.

The victims included the security guards watching over emergency rooms. They were the chefs who cooked food for patients. They assigned hospital beds and checked patients' medical records. They greeted visitors and answered phones. They mopped the hallways and took out the garbage.

"You know how people clap for health workers at 7 o'clock? It's mainly for the nurses and doctors. I get it. But people are not seeing the other parts of the hospital," said Eneida Becote, whose husband died last month after working for two decades as a patient transporter. "I feel like those other employees are not focused upon as much."

More states are allowing certain businesses to open up.

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After a wave of reopenings over the weekend, at least six more states will begin allowing certain businesses to open back up on Monday, the latest expansion in economic activity despite rising coronavirus cases.

In Florida, restaurants, stores, museums and libraries are allowed to reopen with fewer customers, except in the most populous counties, which have seen a majority of the state's cases. Restrictions on certain businesses or parts of the state were also lifted in Indiana, Kansas, Missouri, Nebraska and West Virginia.

About half of all states have now begun reopening their economies in some significant way, introducing a pivotal new chapter. Some states have lifted stay-at-home orders or reopened businesses even though reported new cases are rising or remaining steady. Public health experts have warned that reopening too soon could lead to a new wave of cases and deaths.

"The fact remains that the vast majority of Americans have not been exposed to the virus, there is not immunity, and the initial conditions that allowed this virus to spread really quickly across America haven't really changed," said Dr. Larry Chang, an infectious-diseases specialist at Johns Hopkins University.

Though businesses are almost universally reopening under restrictions, such as allowing fewer customers or enforcing social distancing, experts say it's too soon to tell how much that will help stop the spread of the virus. "Reopening is not a one-way street," Dr. Chang said. "If there is a surge in cases, you may need to clamp down again."

Officials in Miami Beach said Monday that they would again close a popular park after "not everyone followed the rules put in place" to curb the spread of the virus. According to the local authorities, park rangers at the city's parks issued 7,329 warnings about face coverings and 478 concerning social distancing across Friday, Saturday and Sunday.

In Texas, just days after Gov. Greg Abbott lifted statewide restrictions that allowed many businesses across to reopen with limited occupancy, a federal task force was expected in Amarillo on Monday to combat an alarming surge of cases largely attributed to outbreaks in area meatpacking plants.

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Mayor Ginger Nelson advised residents in a Facebook post that the federal team would be taking over coronavirus testing and investigations to assist state and county officials in an urgent response against rising coronavirus rates.

A new group of citizens informing on their neighbors for violating stay at home orders is emerging.

Largely confined to their homes and worried about the spread of the virus and its risks to their own health or that of loved ones, a segment of the United States has turned informant, calling the police, public health authorities and the employers of people they believe are violating social-distancing decrees or stay-at-home orders.

These complaints have led to shut downs of dog groomers and massage parlors as well as citations and police scoldings to restaurant and bar owners whose patrons are lingering too close to one another.

The citizen action comes into direct conflict with new and mounting calls for the economy to reopen. In one instance, a Wisconsin doctor was photographed at a rally protesting a stay-at-home order, without a mask and arm-in-arm with a fellow demonstrator. The photo was shared on Facebook, and the doctor was suspended by his hospital for a week.

But such reporting also has occurred in more local ways, with neighborhood websites that once served as bulletin boards for lost cats or plumber recommendations now becoming social distancing complaint boxes.

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And as Mr. Trump and many Republican governors aggressively push to reopen businesses and some Democratic officials call for continued restraint, the actions are sometimes becoming politicized.

Some liberals said they think that calling out violators is a civic duty and a matter of public health. But Vicki McKenna, a conservative talk radio host in Wisconsin who has promoted rallies resisting the state's shutdown orders, likened the outing of social-distancing

offenders to the actions of informants in a totalitarian state.

"There's a creepy Orwellian sensibility people have," she said.

New Mexico invokes a riot law to seal off Gallup, amid an outbreak on the nearby Navajo Nation.

All the roads into Gallup, N.M., a city on the edge of the Navajo Nation, are closed. The soldiers at the checkpoints have their orders: outsiders must turn around and drive away.

The threat of the coronavirus in Gallup became so serious last week that Gov. Michelle Lujan Grisham invoked the state's Riot Control Act to lock down the entire city. The downtown of shops, bars and Indian trading posts is now nearly deserted.

"We're scared to death, so this had to be done," said Amber Nez, 27, a shoe store saleswoman and Navajo Nation citizen who lives in Gallup. "I only wonder why we didn't do this sooner."

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The lockdown comes as state and local authorities grapple with [one of the worst coronavirus outbreaks in the United States](#) on the nearby Navajo Nation, the country's largest Indian reservation, and a surge in detected cases in places near the reservation.

Gallup, a city of 22,000, serves as a regional hub for the Navajo and other nearby Native American pueblos. Many citizens of various tribal nations regularly drive into Gallup to buy food and other goods.

As of Sunday, the Gallup area had the third-highest rate of infection of any metropolitan area in the United States. Only the areas around New York City and Marion, Ohio, the site of a large prison cluster, had higher rates.

Normal wasn't working, many California liberals say, as they push agenda in crisis.

Housing for the homeless. Criminal justice reform. Addressing the digital divide for schoolchildren in rural areas.

Propelled by the urgency of the coronavirus crisis, and despite severe economic headwinds, liberal Californians see this moment as an opening to push through an agenda that addresses some of the state's most intractable and long-debated problems.

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Already, thousands of people have been let out of the state's jails and prisons, cash bail has been eliminated for most crimes, thousands of homeless people now have roofs over their heads, and children in rural and poor areas of the state are being sent tens of thousands of laptop computers for distance learning — temporary measures to confront the pandemic that leaders are hoping will become durable solutions to longstanding problems of inequity.

While many in the country talk about returning to normal, a common refrain is emerging among California's powerful political left wing and many liberal leaders across America: Normal wasn't working.

"We are doing things today that should have been done a long time ago," said George Gascon, a former San Francisco district attorney who is now running for the same office in Los Angeles, and who has been at the vanguard of a national movement of prosecutors looking to reduce mass incarceration. "The reset button was pushed, and I don't see us coming back."

Trump stepped up criticism of China as part of an international backlash over the outbreak.

Mr. Trump accused the Chinese government of making a "horrible mistake" in its virus response and of then orchestrating a cover-up that allowed the pathogen to spread.

"They tried to cover it, they tried to put it out. It's like a fire," Mr. Trump said on Sunday night during a [virtual town hall on Fox News](#). "You know, it's really like trying to put out a fire. They couldn't put out the fire."

China did [eventually suppress the disease](#) with a harsh lockdown, but public health experts have criticized Beijing for [withholding information](#) and [acting too late](#).

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Mr. Trump, who has come under fierce criticism for his handling of the crisis, also issued the latest in a [series of accusations from members of his administration](#) laying blame on China for the creation and spread of the virus.

"We're going to be giving a very strong report as to exactly what we think happened," Mr. Trump said. "And I think it will be very conclusive."

Secretary of State Mike Pompeo was even more explicit, saying on Sunday that the [coronavirus originated in a research laboratory](#) in Wuhan, China. That conflicts with the judgment of most virologists and of [U.S. intelligence agencies](#), which say the virus was "not

man-made or genetically modified."

It is not just the Trump administration that has been increasingly critical of China. The Times's chief diplomatic correspondent for Europe, Steven Erlanger, reports that a backlash against Beijing is building across the globe, creating a deeply polarizing battle of narratives and setting back China's ambition to fill the leadership vacuum left by the United States.

China has denied that the virus originated in a laboratory.

An Amazon executive quit over the firings of employees who protested.

A vice president of Amazon's cloud computing arm said on Monday that he had quit "in dismay" over the recent firings of workers who had raised questions about workplace safety during the coronavirus pandemic.

Tim Bray, an engineer who had been a vice president of Amazon Web Services, wrote in a blog post that his last day at the company was on Friday. He criticized a number of recent firings by Amazon, including that of an employee in a Staten Island warehouse, Christian Smalls, who had led a protest in March calling for the company to provide workers with more protections.

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Mr. Smalls's firing has drawn the scrutiny of New York State's attorney general.

Mr. Bray also criticized the firing last month of two Amazon employees, Maren Costa and Emily Cunningham, who circulated a petition in March on internal email lists that called on Amazon to expand sick leave, hazard pay and child care for warehouse workers.

Mr. Bray, who had worked for the company for more than five years, called the fired workers whistle-blowers, and said that firing them was "evidence of a vein of toxicity running through the company culture."

Amazon did not immediately respond to a request for comment.

Countries are taking steps to ease restrictions, and their neighbors are watching closely to see what happens.

At least 12 countries began easing restrictions on public life on Monday, as the world tried to figure out how to placate restless populations tired of being inside and reboot stalled economies without creating opportunities for the virus to re-emerge.

The steps, which include reopening schools and allowing airports to begin domestic service, offer the rest of the world a preview of how areas that have managed to blunt the toll might work toward resuming their pre-pandemic lives. They also serve as test cases for whether the countries can maintain their positive momentum through the reopenings, or if the desire for normalcy could place more people at risk.

Most of the countries easing their restrictions are in Europe, including Italy, one of the places where the virus hit earliest and hardest, leaving more than 28,000 dead. The country plans to reopen some airports to passengers.

In Germany, where widespread testing has kept the pandemic under control, children will return to schools. Austria also plans to restart its school system.

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In Lebanon, bars and restaurants will reopen, while Poland plans to allow patrons to return to hotels, museums and shops.

India allowed businesses, local transportation and activities like weddings to resume in areas with few or no known infections. Wedding ceremonies with fewer than 50 guests would be permitted and self-employed workers like maids and plumbers can return to work.

Tracking symptoms can help you and your doctors.

Marking your calendar at the first sign of illness, and noting your fever and oxygen levels, are important steps in monitoring an infection.

Follow what's happening around the globe with our team of international correspondents.

Reporting was contributed by Peter Baker, Brooks Barnes, Julian Barnes, Alan Blinder, Jonah Engel Bromwich, Michael Cooper, Caitlin Dickerson, Reid J. Epstein, Nicholas Fandos, Nicole Hong, Adam Liptak, Patricia Mazzei, Sarah Mervosh, David Montgomery, Matt Richtel, Rick Rojas, Simon Romero, David Sanger, Marc Santora, Dionne Searcey, Michael D. Shear, Eileen Sullivan, Sheryl Gay Stolberg, Tracey Tully and Neil Vigdor.

Frequently Asked Questions and Advice

Updated April 11, 2020

What should I do if I feel sick?

If you've been exposed to the coronavirus or think you have, and have a fever or symptoms like a cough or difficulty breathing, call a doctor. They should give you advice on whether you should be tested, how to get tested, and how to seek medical treatment without potentially infecting or exposing others.

When will this end?

This is a difficult question, because a lot depends on how well the virus is contained. A better question might be: "How will we know when to reopen the country?" In an American Enterprise Institute report, Scott Gottlieb, Caitlin Rivers, Mark B. McClellan, Lauren Silvis and Crystal Watson staked out four goal posts for recovery: Hospitals in the state must be able to safely treat all patients requiring hospitalization, without resorting to crisis standards of care; the state needs to be able to at least test everyone who has symptoms; the state is able to conduct monitoring of confirmed cases and contacts; and there must be a sustained reduction in cases for at least 14 days.

How can I help?

The Times Neediest Cases Fund has started a special campaign to help those who have been affected, which accepts donations here. Charity Navigator, which evaluates charities using a numbers-based system, has a running list of nonprofits working in communities affected by the outbreak. You can give blood through the American Red Cross, and World Central Kitchen has stepped in to distribute meals in major cities. More than 30,000 coronavirus-related GoFundMe fund-raisers have started in the past few weeks. (The sheer number of fund-raisers means more of them are likely to fail to meet their goal, though.)

Should I wear a mask?

The C.D.C. has recommended that all Americans wear cloth masks if they go out in public. This is a shift in federal guidance reflecting new concerns that the coronavirus is being spread by infected people who have no symptoms. Until now, the C.D.C., like the W.H.O., has advised that ordinary people don't need to wear masks unless they are sick and coughing. Part of the reason was to preserve medical-grade masks for health care workers who desperately need them at a time when they are in continuously short supply. Masks don't replace hand washing and social distancing.

How do I get tested?

If you're sick and you think you've been exposed to the new coronavirus, the C.D.C. recommends that you call your healthcare provider and explain your symptoms and fears. They will decide if you need to be tested. Keep in mind that there's a chance — because of a lack of testing kits or because you're asymptomatic, for instance — you won't be able to get tested.

How does coronavirus spread?

It seems to spread very easily from person to person, especially in homes, hospitals and other confined spaces. The pathogen can be carried on tiny respiratory droplets that fall as they are coughed or sneezed out. It may also be transmitted when we touch a contaminated surface and then touch our face.

Is there a vaccine yet?

No. Clinical trials are underway in the United States, China and Europe. But American officials and pharmaceutical executives have said that a vaccine remains at least 12 to 18 months away.

What makes this outbreak so different?

Unlike the flu, there is no known treatment or vaccine, and little is known about this particular virus so far. It seems to be more lethal than the flu, but the numbers are still uncertain. And it hits the elderly and those with underlying conditions — not just those with respiratory diseases — particularly hard.

What if somebody in my family gets sick?

If the family member doesn't need hospitalization and can be cared for at home, you should help him or her with basic needs and monitor the symptoms, while also keeping as much distance as possible, according to guidelines issued by the C.D.C. If there's space, the sick family member should stay in a separate room and use a separate bathroom. If masks are available, both the sick person and the caregiver should wear them when the caregiver enters the room. Make sure not to share any dishes or other household items and to regularly clean surfaces like counters, doorknobs, toilets and tables. Don't forget to wash your hands frequently.

Should I stock up on groceries?

Plan two weeks of meals if possible. But people should not hoard food or supplies. Despite the empty shelves, the supply chain remains strong. And remember to wipe the handle of the grocery cart with a disinfecting wipe and wash your hands as soon as you get home.

Can I go to the park?

Yes, but make sure you keep six feet of distance between you and people who don't live in your home. Even if you just hang out in a park, rather than go for a jog or a walk, getting some fresh air, and hopefully sunshine, is a good idea.

Should I pull my money from the markets?

That's not a good idea. Even if you're retired, having a balanced portfolio of stocks and bonds so that your money keeps up with inflation, or even grows, makes sense. But retirees may want to think about having enough cash set aside for a year's worth of living expenses and big payments needed over the next five years.

What should I do with my 401(k)?

Watching your balance go up and down can be scary. You may be wondering if you should decrease your contributions — don't! If your employer matches any part of your contributions, make sure you're at least saving as much as you can to get that "free money."



EXHIBIT K

**COVID-19, the Pennsylvania Primary Election and the focus on Philadelphia
Remarks by Commissioner Deeley, Chairwoman, Philadelphia Board of Elections**

Philadelphia is doing all that we can to prepare for a June 2nd Election Day, while being faced with a multitude of difficult and challenging realities. A lot of the time we are faced with decisions where there is no good option, and the best option is often times just the least bad.

Previously, I joined with elected officials from other southeastern counties and asked for Primary Day to be delayed to June 23rd, which certainly would have allowed us the most time to prepare. Although the date of June 23rd was not what was settled on, let me take this opportunity to thank you for the delay to June 2nd date. The election would not have been able to go on April 28th and the additional time has given us the ability to put together a comprehensive plan to hold an in-person election and to communicate to voters their ability to vote safely from their homes.

In recent weeks, my fellow Commissioners and I have been working in tandem with the Pennsylvania Department of State, Governor Tom Wolf, and following public health procedures to the best of our ability. COVID-19 caused the cancellation of all our Election Board training classes, an unprecedented move that was done out of the safety of our Election Board workers, our training host sites, and our staff. We are receiving calls and emails from Election Board workers and polling places saying that they are not available for the June 2nd Primary. The passage of ACT 12 allows for the consolidation of polling sites. We are currently working on our Election Day plan with these consolidated polling places. This election, a greater percentage of Philadelphia voters will cast their votes through the mail than ever before. These ballots will be counted after Election Day, it is likely that it will be a few days before the close races are able to be called. Even without a pandemic, we do not have the available staff to begin counting the absentee and mail-in ballots on Election Day.

Recently, a huge effort to highlight the option of mail-in ballots has been undertaken. The Department of State mailed every Democrat and Republican voter a postcard with the URL to the online application and they are beginning a media and social media campaign. In Philadelphia, the Commissioners are on the radio asking voters to apply. All the department's social media accounts are urging Philadelphia voters to apply for a mail-in ballot on a daily basis. We are looking into email and texting options in order to drive voters to the online form and are also exploring providing information and paper applications with the city's food distribution program. I recently passed a motion that the Board of Elections will prepay the return postage of the ballots so that voters do not have to leave their homes to buy a stamp. We have seen a significant uptick in applications, more so than we ever would have imagined. Staff of the Philadelphia Board of Elections are being reassigned and a greater number of staff are being brought back to work to process the increased number of absentee and mail-in ballot applications. As of today, Philadelphia has received over 70,000 applications. For comparison purposes, the Board received 16,101 applications for the 2012 General, 15,887 for the 2016 General, and 5,742 for the 2016 Primary.

While the large number of applications are important, they are misleading. The poor and working-class neighborhoods of the city are not keeping pace with the more affluent parts. More steps must be done to advocate voters to vote by mail. Governor Tom Wolf holds press

conferences daily, and one of his pieces of information to Pennsylvanians' should be to apply for a mail-in ballot from their local county election office. Additionally, thousands of Pennsylvania citizens are utilizing online services to apply for unemployment claims, as well as other services such as ordering alcohol from the Pennsylvania Liquor Control Board. Information should be displayed on these websites so these thousands of citizens are aware that they can – and should – vote by mail for this election. Applications and information should be put in the bags of wine and spirits that citizens are buying through curbside pickup.

Just last week, I called on the Governor and the State Legislature to act and extend the deadline to return voted ballots to the Board of Elections. Currently, voted ballots must be received by the Board of Election by 8pm on Election Day, June 2nd. I asked that, due to the unprecedented circumstances of the COVID-19 Pandemic and the resulting increase in the number of applications from voters requesting to vote from home, the deadline for County Boards of Elections to receive voted ballots be extended to June 9th and that all voted ballots received by that date and postmarked by June 2nd be accepted. June 9th is the current deadline for military and overseas absentee ballots and the postmark requirement is the same as what the courts granted to the voters of Wisconsin.

The state should act well ahead of the lawsuits that were seen in Wisconsin and Ohio, which confused voters with ever-changing information and are already starting to be filed here. The Courts have been clear, they would prefer Governors and Legislatures act to prevent these matters from coming before them, this is a bipartisan issue. Both the Democratic and Republican parties have been encouraging their voters to apply for the new, no-excuse mail-in ballots. Our staff and elections' staffs all around the state are working hard every day to process the mountain of applications we are receiving. But, the rules were not designed to handle ten times the number of applications that we typically see in a presidential general election. I'm calling on you to do the responsible thing and update the rules for this Primary to reflect the new reality. We do not want to be Wisconsin and we do not want the courts to have to step in.

Finally, I would like to address the financial crisis that the Philadelphia City Commissioners' Office is facing. The implementation of, the Governor's voting machine replacement mandate, Act 77, and now Act 12, requires funding. This funding to implement these monumental changes and meet lawmakers and voters' expectations - even prior to this pandemic – was in desperate need. For example, our new voting system has a voter verifiable paper ballot, we must now spend about \$95,000 on paper ballots per citywide election. This comes out to \$190,000 a year in new expenses on just the ballots. We just received notice that we will be receiving 878,000 in a federal Election Security grant that we could use towards Act 77 expenses. That amount does not even cover one year's base salaries of all the new clerks we have to hire to enter the voter registration forms in time to make the supplemental poll books. To this day, the Philadelphia City Commissioners have yet to receive any state grants, from the Commonwealth, to implement Act 77 or to communicate the changes to the voters, despite repeated promises. Before the COVID-19 crisis, the City of Philadelphia stepped in, seeing that the changes brought upon by Act 77 needed to be adequately addressed and increased our budget by \$10 million. Since the financial impacts of COVID-19, the administration has since rescinded that funding. Our ability to run an election under the new reality of Act 77 is in jeopardy.

To recap, we are faced with enforcing some of the greatest changes to voting in the Commonwealth in decades, yet the Commonwealth has given ZERO funding to do so, right in the middle of a pandemic.

In closing, I want to thank the staff of the Philadelphia City Commissioners Office, who have been nothing but dedicated and committed to the cause. I would also like to thank election staff workers throughout the Commonwealth who have been dealing with a crisis while performing their duties, often in an ever-changing environment. This is all being done to ensure Pennsylvanian's have their right to a free, fair election and can have their voices heard on June 2nd.

Thank you for this opportunity to provide this testimony.

EXHIBIT L

Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco

[inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html](https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html)

by Jonathan Tamari and Jonathan Lai , Updated: April 12, 2020



With the coronavirus still spreading, Montgomery County poll workers are already calling in to beg off their shifts.

The county is buying two more scanners to count mail-in ballots — at \$25,000 apiece — and may need even more, but doesn't have the space or staffing. Berks County ordered two scanners, too, but could only get one because demand has spiked. Philadelphia has already lost polling places and officials expect more will follow. And in Delaware County, election officials are falling behind on processing mail-in ballot requests — seven weeks before the state's rescheduled June 2 primary.

As Wisconsin's election debacle showed Tuesday, the coronavirus has left officials across the country scrambling to prepare for short staffing, health hazards at the polls, and a tsunami of demand for mail-in voting. Those hoping to avoid a repeat in Pennsylvania and New Jersey have much to do and little time.

"Sorry, you get very emotional, you get frustrated. You want to conduct a successful election. I don't want to be Wisconsin," said Debbie Olivieri, the Berks County elections director.

Pennsylvania and New Jersey have both postponed their primary elections due to the pandemic, and New Jersey Gov. Phil Murphy said further changes, including a move to an entirely vote-by-mail election, could still come [for its July 7 primary](#).

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In Pennsylvania, lawmakers made other election changes when they postponed the date, but Olivieri and other county elections officials said that wasn't enough — they need more flexibility, including, some said, a move to vote entirely by mail, as several other states have done, [including Alaska, Wyoming, and Ohio](#), which all vote this month.

"We can learn from what happened in other states and fix this now. And we can't," Olivieri said. "Our hands are tied."

Wisconsin sent up a vivid [warning flare about what can go wrong](#) in the primary elections still unfolding, and perhaps in the presidential election in November.

» **[FAQ: Your coronavirus questions, answered.](#)**

States are [increasingly turning to mail-in voting](#) to ensure that people can exercise one of democracy's most fundamental rights, but the change isn't easy. Changing habits, processing and counting mail-in ballots, while also keeping polling places open and safe, requires expensive equipment, training and new staffing.

"It took us five years as a state to move from poll-side voting to vote-by-mail just to build in that capacity in our larger counties," said Kim Wyman, the secretary of state in Washington state, one of five states that rely almost entirely on mail-in voting.

In the 2018 election around 96% of ballots in Pennsylvania and 88% in New Jersey were cast in-person according to the [federal Election Assistance Commission](#).

Both states have seen a surge in absentee-ballot requests, with Pennsylvania already receiving three times more applications for mail-in ballots than were cast in the 2016 primary. And the election is still weeks away.

» **[READ MORE: Despite coronavirus, Wisconsin is holding an election Tuesday. It could hold lessons for Pa. and N.J.](#)**

Wisconsin faced a similar shift. Election officials there ran short of envelopes and struggled to process a flood of late requests, so tens of thousands of ballots reached voters too late. Voters ended up in long lines, sometimes for hours, despite the risk of a life-threatening illness. Milwaukee opened just five of 180 polling places.



Morry Gash / AP

Voters masked against coronavirus line up at Riverside High School in Milwaukee for Wisconsin's primary election Tuesday.

"If this pandemic has taught us anything, it's that a competent response requires early and comprehensive action," said Sen. Chris Coons of Delaware, one of the Democrats leading the push to increase vote-by-mail nationwide and urging Congress to approve \$2 billion in new funding for elections, on top of the \$400 million already approved.

States have a long to-do list.

It includes: building the capacity to print more envelopes and mail-in ballots; acquiring big, expensive ballot-sorting machines, scanners to count them, and ballot-tracking software; training staff, despite restrictions on group gatherings, and setting up secure storage for ballots. States will also have to ensure that their web sites can handle the demands, and that they can count mailed ballots quickly and accurately. (Wisconsin, as of Friday, still had not produced results.)

Washington state sets up 500 drop boxes where voters can leave their ballots if they don't want to trust their vote to the mail.

» **READ MORE: [Voting by mail is a safe option during coronavirus. Here's what you need to know about absentee ballots in Pennsylvania and New Jersey.](#)**

And it's not only mail-in voting that needs updating, since many people, including those who are blind or disabled, may still have to, or choose to, vote in-person.

So experts advise also allowing more early voting, to spread out the crowds, and setting up curbside voting where people can cast ballots from their cars. States will need to increase staffing to account for the many poll workers who call out. They'll need sanitizer and protective gear for poll workers and voters.



A woman hands out surgical masks to people standing in line to vote in Milwaukee Tuesday.

“Unfortunately this is not going to be easy given the financial crisis that so many states are going to be facing, including New Jersey and Pennsylvania, but it’s going to require more resources,” said Lawrence Norden, director of the election reform program at the Brennan Center for Justice at New York University.

The effort will also require a huge public awareness push, especially since most in Pennsylvania and New Jersey vote in person.

"We're starting public education basically from scratch," said Pennsylvania Secretary of State Kathy Boockvar, who noted that the state is going into its first election in which anyone can vote by mail, for any reason. "I've gotten texts from people that I consider highly engaged, highly educated people who still have no idea that we had vote by mail."

» ***READ MORE: Lessons for Pa. elections so we don't repeat Wisconsin's political disgrace | Opinion***

She said a major education campaign is planned, including postcards that will go out to voters in the coming weeks explaining their options, along with campaigns on social media and elsewhere.

In Ohio, some newspapers have printed absentee-ballot requests that voters can cut out and mail, and grocery stores are adding the request forms when people check out.

Few states have used mail-in voting on the scale likely to be required this year.

A faint silver lining for Pennsylvania and New Jersey is that their primaries will give them a chance to test their readiness before November's general election. And New Jersey will run a smaller, local election entirely by mail May 12.

Some Democrats want Congress to mandate national standards that make it easier to vote during the crisis, including requiring early voting, no-excuse mail-in voting, and automatically sending absentee ballots to every registered voter, though those ideas face opposition from Republicans, who say the rules should be left to individual states.

Some practices that experts recommend could require changes to state laws. (Most voting rules are set by state governments). Amber McReynolds, the head of the nonpartisan National Vote Home Institute and former elections director in Denver, said states should use statewide or regional coordination, so counties aren't overwhelmed.

Funding and changes to laws, however, could be tied up in partisanship.



Mark Hoffman / AP

A City of Milwaukee Election Commission worker processes and sorts absentee ballots for Tuesday's primary election.

While some Republican governors and secretaries of state embrace mail-in voting, many others, including President Donald Trump, have blasted the calls to expand it, arguing it opens the door to fraud and helps Democrats. (Trump voted by mail in 2018 and requested a mail-in ballot last month for Florida's primary.)

Voter fraud, however, is extraordinarily rare, and studies suggest neither party gains a major advantage from vote-by-mail.

Democrats say every public official should want voting to be as accessible as possible.

» ASK US: Do you have a question about the coronavirus and how it affects your health, work and life? Ask our reporters.

Even if Pennsylvania and New Jersey can quickly ramp up their vote-by-mail operations, advocates say that method doesn't work for people who are homeless, transient, or who can't read English. And the post office doesn't serve tribal lands.

Some people simply prefer the assurance or tradition of voting in person. So polls will still have to be open.

"It's not just about upcoming primaries," McReynolds said. "It's also about preparing for November, and clearly there's going to be a huge shift in how voters vote."

EXHIBIT M

Nearly 1 Million Pennsylvanians Have Applied for a Mail-In Ballot for June 2 Primary Election

governor.pa.gov/newsroom/nearly-1-million-pennsylvanians-have-applied-for-a-mail-in-ballot-for-june-2-primary-election

May 4,
2020

May 04, 2020



Press Release, Voting & Elections

Nearly one million voters have applied for a mail-in ballot for the June 2 primary election, Governor Tom Wolf and Pennsylvania Secretary of State Kathy Boockvar announced today in an update on how the state is preparing for the election.

“We are in an unprecedented time and are facing a major public health crisis in a presidential election year,” said Governor Wolf. “I want Pennsylvanians to know that they have options for how to cast their ballots, including both voting by mail and voting in person. Voting is the cornerstone of our democracy, and Pennsylvanians can still cast their ballots while keeping themselves safe and healthy.”

Mail-in ballots are new to Pennsylvania because of Act 77 of 2019, which Governor Wolf signed last year as part of the state’s most sweeping election law improvements in 80 years. The law created the option of mail-in ballots with no excuse needed, along with later deadlines for voter registration and for returning mail-in and absentee ballots.

“Our priority is to ensure the integrity of our elections while also keeping Pennsylvania voters safe,” Secretary of State Kathy Boockvar said. “Voting by mail-in ballot is a secure way to vote from the comfort of your own home and to make sure that your voice is heard on election day.”

The Department of State has seen a significant increase in mail ballot application requests since the onset of COVID-19 in Pennsylvania. To date, 948,831 applications have been submitted for mail-in and absentee ballots.

Due to the COVID-19 crisis, in March the Pennsylvania General Assembly passed, and Governor Wolf signed Act 12 of 2020, which rescheduled the primary election and made additional changes in the process for voters as well as county election officials.

Registered voters have until 5:00 PM, May 26 to apply for a mail-in or absentee ballot and until 8:00 PM on election day to return their voted ballot. Voters who applied for a ballot before the change of election date do not need to apply again, but voters whose address has changed should contact their county election office.

Act 12 also allows counties to temporarily consolidate polling places more easily as they work to relocate voting sites, including those in locations such as senior centers. The Department of State is working with counties as they develop their consolidation plans to ensure that convenient, accessible locations will remain, and the public is informed where locations will change.

To assist counties during this extraordinary time, the Wolf Administration will provide counties with federal funds from the recent CARES Act and from a prior appropriation on election security and technology. Counties will be able to use this funding to send informational mailings to voters, purchase equipment and protective supplies, promote and facilitate mail-in voting, increase needed staffing, and take other actions to improve election administration and voting safety and security.

Additionally, the Department of State is procuring precinct infection-protection kits so poll workers can maintain a safe voting environment at polling locations on June 2. These kits will include masks, gloves, hand sanitizer, floor-marking tape and other sanitizing supplies and will be provided to the counties at no cost

The Department of State has launched an awareness campaign, including sending 4.2 million postcards to primary voters to inform them about the new primary election date and how to apply for a mail-in ballot. The department is also working closely with counties to ensure that voters, poll workers, and election officials have the resources they need to be ready for election day.

For more information on the new mail-in ballots and all things related to voting in Pennsylvania, call the Department of State’s toll-free hotline at 1-877-VOTESPA (1-877-868-

3772) or visit votesPA.com.

EXHIBIT N

Information as of 05/04/2020

County	ID#	Count of Democratic Voters	Count of Republican Voters
ADAMS	2290	19,394	37,326
ALLEGHENY	2291	521,792	250,346
ARMSTRONG	2292	13,790	23,345
BEAVER	2293	53,528	42,579
BEDFORD	2294	7,459	21,560
BERKS	2295	114,488	101,140
BLAIR	2296	21,560	44,418
BRADFORD	2297	9,211	22,168
BUCKS	2298	200,194	184,650
BUTLER	2299	40,329	71,099
CAMBRIA	2300	38,434	35,908
CAMERON	2301	957	1,635
CARBON	2302	17,596	19,772
CENTRE	2303	46,391	42,821
CHESTER	2304	147,849	147,912
CLARION	2305	6,992	13,499
CLEARFIELD	2306	15,676	25,199
CLINTON	2307	7,619	10,460
COLUMBIA	2308	13,695	18,513
CRAWFORD	2309	18,347	28,509
CUMBERLAND	2310	61,336	87,704
DAUPHIN	2311	85,565	73,445
DELAWARE	2312	196,004	155,615
ELK	2313	7,779	9,207
ERIE	2314	97,445	69,876
FAYETTE	2315	40,045	29,601
FOREST	2316	1,170	1,844
FRANKLIN	2317	24,181	56,281
FULTON	2318	2,055	6,068
GREENE	2319	10,391	9,135
HUNTINGDON	2320	7,507	16,332
INDIANA	2321	18,472	24,920
JEFFERSON	2322	8,591	18,046
JUNIATA	2323	3,402	8,798
LACKAWANNA	2324	84,202	43,168
LANCASTER	2325	109,409	168,187
LAWRENCE	2326	23,969	23,936
LEBANON	2327	26,430	47,126
LEHIGH	2328	113,859	79,149
LUZERNE	2329	104,963	79,546
LYCOMING	2330	20,533	39,185
McKEAN	2331	6,465	14,229
MERCER	2332	28,911	32,410
MIFFLIN	2333	6,565	15,809
MONROE	2334	51,139	36,867
MONTGOMERY	2335	284,125	200,361
MONTOUR	2336	4,689	6,469
NORTHAMPTON	2337	97,588	74,873

NORTHUMBERLAND	2338	18,832	27,662
PERRY	2339	6,470	17,959
PHILADELPHIA	2340	826,027	119,040
PIKE	2341	13,900	18,259
POTTER	2342	2,334	7,165
SCHUYLKILL	2343	29,887	44,638
SNYDER	2344	5,295	14,009
SOMERSET	2345	14,119	27,809
SULLIVAN	2346	1,412	2,516
SUSQUEHANNA	2347	7,153	14,972
TIOGA	2348	6,006	15,882
UNION	2349	7,305	12,716
VENANGO	2350	9,601	17,393
WARREN	2351	9,812	15,846
WASHINGTON	2352	66,322	61,506
WAYNE	2353	9,547	18,445
WESTMORELAND	2354	102,513	108,445
WYOMING	2355	5,191	9,944
YORK	2356	96,933	147,023
Totals:		4,080,750	3,272,275

Count of No Affiliation Voters	Count of all Other Voters	Total Count of All Voters
7,313	3,463	67,496
79,611	44,502	896,251
2,926	1,953	42,014
8,190	5,962	110,259
1,950	1,141	32,110
27,746	12,619	255,993
5,849	3,356	75,183
2,765	2,019	36,163
48,708	25,797	459,349
11,215	6,498	129,141
6,174	2,391	82,907
215	170	2,977
4,181	2,626	44,175
14,504	5,494	109,210
37,362	24,598	357,721
1,793	862	23,146
3,100	2,270	46,245
1,754	901	20,734
4,001	1,775	37,984
4,122	2,455	53,433
19,682	9,179	177,901
18,807	9,181	186,998
30,739	21,227	403,585
1,213	934	19,133
17,440	10,024	194,785
4,849	2,523	77,018
210	159	3,383
10,262	3,442	94,166
592	350	9,065
1,371	760	21,657
2,007	726	26,572
4,136	2,254	49,782
1,974	1,525	30,136
971	393	13,564
11,328	3,425	142,123
32,539	20,517	330,652
3,867	2,248	54,020
8,802	4,138	86,496
32,939	8,121	234,068
19,056	7,080	210,645
5,749	3,304	68,771
2,051	1,272	24,017
6,901	2,261	70,483
2,009	749	25,132
14,380	7,204	109,590
51,147	35,997	571,630
1,536	585	13,279
27,196	12,685	212,342

4,286	2,924	53,704
2,539	957	27,925
93,660	36,340	1,075,067
5,542	3,086	40,787
831	317	10,647
6,209	4,440	85,174
1,957	813	22,074
3,059	1,478	46,465
286	183	4,397
1,984	1,310	25,419
2,348	911	25,147
2,714	1,201	23,936
2,504	1,419	30,917
2,367	2,439	30,464
13,062	4,338	145,228
4,013	1,247	33,252
16,765	11,570	239,293
1,149	842	17,126
36,450	9,312	289,718
808,957	408,242	8,570,224

EXHIBIT O

As U.S. Postal Service suffers, Gillibrand proposes it adds banking

[tu timesunion.com/news/article/As-U-S-Postal-Service-suffers-Gillibrand-15231928.php](https://www.timesunion.com/news/article/As-U-S-Postal-Service-suffers-Gillibrand-15231928.php)



WASHINGTON — The U.S. Postal Service has been losing money for more than a decade and coronavirus is only accelerating the decline.

Congress is debating how to help the struggling mail service, while President Donald Trump repeatedly slams the agency for its losses, which the president attributes, in large part, to its low package-delivery rates for Amazon. On Tuesday, Sen. Kirsten Gillibrand, D-N.Y., proposed allowing the Postal Service to offer banking at its 30,000 locations all across the country to boost the agency's financial health and allow more Americans access to banks.

USPS was \$62 billion in debt at the end of fiscal year 2018, a [U.S. Treasury department report](#) said, and forecasted to lose tens of billions of dollars over the next decade.

[Latest coronavirus-related cancellations, postponements](#)

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Full coronavirus coverage

Now, in the grips of a pandemic, mail volume is down by about one-third compared to this time last year, although postal workers are essential employees and millions of Americans are relying on mail service to receive goods, correspondence and to vote. The USPS projects a \$13 billion shortfall in revenue as a result of the virus.

"The U.S. Postal Service may not survive the summer," Gillibrand said.

The USPS has warned that the mail service may not be able to make payroll for its 600,000 employees and continue mail service uninterrupted past September. Some lawmakers have expressed alarm that a cash-strapped postal service will not be able to send ballots to Americans on Election Day in November, even as Democrats push to expand vote-by-mail amid fear the coronavirus will make polling places unsafe.

The White House and congressional Democrats have clashed over a bail-out for the suffering mail service. In the federal stimulus bill signed into law March 27, Democrats and Republicans agreed to a \$10 billion loan from the U.S. Treasury to the Postal Service.

But on Friday, Trump suggested he might block the loan unless it agreed to raise its shipping prices on e-commerce retailers like Amazon.

"The Postal Service is a joke because they're handing out packages for Amazon and other internet companies, and every time they put out a package, they lose money on it," Trump had said. "The Post Office should raise the price of a package by approximately four times because they don't raise them. For some reason — these people have been in there a long time — but for some reason they're very cozy with some of these companies, and they don't raise the price of a package."

Trump asked his Treasury Secretary Steven Mnuchin if he concurred and Mnuchin agreed with the president.

"We are going to put certain criteria for a postal reform program as part of the loan," Mnuchin said. "The board is recruiting a new postmaster general and doing postal reform."

But the December 2018 report from the Treasury Department Postal Service Task Force, chaired by Mnuchin, found that Postal Service losses were due to "the shift toward digital correspondence and the corresponding decline in USPS mail volumes ... compounded by caps on mail pricing, leading to mail revenue declines of around 4 percent per year."

The report said: "Although package volumes are increasing due to the rise of e-commerce, package revenues alone cannot offset the decline in mail revenues." The task force recommended several changes including charging market prices for mail and packages that are not "essential," and reducing its rising labor and operations costs.

The Postal Service is also subject to an expensive congressional requirement to pre-fund its health benefits for retired employees.

In the Postal Banking Act, Gillibrand proposes establishing a retail bank at all USPS locations, which she said "would create approximately \$9 billion in revenue for the Postal Service" and provide banking service to low-income and rural Americans.

"The Postal Service is in desperate need of reinforcement, and providing postal banking for the nearly 10 million American households who lack access to basic banking services is the first step," Gillibrand said. "The Postal Banking Act would not only revitalize the agency, but it would also strengthen our voting rights."

Congress is now drafting a fourth legislative package to respond to the coronavirus.

EXHIBIT P

United States Postal Service Station Branches Identified For Full Study

<http://www.washingtonpost.com/wp-srv/politics/documents/post-offices.html>

District	Station/Branch Name	City/State
CENTRAL IL	NAPERVILLE-WASHINGTON STREET STATION-FIN STA	NAPERVILLE IL
CENTRAL IL	SPRINGFIELD-CAPITOL STA-FIN STA	SPRINGFIELD IL
CHICAGO	CHICAGO-AMOCO POSTAL STORE-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-CHICAGO LAWN-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-CHINATOWN-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-EDGEBROOK POSTAL STORE-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION E-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION H-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION K-FND STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION L-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION M-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION N-FND STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION Q-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION T-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION U-FND STA	CHICAGO IL
CHICAGO	CHICAGO-FINANCE STATION W-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-GRAND CROSSING POSTAL STORE-FIN STA (JAMES E WORSHAM)	CHICAGO IL
CHICAGO	CHICAGO-HAYMARKET-FIN STA	CHICAGO IL

CHICAGO	CHICAGO-JEFFERSON PARK POSTAL STORE-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-JOHN HANCOCK POSTAL STORE-FND STA	CHICAGO IL
CHICAGO	CHICAGO-LAKE PARK POSTAL STORE-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-LINCOLN PARK POSTAL STORE-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-LOOP - JEWELERS ROW-FND STA	CHICAGO IL
CHICAGO	CHICAGO-OHARE FINANCE STATION (AMC)-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-ONTARIO STREET-FIN STA	CHICAGO IL
CHICAGO	CHICAGO-ROGERS PK/CLARK FINANCE-FIN STA (FIN STA F)	CHICAGO IL
CHICAGO	CHICAGO-WACKER DR POSTAL STORE-FIN STA	CHICAGO IL
DETROIT	ANN ARBOR-SOUTH UNIVERSITY STA-FIN STA	ANN ARBOR MI
DETROIT	DEARBORN-MAPLE-FIN STA	DEARBORN MI
DETROIT	DEARBORN-TELEFORD STA-STA	DEARBORN MI
DETROIT	DETROIT-FISHER BLDG FINANCE-FIN STA	DETROIT MI
DETROIT	DETROIT-HAMTRAMCK-FIN BR	DETROIT MI
DETROIT	DETROIT-HARPER-STA	DETROIT MI
DETROIT	DETROIT-LINWOOD STA-FIN STA	DETROIT MI
DETROIT	DETROIT-OLD REDFORD-FIN STA	DETROIT MI
DETROIT	DETROIT-PENOBSCOT POSTAL STORE-FIN STA	DETROIT MI
DETROIT	WAYNE-WESTLAND-WESTLAND MALL-FIN STA	WAYNE MI
DETROIT	WAYNE-WESTLAND-WESTLAND-BR	WAYNE MI
GATEWAY	SAINT LOUIS-AFFTON-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-BADEN-FIN STA	ST LOUIS MO

GATEWAY	SAINT LOUIS-BENTON PARK-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-BERKELEY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-CHARLES J COYLE-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-CHOUTEAU-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-CLAYTON-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-CRESTWOOD PLAZA POSTAL STORE-FIN BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-CREVE COEUR-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-DES PERES-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-FERGUSON-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-FREDERICK N WEATHERS-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-GALLERIA POSTAL STORE-FIN BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-GRAVOIS-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-GWEN B GILES-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-HENRY W WHEELER-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-JEFFERSON MEMORIAL-FIN STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-JENNINGS-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-JORDAN W CHAMBERS-FIN STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-KIRKWOOD POSTAL STORE-FIN BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-MACKENZIE POINTE-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-MAIN OFFICE FIN POSTAL STORE-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-MAPLEWOOD-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-MARIAN OLDHAM-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-MARYVILLE GARDENS-STA	ST LOUIS MO

GATEWAY	SAINT LOUIS-NORMANDY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-NORTH COUNTY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-OLIVETTE-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-RICHMOND HEIGHTS-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-SAPPINGTON-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-SOULARD-FIN STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-SOUTH COUNTY POSTAL STORE-FIN BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-SOUTH COUNTY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-SOUTHWEST-STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-TIMOTHY M GAFFNEY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-TOWER GROVE-FIN STA	ST LOUIS MO
GATEWAY	SAINT LOUIS-UNIVERSITY CITY-BR	ST LOUIS MO
GATEWAY	SAINT LOUIS-WEST COUNTY-BR	ST LOUIS MO
GREATER IN	BLOOMINGTON-WOODBRIDGE-BR	INDIANAPOLIS IN
GREATER IN	FORT WAYNE-DIPLOMAT PLAZA-STA	FORT WAYNE IN
GREATER IN	FORT WAYNE-WAYNE DALE-FIN STA	FORT WAYNE IN
GREATER IN	GARY-BRUNSWICK-STA	GARY IN
GREATER IN	GARY-DOWNTOWN FINANCE-FIN STA	GARY IN
GREATER IN	GARY-LAKE STATION-BR	GARY IN
GREATER IN	GARY-MILLER-STA	GARY IN
GREATER IN	INDIANAPOLIS-BRIDGEPORT-FIN BR	INDIANAPOLIS IN

GREATER IN	INDIANAPOLIS-CIRCLE CITY-STA	INDIANAPOLIS IN
GREATER IN	INDIANAPOLIS-WEST INDIANAPOLIS FIN-FIN STA	INDIANAPOLIS IN
GREATER IN	SOUTH BEND-OLIVE STREET-STA	SOUTH BEND IN
GREATER MI	GRAND RAPIDS-KENTWOOD-BR	GRAND RAPIDS MI
GREATER MI	GRAND RAPIDS-WYOMING-ROGERS PLAZA POSTAL STORE-FIN STA	GRAND RAPIDS MI
GREATER MI	GRAND RAPIDS-WYOMING-WYOMING-BR	GRAND RAPIDS MI
GREATER MI	KALAMAZOO-ARCADIA CREEK-FIN STA	KALAMAZOO MI
GREATER MI	LANSING-DELTA POSTAL STORE-FIN STA	LANSING MI
GREATER MI	LANSING-MERRILL STREET STATION-FND STA	LANSING MI
GREATER MI	MUSKEGON-MUSKEGON HEIGHTS-BR	MUSKEGON MI
GREATER MI	MUSKEGON-NORTH MUSKEGON-BR	MUSKEGON MI
GREATER MI	SAGINAW-WHEELER STATION-STA	SAGINAW MI
LAKELAND	GREEN BAY-STA A-FIN STA	GREEN BAY WI
LAKELAND	RACINE-FOUR MILE STATION-STA	RACINE WI
SOUTHEAST MI	FLINT-CODY-STA	FLINT MI

SOUTHEAST MI	FLINT-DOWNTOWN FLINT-FIN STA	FLINT MI
SOUTHEAST MI	FLINT-MOTT PARK-FIN STA	FLINT MI
SOUTHEAST MI	FLINT-NORTHSIDE-STA	FLINT MI
SOUTHEAST MI	MOUNT CLEMENS-SELFRIDGE ANGB-FIN BR	MOUNT CLEMENS MI
SOUTHEAST MI	PONTIAC-PHOENIX-FIN STA	PONTIAC MI
SOUTHEAST MI	ROYAL OAK-BERKLEY-BERKLEY-FIN BR	ROYAL OAK MI

EXHIBIT Q

Hundreds of Post Offices Could Soon Close

http://voices.washingtonpost.com/federal-eye/2009/07/hundreds_of_post_offices_could.html

By Ed O'Keefe

Hundreds of post offices like the one above could soon close.

The Postal Service has marked 677 post offices nationwide for possible closure or consolidation, according to a document given today to a House subcommittee holding a hearing on the future of American mail delivery. Among them are 10 post offices in the District and three in the Maryland suburbs of Hyattsville, Rockville and Silver Spring.

[Click here for the full list of possible post office closures](#)

"The writing is on the wall and the postal service obviously has to make some tough decisions if it wants to weather this storm," Del. **Eleanor Holmes Norton** (D-D.C.) told Postal officials during the hearing.

"You better believe that if those post offices have to be closed I'm going to be besieged by people asking, 'Please don't close my post office,'" she said later.

Postal and Congressional sources said privately that only about 200 of the 677 postal facilities are likely to be closed after a review. Regardless, several lawmakers criticized Postal officials for not informing them about possible closures, cutbacks in service hours and the removal of mailboxes.

"I'm afraid the Postal Service leadership has left to the conclusion that the only way to keep the Postal Service solvent is to cut back on hours of operation," said Rep. **Gerry Connolly** (D-Va.), who noted that many of his constituents have long commutes and cannot get to post offices before they close in the late afternoon.

The House subcommittee that oversees the Postal Service today reviewed the various options as the Postal Service struggles amid sharply declining mail volume and the gradual migration to e-mail and online payment systems.

As The Eye reported in today's Post, the Government Accountability Office added the Postal Service to its list of high-risk government agencies and programs on Tuesday and has urged a rapid overhaul that includes layoffs, plant closures and changes to retiree health benefits.

Review the possible nationwide closures and see the possible D.C.-area closures below:

Station Branch Name	City/State
Columbia Heights Finance	Washington, D.C.
Derwood	Rockville, Md.
Fort Davis	Washington, D.C.
Friendship Heights	Washington, D.C.
Landover Hills	Hyattsville, Md.
Ledroit Park	Washington, D.C.
Naval Research Laboratory	Washington, D.C.
Navy Annex	Washington, D.C.
Northeast	Washington, D.C.
Petworth	Washington, D.C.
Randle	Washington, D.C.
Silver Spring Center	Silver Spring, Md.
Woodridge	Washington, D.C.

Source: U.S. Postal Service

By Ed O'Keefe | July 30, 2009; 2:59 PM ET

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The comments to this entry are closed.

EXHIBIT R

Coronavirus Is Threatening One of Government's Steadiest Services: The Mail

[nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html](https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html)

Nicholas Fandos

April 9,
2020



Advertisement

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WASHINGTON — Ravaged by the impact of [the coronavirus pandemic](#), the United States Postal Service appealed to lawmakers on Thursday for an \$89 billion lifeline, telling them that it could run out of cash by the end of September if Congress fails to act.

But as Washington begins to debate the next round of government relief to prop up the virus-plagued economy, a Postal Service bailout has already emerged as a political sticking point, with Democrats pressing to deliver one and President Trump, a persistent critic of the agency, opposed. The debate appears to be playing out along the same fault lines that have divided the two sides for years as they have quibbled over how to position the cash-strapped agency — one of the government's oldest and most reliable entities — for an increasingly digital future.

The coronavirus crisis has rapidly exacerbated those woes, officials told lawmakers on Thursday. Mail volume is down by nearly a third compared with the same time last year and dropping quickly, as businesses drastically cut back on solicitations, advertisements and all kinds of letters that make up the bulk of the mail service's bottom line.

As a result, the Postal Service is projecting a \$13 billion revenue shortfall this fiscal year because of the pandemic and another \$54 billion in losses over 10 years.

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Megan J. Brennan, the postmaster general, told lawmakers on the House Oversight and Reform Committee that the agency would need \$25 billion in federal grants to cover lost revenue from the pandemic, plus an additional \$25 billion to update aging infrastructure. Another \$14 billion is needed to pay off long-term debt related to a retirement benefits program, along with \$25 billion in unrestricted borrowing authority, she said, according to officials familiar with the information she shared privately.

"At a time when America needs the Postal Service more than ever, the reason we are so needed is having a devastating effect on our business," Ms. Brennan said in a statement to The New York Times later Thursday. "The sudden drop in mail volumes, our most profitable revenue stream, is steep and may never fully recover."

She called on Congress to "shore up the finances of the Postal Service" as it had other businesses.

Democrats have been pressing for weeks to give the Postal Service most of what it is asking for. But Mr. Trump has resisted, saying the agency could solve its woes simply by raising prices on packages delivered for big online retailers like Amazon. And his administration wants to attach strings to any government help the service receives.

Latest Updates: Coronavirus Outbreak in the U.S.

Steven Mnuchin, the Treasury secretary, squashed a bipartisan attempt to send the agency emergency funds last month, insisting instead that his department be given new authority to lend up to \$10 billion to the Postal Service on terms it helps set, according to officials familiar with the negotiations who described them on the condition of anonymity.

Some lawmakers, postal union representatives and others who rely on the service now fear that the Trump administration is trying to use the current crisis to achieve conservatives' longstanding goal of nudging the mail service toward privatization — either by setting highly prescriptive loan terms or by essentially forcing it into bankruptcy. That would aid commercial competitors like FedEx and UPS.

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Ms. Brennan told lawmakers on Thursday that the agency was already in talks with the Treasury about the potential loan, but its revenue predictions suggest that the money would not be enough if the crisis continues.

Even with an increase in online shopping and package delivery to Americans cooped up at home, the agency could see a 50 percent reduction in total mail volume by the end of June, compared with the same period last year, Ms. Brennan told the lawmakers.

She said the projected shortfall this fall could throw regular mail delivery into doubt.

“They are chilling numbers,” said Representative Gerald E. Connolly, Democrat of Virginia, who leads the House subcommittee responsible for the Postal Service. “The reaction of a lot of my colleagues — their jaws were dropping. It is one thing to say the Postal Service is suffering. It is another to hear these specifics.”

For now, the mail service, which operates under government-mandated service requirements, has continued uninterrupted during the pandemic. Even as scores of its more than 600,000-person work force have fallen ill and some have died, mail sorters and carriers have continued to walk their routes in every corner of the country, in many cases the only physical lifeline Americans now have to the outside world. They deliver medicines, coronavirus test kits and packages ordered online, and could play a crucial role in November’s presidential election, in which voting by mail is expected to surge.

Sign up to receive an email when we publish a new story about the coronavirus outbreak. But the debate over whether to shore up the Postal Service has been politically fraught.

Negotiators on Capitol Hill had reached a tentative deal last month to provide the Postal Service around \$13 billion in direct relief as part of the \$2 trillion stimulus law. That was far less than House Democrats had proposed, but it had the buy-in of a crucial Republican negotiator: Senator Ron Johnson of Wisconsin, the chairman of the Senate Homeland Security and Governmental Affairs Committee, according to the officials familiar with the talks.

But Mr. Mnuchin said the administration would not have it.

Mr. Connolly said on Thursday that he would recommend that House leaders promptly back the new, higher figures presented by the Postal Service, and Representative Carolyn B. Maloney, Democrat of New York and the chairwoman of the oversight panel, indicated that she saw doing so as a matter of life and death for the agency.

“Unless Congress and the White House provide meaningful relief in the next stimulus bill, the Postal Service could cease to exist,” she said.

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Republican lawmakers, whose views may prove decisive under the circumstances, remain open to direct cash payments under certain circumstances. Historically, the Postal Service has counted on strong support from Republicans representing rural districts, where the service is a lifeline to homes and small businesses. But it is unclear if they would allocate the funds without imposing reform requirements on the agency or if they would be willing to break with Mr. Mnuchin and the White House.

An independent executive agency, the Postal Service has not taken federal funding in decades, running instead off revenue raised from stamps and other postal products. But since the 2008 financial crisis, it has struggled to stay in the black, weighed down largely by a congressional mandate to pre-fund its retirement benefits programs.

The agency has stopped making those payments in recent years, running up billions of dollars in debt, while its mail delivery business has otherwise remained profitable. Lawmakers in both parties have proposed overhauls to the service along the way, but none have taken hold.

Mr. Trump has frequently criticized the service for not charging higher prices to deliver packages for large online retailers like Amazon — a company he has sometimes singled out in his Twitter tirades on postal issues. Aides have said the president’s complaints often followed critical articles about his administration published by The Washington Post, which is owned by the Amazon founder Jeff Bezos.

He repeated the criticism this week, as he appeared to reject calls for a cash bailout. Asked about Mr. Connolly’s proposal, he said the congressman should focus instead on raising package delivery prices.

A task force led by Mr. Mnuchin published a study in 2018 recommending steps that could reduce the frequency of mail delivery and increases in the prices of sending some packages. Online retailers criticized the recommendations, which they said could particularly hurt rural customers.

The report did not spur any action in Congress last year. But a longtime congressional advocate of changes to the service, Mark Meadows of North Carolina, recently took over as Mr. Trump’s chief of staff.

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“At the end of the day, they have an agenda,” said Mark Dimondstein, the president of the American Postal Workers Union, which represents more than 220,000 postal workers. “Raise prices, reduce worker benefits and reduce services, make it appear more profitable and set it up for sale.”

“The Covid crisis should not be used to achieve political aims,” he added.

The Package Coalition, a lobbying group on postal issues that includes Amazon and other online retailers, raised concerns this week that the strings Treasury officials might attach to postal loans could raise prices during a pandemic that has made Americans more dependent than ever on package delivery.

“The Treasury has the Postal Service over a \$10 billion barrel, and the Postal Service is on the brink of bankruptcy,” said the coalition’s chairman, the former Army secretary John M. McHugh. “What do you do? We’re worried they’ll accept the terms.”

Frequently Asked Questions and Advice

Updated April 11, 2020

What should I do if I feel sick?

If you’ve been exposed to the coronavirus or think you have, and have a fever or symptoms like a cough or difficulty breathing, call a doctor. They should give you advice on whether you should be tested, how to get tested, and how to seek medical treatment without potentially infecting or exposing others.

When will this end?

This is a difficult question, because a lot depends on how well the virus is contained. A better question might be: “How will we know when to reopen the country?” In an American Enterprise Institute report, Scott Gottlieb, Caitlin Rivers, Mark B. McClellan, Lauren Silvis and Crystal Watson staked out four goal posts for recovery: Hospitals in the state must be able to safely treat all patients requiring hospitalization, without resorting to crisis standards of care; the state needs to be able to at least test everyone who has symptoms; the state is able to conduct monitoring of confirmed cases and contacts; and there must be a sustained reduction in cases for at least 14 days.

How can I help?

The Times Neediest Cases Fund has started a special campaign to help those who have been affected, which accepts [donations here](#). [Charity Navigator](#), which evaluates charities using a numbers-based system, has a running list of nonprofits working in communities affected by the outbreak. You can give blood through the [American Red Cross](#), and [World Central Kitchen](#) has stepped in to distribute meals in major cities. More than 30,000 coronavirus-related [GoFundMe fund-raisers](#) have started in the past few weeks. (The sheer number of fund-raisers [means more of them are likely to fail](#) to meet their goal, though.)

Should I wear a mask?

The C.D.C. has [recommended](#) that all Americans wear cloth masks if they go out in public. This is a shift in federal guidance reflecting [new concerns that the coronavirus is being spread by infected people who have no symptoms](#). Until now, the C.D.C., like the W.H.O., has advised that ordinary people don't need to wear masks unless they are sick and coughing. Part of the reason was to preserve medical-grade masks for health care workers who desperately need them at a time when they are in continuously short supply. Masks don't replace hand washing and social distancing.

How do I get tested?

If you're sick and you think you've been exposed to the new coronavirus, [the C.D.C. recommends that you call your healthcare provider and explain your symptoms and fears](#). They will decide if you need to be tested. Keep in mind that there's a chance — because of a lack of testing kits or because you're asymptomatic, for instance — you won't be able to get tested.

How does coronavirus spread?

It seems to spread [very easily from person to person](#), especially in homes, hospitals and other confined spaces. The pathogen can be carried on tiny respiratory droplets that fall as they are coughed or sneezed out. It may also be transmitted when we touch a contaminated surface and then touch our face.

Is there a vaccine yet?

No. [Clinical trials are underway](#) in the United States, China and Europe. But American officials and pharmaceutical executives have said that a vaccine remains at least 12 to 18 months away.

What makes this outbreak so different?

Unlike the flu, there is no known treatment or vaccine, and little is known about this particular virus so far. It seems to be more lethal than the flu, but the numbers are still uncertain. And it hits the elderly and those with underlying conditions — not just those with respiratory diseases — particularly hard.

What if somebody in my family gets sick?

If the family member doesn't need hospitalization and can be cared for at home, you should help him or her with basic needs and monitor the symptoms, while also keeping as much distance as possible, according to guidelines issued by the C.D.C. If there's space, the sick family member should stay in a separate room and use a separate bathroom. If masks are available, both the sick person and the caregiver should wear them when the caregiver enters the room. Make sure not to share any dishes or other household items and to regularly clean surfaces like counters, doorknobs, toilets and tables. Don't forget to wash your hands frequently.

Should I stock up on groceries?

Plan two weeks of meals if possible. But people should not hoard food or supplies. Despite the empty shelves, the supply chain remains strong. And remember to wipe the handle of the grocery cart with a disinfecting wipe and wash your hands as soon as you get home.

Can I go to the park?

Yes, but make sure you keep six feet of distance between you and people who don't live in your home. Even if you just hang out in a park, rather than go for a jog or a walk, getting some fresh air, and hopefully sunshine, is a good idea.

Should I pull my money from the markets?

That's not a good idea. Even if you're retired, having a balanced portfolio of stocks and bonds so that your money keeps up with inflation, or even grows, makes sense. But retirees may want to think about having enough cash set aside for a year's worth of living expenses and big payments needed over the next five years.

What should I do with my 401(k)?

Watching your balance go up and down can be scary. You may be wondering if you should decrease your contributions — don't! If your employer matches any part of your contributions, make sure you're at least saving as much as you can to get that "free money."



EXHIBIT S

Two United States Postal Service employees test positive for COVID-19 in Harrisburg

[21 local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg](https://www.local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg)

□

DAUPHIN COUNTY — The U.S. Postal Service confirmed on Wednesday morning that two employees at Harrisburg facilities have tested positive for the coronavirus.

USPS says the infected employees worked at the Harrisburg District Office and in the Harrisburg Processing & Distribution Center located at 1425 Crooked Hill Road.

The Postal Service says it is currently following CDC guidelines and will keep employees updated as new information and guidance becomes available.

Due to legal matters, USPS cannot share the name of the employees that tested positive for COVID-19 or further specifics of their medical condition.

USPS says that the WHO and U.S. Surgeon General have stated that there is currently no evidence that COVID-19 can be spread through mail or packages.

EXHIBIT T

Exton postal employee dies from coronavirus complications

[dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html](https://www.dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html)

Bill Rettew

April 12,
2020



EXTON — The coronavirus has hit home.

An employee at the Exton Post Office recently died after reportedly suffering from COVID-19 symptoms.

A spokesman reported that under the Rehabilitation Act and the Privacy Act, specific employee medical information must be kept confidential, may only be shared in very limited circumstances and the Postal Service cannot share the name of the employee.

“The Postal Service is deeply saddened by the passing of one of our postal family members in Exton,” according to a Saturday statement from spokesman Raymond V. Daiutolo Sr. “The employee was a dedicated public servant, and we extend our deepest condolences to his family during this difficult time.”

The Exton Post Office was recently partially closed and now the virus has impacted the West Chester Post Office.

The U.S. Postal Service learned on April 9 that employees at the West Chester Post Office tested positive for the Coronavirus Disease, according to Daiutolo.

“The safety and well-being of our employees is one of our highest priorities,” Daiutolo said. “To ensure the health of our employees, we are continuing to follow recommended strategies from the CDC. We also continue to monitor the COVID-19 situation on a nationwide basis.”

Picking up your mail is still safe, officials said.

“Both the CDC (<https://www.cdc.gov/coronavirus/2019-ncov/faq.html>) and the World Health Organization (<https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>) have indicated that there is currently no evidence that COVID-19 can spread through the mail,” Daiutolo said. “In addition, both the Surgeon General and the Director of the National Institute for Allergies and Infectious Diseases have indicated that there is currently no evidence that the coronavirus is being spread through the mail.”

EXHIBIT U

'The supervisor coughed in a coworker's direction as a joke': As coronavirus cases at the US Postal Service surpass 1,200, employees say a lack of supplies and care is putting them at risk

BI [businessinsider.com/postal-workers-usps-worry-for-their-safety-amid-coronavirus-pandemic-2020-4](https://www.businessinsider.com/postal-workers-usps-worry-for-their-safety-amid-coronavirus-pandemic-2020-4)

Alanis King 2020-04-25T14:15:00Z

- Confirmed cases of the novel coronavirus have surpassed 1,200 at the United States Postal Service, which logged a mere 51 cases less than a month ago. More than 30 employees have died.
- In emails to Business Insider, USPS employees claimed a lack of sanitation supplies, sick pay, and care from supervisors.
- One employee said a supervisor coughed in the direction of a coworker "as a joke." The USPS told Business Insider that the US Occupational Safety and Health Administration issued an inquiry into the claim, and that after the USPS responded, "OSHA closed the matter without further inspection."
- The USPS has established safety and leave policies during the pandemic, but employees and unions have said those policies aren't being carried out everywhere.
- [Visit Business Insider's homepage for more stories.](#)

United States Postal Service employees from various states and municipalities are sharing their stories about what it's like to process and deliver the nation's mail during a pandemic.

As confirmed COVID-19 cases surpass 1,200 among the employees, a common refrain has emerged: lack of supplies and care amid the deadly outbreak is putting them at risk.

"I'm almost begging you to do some sort of investigation," a longtime USPS employee and American Postal Workers Union (APWU) member in California told Business Insider via email. The employee said they felt as if their supervisors didn't care, which was underscored by one particular event.

"A coworker stated that the supervisor coughed in his direction less than a few feet away as a joke after the employee had made a remark about [the coronavirus]," they said. The employee claimed that the acting manager "sort of chuckled" when it happened, making light of a pandemic that has so far [infected more than 2.8 million people](#) and killed nearly 200,000 worldwide.

A USPS spokesperson told Business Insider that the US Occupational Safety and Health Administration issued an inquiry into the claim, and that after the USPS responded, "OSHA closed the matter without further inspection."

A USPS employee in Manhattan during the coronavirus pandemic.

Mike Segar/Reuters

Emails like the one above began to flood in not long after the USPS joined the coronavirus news cycle, such as in this story about how the service was in a financial crisis and how, as of March 25, 51 of 630,000 USPS employees had tested positive for the coronavirus and nearly 2,000 were in quarantine.

At the time, the National Association of Letter Carriers (NALC) union representing USPS city carriers said protective measures from the USPS weren't being deployed evenly.

But things have gotten worse since then. As of April 17, counts from the NALC were that more than 900 employees had tested positive for the virus, more than 600 additional workers were presumed positive, more than 8,000 were in quarantine, and that more than 30 USPS employees had died from COVID-19, including nine city carriers.

The American Postal Workers Union, which also represents USPS employees, wrote on April 16 that more than 35 postal workers, including "a number of APWU members," had died of COVID-19.

On April 21, USPS spokesperson Dave Partenheimer told Business Insider that 1,219 employees had tested positive for COVID-19, in addition to "some deaths." Partenheimer did not have quarantine numbers to provide.

A USPS mail carrier during the COVID-19 pandemic.
AP Photo/Paul Sancya

That means the USPS has roughly 24 times the amount of cases it had less than a month ago, despite both insufficient amounts of testing and inequality in distribution across the US — as illustrated by asymptomatic celebrities, athletes, and billionaires obtaining tests while nurses on the front lines struggle to do the same.

The longtime USPS employee in California, who isn't a carrier, told Business Insider that employees including themselves were "either scared to speak up or simply don't want to put a target on [their] back for speaking up" about insufficiencies at the post office amid the pandemic.

Only one employee who emailed Business Insider, who had been previously quoted by another outlet, didn't ask to stay anonymous out of fear of retaliation — Colorado carrier Stefan Geissler, who has actively spoken about the USPS' response to the pandemic.

"While so many businesses have done their part and made difficult decisions to flatten the curve, the USPS is, as you know, not even in the starting blocks," Geissler told Business Insider via email.

A USPS employee in Manhattan during the coronavirus pandemic.
Mike Segar/Reuters

Other employees who reached out to Business Insider specifically asked not to be identified in order to protect their employment, which Business Insider has verified.

The others echoed Geisler, along with the California employee saying they don't feel like the pandemic is being taken seriously enough. Management and other employees aren't following Centers for Disease Control and Prevention guidelines, they said, and they've sent complaints to multiple organizations about what's going on.

"We're given daily 'stand up' safety briefings and are required to sign documents saying we were given this 'training,' yet the supervisors do not practice any of the recommendations," they said, adding that the safety briefings happen every day in a small room and social-distancing guidelines aren't followed during them. "They are different everyday, and seem to be from the CDC and the post office's safety department."

But, the employee said, their office hasn't "bothered to inform [them] of an employee who got the coronavirus in a building less than 100 yards away." They discovered the nearby case after seeing an alert that was intended for managers, they said.

"When an employee asked about any cases next door, both the supervisor and acting manager acted as though they knew nothing and quickly changed the subject," they said. "Myself and three other employees go into that building to get our facility's mail, and they

said nothing to us.

"And here we are interacting within the vicinity, not knowing if we could be contracting a deadly disease and take it home to our families."

A mail carrier during the coronavirus outbreak.

AP Photo/Nati Harnik

The NALC said that in March, the USPS created a mandatory stand-up talk required to be given each time a facility has an employee who tested positive for COVID-19. The union has asked employees to report it if those talks are not happening.

When asked, Partenheimer told Business Insider that in addition to stand-up talks that are supposed to be given when an employee tests positive, "any employees who may have had exposure" to the person who tested positive are notified.

The California employee, an American Postal Workers Union member, said the union had been notified of all of the issues in their facility. On April 17, they sent Business Insider a photo of a bottle with clear liquid and a homemade label reading "hand sanitizer," claiming that it was a replacement bottle in the office.

"No labels, just some bottle management gave us," they said. "Is it the right mixture?"

When asked about the photo, Partenheimer told Business Insider that the USPS "only uses or purchases EPA approved products for cleaning and sanitizing."

A USPS letter carrier crosses a quiet Boylston Street with greatly reduced foot and vehicle traffic in Boston on March 18, 2020.

Lane Turner/The Boston Globe via Getty Images

A Massachusetts employee who has spent decades working for the postal service, primarily as a city carrier, said that while their branch is supposed to receive daily safety briefings,

there were three days during the first week of April when there were no briefings. The inconsistency carried into the next week, they said.

When asked how the USPS is ensuring daily talks happen and safety protocols are being enforced, Partenheimer told Business Insider: "Standard Work Instructions have been issued to address social distancing in a number of different situations, including performing talks to our employees."

In addition, Partenheimer said, all stand-up talks "are tracked" to ensure they happen. When asked how they're logged, Partenheimer said it's done in an online system called the "Safety Toolkit." People who are conducting the briefings have to certify that they delivered the talks and when they were given.



A USPS worker walks by a LinkNYC sign reading "Staying home saves lives" as the coronavirus continues to spread across the United States on April 2, 2020 in New York City. Cindy Ord/Getty Images

But the Massachusetts employee said the inconsistency of safety briefings wasn't the only problem.

"We have had limited access to sanitizing wipes and employees have resorted to buying construction wipes online," they said, adding that as of April 3, their postal facility hadn't provided employees with any hand sanitizer.

The local fire and EMS service donated more than 20 small bottles of sanitizer, they said, adding that the USPS' "lack of preparedness and concern" is "systemic of our work conditions." The local fire chief confirmed the donation to Business Insider, saying the employee's office was one of two that received sanitizer donations.

The employee "wouldn't dream of treating employees this way," they said.

Employees were eventually provided with Lysol spray to share, the employee from Massachusetts said, in addition to a "short supply of gloves and limited wipes." Those in the community created cloth masks, too.

A USPS employee in Manhattan during the coronavirus pandemic.

Andrew Kelly/Reuters

A longtime city carrier in Ohio told Business Insider that when they opted to self quarantine at the end of March after not receiving adequate supplies or workstation sanitation, and after hearing that employees weren't being "informed of employees with pending tests," they weren't able to use their hundreds of hours of earned sick leave.

The employee, a National Association of Letter Carriers member, sent photos of their hour tracking and earned hours, and said they were docked for leave without pay — which they felt was retaliation for feeling unsafe.

"I am sure the union will get me the money eventually after a long grievance process," they said. "It is just the principal of the matter."

When the Ohio employee returned to work on April 6 after their leave, they said their office did have hand sanitizer, surgical masks, gloves and wipes, but not everyone's temperature was taken. It was also announced that carriers would start staggering work by two hours in order to maintain proper social distancing, they said, but it still wasn't enough.

"Out of the 30-plus people there this morning, I and two others were the only ones with masks on in the office and nothing was ever mentioned about the fatalities of fellow carriers in New York or the recent death of the mail handler in Detroit," they said, adding that carriers were responsible for sanitizing their own vehicles and were instructed not to let businesses or senior-living facilities take their temperatures. "We are also not being updated as to our number of positive cases within the company."

A USPS employee in Santa Monica, California, during the coronavirus pandemic.
Mario Tama/Getty Images

Partenheimer confirmed that employees aren't allowed to submit to temperature readings or medical questionnaires as a condition of delivery, "because temperature readings and medical questionnaires are currently considered confidential medical information."

"Under the Rehabilitation Act and the Privacy Act, specific employee medical information must be kept confidential and may only be shared in very limited circumstances," Partenheimer said.

Partenheimer also confirmed that carriers are responsible for maintaining vehicles and workstations, and that the USPS has instructed drivers "to clean frequently touched surfaces regularly."

"All required supplies were made available to employees on a daily basis," Partenheimer told Business Insider. "When supplies need to be replenished, every effort was and is being made to expedite the orders."

A USPS employee in New York City during the coronavirus pandemic.
John Nacion/NurPhoto via Getty Images

A month ago, the NALC union was talking about the claimed lack of supplies promised by the USPS. While the service agreed to provide certain provisions during the coronavirus pandemic, the union said in a March 25 update — daily cleaning supplies for offices and vehicles, hand sanitizer and other clearing supplies for carriers, and masks and gloves for any employee who requested them — much of that promise wasn't being fulfilled.

"We have received almost 3,000 reports from all over the country regarding these issues," the union statement from March said. "In some places, all of these things are being done. However, in too many places they are not.

"In the places where there are not enough supplies, or none at all, it is generally due to the overall shortage of these items throughout the country. USPS has been working to acquire more items, even authorizing local managers to purchase them if they could be found."

A USPS employee in Washington, DC, during the coronavirus pandemic.
Saul Loeb/AFP via Getty Images

In the April 17 update, the NALC indicated that the problem hadn't been fixed entirely, saying that the NALC was "in constant communication and negotiation with management" about "supplies, equipment, policies, protocols, and work procedures necessary to keep letter carriers safe."

When asked about the claims of supply shortages, Partenheimer told Business Insider that the USPS "worked through some early supply-chain issues — the same issues faced by others across the country — and [is] making sure the supplies and equipment are getting to all areas."

The NALC told members to immediately contact the union if they saw issues in the workplace, many of which were mentioned by the employees who reached out to Business Insider. Those issues included, emphasis ours:

Please continue to contact us with any questions, and to report **offices that are not being sanitized on a regular basis**, that **do not have sufficient supplies** (hand sanitizer, disinfectant wipes, masks, gloves, etc.), that are not following Centers for Disease Control & Prevention (CDC) protocols for employees to be quarantined, that **have not implemented social distancing practices**, that are **not providing daily communication regarding stand-up talks, safety precautions, and instances of infection in the building**, that expect employees to work without protection or in an unsanitized environment, or that have any other issues that put employees at increased risk.

The union added in that same update that the USPS had recently agreed to provide N95 masks to employees who are more vulnerable to the virus and request such equipment.

That's in addition to [an April 2 update](#) from the USPS, which said it would: ensure "millions of masks, gloves and cleaning and sanitizing product are available and distributed to more than 30,000 locations every day"; ensure appropriate social distancing at facilities; update cleaning policies to meet CDC guidelines; allow "allow liberal use of leave" for employees; allow those who can work remotely to do so; and issue "a daily cadence of employee talks, articles, videos, and other communications to ensure employees have the latest information and guidance."

Neither the NALC nor the APWU responded to a list of questions sent over by Business Insider.

But as both employees and the unions have pointed out, not all of those protection promises from the USPS have panned out yet.

A USPS employee in Manhattan during the coronavirus pandemic.

Mike Segar/Reuters

Still, the Ohio employee said, people rely on the work of USPS employees — from those looking for medication to local restaurants sending out deal fliers to stay afloat and those relying on an income by making masks and selling them. And even amid a "toxic" work environment that requires the right mental attitude to stick with, they said, "the good outweighs the bad."

"I love my job and my customers, and I take pride in going out of my way for them everyday," they said. "We are essential.

"But if I can't ensure my own safety, I can't ensure my customers' safety either."

Are you a USPS employee with a story to share about the coronavirus pandemic? Contact the reporter at aking@businessinsider.com.

EXHIBIT V

United States Postal Service®

INDUSTRY ALERT

April 17, 2020

COVID-19 CONTINUITY OF OPERATIONS UPDATE Expected Delivery Changes for Priority Mail and First-Class Package Services

U.S. Postal Service Priority Mail products and First-Class packages may require more time to be delivered due to limited transportation availability as a result of the ongoing Coronavirus Disease (COVID-19) impacts to the United States.

Effective April 17, 2020:

The Postal Service's flagship **Priority Mail Express** service, which guarantees overnight service, will not change.

Service commitments for local 1-day **Priority Mail** will not change.

Priority Mail's two and three day service commitments now will be extended to three and four days respectively. Customers will continue to receive end-to-end visibility and improved product tracking, as well as up to \$50 in free insurance.

With the extra day extension, customers should expect delivery using **Priority Mail Open and Distribute (PMOD)** to range from two to four days nationwide.

First-Class Package Service (FCPS) two and three day service commitments will also be extended to three and four days respectively.

Global Express Guaranteed Services also have been altered. For a full list of international and domestic updates, refer to usps.com.

The Postal Service's goal continues to be to move packages as expeditiously as possible. The Postal Service continually reviews its network capacity to provide the American public reliable, efficient, and fast-delivery service. We will continue to keep you abreast of improvements in transportation availability and when we will be able to return to normal service levels.

EXHIBIT W

House panel warns coronavirus could destroy Postal Service by June

[politico.com/news/2020/03/23/coronavirus-postal-service-june-145683](https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683)

coronavirus

"It has become clear that the Postal Service will not survive the summer without immediate help," said Rep. Carolyn Maloney.



US Postal Service is in dire straits due to the drop in revenue from coronavirus. | Scott Olson/Getty Images

The U.S. Postal Service could be gone by June unless Congress immediately delivers billions of dollars to counteract the impact of the coronavirus crisis, a House committee chairwoman warned Monday night.

"Based on a number of briefings and warnings this week about a critical fall-off in mail across the country, it has become clear that the Postal Service will not survive the summer without immediate help from Congress and the White House," Oversight Chairwoman Carolyn Maloney (D-N.Y.) said in a statement.

Advertisement

Maloney, who was joined in the statement by Rep. Gerry Connolly (D-Va.), indicated the Postal service has seen a "drastic" reduction in mail volume and could shutter by the summer without intervention, a collapse that could, among other things, jeopardize access to mail-order prescription drugs for millions of Americans, especially in rural communities.

A Postal Service shutdown would also affect the ability of voters to cast ballots by mail.

Maloney and Connolly noted the [House's \\$2.5 trillion coronavirus relief package](#) would send \$25 billion to the Postal Service in emergency funding and eliminate the Postal Service's \$11 billion debt. The measure would reset the Postal Service's borrowing limit to \$15 billion and eliminate an annual \$3 billion borrowing cap. The measure would also require the agency to prioritize medical deliveries.

The House bill would also allow the Postal Service to create "temporary delivery points" and establish flexible staffing procedures if the novel coronavirus affects its operations.

The Postal Reorganization Act of 1970 turned the Postal Service into an independent agency within the U.S. government that was primarily responsible for funding itself, something that has become harder since the internet era led to a dramatic drop in the volume of mail. Beyond that, the Postal Service has been required since 2006 to pay at least \$5.5 billion annually to pre-fund retiree benefits.

David Cohen contributed to this article.

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EXHIBIT X

How hard will it be to vote during the coronavirus? It depends on where you live.

I [inquirer.com/news/voting-by-mail-pennsylvania-new-jersey-coronavirus-20200421.html](https://www.inquirer.com/news/voting-by-mail-pennsylvania-new-jersey-coronavirus-20200421.html)

by Jonathan Tamari and Jonathan Lai , Updated: April 21, 2020



If you're a Pennsylvanian who wants to vote by mail this year, you can — but make sure your ballot arrives by 8 p.m. on Election Day.

If you're in New Jersey, you have more time. Your ballot will be counted as long as it's postmarked by Election Day and arrives within 48 hours of the polls closing.

Across Pennsylvania's northern border in Erie County, N.Y. (home to Buffalo), some polling places open more than a week before Election Day and are scheduled to be available over two weekends, for convenience. In Erie County, Pa., a few miles south, voting early is less flexible. You have to do it with an absentee ballot at the county election office. Weekend hours aren't certain. (The same goes throughout Pennsylvania.)

And if you live in Allegheny County, you'll automatically get a vote-by-mail application sent to your home. Elsewhere in Pennsylvania, you have to request one.

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» READ MORE: *Voting by mail is a safe option during coronavirus. Here's what you need to know about absentee ballots in Pennsylvania and New Jersey.*

Inquirer Morning Newsletter

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As states scramble to adapt elections for the coronavirus pandemic, the rules vary widely, each set by seemingly small bureaucratic decisions that together determine how easy or hard it is to vote — and how many people do or don't.

Those rules are now subject to a growing legal and political battle across the country, especially in closely divided states like Pennsylvania, where tiny differences could influence who wins its 20 electoral votes and, ultimately, the White House.

Democrats in Congress are pressing for national standards to impose early voting nationwide and ease mail-in voting. After the U.S. Supreme Court ruled that ballots in Wisconsin's April 7 primary had to be counted if they were postmarked — not received — by that date, some Democrats now argue that standard should apply to all states, including Pennsylvania, and have brought a lawsuit to force the change in Arizona, another battleground.

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The Republican National Committee, meanwhile, has set aside \$10 million for legal battles against efforts to make it easier to vote, arguing that looser laws could lead to fraud (though studies show election fraud is rare).

The fight — in Congress, courthouses, and legislatures — is now one of the central battles of the presidential race.



Morry Gash / AP

Voters wait in line to cast ballots at Washington High School in Milwaukee April 7 while ignoring a stay-at-home order over the coronavirus.

“Now is the time to be thinking about what voting should look like in November,” said Rick Hasen, an election law expert at the University of California, Irvine.

As each state decides how to do that, key questions include:

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- How easy is it to obtain a mail-in ballot? Are they automatically sent out, or do voters have to request one? Can they be requested online?
- Is the ballot’s postage prepaid?
- Do mail-in ballots require a witness? Or do election officials just check that the signature matches registration records?
- Can voters give their ballots to someone else to turn in? If so, who? Relatives? Caregivers? Political activists?

Much could depend on which counties can afford to pay the postage for mail-in ballots or buy the machines needed to process votes — and on localized politics. In states that have long relied on mail voting, every registered voter automatically gets an absentee ballot. In Pennsylvania, state law requires people to apply for them.

In Pennsylvania, you can request an absentee ballot online. New Jersey requires a paper form.

3:01

Astrid Rodrigues, Megan Griffith-Greene

This step-by-step tutorial for making your own face mask is based on guidance from the Pennsylvania Department of Health.

Pennsylvania has a system to track a mail ballot's status online. New Jersey doesn't.

New Jersey provides prepaid postage to voters, while Pennsylvania counties mostly don't (though [Philadelphia will this primary](#)).

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Elections are run by counties, but they follow highly specific laws set at the state level. In Pennsylvania, that means changes have to clear both the GOP-led legislature and Gov. Tom Wolf, a Democrat.

And given the partisan divide over voting rules, changes for November could be hard to enact.

Democrats, [and some Republicans](#), have argued that during a pandemic, states should do all they can to make voting easier, and provide options — including early voting (which could thin lines at the polls), voting by mail, and secure drop boxes where people can leave absentee ballots.

"This is an attempt at making sure that elections that are run at the local level recognize the pandemic that we are in," Sen. Chris Coons (D., Del.) said of the national legislation. "This really shouldn't be a partisan issue. We shouldn't be forcing people to put their health at risk to vote."

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Philadelphia's top elections official, Lisa Deeley, called Monday for a change in state law to allow ballots to count if postmarked by an election day and received up to seven days later.

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While some Republican governors and secretaries of state have supported mail-in voting, the GOP more broadly has long fought efforts to make it easier to vote. Led by President Donald Trump, Republican officials argue that each state should set the rules and that it's risky to mail ballots to people who didn't request them.

"The overhaul would vastly expand opportunities for fraud and weaken confidence in our elections, but all Washington Democrats see is a potential benefit for their party," Republican National Committee Chairwoman Ronna McDaniel wrote this month in a Fox News column.

In Pennsylvania, elections officials were already implementing new voting machines and a vast expansion of absentee voting.



Mark Hoffman / AP

City of Milwaukee Election Commission workers process absentee ballots April 7 in downtown Milwaukee.

As Pennsylvania prepares for its June 2 primary, some counties are hitting bottlenecks: Social distancing measures mean elections staff are working staggered shifts or remotely, and the specialized computers they use don't always fit within existing office space.

» READ MORE: *Pennsylvania House unanimously backs proposal to delay the 2020 primary due to the coronavirus*

Delaware County has fallen behind in processing absentee ballots. More than one-third of Philadelphia's mail ballot requests had not been processed as of April 15, which a city official attributed to COVID-19 precautions.

To remove the logistical hurdles around in-person voting, a number of county elections officials in Pennsylvania are calling for the state to conduct its primary entirely by mail, along with allowing earlier counting of absentee ballots.

If ballots were automatically mailed statewide, proponents argue, it would eliminate one step for voters and free short-staffed offices from having to process requests. In Wisconsin, officials couldn't keep up and thousands of absentee ballots didn't reach voters in time — forcing many to stand for hours in lines at the polls.

» ***READ MORE: Despite coronavirus, Wisconsin is holding an election Tuesday. It could hold lessons for Pa. and N.J.***

Unlike many other states, Pennsylvania officials can't begin reviewing absentee ballots until Election Day, potentially delaying the count. UC Irvine's Hasen warned that if counting drags and the lead shifts, it could undermine faith in the results.

» ***READ MORE: How does a Republican lead on election night and still lose Pennsylvania? It's called the 'blue shift.'***

With Pennsylvania elections officials already short of money, changing to all-mail elections would require investments, along with massive public education campaigns.

Congress has approved \$400 million for pandemic-related election costs this year, but Democrats say at least \$2 billion more is needed.



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A look at different psoriasis treatments
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Voting rights advocates worry that politics could stymie reforms.

"It frustrates me that voting rights are a partisan fight," said Suzanne Almeida, acting executive director of Common Cause Pennsylvania.



EXHIBIT Y

County Election Official Notes for Senate Hearing

April 30, 2020

Jeff Greenburg, Mercer County

Tim Benyo, Lehigh County

Ed Allison, Lawrence County

- It appears 1000s of Wisconsin and Ohio voters in their recent primaries never got a ballot. If Pennsylvania is okay with that, then we should do nothing. If we're not okay with it, then let's fix it now for the primary and November.
- To be clear there is no fault here. We are all trying our best under unprecedented circumstances to figure out the best way to deliver elections while keeping voters and poll workers safe. We hear and see "disenfranchisement" needing to be the nation's No. 1 priority in discussions about options for voters. We would argue Covid-19 has disenfranchised the world at the moment and our number one priority must be safety.
- The best option to avoid what's happening in other states might have been to simply mail all registered voters a ballot. That's the only way to avoid a situation where counties will not be able to process all applications.
- Because we are required to provide accommodations for voters with accessibility needs and we recognize some voters do not update their records, we would also suggest some form of in-person voting locations, perhaps, at local public high school gyms, which are accessible and provide plenty of parking and space to ensure social distancing.
- Pennsylvania and many other states might have miscalculated the fallout from massive scaling up of mail voting because there was one bottle neck we couldn't avoid – processing applications. Counties were not built for this either administratively or through human capital. There aren't enough people and hours in the day in many places to overcome that bottleneck because PA has been built to handle a minimal number of mail applications over decades.

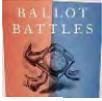
- While we expected difficulties and some hiccups related to the roll out of Act 77, we went from expecting perhaps a 15 to 20 percent uptick in applications to seeing currently a 400 to 500 percent increase and growing. Put another way, counties were expecting about 30 inches of snow. What we're getting is the equivalent of 10 feet and it's going to get worse.
- We're at 800,000 applications now and are falling behind daily. Other states have seen exponential explosions of applications in the weeks leading up to their primaries so "we ain't seen nothing yet." Wisconsin's numbers multiplied 10 times during the three weeks prior to their primary. I don't think we'll get that high, but even if we triple or quadruple what we've done, many counties will be in trouble.
- If no changes are coming for the primary, one request: We are asking the Governor to issue a public directive immediately asking all polling locations to be open for voters on June 2. There seems to be plenty of confusion from locations as to what they're permitted and not permitted to do when it comes to opening and a message from the Governor would go a long way to helping counties secure at least public buildings. We understand private facilities might not be covered.
- Last note: With the overwhelming majority of ballots cast coming by mail, PA should full expect that it will be several days before complete results are reported. Any in-person results will be reported under normal timelines on June 2, but mail ballots will likely take days to process. Should address pre-canvass options for November.

EXHIBIT Z

Worrying about Wisconsin, While Waiting for Its Election Returns

 medium.com/@Nedfoley/worrying-about-wisconsin-while-waiting-for-its-election-returns-9dc94334c8a6

April 12,
2020



The United States holds genuine elections, not sham ones.

That's what distinguishes this country from Putin's Russia and other authoritarian regimes. Or at least it has ever since the Voting Rights Act, when we finally paid — in King's words — that "promissory note" from "the architects of our Republic" that all Americans would be equal in their citizenship.

Now, as we await results from Wisconsin's April 7 election (to be released starting at 4pm on Monday), we must wonder whether this election is one that fails our national commitment to genuine democracy and, if so, what to do about it.

In my judgment, without yet seeing those results, it is too soon to say that any of the reported vote tallies will require judicial modification or even judicial nullification.

To be sure, just from watching what took place on Tuesday — with Milwaukee voters braving coronavirus infection, perhaps even death, in hours-long lines at a paucity of polling places because of the pandemic — we know that what happened was an abomination, a civic tragedy, that never should have occurred. But to my mind that does not mean a court should invalidate the election, requiring a do-over, without regard to the results. Indeed, that would be unfair to those voters who, as Sherrilyn Ifill has so movingly described it, were "risking it all to stand as full American citizens and cast a ballot."

We hold elections to put candidates in office, so that they can govern on our behalf. Therefore, to know whether or not an election succeeded or failed, we need to assess whether a candidate's apparent victory, as reflected in the reported vote tallies, genuinely corresponds to the electoral choice of the participating voters.

If the outcome is what the voters actually wanted, then the result should stand despite the travesty of the process that produced this authentic result. But if not — if the vote count does not accurately reflect the preference of participating voters — then some sort of

judicial remedy becomes warranted. Otherwise, the election was a sham, not genuine, and the winner takes office without the consent of the governed, which as we declared at the outset is our national test of government's legitimacy.

So, let's wait for the evidence on whether Wisconsin's election meets, or fails, this crucial test. As I told the students in my Election Law class last week, what we all want most from our judges is that they always keep an open mind, willing to consider new arguments that they have not examined previously, and to decide cases based on the merits of those arguments and the facts presented.

Thus, my own views on what, if any action, a court should take in a case challenging the outcome of any race on this Wisconsin ballot necessarily remains tentative. Modeling judiciousness, I would want to read the briefs on both sides of a case before deciding which I thought had the better position.

But with that tentativeness in mind, I can begin to imagine at least three sorts of issues that might arise that could put in doubt the validity of vote totals as an accurate reflection of the electorate's choice.

First, apparently there are a significant number of absentee ballots that arrived without a postmark, but likely cast on or before Election Day, and thus as substantively worthy of inclusion in the election as ballots postmarked by Election Day, according to the principle articulated by the U.S. Supreme Court in its last-minute ruling before Tuesday's voting began.

Second, there is also likely to be some number of ballots postmarked after Election Day, but which voters were not in a position to cast any earlier because, through no fault of their own, they had not received their ballots in adequate time from the government. Although the Supreme Court ruled that the federal judiciary could not insist in advance that Wisconsin count these ballots (since they could have been cast after Election Day), the Supreme Court did not decide what other type of remedy might be necessary or appropriate, under either state or federal law, if these votes would make the difference in any of the races in this election.

Third, there are the voters who properly requested an absentee ballot but never received one in time to cast it by April 7, the date of the election, and thus did not send it back even if they received it subsequently. They also did not go to the polls on Election Day because they reasonably feared for their health and, even more, wanted to obey the directive from Dr. Deborah Birx, among other public health officials, that they should not be leaving their homes even to go grocery shopping this past week if at all possible.

A cast ballot, left uncounted by election canvassers although it should have been in order to treat similarly situated voters fairly, can be counted later by a court, leading to the judicial declaration of a different winner if there enough of these wrongly uncounted votes. (Additional guidance on implementing this remedial principle can be found in section 213 of the American Law Institute's , which — full disclosure — I helped to draft.) But it is impossible for a court to count a ballot that was never cast. But these voters cannot be held responsible for failing to cast a ballot. They did exactly what they were supposed to do — and was their right — in making a timely request for an absentee ballot, which they did not receive because of the government's failure.

These voters did their part to participate in this election. They are part of the electorate whose collective will must be accurately reflected in the resulting vote tallies in order for the election to be valid. If their missing votes would have made a difference in any race on the ballot, then the reported vote count is not a genuine expression of the electorate's actual choice.

While it may be an evidentiary challenge for a court to determine if ballots never cast because of wrongful disenfranchisement would have yielded a different outcome, it is not necessarily impossible. The names and addresses of disenfranchised voters may be identifiable, based on records of their timely absentee ballot requests (and documentation of the too-late date on which the government sent them their ballots). Statistical analysis of the precincts in which these disenfranchised voters reside may yield a high probability that the missing votes, if added to the reported tallies, would have overtaken the apparent margin of victory. Although this kind of statistics might not be enough to award the election to a different candidate than the apparent "winner," it should suffice for judicial invalidation of the reported result (a point that the ALI project emphasized in section 213(g) of its principles).

To declare a "winner" based on that incomplete result would be a sham — based as it is on ballots missing as a consequence of the government's wrongful disenfranchisement of valid voters — and to let that "winner" hold office because of a purported mandate to govern derived from the election, would make a mockery of what "consent of the governed" truly means.

Consequently, we need to be prepared for the possibility that Wisconsin's election failed in its essential purpose and that its results cannot stand. This is a sobering conclusion. No one likes to declare failure, especially not when it concerns self-government.

And maybe it won't come to that. Maybe, despite all its horrific flaws, Wisconsin's vote will have conformed to the will of its voters. But if not, then something must be done to remedy the situation. Otherwise, as an exercise of self-rule, Wisconsin's election will have been a pretense, not the real thing.

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After Its Disturbing Election Day, What Happens Next in Wisconsin?

nymag.com/intelligencer/2020/04/after-a-disturbing-election-day-now-what-in-wisconsin.html

Ed Kilgore

April 8,
2020



Primary Day in Milwaukee. Photo: Scott Olson/Getty Images

Unless it is exceeded by even more nightmarish scenarios later in the year, Wisconsin's election on April 7 will go down in the history books as a low point of intensely partisan, banana-republic high jinks. Through a tag-team maneuver involving the state legislature and

conservative majorities on both state and federal Supreme Courts, Republicans managed to engineer an election where in-person voting was depressed by fear of death from the coronavirus along with poll-worker shortages in the Democratic stronghold of Milwaukee. At least 10,000 absentee ballots cast in good faith were discarded because election officials were overwhelmed by requests. Never has the abiding Republican satisfaction with a restricted franchise been more baldly evident.

But now that this scandalous event has come and gone, there is the little matter of compiling the results and mulling the implications, including the possibility of still more litigation.

We won't have any official results until Monday, April 13. That's because in striking down federal district court judge William Conley's order allowing absentee ballots postmarked after April 7 but received by April 13 to be counted, SCOTUS left in place his subsequent ban on county reports of results until that latter date. Unless results somehow leak, we'll just have to wait to learn who won the Democratic presidential primary, the much-watched Wisconsin Supreme Court contest, and the Milwaukee mayoral election (a nonpartisan election narrowed to two candidates, incumbent Tom Barrett and challenger Lena Taylor, in a February primary).

Scattered reports of total votes cast from various counties confirm the general picture of heavy absentee voting marred by failure to get all the ballots mailed out, and disparate Election Day voting patterns, with the big problem being in Milwaukee, where just five of 180 polling places were open. Here's how the Wisconsin *State Journal* summed up the absentee ballot picture:

Statewide, more than 10,000 voters who didn't receive requested absentee ballots by Election Day, according to Wisconsin Elections Commission data, were forced to make the choice between sitting out the election or voting in person and risking their health.

On top of that, there are some eligible voters whose ballots have been disqualified. During a roughly 24 hour window last week, a federal court ruling gave voters the option to certify on their absentee ballot they could not find a witness and have it counted. A later appellate court ruling invalidated that option.

Voters who used that option during the legal window were left without an option. They can't have their absentee ballots counted, and they were barred from voting in person under Wisconsin law.

There is some evidence that early absentee voting in Wisconsin skewed Republican, while Election Day voting in Democratic Dane County (Madison) and Republican Waukesha County was a lot higher than in Milwaukee, mostly because more polling places were open:

Unofficial @CityofMadison turnout numbers (with additional absentees pending until 4/13):
87,552 ballots. 50.3%

Absentees counted today: 61,279

April 2016 turnout: 66%#MadisonVotes2020 #MadisonWI

— Madison WI Clerk (@MadisonWIClerk) April 8, 2020

Glass slightly full: Milwaukee turnout up 9% vs spring 2019.

Glass mostly empty: Milwaukee turnout down 59% vs spring 2016.

Size of glass unclear: we don't know what turnout looked like in rest of state yet, nor how many who wanted to vote were disenfranchised. <https://t.co/temUj13P7W>

— Ben Wikler (@benwikler) April 8, 2020

There's clearly plenty of material for new lawsuits if close results in key races merit them. Otherwise people in Wisconsin may simply want to forget this shameful election, even as voter-suppression practitioners examine it with malicious glee as a fine example of how to exploit tragedy and chaos for partisan gain.

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Wisconsin Supreme Court Justices Voted Absentee Before Making Everyone Else Vote in Person

nymag.com/intelligencer/2020/04/wisconsin-voters-braved-covid-while-justices-voted-absentee.html

Zak Cheney-Rice

April 14,
2020



Amid the coronavirus pandemic, voters line up in Wisconsin to cast their ballots. Photo: Sara Stathas for the Washington Post via Getty Images/2020 The Washington Post

Wisconsin Republicans were dealt a humiliating defeat on Monday. Daniel Kelly, a conservative State Supreme Court justice, lost his reelection bid to Jill Karofsky, his progressive challenger, by a decisive margin. (Returns are still incoming, but as of Monday night, Karofsky was up by 120,000 votes in the nonpartisan race; the New York *Times* reports that the last election for a Wisconsin Supreme Court seat was decided by fewer than 30,000 votes.) The result shocked members of both parties, in no small part because the state GOP did all it could to guarantee the opposite outcome. The novel coronavirus pandemic has forced most Wisconsites into seclusion, but earlier this month, the Republican-held legislature rejected Governor Evers's efforts to postpone the election, forcing people to vote in person and risk infection. (In accordance with public-health guidelines, no other U.S. state is holding an in-person election in April.)

The Wisconsin Supreme Court's conservative majority upheld the move in a clear bid to secure partisan advantage. The virus has wreaked havoc on Milwaukee's black residents in particular, killing dozens; Republicans were counting on fears of further devastation to keep others away from the polls, prompting lower turnout in the population centers where they typically perform the worst. In fact, the opposite seems to have occurred: Turnout in and around cities like Milwaukee and Madison far outstripped the state's more conservative rural counties, lifting Karofsky to victory. It remains unclear how many Wisconsinites were imperiled or made sick by the Republicans' anti-democracy gambit, but its failure throws a wrench in the party's looming gerrymander efforts, and that's what Democrats were hoping for.

Even so, the effort's brazenness boggles the mind. For much of the past week, a defining emblem of the Wisconsin GOP's civic irresponsibility during this pandemic was a video of state assembly Speaker Robin Vos, decked out in full protective gear, a mask, and rubber gloves, assuring his constituents on Election Day, "You are incredibly safe to go out." (Since the video made the rounds, the cumulative number of confirmed COVID-19 cases in Wisconsin grew from 2,578 to 3,428 and is still rising.) But Vos's willingness — and, by extension, that of his party — to expose everyday Wisconsinites to dangers he himself was hesitant to risk is more widespread than the video illustrates. The Milwaukee *Journal Sentinel's* Daniel Bice reported on Monday that all seven of the state's Supreme Court justices — and, most significantly, all four who ruled in favor of requiring Wisconsin voters to cast their ballots in person last week — voted absentee, either by mail or early in person, ensuring that they wouldn't have to join the thousands of people waiting in line last Tuesday, risking their lives.

Local Democrats took notice. "Republicans on the Supreme Court are corrupt hypocrites who forced Wisconsinites to vote in person during a public-health crisis when they themselves enjoyed the safety of casting their ballots absentee," Courtney Beyer,

spokesperson for the state's Democratic Party, told the *Journal Sentinel*. "They are luckier than the thousands of others who tried to do the same and were unable to," added State Senator Chris Larson, a Milwaukee Democrat.

More from Bice:

Just how unusual was this?

Very ...

Voting records show Supreme Court justices — especially the conservative members — don't generally like voting absentee.

Kelly and fellow conservative Justice Brian Hagedorn have gone to polls and voted in person on election day in each of the five previous elections. Bradley, another conservative, has done the same in four of the past five contests, and Chief Justice Patience Roggensack, a conservative, voted in person in three of five.

The two liberal justices — Rebecca Dallet and Ann Walsh Bradley — were acting in accord with their past practices when they voted absentee this time. Walsh Bradley has voted absentee in all of the past five elections, while Dallet has done the same three times.

The only outlier was Justice Annette Ziegler. Unlike her fellow conservatives, she has a preference for voting absentee, having done so in three of the last five elections.

Put simply, the precise motivations for why each individual justice voted the way they did have not been made explicit by any of them, but their behavior during this election, their first and perhaps only during a pandemic, marked a significant departure from most of their usual voting habits. Conveniently, this departure allowed each of the court's conservatives to avoid the perils of crowded in-person voting that they were on the verge of condemning their statesmen to. (In Milwaukee, the typical election features 180 polling locations; last

week's had only five, forcing voters to line up for hours.) It surely made the justices' decision easier knowing that they'd be facing none of its biggest risks. Its incongruity had much of the same effect as donning a hazmat suit and assuring the public that everything was fine.

Now that they've been thwarted, the stakes have only become more urgent. The past decade has seen Wisconsin transform into a hotbed of partisan rancor, with desperate Republicans pursuing all manner of anti-democratic measures to enshrine minority rule at the state level. Voter suppression has been one of their many tools, and the pandemic will likely present more opportunities as November approaches. Their success could have national implications as well. Wisconsin is viewed as a crucial swing state in the presidential race, and GOP redistricting would inevitably tilt Congress in the party's favor. Republicans on the local and national levels have already decried what expanded voting options, implemented to stop voters from contracting or transmitting the coronavirus, might mean for their electoral prospects. "Republicans should fight very hard when it comes to statewide mail-in voting. Democrats are clamoring for it," President Trump wrote on Twitter. "Tremendous potential for voter fraud, and for whatever reason, doesn't work out well for Republicans." Georgia House Speaker David Ralston added that greater reliance on voting by mail "will be extremely devastating to Republicans and conservatives." The stakes are clear, as are the lengths to which the party is willing to go to avert losing power. If Republican legislators, abetted by conservative justices, have no qualms about tossing voters into the maw of a deadly virus, just so they can win a Supreme Court seat, there's no telling what even greater desperation might provoke.

Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear

[nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html](https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election-coronavirus.html)

Astead W. Herndon

April 7,
2020



Advertisement

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MILWAUKEE — Even before voting began, there were lines outside polling locations that stretched for several blocks. Some poll workers wore hazmat suits. Nearly every voter wore a face mask, removing it only to make small talk that reflected a combination of determination and grim humor about the extraordinary experience of voting amid a deadly pandemic.

For thousands of people across Wisconsin on Tuesday, fears of the coronavirus outbreak did not stop them from participating in the state's elections, where critical races such as the Democratic presidential primary and a key state Supreme Court seat were being decided.

"It feels bad to have to choose between your personal safety and your right to vote," said Dan Bullock, 40, as he waited to vote at Washington High School on Milwaukee's North Side. "But you have to be heard."

Many others across the state, however, appeared inclined to stay home as the fear of contracting the disease outweighed their desire to participate in the most fundamental ritual of democracy. Late Monday, Republicans in the state legislature had gone to court to block the Democratic governor's order to postpone the primary.

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"No one should have to choose between risking their health and possibly dying and going to vote," said Marcelia Nicholson, 31, a county supervisor for Milwaukee. She said she was unsure she could vote safely after having been exposed to the coronavirus herself.

In Milwaukee — where the number of polling stations was reduced from 180 to only five — voters tried to exercise proper social distancing as they waited, in some cases, for more than two hours. But in other areas of the state, including Madison, suburbs like Brookfield, and more rural areas like Beloit, the voting process was altered but not totally disrupted, with options that included curbside ballot access and poll locations that were more fully staffed.

Milwaukee has the biggest minority population in the state, which means that geographic and partisan differences in access to voting often overlap with racial ones.



Image



Lines outside of some of Milwaukee's polling places stretched several blocks with people trying to adhere to social distancing. Credit...Tannen Maury/EPA, via Shutterstock

The scenes that unfolded in Wisconsin showed an electoral system stretched to the breaking point by the same public health catastrophe that has killed thousands and brought the country's economic and social patterns to a virtual standstill in recent weeks. And in Wisconsin, the political institutions proved overmatched, with a Republican legislature and a conservative state and federal judiciary resisting efforts to reschedule the election or revise the procedures for voting.

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The result was a dangerous spectacle that forced voters to choose between participating in an important election and protecting their health. While election administrators said they were trying in myriad ways to make the voting process safer, the long lines, last-minute judicial rulings and backlogged absentee ballot requests added up to something resembling system failure.

Latest Updates: Coronavirus Outbreak in the U.S.

- [Trump's travel restrictions led to an exodus from hot spots — and little rigorous screening in U.S. airports.](#)

- A drug promoted by Trump neither helped nor harmed patients, researchers found.
- A battle has erupted between the White House and the C.D.C. over reopening guidelines.

Ellie Bradish, for instance, said she was forced to vote in person in Milwaukee after attempts at early voting and absentee voting failed.

“My friend and colleagues at work were worried about me coming out,” Ms. Bradish, 40, said. “But I was worried that if I didn’t come, my vote would be thrown out.”

Watch: Scenes From the Wisconsin Elections

Voters faced long lines, confusion and risk of infection as Wisconsin's elections, including presidential primaries, took place in spite of the coronavirus pandemic.

"I cannot in good conscience allow any types of gathering that would further the spread of this disease and to put more lives at risk. There is not a sufficiently safe way to administer in-person voting tomorrow."

"I am 65. I'm a Type 2 diabetic. I have had heart issues. I mean, those are the risk factors they say can make it more serious." "I actually think that it's suppressive and dangerously irresponsible that the Legislature hasn't either delayed the election or made it all mail-in ballot. I had a moment where I just really was not sure that I could do this. I woke up crying." "We have some best practices things set up in there with a Plexiglas shield between the voter and the poll workers. We're going to have masks available, gloves available, hand sanitizer. But it's still going to be something that is a risk." "We normally use 13 different polling locations. We normally have 300 poll workers to staff those locations. As of 10 days ago, we were down to 40."

00:00

2:09

2:09 Watch: Scenes From the Wisconsin Elections



Voters faced long lines, confusion and risk of infection as Wisconsin's elections, including presidential primaries, took place in spite of the coronavirus pandemic. Credit Credit... Lauren Justice for The New York Times

The array of procedural problems led some state party officials to predict that the results would be contested by whichever side loses.

“People are going to be wondering about the authenticity of the vote no matter what because of the politicalization,” said Patty Schachtner, a Democratic state senator from St. Croix County, who made her own mask to wear during a six-hour stint as a poll worker.

National voting rights experts said the turmoil and acrimony surrounding the election could be an unsettling example of what might happen across the country later this spring if states do not manage to implement new methods of voting during the coronavirus outbreak — or even in the November general election if the pandemic has not abated by then.

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In Wisconsin, Gov. Tony Evers and his fellow Democrats pushed for a range of changes to the primary process, including rescheduling the election and switching to mail-in voting. But Democrats faced a wall of resistance from Republicans who saw political advantage in leaving existing procedures intact.



Image



People waited to vote at Riverside High School in Milwaukee on Tuesday. Only five polling places were open in the city of half a million. Credit... Lauren Justice for The New York Times

Almost forgotten amid a life-or-death debate about voting procedures was a Democratic presidential race that is still not formally finished: former Vice President Joseph R. Biden Jr. and Senator Bernie Sanders were both competing for delegates in Wisconsin, though neither man campaigned actively in the state. Mr. Biden, with a nearly insurmountable delegate lead overall, was expected to carry the primary, but in a strange byproduct of the tangled judicial rulings there would be no results released until next week.

Sign up to receive an email when we publish a new story about the coronavirus outbreak. It was not only the Democratic presidential primary on the ballot on Tuesday in Wisconsin: there was intense competition over a seat on the Wisconsin Supreme Court, with one of the justices in the conservative majority battling for re-election. The winner will be in position to cast a deciding vote on a case before the court that seeks to purge more than 200,000 people from Wisconsin's voter rolls.

The panel has been a bulwark of Republican dominance in the state over the last decade, along with a G.O.P. majority in the State Legislature that has entrenched itself through aggressive gerrymandering.

Like so much else in Wisconsin, the scene was markedly different outside the main urban areas. Republican county chairs boasted about their smooth process throughout the day, with short lines and ample room for a smattering of voters who often showed little signs of the current health crisis — no masks, no gloves. In Sheboygan County, about an hour north of Milwaukee up the Lake Michigan shore, Dennis Gasper, a Republican Party official, said he drove around local polling places and found no issues.

“All the clerks have figured out how to deal with the coronavirus thing, so nobody should be having a problem voting,” Mr. Gasper said.

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Mr. Gasper chalked up complaints from Milwaukee and elsewhere to Democrats “making political points out of what would normally be a mundane election process.”





A drive-through polling place was set up in New Richmond, WisCredit...Nicholas Pfosi/Reuters

But in Milwaukee, where there are more than 1,000 confirmed cases of the virus and at least 87 people have died of it, many voters cast their ballots wearing full protective gear, some overtaken with fear.

Some Republican efforts to downplay the danger of the election ended up highlighting the medical risks involved. For instance, Robin Vos, the Republican speaker of the Wisconsin Assembly, [posted on Facebook](#) that he was volunteering as a poll worker, writing that “an impressive amount of planning and organization” went into securing the election. In photos, Mr. Vos looked ready to enter a contaminated zone: He was wearing a face mask, a plastic body covering and gloves.

The partisan divide within Wisconsin over the safety and integrity of the election was mirrored on the national level, with the Democratic presidential candidates raising concerns about the safety of the vote and President Trump urging Republican voters to the polls as though little was out of the ordinary. On Twitter, Mr. Trump lauded the incumbent Wisconsin Supreme Court justice seeking re-election, Daniel Kelly, as a jurist who “loves your Military, Vets, Farmers.” And later in the day he weighed in on the vote by mail effort, saying without evidence, “The mail ballots are corrupt, in my opinion.”

“Mail ballots, they cheat,” the president said at his evening briefing on the virus. “Mail ballots are very dangerous for this country because of cheaters. They go collect them. They are fraudulent in many cases.”

Mr. Trump himself voted by mail in the 2018 midterms and in last month’s Florida primary.

Mr. Sanders, who like Mr. Biden has held no campaign events in nearly a month because of the virus, took a far more somber approach, rebuking Wisconsin Republicans for risking “the health and safety of many thousands of Wisconsin voters” to force an election under conditions of extreme adversity.

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Mr. Biden, who last week said he would defer “to the scientists” and to state officials about in-person voting in Wisconsin, was more skeptical Tuesday night. “My gut is that we shouldn’t have had the election in the first place, the in-person election,” he said on CNN. “It should have been all-mail ballots in, it should have been moved in the way that five other states have done it.”

It was not just Democratic candidates who called the election dangerous: As a series of court decisions were announced on Monday evening — every one of them a setback for Democrats — Speaker Nancy Pelosi and other prominent party leaders accused the judiciary of siding with the Republican Party over the interests of voters.

In perhaps the sternest comments of all, Ms. Pelosi rebuked the federal Supreme Court for rejecting an effort late Monday to extend absentee balloting in Wisconsin. The court, Ms. Pelosi said on television, was “undermining our democracy.”



Image



A poll worker checked in a voter from behind a plexiglass barrier in MadisonCredit...Steve Apps/Wisconsin State Journal, via Associated Press

Despite the collective sense of civic duty on display in Wisconsin, many voters expressed dismay at the difficult circumstances. Kinnethia Tolson-Johnson arrived at her polling place in Milwaukee before it opened, hoping to avoid crowds and stay safe. But she had to wait outside for more than an hour while fellow voters organized themselves to keep proper distance. "It was discouraging," Ms. Tolson-Johnson said. "And it was just hard to keep your energy."

Hannah Gleeson, a health care worker in Milwaukee who is 17 weeks pregnant, and who recently tested positive for coronavirus, said she was despondent about being unable to vote. "I've always said that every vote matters, every vote counts, and it's your one chance to have your voice heard," she said. "And it's now something that I really feel has been taken away from me, and my husband as well."

Ms. Gleeson said she filed a request to vote by absentee ballot but never received one.

"They're delivering refrigerated trucks out to Milwaukee because they expect the death toll to be so high," she said. "But they also expect us to go out and vote."

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Representative Mark Pocan, a Democrat who represents Madison, said the electoral troubles that have been on display in the state the last few weeks should serve as a catalyst for national changes.

"We should be the poster child for a national vote by mail program in November," Mr. Pocan said. "We cannot risk having this confusion headed into the national election."

Astead W. Herndon reported from Milwaukee, and Alexander Burns from New York. Reid J. Epstein contributed reporting from Washington, D.C., and Nick Corasaniti from New York.

Frequently Asked Questions and Advice

Updated April 11, 2020

What should I do if I feel sick?

If you've been exposed to the coronavirus or think you have, and have a fever or symptoms like a cough or difficulty breathing, call a doctor. They should give you advice on whether you should be tested, how to get tested, and how to seek medical treatment without potentially infecting or exposing others.

When will this end?

This is a difficult question, because a lot depends on how well the virus is contained. A better question might be: "How will we know when to reopen the country?" In an American Enterprise Institute report, Scott Gottlieb, Caitlin Rivers, Mark B. McClellan, Lauren Silvis and Crystal Watson staked out four goal posts for recovery: Hospitals in the state must be able to safely treat all patients requiring hospitalization, without resorting to crisis standards of care; the state needs to be able to at least test everyone who has symptoms; the state is able to conduct monitoring of confirmed cases and contacts; and there must be a sustained reduction in cases for at least 14 days.

How can I help?

The Times Neediest Cases Fund has started a special campaign to help those who have been affected, which accepts donations here. Charity Navigator, which evaluates charities using a numbers-based system, has a running list of nonprofits working in communities affected by the outbreak. You can give blood through the American Red Cross, and World Central Kitchen has stepped in to distribute meals in major cities. More than 30,000 coronavirus-related GoFundMe fund-raisers have started in the past few weeks. (The sheer number of fund-raisers means more of them are likely to fail to meet their goal, though.)

Should I wear a mask?

The C.D.C. has recommended that all Americans wear cloth masks if they go out in public. This is a shift in federal guidance reflecting new concerns that the coronavirus is being spread by infected people who have no symptoms. Until now, the C.D.C., like the W.H.O., has advised that ordinary people don't need to wear masks unless they are sick and coughing. Part of the reason was to preserve medical-grade masks for health care workers who desperately need them at a time when they are in continuously short supply. Masks don't replace hand washing and social distancing.

How do I get tested?

If you're sick and you think you've been exposed to the new coronavirus, the C.D.C. recommends that you call your healthcare provider and explain your symptoms and fears. They will decide if you need to be tested. Keep in mind that there's a chance — because of a lack of testing kits or because you're asymptomatic, for instance — you won't be able to get tested.

How does coronavirus spread?

It seems to spread very easily from person to person, especially in homes, hospitals and other confined spaces. The pathogen can be carried on tiny respiratory droplets that fall as they are coughed or sneezed out. It may also be transmitted when we touch a contaminated surface and then touch our face.

Is there a vaccine yet?

No. Clinical trials are underway in the United States, China and Europe. But American officials and pharmaceutical executives have said that a vaccine remains at least 12 to 18 months away.

What makes this outbreak so different?

Unlike the flu, there is no known treatment or vaccine, and little is known about this particular virus so far. It seems to be more lethal than the flu, but the numbers are still uncertain. And it hits the elderly and those with underlying conditions — not just those with respiratory diseases — particularly hard.

What if somebody in my family gets sick?

If the family member doesn't need hospitalization and can be cared for at home, you should help him or her with basic needs and monitor the symptoms, while also keeping as much distance as possible, according to guidelines issued by the C.D.C. If there's space, the sick family member should stay in a separate room and use a separate bathroom. If masks are available, both the sick person and the caregiver should wear them when the caregiver enters the room. Make sure not to share any dishes or other household items and to regularly clean surfaces like counters, doorknobs, toilets and tables. Don't forget to wash your hands frequently.

Should I stock up on groceries?

Plan two weeks of meals if possible. But people should not hoard food or supplies. Despite the empty shelves, the supply chain remains strong. And remember to wipe the handle of the grocery cart with a disinfecting wipe and wash your hands as soon as you get home.

Can I go to the park?

Yes, but make sure you keep six feet of distance between you and people who don't live in your home. Even if you just hang out in a park, rather than go for a jog or a walk, getting some fresh air, and hopefully sunshine, is a good idea.

Should I pull my money from the markets?

That's not a good idea. Even if you're retired, having a balanced portfolio of stocks and bonds so that your money keeps up with inflation, or even grows, makes sense. But retirees may want to think about having enough cash set aside for a year's worth of living expenses and big payments needed over the next five years.

What should I do with my 401(k)?

Watching your balance go up and down can be scary. You may be wondering if you should decrease your contributions — don't! If your employer matches any part of your contributions, make sure you're at least saving as much as you can to get that "free money."



You Shouldn't Have to Risk Your Life to Vote

[nytimes.com/2020/04/03/opinion/wisconsin-primary-coronavirus.html](https://www.nytimes.com/2020/04/03/opinion/wisconsin-primary-coronavirus.html)

The Editorial Board

April 3,
2020



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On Tuesday, hundreds of thousands of voters in Wisconsin will be forced to choose between exercising their constitutional right to vote and safeguarding their own lives, not to mention the lives of their loved ones, their neighbors and poll workers across the state.

That's the predicament in which Republican state lawmakers have placed Wisconsinites — who have been under a stay-at-home order since March 25 — by refusing to agree to postpone the state's April 7 presidential primary or to give all voters the option to cast a ballot by mail. Republicans control both chambers of Wisconsin's Legislature.

The stay-at-home order, issued by Gov. Tony Evers, bars people from leaving their homes except for food or medical needs, or to care for a family member or other vulnerable person. When they do go out, they must stay six feet away from other people — a near-impossible task at the polls. "There is no way for us to abide by those guidelines and at the same time administer an in-person election," said the mayor of Green Bay, Eric Genrich.

As of Friday, 1,730 Wisconsinites had tested positive for Covid-19, and 37 had died.

Governor Evers, a Democrat, initially supported holding the election as scheduled. In late March, after the state's coronavirus cases soared above 700, he called for absentee ballots to be mailed to all state residents. On Friday afternoon, he made a last-ditch effort, calling the Legislature to meet in a special session on Saturday to consider legislation that would switch the state to all-mail voting, with a May 26 deadline for returning ballots.

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Yet Republican lawmakers appear to be forging ahead with Tuesday's vote, which includes many state and local races — and, crucially, a fight for a seat on the State Supreme Court, which already has a Republican majority.

It's no surprise that front-line election workers, who come face to face with hundreds if not thousands of voters, are balking. Roughly 7,000 poll workers have said they won't show up for fear of being infected with the coronavirus. Who could blame them? Many are older and at increased risk from an infection.

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As a result of the walkout, however, more than 100 precincts will have no poll workers. In Milwaukee, which usually operates 180 polling sites, fewer than 12 may be open on Tuesday. Because Wisconsin law requires at least three election workers to be stationed at each polling site, Governor Evers said he would deploy National Guard troops to do the job if necessary.

Meanwhile, poll workers who plan to be present on Tuesday are taking whatever protective measures they can. Some are fashioning sneeze guards by propping sheets of plexiglass between card tables. Others are considering wrapping voting booths in plastic.

This is insane, and utterly unnecessary. Fifteen states, including four with primaries scheduled for this coming week, have already postponed their elections; several have canceled all in-person voting and are relying solely on mail-in ballots. On Thursday the Democratic National Committee pushed back its national convention, which is scheduled to be held in Milwaukee, from July to August.

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Republicans insist that widespread mail voting would be an "invitation for voter fraud," even though evidence suggests fraud is actually lower in states with all-mail balloting. They also argue it would be logistically impossible to print and mail so many ballots before Tuesday. If so, then why not just push back the election, as Mr. Evers has proposed? The answer can only be that Republican legislators don't want people to vote.

These are the same Republicans, you might recall, who in 2011 gerrymandered Wisconsin's legislative district maps so egregiously that they were able to win more than 60 percent of the seats while losing the statewide popular vote to Democrats.

These are the same Republicans who, with that ill-gotten majority, passed a strict voter-ID law that denied ballot access to black and Latino Wisconsinites at far higher rates than whites. The law reduced turnout in 2016 by 200,000 votes from 2012, in a key battleground state that Donald Trump won by fewer than 23,000.

And these are the same Republicans who, knowing that Wisconsin could be a decisive state in the 2020 election, are hoping to lock in a state judge's recent purge of more than 230,000 voters, disproportionately from Democratic-voting areas. The judge's ruling, which targeted voters believed to have moved, has been appealed to the State Supreme Court.

On Thursday, a federal judge declined to delay the primary, but he extended the deadline for returning absentee ballots and loosened the requirement that ballots be signed by a witness. These fixes don't come close to creating the conditions for a fair election, but they are both clearly necessary given the more than one million absentee ballots that have been requested — a number that is many times higher than average and is already overwhelming understaffed elections offices. Republican lawmakers immediately appealed the ruling.

In their zeal to ram through this vote, Republicans are subjecting Wisconsinites to the worst of both worlds: a turnout that will be sharply reduced because so many voters will continue to do the right thing and abide by the stay-at-home order, and yet one that will still be large enough to inundate the few precincts that will be open, and expose untold numbers of people to potential infection.

Turnout is likely to be especially lower in Democratic-leaning cities like Milwaukee, which holds a large majority of the state's minority voters and which has been hit hardest by the pandemic.

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Wisconsin Republicans aren't outliers in their attempts to make voting harder. Republicans across the country have known for years that they win when fewer people vote.

But what they used to say quietly has now become a central element of the party's platform. Last year, the Senate majority leader, Mitch McConnell, called a proposal to make Election Day a holiday a "power grab" by Democrats — essentially admitting that if voting were easier, Republicans would suffer at the polls.

The point was made explicit this week by Georgia's House speaker, David Ralston, who opposed a push for mail-in ballots to be sent to every registered voter on the ground that it would encourage more people to vote. "This will be extremely devastating to Republicans and conservatives in Georgia," Mr. Ralston said in a local news interview. "This will certainly drive up turnout."

And there was President Trump himself, who functions as the Republican id, venting on "Fox & Friends" about voter-friendly provisions that House Democrats had included in a draft of the coronavirus stimulus package. "The things they had in there were crazy," Mr. Trump said. "They had levels of voting, that if you ever agreed to it, you'd never have a Republican elected in this country again."

The only good that could come of this travesty would be the demonstration of what happens when huge numbers of voters can't cast a ballot, either in person or by mail. If you are concerned about voter turnout becoming a nationwide problem in November's general election — and you should be — pay attention to what happens in Wisconsin's benighted primary. Republicans hope it will be a harbinger of our future. All Americans who care about democracy need to ensure that it isn't.

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Never Forget Wisconsin

 slate.com/news-and-politics/2020/04/never-forget-wisconsin.html

Sherrilyn Ifill

April 8,
2020

Voters at Riverside University High School in Milwaukee on Tuesday.
Scott Olson/Getty Images

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We must never forget the images we saw in Wisconsin this week. Thousands of mask-wearing Americans standing in staggered lines extended over city blocks as they waited to vote amid the most dangerous pandemic this country has faced in a century. None of them could be certain they would avoid taking the deadly coronavirus home with them after they cast their ballots. And, yet, they waited for hours—keeping as much distance as reasonable from fellow voters waiting in line—to exercise the fundamental right that the Supreme Court described 134 years ago as “preservative of all rights.”

These images of determined, masked voters waiting in lengthy lines—some using canes or in wheelchairs—are a macabre snapshot of American failure. Failure of leadership, politics, and our democracy. Without question, the bulk of the blame falls on the state Legislature, which refused to postpone the election even after Wisconsin Gov. Tony Evers issued a stay-at-home order. The governor’s subsequent effort to unilaterally postpone the election by executive order was rejected in a 4–2 vote by the Wisconsin Supreme Court on Monday. That left it to the U.S. Supreme Court to determine whether to leave in place the order of a federal district court judge extending deadlines to allow tens of thousands of voters who requested absentee ballots as a result of the pandemic—but hadn’t received them due to a crush of such requests—additional time to mail in their ballots.

In that April 2 order, federal district court Judge William Conley starkly summarized the “dilemma” that would face thousands of Wisconsin voters unless the return date for absentee ballots was extended. “Voters who did not or could not vote absentee will be forced on election day to choose between exercising their franchise and venturing into public spaces, contrary to the public message to ‘stay home’ delivered by countless public officials during the course of this pandemic,” he wrote.

For black voters, this “dilemma” was particularly acute. COVID-19 is taking a harsh toll on black communities across the country, including in Wisconsin. Although black Americans constitute only 6 percent of the state’s population, they comprise nearly half of the state’s

deaths from COVID-19. And, in Milwaukee County, where black Americans are 27 percent of the population, they represent 70 percent of those who have died from COVID-19.

Poll closures and the absentee ballot processing backlog also fell harshly on black voters. In Milwaukee, the city with the largest black population in Wisconsin, 180 city polling places were consolidated to only five polling places that would be open on Election Day, guaranteeing long lines and mass gatherings. And state measures taken to provide safer alternatives for returning absentee ballots were less accessible for black voters in Wisconsin. For example, the state expanded drive-by drop-off for absentee ballots in several cities, but 26 percent of Wisconsin's black population does not own a vehicle.

The choice facing black voters was especially agonizing because of the unique history of their struggle for full enfranchisement. Death has far too often been the consequence for black Americans who insisted on exercising their full rights as American citizens by voting. Indeed, for the forebears of many black voters standing in those lines in Wisconsin, attempting to vote mere decades ago in countless instances meant a confrontation with death in counties and cities across the South.

When the Supreme Court announced its decision on Monday overturning the district court ruling adjusting the deadline for the return of absentee ballots from April 7 to April 13 regardless of the postmark date, no details about the “dilemma” facing voters, or the unique challenges to black voters, made it into the majority opinion. Indeed, the pandemic itself—the crisis that formed the context of the entire case—was not mentioned until the penultimate paragraph. And it was only included to insist that the court’s cynical decision was not what it was—a shocking abandonment of American voters amid a frightening, devastating pandemic.

Like the images themselves of Wisconsin’s voters, Americans must never forget the court’s painfully and embarrassingly narrow justification for this monumental betrayal of those voters. The decision itself was crushing. But the court’s refusal to account for this colossal public health crisis—to even bother to wrestle with the “dilemma” created by the state Legislature’s decision to proceed with the election—made the decision particularly galling.

This refusal to deal in real-world consequences is now a feature of the court’s voting rights jurisprudence. From its 2013 decision in Shelby County v. Holder to its 2019 decision in the partisan gerrymandering case Rucho v. Common Cause, the court over and over again has ignored facts that cannot be reconciled with its increasingly rigid and narrow conception of voting and political participation. The fact that its decision would consign voters to choose between exercising their right to vote and risking their lives and health was simply too uncomfortable a truth for the court to even broach. So, instead, it defined the important issue before it as one that was purely “narrow” and “technical,” rather than fundamental

and defining. It was left to Justice Ruth Bader Ginsburg in her dissent to remind the court of its shirked duty: "Ensuring an opportunity for the people of Wisconsin to exercise their votes should be our paramount concern."

The election in Wisconsin plowed through yet another guardrail in the fast-moving descent of our democracy. Power and partisan objectives were placed above public safety, with the acquiescence of America's highest judicial body. With full knowledge that black voters would be disproportionately imperiled or disenfranchised, an election was conducted in a manner designed to compel those voters to make an unconscionable choice between their lives and their citizenship.

I salute every voter in Wisconsin who stood in line for hours, risking it all to stand as full American citizens and cast a ballot. Each one of them emerges from this with a nobility and integrity that ultimately will be all that can save this democracy from a further slide into ignominy. As we head toward one of the most consequential elections in the history of this country, we must use the image of those courageous Americans to power our determination that, going forward, every voter will have a meaningful opportunity to cast their ballot and have it counted without risking their life. It is not too late to ensure that this shameful and disastrous episode is not repeated in November. Proposals offered by civil rights groups and by elected leaders like Sen. Elizabeth Warren to expand voting access would protect the next national election in the face of this pandemic. But we must act soon and decisively if we are to honor the courage and resolve demonstrated by Wisconsin's voters.

'I Could Get the Virus If I Vote': Wisconsin's Terrifying Election Day

 thedailybeast.com/people-are-going-to-die-in-this-election-wisconsin-votes-amid-coronavirus-pandemic-1

April 7,
2020

DAILY BEAST

MILWAUKEE — Even sitting in a car outside of a Wisconsin polling place felt like a risk to Angela Warner.

The 29-year-old wanted to wait there while her partner headed in to vote “for our family.” At eight months pregnant, Warner had already decided going inside wasn’t something she could bring herself to do.

But she wanted to do something, wanted to feel like she had tried. And the whole situation, the one facing many voters in the state torn between the urge to vote and trying to stay safe during the coronavirus pandemic, weighed deeply on the public school educator.

“This whole voting situation is fucked up,” Warner said. “I can’t believe I have to choose between voting and the safety of our child. It almost feels like choosing life or death to be honest.”

Wisconsin’s primary painfully lurched into action Tuesday, even as some Democrats in the state feared sending people to the polls could cause voters to be infected with the coronavirus, and even lead to deaths.

It went on despite a flurry of moves in the last week to postpone the primary, while both blue and red states set to hold their primaries around the same time pushed back their contests in hopes of keeping their voters safe during the pandemic.

Price County Democratic Party chairman Steve Gustafson told The Daily Beast it was “appalling” that in person voting was occurring.

"How can this not spread further? It's absurd," he said. "Obviously people are going to get sick, they're going to spread the virus and people are going to die. And that's not right."

Still, on Tuesday voters showed up, trying to be socially distant, but undoubtedly putting themselves at risk to cast their ballot. In Milwaukee, where the city's election commission had shifted 180 voting locations to "five voting centers" because of "severe shortages in election workers," long lines formed. The videos and photos of voters doing something so ordinary in such panicked times immediately drew expressions of shock online.

One of those voters, Ronny Hill, 65, a retired construction worker, waited over two hours to vote. Dressed in a jogging suit and wearing a medical mask, plastic gloves and a Marines baseball cap, he said his sense of duty outweighed his fear of the virus.

"Was I scared? Hell yea I'm scared!" he said. "This virus is taking out the black people in this community, but I knew what I had to do. My daddy couldn't vote during his time, so I voted for him."

A lengthy wait also didn't deter Lauren Gilbert, a student support consultant and adjunct professor. The 26-year-old voted Tuesday at a polling place located in a predominantly black neighborhood and described lines that "were around the block."

"It took me almost 2 hours to vote," Gilbert said. "I wasn't scared, I felt empowered. I am passionate about voting as an educator."

"I always vote, but I didn't want to be here today. I'm afraid I could get the virus and bring it home to my family, but my absentee ballot didn't arrive," said Lilly Miller, 34, a full-time stay-at-home mom. "My husband stayed home from work with the kids so I could come vote. My husband received his ballot, so he was able to vote."

Jazemeka Fuller, 18, a senior in high school, was casting a ballot for the first time on Tuesday.

"I'm not gonna lie, I'm scared," she said. "When I was younger I was really excited to turn 18 and vote. My granddad used to always tell me the history of voting in this country and how Black people couldn't vote. But today, the excitement I had is gone."

In the days leading up to the contest, a chilling patchwork of stories emerged from people in Wisconsin who feared what in person voting could bring. For 23-year-old Briana Marks, it meant "extra safety precautions tomorrow, a face mask, Lysol wipes, and gloves."

Shannon Romero, 22, a service industry worker who has been a poll worker since 2016, said the polling place consolidation was "disheartening and frustrating."

“The polling sites are going to see thousands of voters for those who didn’t have the ability to vote absentee, and yet that level of congestion jeopardizes the health of workers and other voters,” Romero said. “It steals the right of the elderly and those with compromised immune systems, and it discourages those without access to childcare or cars or time between work.”

The tense situation awaiting voters, who were forced to weigh whether it was worthwhile to risk one's health to cast an in person vote Tuesday, could be seen coming for weeks. Four states were scheduled to hold primaries on March 17 despite the coronavirus pandemic playing out in their states. While Arizona, Florida, and Illinois still held their primaries, unprecedented moves by the Republican governor of Ohio led to the state pushing back its plans to vote in person that same day.

And even though a portrait of confusion emerged from the states that went ahead with their contests as planned, Wisconsin’s Democratic Governor Tony Evers only moved in recent days to try and unsuccessfully push back his state’s primary.

His eleventh hour attempt to delay the contest was blocked first by the state’s Republican legislature and then by the state’s supreme court Monday.

In a statement following the state supreme court’s decision, Wisconsin House Speaker Robin Vos and Senate Majority Leader Scott Fitzgerald maintained that “we advocated for everyone to vote absentee.”

“We continue to believe that citizens should be able to exercise their right to vote at the polls on Election Day, should they choose to do so,” the state GOP leaders said in the joint statement.

In a ruling late Monday, the U.S. Supreme Court said that absentee ballots must be “postmarked by election day,” undoing a lower court’s decision that ballots postmarked after Tuesday’s election would “still be counted so long as they are received by April 13.”

“If you think that this is what should be happening today, you’re either uninformed about coronavirus, a nihilistic partisan, or a Republican-appointed Justice of the Supreme Court of the United States,” Wisconsin Democratic Party Chairman Ben Wikler tweeted Tuesday morning about a video of Waukesha voters standing in line.

Over 1.2 million absentee ballots had been requested in Wisconsin, according to the state’s elections commission. It reported Tuesday that close to 865,000 had been returned.

On a call with reporters Tuesday afternoon, Kristen Clarke, the president and executive director of the Lawyers’ Committee for Civil Rights Under Law, said a top concern coming out of Wisconsin were people who requested, but did not receive, an absentee ballot.

"And many of those individuals are not in a position to go to one of the few polling sites that are open across the state today, and are now in the dark about what they can do to ensure that their voice is heard this election season," Clarke said.

But a severe shortage of poll workers that became clear to officials last week meant that the prospect of voting in person could be a perilous choice in a state where Gov. Evers had already issued a stay at home order to help fight the spread of COVID-19.

As of Monday, the [state's health department](#) listed 2,440 COVID-19 cases in Wisconsin.

"Although I remain deeply concerned about the public health implications of voting in-person today, I am overwhelmed by the bravery, resilience, and heroism of those who are defending our democracy by showing up to vote, working the polls, and reporting on this election," [Evers tweeted Tuesday](#).

Last week, both Sen. Bernie Sanders (I-VT) and the state Democratic party called for the election to be postponed. Former Vice President Joe Biden did not join that call. The presumptive nominee still has a ways to go before reaching the delegate threshold he needs to officially become the Democrats' nominee for president.

President Donald Trump has also weighed in on the state's supreme court contest, with little concern for the optics of encouraging in person voting during a public health crisis. Just days before, Trump had told the country "this is going to be a very painful, very, very painful two weeks," when it came to the coronavirus pandemic.

Tuesday morning, the [president tweeted](#), "Wisconsin, get out and vote NOW for Justice Daniel Kelly. Protect your 2nd Amendment!"

The election also meant some voters had to make the kind of hard decisions about their health and well being that would have been unnecessary during any normal time.

John Kenney, an electrician, waited two hours in drive-thru voting on Sunday in order to early vote. His wife has a pre-existing condition, and he did not feel comfortable voting on Tuesday.

"Thank God I have a car and I had the time to do that, but for the people that can't, this paints a bigger picture of the state of our politics," Kenney said.

The 43-year-old worried that voting in person could mean being exposed to the virus.

"I'm angry [about voting], but I'm glad I voted," he said.

EXHIBIT AA

Wisconsin polling places are closing because there's not enough people to work the April 7 election

[jsonline.com/story/news/politics/elections/2020/03/31/wisconsin-voting-sites-closing-due-coronavirus-poll-worker-shortage/5090003002/](https://www.jsonline.com/story/news/politics/elections/2020/03/31/wisconsin-voting-sites-closing-due-coronavirus-poll-worker-shortage/5090003002/)

Patrick Marley and, Craig Gilbert

milwaukee journal sentinel

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The Schuetze Recreation Center, 1120 Baxter St., will be the only site in the City of Waukesha to offer in-person voting on Election Day on April 7, 2020. The city is reducing the number of polling places from the usual 13 sites to reduce the spread of the coronavirus and because of a lack of poll workers. (Photo: Rick Wood / Milwaukee Journal Sentinel)

Some election clerks are so short of workers because of the coronavirus pandemic that they are planning to shutter polling places around Wisconsin — including many of them in Milwaukee.

And at least one clerk is warning that some voters in the April 7 election won't be able to return their absentee ballots in time to have them counted.

Milwaukee needs about 1,400 poll workers to run its election but so far has fewer than 400, according to Neil Albrecht, director of the Milwaukee Election Commission. Another 300 workers are needed for the central location where absentee ballots are processed, but fewer than 50 had been hired as of last week.

Training those poll workers is difficult because health officials say people must stay 6 feet away from one another to slow the spread of coronavirus.

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Related: [Lack of poll workers, flood of absentee ballots spark fears votes will go uncounted](#)

“Given the inability to train new poll workers, it is virtually certain that we will lack sufficient poll workers to staff the polling locations across the city, and will likewise lack the requisite number of staff members to process absentee ballots at the central count location,” Albrecht said in a court filing last week.

As a result, the city likely won't be able to staff all its voting locations, “leaving mail-in absentee voting as the only means currently by which Milwaukee voters will be able to vote for the spring election scheduled to occur on April 7,” Albrecht said.

The election is shaping up to be like no other in decades. On the ballot is the presidential primary as well as races for state Supreme Court and local offices, including Milwaukee mayor and Milwaukee County executive.

[Around the state, clerks are working overtime](#) to deal with the challenges, from managing the flood of absentee ballot requests to training replacements for poll workers who are fearful of working election day to outfitting their offices to reduce the possibility of the virus spreading.

It's hard to generalize about their experiences because the state's army of local election clerks represents more than 1,800 municipalities of all sizes, but challenges are cropping up all over.

Waukesha announced Monday that because it has lost so many poll workers to concerns about the virus, it would conduct election-day voting at one location instead of 13. That one location will be the city's recreation center, a space large enough that officials believe it can provide the necessary social distancing.

Instead of the 300 or so volunteer poll workers the city might have for all its polling locations, it expects to have only about 40 to 50.

"Every day, I get more emails from people asking to pull out, which is totally understandable," said Gina Kozlik, Waukesha's clerk-treasurer.

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"We're putting other things in place" for election day, Kozlik said. "Our team is working on screens with Plexiglas" and cones to control the flow of walk-in traffic.

The city is urging voters to request an absentee ballot and vote by mail, though it is a separate challenge to keep up with those requests. It is only accommodating in-person early voting by appointment.



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March 31, 2020, the Schuetze Recreation Center at 1120 Baxter St., will be the only site that will offer in-person voting on Election Day on April 7, 2020., in the City of Waukesha. The city has a shortage of poll workers due to coronavirus concerns. (Photo: Rick Wood / Milwaukee Journal Sentinel)

"It's quick," Kozlik said of the sudden transformation that communities have had to manage in conducting elections. "Everybody's being creative ... I really think we're doing some of our best work."

Madison Mayor Satya Rhodes-Conway said election workers are overwhelmed and some voters aren't going to be able to cast ballots because of the pandemic. She wants the election postponed.

"We all believe in a free and fair democracy and we want everyone to have the ability to exercise their right to vote," she said. "We also all believe everyone should be able to stay healthy while they're doing so, and right now those two things are in conflict."

The city has been able to fill about half the election-day shifts it says it needs and can't use at least 14 of its 92 polling places because of coronavirus concerns, according to City Clerk Maribeth Witzel-Behl.

Absentee votes at risk

Responding to absentee ballot requests is taking a week even though state law requires absentee ballots to be sent within 48 hours.

Witzel-Behl estimated Madison would receive more than 1,000 absentee ballots after the polls close on election day — too late to be counted.

"Under the current law, all of those voters will be disenfranchised — their votes won't count," Witzel-Behl said in a court filing.

All these challenges are emerging as clerks and poll workers worry they could be exposed to a disease that has killed thousands around the world.

"Poll workers for the City of Madison and other election officials are facing the same dilemma: Do we perform our obligations to run a full and fair election and risk contracting a possibly fatal illness, or do we decline to assist in the election to stay healthy?" Witzel-Behl said in her filing.

RELATED: [How to get an absentee ballot in Wisconsin during the coronavirus outbreak](#)

State election officials are buying more hand sanitizer and setting guidelines to keep poll workers apart from others as much as possible. But members of the Wisconsin Election Commission have expressed misgivings about their plan.

"I don't think we should be saying to anyone that as long as you follow these (steps), you'll be safe," Commissioner Mark Thomsen said. "I don't think we can tell the public that it's going to be safe on April 7. And I don't know how we're going to man the polls."

"I think we're at a crisis and I think it's imperative on the Legislature and the governor to do something to help us solve this problem," he added.

Dean Knudson, the chairman of the commission, didn't say he wanted an intervention from the Legislature or Gov. Tony Evers but said it was "essential" to get at least 75% of voters to use mail-in ballots.

"We want to make this election as safe as we can — it's our job and our duty to administer laws of the State of Wisconsin," he said. "Nothing is completely safe."

In Brookfield, historically one of the highest-turnout communities in Wisconsin, officials are going to great lengths to prepare for election day. They have recruited and trained both volunteers and city employees on hiatus and others furloughed from their work to replace regular poll workers (many of them in their 60s and 70s) who have declined to work the polls this year because of health concerns.

"All I need them to do is not get sick," Brookfield City Clerk Kelly Michaels said of her replacement poll workers.

The city is moving its election-day operations into the bigger Brookfield Conference Center for a variety of logistical reasons. It will have city sanitation crews on hand to disinfect surfaces. Other personnel will open and close doors for voters so they don't touch the door handles. Local businesses have donated hand sanitizer.

"It's not anything I have a gamebook for, but I do have 30 years of election experience and I'm working really hard ... (people from the city) have all come together to help," Michaels said.

Michaels said she doesn't know how long it will take to count absentee ballots on election night because the city has never had to do it on this scale before.

"I can speak for all clerks. We're doing the best we can. We hope that people will be patient with us," she said.

Jo Ann Lesser, clerk-treasurer for Random Lake in Sheboygan County, said her village installed a Plexiglas shield at the village office Monday to create a barrier between staff and visitors.

She spent her Monday morning processing the accumulated weekend's worth of absentee ballot requests.

Asked whether she was worried about election-day voting, she said, "You're concerned for your workers' safety and for the people coming in to vote."

She would normally have two election-day shifts of seven poll workers for each shift, but "I am having trouble filling those slots," she said.

"You have trepidation ... it would be foolish not to. But we're constantly talking about it and formulating our plans and just trying to do the best we can," she said.

Barbara Goeckner, a past president of the Wisconsin Municipal Clerks Association, said her biggest concerns are the health of election staff and voters, and the fact that any protective gear that poll workers end up using is gear that won't be available to doctors and nurses and people in health care.

"Do we protect our own health, or do we stand by our oath and perform our duties?" Goeckner, a local election clerk in Dane County, said of the choice faced by election workers.

"The average age of poll workers is over 60 and many are well over 70. ... A lot of them will still work, but should they really be making that choice? A lot of them are very dedicated people and they will do whatever it takes to make an election happen," Goeckner said.



Pablo Muirhead and his wife Jackie on Monday, March 30, 2020 at their Shorewood home. Pablo came down with an early cases of the coronavirus and put out a Facebook video. His wife contracted the virus along with one of their two children. Pablo is out of quarantine but Jackie isn't. Angela Peterson, Milwaukee Journal Sentinel

[Fullscreen](#)



Media keeps a distance of six feet or more from each other as they shoot video of personal protective equipment from Milwaukee Area Technical College health programs being delivered to Children's Hospital Monday, March 30, 2020 in response to a shortage as a result of the coronavirus. Five other health care facilities in Milwaukee and Ozaukee County also received donations from MATC. Supplies included four ventilators, a biped machine, 174,500 pairs of gloves, 978 gowns and lab coats, masks, eye protection and hand sanitizer. Rick Wood, Milwaukee Journal Sentinel

[Fullscreen](#)



Personal protective equipment from Milwaukee Area Technical College health programs is delivered to Children's Hospital on Monday, March 30, 2020 in response to a shortage. Five other health care facilities in Milwaukee and Ozaukee County also received donations from MATC. Supplies to combat coronavirus included four ventilators, a biped machine, 174,500 pairs of gloves, 978 gowns and lab coats, 140 N95 masks, eye protection and hand sanitizer. Rick Wood, Milwaukee Journal Sentinel

[Fullscreen](#)



Rob Klasen of Milwaukee socially isolates while doing his full body workout using rings near McKinley Beach along the lakefront, Monday, March 30, 2020. The lake was less crowded as a result of people staying at home from the coronavirus. Rick Wood, Milwaukee Journal Sentinel

[Fullscreen](#)



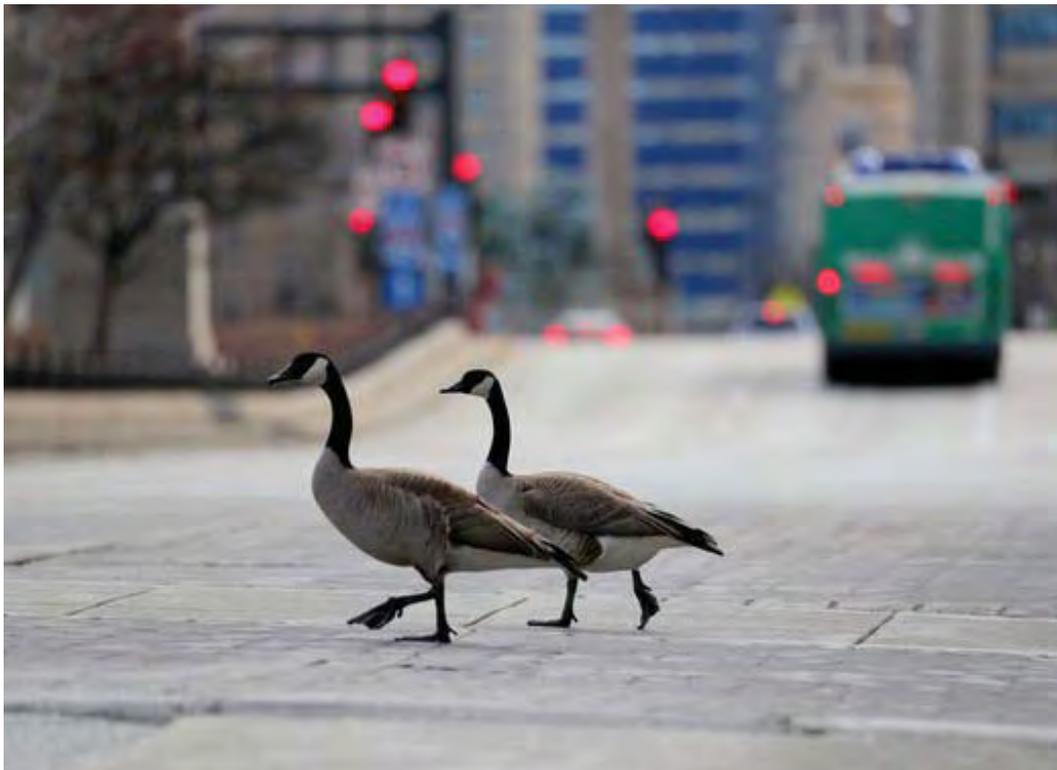
A Sendik's driver prepares to deliver groceries on Ridge Blvd. in Wauwatosa on Monday, March 30, 2020. A high demand of grocery deliveries have increased during the coronavirus pandemic. Angela Peterson, Milwaukee Journal Sentinel

[Fullscreen](#)



The Metro Market at 12735 W. Capitol Drive, Brookfield, Wi., Monday, March 30, 2020. Area groceries stores are struggling to keep up with home deliveries during the coronavirus pandemic. Angela Peterson, Milwaukee Journal Sentinel

[Fullscreen](#)



Canada geese make their way across a nearly empty West Wisconsin Avenue on the Marquette University campus in Milwaukee on Monday, March 30, 2020. Due to the coronavirus stay at home order, area wildlife have a lot less humans to deal with. Photo by MIKE DE SISTI / MILWAUKEE JOURNAL SENTINEL MIKE DE SISTI / MILWAUKEE JOURNAL SENTINEL

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Things are quiet at the Kohl's Store in Brookfield, Monday, as Kohl's Corp. said Monday that it will extend store closures until further notice and, as a result, will furlough many store associates, distribution center workers and corporate staff whose duties are tied to store operations. Rick Wood, Milwaukee Journal Sentinel

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Court rulings awaited

The court filings from the election officials in Milwaukee and Madison were submitted as part of [a lawsuit brought by Souls to the Polls and other voter mobilization groups](#) seeking to delay the election.

U.S. District Judge William Conley over the weekend combined that lawsuit with two others — one brought by Democrats to extend absentee voting and one brought by the League of Women Voters to loosen absentee voting rules because the pandemic has kept so many people in their homes.

Also over the weekend, Conley allowed the Republican National Committee and state Republican Party to participate in the cases. He declined to let the Republican-controlled Legislature intervene.

And in recent days, the governor hired attorney Daniel Bach of Lawton & Cates to represent state election officials in the lawsuits — instead of the state Department of Justice. Bach served as the top deputy to former Democratic Attorney General Peg Lautenschlager.

Conley is expected to issue key decisions in the lawsuits in the coming days.

Separately, the state Republican Party has asked the state Supreme Court to take up a lawsuit over whether voters who are confined to their homes because of the pandemic can get absentee ballots without providing a copy of a photo ID. The justices haven't decided whether to accept the case.

RELATED: [A presidential primary and a Supreme Court race. Here are the key races in Wisconsin's April 7 elections.](#)

Molly Beck of the Journal Sentinel staff contributed to this report.

Contact Patrick Marley at patrick.marley@jrn.com. Follow him on Twitter at [@patrickdmarley](https://twitter.com/patrickdmarley).

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EXHIBIT BB

Madison has 66 polling sites on Election Day, Milwaukee has five. What's the deal?

[madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html](https://www.madison.com/ct/news/local/govt-and-politics/madison-has-66-polling-sites-on-election-day-milwaukee-has-five-whats-the-deal/article_8868bacf-6697-5cf4-aa4f-d85fb37cf846.html)

April 7,
2020



Poll workers wait Tuesday morning for curbside voters to pull up in front of the Madison Municipal Building.

RUTHIE HAUGE

Lines are snaking across parking lots and around blocks as dozens of Wisconsin voters, trying to stand six feet apart, wait more than an hour in some cases to cast their ballots amid the novel coronavirus pandemic.

While that's the Election Day reality in a couple of the state's biggest cities, the story is different in Madison, where 66 of its normal 92 polling sites are open.

Around Madison, there have seemingly been few, if any, voters spotted waiting outside polling places across a city where the local clerk's office reported it issued 87,237 absentee ballots to voters who requested them.

Madison, with more than 250,000 residents, has only seen a 28% drop in the number of its polling locations — a small difference when compared to three of the state’s other large cities that have seen their available locations halved, at the very least.

In Milwaukee, just five of the city’s usual 180 sites are open. In Green Bay, there are only two rather than the typical 31, and in Kenosha there are 10, down from 22.

From Milwaukee (population 600,000) and Green Bay (population 105,000), reporters have documented long lines and wait times as city officials were forced to consolidate sites or find brand new ones amid poll worker shortages.

But locally, Madison City Clerk Maribeth Witzel-Behl credited the city’s commitment to staffing more polling locations than other cities “because anything more than a 15-minute wait in line is unacceptable by our standards.”

Therefore, she said, the city’s Emergency Operations Center and Planning staff pushed to fill 3,032 shifts across Madison, a number later reduced to 1,712 shifts because of the pandemic and consolidated polling locations.

“The city’s ongoing commitment to minimize the amount of time voters must wait in line for any election helped make us resilient,” she wrote in an email.

5/180 in Milwaukee

Milwaukee officials have sounded the alarm in recent days that their polling sites would be heavily reduced because of a shortage of 1,000 poll workers.

While local leaders have said there could be between 10 and 12 polling locations, the city managed to have just five available come Tuesday.

Milwaukee Election Commission executive director Neil Albrecht told reporters late Tuesday morning most sites were reporting a wait time of between one-and-a-half and two-and-a-half hours.

The sites are staffed by between 80 and 100 election workers each, he said, with those on site including around 170 total National Guard members, Milwaukee police officers and health department officials.

Albrecht acknowledged that it could have been possible to perhaps open additional sites if city staff had known how many National Guard members would be available before Monday afternoon, a total he said could have been anywhere from 20 to the 250 the city asked for.

"Had we had that information sooner, I absolutely think it could have influenced the number of voting centers," he said. "The timing really did not allow us to maximize their presence and think about the possibility of opening more centers."

Green Bay and Kenosha

In Green Bay, the city found a couple new polling locations to use — in high school gymnasiums — instead of its usual 31 sites.

Celestine Jeffreys, chief of staff to Mayor Eric Genrich, said the move came after 15 locations pulled out, the city "lost a lot of poll workers" and officials began to seek out sites that would be better for current circumstances.

"Some of those polling locations are good for non-pandemic circumstances but some of them are small with not a lot of space for people to congregate, so just in trying to consolidate polling locations we thought it'd be better to consolidate in areas — like high school gyms — that are bigger," she said. "Bigger parking lots, bigger spaces for people to stand."

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Returning to the schools is a new move. Following 2016, the school district stopped allowing officials to hold elections in schools, she said, citing security concerns. Around 50 poll workers are staffing the two sites Tuesday.

The city filed a lawsuit last month asking a federal judge to delay the contests and move the election entirely to mailed ballots. But the city was found to lack the legal grounds to sue.

Meanwhile, officials in Green Bay and Milwaukee County on Monday also issued their own orders to delay the election after Gov. Tony Evers did the same via executive order at the state level. His order was overruled by the state Supreme Court, and both Green Bay and Milwaukee officials backed off their directives.

Kenosha Clerk Debbie Salas said there are some 95 workers spread across the city's 10 polling centers, down from the usual 22.

That doesn't include around 25 National Guard members and a police officer located at each site, she said.

The drop in polling locations came as staff struggled to find poll workers and handled absentee balloting ahead of the election.

“It was more of our staff managing the set-ups of polling locations because we were so busy with absentee ballots as well,” she said about the 10 existing sites.

Share your opinion on this topic by sending a letter to the editor to tctvoice@madison.com. Include your full name, hometown and phone number. Your name and town will be published. The phone number is for verification purposes only. Please keep your letter to 250 words or less.

Briana Reilly

Briana Reilly covers state government and politics for the Cap Times. She joined the staff in 2019, after working at WisPolitics.com. Follow her on Twitter at @briana_reilly.

EXHIBIT CC

'They should have done something': Broad failures fueled Wisconsin's absentee ballot crisis, investigation shows

[jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002](https://www.jsonline.com/story/news/2020/04/21/wisconsin-absentee-ballot-crisis-fueled-multiple-failures/5156825002)

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11 Photos

Ballot processing continues as election results are expected Monday after...



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In Lodi and Pewaukee, voters were told the system for requesting absentee ballots crashed.

In Marshfield, Shorewood and Bristol, voters threw up their hands after spending hours in front of computers trying to request a ballot.

In Milwaukee and Green Bay, dozens of couples said one member of their household received a ballot while the other didn't.

"Nobody cared," said Brenda Lewis, a 61-year-old Delafield resident who said her local clerk could find no record of her or her husband ever requesting an absentee ballot, even though both of them had.

"They should have done something, some sort of public service (announcement), something, just something," Lewis said. "But nobody did."

Complete Coverage: [Election 2020](#)

An investigation by the Milwaukee Journal Sentinel, the PBS series FRONTLINE and Columbia Journalism Investigations into Wisconsin's missing ballot crisis reveals a system leaking from all sides, buckling under the weight of a global pandemic and partisan bickering that kept the logistics of election day up in the air until less than a day before polls opened.

Inadequate computer systems, overwhelmed clerks and misleading ballot information hampered Wisconsin's historic — and historically troubling — spring election.

This story is produced in partnership with the PBS series FRONTLINE and Columbia Journalism Investigations, an investigative reporting unit at the Columbia Journalism School.

With the prospect of COVID-19 persisting into the fall and beyond, and more elections on the calendar ahead of the presidential ballot in November — which could produce triple the number of votes by mail — eyes will remain fixed on Wisconsin.

Election officials have largely blamed the U.S. Postal Service for many of the missing absentee ballots that forced some citizens to don masks and stand in line on election day this month, increasing their risk of contracting the potentially fatal disease COVID-19.

But the investigation by the Journal Sentinel, FRONTLINE and Columbia, based on interviews with voters, election officials and political experts, as well as responses from more than 600 people to an online questionnaire, shows the problems went far beyond mailing issues.

People from nearly 100 Wisconsin cities and towns responded to the Journal Sentinel's online request for readers to share their information if they did not receive their absentee ballots. Many said they tried requesting their absentee ballots multiple times.

Some people received too many ballots. Some received empty envelopes. Some gave up trying to navigate the state's request system. Others got their ballots after election day.

Three people — two in Mequon and one in West Allis — said they were mailed duplicate ballots. In Wauwatosa, one couple said they received envelopes with no ballots.

In Milwaukee, three would-be voters said they received a form letter from Mayor Tom Barrett thanking them for requesting an absentee ballot — but not the ballot itself.

Officials sent ballots to college students to dorms they had been forced to vacate. For some Wisconsin residents wintering in New Mexico and Florida, ballots simply never showed up.

Nineteen Wisconsin citizens across eight cities — from New Auburn in the north to Bristol in the south — said they requested absentee ballots only to later be told the system had no record of their applications.



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Tom and Altha Arden of South Milwaukee never received their absentee ballots for the spring election. (Photo: Rick Wood / Milwaukee Journal Sentinel)

"I was not happy," said Milwaukee resident Tom Arden, 71. He said he and his wife requested absentee ballots two weeks before election day but found out from a City Hall staffer that no record of their request existed.

"It wasn't her fault, but that's not funny," Arden said. "It's damn serious. That's crazy that they dropped the ball as badly as they did."

Wisconsin residents can request absentee ballots through letter, email or the state-run MyVote website. For presidential primaries, state law requires clerks to mail ballots within one business day from the time a request is received, if the request is made within 47 days of election day.

Roughly 1.28 million absentee ballots had been sent, but as of Friday more than 150,000 absentee ballots had not yet been returned, according to the latest tallies from the Wisconsin Elections Commission.

Less than 12% of votes cast in the 2016 spring election and presidential preference primary were absentee, according to the Wisconsin Elections Commission. This year, an estimated 73% of votes were cast absentee, although officials are still counting ballots.

In response to the Journal Sentinel, FRONTLINE and Columbia investigation, Neil Albrecht, head of the Milwaukee Election Commission, acknowledged that thousands of ballots had not reached their intended recipients in Milwaukee.

"It was not an appropriate environment to be administering an election," said Albrecht. "It was chaos, and chaos is never good for the administration of an election."

Albrecht also pointed to inaccuracies with MyVote, the website run by the Wisconsin Elections Commission where voters can request and track the progress of their absentee ballots, including the date their ballot was mailed.

Albrecht said the date actually reflects the date the mailing label was generated — not the date a ballot was mailed.

It typically took employees another three to seven days to assemble, mail and deliver the ballot, depending on how backlogged the office was, city election officials said.

Asked whether he thought the website was misleading, Albrecht said the issue was "an improvement opportunity."

Still, he said the majority of problems lay with the post office, and that issues such as empty envelopes or people being unable to find their registrations were rare. According to Albrecht, dozens of staffers in Milwaukee worked seven days a week until 11 p.m. to process ballots.

At the state level, Wisconsin Elections Commission spokesperson Reid Magney acknowledged inaccuracies with MyVote's ballot tracking feature and said the agency is looking at improving the feature "based on the user feedback we have received."

However, Magney said the commission believes the majority of problems stem from the post office or mailing vendors used by local clerks.

He said programmers looked through MyVote's code and logs but found no explanation for the large numbers of missing or late absentee ballots reported in late March.

"The more change you have close to an election, the more likely you are to have problems," Magney said.

In Madison, City Clerk Maribeth Witzel-Behl said there was "no way humanly possible" to keep up with the volume of requests.

According to Witzel-Behl, staffers were working 110 hours a week but still had a week's worth of backlogs by mid-March. Their computer system became so bogged down by the volume of applications that it only began working quickly after 10 p.m., she said.

"You reach a point of working so many hours, your eyes glaze over, and you risk making an error," she said.

In the town of Delafield, where Brenda Lewis and her husband faced problems, Clerk Dan Green said he was unsure why the system had no trace of the pair's absentee ballot applications.

According to Green, the MyVote website crashed "a few times," but he said citizens would not have been able to request ballots at all while the system was down.

Citizens, officials still searching for explanations

The lead-up to Wisconsin's chaotic April 7 election was consumed by political infighting, changing deadlines, four lawsuits and a breakneck ascension through the court system that ended up on the steps of the U.S. Supreme Court.

The result was a surreal election day that took place as the state topped 2,500 confirmed coronavirus cases and nearly 100 deaths, with scores of voters across the state complaining that they had not received their absentee ballots.

Facing furious voters, Milwaukee election officials called on the Postal Service the next day to investigate widespread reports of missing absentee ballots. U.S. Sens. Tammy Baldwin, a Democrat, and Ron Johnson, a Republican, made a similar request in a letter two days later, asking the Postal Service to "determine the cause of these failures, which appear to have disenfranchised many Wisconsin voters."

Bob Sheehan, a spokesperson for the U.S. Postal Service in Wisconsin, wrote in an email that the agency's Office of the Inspector General is investigating but would not comment further.

In Wauwatosa, first-time absentee voter Jesse Weinberg said he and his wife received envelopes with no ballots inside.

In an email provided to the Journal Sentinel, their city clerk apologized to Weinberg for the "mishap" and explained that employees had accidentally sent a tray of mail to the mailing room "too soon," before stuffing the envelopes.



Tom Richardson and his wife both received two ballots this year. They've been told by their local clerk to throw away the extra ballots. (Photo: Zhihan Huang / Milwaukee Journal Sentinel)

In Mequon, retiree Tom Richardson said he and his wife both received duplicate ballots. According to Richardson, his local clerk said the office had accidentally mailed a "batch of duplicates" and advised the couple to discard one set of ballots and mail in the others.

Mequon City Clerk Caroline Fochs did not respond to calls and emails for comment.

But in an email exchange with Richardson, a copy of which was provided to the Journal Sentinel and Columbia, Fochs assured the retiree that it is "not possible for both ballots to end up being counted in the system."

University of Wisconsin-Milwaukee senior Haley Peldo said her absentee ballot was delivered to her previous registered address, not to the address she requested on MyVote. Luckily, Peldo said, she still knew the resident at her old home, who was able to bring the ballot to her.

Peldo said several of her college classmates reported similar stories.

"I managed to get it, but it was very confusing," she said. "I don't know how it would be the post office's fault that they got an entirely different address."

Ryan Kapp, a college student in Minneapolis, said he waited for a week and a half before calling the clerk's office in his hometown of Middleton to inquire why his absentee ballot had not arrived.

According to Kapp, the employee told him his ballot had been accidentally mailed out without a street name, and that his was among several that were returned as undeliverable.

"They didn't concern themselves with it until I decided to call," Kapp said.

After taking down his address for a second time, the employee sent out a replacement ballot, Kapp said. But it didn't arrive until April 10 — three days after election day.

The Middleton City Clerk's Office did not respond to a call or email seeking information on what happened.

The vast majority of people who wrote to the Journal Sentinel in the online questionnaire said they requested absentee ballots at least two weeks in advance of election day but did not receive them on time.

Paloma Chavez, four-months pregnant, said she applied for an absentee ballot on March 22, but it never arrived.

On election day, the Milwaukee resident said she called and emailed both the Wisconsin Election Commission and the city office and was given conflicting information about her ability to receive an email ballot or qualify for curbside voting.

"I was shell-shocked," Chavez said. "It feels like the one thing I have control over — my voice — is being taken away from me. Mistakes got made, but not on my end here."

Another common problem reported by voters: Forty-four people across nine cities said they did not receive their absentee ballot even though other members of their household did.

Many said they submitted their applications about the same time or even after their partners or roommates.

Milwaukee resident Lori Yanny, 65, said she submitted her application for an absentee ballot just two hours before her husband — on the same computer they share at home.

Her husband received his ballot a week and a half after requesting it, Yanny said. Hers never arrived. Nor did a replacement ballot she requested on March 31.

Yanny said she made the "difficult decision" not to vote in person due to coronavirus concerns.

“In the past 30 years, I have voted in almost every election — even the little ones,” she said.

Albrecht, the Milwaukee election commission head, said applications are not always processed in chronological order. As a result, he said, Yanny’s application was mailed on March 22, the day after her husband’s.

He said a large number of ballots mailed on March 22 and March 23 appeared to have been lost in the mail — part of what the city has called on the postal service to investigate.

A cumbersome system

In Wisconsin’s decentralized election system, much of the responsibility falls on local clerks, whose staffs are often tiny and not equipped to handle a surge in applications.

At the state-level, the Wisconsin Election Commission maintains both the MyVote website, where voters can request and track their absentee ballot, and WisVote, where absentee applications and requests are stored.

Each absentee ballot application submitted through MyVote is converted into an email. The state’s 1,850 municipal clerks are in charge of opening each email, verifying the voter’s identification, manually entering the application information into the statewide voter registration database and printing the mailing labels.

However, most municipal clerks do not have access to WisVote, and must ask another official, such as a county clerk, to manually enter the applicant’s information in the database.

“This system was designed for a world in which 5% of voters voted by mail, not for a system in which 70% of voters voted by mail,” said Charles Stewart, a political science professor and election expert at the Massachusetts Institute of Technology. “So something has to give, and the thing that ends up giving is probably the accuracy of the request for the ballot.”

Barry Burden, director of the Elections Research Center at the University of Wisconsin-Madison, said officials have limited time to make improvements for Wisconsin’s upcoming elections, including a special Congressional race next month and the statewide primary in August.

Democratic state lawmakers are even calling for a mail-in vote for the November presidential election, although Republicans are unlikely to hear the bill.

“There is not a lot of breathing room,” Burden said.

Reporter Daphne Chen is with the Milwaukee Journal Sentinel; Catharina Felke, Elizabeth Mulvey and Stephen Stirling are from Columbia Journalism Investigations, with support from PBS Frontline.

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EXHIBIT DD

Tammy Baldwin, Ron Johnson call for Postal Service to investigate undelivered absentee ballots

[madison.com/wsj/news/local/govt-and-politics/elections/tammy-baldwin-ron-johnson-call-for-postal-service-to-investigate-undelivered-absentee-ballots/article_bc2e459f-f7b1-51ac-b5be-ec846a1f9c20.html](https://www.madison.com/wsj/news/local/govt-and-politics/elections/tammy-baldwin-ron-johnson-call-for-postal-service-to-investigate-undelivered-absentee-ballots/article_bc2e459f-f7b1-51ac-b5be-ec846a1f9c20.html)

SCOTT BAUER Associated Press

April 10,
2020

1 of 2

A City of Milwaukee Election Commission worker processes and sorts absentee ballots for Tuesday's primary election.

MARK HOFFMAN, MILWAUKEE JOURNAL SENTINEL

A City of Milwaukee Election Commission worker processes absentee ballots for Tuesday's primary election.

MARK HOFFMAN, MILWAUKEE JOURNAL SENTINEL

This content is being provided for free as a public service to our readers during the coronavirus outbreak. Please support local journalism by subscribing.

U.S. Senators Tammy Baldwin and Ron Johnson are asking the Postal Service to investigate why an untold number of absentee ballots never made it to voters who didn't want to risk contracting the COVID-19 coronavirus by going to the polls for Tuesday's election.

Baldwin, D-Madison, and Johnson, R-Oshkosh, sent a letter Thursday to U.S. Postal Service Inspector General Tammy Whitcomb citing reported delivery failures in Appleton, Oshkosh and Fox Point Village and saying they are "concerned there may be more examples" of missing ballots.

The senators said the investigation is necessary so absentee voting procedures are "strictly and effectively followed" during upcoming elections.

Here's what is known and unknown about the absentee ballots:

Under a Monday ruling from the U.S. Supreme Court, all absentee ballots sent to voters had to be postmarked by Tuesday's election to be counted. But many voters said they never got the ballots by Tuesday.

How many ballots were not delivered is the big unanswered question.

The Wisconsin Elections Commission reported Thursday that nearly 1.3 million absentee ballots had been requested by voters, a record-high number that overwhelmed some local election officials. About 235,000 ballots had not yet been returned as of Thursday.

What's not known is how many of the outstanding ballots were completed by voters and mailed back by the Tuesday deadline. It's also not known how many of the ballots never made it to voters.

A state senator said the Wisconsin Elections Commission told him that the U.S. Postal Service discovered three bins of absentee ballots destined for Oshkosh and Appleton voters that weren't delivered. Milwaukee's election chief asked for a formal investigation into ballots requested by city residents around March 22 and March 23 that many voters said were not delivered.

Fox Point Village Administrator Scott Botcher said postal workers began returning undelivered absentee ballots to the village about three weeks before Tuesday's election with no explanation beyond that it might have been a sorting problem in downtown Milwaukee's post office. There were also reports in other cities around the state from voters who said they had requested a ballot but did not receive them by election day.

A Better Wisconsin Together, a liberal group, said it received more than 2,000 reports of missing ballots through a website it created to track them.

Legal action

Attorneys monitoring the election have said voters who didn't get the ballots as requested could have grounds to sue. No lawsuits have been filed to date. Those would most likely come after the results of the election are announced, on Monday, especially if there are close races that could have been swayed by people who didn't vote because they didn't receive their ballots.

"Everybody is trying to figure out what all of this means relative to the outcome of the election, the validity of the election," said election law attorney Doug Poland. "We just have to wait and see."

State Sen. Dan Feyen, a Republican from Fond du Lac, has asked the Elections Commission to go to court to ask that the ballots be counted. The commission, comprised of an equal number of Republicans and Democrats, has not decided what action, if any, it plans to take.

Who's to blame?

Wisconsin's chief elections official, Meagan Wolfe, said Wednesday that there were no issues with the state's My Vote website where voters can request an absentee ballot. All requests made through that system were transmitted to local election clerks, who were then tasked with mailing the ballots, she said.

That puts the focus on the Postal Service. Bob Sheehan, a Postal Service spokesman, said it is looking into what happened but there's no way to trace all the ballots that were sent because they were sent first-class mail without delivery tracking numbers.

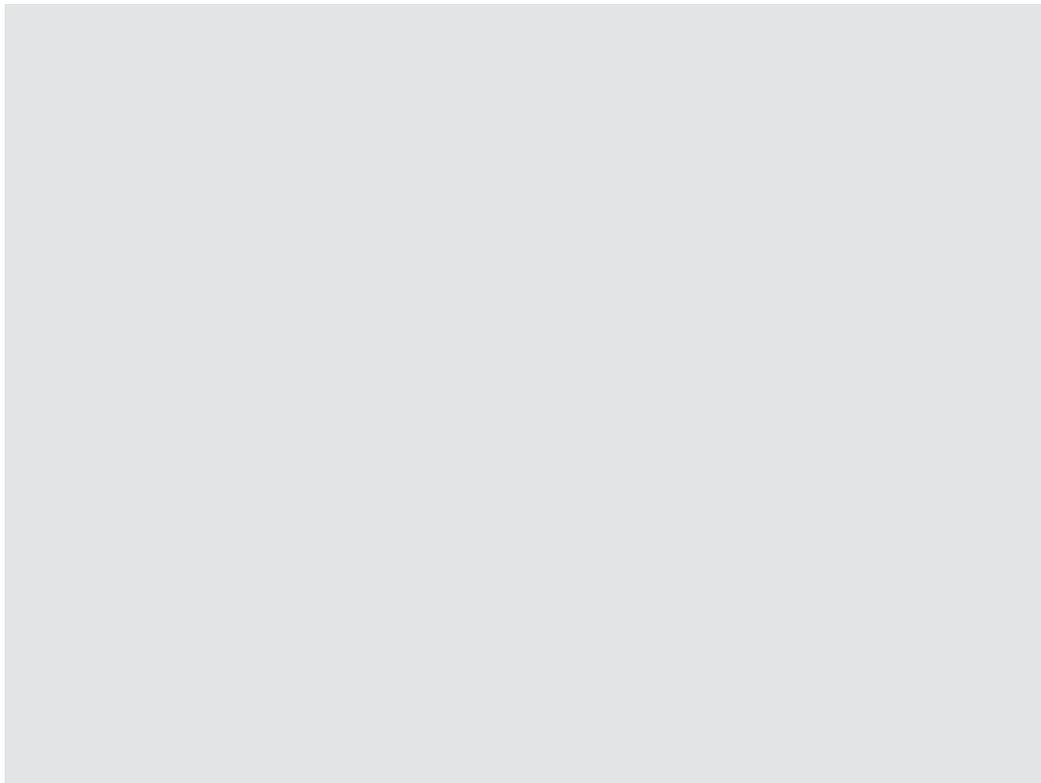
Voters are not happy. One of those who requested an absentee ballot but did not get one, and decided not to vote in person, is the highest-ranking Democrat in the Wisconsin Assembly, Rep. Gordon Hintz, of Oshkosh.

"I complied with the public health order, as did many of my constituents," Hintz said. "You either have a once in a hundred year pandemic or you don't."

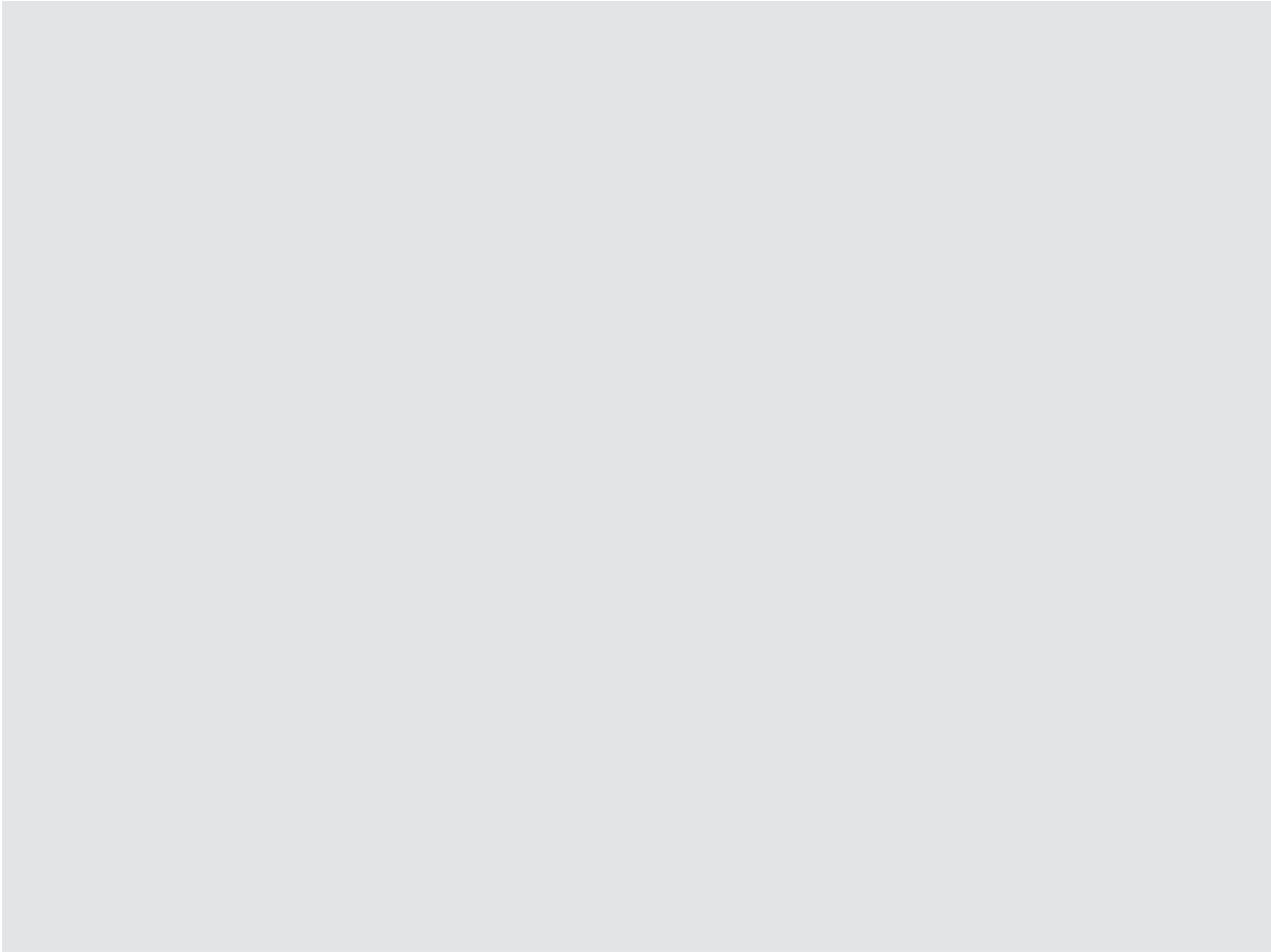
Other voters who didn't get their ballots and then had to vote in person said they were angry at having to risk infection.

State Journal reporter Shanzeh Ahmad contributed to this report.

+3



Baldwin
Associated Press



Johnson
AMBER ARNOLD, STATE JOURNAL ARCHIVES

EXHIBIT EE

Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary

 elections.wi.gov/node/6825

Date

Tue, 04/07/2020 - 07:30

Absentee Ballot Counts by County - 2020 Spring Election and Presidential Preference Vote

County Name	Absentee Application Count	Absentee Ballots Sent Count	Absentee Ballots Returned Count
ADAMS COUNTY	3297	3232	2307
ASHLAND COUNTY	2483	2405	1706
BARRON COUNTY	6691	6635	4774
BAYFIELD COUNTY	3812	3644	2609
BROWN COUNTY	53178	52384	28318
BUFFALO COUNTY	2099	2045	1235
BURNETT COUNTY	2070	2027	1364

CALUMET COUNTY	11273	11259	5644
CHIPPEWA COUNTY	12001	11971	8118
CLARK COUNTY	2379	2157	971
COLUMBIA COUNTY	12805	12738	9662
CRAWFORD COUNTY	2311	2143	1402
DANE COUNTY	178828	178859	122302
DODGE COUNTY	16791	16776	12932
DOOR COUNTY	7691	7432	4293
DOUGLAS COUNTY	6631	6556	4390
DUNN COUNTY	6970	6946	4364
EAU CLAIRE COUNTY	22698	22648	16047
FLORENCE COUNTY	821	678	494

FOND DU LAC COUNTY	19047	18838	13380
FOREST COUNTY	1512	1496	1057
GRANT COUNTY	7774	7720	5199
GREEN COUNTY	7061	5651	4370
GREEN LAKE COUNTY	3115	3063	2481
IOWA COUNTY	5633	5570	4286
IRON COUNTY	1882	1876	1382
JACKSON COUNTY	2497	2483	1176
JEFFERSON COUNTY	18391	18253	13306
JUNEAU COUNTY	2492	2340	1208
KENOSHA COUNTY	30083	30099	20319
KEWAUNEE COUNTY	3937	3904	2556

LA CROSSE COUNTY	24950	24936	18369
LAFAYETTE COUNTY	2766	2754	2131
LANGLADE COUNTY	2742	2708	1722
LINCOLN COUNTY	4147	4144	2273
MANITOWOC COUNTY	15272	15183	11824
MARATHON COUNTY	24793	24421	16117
MARINETTE COUNTY	7787	7757	5818
MARQUETTE COUNTY	2248	2196	1328
MENOMINEE COUNTY	112	74	57
MILWAUKEE COUNTY	203898	203881	124960
MONROE COUNTY	5054	4698	2938

OCONTO COUNTY	6179	5974	4108
ONEIDA COUNTY	8018	7987	5299
OUTAGAMIE COUNTY	40580	40465	24524
OZAUKEE COUNTY	29354	29124	21410
PEPIN COUNTY	936	871	309
PIERCE COUNTY	6189	6144	3437
POLK COUNTY	5633	4841	3449
PORTAGE COUNTY	14721	14615	10108
PRICE COUNTY	2621	2581	1475
RACINE COUNTY	43819	43638	28231
RICHLAND COUNTY	2659	2593	1544
ROCK COUNTY	29591	29406	20916
RUSK COUNTY	1663	1597	785

ST. CROIX COUNTY	14831	14788	8730
SAUK COUNTY	14486	14374	10289
SAWYER COUNTY	3032	2998	1906
SHAWANO COUNTY	6254	6160	4475
SHEBOYGAN COUNTY	25769	25773	19621
TAYLOR COUNTY	2527	2498	1685
TREMPEALEAU COUNTY	3407	2990	2088
VERNON COUNTY	3848	3608	1451
VILAS COUNTY	5409	5387	4202
WALWORTH COUNTY	22207	22192	17153
WASHBURN COUNTY	2649	2617	1384
WASHINGTON COUNTY	39975	39881	31875

WAUKESHA COUNTY	128286	127880	97298
WAUPACA COUNTY	9277	9236	6581
WAUSHARA COUNTY	3580	3402	2226
WINNEBAGO COUNTY	38835	38830	25815
WOOD COUNTY	14405	14344	11187
Total	1282762	1273374	864750

Search

EXHIBIT FF

Important lessons from the Wisconsin primary

 mischiefsoffaction.com/post/important-lessons-from-the-wisconsin-primary

April 17,
2020

By Charles Stewart, III

□

The Greater Wisconsin Primary—votes on April 7, results on April 13—served as a petri dish to study what election might look like if government officials can't agree in time for November about how to flex longstanding election rules to ensure integrity in elections while guarding public health.

The results show that two things are immediately apparent. First, despite the barriers to voting, turnout in the primary was surprisingly high. Second, the subtle-but-real leftward shift in Wisconsin's electoral landscape continues.

Wisconsin was in about as bad a bind as one could imagine—a shifting, uncertain health crisis, conflicting court decisions, a deadlocked state election commission, a history of little vote-by-mail, and the most decentralized election administration system in the nation.

The primary occurred amid a rush of other states delaying their primaries into the summer and a call to expand opportunities for mail balloting. Rather than postpone the primary—either because state Republicans wanted to gain an advantage in the statewide supreme court race or Democrats wanted to provide Joe Biden with a nomination-sealing victory—state leaders pushed ahead to vote on April 7. At the last minute, the Democratic governor Tony Evers sought to delay election day and to mail a ballot to every Wisconsin voter, calling the legislature into session to ratify his decision. Following state Republican rejection of Governor Evers' plan and a series of decisions in the state and U.S. Supreme Court, state election officials had no choice but to go ahead with the voting.

The result was a labored scramble to put on the election, despite the fact that municipal clerks reported that poll workers were refusing to report to work, causing the closing of scores of polling places, and substantial burdens to requesting absentee ballots interfered with the advice of public health officials for people to vote by mail. In the end, potentially thousands of people never received the mail ballots they requested, Election Day voters waited for hours to vote, and trays of undelivered ballots were found after the polling period had closed.

And yet, 1.1 million mail ballots were received in time to be counted—a record for any election in the history of Wisconsin. Overall, 1.5 million ballots were cast in the primary, a turnout rate, measured in terms of the percentage of the voting-age population, that was average for recent years, and above expectations, given the degree of competition in the primaries.

As the nation anticipates running dozens of primaries in the late spring and holding a general election in November, the primary election in Wisconsin offers at least four lessons the nation can learn, as it works to ensure that the presidential election will be safe and secure.

1. It is possible to rapidly expand vote-by-mail even when you're not prepared for it, but don't do this at home. Despite having to adjust to an impossible situation, Wisconsin's state and local election workers largely pulled through and ran an election that reflected the will of the electorate. Part of this was because of the standard "can do" attitude of election officials. Part was due, literally, to calling on the National Guard. The state showed it could push the fraction of mail voters into the 70 percent range, having never before gone above 10 percent. And yet, one could have imagined a very different scenario, especially if the hotly contested supreme court race had had a closer margin. Wisconsin ended up dodging a bullet through a combination of skill and luck.

2. In-person voting is still necessary. The collapse of in-person voting in Green Bay (Brown County) and Milwaukee City (Milwaukee County)—and perhaps in other municipalities, as well—had a measurable effect on turnout. A close inspection of Milwaukee County election results, comparing them to 2016, suggests that Milwaukee City, where only five of 180 polling places opened, saw nearly 16,000 fewer votes than it should have, given the performance of other municipalities in the county. Considering that Milwaukee County relied much more on mail ballots than the rest of the state, the only conclusion to draw is that Milwaukee City did not offer sufficient polling places to meet demand for in-person voting.

3. A surprisingly good primary does not guarantee a surprisingly good general election. The electorate in a general election is different from the primary election. It's less experienced and has more difficulties at the polls. It will be less capable of jumping through the hoops to get mail ballots, and it will be more reliant on election-day registration to be able to vote in the first place. The municipalities that run elections in Wisconsin will need to double their capacity to handle mail ballots, and ensure that the lion's share of in-person Election Day polling places are staffed. The state has time to plan and execute, but the stakes in November will be higher.

4. Wisconsin's electoral landscape is shifting. Even with the difficulties, turnout was well above what a statistical model would have predicted, given the lack of a challenger in one party and the un-competitiveness in the other. Plus, the shift in votes that gave rise to the

liberal Jill Karofsky's victory in the supreme court race—a proxy for partisan politics more broadly—show a pull-back in support for conservative politicians in suburban Milwaukee counties, in counties of the Twin-City exurbs, and in the small “Obama-Trump” counties throughout the state.

Overall, then, the Wisconsin primary has a lot to teach us about preparing for the November election and for preparing us for the eventual outcome. Voters want mail options to vote, but they also need robust in-person options. And, the energy and enthusiasm for electoral politics among Democratic supporters that was shown in the 2018 midterm appears to be carrying over into 2020.

Charles Stewart, III is Kenan Sahin Distinguished Professor of Political Science at Massachusetts Institute of Technology, and Director of the [MIT Election Data and Science Lab](#), and Co-Director of the [Caltech/MIT Voting Technology Project](#). [@cstewartiii](#)

EXHIBIT GG

Voter turnout in Green Bay down more than 50% compared to 2016 spring election

 [fox11online.com/news/election/voter-turnout-in-green-bay-down-more-than-50-compared-to-2016-spring-election](https://www.fox11online.com/news/election/voter-turnout-in-green-bay-down-more-than-50-compared-to-2016-spring-election)

□

GREEN BAY (WLUK) -- Fewer than half as many people in the city of Green Bay cast ballots in last week's presidential primary compared to the 2016 election -- although 2016 had two competitive races for president.

And, the city's 2020 turnout was down about 25% from last year's mayoral race, according to figures compiled by FOX 11.

Green Bay Mayor Eric Genrich has expressed regret for the city's handling of the April 7 election, after the city used just two polling places instead of the usual 31. He had cited concerns with the number of poll workers available because of the coronavirus pandemic, and filed a federal lawsuit -- which was dismissed -- seeking changes in the election. People reported waiting more than three hours to vote in some cases, as long lines snaked around East and West high schools.

View of voting lines at Green Bay East



SKYFOX captures aerial views of the lines for voting outside Green Bay East High School April 7, 2020. (WLUK video)

In 2020, there were 14,586 votes cast by Green Bay residents, according to the preliminary canvass reported by the Brown County Clerk.

In 2019, there were 19,717 votes cast in the mayoral election. There was no city-wide municipal race in 2020.

In 2016, there were 31,457 votes cast. In that race, Ted Cruz was challenging Donald Trump, with John Kasich still running among the Republicans. For Democrats, Hillary Clinton was battling Bernie Sanders.

What was your experience at the polls during last week's election? Share a photo or video with us here:

EXHIBIT HH



23 April, 2020

To: Ohio Congressional Delegation

From: Ohio Secretary of State Frank LaRose

Re: Conflicting Information from the USPS related to Election Mail

Colleagues,

Thank you for the leadership you have shown during this challenging time for our state, nation and world. As we all navigate through the Covid-19 pandemic, every day presents new and unique challenges. Whether on behalf of our constituents or in our personal lives, we all are taking on these challenges and finding ways to overcome them.

As you know, following Ohio Department of Health Director Dr. Amy Acton's order closing in-person polling locations for the March 17th primary election, the 88 county boards of elections and my office have been tasked with completing this primary election by April 28th as a vote-by-mail election – and doing so virtually overnight.

Such an effort has required an all-hands-on-deck approach, and as we near the conclusion of the election, I am happy to report Ohioans from all walks of life have stepped up. Whether it's the A. Philip Randolph Institute, Ohio Right to Life, AFL-CIO, Ohio Library Council, the Ohio Grocers Association, or so many others who have lent a hand to make this election a success, Ohioans have once again shown the nation what it means to be #InThisTogether.

As anyone would expect, completing this election has certainly brought with it the unexpected and the unplanned. Fortunately, as each challenge has presented itself, my team and the bipartisan teams of election officials at our 88 county boards of elections have stepped up and worked hard to find solutions.

However, as we approach the April 28th deadline to complete the election, we are faced with an obstacle that is outside of our control, and we need your help to overcome it. As Ohioans rush to submit their vote-by-mail requests, and our boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times. Instead of first-class mail taking 1-3 days for delivery, we have heard wide reports of it taking as long as 7-9 days. As you can imagine, these delays mean it is very possible that many Ohioans who have requested a ballot may not receive it in time.

Along with our colleagues at the county boards of elections, we have made attempts to work with the USPS to find alternatives that will improve the time it takes to have mail delivered, but have so far been largely unsuccessful. While we certainly understand and respect the adversity that mail carriers are facing right now, something must be done to deliver elections mail promptly so Ohioans may have their voice heard in this primary election.

My recommendations are the following:

1. **Assign additional staff to local USPS offices** and encourage extra hours, *even on Sunday, April 26, 2020*, to ensure prompt delivery of election-related mail.
2. **Work immediately to identify delivery standard shortcomings.** Election officials have reported numerous issues this election cycle, from missed mail deliveries at local boards of elections to delivery times in excess of 10 days for first class letters. The underlying issues must be immediately identified and corrected.
3. **Conduct a thorough search at USPS facilities for unprocessed mail.** Management at all local USPS offices and processing facilities should conduct a thorough review to ensure all election-related mail is being properly processed.
4. **Ensure each USPS office promptly provides mail to the county boards of elections on Saturday, April 25, 2020, and, upon receipt of the absentee ballots which are being mailed to the voters, have the necessary resources on hand to provide for prompt delivery of mail to voters.** Ohio law has established that the last day to request an absentee ballot before the April 28th primary deadline is Saturday, April 25th. This creates a very tight turnaround for both boards of elections and the USPS, so every effort must be made to ensure ballots are received in a timely manner.

I can certainly appreciate the multitude and complexity of the problems our nation is currently working to overcome. However, we must never give an inch in our fight for that most sacred of rights – the right to vote. I hope I can count on your support as we work to successfully complete Ohio’s primary election.

If your staff have any questions, please have them contact my Director of Legislative and Intergovernmental Affairs, Chris Oliveti at COliveti@OhioSoS.gov or 614-306-7109. Additionally you are always welcome to contact me at Frank@OhioSoS.gov or 614-387-7323.

Yours in service,



Frank LaRose

EXHIBIT II



TRANSLATE

SEARCH

Learn more about the [coronavirus \(COVID-19\) outbreak](#) and connect with [resources for Pennsylvanians](#).

Participate in the 2020 U.S. Census to shape your future in PA. Learn more at [PA.gov/census](#).

[Home](#) > [Guides](#) > Responding to COVID-19

Responding to COVID-19 in Pennsylvania

Last updated 8:30 p.m., May 7, 2020

The 2019 novel coronavirus (COVID-19) is a new virus that causes respiratory illness in people and can spread from person-to-person. This virus was first identified during an investigation into an outbreak in Wuhan, China.

All Pennsylvanians have an important role to play in stopping the spread of COVID-19 and saving lives. Here are resources to help individuals, families, and businesses do their part.

Keep checking back. This guide will be kept up to date as resources and information change.

You can find up-to-date information about cases in Pennsylvania at on.pa.gov/coronavirus.

In this guide

Cases in Pennsylvania

Stay at Home Order

Phased Reopening

For Individuals

For Businesses

Popular Resources



Symptoms and Testing



See Map of Cases in PA



How to Make a Homemade Mask



Go to the PA COVID-19 Website



Travel Guidance



Translated COVID-19 Resources



Hospital Data Dashboard



School Guidance

Symptoms and Prevention

Symptoms of COVID-19 can include: fever, cough, and shortness of breath.

Symptoms may appear in as few as two days or as long as 14 days after exposure. Reported illnesses have ranged from people with little to no symptoms to people being severely ill and dying.

Human coronaviruses spread just like the flu or a cold:

- Through the air by coughing or sneezing.
- Close personal contact, such as touching or shaking hands.
- Touching an object or surface with the virus on it.
- Occasionally, fecal contamination.

Here's how you can protect yourself:

- Cover coughs or sneezes with your elbow. Do not use your hands!
- Wash hands often with soap and water for at least 20 seconds. Use an alcohol-based hand sanitizer if soap and water are not available.
- Clean surfaces frequently, including countertops, light switches, cell phones, remotes, and other frequently touched items.
- Contain: if you are sick, stay home until you are feeling better.

CASES IN PENNSYLVANIA

The [Department of Health COVID-19 website](#) is updated daily with total cases, number of counties with cases, and number of positive and negative tests.

Here is a map of COVID-19 cases in Pennsylvania:

STAY AT HOME ORDER

Pennsylvania counties in the red phase are [under a Stay at Home order until June 4.](#)

All individuals in counties subject to this policy must STAY AT HOME except for certain essential activities and work to provide life-sustaining business and government services.

See [Governor Wolf's order](#) and the [Secretary of Health's order](#).

Law enforcement officers should refer to Business Closure Order Enforcement Guidance [available online here.](#)

Allowable Activities and Travel

Allowable Individual Activities

Individuals may leave their residence ONLY to perform any of the following allowable individual activities and allowable essential travel.

- Tasks essential to maintain health and safety, or the health and safety of their family or household members (including, but not limited to, pets), such as obtaining medicine or medical supplies, visiting a health care professional, or obtaining supplies they need to work from home.
- Getting necessary services or supplies for themselves or their family or household members, or to deliver those services or supplies to others, such as getting food and household consumer products, pet food, and supplies necessary to maintain the safety, sanitation, and essential

operation of residences. This includes volunteer efforts to distribute meals and other life-sustaining services to those in need.

- Engaging in outdoor activity, such as walking, hiking or running if they maintain social distancing.
- To perform work providing essential products and services at a life-sustaining business (see below for details about life-sustaining business activities).
- To care for a family member or pet in another household.

Allowable Essential Travel

- Any travel related to the provision of or access to the above-mentioned individual activities or life-sustaining business activities (see below for details about life-sustaining business activities).
- Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
- Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
- Travel to return to a place of residence from an outside jurisdiction.
- Travel required by law enforcement or court order.
- Travel required for non-residents to return to their place of residence outside the commonwealth.
- Anyone performing life-sustaining travel does not need paperwork to prove the reason for travel.

Exemptions

Life-sustaining Business Activities

Life-sustaining business activities are exempt from this policy. On March 19, Governor Wolf ordered the closure of the physical locations of businesses that are not critical to sustaining life in a pandemic.

Businesses can determine whether they are considered a life-sustaining business, and are therefore

allowed to continue in-person, physical operations, by first referring to the [Governor's Order](#) and the list of life-sustaining business which is [available here](#). This list has been updated to conform with guidance on [Essential Critical Infrastructure](#) issued by the Department of Homeland Security Cybersecurity and Infrastructure Security Agency advisory.

If the answer remains unclear, businesses may email the Department of Community and Economic Development (DCED) for further assistance at the following email account: ra-dcedcs@pa.gov. Inquiries will be answered as promptly as possible.

This exemption is subject to continuance of and compliance with the social distancing and other mitigation measures to protect employees and the public, including virtual and telework operations (e.g. work from home) as the primary option when available.

State and Local Governments

Governments should use best judgment in exercising their authorities and issuing implementation directives and guidance. All such decisions should appropriately balance public health and safety while ensuring the continued delivery of critical services and functions. Government employees and contractors should continue to operate under the direction of their supervisors.

Individuals Experiencing Homelessness

Individuals experiencing homelessness are not subject to this policy but are strongly urged to find shelter and government agencies are urged to take steps needed to provide shelter for those individuals.

Displaced Students

International students, foster youth, and any other students who would otherwise experience displacement or homelessness as a result of campus closures are exempt from this policy and may remain in campus housing.

Additional Guidance

Additionally, nothing in this policy shall be construed to affect the operations of:

- Health care or medical service providers.
- Access to life-sustaining services for low-income residents, including, but not limited to, food banks.
- Access to child care services for employees of life-sustaining businesses that remain open as follows: child care facilities operating under the Department of Human Services, Office of Child Development and Early Learning waiver process; group and family child care

operating in a residence; and part-day school age programs operating under an exemption from the March 19, 2020 business closure Orders.

- The news media.
- Law enforcement.
- The federal government.
- Religious institutions. However, religious leaders are encouraged to find alternatives to in-person gatherings and to avoid endangering their congregants. Individuals should not gather in religious buildings or homes for services or celebrations until the stay at home order is lifted.

Frequently Asked Questions

How will this order be enforced?

Law enforcement is focused on ensuring residents are aware of the Stay at Home order and informing the public of social distancing practices and while the order is mandatory, voluntary compliance is preferred.

Law enforcement maintains discretion to warn or issue citations, and their decision is specific to the facts and circumstances of each particular encounter.

What does this order mean for life-sustaining businesses?

Life-sustaining business activities must abide by this order, but they are permitted to maintain physical operations in support of providing life-sustaining goods and services, while abiding by social distancing and other mitigation measures to ensure employee health and safety.

Are people permitted to travel and do they need an official letter or notification to travel?

Individuals are permitted to travel:

- To return home from an outside jurisdiction including out of state.
- As required by a law enforcement court order.
- To perform tasks essential to maintain health and safety for themselves, their households or household members (including pets).

Official letters or notifications are NOT required to travel.

It is recommended that if you are returning to Pennsylvania from New York, New Jersey, or states with community spread of COVID-19, to stay at home for 14 days and self-monitor for symptoms. [See more guidance for travelers.](#)

What does this mean for county and local governments?

Governments should use their best judgment in exercising their authorities and issuing implementation directives and guidance.

All such decisions should appropriately balance public health and safety, while ensuring the continued delivery of critical services and functions. Government employees and contractors should continue to operate under the direction of their supervisors.

Does the governor's Stay at Home order affect child custody orders?

No, the governor's Stay at Home order does not change or overrule custody orders or agreements. Those orders will continue to govern where the child will reside.

More broadly, a parent should not use the crisis as an excuse to violate court-ordered custody arrangements. If you feel you have an emergency reason (compromised health, etc.), the courts are open for emergency petitions.

What Is Social Distancing?

Social distancing means staying away from close contact in public spaces. It includes actions like staying out of places where lots of people gather and maintaining distance — approximately 6 feet — from others.

Social distancing also includes minimizing contact with people by avoiding public transportation when possible, limiting nonessential travel, working from home, and skipping social gatherings.

All Pennsylvanians should practice social distancing — not just those who are seriously ill or at high risk.

Social distancing is a proven way to slow the spread of pandemics.

PHASED REOPENING

Pennsylvania plans to proceed with returning to work cautiously. Broad reopenings or reopenings that are not structured around ongoing social distancing, universal masking, or other public health guidance would likely result in a spike of cases and new stay-at-home and closure orders.

Throughout this process, we will have guidance in place to support best public health practices. This guidance will reinforce and build on existing worker and building safety orders. It will also be able to adapt to the changing nature of the pandemic, as well as lessons learned from communities that return to work strategically.

Pennsylvania will utilize a three-phase matrix to determine when counties and/or regions are ready to begin easing some restrictions on work, congregate settings, and social interactions. [See the full plan for reopening Pennsylvania.](#)

Red Phase

The red phase, which currently applies to the whole state, has the sole purpose of minimizing the spread of COVID-19 through strict social distancing, non-life sustaining business, school closures, and building safety protocols.

RED PHASE

WORK & CONGREGATE SETTING RESTRICTIONS

- Life Sustaining Businesses Only
- Congregate Care and Prison Restrictions in Place
- Schools (for in-person instruction) and Most Child Care Facilities Closed

SOCIAL RESTRICTIONS

- Stay at Home Orders in Place
- Large Gatherings Prohibited
- Restaurants and Bars Limited to Carry-Out and Delivery Only
- Only Travel for Life-Sustaining Purposes Encouraged

- Reiterate and reinforce safety guidance for businesses, workers, individuals, facilities, update if necessary
- Monitor public health indicators, adjust orders and restrictions as necessary

Yellow Phase

The following counties will be in the yellow phase effective 12:01 a.m., May 8, 2020: Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango, and Warren.

As regions or counties move into the yellow phase, some restrictions on work and social interaction will ease while others, such as closures of schools, gyms, and other indoor recreation centers, hair and nail salons, as well as limitations around large gatherings, remain in place.

This purpose of this phase is to begin to power back up the economy while keeping a close eye on the public health data to ensure the spread of disease remains contained to the greatest extent possible.

YELLOW PHASE

WORK & CONGREGATE SETTING RESTRICTIONS

- Telework Must Continue Where Feasible
- Businesses with In-Person Operations Must Follow Business and Building Safety Orders
- Child Care Open Complying with Guidance
- Congregate Care and Prison Restrictions in Place
- Schools Remain Closed for In-Person Instruction

SOCIAL RESTRICTIONS

- Stay at Home Order Lifted for Aggressive Mitigation

- Large Gatherings of More Than 25 Prohibited
- In-Person Retail Allowable, Curbside and Delivery Preferable
- Indoor Recreation, Health and Wellness Facilities and Personal Care Services (such as gyms, spas, hair salons, nail salons and other entities that provide massage therapy), and all Entertainment (such as casinos, theaters) Remain Closed
- Restaurants and Bars Limited to Carry-Out and Delivery Only

- All businesses must follow CDC and DOH guidance for social distancing and cleaning
- Monitor public health indicators, adjust orders and restrictions as necessary

Green Phase

The green phase eases most restrictions by lifting the stay at home and business closure orders to allow the economy to strategically reopen while continuing to prioritize public health.

While this phase will facilitate a return to a “new normal,” it will be equally important to continue to monitor public health indicators and adjust orders and restrictions as necessary to ensure the spread of disease remains at a minimum.

GREEN PHASE

WORK & CONGREGATE SETTING RESTRICTIONS

- All Businesses Must Follow CDC and PA Department of Health Guidelines

SOCIAL RESTRICTIONS

- Aggressive Mitigation Lifted
- All Individuals Must Follow CDC and PA Department of Health Guidelines

- Monitor public health indicators, adjust orders and restrictions as necessary

Universal Masking

On April 3, [Governor Wolf recommended that all Pennsylvanians wear a mask](#) if they must leave their homes.

Members of the general public don't need a surgical mask – we need those for our health care workers and first responders. Instead, they are encouraged to wear homemade fabric or cloth masks.

Homemade masks limit the spread of infectious droplets in the air by containing coughs and sneezes. When a homemade mask can't be acquired a scarf or bandana can be utilized. [Learn more about when to wear a homemade mask and how to wear one.](#)

By implementing community use of these homemade fabric or cloth masks, everyone will have a higher degree of protection from this virus.

FOR INDIVIDUALS

Unemployment Compensation

If you are employed in Pennsylvania and are unable to work because of COVID-19, you may be eligible for [Unemployment Compensation \(UC\)](#) or Workers' Compensation (WC) benefits.

The following changes to UC have been made to help Pennsylvanians during the COVID-19 pandemic:

- The Waiting Week is suspended. Previously, claimants were not eligible for benefits during their first week of unemployment (the “waiting week”). This has been suspended; eligible claimants may receive benefits for the first week that they are unemployed.
- Work Search and Work Registration requirements are temporarily waived for all UC claimants. Claimants are not required to prove they have applied or searched for a new job to maintain their UC benefits. Claimants are also not required to register with [PACareerLink.gov](#).

In addition to regular state [Unemployment Compensation \(UC\) benefits](#), which provide roughly half of an individual's full-time weekly income up to \$572 per week, the [federal CARES Act](#) [expanded UC benefits through several new programs](#):

- [Pandemic Unemployment Assistance \(PUA\)](#) expands benefits to gig-economy workers, independent contractors, and self-employed individuals who are otherwise ineligible for UC.
- [Pandemic Unemployment Assistance \(FPUC\)](#) provides an additional \$600 per week, on top of regular UC benefits, to all UC recipients.
- [Pandemic Emergency Unemployment Compensation \(PEUC\)](#) provides an additional 13 weeks of UC benefits to individuals who exhaust their regular 26 weeks of benefits, for a total of 39 weeks of coverage.

Other Financial Help

Credit Cards

If you have seen a reduction in pay due to COVID-19 and are struggling to make your credit card or loan payments, contact your lender right away.

Regulatory agencies have encouraged financial institutions to work with customers impacted by the coronavirus.

For guidance visit the [Consumer Financial Protection Bureau](#) or [contact a credit counselor](#) near you.

Mortgage or Rent

If you can't cover your mortgage payment or rent, contact your lender or landlord immediately. Do not wait until you're behind on payments.

Some lenders may work out an agreement with you to waive late fees, set up a repayment plan or offer loan forbearance.

- Mortgage information: visit the [Consumer Financial Protection Bureau](#) or [find a housing counselor near you](#).
- Rental assistance: visit the [US Department of Housing and Urban Development](#).

Utilities

On March 6, 2020, Pennsylvania Public Utility Commission Chairman signed an [emergency order](#) prohibiting terminations by utilities that are under the PUC's jurisdiction, including:

- Electric
- Natural Gas
- Water
- Wastewater
- Telecommunication
- Steam

This memorandum is in place for as long as Governor Tom Wolf's Proclamation of Disaster is in effect.

If you are struggling to pay your utility bills, contact your service provider for possible emergency assistance programs.

Food Assistance

Food Pantries

Food pantries continue to operate throughout Pennsylvania, although some have updated hours and all are working on ways to connect people with food without risking contact.

[Find a pantry near you](#), then give them a call to make arrangements.

[Find out more about how to get emergency food assistance](#).

Meals for Students

The Pennsylvania Department of Education [received approval from the federal government](#) to allow K-12 schools in Pennsylvania closed due to COVID-19 to serve meals offsite to students.

These meals will be available at no cost to low-income children and make it possible for kids to receive nutritious meals and snacks while schools are temporarily closed.

See a [county map of schools and districts distributing meals at no cost](#) to children under age 18. For more information, contact your local school.

Grocery Help for Low-Income Individuals

The Supplemental Nutrition Assistance Program (SNAP) helps families, older adults, and

individuals pay for groceries. Benefits are loaded onto an EBT card, which can then be used to purchase food at grocery stores, supermarkets, some farmers markets, and other stores that accept SNAP.

Emergency SNAP applications can be expedited and issued in five days. Pennsylvanians can [apply for SNAP online](#).

Food for Women, Children, and Families

WIC helps with nutrition for pregnant women, nursing women, postpartum women, and infants and children younger than 5. Benefits can be used for approved grocery items at stores that accept WIC.

Apply by calling the toll-free hotline at 800-WIC-WINS, or start your [WIC application online](#).

Meals for Older Adults

Area Agencies on Aging continue to provide meals for older adults throughout the COVID-19 pandemic. Call [your local Area Agency on Aging](#) and request that you be connected with meals.

Driver Services

All Driver License Centers and Photo License Centers in Pennsylvania will be closed for two weeks effective close of business on Monday, March 16.

Driver and vehicle [online services are still available 24 hours a day, seven days a week](#). These services include driver's license, photo ID and vehicle registration renewals; driver-history services; changes of address; driver license and vehicle registration restoration letters; ability to pay driver license or vehicle insurance restoration fee; driver license and photo ID duplicates; and driver exam scheduling. There are no additional fees for using online services.

[More information on changes being implemented as part of PennDOT's response to COVID-19](#).

Expiration Dates

Effective April 30, 2020, expiration dates for driver licenses, photo ID cards and learner's permits scheduled to expire from March 16, 2020 through May 31, 2020, [are now extended through June 30, 2020](#).

Pennsylvania Turnpike

The Pennsylvania Turnpike has temporarily suspended cash payments. [Find out more about accepted forms of payment.](#)

Rest Areas

Some PennDOT rest areas and welcome centers statewide will be closed to the public effective 12:01 AM Tuesday, March 17, 2020. [See below a list of open locations.](#)

REAL ID

The Department of Homeland Security has postponed the enforcement date for REAL ID from October 1, 2020, to October 1, 2021, in response to COVID-19 and the national emergency declaration. [Find out more about REAL ID in Pennsylvania.](#)

State Correctional Institutions

As part of the statewide COVID-19 mitigation effort, [visits at all state correctional institutions are cancelled](#) through April 10, 2020.

The Pennsylvania Department of Corrections understands the impact that canceling visits could have on inmates and their families and friends.

Video visitation is a free service being offered to inmates and authorized visitors while visitation is suspended at the facilities in response to COVID-19 precautions. [Find out how to participate.](#)

More Resources


[Apply for Benefits](#)


[Job Portal](#)



New Tax Return Filing Deadline



Report Neglect or Abuse



Substance Use Disorder Resources



Mental Health Help



New Property Tax/Rent Rebate Program Deadline



Tips for Avoiding Scams



Tips for Pet Owners



Temporary Medical Marijuana Program Changes



New PACE Program Deadline



New Primary Election Dates

FOR BUSINESSES

Businesses in the Red Phase

Life-Sustaining Businesses

Governor Wolf has ordered all non-life-sustaining businesses in Pennsylvania to close their physical locations as of 8 p.m. March 19, to slow the spread of COVID-19. Enforcement actions against businesses that do not close physical locations are now in effect.

Business guidance has been updated after conversations with businesses, stakeholders, and individuals and has been aligned with guidance on Essential Critical Infrastructure issued by the Department of Homeland Security Cybersecurity and Infrastructure Security Agency advisory.

Restaurants and Bars

All restaurants and bars have been ordered to close their dine-in facilities to help stop the spread of COVID-19.

Businesses that offer carry-out, delivery, and drive-through food and beverage service may continue to do so, but eating and drinking inside restaurants and bars is temporarily prohibited.

The Pennsylvania Liquor Control Board announced steps to enforce this order beginning on Wednesday, March 18 at 8:00 PM.

Businesses offering carry-out, delivery, and drive-through food and beverage should employ social distancing best practices and be aware of the Trump Administration's guidance to avoid gatherings of 10 or more people.

Failure to Comply and Enforcement

Failure to comply with these requirements will result in enforcement action that could include citations, fines, or license suspensions.

The governor has directed the following state agencies and local officials to enforce the closure orders to the full extent of the law:

- Pennsylvania Liquor Control Board
- Department of Health
- Department of Agriculture
- Pennsylvania State Police
- Local officials, using their resources to enforce closure orders within their jurisdictions

Private businesses, local organizations and other noncompliant entities that fail or refuse to comply with the governor's orders that protect the lives and health of Pennsylvanians will forfeit their ability to receive any applicable disaster relief and/or may be subject to other appropriate administrative action. Such action may include termination of state loan or grant funding, including Redevelopment Assistance Capital Project (RACP) grant funding and/or suspension or revocation of licensure for violation of the law.

Finally, in addition to any other criminal charges that might be applicable, the Department of Health is authorized to prosecute noncompliant entities for the failure to comply with health laws, including quarantine, isolation or other disease control measures. Violators are subject to fines or imprisonment.

Guidance and Resources



Life-Sustaining Business List (updated 4/28/20)



See Life-Sustaining Business FAQ's



Find Child Care for Life-Sustaining Employees



Building Safety Measures



Worker Safety Order



Construction Guidance

Businesses in the Yellow Phase

On May 4, 2020, Governor Wolf provided [guidance that details procedures businesses must follow](#) to conduct in-person operations in counties that move to the yellow phase of reopening.

All businesses, including non-profits, permitted to conduct in-person operations are subject to this guidance. This guidance is based on the [building safety](#) and [business safety](#) orders, under which nearly all life-sustaining businesses have been operating during the red phase.

Under the yellow phase of reopening, life-sustaining businesses that could not conduct either all or part of their operations via telework will continue to conduct their operations in-person, and many non-life-sustaining businesses will be permitted to restart their in-person operations through the loosening of some restrictions under the stay-at-home and business closure orders.

Protecting Employees

All businesses that have been conducting their operations in whole or in part remotely through individual teleworking must continue telework operations for each of those employees.

All businesses conducting in-person operations must:

- Clean and disinfect high-touch areas frequently and continue to regularly clean all other areas of the building(s).
- Establish and implement a plan in case the business is exposed to a probable or confirmed case of COVID-19 that includes:
 - Securing and decontaminating the affected areas by:
 - Closing off areas visited by the person who is a probable or confirmed case of COVID19;
 - Opening outside doors and windows and using ventilation fans to circulate air in the area;
 - Waiting at least 24 hours, or as long as practical, before cleaning and disinfecting the affected area;
 - Cleaning and disinfecting all shared areas such as offices, bathrooms, break rooms, shared electronic equipment (tablets, touch screens, keyboards, remote controls) and ATM machines used by the sick person;
 - Identifying employees who were in close contact (within about 6 feet for 10 minutes or more) with a person with a probable or confirmed case of COVID-19 from the period 48 hours before symptom onset to the time at which the patient isolated.
 - If any employee who was in close contact remain) asymptomatic, the employees should adhere to the practices set out by the CDC in its April 8, 2020 Interim Guidance for Implementing Safety Practice for Critical

Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19;

- If the affected employee becomes sick during the workday, the person should be sent home immediately. Surfaces in the employee's workspace should be cleaned and disinfected. Information on other employees who had contact with the ill employee during the time the employee had symptoms and 48 hours prior to symptoms should be compiled. Others at the workplace with close contact within 6 feet of the employee during this time are considered exposed;
- Promptly notify employees who were close contacts of any known exposure to COVID19 at the business premises, consistent with applicable confidentiality laws.
- Taking each employee's temperature before they enter the business and sending home those who have a temperature of 100.4 degrees Fahrenheit, or higher. Ensure employees practice social distancing while waiting to have temperatures screened;
- Informing employees that if they have symptoms (i.e., fever, cough, or shortness of breath), they should notify their supervisor and stay home;
- Advising sick employees to follow CDC-recommended steps, including not returning to work until the CDC criteria to discontinue home isolation are met, in consultation with health care providers and state and local health departments;
- Employers are encouraged to implement liberal paid time off for employees who do not return to work for the reasons set forth above.
- Prevent large groups from entering or leaving the building by staggering work start and stop times;
- Limit the number of people in employee common areas, like locker rooms or break rooms, and ensure these areas are cleaned frequently;
- Conduct meetings and trainings virtually. If a meeting needs to be held in person, limit the number of employees to 10 and maintain a social distance of six feet;
- Make sure employees have access to soap and water to wash their hands, hand sanitizer and disinfectant wipes;
- Provide non-medical masks for employees to wear at all times and make it mandatory to wear masks while on the work site. Employers may approve masks obtained or made by employees according to Department of Health policies;
- Make sure the facility has enough employees as applicable to follow these protocols and conduct business effectively and safely;
- Discourage non-essential visitors from entering the business premises;
- Communicate these procedures to all employees to ensure that everyone knows how to be safe.

Protecting Employees That Serve the Public

Any business that serves the public inside a building or other defined area must follow the above guidance and take the additional precautions listed below:

- Conduct business with the public by appointment only, whenever possible;
- If appointment-only service is not feasible, limit the number of people inside the building to no more than 50% of the total maximum occupancy;
- Modify the hours of business so that there is enough time to clean and restock;
- Install shields or other barriers at registers and check-out areas to physically separate cashiers and customers, or take other measures to maintain social distancing between customers and employees;
- Encourage customers to use online ordering by providing delivery or pick-up options;
- Designate a specific time for people at high risk, including those over the age of 65 to use the business at least once a week;
- Require all customers to wear masks while on the premises. Businesses that provide medication, medical supplies or groceries must provide an alternate, no contact, means of delivering goods for customers who cannot wear a mask.
 - However, individuals who cannot wear a mask due to a medical condition (including children under the age of 2 years per CDC guidance) may enter the premises and are not required to provide documentation of such medical condition.
- In businesses with multiple check-out lanes, limit use to every other register. After every hour, rotate customers and employees to the previously closed registers and clean the previously open registers and the surrounding areas;
- Schedule handwashing breaks for employees at least every hour; and
- Assign an employee to wipe down carts and handbaskets before the customer uses it.

No business is required to conduct in-person operations, and should not do so if the business is unable to do so in accordance with this guidance. Businesses permitted to conduct in-person operations that are unable or unwilling to comply with these requirements may engage in curbside delivery to customers so long as strict social distancing and other mitigation measures are followed.

Businesses serving the public that inherently involve close contact with customers, and therefore cannot attain social distancing, are not permitted to conduct in-person operations until the county in which the business is located transitions to the green phase, when the building safety and business safety orders are lifted.

Enforcement

Enforcement of the Secretary's Order Directing Building Safety Measures began at 12:00 AM on

Monday, April 6, 2020. Enforcement of the Secretary's Order Directing Public Health Safety Measures for Businesses Protection Order began at 8:00 PM on Sunday, April 19, 2020.

The governor has directed the following state agencies and local officials to enforce orders related to the COVID-19 pandemic to the full extent of the law:

- Department of Health
- Department of Agriculture
- Department of Labor and Industry
- Pennsylvania State Police
- Local officials, using their resources to enforce closure orders within their jurisdictions.
- Pennsylvania Liquor Control Board

Law enforcement officers should refer to [Enforcement Guidance available online here](#).

If employees or customers want to report possible health and safety violations in the workplace related to COVID-19:

1. File a complaint with a local health department or a law enforcement agency.
2. [Submit this webform](#) to the PA Department of Health.
3. Review OSHA guidance and, if appropriate, [file a complaint at OSHA.gov](#).

Requirements for Communicating with Employees and Any On-site Customers about COVID-19 Safety

Businesses conducting in-person operations or serving the public are required to make employees and customers aware of the guidance provided by the commonwealth to keep people at their establishment safe. In addition, businesses are required to publicly acknowledge their responsibility to conduct their operations to ensure the health and safety of employees.

Businesses must print, sign, and post the "COVID-19 Safety Procedures for Businesses" flyer on their premises. Businesses must post the signed flyer in employee common space and, if the business serves the public, the business must also post the flyer near the business's public entrance(s) in prominent location(s).

Businesses must sign the flyer on the space provided. The signature is an acknowledgement that the owner or management is aware of the COVID-19 safety procedures and understands their responsibilities to carry out the guidance and procedures.

The flyer must be signed by the business's corporate officer, site manager, site foreperson, or equivalent. The flyer also contains a space for the business to indicate the employee who is the "Pandemic Safety Officer," or the person in charge of the COVID-19 safety procedures for the

business (specific workplace). The signed acknowledgement and Pandemic Safety Officer designation should not be returned to the Commonwealth – it must be simply posted and available if requested by local law enforcement.

The Commonwealth encourages businesses to share this guidance or the flyer electronically with employees as well. There is no requirement to submit a safety response plan to the Commonwealth.

NOTE: There are two versions of the flyer. One is a document that can be printed on ONE 8.5x14-inch (legal) piece of paper. The other is a document that can be printed on TWO 8.5x11-inch (letter) pieces of paper. Businesses can choose which version to use and post and do not have to use both versions.

COVID-19 Safety Procedures for Businesses Flyer



Resources and Loans

COVID-19 Working Capital Access Program

We are no longer accepting applications for the [COVID-19 Working Capital Access Program](#). All funding has been exhausted. However, low-interest loans for small businesses and eligible non-profits in all 67 counties in Pennsylvania is now available through the U.S. Small Business Administration (see below).

Pennsylvania Department of Community and Economic Development

The Pennsylvania Department of Community and Economic Development offers working capital loans that could be of assistance to businesses impacted by COVID-19. [Resources and information can be found here as they become available.](#)

U.S. Small Business Administration

On March 19, 2020, Governor Wolf [announced the availability of low-interest loans](#) for small businesses and eligible non-profits in all 67 counties in Pennsylvania through the U.S. Small Business Administration (SBA).

Loan applications can also be downloaded at sba.gov/disaster. Applicants may apply online using the Electronic Loan Application (ELA) via the SBA's secure website at disasterloan.sba.gov/ela. Completed applications should be returned to the local DLOC or mailed to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

More Resources

□
Critical Medical Supplies Procurement

□

Manufacturing Call to Action Portal



Critical Donation Portal

Additional Guidance from Agencies

Dept. of Aging

Dept. of Agriculture

Dept. of Banking & Securities

Dept. of Community & Economic Development

Dept. of Conservation & Natural Resources

Dept. of Corrections

Dept. of Drug & Alcohol Programs

Dept. of Education

Dept. of Environmental Protection

Dept. of General Services

Historical & Museum Commission

Dept. of Human Services

Insurance Dept.

Dept. of Labor & Industry

Dept. of Military & Veterans Affairs

Dept. of Transportation

Dept. of Revenue

Dept. of State

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Yes, it was

If not, [help us improve this.](#)

WORK SMART.

PA

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Design Standards

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EXHIBIT JJ

Montco judge extends deadline for absentee ballots

I [inquirer.com/philly/news/politics/20161104 Montco seeks to extend deadline for absentee ballots.html](http://inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html)

by Laura McCrystal, Staff Writer , Posted: November 3, 2016

With thousands of ballots outstanding and complaints pouring in, a Montgomery County judge on Thursday granted a petition to extend by four days the deadline for returning absentee ballots.

"I guess we run the risk that 17,000 people could be disenfranchised unless there's some extension," Senior Judge Bernard A. Moore said at a hearing in Norristown.

Related stories

Hundreds in Montco say they haven't received absentee ballots

County officials acknowledged receiving "unprecedented demand" this year for absentee ballots and said they had mailed 29,541 absentee ballots.

But with the 5 p.m. Friday deadline looming, voters continued to complain that they had not yet received their ballots. By Thursday afternoon, only half of the ballots had been returned, while other counties were seeing return rates closer to 80 percent, officials said.

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"It is totally unacceptable," said Cheryl L. Austin, a county judge and election board member who said her daughter in California was among those still waiting for her absentee ballot.

Moore ruled that absentee ballots will be counted if they are submitted before 8 p.m. Tuesday, when polls close.

Clout Newsletter

Your guide to the wild world of politics

The reason behind the slowdown remained a matter of debate. Various officials pointed to a delay in printing absentee ballots, the high volume of applications, problems with the postal service, or the loss of key workers in the voter services department.

Representatives from both parties told the judge the delays were unprecedented and they had not heard of similar backups in other counties.

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Val Arkoosh, a Democratic county commissioner and chairwoman of the election board, declined to assign blame Thursday or say that a mistake was made.

She said the county met its legal obligation to send out all ballots by the deadline Tuesday. She also stood by a decision to delay printing and sending absentee ballots until Oct. 11, due to a dispute over wording of a ballot question. "It was a decision our team made," Arkoosh said.

In court Thursday, Nicole Forzato, a senior assistant county solicitor, showed the judge a stack of legal pads filled with notes logging complaints or questions left by county voters in 1,300 voice mails in the last week.

"Within a few hours, our mailboxes are getting full," voter services administrator Matthew Macekura said.

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Macekura testified that voter services also had an issue with the Norristown post office, which he said was understaffed and unprepared to sort mail quickly.

"Something has happened here that we can't explain, but we need to make it right," Forzato said.

Republican Commissioner Joe Gale, vice chairman of the election board, suggested that there was an explanation: chaos within the voter services department. The department's top two employees resigned in recent weeks.

"Everyone should acknowledge it's been chaotic," Gale said.

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Gale complained that former campaign staffers for Democratic commissioners - including Chairman Josh Shapiro, who is running for attorney general - have now been hired to work in voter services.

"I can understand why so many members of the public lack confidence and trust in the election process," he said.

Arkoosh said Gale's claims were "factually wrong" and maintained that the staff working on the election were well-prepared and working in a nonpartisan manner. She criticized Gale for running radio advertisements in which he assailed the voter services department, while also serving as a member of the board responsible for upholding integrity in the election.

Arkoosh said the election board will meet after the election to discuss what happened and how to improve.

After the judge's order, the county announced that voters approved for absentee ballots can deliver them or vote in person at the county voter services office in Norristown through Monday (<http://www.montcopa.org/753/Voter-Services>).

The office will also hold weekend hours: Saturday from 9 a.m. until noon and Sunday from noon until 3 p.m.

Lmccrystal@philly.com

610-313-8116 @LMcCrystal

EXHIBIT KK

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY,
PENNSYLVANIA

IN RE: :
EXTENSION OF TIME FOR : Civil Action
ABSENTEE BALLOTS TO BE : Docket No. 2016-26326
RECEIVED AND COUNTED IN :
THE 2016 GENERAL ELECTION :

ORDER

AND NOW, this 3RD day of November, 2016, upon consideration of the Emergency Petition of the Montgomery County Board of Elections for an Extension of Time for the Voted Absentee Ballots of the Qualified Registered Electors of Montgomery County to be Counted for all Offices Up for Election in the 2016 General Election, and any opposition thereto, it is hereby **ORDERED** and **DECREED**, that said Petition is **GRANTED** as follows:

The Montgomery County Board of Elections shall accept all completed absentee ballots received by the Montgomery County Board of Elections any time ~~before~~ after 5:00PM on Friday, November 4, 2016 and ^{UNTIL} Tuesday, November 8, 2016, at 8:00 PM. Those absentee ballots shall be kept separate from the absentee ballots received before 5:00PM on November 4, 2016;

It is further **ORDERED** and **DECREED** that The Montgomery County Board of Elections shall accept for tabulation during the official tabulations, all civilian absentee ballots received at the Montgomery County Board of Elections between 5:00PM on Friday, November 4, 2016 and Tuesday, November 8, 2016, at 8:00 PM for all offices on the absentee ballots.

All Absentee ballots received after Friday, November 4, 2016, at 5:00 PM shall be retained, unopened, by the Montgomery County Board of Elections and shall not be sent to the appropriate polling place;



2016-26326-0002 11/3/2016 2:05 PM # 11028307
Order

Rept=Z2928174 Fee:\$0.00

Mark Levy - MontCo Prothonotary

Rather, said absentee ballots retained by the Montgomery County Board of Elections shall be subject to challenge pursuant to the Pennsylvania Election Code and set aside accordingly, or if not so challenged, shall be so tabulated during the Official Tabulations of the General Election commencing Monday, November 14, 2016.

BY THE COURT:


Bernard D. Moore
J.

Copies: ✓ mailed hand delivers
NICOLE FORZANO, ESG.

Shannon, Ct Admin
Clerk: L. Nowicki

EXHIBIT LL

Gov. Tom Wolf outlines plan for reopening Pa. but offers no dates: 'We cannot flip a switch'

 [pennlive.com/coronavirus/2020/04/gov-tom-wolf-gives-update-on-coronavirus-in-pa-watch-live.html](https://www.pennlive.com/coronavirus/2020/04/gov-tom-wolf-gives-update-on-coronavirus-in-pa-watch-live.html)

By Ron Southwick | rsouthwick@pennlive.com

April 17,
2020

Gov. Tom Wolf provided an overview of general steps to reopen Pennsylvania as the state continues to grapple with COVID-19.

In a public address this afternoon, Wolf outlined a plan for relief, reopening and recovery. He didn't cite any dates or specify when the state's stay-at-home order, slated to end April 30, will expire.

Wolf said his administration will make sure the plan to reopen "respects the reality on the ground."

"We cannot flip a switch and reopen the commonwealth," Wolf said. "It won't be one big day."

[Reaction to Gov. Wolf's COVID-19 recovery plan varies: some see strong leadership, while critics crave specifics](#)

You can **[watch the governor's news conference here](#)**.

The governor described several general steps that will guide the reopening of the state.

First, Wolf said the state will utilize a data-driven approach in examining when the state can ease restrictions. The state will work to offer guidance to businesses and health care facilities. Reopening requires adequate testing material and protective equipment for workers, Wolf said.

The state also will need "a monitoring and surveillance program that allows the Commonwealth to deploy swift actions for containment or mitigation if it's necessary."

Protections for vulnerable populations must remain, including limitations of visitors to nursing homes and prisons, he said.

Lastly, large gatherings outside of the workplace will still be prohibited during the reopening process, Wolf said.

Wolf said it's not time for a mass reopening of businesses. The governor has ordered the closure of businesses that aren't deemed "life sustaining."

"Moving to reopen large swaths of our economy now is only going to prolong this crisis," Wolf said.

"When we get ready to re-open, it has to be a staged approach," Wolf said. "And it will be."

Republican lawmakers have passed legislation that would allow some businesses to reopen their doors. GOP lawmakers said their bills would replace the state's restrictions with federal guidelines on allowing businesses to open. Republicans contend those measures could protect the public and help the state's ailing economy.

The governor said he will veto the legislation. He contends a wider reopening of businesses would risk lives and weaken the economy further in the long run. Wolf has also said he'll veto a bill that would allow counties to make their own decisions on reopening businesses.

Wolf said the efforts of Pennsylvanians have helped stem the spread of the virus. But Pennsylvania still ranks fifth in cases nationwide. He cited the national shortage of testing materials and more than 1,000 new cases are reported each day.

"There is no magic wand to wave to get to where we want to be," Wolf said.

On Friday, the Pennsylvania Department of Health confirmed 1,706 new coronavirus cases. Friday's new cases brings the statewide total to 29,441.

The state health department reported 49 new fatalities, raising the state's total of fatalities to 756. At least 54 people in central Pennsylvania have died of the virus, including two newly reported deaths today in Lancaster County.

Wolf hailed Pennsylvanians for their courage, compassion and sacrifices. He hailed the heroic efforts of health care professionals and first responders and asked the public to continue social distancing to protect those workers.

The governor said he understands the economic blow the shutdown has taken on businesses, farmers and child care centers. He said the state needs to prepare for rebuilding the economy and a new commonwealth after the outbreak subsides. More than 1 million Pennsylvanians have filed for unemployment since mid-March.

Wolf said the social distancing efforts have helped hospitals withstand an influx of new patients.

"I'm asking you to stay the course," Wolf said.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

Civil Action No. 266 MD 2020

**DECLARATION OF KARLEY SISLER IN SUPPORT OF PETITIONERS'
APPLICATION FOR PRELIMINARY INJUNCTION**

I, Karley Sisler, declare as follows:

1. I am over the age of 18 and competent to testify as to the matters set forth herein.
2. I am the Director of The Office of Voter Services for Montgomery County. As Director, my responsibilities include overseeing the process of issuing absentee and mail-in ballots and tabulating and certifying election returns. I have served in this position for three years.
3. For the upcoming June 2 primary election, we have received approximately 83,000 requests for absentee and mail-in ballots as of Tuesday, May 5, 2020. At the current rate, we expect to receive approximately 120,000 ballot requests by the ballot application deadline of May 26. We have been working around the clock—on the weekends and in the evenings—to keep up with the number of applications we are receiving every day.
4. Even though we are working diligently, we are experiencing staffing challenges because of the coronavirus. For example, we are working on a staggered basis to limit group exposure and to ensure appropriate social distancing. We were also in the process of

hiring additional staff to double the size of our office in anticipation of the June 2 primary election, but were unable to fully up-staff following the statewide shutdown. Instead, we have pulled staff from other departments to assist with processing applications and ballots and work evenings and weekends to keep up with the volume of applications. In addition, we have had to contract with a third-party vendor to handle mailing out ballots due to our resource limitations.

5. In the 2016 and 2018 general elections, when the ballot-receipt deadline was 5:00 p.m. on the Friday before Election Day, we received, respectively, 288 and 1,326 absentee ballots from non-military and non-overseas voters after that deadline. Because these ballots arrived after the deadline, they were not counted.

6. Our office is also experiencing delays with the U.S. Postal Service. We have been working with the post office in recent weeks to process paperwork to obtain permits and other documents to allow for our ballots to be mailed with a prepaid business reply mail return envelope. This process, which we understood would take no more than a day, has stretched to more than a week and has hindered our ability to distribute ballots. Additionally, as we begin to see more ballots return, we anticipate delivery times to become longer than they currently are.

7. If the county board is fully capable of counting absentee and mail-in ballots that are postmarked by Election Day but arrive up to seven days after the Election Day deadline, depending on the volume, we may have to maintain our temporary increase in staff numbers to process these ballots and transport them to our canvassing location in order to meet the canvassing and tabulation deadlines. Furthermore, having third parties deliver ballots for voters would not create any burden other than the fact that we would potentially have more ballots to count, and may need to devote more staff to handle the increase in voting. In prior elections, people have tried to return ballots for their family members and we have had to turn them away. If voters were permitted to have a

family member or someone else return their ballots, we would accept and count their ballots as we have done for all other absentee voters.

I declare under penalty of perjury that the foregoing is true and correct. I understand that false statements herein are subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Executed on May 6, 2020

Respectfully submitted,



Karley Sisler

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

DECLARATION OF DR. DANIEL MCCOOL

I. INTRODUCTION

A. Qualifications

1. I am Professor Emeritus of Political Science at the University of Utah. I received a B.A. in Sociology from Purdue University, and a Ph.D. in Political Science from the University of Arizona. I have a doctoral minor in Latin American History. For over thirty-five years I have conducted research on voting rights. In 2007 I co-authored *Native Vote: American Indians, The Voting Rights Act, and the Right to Vote* (Cambridge University Press). In 2012 I edited a book titled *The Most Fundamental Right: Contrasting Perspectives on the Voting Rights Act* (Indiana University Press). I also have several peer-reviewed publications that focus on public policy methodology and theory. I utilized “qualitative methods,” described below, for nearly all of the ten books, 25 articles, and 19 book chapters that I have published. From 1998 to 2007 I directed the American West Center, which conducted research on behalf of rural people in Utah and the West.

2. I have served as an expert witness in 13 voting rights cases:

- > *U. S. V. South Dakota*. 615 NW 2d 590 Dist. Ct. SD (2000)
- > *U.S. v. Blaine County*. 157 F. Supp. 2d 1145 Dist. Ct. MT (2001)
- > *Bone Shirt v. Hazeltine*. 336 F.Supp.2d 976 Dist. Ct. SD (2004)
- > *Cottier v. City of Martin*. No. CIV. 2002-5021 Dist. Ct. SD (2005)
- > *Koyukak v. Treadwell*. Case No. 3:13-cv-00137-JWS Dist. Ct. AK (2014)
- > *Navajo Nation v. San Juan County, Utah*. Case No. 2:12-cv-00039-RJS-DPB. Dist. Ct. UT (2016)
- > *Brakebill v. Jaeger*. Civ. 1: 16-CV-08 Dist. Ct. ND (2016)
- > *Sanchez et. al. v. Cegavske*. Case No. 3:16-cv-00523-MMD-WGC Dist. Ct. NV (2016)
- > *Navajo Nation Human Rights Commission v. San Juan County, Utah*. Case No. 2:16-cv00154-JNP-BCW Dist. Ct. UT (2017)
- > *Voto Latino v. Hobbs*. CV-05685-PHX-DWL. Dist. Ct. AZ (2019)
- > *DSCC v. Simon*. 2nd Jud. Dist. Minn. (Jan. 2020, April, 2020)
- > *Western Native Voice v. Stapleton*. Mont. 13th Jud. Dist. (March, 2020)
- > *Corona et. al. v. Cegavske et. al.* 1st Jud. Ct. in and for Carson City, NV (April, 2020)

Three of these cases were filed in state courts, and the others involved federal claims under Section 2 or Section 203 of the Voting Rights Act. The four most recent cases dealt with issues regarding vote-by-mail, and ballot delivery assistance. I applied the same methodology, described below, in all of these cases. My reports have never been rejected by a court. My vita is attached. I have been hired by the plaintiffs for this case and I am compensated at the rate of \$250/hour. The conclusions I present in this report are mine alone, are not related to or endorsed by the University where I have an appointment, and were reached through an independent process of research and inquiry.

B. Research Questions

3. The plaintiffs have asked me to address the following research questions in the context of the state of Pennsylvania's possible response to the unprecedented conditions created by the COVID-19 pandemic:

- a. To what extent does the Ballot Delivery Assistance Ban impact access to the franchise for some voters during the COVID-19 pandemic?

- b. Does the cumulative impact of the Commonwealth's Ballot Receipt Deadline, potential delays to USPS delivery of requested ballots and mailed ballots, and the Ballot Delivery Assistance Ban, affect voters' access to the franchise during the COVID-19 pandemic?

C. *Qualitative Methods*

4. In this report I utilize a well-recognized methodology known as "Qualitative Methods" (Denzin and Lincoln, 2000, 2011). This is the same methodology I have used in nearly all my academic work, as well as all of my previous expert witness reports. I employ this methodology by using data and information gleaned from multiple and overlapping sources. For this report I relied primarily on the political science literature focusing on voting behavior and the design of electoral systems.

5. Qualitative Methods is well recognized in the social sciences. The Consortium on Qualitative Research Methods was established in 2001 (Consortium on Qualitative Research Methods, n.d.). The American Political Science Association organized a section on Qualitative Methods in 2003 (American Political Science Association, n.d.). By 2003 almost half of all peer-reviewed articles in Political Science journals utilized Qualitative Methods (Bennett, Barth, and Rutherford 2003). Syracuse University, with funding from the National Science Foundation, established a "Qualitative Data Repository" to assist researchers who utilize this method (Qualitative Data Repository, n.d.).

6. Qualitative Methods is well-suited for expert analysis in voting rights cases because it is adept at analyzing phenomena that are complex, long-term, multi-dimensional, and subject to rapid change. Furthermore, it is "color-blind" in that the application of the methodology is not limited to any particular social or ethnic group. Lamont and White note that Qualitative Methods is "particularly useful for studying timely topics such as group identities and boundaries [and] race,

class, gender...” (2009: 5). It is also particularly useful to study phenomena that occur over long periods of time, due to the large number of variables and factors that change over time (see, for example: Bartolini 2013).

7. There are many methodology textbooks that focus on Qualitative Methods; most are written by political scientists but others are by authors in fields such as public health, anthropology, sociology, and increasingly the humanities. The widespread use and acceptance of Qualitative Methods, along with its applicability to large-scale analytical problems, is why I have consistently relied on it for both my academic work and my expert witness reports.

II. RESEARCH ON “VOTER COSTS” AND “VOTER TRADITION”

8. Before I examine the specifics of the research questions posed above, it is useful to understand the prevailing themes in the political science literature that are most relevant to these research questions. A large body of research has found that many variables affect voter behavior and voter turnout, but the two most important and relevant trends in the literature concern “voter costs” and “voter tradition.”

9. The concept of “voter costs” is well-defined in the political science literature (Berinsky. 2005). As Brady and McNulty note, “costs do matter to voter turnout” (2011: 115). Rosenstone and Hansen put it in blunt terms: “Participation in politics...has a price, a price that is some combination of money, time, skill, knowledge, and self-confidence” (1993:12-14). As Brady, Verba and Schlozman note, “time, money and civil skills” are “essential to political activity” (1995: 271). These voter costs have a direct impact on voter behavior and turnout. Even the weather can affect the costs of voting (Hansford and Gomez. 2010). The key point is that certain attributes of an electoral system can increase, or decrease, those costs. Any attribute of an electoral system that increases voter costs tends to decrease voter participation and turnout. Thus,

if the goal is to increase participation, inclusivity, and turnout, then voter costs should be minimized.

10. A second theme in the literature concerns voter tradition. Voters are creatures of habit, and when their expected and accustomed vote tradition is disrupted, it tends to decrease turnout. As one study put it, “Voting may be habit-forming” (Gerber, Green, and Shachar. 2003. Also see: Kwak, Shah, and Holbert. 2004). For example, Brady and McNulty found that the outcome of elections could be changed by the “extensive manipulation of polling place locations” (2011: 115). Changes to polling locations, new limits on “convenience voting,” and changes in voter criteria or election schedules can reduce turnout. Furthermore, these reductions do not occur equally across all demographic subsets of voters; some groups of voters are more affected than others. Thus, perturbations in voting procedure tend to have a negative impact on turnout that is unevenly distributed across voting populations.

III. TO WHAT EXTENT DOES THE BALLOT DELIVERY ASSISTANCE BAN IMPACT ACCESS TO THE FRANCHISE FOR SOME VOTERS DURING THE COVID-19 PANDEMIC?

11. Pennsylvania law bans ballot delivery assistance for all voters except those who can prove they are disabled. Thus, it is illegal to help someone deliver their ballot, even if they have requested this service. This results in significant increases in voter costs, but cannot be justified by any reasonable criteria of public good. Those costs increase dramatically during the COVID-19 pandemic.

A. Increased Voter Cost

12. A Ballot Delivery Assistance Ban makes it illegal for a voter to have someone other than those specified in the law to assist them by delivering their ballot to a mailbox or polling location. Twelve states limit who may collect a ballot, 24 states allow anyone chosen by the voter to deliver ballots, and 13 states do not specify who may return a ballot. Only one state, Alabama,

prohibits all forms of ballot delivery assistance (Ballotpedia n.d.; Underhill. 2020). In states that allow ballot delivery assistance, an individual voter may, at their discretion, opt to have someone collect their ballot and deliver it to a mailbox or polling place. Thus, it is a voluntary act on the part of the voter as to whether they want to accept the services of a ballot collector. If a voter chooses to have their ballot collected by another person, they do not have to travel to a mailbox or polling site; this eliminates travel costs, and during a pandemic, protects them from potential exposure to COVID-19.

13. A ban on ballot delivery assistance effectively moves the polling place from someone's front porch to a point that may be quite distant and inaccessible for some people. Thus, a ballot delivery assistance ban significantly increase voter costs by exposing voters to potential COVID-19 infection and requiring voters to travel to a mailbox or a polling location. Traveling to a polling place or a mailbox may entail walking on a crowded sidewalk, taking public transportation (especially relevant to low-income people), stopping at gas stations, and encountering other people in close proximity while at a post office or polling location. All of these activities significantly increase potential exposure to a disease that has killed over 73,000 Americans (as of May 6). That death toll is roughly equivalent to the entire population of Scranton, or Bethlehem, Pennsylvania.

14. Ballot delivery assistance has been utilized in other states. Particular groups of people, such as low-income Hispanic and Black communities where people lack the time and financial resources to travel to a polling place or take time off work, have often relied on ballot delivery assistance. Ballot delivery assistance has also been used on Indian reservations to help voters overcome long distances, poor roads, and limited ability to travel (Hendley. 2014a; *Democratic National Committee v. Hobbs*. 2020; *Western Native Voice v. Stapleton*. 2020;

Michels. 2020a, 2020b). Those claiming that “ballot harvesting” results in voter fraud often point to minority communities as examples of voter fraud when they choose to use ballot delivery assistance (Celeste. 2017; Garcia. 2016; Morefield. 2018; Hendley. 2014b). These critics sometimes use the Spanish words for ballot delivery assistance personnel (“boleteros” or “politiqueros”) as a way of emphasizing their Hispanic ethnicity (Rogers. 2018; Re. 2020). Some of the minority groups that have relied on ballot delivery assistance have charged that ballot delivery assistance bans are discriminatory in their impact and reduce turnout in minority communities (Re. 2020; *Los Angeles Times*. 2018; *Arizona Independent News Network*. 2014; *Democratic National Committee v. Hobbs*. 2020: 102).¹

15. It is important to note that ballot delivery assistance bans prohibit, not just fraudulent or illegal ballot assistance, but all ballot delivery assistance. There are other laws that prohibit vote-related fraud, deception, intimidation, or bribery (Pennsylvania Stat. 25). The Pennsylvania Ballot Delivery Assistance Ban prohibits assistance even when the voter desires assistance and the collector acts in good faith and follows all voting laws to the letter. The 9th Circuit made this point in a case on ballot delivery assistance in Arizona; the law didn’t just “forbid fraudulent third-party ballot collection. It forbids *non-fraudulent* third-party ballot collection” (*Democratic National Committee v. Hobbs*. 2020: 91).

B. No Justification

16. The usual rationale provided for banning ballot delivery assistance is to prevent voter fraud (Chaffetz. 2020; Blood and Ohlemacher. 2018; Morefield. 2018; The Federalist. 2018). However, there is virtually no evidence that voter fraud is a problem in Pennsylvania. The most

¹ In the Arizona case of *Democratic National Committee v Hobbs*, the 9th Circuit concluded that the state’s criminalization of ballot collection would not have been enacted “without the motivating factor of racial discrimination” (2020: 102).

complete compendium of actual convictions for voter fraud is compiled by the conservative think tank, The Heritage Foundation. Their total count of “proven instances of voter fraud” is 1,285, out of a data bank that covers local, state, and federal elections beginning in the early 1980s and through the 2018 election (i.e. hundreds of millions of votes). For Pennsylvania, there are 22 cases; three of them involved absentee ballots, and none of them involved illegal ballot delivery assistance. These 22 cases are from all local, state, and national elections (they even include private home-owners association elections) and cover elections from 1998 to 2018 (Heritage Foundation. 2020). There are over 8.5 million registered voters in Pennsylvania, and over five million voted in the 2018 elections (state election data and the U.S. Election Assistance Commission. 2018). The time period over which these convictions occurred covers eleven election cycles. Thus, out of about 55 million votes cast, only 22 resulted in confirmed voter fraud or registration fraud.²

17. If voting by mail actually increased voter fraud, we would expect to see a dramatic increase in the number of voter fraud convictions in the five states that have gone to all-mail balloting.³ But that is not the case. Again relying on the data compiled by the Heritage Foundation, here are the number of “proven instances of voter fraud” in the five all-mail states: Oregon: 15; Washington: 12; Colorado: 14; Utah: 1; Hawaii: 2.

² This absence of voter fraud is not limited to Pennsylvania. For complete nation-wide analyses see: Chapter 2 of *The Voting Wars (2012)* by Richard Hasen; *Election Meltdown* by Richard Hasen (2020); chapter 6 of *Stealing Democracy* by Spencer Overton (2006); and *The Myth of Voter Fraud* by Lorraine Minnite (2010). Also see: Urbina (26 Oct. 2010) and Levitt (2007). Even the U.S. Justice Department under President George W. Bush could not find evidence of significant voter fraud; see: Lipton and Urbina (12 April 2007); Levitt (2007). One legal scholar calculated that the likelihood of voter fraud was more than 12 times less likely than being struck by lightning (Sobel 2014: 7). For a list of studies confirming the absence of widespread voter fraud, see: <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth>.

³ Even these states have vote centers for people who want or need to vote in-person on Election Day.

18. There are also charges that allowing ballot delivery assistance will lead to fraud. In the Heritage Foundation data bank of fraud, there is no appreciable difference in the number of voter fraud convictions in states that allow, or severely limit, voter assistance. Alabama is the only state to have an absolute ban on ballot delivery assistance; there are 19 fraud convictions in that state. States that allow ballot delivery assistance include Mississippi (31 fraud convictions); Oklahoma (5 convictions); Wisconsin (46 convictions); and Wyoming (3 convictions). Out of those 85 convictions, there was one possible case in Mississippi that involved ballot delivery assistance. California, which now allows state-wide ballot delivery assistance, has 42 voter fraud or registration fraud convictions out of a population of nearly 40 million people; none of the 42 cases involved ballot assistance. Montana, which recently banned voter assistance to stop alleged voter fraud, has one conviction—a man who mailed his ex-wife’s ballot without her permission. Thus, over decades, including numerous election cycles, with tens of millions of votes cast at the local, state, and national level, these cases indicate that actual voter fraud convictions are extremely rare. And among that small number, the cases involving voting by mail or ballot delivery assistance are a very small percentage.

19. The only verified case of significant and coordinated voter fraud involving absentee ballots in the U.S. was in North Carolina in 2018. That state does not allow ballot delivery assistance by anyone except a family member, and only three percent of the voters used mail-in voting (U.S. Election Assistance Commission. 2018:30). In that case a Republican operative for a congressional candidate ran an absentee ballot scam (Blinder. 2019: *North Carolina v. Dowless*. 2019). There is no evidence, either nation-wide or in Pennsylvania, that the extremely few cases of voter fraud were part of a larger partisan scam or were widely-coordinated.

20. Thus, the claim by critics of vote-by-mail and ballot delivery assistance that they inevitably lead to voter fraud is not supported by the data. The rationale of preventing voter fraud by outlawing ballot delivery assistance “seems to have been contrived” (*Democratic National Committee v. Hobbs*, 2020: 91). In short, an important freedom exercised by millions of voters in other states—to assist a fellow voter in a legal manner with their approval—is illegal in Pennsylvania for a rationale that cannot be substantiated.

21. In sum, Pennsylvania’s Ballot Delivery Assistance Ban impedes access to the polls for several groups of people: those who live in rural areas and must travel a long distance to cast a ballot, especially those who do not have home mail delivery and must access a PO box to mail a ballot; the elderly, who are especially vulnerable to COVID-19; students and low-income people who may have limited transportation choices; and low-income people who work multiple jobs with little spare time. Ballot delivery assistance is an effective way to lower voter costs by providing transportation for the ballot so that the voter does not have to provide that transportation. For an election that occurs during a life-threatening pandemic, ballot delivery assistance offers the voter a way to cast a ballot without leaving the safety of their home. If a voter cannot take his/her ballot to a distant mailbox or polling location, and others are prohibited from assisting them by collecting and delivering that ballot, they effectively cannot vote; a ballot that is not delivered is a vote that is denied.

IV. DOES THE CUMULATIVE IMPACT OF THE COMMONWEALTH’S BALLOT RECEIPT DEADLINE, POTENTIAL DELAYS TO USPS DELIVERY OF REQUESTED BALLOTS AND MAILED BALLOTS, AND THE BALLOT DELIVERY ASSISTANCE BAN, AFFECT VOTERS’ ACCESS TO THE FRANCHISE DURING THE COVID-19 PANDEMIC?

A. The Ballot Receipt Deadline

22. The fundamental aspect of a “deadline” is that it is invariable and firm; once established, it is known to everyone that a certain point in time is a demarcation of what can and

cannot happen. But the current Ballot Receipt Deadline in Pennsylvania creates an additional “deadline”—the day a ballot must be placed in the mail so that it will arrive at a county recorder’s office in time to be counted. That “deadline” for mailing a ballot is, in fact, not a firm date; there is significant variation as to when a ballot must be placed in the mail to be counted, and no guarantee that ballots will actually arrive in-time. Thus, the “get-the-ballot-in-the-mail-deadline” might best be described by the oxymoronic term, “live deadline,” because it changes depending upon multiple variables such as vagaries in mail delivery, the level of understanding of voting laws, voter costs, and the resources available to the voter.

23. Voters may choose to mail their ballot extra early to ensure its timely arrival, but this lengthens the amount of election campaigning they miss. In many electoral campaigns, important events occur in the last week of the campaign, but the early voter misses the opportunity to consider new information that becomes available after they have mailed their ballot. This is another form of voter cost—the loss of campaign knowledge.

24. The variable nature of the Ballot Receipt Deadline introduces a level of uncertainty for all voters, but it is especially burdensome for voters who experience unique problems with timely mail delivery, voters in rural areas, or voters with less education and understanding of the electoral system. It may also be problematic for Pennsylvania voters who, due to the pandemic and/or the closing of polling places, choose to vote by mail for the first time, and may not understand the unpredictable nature of a receipt deadline in an era of funding challenges for the USPS (more on that below).

B. Closing Polling Places

25. The political science research on the impact of closing traditional polling places uniformly indicates that such closures decrease turnout. McNulty, Dowling, and Ariotti found that “polling consolidation decreases voter turnout substantially... suggesting that even habitual voters

can be dissuaded from going to the polls” (2017: 435). Brady and McNulty reached a similar conclusion: “Changes in polling places and increased distances to polling places change turnout behavior due to increased inconvenience” (2011: 12). Haspel and Knotts also found that “small differences in distance from the polls can have a significant impact on voter turnout. We also find that moving a polling place can affect the decision to vote” (2005: 560). Similarly, Stein and Vonnahme found that “voting places that are more accessible and open... significantly enhance voter performance and evaluation” (2012: 692).

26. Closing or consolidating polling places can dramatically increase voter costs. A recent U.S. House Subcommittee report found that “Polling place closures can lead to long lines and extreme wait times and can require voters to drive for miles to reach a polling place” (U.S. House. 2020). In short, changing the location of in-person polls creates additional voter costs and reduces turnout (Yoder. 2018).

27. One of the biggest negative factors with the closure of polls is the increased distance that many voters must travel to a new polling location; greater travel distance lowers turnout. Gimpel and Schuknecht concluded that: “Even after controlling for variables that account for the motivation, information and resource levels of local precinct populations, we find that accessibility does make a significant difference to turnout” (2003: 471. Also see: Dyck and Gimpel. 2005).

28. One of the responses to the pandemic may be to close most polling places and replace them with a small number of vote centers or consolidated polling places. This reduces the number of poll workers necessary to administer an election, but it also concentrates voters in a small area, which may significantly increase infection rates. Thus, a balance must be struck that maintains existing polling locations where that can be operated safely.

C. *Potential Delays in USPS Delivery*

29. In the last fifteen years, the volume of first-class mail has decreased so dramatically that the USPS was forced to downsize. This occurred just as VBM was gaining popularity, resulting in a potential mis-match between demand and capacity. The USPS downsizing and restructuring was referred to as network or plant “rationalization” (Bipartisan Policy Center. 2016: 6). As a result, mail takes longer to deliver, especially in rural areas. That means that a ballot mailed in a rural area of the state may have to travel hundreds of miles to a processing facility, and then back to the local county recorder’s office before it can be counted. This can result in a back-up in mail processing: “[A] complication with the USPS’s plant rationalization has been that some plants service an entire state. When all jurisdictions within a state simultaneously deliver their ballots for induction, there are inevitable clogs in the mail system” (Bipartisan Policy Center. 2016: 13). If a voter happens to be in an area where mail delivery is slow or such a “clog” occurs, they are potentially deprived of a right to vote, especially with a Ballot Receipt Deadline and a ban on ballot delivery assistance.

30. Starting in 2011, the USPS began closing post offices and processing centers. A year later, on February 23, 2012, the Postal Service made this rather dramatic change to postal service in Pennsylvania:

PITTSBURGH, PA – As a result of studies begun five months ago, the Postal Service has made the decision to move all mail processing operations from the following locations in Pennsylvania: Altoona P&DF to the Johnstown P&DF; Erie P&DF to the Pittsburgh and Rochester P&DCs; Greensburg CSMPC to the Pittsburgh P&DC; Washington Post Office to the Pittsburgh P&DC; Lancaster P&DF to the Harrisburg P&DC; New Castle P&DF to the Pittsburgh P&DC; Reading P&DF to the Harrisburg P&DC; Scranton P&DF to the Lehigh Valley P&DC; Southeastern P&DC to the Philadelphia P&DC and the Williamsport P&DF to the Harrisburg P&DC (USPS. 2012).

Closing the processing centers in Scranton and Williamsburg was predicted to lead to “...delays in mail delivery in this area” (Lange. 2012). The closures in the Philadelphia area were expected

to “slow the speed of the U.S. mail” (Simmons. 2012). A 2014 investigation of the Harrisburg processing center by the USPS Inspector General found a large volume of “significant delayed mail” (2014). As postal workers in Pennsylvania become infected with the coronavirus, and the agency takes steps to protect its employees, delivery may be even slower and unpredictable (Luciew. 2020; Dolnick. 2020). There is a very real possibility that ballots mailed in good faith may not arrive in time to be counted, especially if the deadline is a Ballot Receipt Deadline. A Caltech/MIT study noted: “The closure of mail processing facilities will only serve to increase these numbers [of ballots rejected for being late]” (CALTECH. n. d.: 39). The Republican Secretary of State in Colorado recently said: “The Postal Service is cutting back services for cost-cutting measures. You’re seeing some disenfranchisement of voters where the post office is just so slow” (Wilson. 2014). This could happen in Pennsylvania if the state suddenly moves to all-mail elections without adequate preparation and consideration of these problems

31. The issues regarding USPS delivery may be greatly exacerbated by the pandemic—precisely at a time when the USPS is unprepared to handle a dramatic increase in demand. Due to the pandemic and long-standing funding concerns, the USPS is facing dramatic budgetary shortfalls (Bogage. 2020; Goodkind. 2020; Pecorin. 2020). The Postmaster General explained the difficulty: “At a time when America needs the Postal Service more than ever, the reason we are so needed is having a devastating effect on our business” (quoted by Fandos and Tankersley. 2020).

D. The Promise and Limitations of Vote-By-Mail (VBM)

32. VBM offers significant advantages to many voters. During a pandemic, it has the added advantage of avoiding social contact and reducing the spread of the virus. However, there is considerable variation in how mail-in voting systems are designed (Mann. 2014; Hassell. 2017;

CALTECH. n.d.) Those design features affect two aspects of voting: turnout, and variation in voter costs across different groups of voters.

33. Research on the impact of VBM on turnout is decidedly mixed; some studies demonstrate an increase in turnout, some found it was neutral, and some studies indicate a decrease in turnout (Dyck and Gimpel. 2005; Baretto et. al. 2006; Kousser and Mullin. 2007; Gronke and Miller. 2012; Hernandez. 2014; Menger, Stein, and Vonnahme. 2017). As Gerber and Huber note, “the effects of all-mail elections on turnout are ambiguous” (2013:91). Bergman and Yates found that “when all-mail balloting was implemented, the estimated odds of an individual registrant voting decreased by 13.2%” (2011). Burden, et. al. concluded that “the most popular reform—early voting—is actually associated with lower turnout when it is implemented by itself” (2014: 95). Gronke makes an even stronger statement: convenience voting “does not increase turnout or expand the electorate” (2008: 447). The most comprehensive review of the research on the relationship between mail-in voting and turnout was conducted by the Government Accountability Office in 2016. The GAO reviewed 400 sources and found that, in some cases, turnout increased with the advent of mail-in voting, but numerous studies found no impact or a negative impact on turnout (p.35).

34. The reason why the impact of VBM varies dramatically is because for some voters it decreases voter costs and for others it increases voter costs. The latter is especially true for low-income people, people with less education, and voters who live in remote areas with poor mail services. In short, the advantages and disadvantages of VBM are not distributed equally across voting populations, and procedural aspects of VBM affect sub-populations of voters in different ways. (See: Haspell and Knotts. 2005; Gronke, et. al. 2008; McNulty, Dowling, and Ariotti. 2009;

Meredith and Malhotra. 2011; Brady and McNulty. 2011; Bergman and Yates. 2011; Burden and Neiheisel. 2013; Burden, et. al. 2014).

35. If VBM systems are designed without regard to its potential disadvantages, it can create a bias in the distribution of voter costs and thus affect turnout. Gronke notes that “early voting provides [voters] an opportunity to express their preferences quickly and conveniently, but we are likely to observe this behavior only among the most well-informed and politically aware.” He also found that early voters tend to be those with “higher than average incomes and education levels” (2008: 424), a finding corroborated by Leighley and Nagler (2014). Berinsky points out that early voting “has exacerbated the socioeconomic biases of the electorate” (2005: 471). Another study found that “voting only by mail appears to advantage those groups that are advantaged in other elections” (Karp and Banducci 2000: 234. Also see: Stein and Vonnahme 2008; Stewart 2010, 2011; Suo 2000). One analysis concluded: “[voting by mail] reinforces the stratification of the electorate... and it depends too much on the reliability of the U.S. Postal Service” (Slater and James 2007: 4).

36. The shift to an all-mail election is also a fundamental change in election procedure that interrupts voter tradition. In Pennsylvania, for the 2018 election, 5,057,630 people voted; only 195,953 of them returned a ballot by mail (U.S. Election Assistance Commission. 2018: 30). Shifting to all-mail or mail-centric elections will require most Pennsylvania voters to abandon their voting tradition and vote in a manner that they have chosen not to use in past elections.

37. The voter costs of changing polling places and moving to all-mail elections are compounded by socio-economic factors that have a major impact on turnout, especially in Hispanic communities (7.6 percent of the population) and Black communities (12 percent of the population) with lower income levels (U.S. Census Quick Facts. 2020). It is well established in

political science that socio-economic well-being correlates positively with political participation: “The SES [socio-economic status] model does an excellent job predicting political participation” (Brady, Verba and Schlozman. 1995: 272). This is especially true for voting (Wolfinger and Rosenstone. 1980; Brady and McNulty. 2011; Leighley and Nagler. 2014). This fact has particular relevance to minorities that tend to have lower income than their white counterparts: “In general, minority participation can be suppressed by socioeconomic factors such as less education and lower income” (Lien. 2000). Another political scientist framed the SES/participation link as “the issue of our time” (Williams. 2004). Thus, unequal financial resources—money, access to high-quality schools, an internet connection, time to develop a knowledge of the system and civic skills, and the time and means to access polling sites and mailboxes—result in unequal opportunities to participate in the electoral process.

38. Not surprisingly, this inequality is also present with VBM. Berinsky found that early voting “exacerbated the socioeconomic biases of the electorate” (2005: 471). Even wealthier candidates benefit from VBM; Meredith and Malhotra conducted a study that suggests “the dual election system that exists in the U. S. today (with both early voting and Election Day voting) may benefit candidates with more resources (2011).” Over twelve percent of Pennsylvanians live in poverty, so the number of voters affected by these systemic biases in the electoral process is significant (U.S. Census, Quick Facts. 2020).

39. Another demographic element that affects voting is a voter’s level of education, which correlates positively with turnout rates. Tenn notes: “Numerous studies demonstrate that the highly educated are more likely to vote” (2007: 446). Sondheimer and Green make a similar statement: “The powerful relationship between education and voter turnout is arguably the most well-documented and robust finding in American survey research” (2010: 174). This relationship

is reflected in who uses VBM and other forms of convenience voting. Stewart found that “Better-educated voters were also slightly more likely to take advantage of convenience voting methods than were less well-educated voters. Among voters with at least some college education, 46% voted either absentee or early, compared to 39% of voters with a high school education or less” (2016: 13).

40. These data show that Pennsylvanians vary greatly in income and education—two factors that directly affect turnout. They also vary in other ways that affect their ability to vote; 11.3 percent speak a language other than English, 20 percent do not have broadband internet in their home, and nearly ten percent have a disability (U. S. Census, Quick Facts. 2020). Mail-centric electoral systems can be designed to accommodate these people.

41. In short, VBM has the potential to reduce voter costs for many voters, but that reduction, and its impact on turnout, is affected by the design of the VBM system. The reduction in voter costs that accompany VBM can be more widely distributed across the spectrum of voters by making specific design changes that make the system more accessible to a broader spectrum of voters; a more open and accessible mail-centric system can help remediate the built-in biases of the electoral system. Allowing for an Election Day postmark deadline (as opposed to a variable deadline based on receipt), and allowing for ballot delivery assistance, are precisely the kind of design features of a mail-centric election system that help correct the limitations of VBM, lower voter costs, and make elections more accessible to citizens who otherwise may not be able to vote.

V. CONCLUSION

42. In the 2018 election, Pennsylvania had a turnout rate of 51.8 percent (percent of citizen voting-age population) (U.S. Election Assistance Commission. 2018: 27). The COVID-19 pandemic has the potential to dramatically decrease this already low turnout rate, especially for low-income people, the elderly, and minorities, and it presents dramatic health threats to both poll

workers and voters, as witnessed in Wisconsin (McCaskill. 2020). Under normal conditions, changes to electoral procedure could increase voter costs and substantially alter voter tradition for many voters. The political science literature makes it clear that such changes have a negative impact on turnout because they create additional burdens for voters, and those burdens are not distributed equally across the electorate. But with COVID-19, the calculus of “voter costs” now has to include the threat of serious illness and possibly death. In sum, VBM can be a useful tool that has the potential to increase turnout for some groups of voters. But if not designed properly, with reasonable options for voting in-person in some situations, it can depress turnout and effectively deprive some people of access to the ballot box.

43. Some of the negative impacts that the pandemic may have on elections can be ameliorated by changing features of the electoral process. Changes that reduce voter costs and minimize the impact on voter tradition will reduce impediments to voting. All of the design features I have examined in this report—the Ballot Delivery Assistance Ban, moving or consolidating polling places, a rapid switch to VBM and problems with mail delivery, and the Ballot Receipt Deadline, potentially increase voter costs. If the policy goal is to minimize the impact of the pandemic on voter turnout, then the most effective strategy, in my professional opinion, is to allow voter assistance, pre-pay mail ballots, minimize the number of poll closures in some areas, prepare early for a switch to VBM, and change the Ballot Receipt Deadline to a later point in time to allow for flexibility in a highly stressed system. These changes will reduce impediments for all voters, especially seniors and other people with limited mobility, the poor, minorities, rural people, and first-time VBM voters.

Dated: May 7, 2020

DocuSigned by:



8230EF568BF043F...

Dr. Daniel McCool

Weber County, Utah

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

Civil Action No. 266 MD 2020

DECLARATION OF DWAYNE THOMAS

I, Dwayne Thomas, declare as follows:

1. My name is Dwayne Thomas. I am over the age of 18 and I make this declaration based upon my personal knowledge and experience, and in support of Petitioners' application for preliminary injunction in the above-captioned matter.

2. I am 70 years old, a resident of Fayette County, and registered to vote in Pennsylvania. I am a retired mineworker. Currently, I am the President of the Pennsylvania Alliance for Retired Americans (the "Alliance").

3. I have voted in-person at the polls on election day for nearly every election for the past five decades. This year, COVID-19 has spread throughout Pennsylvania and I understand that people over the age of 65 are particularly vulnerable to the virus. Because of this and Governor Wolf's stay-at-home order, I have been debating whether to request a mail ballot. Given the choice, I prefer to vote in person as I have done for so long. But the spread of the virus has not meaningfully slowed, nor are there enough safety precautions in place that make me feel safe enough to vote in

person, and therefore I have decided to request a mail-in ballot for the primary election this year to avoid the need to go to the polls on Election Day.

4. I understand that my mail-in ballot must be received by Election Day for the primary election. This means that I must place my ballot in outgoing mail with sufficient time for it to reach the proper location by Election Day, but I am unsure how many days in advance I need to send the ballot. This concerns me because I do not have access to reliable mail services in my area.

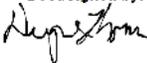
5. I understand that the U.S. Postal Service is currently experiencing delays and is in the middle of a budgetary crisis. I understand that these issues have affected postal service in Pennsylvania, and that there have been significant delays in mail delivery in Fayette County.

6. I have consistently had issues in my area when I try to mail letters or packages: often, those letters and packages are severely delayed in arriving to the intended destinations, and sometimes the letters and packages never arrive. I am worried that I will not receive my requested mail-in ballot with enough time to vote before the election. And, if I do receive the ballot soon, I am also worried that no matter how early I place my ballot in the mail, it may not arrive by Election Day. I am also concerned for my health and the health of other seniors in the community who may be forced to deliver ballots in person to avoid mail delays associated with the current crisis.

7. To avoid these burdens, if I could, I would ask someone I trust to deliver my ballot for me. But if my ballot did not have to arrive by Election Day to count, which would give me more time to mail the ballot in case there are long delays at the post office, then I would feel more comfortable sending my ballot by mail. If Pennsylvania allowed the Alliance to assist voters, especially vulnerable seniors, in delivering their ballots, then the Alliance would be involved in

these efforts to ensure our senior members have an opportunity to vote safely in the primary election.

Executed on May 7, 2020

Respectfully submitted,
DocuSigned by:

092A7862A7494FC
Dwayne Thomas

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

Civil Action No. 266 MD 2020

DECLARATION OF DR. MARC MEREDITH

I. Executive Summary

1. The plaintiffs in this case have asked me to investigate how the requirement that all mail ballots be received by Election Day will affect the number of ballots counted in the upcoming June 2, 2020 primary election. My primary conclusions are:

- a. The circumstances surrounding COVID-19 will increase the number of Pennsylvanians requesting a mail ballot who would choose to abstain instead of voting in-person if that mail ballot is not delivered in a timely manner.
- b. Pennsylvania will see an unprecedented number of mail ballot requests in the primary and general elections both because of changes to state law and the circumstances surrounding the COVID-19 virus.
- c. The unprecedented number of mail ballot requests will make it challenging for election administrators to ensure that all people who request a mail ballot receive one in a timely manner.

- d. Requiring mail ballots to be received by Election Day will make it so that some people who request a mail ballot will be unable to utilize it.
- e. Requiring voters to affix postage to mail ballots will make it so that some people who request mail ballots will be unable to utilize them.

2. I reach these conclusions based on my application of political science research on the calculus of voting and historical data on mail ballot usage and rejection. My report proceeds as follows. Section II highlights my background and qualifications. Section III documents my sources of information. Section IV presents the calculus of voting, a widely applied framework within political science to understand why someone chooses to vote or abstain from voting. Section V discusses why Pennsylvania elections officials will struggle to fulfill mail ballot requests in a timely manner in the 2020 primary and general elections. Section VI shows how I reach the conclusion that requiring ballots to be received by Election Day will disenfranchise Pennsylvania voters. Section VII details why requiring voters to affix postage to mail ballots make it so that some people will be unable to utilize them. Section VIII details the works that I referenced when preparing this report. Section IX contains my current curriculum vitae.

II. Background and Qualifications

A. Credentials

3. I am a tenured associate professor in the Department of Political Science at the University of Pennsylvania. I also hold a courtesy appointment in the Business Economics group at the Wharton School of Business at the University of Pennsylvania. Prior to starting my position at the University of Pennsylvania in 2009, I was a visiting lecturer at the Massachusetts Institute of Technology Department of Political Science.

4. I have extensive training in economics, political science, and statistics. I received a B.A. in Economics and Mathematical Methods in the Social Sciences from Northwestern University in 2002, a M.A. in Economics from Northwestern University in 2002, a M.A. in Political Science from Stanford University in 2006, and a Ph.D. in Business Administration from the Political Economics group in the Stanford Graduate School of Business in 2008. My coursework in these degree programs trained me in how to apply economic and statistical modeling to understand the behavior of voters and politicians.

5. At both the Massachusetts Institute of Technology and the University of Pennsylvania, I have taught a number of different courses in statistical theory and statistical programming to both undergraduates and Ph.D. students. At the University of Pennsylvania, I also frequently teach a large survey course on American Politics to undergraduates and courses on the public policy process to both undergraduate and master's in public administration students. I received the Henry Teune Award for outstanding teaching in the undergraduate political science program in 2014 and the Fels Institute Teaching Award for outstanding teaching in the master's in public administration program in 2017.

B. *Publications*

6. Since receiving my Ph.D., I have continued to expand my expertise in American elections and statistics through my work on numerous research projects. I am an author on twenty peer-reviewed journal articles, and currently working on many additional projects that I anticipate will generate numerous more peer-reviewed articles. Much of my peer-reviewed work is published in the leading journals for scholars of American Politics or interdisciplinary science journals, including *American Political Science Review*, *American Journal of Political Science*, or the *Journal of Politics*, and the *Proceedings of the National Academy of Science*. One of these articles

received the Best Paper on Public Policy award from the American Political Science Association in 2014.¹ One strand of my research that is particularly relevant for this case uses information contained in voter registration databases to understand the determinants of voter turnout. One of my best-cited articles examines the reinforcing nature of voter turnout.² Using data on turnout contained in state voter registration databases, I establish that voting in one election increases the chance that someone votes again in future elections. I also authored a number of additional studies that examine the administration and consequences of criminal disenfranchisement laws.³ By merging voter registration and criminal justice databases, I generated widely-cited estimates of ex-felon turnout and show how ex-felon turnout is affected by state policy. Some of my other published work within this strand of research examines how electoral administration policies, like mail balloting and voter identification requirements, affect voter turnout.⁴

C. Professional Recognition

7. My expertise on American politics is frequently recognized within the academy. While a professor at the University of Pennsylvania, I have received highly-competitive visiting scholar appointments at the Institute for Advanced Study in Toulouse, Nuffield College at Oxford University, and the Center for the Study of Democratic Politics at Princeton University. Many top universities, including the University of California-Berkeley, Columbia University, Harvard

¹ Alan S. Gerber, Gregory A. Huber, Marc Meredith, Daniel R. Biggers, and David J. Hendry, 2015, “Can Incarcerated Felons Be (Re)integrated into the Political System? Results from a Field Experiment”, *American Journal of Political Science* 59(4): 912-926.

² Marc Meredith, 2009, “Persistence in Political Participation”, *Quarterly Journal of Political Science* 4(3): 187-209.

³ Marc Meredith and Michael Morse, 2015, “The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa”, *Quarterly Journal of Political Science* 10(1): 41-100; Alan S. Gerber, Gregory A. Huber, Marc Meredith, Daniel R. Biggers, and David J. Hendry, 2017, “Does Incarceration Reduce Voting? Evidence about the Political Consequences of Spending Time in Prison”, *Journal of Politics* 79(4): 1130-1146.

⁴ Marc Meredith and Neil Malhotra, 2011, “Convenience Voting Can Affect Election Outcomes”, *Election Law Journal* 10(3): 227-253; Daniel J. Hopkins, Marc Meredith, Michael Morse, Sarah Smith and Jesse Yoder, 2017, “Voting but for the Law: Evidence from Virginia on Photo Identification Requirements”, *Journal of Empirical Legal Studies* 14(1): 79-128; Justin Grimmer, Eitan Hirsch, Marc Meredith, Jonathan Mummolo, and Clayton Nall, 2018, “Obstacles to Estimating Voter ID Laws’ Effect on Turnout”, *Journal of Politics* 80(3): 1045-1051.

University, Princeton University, and Yale University, have invited me to present in their colloquia. I also recently presented my research on voter identification laws before the Michigan Advisory Committee to the U.S. Commission on Civil Rights. My expertise is also frequently drawn upon to evaluate conference submissions, peer-review submissions, and candidates for tenure. Since the start of 2017, I have reviewed 65 journal articles and 7 external promotion cases. I served as the co-chair of the host committee for the 2019 Election Science, Reform, and Administration Conference at the University of Pennsylvania.

8. Journalists also frequently cite my expertise on American elections. In the last year, numerous leading outlets including *The New York Times*, *Newsweek*, *The Wall Street Journal*, and *The Washington Post* have quoted me when talking about criminal disenfranchisement laws. In addition, the NPR program *This American Life* did a segment on my research on voter fraud as part of an episode entitled “Things I Mean To Know,” while Slate and Vox published articles that I have written summarizing my academic research on voter fraud and criminal disenfranchisement, respectively, to a broader audience. I also consult for the NBC News Decision Desk, where, as a senior analyst, I help generate statistical models and apply them with a team to determine NBC’s projections of election winners on election nights.

D. Previous work and compensation

9. I was previously accepted and testified as an expert witness in *Common Cause v. Brehm* (Case No. 1:17-cv-06770-AJN). Plaintiffs’ counsel is compensating me at the rate of \$350/hour for my work in this case. This compensation is in no way dependent on the conclusions that I reach. A complete version of my curriculum vitae is presented in Section VIII.

III. Sources of Information

10. This declaration is informed by data on mail ballot usage, acceptance, and rejection recorded in the 2016 Election Administration and Voting Survey, a publicly available database maintained by the Georgia Secretary of State's office on individual absentee ballot requests in the November 8, 2016 election, a publicly available database maintained by the North Carolina Board of Elections on individual absentee ballot requests in the November 8, 2016 election, and publicly available reports produced by the Wisconsin Election Commission on the number of absentee ballots processed by county by day in the April 7, 2020. I also draw from my scholarly expertise and experience with election administration, as well as a number of academic, governmental, legal, and media sources. All of these sources, and methodologies that I use to analyze them, are standard within political science. A complete listing of the works that I relied upon is included in Section VII of this declaration.

IV. The Calculus of Voting

11. Political scientists have long understood that a citizen's decision about whether to vote or abstain in an election is determined by his or her calculus of whether the benefits from voting are greater than the costs. This is referred to as the calculus of voting.⁵ This section highlights three key points about voting costs that are established by political science research. These include:

- a. Voting costs are not limited to monetary costs, but more frequently refer to the opportunity costs of the time that citizens spend registering to vote, acquiring information that is needed to vote, and finally actually voting (see Section IV.A);
- b. Voting costs also affect the method people use to vote (see Section IV.B);

⁵ Anthony Downs, 1957, "An Economic Theory of Political Action in a Democracy", *Journal of Political Economy* 65(2): 135-150; William Riker and Peter Ordeshook, 1968, "A Theory of the Calculus of Voting", *American Political Science Review* 62(1): 25-42.

- c. The circumstances surrounding COVID-19 increases the number of people requesting a mail ballot who would abstain rather than casting an in-person ballot at a polling place if their mail ballot does not arrive in a timely manner (see Section IV.C).

12. Putting these three points together, I conclude that COVID-19 will place an unusually high number of voters at risk of disenfranchisement in the 2020 Pennsylvania elections because in-person voting is prohibitively costly, and various delays in the voting process, including at the local boards of elections, will result in many voters not having sufficient time to request, receive, and submit mail ballots by the Election Day deadline. This significantly increases the costs of voting by mail in the June 2 primary election.

A. *What are voting costs*

13. Citizens incur many costs in order to cast a ballot. Many of these costs depend on a citizen's life circumstances, such as whether he or she is forgoing wages in order to vote or has conflicting obligations on his or her time.⁶ Others costs relate to the ease of getting to the polls, such as the weather.⁷ But most relevant for the issue at hand in this case are the numerous ways in which political scientists have documented how the decision to vote or abstain is affected by policies governing the process through which people vote.

14. To illustrate how policies can impose or reduce costs that affect turnout, consider the effect of a voter registration requirement on turnout. Political scientists estimate that the additional cost of requiring voter registration reduced turnout by three, five, and two percentage

⁶ Sidney Verba, Kay Schlozman, and Henry E. Brady, 1995, Voice and Equality: Civic Voluntarism in American Politics, Harvard University Press: Cambridge; Ariel White, 2019, "Family Matters? Voting Behavior in Households with Criminal Justice Contact", *American Political Science Review* 113(2): 607-613.

⁷ Brad T. Gomez, Thomas G. Hansford, and George A. Krause, 2007, "The Republicans Should Pray for Rain: Weather, Turnout, and Voting in U.S. Presidential Elections", *Journal of Politics* 69(3): 649-663.

points in New York, Ohio, and Wisconsin, respectively.⁸ One way in which voter registration increases the cost of voting is by requiring a potential voter to register before a deadline. A team of computer scientists, political scientists, and statisticians estimated that about 3.5 million people nationwide were prevented from voting in the 2012 presidential election because they missed the deadline.⁹ Political scientists also show that more people vote when states engages in policies, like outreach, that reduce the cost of voter registration.¹⁰

15. It is not just high-level election administration policies like voter registration that affect the cost of voting, but also less salient policies that often are set by local elections officials. For example, it is well documented that the relatively small costs imposed by less accessible polling places can be consequential to turnout. There are also costs associated with identifying where your polling place is located and traveling to this polling place on Election Day. The farther a polling place is located from an individual's residence, the less likely they are to vote. The same is true when their polling place changes from the previous election.¹¹ Studies from outside the United States also highlight how the cost of voting increases when polling places are open for fewer hours.¹² The broad lesson from these studies is that changes in the cost of voting can have important consequences on voter turnout.

B. Voting Costs Affect Methods of Voting

⁸ Stephen Ansolabehere and David M. Konisky, 2006, "The Introduction of Voter Registration and Its Effect on Turnout", *Political Analysis* 14(1): 83–100; Barry Burden and Jacob Neiheisel, 2013, "Election Administration and the Pure Effect of Registration on Turnout", *Political Research Quarterly* 66(1): 77-90.

⁹ Alex Street, Thomas A. Murray, John Blitzer, and Rajan S. Patel, 2015, "Estimating Voter Registration Deadline Effects with Web Search Data", *Political Analysis* 23(2): 225–241.

¹⁰ Christopher B. Mann and Lisa A. Bryant, 2020, "If You Ask, They Will Come (To Register and Vote): Field Experiments with State Election Agencies on Encouraging Voter Registration", *Electoral Studies* 63(1).

¹¹ Henry Brady and John McNulty, 2011, "Turning out to Vote: The Costs of Finding and Getting to the Polling Place", *American Political Science Review* 105(1): 115-134; John McNulty, Conor Dowling, and Margaret Ariotti, 2009, "Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters", *Political Analysis* 17(4): 435-455.

¹² Sebastian Garmann, 2017, "The Effect of a Reduction in the Opening Hours of Polling Stations on Turnout", *Public Choice* 171(1-2): 99-117; Niklas Potrafke and Felix Roesel, 2020, "Opening Hours of Polling Stations and Voter Turnout: Evidence from a Natural Experiment", *Review of International Organization* 15: 133-163.

16. Voting costs affect not only the decision to vote or abstain, but also which method you use to vote. When the cost of polling place voting on Election Day increases, people are more likely to use early in-person voting or vote-by-mail. One study shows, for example, that people are more likely to switch to early voting or vote-by-mail when their polling place location changes, especially when it moves substantially farther away.¹³ Research also shows the cost of using a new vote method decreases as people gain experience with it. Voters, for example, are more likely to cast mail ballots if they have used one before.¹⁴

17. Furthermore, there are some registrants for whom polling place voting is not a viable substitute for a mail ballot. For example, people with certain disabilities may find it substantially more, or even prohibitively, costly to vote in a polling place rather than by mail ballot.¹⁵ Consequentially, many states make it easier for disabled registrants to access and cast mail ballots than other registrants. Research shows that accessible mail-ballot policies particularly increase mail-ballot usage among disabled citizens, demonstrating that cost reductions are important to facilitate turnout among those with certain disabilities.¹⁶

C. COVID-19 Can Make Polling Place Voting Prohibitively Costly

18. Some people who would normally incur a relatively low cost of polling place voting will find it prohibitively costly to vote at a polling place during the COVID-19 pandemic. Many Americans currently are sheltering in place to avoid contracting or spreading the COVID-19, with

¹³ Joshua D. Clinton, Nick Eubank, Adriane Fresh, and Michael E. Shepherd, “Polling Place Changes and Political Participation: Evidence from North Carolina Presidential Elections, 2008-2016”, Working paper (accessed from https://www.dropbox.com/s/gh8uk6rv95kincu/PPChange_ClintonEubankFreshShepherd.pdf?dl=0 on Apr. 27, 2020)

¹⁴ Marc Meredith and Zac Endter, “Aging into Absentee Voting: Evidence from Texas”, Working paper (accessed from <https://www.sas.upenn.edu/~marcmere/workingpapers/AgingIntoAbsentee.pdf> on Apr. 27, 2020).

¹⁵ Daniel P. Tokaji and Ruth Colker, 2007, “Absentee Voting by People with Disabilities: Promoting Access and Integrity”, *McGeorge Law Review* 38: 1015-1064.

¹⁶ Peter Miller and Sierra Powell, 2016, “Overcoming Voting Obstacles: The Use of Convenience Voting by Voters with Disabilities”, *American Politics Research* 44(1): 28-55.

about 20 percent reporting that they haven't even left their home to shop for food, medicine, or other essential household items.¹⁷ These are the individuals most likely to find that the risks of COVID-19 make in-person voting prohibitively costly. In the wake of recent elections, news reports have highlighted poll workers and voters who tested positive for COVID-19 after being present in a polling place.¹⁸ While it remains unclear whether any of these cases of COVID-19 were caused by being present at a polling place, political science and psychology research provides many examples in which beliefs about facts are more important than objective reality in shaping behavior. Many people believe that the influenza vaccination can cause flu, for example, and sometimes report even less willing to get vaccinated when attempts are made to correct this misperception.¹⁹ Thus, I assess that some people will infer that the risk of catching or spreading COVID-19 is high when voting in-person, no matter what the objective evidence says about the likelihood of this happening on Election Day.

19. While vote-by-mail prevents the disenfranchisement of people who find voting at a polling place prohibitively costly, errors by those requesting a mail ballot, election administrators, or the United State Postal Service (USPS) may result in delays in getting mail

¹⁷ Kaiser Family Foundation Press Release, "Poll: 8 in 10 Americans Favor Strict Shelter-in-Place Orders to Limit Coronavirus' Spread, and Most Say They Could Continue to Obey Such Orders for Another Month or Longer", Apr. 23, 2020 (accessed from <https://www.kff.org/global-health-policy/press-release/poll-8-in-10-americans-favor-strict-shelter-in-place-orders-to-limit-coronavirus-spread-and-most-say-they-could-continue-to-obey-such-orders-for-another-month-or-longer/> on Apr. 28, 2020).

¹⁸ John Keilman, "After Chicago Poll Worker Dies from COVID-19 and Others Test Positive, City Warns Voters They Might Have Been Exposed to Virus at Polling Places", *Chicago Tribune*, Apr. 13, 2020 (accessed from <https://www.chicagotribune.com/coronavirus/ct-chicago-poll-worker-dies-covid-cornavirus-20200413-rz55vqpo6jfbxn7e4i6vkj6n2y-story.html> on April 27, 2020); Nolan D. Mccaskill, "Wisconsin Health Department: 36 People Positive for Coronavirus After Primary Vote", *Politico*, Apr. 27, 2020 (accessed from <https://www.politico.com/news/2020/04/27/wisconsin-tested-positive-coronavirus-election-211495> on Apr. 27, 2020); David Smiley and Bianca Padro Ocasio, "Florida Held Its Primary Despite Coronavirus. Two Broward Poll Workers Tested Positive", *Bradenton Herald*, Mar. 27, 2020 (accessed from <https://www.bradenton.com/news/coronavirus/article241539451.html#storylink=cpy> on Apr. 27, 2020).

¹⁹ Brendan Nyhan and Jason Reifler, 2015, "Does Correcting Myths About the Flu Vaccine Work? An Experimental Evaluation of the Effects of Corrective Information", *Vaccine* 33(3): 459-464.

ballots to voters. As I document in Section V, there are a number of reasons why we should expect more of these errors than normal in Pennsylvania's 2020 elections.

20. The April 7 election in Wisconsin demonstrates the disenfranchisement that results from the combination of more individuals finding polling place voting prohibitively costly and more errors in the administration of mail balloting. Media reports highlighted the considerations being made by registered voters who did not receive their mail ballots by Election Day.²⁰ People who reported abstaining rather than voting in-person in these reports included a medical director of a psychiatric hospital who decided not to vote at the polls after failing to receive his mail ballot "out of concern for his family, his patients, and his fellow staff members", a health care worker who had tested positive for COVID-19, and multiple people who were immunocompromised.

21. While people who do not receive their requested mail ballot by Election Day are at the greatest risk of disenfranchisement because of COVID-19, people who receive their ballot too close to Election Day also are at risk of disenfranchisement. As I document in Section V.C, COVID-19 is increasing uncertainty about long it will take for a mailed ballot to be received by an election administrator. Thus, the probability that a mailed ballot is not delivered to election officials in time to be counted increases the later the ballot is returned by the voter, even when the USPS service commitment indicates that the ballot should be delivered by the ballot receipt deadline. COVID-19 means that fewer voters will take actions to mitigate this risk, like bringing

²⁰ Daphne Chen, Marica Robiou, Elizabeth Mulvey, Kacey Cherry, June Cross, "Voter Suppression at its Finest: Wisconsin Citizens Say Missing Ballots Kept Them from Being Counted in Election", *Milwaukee Journal Sentinel*, Apr. 12, 2020 (accessed from <https://www.jsonline.com/story/news/politics/elections/2020/04/13/wisconsin-election-missing-ballots-long-lines-kept-many-voting/2979975001/> on May 5, 2020); New York Times, "Wisconsin Primary Recap: Voters Forced to Choose Between Their Health and Their Civic Duty", Apr. 7, 2020 (accessed from <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-primary-election.html> on May 5, 2020); Adam Rogan, "I Want This Fixed: Voters Who Requested Absentee Ballots That Never Arrived Share Their Stories", *Racine Journal Times*, Apr. 7, 2020 (accessed from https://journaltimes.com/news/local/i-want-this-fixed-voters-who-requested-absentee-ballots-that-never-arrived-share-their-stories/article_9df2c3e6-95bf-5fb1-a2f3-570cbf4930a0.html on May 5, 2020).

their ballot to their county election office or casting a provisional ballot at a polling place, to ensure that their ballot gets counted.

V. Pennsylvania Elections Officials Will Struggle to Fulfill Mail Ballot Requests in a Timely Manner

22. The previous section establishes that COVID-19 risks disenfranchising an unusually high number of voters in the 2020 Pennsylvania elections if their requested mail ballots do not arrive in a timely manner, or if the delivery of their ballots to election officials is delayed. This section establishes three reasons why I expect there to be a substantial number of mail ballot requests made in the 2020 Pennsylvania primary and general elections that will not be fulfilled, and marked ballots that will not be delivered, in a timely manner:

- a. Pennsylvania will experience an unprecedented amount of mail ballot requests in 2020 (see Section V.A);
- b. The unprecedented amount of mail ballot requests will be overwhelming for county administrators, some of who already struggled to distribute mail ballots in a timely way (see Section V.B);
- c. COVID-19 is negatively affecting USPS's capacity to support mail voting (see Section V.C).

A. Pennsylvanians Will Request an Unprecedented Number of Mail Ballots in 2020

23. This is the first federal election cycle in which Pennsylvania will be allowing for no-excuse mail balloting. As of April 30, 2020, at least 880,000 mail ballots already had been requested for the June 2 primary, as compared to only 84,000 mail ballots that were cast statewide in the 2016 primary election.²¹ Given that voters have until May 26, 2020 to request a mail ballot,

²¹ John Finnerty, "Unprecedented Volume of Mail-in Voting Looming in Primary", *Johnstown Tribune-Democrat*, Apr. 30, 2020, (accessed from https://www.tribdem.com/news/unprecedented-volume-of-mail-in-voting-looming-in-primary/article_35706f7e-6a13-542c-b42b-006c1783dad6.html on May 5, 2020).

the number of mail ballots requests is likely to continue to grow, particularly in counties like Allegheny, which is mailing all eligible registrants a mail ballot request form, along with a postage-paid envelope to return the form.²²

24. My expectation is that counties will receive even more requests for mail ballots for the general election on November 3 general election than the primary because more people cast ballots in general elections than primary elections. In the 2016 general election, Pennsylvania only transmitted 292,191 mail ballots statewide out of the 6,223,150 total ballots cast.²³ Given that ten times more mail ballots have already been requested for the 2020 primary as were cast in the 2016 primary, counties should be preparing for the possibility that millions of mail ballots could be requested for the 2020 general election if a similar patterns occurs in the general.

B. Pennsylvania Election Administrators Will Struggle to Respond to All Mail Ballot Requests in a Timely Way

25. Distributing mail ballots timely is a challenge for election administrators even when they are not facing a surge in demand. One challenge is that while Pennsylvania counties may begin processing mail ballot applications fifty days before an election,²⁴ mail ballots cannot be distributed until a voter's ballot is finalized and printed. For example, Montgomery County did not send out mail ballots for the presidential election on November 8, 2016 until October 11, in part because of a dispute over the wording of a ballot question.²⁵ Ultimately, a judge had to extend

²² Natasha Lindstrom. "Allegheny County to Send Mail-in Ballot Forms to Every Voter; Gov. Wolf Mulls Pleas for Mail-only Election", *Pittsburgh Tribune-Review*, Apr. 17, 2020 (accessed from <https://triblive.com/news/pennsylvania/allegheny-county-to-send-mail-in-ballot-forms-to-every-voter-gov-wolf-mulls-pleas-for-mail-only-election/> on Apr. 28, 2020).

²³ Election Administration and Voting Survey, 2016 (accessed from https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf on April 28, 2020), p 24.

²⁴ Pennsylvania Election Code, Article XIII Section 1302.1

²⁵ Laura McCrystal, "Why Thousands of Montco Absentee Ballots Went Uncounted by Election Deadline" *Philadelphia Inquirer*, Mar. 2, 2017 (accessed from <https://www.inquirer.com/philly/news/politics/Montgomery-County-reviews-issues-election-2016-absentee-ballots.html> on Apr. 28, 2020).

the receipt deadline for these ballots after issues with the postal service further delayed when registrants received their ballots. Pending legal cases and disputes over ballot wording also delayed the distribution of mail ballots in the 2016 Pennsylvania primary election in a number of counties.²⁶

26. The huge increase in requests for mail ballots will make it challenging for election administrators to satisfy all requests for mail ballots in a timely way. Shifting voters from polling places to mail voting requires election administrators to spend more staffing and monetary resources dealing with mail ballots, without a corresponding reduction in time and money needed to prepare for polling place voting.

27. Wisconsin's April 7 election demonstrates how simultaneously managing increased demand for mail ballots and preparing for Election Day voting can make it hard to deliver mail ballots in a timely way. Data from the Wisconsin Elections Commission shows that Wisconsin municipalities distributed 1,282,097 absentee ballots for the April 7 election.²⁷ As a point of comparison, 134,892 mail ballots were distributed in the 2016 general election.²⁸ A post-mortem by the Wisconsin Elections Commission highlighted how the increased demand for mail ballots led to shortages of labor, supplies, and computing needed to distribute mail ballots.²⁹ All of these

²⁶ Christopher Pratt, "Legal Challenges Delay Thousands of Absentee Ballots in Lancaster, Other Pa. Counties", *Lancaster Online*, Mar. 25, 2016 (accessed from https://lancasteronline.com/news/local/legal-challenges-delay-thousands-of-absentee-ballots-in-lancaster-other/article_441951a2-f23e-11e5-aa67-dbcbb696f37d.html on Apr. 29, 2020).

²⁷ Wisconsin Elections Commission, "Absentee Ballot Report – Apr. 7, 2020 Spring Election and Presidential Preference Primary" (accessed from <https://elections.wi.gov/node/6862> on Apr. 28, 2020). Note that absentee ballot refers to both mail ballots and early in-person votes in Wisconsin. While the state did not differentiate between the two on this report, I assess an overwhelming are mail ballots as many municipalities shut down early in-person voting in light of concerns about COVID-19 (see Laurel White, "Election Officials Across Wisconsin Eliminate, Scale Back In-Person Early Voting", *Wisconsin Public Radio*, Mar. 23, 2020, <https://www.wpr.org/election-officials-across-wisconsin-eliminate-scale-back-person-early-voting>, accessed on Apr. 28, 2020).

²⁸ Wisconsin Elections Commission, "Absentee Ballot Report" (accessed from <https://elections.wi.gov/node/4414> on Apr. 28, 2020).

²⁹ Wisconsin Elections Commission, "Summary of April 7, 2020 Election" (accessed from <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf> on Apr. 28, 2020).

factors contributed to the delays in voters receiving mail ballots that were discussed in Section IV.C.

28. Pennsylvania is also likely to encounter unforeseen challenges in distributing mail ballots in a timely way because this is the first presidential election cycle in which no-excuse mail voting is permitted. Michigan’s experience with no-excuse mail voting provides a useful preview of the issues that will arise. Like Pennsylvania, the November 2020 election is the first presidential election cycle in which Michigan will offer no-excuse mail voting. Michigan voters passed a constitutional amendment in 2018 that gave eligible voters “[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election.”³⁰ In the lead up to its primary election on March 10, 2020, a number of newspaper articles highlighted the struggles that Michigan clerks faced getting their mail ballots sent in a timely way.³¹ Having observed these struggles, the Office of the Michigan Secretary of State immediately began lobbying the Michigan state legislature to move-up the window in which clerks can begin doing activities like finalizing ballot language and printing ballots.³² The issues that Michigan faced in implementing this new law are illustrative of the types of issues that arise when states first expand mail voting.

C. COVID-19 is Negatively Affecting USPS’s Capacity to Support Mail Voting

³⁰ Michigan Constitution, Article II, Sec. 4.1(g) (accessed from <http://legislature.mi.gov/doc.aspx?mcl-Article-II-4> on Apr. 28, 2020).

³¹ Craig Lyons, “Officials Spar Over Why Meridian Township’s Absentee Ballots Were Delayed”, *Lansing State Journal*, Feb. 20, 2020 (accessed from <https://www.lansingstatejournal.com/story/news/2020/02/20/meridian-township-absentee-ballots-delays-presidential-primary/4794772002/> on Apr. 28, 2020), Craig Mauger, “Voting Advocates: Some Clerk Failing to Send Absentee Ballots Quickly Enough”, *Detroit News*, Feb. 5, 2020 (accessed from <https://www.detroitnews.com/story/news/politics/2020/02/05/voting-advocates-michigan-clerks-not-sending-ballots-quickly-enough/4668922002> on Apr. 28, 2020), Craig Mauger, “Elections Head: Issue Absentee Ballots Within 24 Hours; Demand Rises 63%”, *Detroit News*, Feb. 10, 2020 (accessed from <https://www.detroitnews.com/story/news/politics/2020/02/10/elections-director-issue-absentee-ballots-24-hours-demand-rises-63-percent/4693018002/> on Apr. 28, 2020).

³² Michigan Office of the Secretary of State Press Release. “Benson and Clerks: No Ballot Changes Within 75 Days of Elections”, Feb. 12, 2020 (accessed from <https://www.michigan.gov/sos/0,4670,7-127--519447--,00.html> on Apr. 28, 2020).

29. The USPS is instrumental in making the mail voting function. The USPS has built up many protocols to support election mail, which refers to the mailing of ballot material, voter registration cards, absentee applications, and polling place notifications.³³ However, Wisconsin and Ohio's recent experiences suggest that COVID-19 is reducing the USPS's capacity to support mail voting.

30. There are a number of reasons why COVID-19 might reduce USPS's capacity to deliver election mail in a timely way. Testifying before the House Committee on Oversight and Reform, the Postmaster General Megan Brennan described the dire budgetary situation the USPS is facing in the wake of COVID-19.³⁴ She highlighted that the USPS was anticipating a loss of \$13 billion in revenues because of COVID-19 and predicted that USPS would run out of money to sustain operations during the current fiscal year without emergency appropriations. Additionally, the USPS is facing personal and operations challenges because of COVID-19. As of April 28, 2020, at least 1,606 USPS employees have tested positive for COVID-19.³⁵ And on April 25, 2020, over 9,000 additional USPS employees were quarantined because of potential exposure.³⁶ The USPS has substantially changed its operating procedures to deal with more limited personnel and

³³ United States Postal Service, "2020 Official Election Mail Kit" (accessed from <https://about.usps.com/kits/kit600.pdf> on Apr. 28, 2020).

³⁴ House Committee on Oversight and Reform Press Release, "Postmaster General Warns Committee of Dire Consequences Without Congressional Action", Apr. 9, 2020 (accessed from <https://oversight.house.gov/news/press-releases/postmaster-general-warns-committee-of-dire-consequences-without-congressional> on Apr. 29, 2020).

³⁵ Eric Katz, "More Than 10,000 Federal Employees Have Contracted COVID-19", *Government Executive*, Apr. 28, 2020 (accessed from <https://www.govexec.com/workforce/2020/04/more-10000-federal-employees-have-contracted-covid-19/164986/> on Apr. 29, 2020).

³⁶ National Association of Letter Carriers Press Release, "Re: COVID-19 Virus Crisis and the Administration's Attack on the Postal Service", Apr. 25, 2020 (accessed from <https://www.nalc.org/news/nalc-updates/body/4-25-20-statement.pdf> on Apr. 29, 2020).

to better protect the safety of its workers.³⁷ Media reports highlight how this has included cases of reducing mail delivery to every other scheduled delivery day.³⁸

31. Wisconsin faced many issues with the USPS during its election on April 7, 2020.

Summarizing these issues, the Wisconsin Elections Commission (WEC) wrote:

Starting on April 8, municipalities began reporting irregular or illegible postmarks on ballot return envelopes. Some voters also reported not receiving their absentee ballots by Election Day. Some voters had been issued ballots more than 10 days prior to the election but never received them. WEC asked clerks to report their postmark and mailing issues to the USPS and the WEC.³⁹

32. In addition, media reports highlighted multiple instances in which entire batches of ballots went undelivered.⁴⁰ Given how much election mail is routed through the USPS, some problems will inevitably arise even when it is operating at full capacity. However, both the breadth and the number of issues identified suggests that USPS systems are not operating as intended.

33. While it was possible the issues in Wisconsin reflected something unique to its postal offices, the fact that Ohio experienced similar issues during its April 28, 2020 election suggest there are systemic issues affecting the USPS's ability to meet its service commitments. In a letter to Ohio's Congressional delegation, Frank LaRose, the Ohio Secretary of State stated:

³⁷ United States Postal Service Press Release, "Media Statement- COVID – 19", Apr. 30, 2020 (accessed from <https://about.usps.com/newsroom/statements/usps-statement-on-coronavirus.htm> on Apr. 29, 2020 [change or delete date?]).

³⁸ Justin P. Hicks, "Michigan Mail Delivery Slows as Coronavirus Hits Postal Service Workers" *Mlive*, Apr. 7, 2020 (accessed from <https://www.mlive.com/public-interest/2020/04/michigan-mail-delivery-slows-as-coronavirus-hits-postal-service-workers.html> on Apr. 29, 2020).

³⁹ Wisconsin Elections Commission, "Summary of April 7, 2020 Election" (accessed from <https://elections.wi.gov/sites/elections.wi.gov/files/2020-04/April%207%20Election%20Summary%20and%20Next%20Steps.pdf> on April 28, 2020), p 9.

⁴⁰ Chris Rickert, "'Three Large Tubs': Reports of Missing Absentee Ballots Pile Up", *Wisconsin State Journal*, Apr. 9, 2020 (accessed from https://madison.com/wsj/news/local/govt-and-politics/three-large-tubs-reports-of-missing-absentee-ballots-pile-up/article_a8d25435-5dfa-5e55-a422-b26477321894.html on Apr. 28, 2020); Jeff Ramage, "Post Office Returns Hundreds of Absentee Ballots That Were Supposed to be Delivered to Fox Point Voters", *Milwaukee Journal Sentinel*, Apr. 8, 2020 (accessed from <https://www.jsonline.com/story/communities/northshore/news/fox-point/2020/04/08/wisconsin-election-fox-point-absentee-ballots-never-made-voters/5119812002/> on Apr. 28, 2020).

As Ohioans rush to submit their vote-by-mail requests, and our boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times. Instead of first-class mail taking 1-3 days for delivery, we have heard wide reports of it taking as long as 7-9 days. As you can imagine, these delays mean it is very possible that many Ohioans who have requested a ballot may not receive it in time.⁴¹

34. The memo also notes that:

Election officials have reported numerous issues this election cycle, from missed mail deliveries at local boards of elections to delivery times in excess of 10 days for first class letters. The underlying issues must be immediately identified and corrected.

35. Some of the issues that Ohio experienced were inevitable given the tight turnaround between their mail ballot request deadline (April 25, 2020) and Election Day (April 28, 2020). Even if mail was delivered within its service commitment window of one to three days for first-class mail referenced by LaRose, this process may take a week: three days for the ballot to travel from the election administrator to the voter, one day for voter to fill out the ballot, and three days for the ballot to travel from the voter to the election administrator. But the repeated complaints by local election boards of locally sent mail taking more than one week to reach its destination suggests that the challenges USPS has encountered due to COVID-19 is reducing its ability to meet its service commitments, and thus its capacity to support mail balloting.

VI. Requiring Ballots to be Received by Election Day Will Disenfranchise Pennsylvania Voters

36. The last section established that it is likely that a sizable number of mail ballot requests submitted by Pennsylvania voters in this year's elections will not be fulfilled in a timely

⁴¹ Office of the Ohio Secretary of State Press Release, "Re: Conflicting Information from the USPS related to Election Mail", Apr. 23, 2020 (accessed from <https://www.ohiosos.gov/globalassets/media-center/news/2020/2020-04-24.pdf> on Apr. 28, 2020).

manner. In this section, I will build on this to explain why this means Pennsylvania voters will be disenfranchised if all ballots must be received by county elections officials by Election Day. To do this, I will:

- a. Use data from North Carolina, Georgia, and Wisconsin to demonstrate how requiring ballots to be received by Election Day can be consequential in determining whether a ballot counts (see Section VI.A);
- b. Explain why Pennsylvania's mail ballot request deadline makes the untimely delivery of mail ballots more likely to disenfranchise when mail ballots must be received by Election Day in order to be counted.

A. Voters Are Disenfranchised When Ballots Must Be Received by Election Day

37. Pennsylvania currently requires that ballots be received by Election Day to be counted. Such receipt deadlines were binding on tens-of-thousands of ballots in the 2016 presidential election. Of the 318,728 mail ballots that were rejected nationwide in the 2016 presidential election, 23.1 percent of these ballots were rejected either because the ballot was not received before the deadline or it was postmarked after Election Day.⁴² Additional would-be voters were dissuaded from voting because of a receipt deadline, and thus did not submit a ballot that they did not believe would be received in time.

38. Not all states require ballots be received by Election Day to be counted. For example, North Carolina counts ballots that are received within three days of Election Day provided that they are postmarked by Election Day. N.C. Gen. Stat. § 163-231(b)(2). Thus, given that this election was held on November 8, this meant that mail ballots that were received by

⁴² Election Administration and Voting Survey, 2016 (accessed from https://www.eac.gov/sites/default/files/eac_assets/1/6/2016_EAVS_Comprehensive_Report.pdf on Apr. 28, 2020), p. 11 and 25.

November 11 could be counted if they met all other requirements. North Carolina also is one of the few states that I am aware of that makes data publicly available on who requests absentee ballots, what day they receive each request, what day each absentee ballot is received, and whether each absentee ballot is counted.⁴³ These data from the 2016 presidential election show the following:

- 191,601 mail ballots were counted in the 2016 presidential election;
- 25,683 of the counted mail ballots were received either on November 7 or November 8;
- 7,646 of the counted ballots were received between November 9-11;
- 671 ballots were received on November 12 or on a later date and denoted as having been rejected for being returned after deadline.

39. We can compare these data to similar data from Georgia. Georgia also makes data publicly available on who requests absentee ballots, what day each request is received on, on what day each absentee ballot is returned to election officials, and whether each absentee ballot is counted.⁴⁴ Unlike North Carolina, Georgia required that mail ballots be received by Election Day to count in 2016. Data from Georgia show:

- 202,492 mail ballots counted in the 2016 presidential election;
- 26,151 of the counted ballots were received either on November 7 or November 8;

⁴³ Downloaded from https://s3.amazonaws.com/dl.ncsbe.gov/ENRS/2016_11_08/absentee_20161108_w_ethnicity.zip on Apr. 29, 2020.

⁴⁴ Downloaded from <https://elections.sos.ga.gov/Elections/voterabsenteefile.do> on Apr. 29, 2020.

- 3,087 ballots were received on November 9 or later and denoted as having been rejected as untimely, 1,471 of which were received at some point between November 9-11.

40. Contrasting these data from North Carolina and Georgia demonstrates how accepting otherwise eligible mail ballots postmarked by Election Day but received a few days after can enfranchise voters. North Carolina counted thousands of ballots that would not have been counted in Georgia.

41. Focusing on mail ballot requests received on the North Carolina mail ballot deadline further demonstrates how voters are enfranchised when ballots are counted after Election Day. North Carolina, like Pennsylvania, requires that mail-ballot requests be received seven days before an election. Thus, the deadline for mail-ballot requests for the 2016 presidential election was November 1. The North Carolina data show that:

- 5,562 mail-ballot requests were processed on November 1;
- 3,404 of these requests produced mail ballots that were counted;
- 963 of these counted ballots were received on November 9-11, within three days after Election Day.

42. In Georgia, registrants could also request a mail ballot on November 1, 2016, as mail-ballot requests can be made up until four days prior to an election. The Georgia data show that:

- 4,275 mail-ballot requests were processed on November 1, 2016;
- 2,411 of these requests produced mail ballots that were counted.

43. Thus, mail-ballot requests made on November 1, 2016 were more likely to produce a mail ballot that was counted in North Carolina than Georgia. In North Carolina, about 61 percent

of mail-ballot requests processed on November 1, 2016 generated a mail ballot that was counted. Moreover, 28 percent of the mail ballots that counted were received after Election Day. In contrast, only about 56 percent of mail-ballot requests produced on November 1, 2016 in Georgia generated a mail ballot that was counted.

44. While counting mail ballots received after Election Day generally enfranchises voters, it may particularly be enfranchising in 2020 given the circumstances surrounding COVID-19. First, Section V.A shows that more mail ballots will be cast. Second, Section IV.C highlights that fewer people will see polling place voting as a substitute for mail voting, and therefore people are going to be more likely to risk casting a mail ballot that may not be received on time than casting a vote at a polling place. Third, the increased mail delays discussed in Section V.C are likely to cause more of these ballots to arrive after Election Day.

45. Data from Wisconsin's April 7, 2020 election is used to examine whether voters are enfranchised when receipt deadlines are extended past Election Day when COVID-19 is salient. While Wisconsin normally requires mail ballots to be received by Election Day, judicial rulings made it so that mail ballots postmarked by April 7 could be counted if they were received by April 13. Unfortunately, Wisconsin does not make public similar individual-level absentee data, like North Carolina and Georgia. Moreover, municipalities were barred by court order from producing results until April 13. Thus, I can only indirectly assess how many valid mail votes were received between April 8 and April 13. One way to do this is with the Wisconsin Elections Commission's daily snapshots of the total number of absentee ballots counted.⁴⁵ However, these reports may overstate the number of mail ballots received between April 8 and April 13 for two

⁴⁵ Wisconsin Elections Commission, "Absentee Ballot Report – April 7, 2020 Spring Election and Presidential Preference Primary", Apr. 7, 2020 (accessed from <https://elections.wi.gov/node/6825> on Apr. 29, 2020).

reasons: First, there may have been a lag in county reporting the number of ballots counted to the state, meaning that the April 7 report for some counties may not have included the full inventory of the ballots that the counties received by that date. Second, counties may have included absentee ballots that ultimately did not count in these reports. Thus, I looked to validate these numbers using data from a small number of jurisdictions that provided more information on when ballots were received and whether the ballots counted.

46. The Wisconsin Elections Commission data shows that a substantial number of absentee ballots were counted between April 8 and April 13. Table 1 highlights that nearly 250,000 more absentee ballots were reported as being counted on April 13 as on April 7. While the state hasn't finalized the total number of valid ballots, this represents about 16 percent of the total ballots cast.⁴⁶ The more detailed data show that this likely overstates the actual number of valid absentee ballots received between April 8 and April 13.

47. The City of Milwaukee reported a detailed breakdown on how many mail ballots were received, rather than processed, on April 8 through 12.⁴⁷ They received 9,962 ballots postmarked prior to April 7 on April 8 through April 12. Given that 95,168 total ballots were cast in Milwaukee,⁴⁸ this represents about 10 percent of the total counted ballots.

48. *The Washington Post* identified that more than 30,000 votes arrived by mail after Election Day in eleven cities that provided them with this information.⁴⁹ Three of these cities were

⁴⁶ Based on the total number of votes reported in the Wisconsin's State Supreme Court race from <https://www.nytimes.com/interactive/2020/04/07/us/elections/results-wisconsin-spring-elections.html> on Apr. 29, 2020.

⁴⁷ <https://twitter.com/srl/status/1252985801090138112> accessed on Apr. 29, 2020.

⁴⁸ <https://city.milwaukee.gov/ElectionResults1717.htm#.XqnutS2ZNYg> accessed on Apr. 29, 2020.

⁴⁹ Amy Gardner, Dan Simmons, Robert Barnes, "Unexpected Outcome in Wisconsin: Tens of Thousands of Ballots That Arrived After Election Day Were Counted, Thanks to Court Decisions", *Washington Post*, May 3, 2020 (accessed from https://www.washingtonpost.com/politics/unexpected-outcome-in-wisconsin-tens-of-thousands-of-ballots-that-arrived-after-voting-day-were-counted-thanks-to-court-decisions/2020/05/03/20c036f0-8a59-11ea-9dfd-990f9dcc71fc_story.html on May 5, 2020).

Brookfield, Madison, and Milwaukee. The other eight cities were not identified in the article, although the articles note that these cities comprised fewer than 25 percent of registered voters in Wisconsin.

49. Lincoln County reported 7,377 ballots were counted at poll close (8 pm) on April 7 on their county website.⁵⁰ This report also noted there were no provisional ballots cast in the county. Thus, any additional ballots counted after this point would be mail ballots counted after 8 pm on Election Day, when mail ballots normally would need to be received in order to be counted. The unofficial election results posted on its website show that 7,708 ballots were ultimately counted in the county. This means just over four percent of votes in the county were mail ballots counted after Election Day.

50. Put together, this evidence suggests at least tens of thousands, and possibly more than one hundred thousand, additional mail ballots were counted in the Wisconsin election because the mail-ballot deadline was extended by six days after Election Day.

Table 1: Absentee Ballots Counted by Date in Wisconsin’s April 7, 2020 Election

Date	Total Absentee Ballots Counted	Change from Yesterday	Change from Previous Day
7-Apr	864750		
8-Apr	1003422	138672	138672
9-Apr	1042690	39268	177940
10-Apr	1080403	37713	215653
11-Apr	1092302	11899	227552
12-Apr	1096020	3718	231270
13-Apr	1098489	2469	233739
14-Apr	1117328	18839	252578

⁵⁰ Lincoln County Voter Statistics, April 7, 2020 Election, previously available at https://co.lincoln.wi.us/sites/default/files/fileattachments/county_clerk/page/23581/voter_statistics.7.20_0.pdf (accessed on Apr. 30, 2020) (on file with author).

B. *Pennsylvania's Mail Ballot Request Deadline Makes USPS's Service Disruptions More Likely to Disenfranchise*

51. Pennsylvania allows registrants to request a mail ballot until seven days before Election Day. Allowing people to request mail ballots this close to Election Day is important to prevent disenfranchisement. As I established in Section V.C, seven days is the minimum amount of time that must be provided to guarantee that a mail ballot can make the round-trip from election administrators to a voter's residence and back to election administrators under the standard USPS service commitment of one to three days for first class mail.⁵¹ A ballot will spend a total of seven days in transit if it takes three days for a ballot to travel from election administrators to a voter's residence, one day for the voter to fill out the mail ballot, and three days for the ballot to travel from a voter's residence back to election administrators.⁵²

52. However, Section V.C. highlights the USPS's recent struggles and its persistent failures to meet service commitments with respect to the mailing of ballots in the recent Wisconsin and Ohio elections. When the USPS does not meet its service commitments, many mail ballots will be returned by Election Day, particularly among mail-ballot applicants whose request is processed seven days before the election. The ability of such individuals to use mail balloting can be jeopardized by even small violations of the USPS service commitment to deliver first-class mail in one to three days. And the recent Ohio election shows that some of the violations of the service commitment are significant enough to disenfranchise mail-ballot applicants whose applications are processed even earlier than the seven-day cutoff. As a consequence, some Pennsylvania voters

⁵¹ See <https://www.usps.com/ship/first-class-mail.htm> (accessed on Apr. 29, 2020). While the Post Office has altered service commitments about how quickly it can deliver first-class packages and priority mail due to the issues surrounding COVID-19, it has not altered its service commitments about how quickly it can deliver first-class mail.

⁵² <https://postcalc.usps.com/ServiceCommitments> (accessed on Apr. 29, 2020).

requesting a mail ballot close to the request deadline will be disenfranchised because their ballots will not be delivered to election officials by Election Day.

53. While in some circumstances people may be able to substitute into polling place voting, this will not be true of everybody, and is even less likely now, as discussed in Section IV.C, given the increased costs posed by the risk of COVID-19 infection, the costs of finding the voter's potentially consolidated or relocated polling place, and other potential costs of in-person voting. Disenfranchisement also is more likely when the USPS's failure to meet its service commitment occurs at the point when the mail ballot is mailed from a voter's residence to election administrators, as the would-be voter is unlikely to know that there is an issue with the delivery of their ballot, and unable to rectify it before it is too late.

VII. Requiring Postage to Be Added to Absentee Ballots Will Disenfranchise Voters in the 2020 Pennsylvania Elections

54. Pennsylvania currently requires that voters affix postage to absentee ballot envelopes. In this section, I establish three reasons why Pennsylvanians will be disenfranchised in the 2020 elections if this practice remains in place instead of an alternative policy in which pre-paid postage is affixed to absentee ballot envelopes.

- a. Affixing absentee ballot envelopes with pre-paid postage can reduce the cost of voting, particularly among those without easy access to postage;
- b. COVID-19 will increase the number of people who lack access to a postage stamp.

A. Pre-paid Postage on Absentee Ballot Envelopes Reduces the Cost of Voting

55. States and localities differ with respect to whether they affix absentee-ballot envelopes with pre-paid postage. The National Conference of State Legislatures currently identifies sixteen states that require local election officials to provide return postage on mail ballots, plus one state (New Jersey) which gives its county clerks discretion about whether to pay

for return postage.⁵³ A number of these states recently adopted this practice since the 2016 presidential election, including California, Oregon, and Washington.⁵⁴ These are three of the six states in which absentee ballots comprised more than half of the ballots cast in the 2016 presidential election (the other three are Arizona (prepays absentee ballot return postage), Colorado (does not prepay absentee ballot postage), and Utah (does not prepay absentee ballot postage)). In the notes to the enacting legislation in Washington the legislature noted:

The legislature finds that voting by mail has many advantages. However, the legislature also finds that while the cost of ballot return postage may only be a small amount, passing the burden along to Washington's citizens, many of whom no longer need stamps in their everyday lives, is an unnecessary barrier to fully participate in the democratic process. The legislature further finds that in order to continue to increase participation in our democracy, we must lower all barriers to participation in the democratic process. The legislature finds that voting should be free for all citizens.⁵⁵

56. Political science research confirms that requiring voters to affix postage on absentee ballot envelopes can burden potential-voters so that they don't vote. The most comprehensive study on the topic was conducted in Switzerland.⁵⁶ This was a particularly good place to study the effect of pre-paid return postage on absentee-ballot envelopes on turnout because law changes allowed municipalities to start affixing pre-paid postage to absentee-ballot envelopes in some provinces in 2007. Turnout increased by four percent in municipalities that adopted pre-paid postage relative to places that did not.

⁵³ The National Conference of State Legislatures, "Voting Outside the Polling Place: Absentee, All-Mail, and Other Voting at Home Options", (access from <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> on Apr. 30, 2020), Table 12.

⁵⁴ California 2017-2018 Assembly Session, Assembly Bill 216, Oregon Legislative Assembly --2019 Regular Session. Senate Bill 861, Washington Legislature – 2019 Regular Session, Substitute Senate Bill 5063.

⁵⁵ See <https://app.leg.wa.gov/RCW/default.aspx?cite=29A.40.091> (accessed on Apr. 30, 2020).

⁵⁶ Mark Schelker and Marco Schneider, 2017, "The elasticity of voter turnout: Investing 85 cents per voter to increase voter turnout by 4 percent", *Electoral Studies* 49: pp. 65-74.

57. There are no evaluations of pre-paid absentee ballot envelopes done at the scale of the aforementioned study from Switzerland in the United States. Pre-paid postage was piloted in some local and primary elections in Washington, before it was adopted statewide. In these pilots, turnout was higher than expected and more ballots were returned by mail.⁵⁷ But there was no formal control group and the studies have not been peer-reviewed. The only peer-review study of pre-paid postage on turnout in the United States examined a randomized intervention in San Mateo County, California in 2010 in which some registrants were sent an absentee envelope with pre-paid postage instead of the normal absentee envelope that required people to affix their own postage.⁵⁸ It found no statistically distinguishable difference in turnout between the two groups. However, the authors also noted that the way they described the pre-paid postage confused voters, and this may have negated its ability to increase turnout.

58. The Swiss study referenced above highlights that pre-paying for return postage on absentee ballots reduces both the monetary and transaction costs of voting. The monetary savings to a voter in the Swiss study was roughly \$0.85 USD, which is slightly higher for the current cost of \$0.55 USD for a first-class letter that is less than one ounce. But arguably more consequential are the transaction costs associated with affixing a stamp.⁵⁹ These transactions costs vary substantially over individuals. For those who already possess stamps, the transaction costs are

⁵⁷ See both

https://members.naco.org/FileUpload/Awards/Storage/2018/107684/Final_Prepaid%20Postage_2018_NoSupplement.pdf and <https://kcelections.com/2018/09/06/2018-primary-election-voter-turnout-exceeds-projections-as-prepaid-postage-launches-countywide/> (both accessed on Apr. 30, 2020).

⁵⁸ Melissa R. Michelson, Neil Malhotra, Andrew Healy, Donald P. Green, Allison Carnegie, and Ali Adam Valenzuela, 2012, “The effect of prepaid postage on turnout: A cautionary tale for election administrators”, *Election Law Journal* 11(3): 279-290.

⁵⁹ U.S. Election Assistance Commission, 2008, “Free or reduced postage for the return of voted absentee ballots” (accessed from

https://www.eac.gov/sites/default/files/document_library/files/free_absentee_ballot_postage_study_public_meeting_february_7_2008_1.pdf on Apr. 30, 2020), pp 26-27.

negligible. In contrast, the transaction costs may be substantial for individuals who rarely send mail or have difficulty gaining access to stamps, which may be particularly challenging for people with limited mobility.⁶⁰ Elections officials also express specific concerns about whether young people, who as a group are less likely mail things, will have access to the necessary postage to affix to absentee ballots.⁶¹

59. While USPS policy is that mailed ballots get delivered to election administrators even when they lack sufficient postage, this does not eliminate the issues that people face with respect to access to postage and mail balloting. First, this policy generally is not advertised to the public or noted in the instructions that accompany an absentee ballot.⁶² Thus, I assess that many people who lack access to postage will be unaware that a ballot would be delivered if mailed without postage. Second, while USPS policy is that ballots should be delivered to election administrators when mailed without sufficient postage, this doesn't guarantee that policy will always be implemented. Particularly in areas with less of a history of mail ballot use, I am concerned whether the USPS, operating in its current state of diminished capacity, will deliver ballots without sufficient postage to election administrators in a timely way.

B. COVID-19 is Increasing the Number of People Who Lack Access to Postage Stamps

60. The previous section established that affixing an absentee ballot with pre-paid postage reduces the cost of voting, particularly for those who don't currently possess stamps. This

⁶⁰ U.S. Election Assistance Commission, 2008, "Free or reduced postage for the return of voted absentee ballots" (accessed from https://www.eac.gov/sites/default/files/document_library/files/free_absentee_ballot_postage_study_public_meeting_february_7_2008_1.pdf on Apr. 30, 2020), p 3.

⁶¹ Ashley Collman, "College students say they can't send their in their absentee ballots because they don't know where to buy stamps", *Business Insider*, Sept. 19, 2018 (accessed from <https://www.businessinsider.com/young-voters-dont-know-where-to-buy-stamps-for-absentee-ballots-2018-9> on Apr. 30, 2020).

⁶² Susie Armitage, "Mail-in ballot postage becomes a surprising (and unnecessary) cause of voter anxiety", *Propublica*, Nov. 1, 2018 (accessed from <https://www.propublica.org/article/mail-in-ballot-postage-becomes-a-surprising-and-unnecessary-cause-of-voter-anxiety> on Apr. 30, 2020).

section highlights why COVID-19 is increasing the transaction costs that people face in acquiring stamps.

61. One source of the increased transaction costs for stamps is that people are much less likely to encounter a place to buy stamps in their everyday lives. While many of the businesses that sell stamps remain open, others are shut down because of policies designed to stop the spread of COVID-19. USPS retail locations remain open, but news reports highlight how fewer people are going in to use them.⁶³ This means that people will have fewer opportunities to purchase stamps. This is particularly true for those people who are limiting their shopping to prevent the spread of COVID-19, and especially those people who are not leaving their home to shop for food, medicine, or other essential household items. Such individuals can acquire stamps online through stores like <https://store.usps.com/store/home>. However, this is not an option that can be used if someone needs a stamp to mail an absentee ballot immediately.⁶⁴

62. COVID-19 also may impact the ability of would-be voters to buy a small number of stamps. While people can purchase an individual stamp if needed at a USPS retail location, stamps only are sold in bulk at many other retailers. This includes the USPS online retail store referenced in the previous paragraph, which only sold books of 55-cent stamps in units of 20 or 100 when I browsed on April 30, 2020. The same is generally true for website like stamps.com, which allows people to use a printer to print stamps at home.

63. The massive economic slowdown associated with COVID-19 makes these changes in transaction costs more consequential for turnout decisions. I assess that increased personal

⁶³ See <https://weartv.com/news/local/post-office-operations-changed-by-covid-19-pandemic> (accessed on April 30, 2020)

⁶⁴ Moreover someone attempting to buy a twenty pack of U.S. Flag stamps on <https://store.usps.com/store/home> on April 30, 2020 would have encountered a warning message that said “Do to a high volume of orders at this time, please allow an additional 2-3 days for delivery of your order.”

financial hardship could increase the share of people who decide to abstain rather than pay \$0.55 of postage. This is consistent with previous survey research showing that low-income voters' voting calculus would be more likely to be swayed by free- or reduced-postage on absentee ballots than high-income voters.⁶⁵ But I assess that it is even more likely to affect the share of people who decide to abstain rather than outlay \$11.00 for a book of 20 stamps, particularly if they don't generally use stamps.

Date: May 7, 2020

DocuSigned by:

85A32EACA9894CF...
Dr. Marc Meredith

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⁶⁵ U.S. Election Assistance Commission, 2008, "Free or reduced postage for the return of voted absentee ballots" (accessed from https://www.eac.gov/sites/default/files/document_library/files/free_absentee_ballot_postage_study_public_meeting_february_7_2008_1.pdf on April 30, 2020), p 11.

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IX. Curriculum Vitae

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Education

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M.A. in Political Science, Stanford University, June 2006
M.A. in Economics, Northwestern University, June 2002
B.A. in Economics and Mathematical Methods in Social Science (w/ honors),
Northwestern University, June 2002

Employment

University of Pennsylvania

Associate Professor (with tenure) of Political Science and (secondary appointment)
Business Economics and Public Policy, 7/2014 –
Undergraduate Chair of Political Science, 7/2015 – 6/2018
Faculty Director of Undergraduate Research for Center for Undergraduate
Research, 1/2020 -
Assistant Professor of Political Science and (secondary appointment) Business
Economics and Public Policy, 7/2009 – 6/2014

NBC Decision Desk

Election Analyst, 10/2014 –

Massachusetts Institute of Technology

Visiting Lecturer of Political Science, 7/2008 – 6/2009

Stanford University

Lecturer of Economics, 4/2006 – 6/2006

Federal Reserve Bank of San Francisco

Research Associate, 6/2002 – 8/2003

Visiting Appointments

Oxford University

Visiting Scholar, Nuffield College, 3/2019 – 5/2019

Institute for Advanced Study in Toulouse

Visiting Scholar, 1/2019 – 3/2019

Princeton University

Visiting Scholar, *Center for the Study of Democratic Politics*, 9/2012 – 6/2013

Peer Reviewed Journal Articles

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Invited Book Reviews

Meredith, Marc. 2015. "The Punishment Imperative: The Rise and Failure of Mass Incarceration in America by Todd R. Clear and Natasha A. Frost." *Political Science Quarterly* 130(1): 166-167.

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Henninger, Phoebe, **Marc Meredith**, and Michael Morse. “Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws.”

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Abernathy, Claire, Jason A. Grissom, **Marc Meredith**, James Sadler. “Holding Local Officials Accountable: School District Performance and School Board Turnover.”

Meredith, Marc. “Heterogeneous Friends-and-Neighbors Voting”

Meredith, Marc and Jason Grissom. “The Value of Partisan Cues in Local Elections: Regression Discontinuity Estimates from Unconventional School Board Races.”

Invited and Conference Presentations (Political Science Unless Otherwise Noted)

2004 – 2005: Midwest Political Science Association Conference (MPSA)

2006 – 2007: MPSA

2007 – 2008: Georgetown, Yale, Emory, Harvard, Princeton, Chicago (Harris), American Political Science Association (APSA), MPSA

2008 – 2009: Berkeley (Haas), Columbia, MIT, Penn (Wharton), Penn, Wisconsin, Yale, MIT American Politics Conference, Yale CSAP Conference, APSA, MPSA

2009 – 2010: Stockholm (IIES), Caltech, APSA, MPSA, State Politics and Policy Conference (SPPC)

2010 – 2011: Cornell, Harvard/MIT (Positive Political Economy), Chicago (Harris), Temple, Columbia, Analyst Institute, APSA, MPSA, Society for Political Methodology Conference

2011 – 2012: NYU, Analyst Institute, Yale CSAP Conference, Stanford Strategy and the Business Environment (Discussant), MSPA, SPPC

2012 – 2013: Penn (Economics), Harvard/MIT (Positive Political Economy), Wisconsin, Princeton, Emory, Yale Detaining Democracy Conference, Princeton Political Impact of Media Conference (Discussant), Law and Society Conference, Yale CSAP Conference (Discussant)

2013 – 2014: Vanderbilt, Wisconsin, Pittsburgh, Virginia (Batten), Texas (McCombs), Yale, Rochester, APSA, Empirical Legal Studies Conference, Columbia Political Economy Conference (Discussant), MPSA (Section Chair), SPPC, Yale CSAP Conference (Discussant)

2014 – 2015: Princeton, Berkeley, Penn (Wharton), MPSA

2015 – 2016: UConn (Law), Dartmouth, Azavea, APSA, MPSA, European Political Science Association Conference (EPSA)

2016 – 2017: Yale (Behavioral Science), Harvard, Vanderbilt Urban Political Economy Conference, Princeton Rethinking Voter Turnout Workshop, MPSA (Section Chair)

2017 – 2018: Columbia Political Economy Conference (Discussant), Election Sciences, Reform, & Administration Conference (ESRA)

2018 – 2019: Institute for Advanced Study in Toulouse, American Sociological Society
Computational Pre-Conference, APSA (Discussant), Microsoft Research
Digital Economic Conference, ESRA (Host Committee)
2019 – 2020: APSA (Discussant),

Teaching Experience

Election Law (undergraduate): Spring 2014
Government and Legal Environment of Business (MBA): Spring 2011, Spring 2012
Introduction to American Politics (undergraduate): Fall 2011, Fall 2015, Fall 2017, Fall
2018
Policy Making and Public Institutions (MPA): Spring 2016, Spring 2018
Policy Making and Public Institutions (undergraduate): Spring 2017, Spring 2020
Political Economics (undergraduate): Spring 2007
Quantitative Research Methods (undergraduate): Fall 2010, Fall 2011, Fall 2013, Spring
2015, Spring 2016, Spring 2018, Fall 2018
Quantitative Research Methods I (graduate): Fall 2008, Fall 2010
Quantitative Research Methods II (graduate): Spring 2010, Spring 2012, Spring 2015,
Spring 2020
Quantitative Research Methods III (graduate): Spring 2009, Spring 2014
State and Local Politics (undergraduate): Fall 2009\

Departmental Service

American Politics Workshop Co-organizer: 2011-2012, 2014-2015, 2015-2016, 2016-
2017
Comprehensive Exam Committee: American Politics (2011, 2013 (chair), 2014, 2017),
Methods (2012), Political Communication (2010)
Committee on Associated Faculty: 2009-2010
Dissertation Committee: Joshua Darr (2015 PhD, placed at LSU), Ellen Donnelly (2015
PhD, placed at the University of Delaware), Alex Garlick (2016 PhD (chair),
placed at College of New Jersey), Eunji Kim (2019 PhD, placed at Vanderbilt),
Patricia Posey (2019 PhD, placed at University of Chicago), Laura Silver (2016
PhD, placed at US State Department), Ashley Tallevi (2017 PhD (co-chair),
placed at Facebook), Emily Thorson (2013 PhD, placed at George Washington
University, now at Syracuse)
Promotion Committee: 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-
2020
Search Committee: Political Identity (2014)
Senior Thesis Advisor: Maryam Alireza (2013), Richard Diurba (2018), August Gebhard-
Koenigstein (2019), Yoni Gruskin (2011), Ketaki Gujar (2020), Phoebe
Henninger (2018), Urja Mittal (2014), Riley Morrison (2020), Michael Morse
(2013), James Sadler (2013), Joseph Sachi (2019), Joseph Sageman (2017), Lucas
Salzman (2014), Eric Selzer (2019), Mark Steiner (2020), Jack Weisman (2019),
Max Wheeling (2011), Kevin Yang (2020) Jesse Yoder (2016)
Undergraduate Chair: 2015-2018
Undergraduate Executive Committee: 2010-2012, 2013-2015, 2015-2018 (chair)

School and University Service

Penn Undergraduate Research Mentor: 2011, 2013

SAS Committee on Undergraduate Academic Standing: 2014-2016

SAS Learning, Culture, and Social Change Strategic Planning Committee: 2013-2014

SAS Quantitative Exploration of Evolving Systems Strategic Planning Committee: 2014-2015

SAS Teaching Awards Committee: 2017-2018, 2019-2020 (chair)

SAS Undergraduate Pre-Major Advisor: 2010-2012, 2014-2016, 2016-2018

Search Committee for Executive Director of the Center for Undergraduate Research and Fellowship; 2018

Senior Thesis Advisor: Claire Greenberg (2017, PPE), Rebecca Molinoff (2020, PPE), Amelia Storck (2016, Visual Studies)

University Faculty Review Committee for Undergraduate Research: 2016-2017, 2017-2018, 2018-2019, 2019-2020 (chair)

University Scholars Faculty Council: 2019-2020

Vice Provost for Education Fellowship Selection Committee: 2018-2019, 2019-2020

Disciplinary Service

Book Conference Participant: “Primaries and Candidate Quality” by Shigeo Hirano and James M. Snyder Jr., “Southern Slavery and its Political Legacy” by Avidit Acharya, Matthew Blackwell, and Maya Sen, “Who Wants to Run?” by Andrew Hall

Book Reviewer: CQ Press, University of Chicago Press

Editorial Board Member: American Politics Research (2017-), Journal of Politics (2019-)

External Promotion Reviewer: Columbia University (X2), Massachusetts Institute of Technology, Microsoft Research, University of California Berkeley, University of California Los Angeles (X2), University of California Riverside, University of California San Diego, University of Chicago (X3)

Grant Reviewer: National Science Foundation, Research Council of Canada, Belgium FNRS

Journal Reviewer: American Economic Review, American Journal of Political Science (X19), American Law and Economics Review, American Politics Research (X10), American Political Science Review (X16), B.E. Journal of Economic Analysis & Policy, British Journal of Political Science (X8), Comparative Political Studies, Congress and the Presidency, Criminology, Criminal Justice, Law & Society, Criminal Justice Studies, East European Politics and Societies and Cultures, Econometrica, Economics and Politics (X6), Education Policy, Election Law Journal (X4), Electoral Studies (X5), Empirical Economics, European Journal of Political Economy, European Journal of Political Research (X2), International Journal of Health Care Economics and Finance, International Journal of Public Opinion Research, International Political Science Review, Journal of Economic Behavior and Organization, Journal of Elections, Public Opinion, and Parties (X4), Journal of Experimental Political Science (X5), Journal of Empirical Legal Studies (X2), Journal of Political Economy, Journal of Politics (X27), Journal of Public Administration Research and Theory, Journal of Public Economics (X3), Journal of Public Policy, Journal of Theoretical Politics,

Legislative Studies Quarterly (X3), Nature (X2), Quarterly Journal of Economics, Quarterly Journal of Political Science (X10), PLOS ONE, Political Analysis, Political Behavior (X10), Political Communication, Political Psychology (X2), Political Research Quarterly (X6), Political Science Research and Methods (X4), Politics and Governance, Politics, Groups, and Identities, Polity, PS, Proceedings of the National Academy of Sciences (X5), Public Choice (X7), Public Opinion Quarterly (X8), Research and Politics, Review of Economics and Statistics, Social Problems (X2), State Politics and Policy Quarterly (X4), Statistics, Politics and Policy, Time-sharing Experiments for the Social Sciences, Yale Law Journal

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

Civil Action No. 266 MD 2020

DECLARATION OF MICHAEL CROSSEY

I, Michael Crossey, declare as follows:

1. My name is Michael Crossey. I am over the age of 18 and I make this declaration based upon my personal knowledge and experience, and in support of Petitioners' application for preliminary injunction in the above-captioned matter.

2. I am 69 years old, a resident of Allegheny County, and registered to vote in Pennsylvania. I am a retired schoolteacher and the former President of the Pennsylvania State Education Association. Currently, I am the Treasurer for the Pennsylvania Alliance for Retired Americans.

3. I have voted in-person at the polls on Election Day in every year in which I have been eligible to vote in Pennsylvania. This year, COVID-19 has spread throughout Pennsylvania and I understand that people over the age of 65 are particularly vulnerable to the virus. Because of this and Governor Wolf's stay-at-home order, I requested to vote by mail for the primary election

this year to avoid the need to go to the polls on Election Day. I plan to do the same for the general election.

4. I understand that my mail-in ballot must be received by Election Day for both the primary and general elections. But I am also aware that the U.S. Postal Service is currently experiencing delays and a budgetary crisis. I understand that these issues have generally affected postal service in Pennsylvania, and I know that the issues have caused significant delays in mail delivery in Allegheny County. I requested my mail ballot several weeks ago and have yet to receive it. Assuming I actually receive the ballot, I am unsure how early I will need to mail my ballot in order for it to arrive on Election Day, or whether it will arrive on time regardless of when I place the ballot in the mail.

5. Delivering my ballot in person would expose me to the risk of contracting COVID-19, and I am concerned about putting myself in that position after seeing how the primary election unfolded in Wisconsin and learning about the new COVID-19 infections that resulted from it.

6. To avoid these burdens, if I could, I would ask someone I trust to deliver my ballot for me. But if my ballot did not have to arrive by Election Day to count, which would give me more time to mail the ballot in case there are long delays at the post office, then I would feel more comfortable sending my ballot by mail.

Executed on May 7, 2020

Respectfully submitted,

DocuSigned by:

530A0AE8E1CD484...
Michael Crossey

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I. INTRODUCTION

Respondents neither discount the very real threat of COVID-19 nor deny the effects that the pandemic is having on Pennsylvanians' lives. But even in the face of an unprecedented health crisis, rules of pleading, justiciability, and jurisdiction retain their importance. For three reasons, these rules require dismissal of the Petition for Review (the "Petition").

First, Petitioners fall far short of carrying the substantial burden required to make out constitutional claims against election laws. Petitioners posit that a constitutional violation *may* arise from some combination of factors related to the current COVID-19 crisis. But, as shown below, Petitioners do not allege facts sufficient to support a concrete injury of constitutional significance. Second, for many of the same reasons, Petitioners' claims are too speculative to be justiciable. And third, Petitioners seek affirmative relief from Pennsylvania's county boards of elections and accuse the counties of violating the Pennsylvania Constitution, making the boards of elections—who are not named as Respondents—indispensable to resolution of this litigation. For these reasons, this Court should sustain Respondents' Preliminary Objections and dismiss the Petition.

II. STATEMENT OF JURISDICTION

Respondent objects to the exercise of this Court’s jurisdiction because Petitioners have failed to join indispensable parties, as detailed *infra* Section VI.C.

III. STATEMENT OF THE CASE²

In the Petition, an individual voter and several organizations challenge the Pennsylvania Election Code’s requirement that, to be counted, a voter’s absentee or mail-in ballot must be received by the appropriate county board of elections “on or before eight o’clock P.M. the day of the primary or election.” *See* Pet., ¶ 26 (quoting 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c)). Petitioners refer to this as the “received-by” deadline. *See, e.g.*, Pet., ¶ 27.

According to Petitioners, enforcing the received-by deadline in the context of the COVID-19 pandemic will lead to the disenfranchisement of thousands of voters, violating various provisions of the Pennsylvania Constitution. To support that theory, Petitioners predict that (i) county boards of elections may be delayed in processing applications for absentee and mail-in ballots; and (ii) the United States Postal Service may be slow in transporting blank ballots to voters and returning

² For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition’s well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

filled-out ballots to county boards of elections. As a result, Petitioners allege, voters will have to either endanger their health by voting in-person or risk that their mailed votes will go uncounted, because processing and transit delays will cause otherwise timely ballots to arrive past the received-by deadline. *See, e.g.*, Pet., ¶¶ 2–4.³

To redress their purported constitutional injuries, Petitioners seek, *inter alia*, (i) a declaration that, during the COVID-19 pandemic, the received-by deadline is unconstitutional and invalid; (ii) a declaration that the non-severability provision in the enacting statute for the received-by deadline is unenforceable; and (iii) injunctions prohibiting enforcement of the received-by deadline and requiring all county boards of elections to count certain mailed ballots received up to a week after election day. Although Petitioners seek relief that will require the county boards of elections to adopt new procedures to affirmatively enforce what will essentially be a new election law, Petitioners did not name the county boards of election as Respondents.

One week after filing the Petition, Petitioners filed an Application for Special Relief in the Nature of a Preliminary Injunction. The next day,

³ As set forth in the Preliminary Objections, Petitioners' claims are speculative as to both the primary and general elections, but doubly so for the general election, which is still six months away. *See, e.g.*, Preliminary Objections ¶ 25.

Respondents filed Preliminary Objections seeking dismissal of the Petition because (i) Petitioners' claims are too speculative to state a constitutional claim, (ii) Petitioners' claims are not justiciable under the doctrines of standing and ripeness, (iii) Petitioners failed to join the county boards of election, which are indispensable parties to this litigation, and (iv) Petitioners failed to provide notice and a copy of the Petition to the Attorney General's Office. On May 8, Petitioners filed their Opposition to the Preliminary Objections and provided proof of service on the Attorney General's Office.⁴ On Monday, May 11, Respondents filed an Opposition to Petitioners' Application for Special Relief.⁵

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioners claim only that they may, in the future, suffer constitutional injuries, should the Court dismiss Petitioners' claims because they have not alleged facts that, if true, would clearly, palpably, and plainly demonstrate a constitutional violation?

Suggested Answer: Yes. *See infra* Section VI.A.

Where Petitioners rely entirely on speculation that they may, in the future, suffer constitutional injuries, should the Court dismiss their claims because speculation (i) is too remote to satisfy the immediacy requirement for standing and (ii) provides insufficient factual development to render a claim ripe?

Suggested Answer: Yes. *See infra* Section VI.B.

⁴ Because Petitioners have now established their compliance with the service requirement, Respondents are no longer pursuing their fourth preliminary objection.

⁵ In their Preliminary Objections, Respondents seek dismissal of all of Petitioners' claims. A grant of the Preliminary Objections will therefore moot the Application for Special Relief.

Where Petitioners seek relief that would mandate that county boards of elections take affirmative action, based on the allegation that the county boards of election are unconstitutionally disenfranchising voters by delaying processing of absentee and mail-in ballot applications, does the Court lack jurisdiction because Petitioners have not named the county boards of election as respondents?

Suggested Answer: Yes. *See infra* Section VI.C.

V. SUMMARY OF ARGUMENT

The Petition should be dismissed for three reasons.

First, Petitioners' claims are legally insufficient. Constitutional challenges to election statutes are cognizable only where an injury is concrete. "There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision." *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017) (citation and quotation omitted). Moreover, "nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted." *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914).

Here, the Petition asserts constitutional violations, but Petitioners have alleged only hypothetical—rather than clear, palpable and plain—constitutional injury. The allegations are a parade of what-ifs: increases in absentee ballot and

mail-in ballot applications *could* lead to overwhelming processing backlogs in unspecified counties (citing weeks-old application numbers from just two of Pennsylvania’s 67 counties), Pet. ¶¶ 46–47; the U.S. postal system *may* fall behind (citing experiences from “other parts of the country”) and therefore may delay ballot deliveries, Pet. ¶ 50; there is a “*possibility* that local post offices will need to shut down,” Pet. ¶ 50 n.19 (emphasis added); because of these “myriad” delays, some voters’ ballots *might* not arrive on time; and this outcome might disproportionately affect one or another group of voters, *id.* ¶¶ 52–55. Petitioners have not given any specifics about which counties may fall behind, and by how much; which mail routes may slow, and when and for how long; which post offices could close, and what effect that could have; and how all of this would affect any specific group of Pennsylvania voters. Because Petitioners’ alleged constitutional injuries are entirely speculative, the Court should dismiss them as legally insufficient.

Second, Petitioners’ claims are not justiciable. To have standing to sue, a claimant must have “a substantial, direct, and immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016). If the claimant’s interest in the litigation is too “remote or speculative,” however, she lacks standing to bring her claims. *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). Likewise, for Petitioners’ claims to be ripe, there must be an

“actual controversy” and Petitioners must allege facts “sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). Just as Petitioners have not alleged adequate facts to demonstrate a legally sufficient constitutional injury, Petitioners lack standing to bring their unripe claims.

Third and finally, Petitioners failed to join indispensable parties. Petitioners do not just seek a declaration that the received-by deadline is unconstitutional during the COVID-19 pandemic; they also seek an injunction affirmatively requiring Respondents *and the county boards of elections* to adopt new criteria for determining whether mail-in and absentee ballots are properly submitted and to count some ballots received up to a week after the June 2 primary date. *See* Pet. at p. 62 (Prayer for Relief d.1–4.) Because Petitioners seek to compel action by the county boards of election—and because Petitioners allege that the county boards are violating the Pennsylvania Constitution—the counties are indispensable parties that must be joined in this litigation.

VI. ARGUMENT

A. The Court Should Dismiss the Petition as Legally Insufficient Because Petitioners Do Not Adequately Allege a Constitutional Violation

Petitioners describe the pleading standard in this case as “makeweight,” Opp. at 8, but they have a heavy burden to make a “clear, palpable and plain

demonstration” of unconstitutionality to overcome the “presumption that lawfully enacted legislation is constitutional.” *Yocum*, 161 A.3d at 238.⁶ “Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.” *Winston*, 91 A. at 522. Election laws “invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)); *see also In re Zulick*, 832 A.2d 572, 578 (Pa. Commw. Ct.), *as amended* (Sept. 26, 2003), *aff’d*, 575 Pa. 140, 834 A.2d 1126 (Pa. 2003) (stating same). Recognizing that these incidental burdens are not typically matters of constitutional dimension, this Court has held that “the state may enact substantial regulation containing reasonable, non-discriminatory

⁶ *See also Working Families Party v. Commonwealth*, 209 A.3d 270, 278–79 (Pa. 2019) (“[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.’ The presumption that legislative enactments are constitutional is strong. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.”) (internal citations omitted).

restrictions to ensure honest and fair elections that proceed in an orderly and efficient matter.” *Banfield v. Cortes*, 110 A.3d 155, 177 (Pa. 2015) (citing *In re Nader*, 905 A.2d 450, 459 (Pa. 2006)).

As courts have repeatedly recognized, electoral deadlines directly promote “the public interest in the maintenance of order in the election process.” *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) (rejecting challenge to registration deadline); *accord, e.g., Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373-78 (S.D. Fla. 2004) (rejecting challenge to deadline for receipt of absentee ballots by Supervisors of Election); *Mays v. LaRose*, 951 F.3d 775, 791–93 (6th Cir. 2020) (rejecting challenge to deadline for requesting absentee ballot); *Texas Independent Party v. Kirk*, 84 F.3d 178, 184-87 (5th Cir. 1996) (rejecting challenges to deadlines for a candidate to declare intent to run for office, for holding nominating conventions, and for filing petitions by minor-party and independent candidates).

Petitioners do not dispute that deadlines play an essential role in ensuring that “some sort of order, rather than chaos, is to accompany the democratic processes,” *Burdick*, 504 U.S. at 434; indeed, they do not contend that the received-by deadline is unconstitutional under ordinary circumstances. Instead, they allege that the particular circumstances created by the COVID-19 crisis make the received-by deadline unconstitutional as applied to those circumstances. But

the Petition does not allege facts about the current situation that, even if true, would meet the significant burden required to show that a statutory election deadline is unconstitutional.

Many of the allegations in the Petition involve difficulties that any deadline, in any election, can cause for voters. For example, Petitioners allege that voters who want to wait until the last minute to fill out their ballots might wait too long to get their ballots in on time, Pet. ¶¶ 56–57; that because of differences in mail processing speeds, some voters’ ballots might reach their destinations more quickly than other voters’ ballots, Pet. ¶ 55; and that voters who apply for their ballots on the last possible day, and choose to return their completed ballots by mail rather than in person, run the risk that their ballots will not arrive on time, Pet. ¶ 52. Petitioners do not contend that any of these realities present unconstitutional barriers to voting under ordinary circumstances. To successfully plead an as-applied challenge to the received-by deadline in this case, Petitioners must plead facts that, if true, would show that something about the COVID-19 crisis has turned a constitutional deadline into an unconstitutional one. Petitioners have failed to do so.

In their Opposition to the Preliminary Objections, Petitioners contend that four sets of allegations in their Petition establish that the received-by deadline violates the Pennsylvania Constitution in the particular circumstances of COVID-

19. But upon closer examination, these allegations are nothing more than theories.⁷ First, Petitioners argue that “[i]t is an indisputable fact that applications to vote by absentee and mail-in ballot have massively increased due to the pandemic.” Opp. at 3. The Petition alleges that “[a]s of April 23 . . . more than 600,000 Pennsylvanians had requested an absentee or mail-in ballot for the June 2 primary election[.]” Pet. ¶ 46. In their Opposition to the Preliminary Objections, Petitioners offer a new statistic: 880,000 Pennsylvanians have applied for absentee or mail-in ballots as of April 30. Opp. at 3. What Petitioners do not allege, however, is (i) what these numbers suggest, if anything, about how many more applications will follow, and (ii) how these facts support Petitioners’ contention that Pennsylvanians will be deprived of the right to vote.

To support their assertion that the number of absentee and mail-in applications will lead to disenfranchisement, Petitioners make an inapt comparison to the last-second spike in absentee ballot applications in Wisconsin, where “numbers multiplied 10 times during the three weeks prior to their primary.” *Id.* at 4; *see also* Pet. ¶¶ 59–67. But just because another state, under very different circumstances, had difficulties in processing ballot applications, Pet. ¶ 62, it does

⁷ In their Opposition, Petitioners repeatedly cite to facts that were included only in their Application for Special Relief and not in the Petition. In ruling on the Preliminary Objections, however, the Court must consider only the allegations of the Petition. *See Torres*, 997 A.2d at 1245.

not follow that the same thing will happen—or is even likely to happen—in Pennsylvania. The Petition contains no allegations that show that the problems that plagued the Wisconsin primary exist in Pennsylvania.⁸

Second, the Petition forecasts that the “unprecedented increase in absentee and mail-in ballot applications *will* predictably result in backlogs in the processing and approval of such applications by county boards of elections.” Pet. ¶ 47 (emphasis added). In their Opposition, Petitioners claim that their allegations about backlogs are “concrete, not hypothesized.” But there is nothing “concrete” about Petitioners’ predictions of backlogs; Petitioners simply ask the Court to accept that they will occur.⁹

⁸ In fact, other than the fact that they were primary elections taking place during the COVID-19 pandemic, the two elections have little in common. The Wisconsin election was scheduled to occur just after the pandemic began to take hold in mid-March, and was not postponed; the Pennsylvania election was to take place three weeks after Wisconsin’s, and was then postponed for another five weeks. In Wisconsin, a surge of ballot applications rolled in immediately before the election; in Pennsylvania, a surge has occurred with weeks to spare. In Wisconsin, election officials asked to postpone the ballot receipt deadline; in this case, at this point, no county has asked a court for such relief. *See* Opp. to Mot. for Preliminary Injunction at 24–25.

⁹ The sources Petitioners cite in their Petition and Opposition do not predict backlogs and do not support Petitioners’ assertions. Two of them, a newspaper article about Allegheny County and a press release by the Chair of Philadelphia’s Board of Elections, explain what two large counties are doing to ensure that applications will be processed quickly. *See* Jamie Martines, *Allegheny County Votes to Consolidate Primary Polling Locations*, Tribune-Review, Apr. 23, 2020, <https://triblive.com/local/pittsburgh-allegheny/allegheny-county-votes-to-consolidate-primary-polling-locations/> (cited by Petitioners at Pet. ¶ 53, fn. 20) (explaining increase in staff enabling Allegheny County to process 10,000

Third, in another speculative allegation, Petitioners claim that United States Postal Service mail delivery is going to be delayed. But again, Petitioners allege no facts supporting the allegation that that postal service delays in Pennsylvania exist now or will affect the primary three weeks from now. The USPS advisory that Petitioners cite to in their Opposition to the Preliminary Objections is nearly a month old and involves packages, not election mail; the unsupported allegation that “*residents in other parts of the country* ‘are experiencing delays in their mail delivery service’” because of COVID-19 similarly supports no conclusions about what first class mail delivery times in Pennsylvania will be during the last week of May. Pet. ¶ 50 (emphasis added).¹⁰

applications a day); Press Release, Philadelphia City Commissioners’ Chairwoman Lisa Deeley Calls on Governor Wolf and the Legislature to Extend Voted Ballot Return Deadline for the June 2nd Primary, <https://twitter.com/Elaijuh/status/1252298585808535552> (cited by Petitioners at Pet. ¶ 48, fn. 16) (“Staff of the Philadelphia Board of Election are being reassigned and a greater number of staff are being brought back to work to process the increased number of absentee and mail-in ballot applications.”). A third source, Senate testimony by three election officials, describes election management challenges in broad terms, but does not predict backlogs in any particular county and does not mention the ballot return deadline at all.

¹⁰ Petitioners argue that a certified mail envelope was made “available for pickup” at a Harrisburg post office and that this is relevant to ballot delivery times. Opp. at 20. They subsequently provided evidence that the envelope may not have been held at the post office after all. Supp. Decl. of K. Glick. Even if USPS held a certified mail envelope – presumably because no one was available at the delivery location to sign for it – this anecdote has no relevance to ballots, which should not be delivered by certified mail.

Finally, Petitioners state that “contrary to Respondents’ assertions, there is nothing speculative about Pennsylvanians’ ‘health concerns about voting in person.’” Opp. at 6. Respondents did not, of course, suggest that Pennsylvanians’ health concerns are speculative. Instead, Respondents stated that Petitioners did not properly allege that those concerns created a constitutional injury.¹¹ Petitioners have not shown that that statement is incorrect.

Petitioners have not carried their “heavy burden” to overcome the “strong” “presumption that legislative enactments are constitutional,” *Working Families Party*, 209 A.3d at 279, nor do their allegations rise to the level of “clear, palpable and plain” constitutional violations. *Yocum*, 161 A.3d at 238; *see also Working Families Party*, 209 A.3d at 279. Accordingly, because Petitioners’ constitutional claims are legally insufficient, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

B. The Court Should Dismiss the Petition Because Petitioners’ Claims Are Not Justiciable

Petitioners’ claims present two justiciability issues: standing and ripeness. First, Petitioners lack standing to bring their claims. To establish standing to seek

¹¹ See Preliminary Objections at 3 (“Petitioners hypothesize that an ‘as applied’ constitutional violation will arise from some combination of factors related to the current COVID-19 crisis, such as increased numbers of absentee and mail-in ballot applications, delayed application processing by county boards of elections, slow service by the U.S. Postal Service, and voters’ health concerns about voting in person.”).

relief from this Court, Petitioners must demonstrate that they are “aggrieved,” *i.e.*, that they have “a substantial, direct, and immediate interest in the matter.”

Markham v. Wolf, 136 A.3d 134, 140 (Pa. 2016). “[A]n individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). “[A]n interest is ‘immediate’ if the causal connection is not remote or speculative.” *Id.* (citation omitted).

Here, Petitioners’ interest is not “immediate” for the same reasons that they have not alleged a constitutional injury: Petitioners rely solely on speculation to support their assertion that otherwise timely votes will not arrive at county boards of elections by the received-by deadline (and that, faced with that reality, some voters will be forced to vote in-person). It is not, as Petitioners assert in their Opposition, a “guarantee” that the individual petitioner or members of the organizational petitioners will be adversely and unconstitutionally affected by the received-by deadline. Opp. at 12–14. Rather, “any possible harm to Petitioners is wholly contingent on future events,” namely whether county boards of election or mail carriers cause delays in the delivery of otherwise timely ballots. *Pittsburgh Palisades Park*, 888 A.2d at 660.

Petitioners contend that Respondents' standing argument would require Petitioners to "predict which particular individual's ballot will take 5 days for delivery (and so will not be counted) and which particular individual's ballot will take 2 days (and will be counted)[.]" Opp. at 15. Not so. Petitioners simply must demonstrate *concretely* that the COVID-19 emergency is going to cause a breakdown in the delivery of ballots. But here, three weeks before the primary election and two weeks before the deadline for absentee and mail-in ballot applications, Petitioners have done nothing more than speculate about what the future might hold. "[A]s Petitioners do not offer that [the received-by requirement] has harmed them or will harm them in any way that is not remote or speculative, they fail to demonstrate that they have an immediate interest," as is required for standing. *Pittsburgh Palisades Park*, 888 A.2d at 660 (citation omitted).

Second, Petitioners' claims are not justiciable on ripeness grounds. Like standing, the principle of ripeness "mandates the presence of an actual controversy." *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010). Unlike standing, however, ripeness "also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute." *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013). As discussed above, Petitioners allege only that the COVID-19 crisis has created an environment where bottlenecks *may* occur at one or more

points during the balloting process. But Petitioners do not allege facts sufficient to show that the individual petitioner or any of the organizational petitioners' members are likely to suffer a constitutional deprivation as a result of these yet-to-be-identified future bottlenecks.

Beyond the speculative nature of Petitioners' claims, at this juncture the "relevant facts are not sufficiently developed to permit judicial resolution of the dispute," making Petitioners' claims unripe. *Id.* Respondents **do not** contend, as Petitioners assert, that "the case will not become ripe until after the election is over and Petitioners can identify with particularity the number of voters who were disenfranchised in each county and the number of absentee and mail-in ballot applications and completed ballots that arrived too late." *Opp.* at 10. Instead, Respondents suggest only that Petitioners must offer facts in support of their claims, not just speculation about potential mail delays and prospective backlogs of ballot applications.¹²

Accordingly, because Petitioners have not satisfied the requirements for standing and because their claims are not ripe, Respondents respectfully request that this Court sustain their second Preliminary Objection and dismiss the Petition.

¹² The mere existence of a statute of limitations cannot, as Petitioners contend, make Petitioners' claims justiciable. *Opp.* at 11. Ripeness is contingent on an actual controversy and reasonably developed facts, not the presence or absence of potential procedural hurdles.

C. The Court Should Dismiss the Petition for Nonjoinder of an Indispensable Party

The county boards of election are indispensable parties to this action. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *see also CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that Petitioners seek an injunction that would write into existence *new law* and compel *affirmative action* by the county boards of election, by requiring the boards to adopt new standards and procedures in order to count certain ballots received up to a week after the June 2 primary. *See* Pet. at p. 62 (Prayer for Relief d.1–4). Indeed, at least a portion of the requested injunction

would require county boards of election to make *subjective determinations* about “indicia that [a] ballot was mailed by the voter on or before the day of the primary or general election.” See Pet. at p. 62 (Prayer for Relief d.4). As in *CRY, Inc. v. Mill Serv., Inc.*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioners’ requested relief will require cooperation and affirmative steps from the county boards of elections.

Additionally, Petitioners’ claims hinge largely on their expectation that the county boards of elections will not be able to timely process absentee and mail-in ballots because of COVID-19: “[E]lections are not ‘equal’ when similarly situated citizens who timely request absentee and mail-in ballots may or may not have their votes counted based on factors outside their control, such as variation in mail-delivery schedules across the Commonwealth or *application-processing speeds at different county elections boards.*” Pet., ¶ 5 (emphasis added); see also, e.g., Pet., ¶¶ 3; 19; 25–27; 33; 31; 36; 47; 55, 83, 118, 153. Because Petitioners allege that the county boards of election will be at least partially responsible for violating the Pennsylvania Constitution, “justice [cannot] be afforded without violating the due process rights of” the counties. *DeCoatsworth*, 639 A.2d at 797; see also *CRY*,

640 A.2d at 376 (party was indispensable where it was accused of “misfeasance and malfeasance”).

Petitioners contend that *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953 (Pa. 1981), establishes that not all affected parties are indispensable parties. In *Kline*, the plaintiff school district sought to compel various state officials to calculate the income valuation of that district in accordance with state funding statutes; at issue was whether all the other school districts of the Commonwealth were indispensable parties to the action—given that the recalculation of one school district’s valuation might affect the calculation of the other districts’ valuation. *Id.* at 955–56. The Court held that the other school districts were not indispensable because their “right of a correct computation . . . [wa]s not interlocked with appellant [school district]’s right to a correct computation[.]” *Id.* at 958. Thus, the Court held that any “ripple effect” that might affect the other school districts was not sufficient to make them indispensable. *Id.*; *see also id.* (“Inasmuch as there is no such averment, there can be no assumption that a recalculation of Mechanicsburg’s subsidy will affect that which is received by any other unit.”).

Here, however, the rights of the county boards of election *are* interlocked with the rights of Respondents. If the Petitioners’ relief is granted, the county boards of elections’ responsibilities will change immediately, and they will have to take affirmative action over the next few weeks in accordance with those

responsibilities. Granting Petitioners' relief would *directly* require action by the county boards of election, rather than doing so by "ripple effect." *Id.*

Petitioners' reliance on *Banfield v. Cortes*, 922 A.2d 36 (Pa. Commw. Ct. 2007), is similarly misplaced. There, the court held that the county boards of elections were not indispensable in a challenge to the Commonwealth's use of Direct Recording Electronic voting systems because Petitioners "d[id] not seek redress from the fifty-six counties and, because the November 2006 election ha[d] passed[.]" *Id.* at 44. Additionally, the Court emphasized that "the counties must be prepared for [the] possibility" that the at-issue voting systems could be decertified by the Department of State. *Id.* Here, however, the election is still forthcoming and Petitioners explicitly seek relief from the county boards of election. Moreover, there is no reason that the county boards of election should expect that, notwithstanding the requirements of Act 77, they will have to create new procedures to implement new statutory deadlines for absentee and mail-in balloting weeks before the primary.

Lastly, Petitioners suggest that requiring joinder of the county boards of elections here would open Pandora's box, resulting in a *de facto* requirement that "individuals in all future cases challenging statutes or government policy as unconstitutional would systematically need to effectuate service on dozens, if not thousands, of government officials across Pennsylvania." *Opp.* at 19. This

exaggeration is a red herring. Here, Petitioners must join the county boards of election because they both seek affirmative relief from all of the counties and accuse all of the boards—without distinguishing amongst them—of unconstitutional conduct. The counties are entitled to defend themselves from this allegation and, if the Court decides that a Constitutional violation is taking place, to have a say in the fashioning of relief. Thus, the county boards of elections referenced by the Petitioners are necessary parties to this litigation.

VII. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court sustain the Preliminary Objections and enter an order dismissing the Petition for Review.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: May 12, 2020

By: /s/ Michele D. Hangley

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: May 12, 2020

/s/ Michele D. Hangle

Michele D. Hangle

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

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

Respondents.

No. 266 MD 2020

**RESPONDENTS' ANSWER TO PETITIONERS' EMERGENCY
APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A
PRELIMINARY INJUNCTION AND FOR EXPEDITED REVIEW**

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BACKGROUND

1. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

2. Admitted in part and denied in part. Respondents admit that the COVID-19 crisis is presenting challenges with respect to the administration of the 2020 primary election, and state that they are working with county boards of elections to overcome these challenges. Respondents admit that COVID-19 will necessitate taking precautions to safely permit in-person voting at polling places and, as a result, counties for some time have been planning ways to adapt in-person election day voting to the constraints caused by the pandemic. Counties are consolidating polling places to allow for reductions in the numbers of available poll workers and are facilitating social distancing and personal protection for poll workers and voters. The Department, the counties, and third parties are also attempting to ease crowding at polling places by encouraging voters to vote by mail-in or absentee ballot. To date, an unprecedented number of Pennsylvanians are taking advantage of absentee voting and the Commonwealth's newly implemented mail-in balloting procedure, the latter of which is being offered for the first time this year. Respondents admit that many county boards of elections have had to devote extra resources to respond to mail ballot requests, but state that,

based on current progress and barring a change in circumstances, they expect that a great majority of counties will be able to timely process primary ballot applications. At this point in time, the Department does not yet have knowledge or information sufficient to form a belief as to whether the remaining handful of counties will experience unexpected delays in processing applications and issuing ballots; as discussed in the accompanying Memorandum of Law, Respondents expect to receive updated data on this subject in the coming week, and will report to the Court accordingly. The remaining averments in this paragraph constitute (i) allegations about which Respondents, after reasonable investigation, lack knowledge or information sufficient to form a belief as to their truth, or (ii) allegations that are conclusions or statements of law to which no response is required. They are accordingly denied.

3. The averments in this paragraph constitute (i) allegations about which Respondents, after reasonable investigation, lack knowledge or information sufficient to form a belief as to their truth, or (ii) allegations that are conclusions or statements of law to which no response is required. They are accordingly denied.

INJUNCTIVE RELIEF

4. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

5. Denied. The averments of this paragraph are conclusions or

statements of law to which no response is required.

6. Admitted in part and denied in part. Respondents incorporate their response to Paragraph 2 of Petitioners' Application.

7. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

8. The averments in this paragraph constitute (i) allegations about which Respondents, after reasonable investigation, lack knowledge or information sufficient to form a belief as to their truth, or (ii) allegations that are conclusions or statements of law to which no response is required. They are accordingly denied.

9. Admitted in part and denied in part. Respondents admit that COVID-19 has disrupted daily life in Pennsylvania and across the country. The remaining averments in this paragraph constitute allegations that are conclusions or statements of law to which no response is required. They are accordingly denied.

10. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

11. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

12. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

13. Denied. The averments of this paragraph are conclusions or

statements of law to which no response is required.

14. Denied. The averments of this paragraph are conclusions or statements of law to which no response is required.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: May 18, 2020

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

/s/ Michele D. Hangley
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH, *et al.*,

Respondents.

No. 266 MD 2020

**RESPONDENTS' PRELIMINARY OBJECTIONS TO PETITIONERS'
PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF**

Respondent Kathy Boockvar, in her official capacity as Secretary of the Commonwealth, and Respondent Jessica Mathis, in her official capacity as Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State (collectively, “Respondents”), hereby present Preliminary Objections to the Petition for Declaratory and Injunctive Relief (“Pet.”), a copy of which is attached as Exhibit A.

I. PRELIMINARY STATEMENT

In 2019, with broad and bipartisan support, the Pennsylvania legislature enacted Act 77 of 2019,¹ which made several important updates and improvements to Pennsylvania’s Election Code. Among these were provisions that, for the first time, offered the option of mail-in voting to Pennsylvania electors who did not qualify for absentee voting. This historic change was a significant development that undeniably makes it easier for all Pennsylvanians—including Petitioners and their members—to exercise their right to vote.

Act 77 was the result of complex negotiations between the executive and legislative branches, with neither receiving everything it bargained for. While the statute may not align in every respect with Respondents’ policy views or the

¹ Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West).

institutional preferences of the Pennsylvania Department of State (the “Department”), Respondents recognize that many of its provisions are the product of good faith tradeoffs between competing considerations. Such tradeoffs were likely reflected in various deadlines. Every deadline in the election process can present an obstacle because every deadline can be missed; however, deadlines are necessary for the effective management of elections. One change made by Act 77 was to extend the deadline for return of absentee and mail-in ballots from the Friday before Election Day to 8:00 p.m. on Election Day.

Respondents understand that Petitioners do not challenge any of Pennsylvania’s election laws as unconstitutional under normal circumstances. Instead, Petitioners hypothesize that a constitutional violation will arise from some combination of factors related to the current COVID-19 crisis, such as increased numbers of absentee and mail-in ballot applications, delayed application processing by county boards of elections, slow service by the U.S. Postal Service, and voters’ health concerns about voting in person. Petitioners further hypothesize that this combination of factors renders unconstitutional Act 77’s deadline for receipt of absentee and mail-in ballots, and requires implementation of other policies that will, according to Petitioners, make it easier to vote by mail.

Respondents do not at all disagree with Petitioners’ general concerns about COVID-19’s effect on the voting process; indeed, the COVID-19 pandemic is

causing real and constantly evolving challenges to every aspect of administering the primary election. Moreover, there are reasonable differences of opinion among election management officials as to the wisdom of the policies Petitioners advocate. Respondents agree with Petitioners that from a policy perspective—especially during an emergency, such as the one that currently presents itself, that may affect the timeframes for mailing ballots—extending the deadlines for returning ballots could increase the likelihood that all ballots will be timely received. The Commonwealth’s existing laws, however, reflect a different policy, and in the absence of a constitutional violation, this Court cannot wholesale overrule that choice. Here, Respondents believe that Petitioners’ predicted statewide breakdown of the election system is too speculative, at this point, to state a claim under the Pennsylvania Constitution or to establish Petitioners’ standing.

Throughout the run-up to the primary election, Respondents and the county boards of elections have been directing significant effort toward educating voters on the importance of applying for absentee or mail in ballots as soon as possible—a message that appears to have been heard and acted on by over 1.5 million voters already—and strengthening counties’ processes for reviewing ballot applications and mailing out ballots. Thanks to the delay of the primary that added five additional weeks for voters to cast their ballots by mail, it appears that the great majority of Pennsylvania’s 67 counties are not experiencing significant difficulties

with processing mail-in and absentee ballot applications. To the extent that a handful of counties experience such difficulties, Respondents believe that the proper remedy would be county-level challenges to county conditions, rather than the sweeping, statewide amendment of voting procedures that Petitioners seek.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

1. The Secretary of the Commonwealth is tasked with the important duty of leading the Department of State's work to protect the integrity and security of the electoral process in Pennsylvania. In this role she coordinates with a wide range of stakeholders—including government officials from the local to the federal level, the public, public interest groups, and election technology experts—to ensure that Pennsylvania's elections are free, fair, secure, and accessible to all eligible voters.

2. The Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State supervises the Commonwealth's Election Services and Voter Registration divisions. The Bureau is responsible for planning, developing and coordinating the statewide implementation of the Election Code, voter registration process, and notaries public law.

3. Petitioners—four individuals and one organization—filed their Petition for Declaratory and Injunctive Relief with this Court on April 22, 2020.

4. The Petition alleges four potential burdens on voting by mail during the COVID-19 pandemic. First, Petitioners take issue with the Pennsylvania Election Code's requirement that, to be counted, a voter's absentee or mail-in ballot must be received by the appropriate county board of elections "by 8:00 p.m. on Election Day," which Petitioners refer to as the "Election Day Receipt Deadline." *See* Pet. ¶ 34 (citing 25 P.S. §§ 3146.6(c), 3150.16(c)); *see also* Pet. ¶ 3. Second, Petitioners challenge the provision that "in most cases prohibits third parties from assisting voters in delivering mail ballots." *See, e.g.,* Pet. ¶ 42 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Third, Petitioners allege that "most voters who choose to return their ballots by mail must also provide their own postage," but some individuals cannot afford this expense. *See, e.g.,* Pet. ¶ 48 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Finally, Petitioners contend that unidentified "counties . . . rely on signature matching to determine whether mail ballots should be counted," leading to ballots being arbitrarily discounted. *See, e.g.,* Pet. ¶ 54 (citing 25 P. S. § 3146.8(g)(3)).

5. According to Petitioners, because of COVID-19, (i) individual voters do not want to vote in person; (ii) counties may fall behind on processing ballot applications; (iii) the United States Postal Service may be slow in returning filled-out ballots to county boards of elections; and (iv) there are additional possible barriers to voting by mail, including the (a) inability to use third-party assistance to

return ballots; (b) monetary costs for postage; and (c) rejection of votes in unspecified counties using signature verification. Thus, according to Petitioners, voters are at risk of being disenfranchised. *See, e.g., Pet., ¶¶ 3–6.*

6. Petitioners seek a declaration that (i) the failure to provide prepaid postage on absentee and mail-in ballots is unconstitutional; (ii) it is unconstitutional to fail to provide procedures for counting mail ballots returned after 8:00 p.m. on Election Day; (iii) it is unconstitutional to disallow third party mail ballot collection or assistance; and (iv) it is unconstitutional to fail to “provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for a signature mismatch.” *Pet. at p. 34.*

7. Petitioners further seek an order requiring Respondents to: (i) provide prepaid postage on all absentee and mail-in ballots; (ii) “implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day . . . will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause;” (iii) “[a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots and ensure that all such ballots are counted if otherwise eligible;” and (iv) “[p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice

and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” *Id.* at pp. 34–35.

8. Petitioners appear to seek relief for 2020 and beyond, including for the primary election scheduled for June 2, 2020, the general election scheduled for November 3, 2020, and other elections after 2020.

9. The COVID-19 crisis is, as Petitioners allege, presenting severe and unprecedented challenges to the administration of the primary election.

10. Respondents, along with the entire Department, the General Assembly, county boards of elections, and other stakeholders, have been bending their efforts toward ensuring that the primary election proceeds as smoothly as possible in light of these challenges.

11. The General Assembly has already taken a critical step in this effort: postponing the primary election from April 28 to June 2.² In the same legislation, the General Assembly also gave counties flexibility in recruiting poll workers and relocating polling places, for the June 2, 2020 primary, and allowed counties to begin pre-canvassing absentee and mail-in ballots at 7 a.m. on election day.³

² See Act of Mar. 27, 2020 (P.L. 41, No. 12), 2020 Pa. Legis. Serv. Act. 2020-12 (S.B. 422) (West). Courts “may take judicial notice of public documents in ruling on a preliminary objection in the nature of a demurrer.” *Solomon v. U.S. Healthcare Sys. of Pennsylvania, Inc.*, 797 A.2d 346, 352 (Pa. Super. 2002).

³ See *id.*

12. Because of the General Assembly's actions, Pennsylvania's election officials are not in the same position as Wisconsin's, who were required to adapt to the COVID-19 pandemic during its early stages, with little time to prepare. *See* Pet. ¶¶ 27–29. The postponement of the primary election has given the Department and boards of elections additional weeks to prepare for the primary election and allow voters to cast mail-in ballots.

13. In furtherance of the Commonwealth's efforts, the Department has mailed postcards to all households with registered primary voters (voters registered to either major political party), informing voters about (i) the changed primary date and (ii) the availability of absentee and mail-in voting options. The Department is also conveying this information to voters using bilingual statewide TV, radio, and streaming online broadcasts.⁴

14. Additionally, the Department is accepting requests for absentee and mail-in ballot applications via a call-in number, 1-877-VOTESPA. Thus far, the

⁴ *See* Public Hearing on Primary Election Issues Related to the Ongoing COVID-19 Restrictions: Hearing Before the Senate State Government Committee (April 30, 2020) (Testimony of Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania) *available at* <https://www.pasenategop.com/blog/043020/>. The Court may take judicial notice of testimony presented at this public hearing. *See Solomon*, 797 A.2d at 352; *Harrisburg Sch. Dist. v. Hickok*, 762 A.2d 398, 401 fn.1 (Pa. Commw. Ct. 2000), *as amended* (Nov. 15, 2000) (taking judicial notice of legislative history of Senate bill).

Department has already received thousands of telephone requests and mailed out thousands of applications.⁵

15. Finally, the Department has taken various other measures aimed at smoothing the administration of the primary election. It has, for example, provided counties with \$13 million in sub-grants—which the Commonwealth received from the federal government—for the counties to use towards additional staff, purchasing equipment, and otherwise ensuring the primary is administered as seamlessly as possible.⁶ The Department has also procured 6,000 safety kits to provide to counties, which include masks, gloves, and other supplies for safely administering in-person voting.⁷

III. PRELIMINARY OBJECTIONS

A. **First Preliminary Objection: Only the Pennsylvania Supreme Court Has Jurisdiction to Hear This Matter (Pa. R. Civ. P. 1028(a)(1))**

16. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

17. Section 13(2) of Act 77 provides that the “Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

judgment concerning the constitutionality” of certain enumerated provisions, including Section 1306 and all of Article XIII-D of Act 77.

18. Section 1306 of Act 77 is codified at 25 P.S. § 3146.6. § 3146.6(c) sets forth the Election Day Receipt Deadline for absentee ballots: “[A] completed absentee 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.”

19. Article XIII-D of Act 77 contains Section 1306–D, which is codified at 25 P.S. § 3150.16. § 3150.16(c) sets forth the Election Day Receipt Deadline for mail-in ballots: “[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.”

20. Each of the three counts in the Petition includes constitutional challenges to the enforcement of the Election Day Receipt Deadline as enacted. *See* Pet. ¶¶ 63, 71, 77.

21. Thus, only the Pennsylvania Supreme Court has jurisdiction to hear Petitioners’ claims, and Petitioners’ claims must be transferred there. *See* 42 Pa. C.S.A. § 5103 (stating that if a court does not have jurisdiction over a matter, the court “shall transfer the record thereof to the proper tribunal”); *Kneller v. Stewart*, 112 A.3d 1269 (Pa. Commw. Ct. 2015).

WHEREFORE, Respondents respectfully request that this Court sustain their

Preliminary Objection for lack of jurisdiction and transfer this matter to the Pennsylvania Supreme Court.

B. Second Preliminary Objection: The Petition Should Be Dismissed for Nonjoinder of a Necessary Party Because Petitioners Seek Redress from Pennsylvania Counties and Those Counties Are Therefore Indispensable to the Resolution of This Action (Pa. R. Civ. P. 1028(a)(1))

22. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

23. Petitioners failed to join necessary parties to this action. A court must join the necessary party or, if that is not possible, dismiss the action “[w]henver it appears by suggestion of the parties or otherwise . . . that there has been a failure to join an indispensable party.” Pa. R. Civ. P. 1032(b).

24. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); accord *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372, 375 (Pa. 1994). “The absence of indispensable parties goes absolutely to the jurisdiction, and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations omitted). The failure to join an indispensable party is a non-waivable issue. *See id.*; *see also Fiore v. Oakwood Plaza Shopping Center, Inc.*, 585 A.2d 1012, 1020

(Pa. Super. 1991) (stating issue of failure to join indispensable party cannot be waived).

25. The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

26. Petitioners allege that the counties are engaging in unconstitutional conduct and call for relief that requires action from the counties.

27. For example, Petitioners allege that the Commonwealth’s county boards of elections will not utilize appropriate verification procedures for mail ballots: “In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and *their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.*” *See, e.g.*, Pet. ¶ 59 (emphasis added); *see also* Pet. ¶¶ 54–55, 58, 67, 71, 80.

28. Petitioners also allege that counties are “falling behind on processing mail-in ballot requests,” Pet. ¶ 35, placing voters in jeopardy of violating the Election Day Receipt Deadline.

29. In Count III of the Petition, Petitioners allege that this conduct by the *counties*—not by Respondents—deprives voters of procedural due process. Pet. ¶¶ 78–81.

30. Petitioners also allege that counties, including Beaver County, will unconstitutionally fail to provide prepaid postage for mail ballots. Pet. ¶ 52.

31. Moreover, Petitioners’ requested relief requires affirmative actions by the non-joined county boards of elections. The injunctive relief that Petitioners purport to seek—which includes “[p]rovid[ing] prepaid postage on all absentee and mail-in ballots”), “[i]mplement[ing] additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day ... will be counted if otherwise eligible” and “[p]rovid[ing] uniform guidance and training to election officials involved in verifying mail ballots and implement[ing] procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected”—will require county action and the direct involvement of county election officials. Pet. at pp. 34–35 (Prayer for Relief).

32. Petitioners have not joined county election officials despite the fact that Petitioners seek to alter conduct of the county boards. Put another way, Petitioners' claims seek to direct the counties' behavior and relate substantially to the counties' responsibilities, and the counties' behavior and responsibilities are essential to the merits of Petitioners' claims.

33. Thus, the county boards of elections referenced by the Petitioners are necessary parties to this litigation, which Petitioners failed to join.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for lack of jurisdiction based on Petitioners' failure to join a necessary party, and enter an order directing that the county boards of elections be joined or dismissing the Petition for Declaratory and Injunctive Relief.

C. Third Preliminary Objection: Petitioners Do Not Allege a Constitutional Violation (Pa. R. Civ. P. 1028(a)(4))

34. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

35. The Petition for Declaratory and Injunctive Relief is based entirely on purported constitutional violations, but Petitioners have not adequately alleged an actual—rather than hypothetical—constitutional injury. The Petition must therefore be dismissed for legal insufficiency.

36. The Pennsylvania Constitution provides that “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives.” PA. CONST. art. II, § 1.

37. Because Petitioners ask this Court to invalidate a statute, this case necessarily implicates the separation of powers. While a court may always determine the constitutionality of a statute, it is not the court’s role to pass judgment on the statute’s wisdom. “In our judicial system[,] the power of courts to formulate pronouncements of public policy is sharply restricted; otherwise they would become judicial legislatures rather than instrumentalities for the interpretation of law. Generally speaking, the Legislature is the body to declare the public policy of a state and to ordain changes therein.” *Mamlin v. Genoe (City of Phila. Police Beneficiary Ass’n)*, 17 A.2d 407, 409 (Pa. 1941).

38. This is especially true when courts are effectively asked to rewrite provisions of the Pennsylvania Election Code. “Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914). “This system of regulating free and equal elections would be more than a human device if it did not encounter criticism. . . . It may or may not be wise legislation. The convenience of the

elector may not have been properly considered when it was passed. Another system might be more convenient. Defects in it may be fairly pointed out, and improvements suggested. But these are not matters for us. [Courts'] duty is to apply the touchstone of the Constitution[.]” *Oughton v. Black*, 61 A. 346, 349 (Pa. 1905).

39. Indeed, constitutional challenges to election law are cognizable only where the injury is concrete. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Yocum v. Commonwealth of Pennsylvania Gaming Control Bd.*, 161 A.3d 228, 238 (Pa. 2017) (citation and quotation omitted). “[N]othing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.” *Winston*, 91 A. at 523.

40. Although Petitioners premise their claims on different provisions of the Pennsylvania Constitution, the alleged injury in each instance is at bottom the same: If the anticipated COVID-19-related complications materialize, and this Court does not grant the relief Petitioners seek, some votes will not be counted.

Petitioners' alleged injuries are too speculative at this point to cross the constitutional Rubicon.⁸

41. Petitioners rely on conjecture to assert that COVID-19 may cause mailed ballots to go uncounted. The allegations set forth a string of theoretical what-ifs: Counties could fall behind on processing mail in and absentee ballot applications, Pet. ¶ 35; the U.S. postal system may need more time to deliver some things due to decreased capacity (“it is likely that the USPS will need to make cuts to routes, processing centers, or staff”), Pet. ¶ 26; Pennsylvania voters casting mail in ballots will “bear the brunt of these cuts”, Pet. ¶ 26; and resulting delays will therefore disenfranchise voters.

42. Petitioners' contentions about other alleged barriers to mail ballots are similarly speculative and vague. Petitioners allege that third party ballot collection, prepaid postage, and different ballot review procedures would ease the voting process for some, but do not tie these alleged improvements to actual, current COVID-19 related complications or to alleged constitutional violations.

⁸ On May 15, 2020, the Pennsylvania Supreme Court dismissed a different petition, which also alleged that the Election Day Receipt Deadline violated the Constitution, on similar grounds. *See Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020, Concurring Statement of Wecht, J. dated May 15, 2020 (“[W]hile circumstances may change, the possibility that votes may be suppressed due to late ballot delivery, as presently alleged, is too remote at this time to constitute a cognizable injury.”). Because the allegations of *Disability Rights* and this case are very different, the Supreme Court’s decision is persuasive but not dispositive here.

43. The Petition offers that given the COVID-19 emergency, something is likely to go wrong with someone's absentee or mail-in ballots, and that extending the ballot return deadline is a good way of correcting that wrong. But nothing in the Petition gives any specifics on what exactly will go wrong, where it will go wrong, or why the state-wide remedy Petitioners seek will correct the problem.

44. At this point, Respondents believe that they have enough information to predict that certain Pennsylvania counties may have difficulty with timely processing of mail-in and absentee ballot applications. They will continue to update the Court on the status of the counties' efforts, including in a supplemental Declaration to be filed shortly. Accordingly, Respondents believe that if the Court agrees that the Petition is too speculative, Petitioners should be given leave to amend it.

45. But Petitioners have not yet alleged a series of events that is anything other than speculation. As a result, Petitioners fail to allege that enforcement of current laws and procedures will result in a constitutional violation. Therefore, as it is currently stated, the Petition for Review does not allege a cognizable constitutional injury.

46. Respondents agree with Petitioners that procedures that extend the deadline for receipt of ballots may be good policy under the circumstances, and could increase the number of votes that are timely returned. This might well

increase voters' confidence in the midst of a crisis. Without properly alleging a constitutional violation, however, Petitioners lack a basis to ask this Court to change election procedures that the legislature has put in place, however welcome that change might be to many stakeholders. Petitioners have not succeeded in making that allegation; they cannot establish the "gross abuse" necessary to overcome the "presumption of constitutionality" that election laws enjoy, *In re Nomination Papers of Rogers*, 908 A.2d at 955 (Pa. Commw. Ct. 2006), nor do the allegations rise to the level of "clear, palpable and plain" constitutional violations. *Yocum*, 161 A.3d at 238.

47. Accordingly, because Petitioners' constitutional claims are legally insufficient, their claims must be dismissed pursuant to Pa. R. Civ. P. 1028(a)(4).

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for legal insufficiency of the pleading and dismiss without prejudice the Petition for Declaratory and Injunctive Relief.

D. Fourth Preliminary Objection: Petitioners Lack Standing and Their Claims Are Not Ripe (Pa. R. Civ. P. 1028(a)(4), Pa. R. Civ. P. 1028(a)(5))

48. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

49. To establish standing to seek relief from this Court, a party must demonstrate that it is "aggrieved," that is, that it has "a substantial, direct, and

immediate interest in the matter.” *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016).

50. “With respect to this requirement of being aggrieved, an individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing.” *Pittsburgh Palisades Park, LLC v. Com.*, 888 A.2d 655, 660 (Pa. 2005) (citation omitted). “[A]n interest is ‘immediate’ if the causal connection is not remote or speculative.” *Id.* (citation omitted).

51. Similarly, the principle of ripeness “mandates the presence of an actual controversy.” *Bayada Nurses, Inc. v. Department of Labor and Industry*, 8 A.3d 866, 874 (Pa. 2010). Unlike standing, however, ripeness “also reflects the separate concern that relevant facts are not sufficiently developed to permit judicial resolution of the dispute.” *Robinson Twp., Washington Cty. v. Com.*, 83 A.3d 901, 917 (Pa. 2013).

52. As discussed above, Petitioners allege only that the COVID-19 crisis has created an environment where bottlenecks may occur at one or more points during the balloting process. Petitioners do not allege facts sufficient to show that the individual petitioners or any of the organizational petitioner’s members are likely to suffer a constitutional deprivation as a result of these yet-to-be-identified bottlenecks.

53. Petitioners speculate about an injury that *might* occur, to someone, if—and only if—certain contingencies do or do not arise.

54. “Thus, any possible harm to Petitioners is wholly contingent on future events.” *Pittsburgh Palisades Park*, 888 A.2d at 660. “[A]s Petitioners do not offer that [the received-by requirement] has harmed them or will harm them in any way that is not remote or speculative, they fail to demonstrate that they have an immediate interest,” as is required for standing. *Id.* (citation omitted).

55. Accordingly, because Petitioners have not satisfied the requirements for standing and because their claims are not ripe, Respondents respectfully request that this Court sustain their Preliminary Objection and dismiss the Petition.

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection for lack of standing and ripeness and enter an order dismissing the Petition for Declaratory and Injunctive Relief.

E. Fifth Preliminary Objection: Sovereign Immunity Bars This Petition to The Extent It Would Require Respondents to Pay Postage For Mail-In Ballots (Pa. R. Civ. P. 1028(a)(1))

56. Respondents incorporate by reference the preceding paragraphs of these Preliminary Objections.

57. Sovereign immunity⁹ prohibits suits that “seek to compel affirmative action on the part of state officials.” *See, e.g., Fawber v. Cohen*, 532 A.2d 429,

⁹ Although sovereign immunity is an affirmative defense, it may be raised in

433-34 (Pa. 1987)); *see also Snelling v. Dept. of Transp.*, 366 A.2d 1298, 1304 (Pa. Commw. Ct. 1976) (holding sovereign immunity bars portion of suit seeking to compel the Secretary of the Department of Transportation “to revoke previously-issued high-way occupancy permits”).

58. Therefore, the doctrine of sovereign immunity prevents Petitioners from obtaining an order requiring Respondents to provide (i) prepaid postage on all absentee and mail-in ballots and (ii) uniform guidance and training to election officials involved in verifying mail ballots.

preliminary objections where a delayed ruling would serve no purpose. *Faust v. Dep't of Revenue*, 592 A.2d 835, 838 n.3 (Pa. Commw. Ct. 1991).

WHEREFORE, Respondents respectfully request that this Court sustain their Preliminary Objection and enter an order dismissing Petitioners' claims to the extent they seek to compel Respondents to provide prepaid postage on all absentee and mail-in ballots.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: May 22, 2020

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: May 22, 2020

/s/ Michele D. Hangle

Michele D. Hangle

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. _____

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Petitioners Michael Crossey, Dwayne Thomas, Irvin Weinreich, Brenda Weinreich, and the Pennsylvania Alliance for Retired Americans file this Petition for Declaratory and Injunctive Relief against Defendants Kathy Boockvar in her official capacity as Secretary of the Commonwealth and Jessica Mathis in her official capacity as the Director of the Bureau of Election Services and Notaries, and allege as follows:

NATURE OF ACTION

1. The United States is in the midst of an unprecedented pandemic. The highly infectious coronavirus (“COVID-19”) is rapidly spreading throughout the country. As of April 22, 2020, there are 34,528 confirmed cases of COVID-19 in Pennsylvania, and 1,564 deaths. These numbers are rapidly increasing and projections from the federal government indicate that the virus will persist at least into the fall, if not longer. Indeed, the Director of the Centers for Disease Control and Prevention recently cautioned that the country may encounter a second, more deadly

wave of COVID-19, which will “be even more difficult than the one we just went through.”¹ This means that Pennsylvania’s upcoming elections will occur in the middle or immediate aftermath of a severe public health crisis. If the recent primary election in Wisconsin is any guide, it illustrates that advance planning and proactive measures to ensure that voters have sufficient access to vote by mail are essential to protect the right to vote and prevent large-scale disenfranchisement.²

2. Petitioners bring this lawsuit because the primary and general elections are fast approaching, yet the Commonwealth has failed to implement adequate safeguards to ensure a free and fair election, in which all citizens have a meaningful opportunity to vote as required by the Pennsylvania Constitution. County election officials have already indicated that in-person voting will be severely compromised in upcoming elections and have encountered some of the same election administration challenges that plagued the Wisconsin primary: some institutions, including retirement communities and nursing homes, are refusing to serve as polling locations and others will likely follow suit, which has led to the consolidation of polling places; poll workers, many of whom are elderly, are already refusing to report to duty; elections staff responsible for processing voter registration and absentee ballot applications were sent home; and county officials have expressed concern that the existing infrastructure is ill-suited to conduct in-person voting while complying with social distancing guidelines. At the same time, Pennsylvania voters are already requesting absentee and mail-in ballots (collectively, “mail ballots”) at record rates, even though the June primary election is still several weeks away.

¹ Zack Budryk, *CDC director warns second wave of coronavirus might be ‘more difficult’*, THE HILL (Apr. 21, 2020), <https://thehill.com/policy/healthcare/493973-cdc-director-warns-second-wave-of-coronavirus-might-be-more-difficult>

² Peter Baker & Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html>.

3. As Pennsylvanians are increasingly forced to turn to absentee or mail-in voting—made possible by new legislation that expanded vote by mail to all eligible voters (“Act 77”)—they will encounter numerous obstacles that, unless enjoined, will disenfranchise significant numbers of voters and violate state law, including the constitutional guarantee to a free and fair election. For instance, Pennsylvania law requires that all mail ballots must be *delivered* to election officials by 8:00 p.m. on Election Day (“Election Day Receipt Deadline”). While Petitioners do not currently challenge this rule’s validity as a general matter—nor do they seek any relief that would trigger Act 77’s non-severability clause—the challenges faced by the U.S. Postal Service during this pandemic, and the resulting disruptions in mail delivery, require additional protections for voters whose ballots are delayed through no fault of their own. At the very least, Pennsylvania should be required to count ballots received for up to seven days following Election Day, on an emergency basis during the current pandemic, in order to account for the delivery of delayed mail ballots. This would ensure that all Pennsylvania voters have an equal chance to vote by mail during this difficult and unprecedented crisis, aligning the receipt deadline for everyone with the current deadline imposed for overseas and military voters to submit their ballots.

4. Making matters worse, Pennsylvania law prohibits voters from obtaining assistance from third parties in mailing or submitting ballots in person, and requires that ballots be returned by mail or delivered *by the voter*, unless the voter is disabled. 25 P.S. §§ 3146.6(a); 3150.16(a). This restriction burdens the franchise for countless Pennsylvanians who lack access to reliable mail service and cannot safely deliver their ballots in person, and denies historically disadvantaged communities—along with those attempting to navigate the mail-in voting process for the first time—the necessary assistance required to ensure timely delivery of their ballots.

5. Voting by mail further requires payment of postage, which creates an unnecessary burden that threatens to disenfranchise the most vulnerable members of the electorate. It imposes a monetary cost on the voting process at a time when many Pennsylvanians are suffering from the devastating economic impact of COVID-19, and it requires voters who do not have ready access to postage to subject themselves to public health risks in order to visit a post office or return their ballots in-person.

6. Removing these barriers is only the first step to ensuring a meaningful opportunity to vote; the Pennsylvania Constitution also guarantees voters the right to have their properly submitted ballots counted. But in addition to the obstacles posed above, outdated and highly error-prone signature verification procedures threaten to disenfranchise eligible voters. It is unclear what, if any, standards election officials follow in verifying signatures on mail ballots; election officials are not required by law to engage in signature verification training, nor are they required to provide voters any prior notice or an opportunity to cure a perceived signature defect. The current mail ballot system thus subjects voters in some counties to an impermissible risk of arbitrary disenfranchisement.

7. To be sure, the Commonwealth's officials have recognized the disrupting effect of the COVID-19 pandemic and have taken some action, but much is left to do in order to guarantee a free and fair election. On March 27, Governor Tom Wolf signed Senate Bill 422 (Act 12 of 2020), which, among other provisions, moved the 2020 primary election from April 28 to June 2. But the Commonwealth is currently under a stay-at-home order, which requires residents "to stay at home except as needed to access, support, or provide life-sustaining business, emergency, or government services." The order also requires residents to practice social distancing and prohibits gatherings of individuals outside of the home except to access, support, or provide life-sustaining

services. While the order as it is currently written expires on May 8, the Governor has not indicated that he is ready to ease safety restrictions.³

8. Even assuming the Governor's order is lifted, the number of confirmed COVID-19 cases will rise, and efforts to minimize the spread of the virus or the risk of infection will continue to disrupt day-to-day life. As Governor Wolf has cautioned, Pennsylvanians will not return to business as usual with the snap of a finger. Election officials will continue to encounter difficulty in securing and staffing polling places, and voters will be deterred by the public health risks created by packing more precincts or divisions—and, by extension, more people—into fewer, crowded polling locations. That is why Commonwealth officials have been actively promoting voting by mail, according to a Department of State spokesperson.

9. By all accounts, Pennsylvanians have heeded this warning and are applying to vote by mail in record numbers for the upcoming June and November elections. As of this week, Pennsylvania counties have received approximately 600,000 applications for mail ballots for the June 2 election, a contest still several weeks away. In comparison, approximately 84,000 absentee ballots were cast in the 2016 primary election.⁴ To protect the right to vote and ensure a meaningful, free, and fair election in the midst of the current pandemic, as required by the Pennsylvania Constitution, the Commonwealth must implement safeguards to ensure that all voters have an opportunity to submit mail ballots and to have those ballots counted.

10. Petitioners therefore request that the Court issue an Order requiring Defendants to: adopt additional procedures to ensure that ballots delivered after the Election Day Receipt

³ See Governor's Remarks of April 17, 2020, <https://www.governor.pa.gov/newsroom/governor-tom-wolf-covid-19-remarks-april-17-2020/> ("Unfortunately, we cannot flip a switch and reopen the commonwealth. There won't be one big day. We need to make smart, data driven decisions.").

⁴ Mark Scolforo & Michael Rubinkam, *Mail-in, absentee ballot applications surge for June primary*, Pittsburgh Post-Gazette (Apr. 15, 2020), <https://www.post-gazette.com/news/politics-state/2020/04/15/Mail-in-absentee-ballot-applications-surge-for-June-primary-pennsylvania/stories/202004150076>.

Deadline due to mail delivery delays or disruptions are counted if received within seven days of Election Day—to the extent that such procedures do not trigger Act 77’s non-severability clause; permit third parties to assist voters in submitting their sealed mail ballots; provide pre-paid postage for all mail ballots; and impose uniform guidelines for mail ballot verification that mandates training for election officials engaged in signature matching, and requires officials to provide voters with notice and a reasonable opportunity to cure before rejecting mail ballots for any signature-related defect. With the primary and general elections fast approaching, the time to act is now, to prevent widespread disenfranchisement and ensure that voters have a meaningful opportunity to participate in the electoral process.

JURISDICTION AND VENUE

11. This Court possesses original and exclusive jurisdiction over Petitioners’ claims against the Secretary and Director, statewide officers of the “Commonwealth government.” 42 Pa. C.S. § 761(a)(1), (b).

PARTIES

12. Petitioner Michael Crossey is a duly registered Pennsylvania voter and resident of Allegheny County. Mr. Crossey is 69 years old and is a retired schoolteacher and former president of the Pennsylvania State Education Association. He is currently the treasurer for the Pennsylvania Alliance for Retired Americans. Mr. Crossey has always voted in-person at the polls on election day in Pennsylvania but due to arthritis in his knees, he will face a hardship if forced to stand in line for extended periods of time. Because of the current spread of COVID-19 throughout Pennsylvania, and because he knows that the disease is particularly harmful to voters his age, Mr. Crossey requested a mail-in ballot this year so that he would not need to vote in public on election day. Mr. Crossey is concerned that, because of mail delivery delays, he may need to personally deliver his ballot to ensure it arrives on time. Not only does this present health concerns—due to

COVID-19's effect on the 65 and older population—but Mr. Crossey is also concerned that he will need to stand in line for long periods of time to submit his mail ballot, exacerbating his injuries. Mr. Crossey would seek assistance in returning his ballot if a third party were permitted to assist him. Finally, Mr. Crossey is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

13. Petitioner Dwayne Thomas is a duly registered Pennsylvania voter and resident of Fayette County. He is 70 years old and is a retired mineworker. Mr. Thomas is the current president of the Pennsylvania Alliance for Retired Americans. Mr. Thomas usually votes in-person at the polls on election day and often encounters long lines at his polling site. This year, Mr. Thomas requested an absentee ballot as a precautionary measure to avoid high-trafficked public places in light of the spread of COVID-19 across the state. Mr. Thomas has consistently had issues sending and receiving mail through the U.S. Postal Service: his letters and packages rarely arrive on time at their desired locations; he often receives returned mail even when he has correctly addressed envelopes and packages; and he often fails to receive letters and packages sent to him through the postal service. Knowing this, Mr. Thomas is concerned that he will need to personally deliver his absentee ballot but is also concerned that this will expose him to COVID-19. He would seek assistance in returning his ballot if a third party were permitted to assist to him. Mr. Thomas is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

14. Petitioner Irvin Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Mr. Weinreich is a disabled war veteran and retired maintenance worker. He has never missed an opportunity to vote in person on election day. Mr. Weinreich frequently has trouble navigating his polling site because it is difficult for him to ascend steps or steep ramps at

his polling site, and he struggles to walk the distance from the street and through the building to reach the voting area. Mr. Weinreich has heart issues and diabetes; even before the spread of COVID-19, Mr. Weinreich was afforded limited public interactions because the common cold could render him incapacitated. For the first time in his life, Mr. Weinreich requested a mail-in ballot this year due to the hardships he faces when voting in-person at his polling site. But he is concerned that his ballot may not arrive in time for the Election Day Receipt Deadline and therefore he may be forced to personally deliver his mail ballot. If permitted, Mr. Weinreich would rely on a third party to assist him in delivering his ballot to the proper location. Because this is his first time voting by mail, Mr. Weinreich is also concerned about the risk that his ballot may not be counted due to the mail ballot verification procedures and potential variations in his signature.

15. Petitioner Brenda Weinreich is a duly registered Pennsylvania voter and resident of Catasauqua County. Ms. Weinreich is a retired textile factory worker. She has never missed an opportunity to vote in person on election day. Ms. Weinreich frequently has trouble navigating her polling site because, due to a knee replacement, it is difficult for her to ascend steps or steep ramps at the polling site, and she struggles to walk the distance from the street and through the building to reach the voting area. Ms. Weinreich is a caretaker for her husband and would be unable to push him up the steep ramp at the polling site if he needed to be in a wheelchair or scooter. Because she is his caretaker, Ms. Weinreich is frequently required to do tasks that require public exposure, such as grocery shopping. But at 70, Ms. Weinreich is within the age group of people who are vulnerable to the more dire consequences of COVID-19. Therefore, limiting her exposure to the public is both necessary for her own health and her ability to care for her husband. Ms. Weinreich is voting by mail this year but is concerned that her ballot may not arrive to the proper polling location in time to meet the Election Day Receipt Deadline, and therefore she is concerned that she will need to

risk both the public exposure and the physical hardships of delivering her ballot in person. If permitted, Ms. Weinreich would rely on a third party to assist her in delivering her ballot. Finally, Ms. Weinreich is concerned about the risk that her ballot may not be counted due to the mail ballot verification procedures and potential variations in her signature.

16. The Pennsylvania Alliance for Retired Americans (“the Alliance”) is incorporated in Pennsylvania as a 501(c)(4) nonprofit, social welfare organization under the Internal Revenue Code. The Alliance has 335,389 members, composed of retirees from public and private sector unions, community organizations and individual activists. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance’s mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Election Day Receipt Deadline, the prohibition on third party mail ballot collection assistance, the lack of pre-paid postage for mail ballots, and the mail ballot verification process which allows election officials to engage in an arbitrary signature matching and erroneously reject mail ballots frustrates the Alliance’s mission because it deprives individual members of the right to vote and to have their votes counted, threatens the electoral prospects of progressive candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and makes it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. The Alliance and its individual members intend to engage in voter assistance programs. These programs would, but do not currently, include voter education and awareness campaigns and returning mail ballots for those electors who require assistance. The Alliance cannot further these activities because of Pennsylvania’s prohibitions.

17. Defendant Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity. As Secretary, she is Pennsylvania’s Chief Election Official and a member of

the Governor’s Executive Board. The Secretary is charged with the general supervision and administration of Pennsylvania’s elections and election laws. Among her numerous responsibilities in administering elections, including ballots cast by mail, she is charged with tabulating, computing, and canvassing all votes cast as well as certifying and filing the votes’ tabulation, 25 P.S. § 3159, and ordering county boards to conduct recounts and recanvasses, *id.* §2621(f.2).

18. Defendant Jessica Mathis is the Director of the Bureau of Election Services and Notaries (“Bureau”). The Bureau is responsible for planning, developing, and coordinating the statewide implementation of the Election Code, voter registration process, and notaries public.

GENERAL ALLEGATIONS

A. The COVID-19 pandemic has upended Pennsylvania’s electoral processes.

19. Virtually all aspects of life in our country today are affected by the unprecedented Covid-19 pandemic. Schools and businesses are closed; a majority of people in the country are sheltering in their homes; more than 20 million people have lost their jobs; and approximately 45,000 people have lost their lives. The dangerous virus that has already infected 34,528 Pennsylvanians and resulted in 1,564 deaths has begun to wreak havoc on Pennsylvania’s voting systems. And the crisis has no clear end in sight.

20. On April 1, Governor Wolf issued a state-wide stay-at-home order and urged residents to maintain social distancing guidelines in order to combat the virus’s spread. Counties across the state have reported difficulty recruiting and retaining poll workers, and venues that have typically served as polling locations—i.e., senior centers, schools, and churches—are unwilling to do so in upcoming elections because of the attendant public health risks. For the limited group of poll workers who agree to staff polling places on Election Day, and the few locations that agree to

open their doors to the public, county election officials have struggled to provide sufficient sanitary supplies and protective equipment to keep voters and election workers safe during in-person voting. This may prove especially problematic for those counties employing touchscreen voting machines, which may require sanitizing after every voter.

21. At the same time, some counties are still in the early stages of the rollout for Pennsylvania's new voting machines, which will require in-person training before Election Day. Because of the current state of the public health emergency, some of those trainings either have been canceled or have not been scheduled at all, sparking concerns of Election Day confusion, and prompting some local officials to question the Commonwealth's Election Day readiness.⁵

22. The Commonwealth is also likely to see a significant reduction in the number of polling places offered for voting. Not only has the public health emergency restricted available sites, the Pennsylvania General Assembly passed emergency legislation earlier this month to postpone the primary election to June 2, and to loosen restrictions on polling place consolidation, among other last-minute changes. As a result, counties may now consolidate polling locations without a court order in the June primary, and if this policy is extended to the November general election, it will allow counties to pack more voters into fewer polling places, which could spell disaster both from a public health and an election administration standpoint.

23. Because of the pandemic, mail ballots—without additional assurances—will not provide an adequate alternative means for Pennsylvanians to vote. The U.S. Postal Service is

⁵ See Jonathan Lai, "Officials in three Southeastern Pa. counties cast doubt on primary voting methods." PHILA. INQUIRER (April 10, 2020), <https://www.inquirer.com/politics/election/coronavirus-covid19-election-pennsylvania-20200410.html>.

experiencing difficulties, delays, and budget shortfalls.⁶ These pressures threaten to shutter the entire agency by this summer.⁷

24. As the pandemic continues to spread, postal workers have increasingly been infected. As of mid-April, nearly 500 postal workers across the country have tested positive for the coronavirus, 19 have died, and more than 6,000 are in self-quarantine because of exposure.⁸ Postal workers in Pennsylvania are no different. Reports of the virus infecting and, unfortunately, killing Postal Service employees throughout the state abound.⁹

25. And as it attempts to deliver an unprecedented number of absentee ballots across the country—both from county elections officials to voters, and then back again—the system will be under increasing pressure, causing delays and, ultimately, some number of ballots that are not received by voters in time.

26. The Postal Service’s budget and personnel struggles have harsh implications for Pennsylvanians’ voting rights. In the past, when the U.S. Postal Service has faced a budget crisis, it has responded by closing hundreds of processing centers.¹⁰ Moving forward, it is likely that the

⁶ The Postal Service is experiencing dramatic decreases in mail volume compared to last year and, as a result, is projecting a \$13 billion revenue shortfall this fiscal year because of the pandemic and another \$54 billion in losses over 10 years.” Nicholas Fandos & Jim Tankersley, *Coronavirus Is Threatening One of Government’s Steadiest Services: The Mail*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/us/politics/coronavirus-is-threatening-one-of-governments-steadiest-services-the-mail.html>.

⁷ Kyle Cheney, *House panel warns coronavirus could destroy Postal Service by June*, POLITICO (Mar. 23, 2020), <https://www.politico.com/news/2020/03/23/coronavirus-postal-service-june-145683>.

⁸ Jacob Bogage, *White House rejects bailout for U.S. Postal Service battered by coronavirus*, WASH. POST (Apr. 11, 2020), <https://www.washingtonpost.com/business/2020/04/11/post-office-bailout-trump/>.

⁹ See, e.g., *Two United States Postal Service employees test positive for COVID-19 in Harrisburg*, CBS 21 News (Apr. 15, 2020), <https://local21news.com/news/local/two-united-states-postal-service-employees-test-positive-for-covid-19-in-harrisburg>; Bill Rettew, *Exton postal employee dies from coronavirus complications*, DAILY LOCAL NEWS (Apr. 12, 2020), https://www.dailylocal.com/news/exton-postal-employee-dies-from-coronavirus-complications/article_c466fd92-7b6e-11ea-9429-9b1e64c419a2.html; CBS3 Staff, *Northeast Philadelphia Postal Worker Tests Positive For COVID-19*, CBS 3 PHILLY (Mar. 30, 2020), <https://philadelphia.cbslocal.com/2020/03/30/coronavirus-bustleton-station-postal-worker-positive-covid-19/>; John Luciew, *U.S. Postal Service employee in Pa. has coronavirus: ‘Risk is low’*, PA. PATRIOT-NEWS (Mar. 24, 2020), <https://www.pennlive.com/coronavirus/2020/03/us-postal-service-employee-in-pa-has-coronavirus-risk-is-low.html>.

¹⁰ See U.S. Postal Service Office of Inspector General, *Area Mail Processing Consolidations* (June 5, 2015), <https://www.uspsog.gov/sites/default/files/document-library-files/2015/no-ar-15-007.pdf>.

USPS will need to make cuts to routes, processing centers, or staff—any of which is likely to increase mail processing delays. Pennsylvania voters casting mail ballots and facing the Election Day Receipt Deadline will bear the brunt of these cuts because of the recent introduction of no-excuse mail-in ballots—already surging in demand for a primary election weeks away—and safety measures needed to slow the spread of COVID-19, such as Governor Wolf’s stay-at-home order.

27. The recent primary election in Wisconsin should serve as a cautionary tale because election officials there encountered many of the same issues leading up to election day. Like here, “the extent of the risk of holding [the] election ha[d] become increasingly clear” well before Election Day. *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Election officials were facing a huge backlog of requests for absentee ballots and questions about voting absentee, including how to satisfy certain registration requirements, how to properly request an absentee ballot, and how to return it in time to be considered. *Id.* Election officials were also dealing with the loss of poll workers due to age, fears of illness, or actual illness. *Id.* The likely consequences of holding an election in that context were clear:

- (1) a dramatic shortfall in the number of voters on election day as compared to recent primaries, even after accounting for the impressive increase in absentee voters, (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19.

Id.

28. When Wisconsin proceeded to hold an election without sufficiently addressing these issues, chaos and widespread disenfranchisement ensued. The Postal Service struggled to deliver absentee ballots to voters. Some ballots were delayed, but others did not arrive at all. In

response, both of Wisconsin's U.S. Senators wrote to the Inspector General for the U.S. Postal Service seeking an investigation into "absentee ballots not being delivered in a timely manner" and the Postal Service's failure to deliver in this regard.¹¹ There were similar delays returning ballots to elections officials. In total, approximately 107,871 absentee ballots were received by elections officials after the day of the election.

29. Additionally, cities in Wisconsin were forced to close polling locations. In Milwaukee, a city with twice the population of Pittsburgh, 18,803 voters cast their ballots in person at only five polling locations. The result was crowds, long lines, and excessive wait times—in the middle of a global pandemic:



Source: David D. Haynes, Haynes: *Wisconsin's Election May Have Been 'Ridiculous' but Those Who Braved Coronavirus to Vote Were Anything but*, MILWAUKEE J. SENTINEL (Apr. 8, 2020), <http://www.jsonline.com/story/news/solutions/2020/04/08/wisconsin-election-ridiculous-voters-who-braved-coronavirus-lines-inspiring->

¹¹ See Letter from Senators Tammy Baldwin and Ron Johnson to U.S. Postal Service Inspector General (Apr. 9, 2020), <https://www.wispolitics.com/wp-content/uploads/2020/04/200409LETTER.pdf>.



Source: Astead W. Herndon & Alexander Burns, *Voting in Wisconsin During a Pandemic: Lines, Masks and Plenty of Fear*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/politics/wisconsin-election->

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Source: *Coronavirus Wisconsin: Scenes from Election Day*, April 7, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.



Source: *Coronavirus Wisconsin: Scenes from Election Day*, April 7, MILWAUKEE J. SENTINEL (Apr. 9, 2020), <http://www.jsonline.com/picture-gallery/news/2020/04/07/coronavirus-wisconsin-scenes-election-day-april-7/2962085001/>.

30. Reports of COVID-19 cases resulting from voters who turned out to vote in Wisconsin's election have already emerged.¹²

31. Without adequate safeguards to ensure access to vote by mail options, Pennsylvania could suffer the same fate. To their credit, Commonwealth and local officials have been encouraging voters to cast ballots by mail, and early indications from mail ballot applications suggest that voters will do so in record numbers. As of today, still six weeks away from the June 2 election, Pennsylvania counties have received approximately 600,000 applications for mail-in and absentee ballots. By contrast, only around 84,000 absentee ballots were cast in the 2016 primary election.

32. But the current mail voting process in Pennsylvania is not equally accessible to all eligible citizens—particularly those in disadvantaged communities, the poor, the elderly, and other vulnerable populations. Many of these individuals have historically relied on in-person voting, which will be severely restricted (and may pose significant health risks) in upcoming elections. In order to ensure that all citizens have reasonable and equal access to the electoral process, the Commonwealth must remove unnecessary restrictions on mail voting that will otherwise deny its citizens the free and equal election guaranteed by the Pennsylvania Constitution.

B. Election Day Receipt Deadline

33. In the 2018 general election, according to data from the Election Administration and Voting Survey, approximately, 8,162 absentee ballots—3.7% of all absentee ballots cast—were rejected because they were delivered to election officials after 5:00 p.m. on the Friday before Election Day.

¹² Alison Dirr, *At least 7 new coronavirus cases appear to be related to Wisconsin's election, Milwaukee health commissioner says*, MILWAUKEE J. SENTINEL (April 20, 2020), <https://www.jsonline.com/story/news/local/milwaukee/2020/04/20/coronavirus-milwaukee-7-new-cases-may-tied-april-7-election/5168669002/>.

34. Since then, the Pennsylvania General Assembly enacted legislation to allow all eligible voters to vote by mail and extended the deadline for election officials to receive mail ballots: now, to be counted, all absentee and mail-in ballots must be received by 8:00 p.m. on Election Day in the county board of elections office. 25 P.S. §§ 3146.6(c), 3150.16(c). Petitioners do not challenge the validity of this law, nor do they seek any relief that would trigger Act 77's non-severability clause. However, the disruptions in the voting process caused by the COVID-19 pandemic require the Commonwealth to implement additional voting procedures that would allow election officials to count mail ballots that arrive after 8:00 p.m. on Election Day due to mail service delays or disruptions.

35. As detailed above, the ability to process mail ballot applications and deliver ballots on time has been compromised by the public health crisis. The demand for mail ballots is already testing the limits of some counties: in Delaware County, for example, election officials have begun "falling behind on processing mail-in ballot requests."¹³ And as the number of self-quarantined and infected postal workers increase nationally and locally, the more likely it is the U.S. Postal Service will continue to face severe staffing shortages, thereby slowing the delivery and receipt of a rapidly increasing volume of election mail.

36. Because mail ballots must be received by 8:00 p.m. on Election Day, voters must mail them several days before Election Day to ensure timely delivery. This date operates as a shadow pre-election cutoff date. But in a post-COVID-19 world, where the Postal Service's regular mail functions have been disrupted, the pre-election cutoff date by which voters should mail their

¹³ Jonathan Tamari & Jonathan Lai, *Pennsylvania, New Jersey, and other states struggle to avoid repeat of Wisconsin election fiasco*, PHILA. INQUIRER (Apr. 12, 2020), <https://www.inquirer.com/news/pennsylvania-new-jersey-vote-by-mail-primary-election-challenges-20200412.html>.

ballots to ensure timely delivery is entirely unclear, subjecting voters to arbitrary disenfranchisement.

37. For instance, Pennsylvania voters can apply for absentee and mail-in ballots if their applications are received by 5:00 p.m. on the Tuesday before Election Day. *See* 25 P.S. §§ 3146.2a(a), 3150.12a(a). But it is anyone's guess whether voters who request absentee ballots on this day will receive their ballots in time to submit them before the Election Day Receipt Deadline. Pennsylvania officials must mail absentee and mail-in ballots to a qualified absentee or mail-in voter "within forty-eight hours after approval of their application." 25 P.S. §§ 3146.5(a), 3150.15. It is even less predictable now when that ballot will arrive. Even assuming the ballot arrives before Election Day, the voter may not have time to fill it out and mail it back to ensure timely delivery.

38. Although Pennsylvania may have an interest in the finality of elections, the Commonwealth can continue to enforce its Election Day Receipt Deadline while providing separate, temporary procedures to allow voters who submit their mail ballots well in advance of Election Day, but are affected by mail service disruptions, to cast an effective ballot. And doing so can still serve the Commonwealth's interest. Pennsylvania currently counts military-overseas ballots so long as they are received "by 5 p.m. on the seventh day following the election." *Id.* at § 3511(a). County boards of elections have seven days after Election Day to examine provisional ballots. *Id.* at § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* at § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not certify election results to the Secretary until 20 days after Election Day. 25 P.S. § 2642(k).

39. There is nothing sacrosanct about the receipt deadline as past (and current) exemptions indicate. Shortly after Hurricane Sandy struck parts of Pennsylvania in 2012, the Governor extended the deadline for absentee ballots returns in Philadelphia, Bucks, Montgomery,

and Chester Counties from 5:00 p.m. on the Friday before Election Day to 5:00 p.m. on the Monday before Election Day.¹⁴ In 2016, a Montgomery County Court judge extended the Deadline from the Friday before the election to 8:00 p.m. on Election Day after elections officials received “unprecedented demand” for absentee ballots and voters “complain[ed] that they had not yet received their ballots” with the Friday deadline impending.¹⁵

40. Adopting such emergency procedures, moreover, does not trigger the non-severability clause added to recent legislation, Act 77, that expanded mail voting to all eligible voters and moved the mail ballot receipt deadline to 8:00 p.m. on Election Day. Petitioners’ requested relief does not render the Election Day Receipt Deadline invalid. Rather, it would implement additional, emergency procedures to count mail ballots delayed by postal service disruptions in light of the COVID-19 pandemic.

41. Rejecting all mail ballots that arrive after 8:00 p.m. on Election Day, notwithstanding the current public health emergency, the unprecedented increase in requests for absentee ballots, and the budgetary crisis at the U.S. Postal Service, disenfranchises Pennsylvania voters—many of whom already lack reasonable access to safe, in-person voting options—for reasons entirely out of their control.

C. Third-Party Ballot Collection Assistance

42. Pennsylvania’s failure to safeguard the rights of voters affected by mail service disruptions is compounded by the fact that Pennsylvania law in most cases prohibits third parties from assisting voters in delivering mail ballots. Thus, to avoid the uncertainty of mail delivery,

¹⁴ *Absentee ballot deadline extended in some Pa. counties*, WHYY (Nov. 5, 2012), <https://whyy.org/articles/absentee-ballot-deadline-extended-in-aome-pa-counties/>.

¹⁵ Laura McCrystal, *Montco judge extends deadline for absentee ballots*, PHILA. INQUIRER (Nov. 3, 2016), https://www.inquirer.com/philly/news/politics/20161104_Montco_seeks_to_extend_deadline_for_absentee_ballots.html.

voters will be forced to submit their ballots in person, potentially subjecting themselves to health risks.

43. For example, Petitioner Dwayne Thomas usually votes in-person on election day but has applied to vote absentee this year as a precautionary measure due to the current health crisis. Relatedly, Mr. Thomas has struggled for years with having his mail arrive promptly—or at all—using his local postal service. Because the current pandemic exacerbates postal service delays and creates further uncertainty in the timing of mail delivery, Mr. Thomas will be forced to deliver his ballot in-person this year to ensure his vote is counted, or subject himself to the risk of arbitrary disenfranchisement. The benefits he gains from voting by mail—avoiding crowded polling locations or waiting in line to vote—are lost if he must nevertheless wait in crowded lines for prolonged periods just to deliver his ballot on time. If the state permitted, Mr. Thomas would designate a third party to safely deliver his ballot on time.

44. The burden caused by the prohibition on third party ballot collection is particularly pronounced this year because many Pennsylvanians, like Mr. Thomas, will be voting by mail for the first time—in light of Act 77’s recent expansion of mail voting—and will have to navigate the public health risks posed by the COVID-19 pandemic.

45. Mr. Thomas’s predicament, moreover, is far from an isolated incident. Pennsylvania has an aging population, ranking fifth among the 50 states by the size of its population over the age of 65 in 2017. Seniors, especially those living in community homes or nursing homes, are particularly vulnerable to the current health risks and have expressed concern that they have no reliable way to deliver their ballots to the proper polling site; they cannot trust that the ballot will be delivered on time through the postal service and they cannot personally deliver the ballot due to health concerns.

46. The prohibition on third party ballot collection also disproportionately burdens poor, minority, and rural communities who generally have less access to postal services, live in areas that lack reliable access to public transportation, and are less able to bear the costs of waiting in long lines to vote or exposing themselves to health risks in order to submit a mail ballot in person. Voters in rural communities, moreover, face longer travel distances to their county board of elections office and even less reliable mail service.

47. Absentee and mail-in ballots are a positive step for Pennsylvania. But, as shown above, voters who opt for these ballots still require assistance in returning their ballots to the appropriate election officials. Pennsylvania allows third party ballot collection in very limited circumstances where someone is disabled or hospitalized but prohibits third party ballot collection in every other instance. This prohibition presents an undue burden on voters generally and will operate to disenfranchise a large swath of Pennsylvania's eligible voters during the current pandemic.

D. Pre-Paid Postage

48. In Pennsylvania, most voters who choose to return their ballots by mail must also provide their own postage. 25 P. S. §§ 3146.6(a); 3150.16(a). This requirement imposes both monetary and transaction costs that bear most heavily on individuals who are least likely to be able to overcome them.

49. In this digital era, many voters do not regularly keep postage stamps in their homes, and therefore must visit a post office or other essential business to obtain the correct postage. Purchasing a book of 20 stamps online will cost voters \$11—an unnecessary expense that could be cost prohibitive for individuals with lower incomes, along with those whose employment and source of income were eradicated due to the devastating economic impact of COVID-19 and the Governor's ensuing stay-at-home order. A trip to the post office or any other establishment that

sells stamps, during a public health crisis in which individuals have been instructed to maintain social distancing guidelines, forces voters to expose themselves to health risks in order to vote. This is especially true for elderly voters, as well as voters who lack access to vehicles and must rely on public transportation.¹⁶

50. Providing postage to allow citizens to complete important government-related functions is a common practice that has been adopted by federal, state, and county governments in other contexts. For instance, the United States Census Bureau sends census surveys with postage-prepaid return envelopes. Pennsylvania provides, as the National Voter Registration Act requires, a postage-prepaid return envelope when it asks voters to verify their address for the purpose of voter registration. Counties in Pennsylvania send juror questionnaires with postage-prepaid envelopes. Recently, Allegheny County Executive Rich Fitzgerald announced that the county will send mail-in ballot applications to all registered voters with prepaid postage.¹⁷ And in its coronavirus stimulus package, Congress allocated \$400 million for elections, which can be used to cover the cost of prepaying postage, among other expenses.

51. Studies have shown that sending absentee ballots in postage-prepaid envelopes increases mail voting turnout. When King County, Washington launched prepaid postage pilot programs during the 2017 and 2018 primary elections, the county found that voters returned their absentee ballots via USPS at higher rates when they received return envelopes with postage prepaid. In the 2016 general election, 48% of the tested group of voters returned their absentee

¹⁶ In Southeastern Pennsylvania, public transportation has been radically reduced in light of the COVID-19 pandemic. Dozens of bus, train, and trolley routes have been cancelled; many subway stations have been shuttered; and those routes which are operating are doing so on a significantly lessened schedule. See Se. Pa. Trans. Auth., *New Lifeline Service Schedules Effective Thursday, April 9, 2020*, <http://septa.org/covid-19/>, (last visited Apr. 22, 2020).

¹⁷ Ryan Deto, *Allegheny County is sending all county voters mail-in ballot applications with prepaid postage*, PITTSBURGH CITY PAPER (April 17, 2020), <https://www.pghcitypaper.com/pittsburgh/allegheny-county-is-sending-all-county-voters-mail-in-ballot-applications-with-prepaid-postage/Content?oid=17142631>.

ballots via USPS. In 2017, 81% of those same voters did. Voters were not only more likely to return their ballots by mail, they were also more likely to *vote*. In the 2017 primary, turnout rose 10%. In the 2018 primary, it rose 6%. Following these pilot programs, King County sent all absentee ballots with postage-prepaid return envelopes. And shortly after that, the Governor and Secretary of State of Washington funded prepaid postage for every county in the state.

52. While Allegheny County’s efforts to provide prepaid postage are laudable, such safeguards should be extended to all voters and not left to the counties’ discretion. Beaver County, for instance, had provided postage-prepaid envelope in its absentee ballot mailing in prior elections, but county officials announced in January of this year that they will no longer cover the cost of postage.¹⁸ Thus some voters in Beaver County and other parts of the state that do not have access to mail ballots with prepaid postage will be forced to put their health at risk—either to obtain postage or stand in line at potentially crowded, consolidated polling places—or incur additional expense in order to exercise their right to vote.

E. Signature Matching

53. Submitting a ballot by mail is only part of the battle; once the ballot is delivered, county election officials must then engage in an opaque verification process, which in some counties involves signature matching, conducted without any identifiable standards or guidelines, by officials who are untrained in signature or handwriting examination.

54. Under Pennsylvania law, county boards, as part of the canvassing process, must “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s]

¹⁸ Daveen Rae Kurutz, *No stamp: Beaver County to cease providing postage for absentee ballots*, ELDWOOD CITY LEDGER (Jan. 20, 2020), <https://www.ellwoodcityledger.com/news/20200120/no-stamp-beaver-county-to-cess-providing-postage-for-absentee-ballots>.

right to vote.” 25 Pa. Stat. Ann. § 3146.8(g)(3). And some counties, on information and belief, rely on signature matching to determine whether mail ballots should be counted.

55. The statute does not set forth any guidelines for conducting this comparison, nor does Pennsylvania law require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process.¹⁹ Indeed, the General Assembly failed to act on proposed legislation in 2019 which would have required election boards to provide notice of signature mismatches and set forth procedures for curing rejected ballots. Thus, counties are left to their own devices in determining whether the information on a voter’s declaration and the applicable voter file verifies their right to vote, or whether the signature on the declaration is sufficiently similar to the information on file to allow the mail ballot to be counted.

56. This lack of guidance or identifiable standards is problematic because signature matching, as one federal court put it, is inherently “a questionable practice” and “may lead to unconstitutional disenfranchisement.” *Democratic Exec. Comm. of Fla. v. Lee*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018). Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification conducted without adequate standards and training is unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries.

57. Even when conducted by experts, signature matching can lead to erroneous results in the ballot verification context because handwriting can change quickly for a variety of reasons entirely unrelated to fraud, including the signer’s age, medical condition, psychological state of mind, pen type, writing surface, or writing position. It is, thus, inevitable that election officials will

¹⁹ Pennsylvania law requires election officials to provide notice to the voter and a formal hearing only when a ballot or application has been challenged, and sets forth procedures for conducting hearings and adjudicating challenges, none of which are at issue here. *See* 25 Pa. Stat. Ann. § 3146.8 (5), (6).

erroneously reject legitimate ballots due to misperceived signature mismatches, which, without notice and a reasonable opportunity to cure, will result in the disenfranchisement of eligible voters.

58. Furthermore, the absence of any clear guidance in the statute—and the Department of State’s willingness to allow counties to adopt their own verification procedures—means that voters will encounter varying and conflicting signature matching practices depending on the county in which they reside. Voters in some counties may receive notice of a potential signature mismatch and an opportunity to cure before the ballots are canvassed, while others may not. Indeed, voters in some counties may avoid signature matching entirely while others will have their ballots rejected. These diverging procedures all but ensure that voters across all counties will not have an equal opportunity to cast an effective mail ballot.

59. In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.

COUNT I

Violation of Pennsylvania Constitution, Article I, Section 5 Free and Equal Elections Clause

60. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

61. “Elections shall be free and equal” in Pennsylvania. Pa. Const. art. I, § 5. Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (1914). The Free and Equal Elections Clause is “specifically intended to equalize the power of voters in

our Commonwealth's election process," *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 812 (2018), and protects voting rights even if they are denied or impeded "by inadvertence." *Id.* at 810 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (1929)).

62. The Commonwealth's failure to implement adequate safeguards to protect the right to vote and ensure access to vote by mail, in the midst of a public health emergency, severely burdens the right to vote and violates the Free and Equal Elections Clause in several ways.

63. Pennsylvania's failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county board of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. In the 2018 general election alone, 3.7% of all absentee ballots were not counted because they arrived after the deadline and, as a result, 8,162 voters were denied the franchise. "The right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (citation and quotation omitted); *see also Stein v. Cortes*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016) ("The right to vote necessarily includes the right to have the vote fairly counted."). In light of Act 77's expansion of mail voting, and the barriers to in-person voting posed by COVID-19, the number of Pennsylvanians voting by mail will increase dramatically in upcoming elections; but their ballots will be subject to the vagaries of the U.S. Postal Service, an agency facing grave difficulties because of the ongoing global pandemic. Thus Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.

64. Pennsylvania's prohibition on third party ballot collection assistance further denies voters their right to a free and fair election. Many Pennsylvanians will vote by mail for the first time in upcoming elections, in part because the health risks posed by COVID-19 has limited access

to polling places and precludes in-person voting for vulnerable individuals. The U.S. Postal service is facing increased demands from the spike in absentee and mail-in ballots while simultaneously confronting a devastating budgetary and resource crisis. Therefore, many voters will be forced to incur the burden and health risks of personally delivering their completed mail-in ballots to ensure they arrive on time, or risk disenfranchisement.

65. The prohibition also presents an undue burden on poor, rural, and other disadvantaged communities that do not have access to reliable mail service, lack of access to reliable transportation, and will be forced to incur significant burdens and health risks to submit their ballots in person. Voters in these groups are less likely to vote without third party assistance to safely collect and deliver their ballots on time to the appropriate county board office. Pennsylvania's prohibition on this practice denies voters access to the electoral process.

66. Pennsylvania's failure to provide pre-paid postage for mail ballots imposes monetary costs on the only safe alternative to voting for individuals who would otherwise have to subject themselves to the health risks of waiting to vote at the few consolidated and potentially crowded polling locations available. These costs bear most heavily on those who are affected by the devastating economic impact of the ongoing public health emergency. Even for voters able to withstand the economic costs, the postage requirement imposes practical burdens—i.e., traveling to a post office to purchase stamps—that will dissuade voters in light of the attendant health risks. Thus, Pennsylvania's failure to provide an opportunity for eligible citizens to vote by mail, without cost, violates the Free and Equal Elections Clause.

67. Finally, Pennsylvania's signature-matching process for absentee ballots subjects Pennsylvanians who vote by mail to an arbitrary and error-prone verification process that can result in the rejection of their ballots without notice or an opportunity to cure. By empowering county

boards to “examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information” on the declaration with the applicable voter file in order to “verify [the individual’s] right to vote,” 25 P.S. § 3146.8(g)(3), and conduct signature matching without any guidelines, Pennsylvania law ensures that some voters will have their ballots rejected erroneously, which violates their right to have their ballots counted, and fails to “equalize the power of voters in [the] Commonwealth’s election process.” *League of Women Voters of Pa.*, 645 Pa. at 113.

COUNT II

Violation of Pennsylvania Constitution, Article I, Sections 1, 26 Equal Protection

68. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

69. The Pennsylvania Constitution states that “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. It also prohibits the Commonwealth and any other political subdivision from denying to any person “the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. art. I, § 26. These equal protection provisions are analyzed “under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (1991) (citing *James v. Se. Pa. Transp. Auth.*, 477 A.2d 1302 (1984)).

70. Those standards are best understood under the *Anderson-Burdick* balancing test, which commands courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as

justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs' rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, "'the regulation must be narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Reed*, 502 U.S. at 289). "However slight th[e] burden [on voting] may appear, ... it must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

71. Pennsylvania's rejection of ballots delayed by mail service disruptions, the prohibition on third party ballot collection assistance, the failure to provide pre-paid postage for mail ballots, and the arbitrary rejection of mail ballots through signature matching substantially burdens the right to vote and bear heavily on certain groups of voters without sufficient justification. This includes voters who are over the age of 65 or who have underlying health conditions that make them vulnerable to COVID-19, minority voters, individuals with limited financial means, and voters who live in rural areas, among others. Pennsylvania has no interest of sufficient importance that outweighs the burdens on otherwise eligible members of the electorate, who will also be denied the opportunity participate in the electoral process on an equal basis with other voters.

COUNT III

Violation of Pennsylvania Constitution, Article I, Section 1 Due Process

72. Petitioners reallege and reincorporate by reference all prior paragraphs and the paragraphs in the counts below as though fully set forth herein.

73. “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” Pa. Const. art. I, § 1. Due process rights “emanate” from this section of Pennsylvania’s Constitution. *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 229 n.4 (1995). The requirements of Article I, Section I “are not distinguishable from those of the 14th Amendment . . . [and courts] may apply the same analysis to both claims.” *Id.* at 229 n.6. Pennsylvania courts have adopted the U.S. Supreme Court’s methodology in reviewing procedural due process claims. *R. v. Dep’t of Public Welfare*, 636 A.2d 142, 153 (1994) (adopting the federal procedural due process analysis expressed in *Mathews v. Eldridge*, 424 U.S. 319 (1976), for assessing due process claims under Article I, Section 1). The Commonwealth, having created processes for voting with absentee or mail-in ballots, “must administer it in accordance with the Constitution,” including with “adequate due process protection.” *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018).

74. What process is due in a given case requires a careful analysis of the importance of the rights and the other interests at stake. *Mathews*, 424 U.S. at 334–35. Courts must first consider the nature of the interest that will be affected by the government’s actions as well as the “degree of potential deprivation that may be created” by existing procedures. *Id.* at 341. Second, courts consider the “fairness and reliability” of the existing procedures “and the probable value, if any, of additional procedural safeguards.” *Id.* at 343. Finally, courts consider the public interest, which

“includes the administrative burden and other societal costs that would be associated with” additional or substitute safeguards. *Id.* at 347. Overall, due process is a “flexible notion which calls for such protections as demanded by the individual situation.” *Dep’t of Transp., Bureau of Licensing v. Clayton*, 546 Pa. 342, 351 (1996).

75. “Having induced voters to vote by absentee ballot,” the Due Process Clause requires the Commonwealth to “provide adequate process to ensure that voters’ ballots are fairly considered and, if eligible, counted.” *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

76. The nature of interest at stake in this case—the right to vote and to have that vote count—is “the most treasured prerogative of citizenship in this nation and this Commonwealth.” *In re Recount of Ballots Cast in General Election on November 6, 1973*, 325 A.2d 303, 308 (1974).

77. Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to the postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots delivered after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurance that they will be delivered in time, even when submitted well in advance of Election Day.

78. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania’s absentee and mail-in voters are both meaningfully cast and actually counted is readily apparent. For instance, accepting absentee and mail-in ballots that arrive within seven days after Election Day, if they contain any indicia, such as a postmark or barcode, made by the U.S. Postal Service to track or record the time that a ballot entered the postal system on or before

Election Day alleviates the risk of arbitrary deprivation that Pennsylvania's Election Day Receipt Deadline currently inflicts on voters affected by mail delivery disruptions.

79. Further, Pennsylvania officials do not need to certify election results to the Secretary until 20 days after Election Day, and the Commonwealth currently accepts mail ballots from overseas and military voters that arrive up to seven days after Election Day. Extending this allowance to voters affected by mail service disruptions would place minimal administrative burden on the state, if any.

80. Pennsylvania's signature-matching process also violates the Due Process Clause. During the canvassing process, county boards must "examine the declaration on the envelope of each [mail ballot] . . . and . . . compare the information" on the declaration with the applicable voter file in order to "verify [the individual's] right to vote." 25 P.S. § 3146.8(g)(3). The statute does not set forth any guidelines for conducting this comparison, and some counties engage in signature matching as part of the verification process. Signature matching, however, is highly error-prone, and Pennsylvania law does not require election officials to provide notice or an opportunity to cure before rejecting a ballot during the verification process for a signature mismatch. Thus, Pennsylvania's ballot verification process allows for the erroneous rejection of mail ballots and arbitrary disenfranchisement of Pennsylvania voters.

81. The value of additional or substitute procedural safeguards to ensure that the votes of Pennsylvania's absentee and mail-in voters are not rejected for a mismatched signature is clear. Providing an opportunity to contest or cure signature mismatch determinations will reduce the risk of erroneous deprivation of the right to vote. Moreover, providing these adequate safeguards to will impose a minimal burden on the Commonwealth and advances the public's interest in counting validly-cast ballots.

82. Having induced voters to cast mail ballots—made all the more necessary and urgent in light of the ongoing public health crisis—Pennsylvania must establish adequate procedures to ensure that voters have a reliable, fair, and effective method to submit their mail ballots and to have those ballots counted. Pennsylvania’s failure to provide safeguards to voters whose ballots are delayed due to mail service disruptions, or voters whose ballots may be rejected under an error-prone signature-matching process, violates Petitioners’ and other Pennsylvania voters’ procedural due process rights.

PRAYER FOR RELIEF

Wherefore, Petitioners respectfully request that this Honorable Court enter judgment in their favor against Defendants, and:

a) Declare unconstitutional the Commonwealth’s failure to: (i) provide prepaid postage on absentee and mail-in ballots; (ii) provide additional procedures that allow mail ballots delivered after 8:00 p.m. on the Election Day, due to mail delivery delays or disruptions, to be counted—to the extent such declaration does not trigger Act 77’s non-severability provision; (iii) allow third party mail ballot collection assistance; and (iv) provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch.

b) Issue an order requiring that Defendants:

- a. Provide prepaid postage on all absentee and mail-in ballots;
- b. Implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day due to mail service delays or disruptions, will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause;

- c. Allow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots and ensure that all such ballots are counted if otherwise eligible; and
- d. Provide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.

c) Maintain jurisdiction over this dispute to ensure that the Defendants comply with their obligations under the Pennsylvania Constitution.

d) Provide such other and further relief as the Court may deem just and proper.

Dated: April 22, 2020

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH, *et al.*,

Respondents.

No. 266 MD 2020

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS’
OPPOSITION TO APPLICATION FOR SPECIAL RELIEF
IN THE NATURE OF A PRELIMINARY INJUNCTION AND FOR
EXPEDITED REVIEW

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Respondents, Secretary of the Commonwealth Kathy Boockvar and Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, submit the following Memorandum of Law in response to Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction.

I. INTRODUCTION

Petitioners predict electoral calamity in the Commonwealth of Pennsylvania's June 2, 2020, primary election. According to Petitioners, the election day deadline for returning absentee and mail in ballots, combined with Pennsylvania's statutory prohibition on allowing third parties to hand deliver most voters' ballots to county election offices and the effects of the ongoing COVID-19 crisis, is creating an "exceedingly high" risk of disenfranchisement in every part of the Commonwealth. Memorandum in Support of Petitioners' Application ("Br.") at 2. Petitioners contend that the pandemic will cause a surge in applications that will cause backlogs in county boards of elections, that the U.S. Postal Service ("USPS") will experience pandemic-related slowdowns in its deliveries of ballots and ballot applications, that these delays will combine to cause unconstitutional impediments to voters' ability to return their ballots on time, and that the solution is to extend the statewide deadline for returning absentee and mail-in ballots and to

allow third parties to hand deliver voters' completed ballots to county boards of elections.

Petitioners, however, have failed to back up their claims with evidence. Their Application does not identify any county that is presently facing an insurmountable backlog, let alone evidence that counties across the Commonwealth are facing such backlogs. Petitioners also present no basis to believe that a surge in applications is coming that is large enough to overwhelm any county's processing abilities. And they give no evidence that the USPS is experiencing, or expects to experience, unusual delays in its delivery of first class mail, or that allowing third parties to retrieve voted ballots from voters and deliver them to county boards of elections would remedy any constitutional violation. Petitioners present no evidence because, at present, there is no indication of the statewide, systemic breakdown in the electoral process that Petitioners predict. Each county is different, and it is possible that, in the next two weeks, individual counties may experience last-minute surges in applications or unexpected delays in processing applications and issuing ballots.¹ Petitioners, however, seek statewide relief, but have not presented (and, at this juncture, cannot present) enough

¹ As discussed in the attached Declaration of Jonathan Marks, Respondents will receive updated data in the coming week that will allow them to assess the likelihood that any counties are likely to face significant delays, and will report to the Court accordingly. *See* Marks Decl. ¶¶ 40-43.

evidence to make out a *prima facie* showing of a right to that relief. This Court should, accordingly, deny their Application on the papers, without proceeding to a preliminary injunction hearing.²

Respondents do not claim that running a primary election in the midst of a pandemic is easy. They are taking the situation very seriously, are deeply aware of the high stakes involved, and are focused on anticipating and mitigating risks. Indeed, election management officials in the Department of State (the “Department”) and across the Commonwealth have worked day and night for months to ensure that the election runs as smoothly and as safely as possible, and will continue to do so. But challenging circumstances, without proof of an actual or likely constitutional violation, do not provide a basis for a court to override election rules that the General Assembly has put in place. Unless and until the factual circumstances support a conclusion that the ballot receipt deadline and the prohibition on ballot delivery by third parties is likely to cause the constitutional harms that Petitioners predict, the Court cannot grant the relief they seek in their Application. Respondents accordingly request that the Court deny or, in the alternative, defer ruling on Petitioners’ Application.

² Respondents also intend to file Preliminary Objections on May 22, 2020, their deadline for responding to the Petition. These Preliminary Objections will present additional bases for denying Petitioners’ Application, including that the Pennsylvania Supreme Court has exclusive jurisdiction over this dispute and the case should therefore be transferred to that Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background of the Statutory Deadline at Issue

1. Act 77 of 2019 Provides for Mail-In Balloting and an Extended Return Deadline

Until late 2019, the Pennsylvania Election Code provided for two methods of voting: in-person voting on election day, or, for electors who were unable to vote in person for various reasons, voting by absentee ballot. The deadline for applying for absentee ballots was 5:00 p.m. on the Tuesday before an election, and the deadline for returning completed absentee ballots was 72 hours later, 5:00 p.m. on the Friday before the election. On October 31, 2019, Governor Thomas Wolf signed into law Act 77 of 2019, which made significant changes to many aspects of the Election Code. *See* Declaration of Jonathan Marks ¶ 1 (May 18, 2020) (“Marks Decl.”). Among other changes, Act 77 provided for mail-in ballots, available to any voter who did not meet the criteria for an absentee ballot. *Id.* ¶ 2. The deadline for applying for absentee ballots remained at 5:00 p.m. on the Tuesday before the election, with mail-in ballot applications due at the same time. *Id.* ¶ 3. Act 77 extended the deadline for receipt of voted ballots, however, by more than four days, from 5:00 p.m. on the Friday before the election to 8:00 p.m. on the day of the election. *Id.* ¶ 4.

After Act 77 took effect, the Department and Pennsylvania’s county boards of elections (the “counties”) expected that many voters would take advantage of

the new mail-in ballot option. Throughout the winter of 2019-20, they accordingly prepared for a large increase in the number of ballots that voters would mail or deliver to the counties. *Id.* ¶ 6. The mail-in and absentee ballot options, however, took on a new importance when the COVID-19 crisis reached Pennsylvania.

2. The General Assembly Amends the Election Code a Second Time to Respond to the COVID-19 Crisis

In March 2020, as Pennsylvania suffered its first COVID-19 deaths and emergency measures took hold, Pennsylvania's executive and legislative branches considered steps to protect voters in the primary election, then scheduled for April 28, 2020. On March 27, 2020, the Governor signed into law Act 12 of 2020, which amended the Election Code to, among other things, postpone the primary election for five weeks to June 2, 2020. *Id.* ¶¶ 8, 9; Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 16, § 1804-B(a), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). Act 12 also provided that in the 2020 primary election, counties would have greater flexibility than usual in relocating and consolidating polling places and recruiting poll workers. Marks Decl. ¶ 10. The new statute also included permanent provisions designed to ease the processing of absentee and mail-in ballots; for example, counties are now permitted to begin pre-canvassing those ballots at 7 a.m. on election day, rather than after the polls close. *Id.* Act 12 did not, however, make any changes to the deadline for returning absentee and mail-in ballots.

B. The Department and the Counties' Efforts to Protect Voters and the Voting Process in the Face of the Crisis

1. The Statewide Efforts to Ease In-Person Voting and Encourage Voting by Mail

The Department, the counties, and many others have worked nonstop to ensure that voting in the primary election will be as safe and as accessible as possible, despite the challenges posed by the health risks involved. The intensity of these efforts varies by region, because in recent weeks, COVID-19 has taken hold at different levels in different areas of the Commonwealth. As of May 15, 2020, as part of a phased reopening plan, Governor Wolf has lifted portions of the COVID-19 restrictions that had been imposed on 37 of the Commonwealth's 67 counties, and announced that restrictions would be lifted in 12 additional counties on May 22, 2020. See Decl. of M. Hangley, Ex. 1. Assuming that infection patterns do not take a turn for the worse, by primary election day, many portions of the Commonwealth will have relaxed their stay-at-home rules, while full stay-at-home restrictions will be in effect in other regions.

Counties have for some time been planning ways to adapt in-person election day voting to the constraints caused by the pandemic. They are consolidating polling places to allow for reductions in the numbers of available poll workers and are facilitating social distancing and personal protection for poll workers and voters. The Department is assisting with these measures, and has provided

counties with \$13 million in sub-grants of federal funds for necessary staff and equipment. Marks Decl. ¶¶ 13, 14.

The Department, the counties, and third parties are also attempting to ease crowding at polling places by encouraging voters to vote by mail-in or absentee ballot. *Id.* ¶ 16. The Commonwealth has made a range of options available for voters to request these ballots. Voters with drivers' licenses or other state-issued identification can apply for these ballots electronically on the Department's website. Other voters can download and print their own applications or request them by mail, email, or telephone from their county election office or from the Department. *Id.* ¶ 17. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and submit them in one visit. *Id.* Some counties are mailing applications to every registered voter. *Id.* ¶ 22. Third parties, such as nonprofits, public officials, and political campaigns, are also making applications available. *Id.* ¶¶ 18, 19.

The Commonwealth is not simply making mail-in and absentee ballots available; it is engaging in an unprecedented campaign to encourage voters to take advantage of these procedures by applying for and returning their ballots promptly. The Commonwealth is educating citizens about the availability of and deadlines for mail-in and absentee ballots with, for example, Governor Wolf's COVID-19 updates; postcards mailed to all registered primary voters (voters registered as

Democrats or Republicans); email notifications to voters; bilingual statewide television, radio, and streaming online broadcasts; communications from various Pennsylvania agencies; and Commonwealth websites. *Id.* ¶¶ 19, 20. Individual counties have also bombarded their registered voters with information by mail and/or social media. *Id.* ¶ 22. Elected officials, political campaigns, parties, and public interest groups are also participating in these efforts, educating voters and making applications available to them. *Id.* ¶ 23. The Department has assisted with these third party efforts with a Ready to Vote Toolkit, which provides a library of templates for materials that third parties can use to educate the public about the upcoming election and the availability of mail-in voting. *Id.* ¶ 19.

2. Voters Have Responded to These Efforts to Solicit Ballot Applications

This push to encourage mail-in and absentee voting has, so far, been highly successful. As of Sunday, May 17 – more than two weeks before election day – *nearly 1.5 million people* had applied for a mail-in or absentee ballot. *Id.* ¶ 29. Petitioners interpret the high number of applications as a sign that the election is under threat, Br. at 8-9; in fact, the opposite is true. Only so many voters can be expected to turn out in a primary election, and the election is still more than two week away; if more voters request ballots now, fewer voters will request them toward the end of the application period. Total turnout in the last few federal primary elections has ranged from approximately 1.3 million, in elections with no

presidential races, to 1.6 million, in the 2012 election with only one contested presidential race, to 3.4 million, in the 2016 election with two contested nominations. Marks Decl. ¶ 28. Because the June 2020 primary will have no contested races at the top of the ticket, it is fair to assume that the 1.5 million ballots requested already is a significant fraction – more, or perhaps even significantly more, than sixty percent – of what the total mail and in-person turnout for the race will be. *Id.* ¶ 34.

In another encouraging sign, the vast majority of the Commonwealth's counties are, so far, keeping pace with ballot applications. Together, the Commonwealth's 67 counties have approved more than 1.3 million, or approximately 88%, of the applications they have received so far, and preliminary data indicates that they have mailed approximately 1.2 million ballots to voters. *Id.* ¶¶ 30-31. As of May 17, 2020, many counties have mailed ballots in response to more than 99% of the applications they have approved. *Id.* ¶ 37. Moreover, counties are speeding up their efforts, not slowing down. Some counties are increasing their numbers of processing staff, and others just recently began mailing out ballots. *Id.* ¶¶ 32, 35. While it is too early to rule out the possibility that one

or more counties may experience delays in ballot processing or mailing,³ there is also no evidence of the statewide backlog in the process that Petitioners predict.

C. Petitioners’ Unsupported Allegations That the Mail-In and Absentee Balloting Process Is Breaking Down

1. Petitioners Present No Admissible Evidence to Back Up Their Predictions of a Balloting Catastrophe

Petitioners state with great certainty that the COVID-19 crisis is overwhelming the counties’ ability to keep up with mail-in and absentee ballot applications. They paint a picture of a “crushing load” of applications, Br. at 11, with counties “falling behind” daily and developing “endless backlogs,” *id.*, and the purported certainty of “[m]ail delivery delays” by the United States Post Office (“USPS”), *id.* at 9. But these allegations are theoretical. Petitioners have failed to present *any* testimony or other evidence that would allow the Court to conclude that these delays are likely to occur in any part of the Commonwealth – let alone everywhere in the Commonwealth. Instead, they provide only anecdotes, out-of-context hearsay, and misapplied data.

First, Petitioners point to the fact that, a month before the primary election, “[n]early 1,000,000 eligible voters ha[d] already requested mail ballots.” Br. at 8 (citing Bonin Decl., Ex. M). This is true, but it is a sign that things are going

³ As discussed in the Declaration of Jonathan Marks, *id.* ¶¶ 41, 42, the Department will be in a better position to assess the counties’ performance after a statutory deadline passes this week; Respondents intend to provide the Court with an update at that point.

according to plan, not that they are out of control. The high numbers, at this stage, mean that the Commonwealth's efforts to encourage voters to apply early for mail-in and absentee ballots are working. If applications skyrocketed in early May, they are less likely to skyrocket later. Petitioners suggest that "millions" more voters may still apply for mail-in ballots, Br. at 9, but do not explain how that is plausible, when more than half of expected voters have already submitted ballot applications, and at least some of those voters will choose to vote in person. Marks Decl. ¶ 34.

Second, Petitioners assert that Pennsylvania's county boards of elections are losing control of the application process and "will eventually [develop] endless backlogs of mail ballot requests." Br. at 11. Curiously, however, Petitioners are unable to produce any witnesses to testify about these allegedly growing backlogs. Petitioners have submitted only one declaration from a single official or employee of any of the 67 counties' boards of elections, or anyone else with knowledge of those counties' progress. *See* Declaration of Karley Sisler. That Declaration, by the Director of The Office of Voter Services for Montgomery County, reports that, as of approximately a month before the election, the County had already received more than two thirds of the total number of ballot applications it expected. *Id.* ¶ 3. It also stated that, although the County was "experiencing staffing challenges because of the coronavirus," it had "pulled staff from other departments ... and work[ed] evenings and weekends to keep up with the volume of applications." *Id.*

¶ 4. Notably, the Declaration nowhere asserts or suggests that Montgomery County will be unable to keep up with mail-in ballot applications.⁴

The balance of Petitioners’ purported evidence regarding county processes consists primarily of out-of-context quotes from out-of-date public statements that, if anything, indicate that counties are rising to the challenges before them. For example:

- Exhibit Y to Petitioners’ Memorandum is state Senate testimony from April 30, 2020 – more than two weeks ago, and more than a month before the primary election – by election officials from Mercer, Lehigh, and Lawrence Counties. The officials comment on the challenges that increased ballot applications pose to counties in general – not necessarily to the officials’ own counties⁵ – and say, vaguely, that “if we triple or quadruple [the 800,000 applications received statewide at that point], many counties will be in trouble.” Br. Ex. Y at 2. The officials do not mention absentee or mail-in ballot deadlines and do not suggest that the ballot receipt deadline should be extended.
- In another statement from the April 30 hearing, Philadelphia Board of Elections Chair Lisa Deeley describes the “huge effort” that Philadelphia has taken to encourage voters to apply for mail-in ballots, Br. Ex. K at 1, the “large number” of applications it has received, *id.*, and its steps to speed processing by reassigning and

⁴ According to the Commonwealth’s preliminary statistics, as of May 17, Montgomery County had received 140,150 applications, approved 125,043 of them, and mailed out 113,512 ballots. Marks Decl. ¶ 38.

⁵ At present, there is no evidence that ballot processing in Mercer, Lehigh, or Lawrence Counties is delayed. According to the Commonwealth’s preliminary statistics, as of May 17 Lawrence County had received 8,340 applications, approved 7,712 of them, and mailed out 7,701 ballots; Lehigh County had received 41,596 applications, approved 35,714 of them, and mailed out 34,480 ballots; and Mercer County had received 9,411 applications, approved 7,649 of them, and mailed out 6,677 ballots. Marks Decl. ¶ 38.

increasing staff, *id.* In this statement, Commissioner Deeley requests various steps from the legislature, including increased funding and an extension in the ballot receipt deadline. *Id.* at 2. She does not predict an applications backlog in Philadelphia, however, and points out that Philadelphia prefers a legislative solution rather than a “confusing” court order.⁶

- Petitioners attach an article from more than six weeks before the election, stating that, as of seven weeks before the election, Delaware County had some unspecified backlog of mail-in ballot requests.⁷ There is no assertion or prediction that Delaware County will not be able to process any backlog between the date of the article and the election. Br. Ex. L, at 1.
- Petitioners attach an article from more than a month ago about Allegheny County’s efforts to encourage mail-in and absentee voting. According to the article, more than six weeks before the primary election, Allegheny County had received nearly 57,000 applications.⁸ Br. Ex. D.
- Petitioners attach a declaration from a political science professor, who conjectures that it will be “challenging for election administrators to satisfy all requests for mail ballots in a timely way.” Declaration of Dr. Marc Meredith ¶ 26. The Declaration, however, does not cite any evidence showing that any county in Pennsylvania will likely be unable to timely process ballot applications in the June primary election. As already noted, the fact that “[a]s of April 30, 2020, at least 880,000 mail ballots already had been requested,” *id.* ¶ 23 – a number that is, unsurprisingly, significantly larger than the number of requests in previous years, before no-excuse mail-in voting was

⁶ According to the Commonwealth’s preliminary statistics, as of May 17, Philadelphia County had received 150,366 applications, approved 131,962 of them, and mailed out 98,435 ballots. Marks Decl. ¶ 38.

⁷ According to the Commonwealth’s preliminary statistics, as of May 17, Delaware County had received 68,418 applications, approved 46,332 of them, and mailed out 18,756 ballots. Marks Decl. ¶ 38.

⁸ According to the Commonwealth’s preliminary statistics, Allegheny County has continued to keep pace with its applications. As of May 17, it had received 205,454 applications, approved 183,345 of them, and mailed out 171,343 ballots. Marks Decl. ¶ 38.

permitted – does not show that counties will face inordinate processing delays as the application deadline approaches. Dr. Meredith’s assertion that Montgomery County experienced delays in sending out ballots in 2016, due to “a dispute over the wording of a ballot question,” has no bearing on the current election. *Id.* ¶ 25. Finally, while the Declaration relies on issues that occurred in past elections in Wisconsin and Michigan, *id.* ¶¶ 27-28, it offers no reason – beyond speculation – to conclude that any of the problems that occurred there are happening or will happen in Pennsylvania’s primary election. *See also infra* Section III.A.1.(b) (explaining the significant differences between the Wisconsin election and the upcoming Pennsylvania election).

As discussed above, *supra* Section II.B.2, Respondents cannot conclude or rule out, at this point, whether problematic delays are likely to develop with mail in and absentee ballot issuance in isolated counties; they are continuously gathering information about the counties’ ballot processing statistics as the primary election approaches, and will update the Court accordingly. At present, however, Petitioners have not demonstrated that delays of a constitutional magnitude are occurring in any county, let alone statewide.

The third prong of Petitioners’ argument that voters will be disenfranchised is that anticipated delays in USPS service will unduly delay application and ballot mailings. *See Br.* at 9-11. But Petitioners present no evidence from which a Court could conclude that the delivery times for first class mail in Pennsylvania are likely to be any slower than usual between now and June 2. Petitioners point to a USPS announcement from a month ago that states that due to the pandemic, certain mail products – Priority Mail two- and three-day service and First-Class Package

Service – might require more time to be delivered. *See* Br. Ex. V. Ballots travel by a different service, however – First Class mail – and on the same day that the USPS issued the announcement they highlight, it also announced that “[t]here is no impact to First-Class letters and flats.” *See* Decl. of M. Hangle, Ex. 2.⁹ Nothing in the USPS’s published service alerts indicates a delay in domestic First Class mail, *see* Decl. of M. Hangle, Ex. 3, and Petitioners offer no evidence to the contrary.¹⁰

Finally, Petitioners point to the disastrous Wisconsin primary election that took place on April 7, 2020, and try to persuade the Court that because Wisconsin could not keep up with a last-minute crush of absentee ballot applications, Pennsylvania is bound to the same fate. Br. at 2, 12-14. But, as discussed below, *see infra* Section III.A.1.(b), the situations are completely different. Wisconsin’s primary election took place as infection rates were sharply increasing, only two weeks after the governor had “issued a ‘Safer-at-Home Order.’” *Democratic Nat’l Comm. v. Bostelmann*, --- F. Supp. 3d ----, 2020 WL 1638374, at *3 (W.D. Wisc. Apr. 2, 2020). Wisconsin’s leaders and voters thus had no time to prepare for the crisis, and its governor was unable to postpone the primary election.

⁹ <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes?r=8&ui-force-components-controllers-recordGlobalValueProvider.RecordGvp.getRecord=1>.

¹⁰ <https://about.usps.com/newsroom/service-alerts/residential/welcome.htm>.

Pennsylvania's primary election, on the other hand, will take place after infection rates have begun to decline, more than two months after stay-at-home orders went into effect. Pennsylvania's primary election was to take place three weeks after Wisconsin's, and has now been postponed for an additional five weeks; as discussed above, Pennsylvania has used the time to urge early applications and submissions of ballots. In Wisconsin, election officials acknowledged, the day before the ballot return deadline, that they were experiencing significant backlogs and that the deadline was unworkable. In this case, there is no such testimony and, as discussed above, no evidence of such backlogs.

2. If Problems Do Occur, They Can Likely Be Addressed With More Limited Relief Than That Sought Here

Petitioners assume not only that the absentee and mail-in ballot system will break down, but that it will break down all across the Commonwealth to an extent that will require a seven-day extension everywhere to remedy. Even if obstacles develop to voters' timely return of ballots in one county, however, there is no reason to conclude that this would also happen in other counties. Each county processes its own ballot applications, sends out its own ballots, runs its own polling places, and allocates its own resources. Social distancing rules have been lifted to a greater extent in some parts of the Commonwealth than in others. Some counties are farther ahead in their ballot processing than others. Marks Decl. ¶¶ 39, 40. If a problem develops, it would likely be possible to handle it on a countywide basis, as

occurred in Montgomery County in 2016, and with a shorter extension than that proposed here. *See* Br. Ex. KK (order of Montgomery County Court of Common Pleas extending ballot return deadline until 8:00 p.m. on election day). *See Woodward Twp. v. Zerbe*, 6 A.3d 651, 658 (Pa. Commw. Ct. 2010) (“Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury.”); *Crowe ex rel. Crowe v. Sch. Dist. of Pittsburgh*, 805 A.2d 691, 694 (Pa. Commw. Ct. 2002) (“[A]ny ... injunction must be narrowly tailored to address the wrong plead and proven.”).

D. Potential Consequences of a Grant of the Relief Sought

Petitioners contend that because Pennsylvania law requires election officials to accept and count mail ballots from overseas voters up to seven days after election day, the “administrative burden” imposed by Petitioners’ requested relief would be “minimal.” Br. at 33. Under current circumstances, however, a statewide, seven-day extension of the ballot receipt deadline could have negative consequences, even beyond the separation of powers concerns that are always implicated when a court sets aside a piece of legislation. First, to grant such an extension now, two weeks in advance of the election, could have unintended counterproductive effects. Counties, which have many pressing responsibilities, might let up on their intense efforts to process applications quickly by reversing

staff increases or focusing their efforts on other tasks. Voters might decide to delay requesting or returning their ballots. Marks Decl. ¶ 54.

Second, an extension of the ballot receipt deadline will cause cascading complications and delays in the entire election management process. Counties will have to put in place an entirely new set of processes for making determinations about what postmarks mean and, potentially, allowing for challenges regarding envelopes with illegible or absent postmarks. Marks Decl. ¶¶ 57, 58. They will also have to hold off on adjudicating provisional ballots until the seventh day after the election, because they cannot count a provisional ballot until they have determined whether the voter also returned an absentee or mail-in ballot.

Accordingly, the seven-day extension requested could turn into a delay of results until more than a week after the primary election. Marks Decl. ¶¶ 59-61. This delay, in turn, will threaten the following statutory deadlines: The deadline by which proof of identification for absentee and mail-in ballots must be received and verified under 25 P.S. § 3146.8(h); the deadline for counties to submit unofficial election returns to the Secretary of the Commonwealth under 25 P.S. § 3154(f); the deadline for a defeated candidate to request that a recount and recanvass not be made under 25 P.S. § 3154(h); and the deadline for the Secretary of the Commonwealth to order a recount or recanvass under 25 P.S. § 3154(g)(2). Marks Decl. ¶ 62.

A grant of the other relief Petitioners seek in their Application, removing the statutory prohibition on third parties' bringing voters' mail-in or absentee ballots to county election offices for them, would also likely have negative consequences. Counties would need to put procedures in place to require written authorizations from voters, which could place administrative burdens on counties and on individual voters. Such a change in policy could also reduce individual voters' assurance that their ballots are secure. *See Marks Decl.* ¶ 50.

III. ARGUMENT

To obtain a preliminary injunction, a party must satisfy every one of several “essential prerequisites”: (1) “that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest” – that is, “that it is likely to prevail on the merits”; (2) “that an injunction is necessary to prevent immediate and irreparable harm”; (3) that “greater injury would result from refusing an injunction than from granting it”; (4) that “a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; (5) that “the injunction ... is reasonably suited to abate the offending activity”; and (6) that “a preliminary injunction will not adversely affect the public interest.” *Summit Towne Centre, Inc. v. Shoe Show of Rock Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners here cannot, at this juncture, establish either of the first two or the fifth (at a minimum) of these necessary elements:

There is currently no basis to conclude that enforcement of the received-by deadline or the prohibition on third-party assistance will result in an unconstitutional deprivation of the right to vote; the injury Petitioners allege is not immediate but rather, at most, speculative and hypothetical; and the requested relief is not reasonably suited to abate, or even responsive to, the alleged wrongdoing.

A. Petitioners Cannot, at this Juncture, Establish the Requisite Likelihood of Success

1. As a General Matter, Petitioners Fail to Make Out a Claim of Unconstitutional Deprivation

(a) The Principles Governing Petitioners’ Constitutional Challenge to the Received-by Deadline and Prohibition on Third-Party Assistance

The standard governing constitutional challenges to a duly enacted statute is well settled.

It is axiomatic that: “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” The presumption that legislative enactments are constitutional is strong. All doubts are

to be resolved in favor of finding that the legislative enactment passes constitutional muster.

Working Families Party v. Commonwealth, 209 A.3d 270, 278-79 (Pa. 2019)

(internal citations omitted) (rejecting challenge to statute which prohibited nomination of single candidate by two or more political parties).

There is also a well-developed jurisprudence specifically addressing challenges to statutory election regulations. There is no question “that the right to vote is fundamental and ‘pervasive of other basic civil and political rights.’”

Banfield v. Cortes, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731

A.2d 1261, 1269 (Pa. 1999)). Nonetheless, as explained by the United States

Supreme Court in an opinion often cited by Pennsylvania courts, “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an

active role in structuring elections; ‘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.’” *Burdick v.*

Takushi, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730

(1974)); accord *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358

(1997).

These regulations “will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting

process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.” *Burdick*, 504 U.S. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Recognizing that these incidental burdens are not typically matters of constitutional dimension, this Court has held that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 177 (citing *In re Nader*, 905 A.2d 450, 459 (Pa. 2006)); accord *Burdick*, 504 U.S. at 434 (“[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” (internal quotation marks omitted)), cited by *Banfield*, 110 A.3d at 177.

Petitioners have not shown the statutory provisions challenged here – namely, the requirement that mail-in and absentee ballots be received by county election boards by 8:00 p.m. on election day, and the prohibition against third parties providing assistance to voters to deliver their mail-in or absentee ballots – to be anything other than such “reasonable, non-discriminatory” regulations. As courts have repeatedly recognized, electoral deadlines directly promote “the public interest in the maintenance of order in the election process.” *Diaz v. Cobb*, 541 F.

Supp. 2d 1319, 1335 (S.D. Fla. 2008) (rejecting challenge to registration deadline); accord, e.g., *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373-78 (S.D. Fla. 2004) (rejecting challenge to deadline for receipt of absentee ballots by Supervisors of Election); *Mays v. LaRose*, 951 F.3d 775, 791-93 (6th Cir. 2020) (rejecting challenge to deadline for requesting absentee ballot); *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184-87 (5th Cir. 1996) (rejecting challenges to deadlines for a candidate to declare intent to run for office, for holding nominating conventions, and for filing petitions by minor-party and independent candidates); see also *Burdick*, 504 U.S. at 437 (rejecting challenge to Hawaii’s prohibition on write-in candidates, given that state provided easy access to ballot until two months before the primary, so that any burden from the write-in prohibition “is borne only by those who fail to identify their candidate of choice until days before the primary”). The received-by deadline ensures that the tabulation of votes and determination of electoral outcomes can proceed immediately upon the conclusion of election day, and will not be delayed by the need to await the arrival of outstanding mail-in and absentee ballots. And the Pennsylvania Supreme Court has enforced the prohibition against third party assistance, observing that it is “consistent with the spirit and intent of our election law.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*, 843 A.2d 1223, 1233 (Pa. 2004). Both of these regulations promote the recognized, important interest in the “‘orderly administration’ of elections.” *Mays*,

951 F.3d at 787 (quoting *Crawford*, 553 U.S. at 196 (Stevens, J., announcing the judgment of the Court)).

Consistent with the principles discussed above, non-discriminatory, generally applicable deadlines with which most voters can easily comply are typically not deemed to impose a significant burden on the right to vote, notwithstanding that they may require some voters to make decisions or take action earlier than they would otherwise be inclined to do. *See id.* at 792 (“Even though this law may eliminate opportunities to vote for electors who fail to register before the deadline, a state’s generally applicable registration cutoff imposes only a minimal burden on the right to vote.” (citing *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973))); *see also Burdick*, 504 U.S. at 437 (noting that the Court’s precedent “gave little weight to the interest ... in making a late rather than an early decision”);¹¹ *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (rejecting challenge to statute imposing 11-month restriction on voters who wish to switch parties).

Likewise, this Court has approved of the regulatory scheme that prohibits third

¹¹ The restriction at issue in *Burdick* was Hawaii’s prohibition of write-in voting in its primary or general elections. The Supreme Court observed that, notwithstanding this prohibition, Hawaii’s electoral system “provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary,” so that, as a practical matter, “any burden on voters’ freedom of choice and association” imposed by the write-in prohibition “is borne only by those who fail to identify their candidate of choice until days before the primary.” *Id.* at 436-37. Citing its statement in *Storer v. Brown*, 415 U.S. 724, 736 (1974), that “the interest [a] candidate and his supporters may have in making a later rather than an early decision to seek independent ballot status” is entitled to “little weight,” the Court concluded that “the same reasoning applies” to the write-in prohibition in *Burdick*. 504 U.S. at 437.

parties from assisting non-disabled persons in delivering their ballots, explaining that such “so-called technicalities of the Election Code” promote the orderly administration of elections. *In re Canvass of Absentee Ballots*, 843 A.2d at 1234. Accordingly, there can be no serious dispute that the two provisions challenged by Petitioners’ preliminary injunction application are facially constitutional.

Respondents do not dispute that extraordinary events occurring close in time to an election may render a facially valid election deadline or other regulation unconstitutional as applied, thus warranting judicial intervention. *See, e.g., Bostelmann*, 2020 WL 1638374 (extending deadline for receipt of absentee ballots), *stay granted in part, Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (leaving in place injunction that required election officials to count absentee ballots that were postmarked by statutory deadline, even if they were not received until later); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (extending voter registration deadline based on hurricane that hit Florida five days before deadline). Such circumstances may impose severe burdens on voters’ ability to comply with the deadline at issue, if not effectively preclude them from doing so.¹² At the same time, the last-minute nature of the

¹² In their Memorandum of Law in support of their Motion to Intervene, Joseph B. Scarnati III, President Pro Tempore of the Pennsylvania Senate, and Jake Corman, Majority Leader of the Pennsylvania Senate, appear to argue that statutory restrictions cannot be deemed unconstitutional where the burdens they impose are the result of “voters’ and poll workers’ [understandable and justifiable] reactions to the pandemic” – such as an unwillingness to

crisis may effectively preclude any legislative response, leaving courts as the only institution realistically able to assess the situation and fashion any appropriate relief.

But in evaluating an as-applied constitutional challenge to election regulations that, like the ones at issue here, are plainly valid on their face, courts must scrupulously observe the distinction between a revision of the regulation that might be desirable as a policy matter and one *required as a matter of constitutional law*. See *Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 798 A.2d 1277, 1283 (Pa. 2002) (“Manifestly, absent constitutional infirmity the courts of this Commonwealth may not refuse to enforce on grounds of public policy that which the Legislature has prescribed.”); *Finucane v. Pa. Milk Mktg. Bd.*, 582 A.2d 1152, 1154 (Pa. Commw. Ct. 1990) (“[T]he power of judicial review must not be used

congregate at polling places due to potential health risks – rather than “the law themselves.” Memorandum of Law in Support of Motion to Intervene by Joseph B. Scarnati III, President Pro Tempore, and Jake Corman, Majority Leader of the Pennsylvania Senate ¶¶ 15 (May 11, 2020). As illustrated by the cases cited above (and many others), a law that is constitutional on its face may impose an impermissible burden on constitutional rights when applied to a particular set of factual circumstances, whether or not those circumstances were contemplated or intended by the legislature – indeed, that is the very premise of an “as applied” challenge. See *Watt v. W.C.A.B.*, 123 A.3d 1155, 1164-65 (Pa. Commw. Ct. 2015) (“a facial challenge seeks to invalidate [a statutory] section entirely, whereas an as-applied challenge seeks to prevent application of the section under the factual circumstances before the Court”) (citing *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298 (Pa. 1992)). If the law were otherwise, individuals would be deprived of protection against unconstitutional burdens on their rights in any set of circumstances unforeseen by the legislature. Further, it need hardly be said that the mere physical ability to vote in-person (in the event the mail-in voting process were to break down) does not preclude the existence of an unconstitutional burden on the right to vote, particularly where much of the Commonwealth remains under stay-at-home orders warning against congregating with large groups of others.

as a means by which the court might substitute its judgment as to public policy for that of the legislature.’ The role of the judiciary is not to question the wisdom of the action of a legislative body, but only to see that it passes constitutional muster.” (quoting and citing *Parker v. Children’s Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978))). As applied here, this fundamental principle requires Petitioners to do much more than show that an extended received-by deadline might, on balance, be preferable for the June primary election, or that permitting third party assistance might make it easier for some voters to comply with the applicable deadline. To obtain injunctive relief, Petitioners must establish a likelihood that enforcement of the received-by deadline and the prohibition on third party assistance will result in a burden on the right to vote that “clearly, palpably, and plainly” violates the Constitution. As shown below, at the present moment in time, Petitioners cannot make this showing.

(b) Petitioners Cannot, at Present, Show a Likelihood That Applying the Facially Valid Received-by Deadline and the Facially Valid Prohibition on Third Party Assistance Will Effect a Constitutional Deprivation

Unsurprisingly, Petitioners lean heavily on the Wisconsin primary election that took place on April 7, 2020 (and to a lesser extent the April 28, 2020 Ohio primary election), suggesting that it is a harbinger of what will occur in connection with Pennsylvania’s forthcoming election scheduled for June 2, 2020 – and that,

Petitioners argue, “demonstrates the consequences of the State’s failure to implement safeguards to ensure access to reliable, safe voting options, including vote by mail, in response to the COVID-19 pandemic.” Br. at 12; *see id.* at 12-13 (discussing “surge” of applications for absentee ballots in Wisconsin and USPS’s “struggle[] to deliver ballots to voters,” and asserting that “Pennsylvania election officials are facing these same issues); *id.* at 14 (asserting that “Ohio’s April 28 election reveals that what happened in Wisconsin was no anomaly,” and that “the same issues are likely to plague Pennsylvania’s upcoming primary election.”). But this case is emphatically *not* the Wisconsin case. In fact, the two scenarios are starkly different, and the differences make clear that, at this juncture, there is no basis for granting the relief Petitioners seek.

The first crucial difference concerns the timing of the respective elections relative to the onset of the COVID-19 pandemic. The April 7 Wisconsin election was scheduled to occur just after the pandemic began to take hold in mid-March.¹³ Only two weeks before the election, Wisconsin’s governor had “issued a ‘Safer-at-Home Order,’ requiring all Wisconsinites to shelter in place to slow the spread of COVID-19.” *Bostelmann*, 2020 WL 1638374, at *3. Not only had voters and

¹³ The Ohio primary election, delayed by six weeks from the initially planned date of March 17, was held on April 28. Petitioners provide no evidence about what actually occurred at the Ohio primary election, and no evidence to show that any problems encountered by Ohio will likely arise in Pennsylvania.

election officials had little time to come to grips with “the emerging ... health crisis,” *id.* at 1, but the infection rate was, at that point, still sharply increasing. *See id.* at *3 (“While Wisconsin and other parts of the country are taking steps to ‘flatten the curve,’ it is clear that the outbreak in Wisconsin is still somewhat near the beginning of that curve, with evidence of increasing community spread.”). As the severity of the crisis came into focus, Governor Evers and the Wisconsin legislature could not agree to postpone the election date. *See* Exec. Order No. 74, at 3, <https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf>. On the very eve of the election, Governor Evers issued an executive order purporting to postpone the election unilaterally, *see id.*, but the Wisconsin Supreme Court invalidated that order later the same day, *Wisc. Legislature v. Evers*, No. 2020AP608-OA (Wisc. Apr. 6, 2020) (amended order enjoining executive order in its entirety), https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

The response of Pennsylvania’s political branches could not have been more different. On March 27, 2020 – six days *before* the federal district court’s order granting injunctive relief in Wisconsin – Pennsylvania enacted Act 12, which, in direct response to the COVID-19 crisis, moved the Commonwealth’s primary election from April 28, 2020 to June 2, 2020. Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 16, § 1804-B(a), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West);

see Marks Decl. ¶ 9. Put differently, in Pennsylvania, the Legislature and Governor deliberated and responded to the challenges posed by the pandemic by giving voters and the election apparatus time to plan for and address these challenges and giving public health officials and the citizenry time to “flatten the curve.”

Notably, the same section of the statute that moved the election date specifies that the deadline for receipt of absentee ballots is 8:00 p.m. on election day. Act of Mar. 27, 2020, sec. 16, § 1804-B(b)(1); *see* 25 P.S. § 3150.16(c). In other words, unlike in Wisconsin, Petitioners are asking this Court to overrule a regulatory scheme agreed upon by the political branches in their specific statutory response to the pandemic.

Second, there is, at present, good reason to believe that, in contrast to what happened in Wisconsin, the vast majority, if not all, of Pennsylvania’s counties will be able to process ballot applications and deliver mail-in and absentee ballots to voters in a timely manner. In Wisconsin, the fact that the public began to appreciate the gravity of the emerging pandemic only in the two or three weeks immediately preceding the election date (indeed, as noted above, it was only on March 24 that Governor Evers issued a stay-at-home directive) led to a last-minute explosion of absentee ballot applications. *See Bostelmann*, 2020 WL 1638374, at *1 (“In the weeks leading up to the election, the extent of the risk of holding that

election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers.”). As a result of both the unanticipated volume and timing of absentee ballot applications, certain Wisconsin jurisdictions were, on the eve of the election, experiencing significant delays in processing applications. *See, e.g., id.* at *5 (“As of March 27, Madison ... was experiencing at least a week-long delay in sending out absentee ballots.”). Furthermore, the Wisconsin court had testimony from “the Madison City Clerk ... that ‘the 8:00 p.m. election day deadline for receipt of absentee ballots is completely unworkable.’” *Id.* Indeed, at the preliminary injunction hearing on April 1 – the day before Wisconsin’s deadline for receipt of absentee ballot applications, and only six days before its election – the Administrator of the Wisconsin Election Commission (“WEC”) “acknowledged that approximately 27,500 voters[’] absentee ballots will be received *after* the receipt deadline of 8:00 p.m. on the day of the election, April 7, 2020, and, therefore, will not be counted.” *Id.* Notably, “[n]o doubt at least in part for this reason, the WEC informed the court on March 31, 2020, that it no longer objects to any absentee ballot postmarked by April 7, 2020, and received by 4:00 p.m. on April 13, 2020, being counted in the election.” *Id.*

In Pennsylvania, by contrast, Act 12 has, in response to the pandemic, given Pennsylvania citizens more than two additional months (relative to their Wisconsin

counterparts) to submit absentee and mail-in ballot applications. Moreover, Pennsylvania officials have made a concerted effort not only to make it as easy as possible for Pennsylvania voters to submit an application (allowing them to do so electronically through the Department of State's website, by downloading and printing a paper application, or by requesting one in person or by phone, email, or letter), but also actively to inform voters about the availability of absentee and mail-in voting options and to encourage voters to promptly apply for and return absentee or mail-in ballots. Marks Decl. ¶¶ 17, 19-21. The educational efforts of state officials have been joined by county boards of elections, candidates, and public interest groups. *Id.* ¶¶ 22, 23. As a result, there is good reason to believe that Pennsylvania will *not* see a last-minute explosion of ballot applications on the scale of what happened in Wisconsin. Oddly, Petitioners point to the number of applications that Pennsylvania has *already* received as an indication of a future problem. To the contrary, the fact that Pennsylvania counties have already received nearly 1.5 million applications is powerful evidence that these concerted efforts have been successful and that there will be no crushing last-minute explosion of applications. *See id.* ¶ 29.

The significant notice and education provided to Pennsylvania voters is relevant in another way. Not only does it diminish the probability of a last-minute explosion of applications that might overwhelm the counties' processing capacity

and USPS's mail delivery capacity, but it also empowers voters to avoid any risk of missing the received-by deadline or needing to deliver their ballots in person to comply with it, by submitting their ballot application before the last possible date. In this regard, it is important to note that Petitioners' claims arise from the fact that the deadline for applying for an absentee or mail-in ballot is only a week before the deadline for receipt of the completed ballot by the county board of elections. Moving the application deadline closer to the received-by deadline allows voters who would otherwise have missed the opportunity to vote by mail (because they would have failed to meet an earlier application deadline) to do so. But this benefit involves a tradeoff: a voter who applies at the last minute will have little time to complete and return her ballot – if she does not complete her ballot quickly, she will have to deliver it in person rather than by mail, and if she does not return her ballot by election day, it will not count at all.

The point is that all deadlines involve a balancing between certain tradeoffs, and the particular balance struck by the legislature in setting a non-discriminatory, generally applicable deadline is not typically a matter of constitutional moment. Again, Respondents acknowledge that it is not impossible that events between now and election day could result in ballot-processing or postal-service delays sufficient to warrant an extension of the received-by deadline. But Petitioners' application provides no evidence that any counties will be unable to process any current

backlogs between now and the May 26 application deadline, and no evidence that any counties' processing of any last-minute applications will be unduly delayed. Nor do Petitioners offer any evidence that there will be delays in the postal service's delivery of ballots. Much of Petitioners' evidence consists simply of information about the scope and gravity of the COVID-19 pandemic. *See, e.g.*, Bonin Decl. Exs. F-J, S-U, II, LL. But the Legislature and Governor were, of course, aware of the scope and gravity of the pandemic when they moved the election date, and Petitioners identify no material change in information or expectations occurring between then and now.

The discussion above underscores another noteworthy difference between the Wisconsin case and the present posture of this case: the judicial decisions in Wisconsin were issued on the very eve of the election, when it was clear and undisputed that there would be an inordinate delay, due to volume-induced backlogs, in the mailing out of absentee ballots to voters. Put differently, the timing of those decisions reduced the need for the courts to speculate about whether an injury of constitutional magnitude would occur in the absence of extending the deadline for receipt of ballots. As noted above, Respondents cannot rule out the possibility that, as election day approaches, some level of judicial relief may ultimately be warranted. What Respondents can say, however, is that there are good reasons, at present, to believe that Pennsylvania's circumstances will not

resemble Wisconsin's; concomitantly, there is not currently any non-speculative basis for this Court to override the judgment of the political branches – which, again, was made in direct response to the public health crisis – regarding the appropriate deadline for receipt of absentee and mail-in ballots, or the longstanding judgment of the political branches that a prohibition on third party assistance with delivery of ballots for non-disabled voters is an appropriate regulation of the election process. Importantly, while this Court can forbear for the moment without foreclosing its ability to extend the deadline on the eve of the election (if circumstances at that time warrant such relief), it will not be able to roll back a premature extension in the event Petitioners' fears fail to materialize. That reality weighs further in favor of judicial restraint.

2. Petitioners Are Unlikely to Succeed on Any of Their Specific Constitutional Theories¹⁴

For the reasons discussed above, Petitioners cannot, at present, establish a likelihood of success on any of their constitutional claims. There is currently no non-speculative basis for the Court to override the judgment of the political branches – embodied in Act 12 and made in direct response to the COVID-19 crisis – that a received-by deadline of 8:00 p.m. on June 2 is appropriate. Nor is

¹⁴ The Petition asserts a procedural due process claim (Count III, Pet. ¶¶ 72-82). However, Petitioners do not base their Preliminary Injunction Application on this claim. Respondents therefore do not address Petitioners' likelihood of success on the merits of this claim. Similarly, Respondents do not address certain types of relief that are requested only in the Petition and not the Preliminary Injunction Application.

there currently a sufficient basis for the Court to invalidate or suspend the statutory ban on third-party assistance. For purposes of completeness, however, Respondents will address each of the specific constitutional provisions invoked by Petitioners.

(a) Petitioners Are Not Likely to Succeed on the Merits of Their Claim Under the Free and Equal Elections Clause

Article I, Section 5 of the Pennsylvania Constitution provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. Petitioners have not shown, at this juncture, that enforcement of Act 12’s deadline for the receipt of mail-in and absentee ballots without the “supplemental procedures” they request, and the enforcement of the prohibition on third party assistance with in-person delivery of absentee and mail-in ballots set forth in 25 P.S. § 3146.6(a) and 3150.16(a), respectively, will render the primary election either unfree or unequal within the meaning of this provision.

Statutes regulating elections will be invalidated under the Free and Equal Elections Clause only “in a case of plain, palpable and clear abuse of the [General Assembly’s] power [to promulgate laws governing elections] which actually infringes the rights of the electors.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (Pa. 2018). As the Court discussed in *League of Women*

Voters, the history of the Clause shows it was concerned, at least primarily, with preventing exclusion of particular classes of people from the franchise and prohibiting regulations that diluted the political power of some voters based on their geographical location (for example, regulations that gave greater political power to counties and thus disenfranchised voters living in western, unincorporated regions and underrepresented voters in the City of Philadelphia (historically) or regulations gerrymandering districts (more recently)). *See id.* at 804-09; *see also id.* at 808-09 (concluding that the Free and Equal Elections Clause “must be understood ... as a salutary effort ... to end ... the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered”). Those concerns are not implicated by the received-by deadline or the prohibition on third-party assistance.

Petitioners cite no cases in which a court has invalidated a non-discriminatory, generally applicable regulation of a discrete aspect of election mechanics – like the received-by deadline and the prohibition on third-party assistance at issue here – under the Free and Equal Elections Clause. The case law indicates that the Clause does not prohibit such regulations, at least not unless they impose a substantial burden on the right to vote. As the Court explained in *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969):

In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, ... and when no constitutional right of the qualified elector is subverted or denied him.

Id. at 899. Under the present circumstances, enforcing the received-by deadline and the prohibition on third-party assistance would not deny any of these protections. These regulations apply generally and to all. Petitioners' argument is that because of the impact of the COVID-19 crisis, in-person voting is not a reliable option for the June 2 primary, and enforcement of the deadline and the prohibition on third-party assistance will leave voters who apply for mail-in or absentee ballot without a sufficient opportunity to complete and submit their ballots. As discussed above, Petitioners provide no basis at present to conclude that it would be *impossible* for any such voter, let alone substantial numbers of such voters, to timely return their completed ballot by mail. Moreover, and significantly, it is within the power of voters to address this concern – and they have been encouraged by election officials to do so (*see* Marks Decl. ¶¶ 20, 21) – by requesting their ballots earlier than the last minute. *See Burdick*, 504 U.S. at 436-37 (upholding election regulation because “any burden on voters’ freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary,” and decisional authority gives “little weight

to the interest the candidate and his supporters may have in making a late rather than an early decision”) (internal quotation marks omitted)).

In the words of *Patterson*, “[i]t is not possible, nor does the Constitution require, that th[e] freedom and equality of election shall be a perfect one.... Individuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional, unless it is a clear and palpable abuse of the power [to regulate elections] in its exercise.” *Patterson v. Barlow*, 60 Pa. 54, 76 (1869); *see also League of Women Voters*, 178 A.3d at 809-10 (noting that the Court “has not retreated from [*Patterson*’s] interpretation of the Free and Equal Elections Clause”). Put simply, non-discriminatory, generally applicable election regulations – including a deadline for all voters to return their mail-in and absentee ballots, and a prohibition on third party assistance with in-person delivery of mail-in and absentee ballots – do not rise to the level of an egregious partisan gerrymander designed to dilute the electoral power of voters who associate with particular parties. Petitioners have not shown that enforcing the received-by deadline and the prohibition on third party assistance in the June election would offend the Free and Equal Elections Clause.

(b) Petitioners Are Not Likely to Succeed on the Merits of Their Equal Protection Claim

Petitioners claim that the prohibition on third party assistance with in-person delivery of absentee and mail-in ballots violates two equal protection provisions of the Pennsylvania Constitution, Article I, Sections 1 and 26.¹⁵ But Petitioners apply the wrong standard of scrutiny, fundamentally undermining their arguments. The appropriate analysis strongly demonstrates that Petitioners are unlikely to succeed on the merits of their equal protection claim.

“The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991). Generally, there are three types of classifications that prompt equal protection review:

classifications which implicate a “suspect” class or a fundamental right; (2) classifications implicating an “important” though not fundamental right or a “sensitive” classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a “compelling” governmental purpose[.]

¹⁵ The Petition alleges that the equal protection provisions of the Pennsylvania Constitution are violated by both (a) the received-by deadline for absentee and mail-in ballots and (b) the prohibition on third-party assistance. (Count II, Pet. ¶¶ 68-71). In their Application for a preliminary injunction, however, Petitioners’ equal protection arguments are limited to the prohibition on third-party assistance. Br. at 26-31. Respondents therefore address only Petitioners’ likelihood of success on the merits of their claim that the prohibition on third party assistance violates Pennsylvania Constitution Article I, Sections 1 and 26.

Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096, 1117–18 (Pa. 2014) (citation omitted).

Petitioners assert that strict scrutiny applies because the burden imposed by the prohibition on third party assistance is “severe.” Br. at 26. However, rather than a “severe” restriction on voting rights, the provision at issue here is a generally applicable, reasonable regulation that imposes at most a slight burden on voters – particularly given the ability of voters to return their ballots by mail, which Petitioners have not shown to be imperiled. Thus, strict scrutiny does not apply here at all.

The Pennsylvania Supreme Court has recognized that “the right to vote is fundamental.” *Banfield*, 110 A.3d at 176. Rather than reflexively applying strict scrutiny when reviewing voting regulations subject to equal protection challenges, however, the Court has repeatedly applied or cited approvingly to the more flexible and less demanding standard developed in *Burdick*, *Anderson*, and their progeny, as Petitioners readily concede (*see* Br. at 26-27). *See, e.g., In re Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) (citing *Burdick*, 504 U.S. 428); *In re Nader*, 905 A.2d 450, 459 (Pa. 2006) (citing *Burdick* and *Anderson*, 460 U.S. 780); *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (citing *Burdick*). The Court has explained that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in

an orderly and efficient manner.” *Banfield*, 110 A.3d at 176-77. Although these laws “will invariably impose some burden upon individual voters,” “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently,” *Burdick*, 504 U.S. at 433, and “compel ... courts to rewrite ... electoral codes,” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). “The Constitution does not require that result.” *Clingman*, 544 U.S. at 593. Rather, under the “flexible” test announced in *Burdick*, “a court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury to the rights ... that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89).

When applying the proper *Burdick* standard, it is clear that Petitioners are unlikely to succeed on the merits. Perhaps recognizing the weakness of their strict-scrutiny position, Petitioners contend that even if the Court does not apply this heightened standard the prohibition on third party assistance should still be found invalid, “as no governmental interest can justify its continued enforcement during a public health emergency.” Br. at 29. But Petitioners offer nothing more than

speculation about the “character and magnitude” of their purported injury.

Burdick, 504 U.S. at 432. As set forth more fully above, the situation here is decidedly different from that in *Wisconsin*. *See supra* Section III.A.1.(b).

Moreover, Petitioners provide no evidence that Pennsylvania counties will be unable to timely process ballot applications, or that the postal service’s delivery of ballots to voters and of voters’ ballots to their local election board will be delayed, thus creating a situation in which voters would be “forced to choose between risking their health by casting a ballot in-person, or their constitutional right to vote by turning their ballot over to the vagaries of mail delivery during the COVID-19 pandemic,” Br. at 30-31, because they are unable to enlist a third party to assist them in delivering their ballot in person. *See supra* Section II.C.

Moreover, the Commonwealth’s interest in ensuring that voted ballots are handled properly weighs heavily in favor of leaving the prohibition on third party assistance in place. This Court has recognized the “obvious and salutary purpose—grounded in hard experience—behind the limitation upon the delivery of absentee ballots.” *In re Canvass*, 843 A.2d at 1232. Specifically, the “limit[ation on] the number of third persons who unnecessarily come in contact with [an absentee or mail-in] ballot [] provides some safeguard that the ballot was filled out by the actual voter, and not by a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to

tamper with it, or even to destroy it.” *Id.* Suspending the prohibition on third party assistance with in-person delivery of absentee ballots at this stage would force the Department, in a matter of days, to either scramble to devise a strategy to replace what has for decades been a core protection of the orderliness and integrity of Pennsylvania’s vote-by-mail process, or shoehorn an unknown number of ballots into a process reserved for voters with disabilities.

Where, as here, “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the . . . rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. at 788). The prohibition on third party assistance is generally applicable and merely regulates the mechanics of absentee and mail-in voting. It is thus a quintessential example of a regulation aimed at ensuring that “some sort of order, rather than chaos, is to accompany the democratic processes.” *Id.* at 433.

Because Petitioners are wrong to apply strict scrutiny and in any event have not demonstrated, beyond naked speculation, that the prohibition on third party assistance with in-person delivery of absentee and mail-in ballots will unduly burden the right to vote, they are unlikely to succeed on their equal protection claim.

B. Petitioners Cannot, at this Juncture, Establish the Requisite Irreparable Injury

Just as Petitioners cannot currently establish a likelihood of success on the merits, they cannot satisfy the separate requirement of showing that a preliminary injunction is necessary to avoid immediate, irreparable injury. “Actual proof of irreparable harm” is a “threshold evidentiary requirement to be met before a preliminary injunction may issue.” *Reed v. Harrisburg City Council*, 927 A.2d 698, 704 (Pa. Commw. Ct. 2007) (citing *New Castle Orthopedic Assocs. v. Burns*, 393 A.2d 1383 (Pa. 1978)). “In order to meet this burden, a plaintiff must present ‘concrete evidence’ demonstrating ‘actual proof of irreparable harm.’ The plaintiff’s claimed ‘irreparable harm’ cannot be based solely on speculation and hypothesis.” *City of Allentown v. Lehigh Cnty. Auth.*, 222 A.3d 1152, 1160 (Pa. Super. Ct. 2019); accord *Summit Towne Ctr.*, 828 A.2d at 1002 (holding that trial court properly denied preliminary injunction where evidence supporting claim of irreparable harm was “no[t] concrete” and “rested almost entirely on speculation and hypothesis”). Indeed, “[i]t is established that ... ‘speculative considerations ... cannot form the basis for issuing [a preliminary injunction].’” *Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (quoting *Berkowitz v. Wilbar*, 206 A.2d 280, 282 (Pa. 1965)) (second omission and alteration in *Novak*); accord *Reed*, 927 A.2d at 704 (“proof of injury” that is “speculative and conjectural” does not

support an injunction (citing *Sameric Corp. of Market Street v. Goss*, 295 A.2d 277 (Pa. 1972))).

As shown above, *see supra* Section III.A.1, Petitioners' claim that irreparable constitutional injury will occur unless the received-by deadline is "supplemented" by extending it and the prohibition on third-party assistance with delivering absentee and mail-in ballots for non-disabled voters is suspended, is, at this juncture, entirely speculative, conjectural, and hypothetical. Petitioners assume that, on the eve of the election, Pennsylvania voters will face the same burdens as Wisconsin voters faced in early April – despite the fact that Pennsylvania moved its primary election specifically in response to the types of challenges that arose in Wisconsin; that Pennsylvania state and county officials (and others) have been hard at work in the interim educating voters and preparing for an influx of mail-in applications and socially-distanced in-person voting; and that Pennsylvania voters, aware of the challenges posed by the pandemic well in advance of the rescheduled election date, have already submitted a substantial number of mail-in ballot applications. Petitioners' speculation and conjecture cannot, as a matter of law, establish the essential prerequisite of immediate, irreparable harm. For this reason, too, their application for a preliminary injunction should be denied – or, at the very least, deferred.

C. **Petitioners Cannot Establish That the Requested Relief is Reasonably Suited to Abate the Offending Conduct**

In addition, Petitioners have not and cannot establish that the extension of the received-by deadline and the suspension of the prohibition on third party assistance with in-person delivery of absentee and mail-in ballots during the June 2 primary election will abate the circumstances and conduct that they allege will result in constitutional violations.

Petitioners focus throughout their Application on the fact that “in-person voting will be severely restricted in the June 2 primary.” Br. at 16. Petitioners emphasize counties’ struggles to prepare for in-person voting in the June 2 primary due to the loss of poll workers, Br. at 5-6, the loss of polling locations, Br. at 7, and the risk of infection on election day, Br. at 7-8. Petitioners continually assert throughout their Application that the COVID-19 crisis imposes a substantial burden on in-person voting, and in fact hinge their arguments that the absentee and mail-in voting procedures set forth in the Election Code are unenforceable on their claim that in-person voting has been compromised. *See, e.g.*, Br. at 16 (“The COVID-19 related disruptions to daily life in the Commonwealth, and to the electoral process specifically, have left Pennsylvanians with a dearth of reasonably accessible options for voting in the upcoming primary.”); *id.* at 22 (“The health risks of in-person voting or personal delivery of mail ballots bear most heavily on medically vulnerable individuals”); *id.* at 30 (“Recognizing the risks of in-

person voting, the Governor and local election officials were correct to encourage Pennsylvanians to vote by mail, as opposed to congregating in fewer, consolidated polling places. Yet the right to vote is unconstitutionally impaired by defects in the mail voting system.”).

Despite their overarching concern that the circumstances of the COVID-19 pandemic threaten to undermine in-person voting, Petitioners do not seek relief designed to lessen this burden. In fact, half of the preliminary relief Petitioners do seek in their Application – suspension of the prohibition on third party assistance with in-person delivery of absentee and mail-in ballots – would actually encourage voters to have contact with additional persons (*i.e.*, the third parties collecting ballots), and encourage additional persons to visit county election board offices in person on or before election day, thus potentially exacerbating the public health risk of in-person voting. Given their inconsistent approach, Petitioners cannot establish that the relief they seek is “reasonably suited to abate the offending conduct,” that is, that the relief will alter the administration of the June 2 primary election in a manner that will promote public safety and the right to vote amid the COVID-19 crisis.

D. If the Court Were Nonetheless to Grant the Requested Preliminary Injunction, the Non-Severability Clause Would Be Inapplicable, or, in the Alternative, Unenforceable

If the Court denies the injunction – as it should – then there is no need to reach the issue of severability at all. Act 77’s non-severability provision states “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 of Oct. 31, 2019 (P.L. 552, No. 77), § 11, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). And here, for all of the foregoing reasons, Petitioners’ claims are likely to fail on their merits, meaning the Court should not determine that any provision of Act 77 is likely invalid.

If, however, the Court concludes that injunctive relief is warranted, there are at least two reasons that the Court should not apply the non-severability provision to invalidate Act 77.¹⁶ First, the non-severability provision should not apply in this case because the claims Petitioners make in the Application are a narrow as-applied, rather than facial, challenge to certain provisions of Act 77. As described in Respondents’ Preliminary Objections, Act 77 resulted from complex negotiations between the executive and legislative branches. It is nearly

¹⁶ Respondents take no position on the effect of paragraph 108 of the Petition for Review, in which Petitioners represent that they “would withdraw their claims without seeking any relief if the non-severability provision were going to apply.” (Pet. ¶ 108.)

inconceivable, therefore, that the legislature intended to nullify the entirety of its historic compromise in the event of a one-time determination that, only because of an unprecedented and unforeseen global health crisis, a single, discrete administrative provision of Act 77, the received-by deadline,¹⁷ was unconstitutional in the context of a single primary election in which both the Republican and Democratic presidential nomination races are uncontested – and unconstitutional only in the sense that it must be extended by a few days. *See Commonwealth v. Maguigan*, 511 A.2d 1327, 1337 (Pa. 1986) (“We are bound under the rules of our Statutory Construction Act to avoid such absurd results and to promote public policy.”). Indeed, this Court has previously refused to apply a statutory non-severability clause to void a statute, despite determining that a portion of the statute was unconstitutional on an as-applied basis, because the law was “still valid as applied to” others prospectively. *Pa. Fed’n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 754 (Pa. 1984). The same is true here: although a final determination would render the received-by deadline invalid for purposes of this single primary election, it would still be “valid as applied to” all future, non-pandemic afflicted, elections. *Id.*

¹⁷ The prohibition on third party assistance with delivery of mail-in ballots is not subject to the non-severability provision of Act 77.

Second, should the Court agree with Petitioners and hold that applying the received-by deadline during the COVID-19 pandemic would disenfranchise voters and be unconstitutional, applying the non-severability provision to void *all of Act 77* would similarly be unconstitutional. Invalidating Act 77 would also undercut the entire purpose of the Petition, which is to *extend* the receipt deadline for mailed votes. Without Act 77, the Court would have to rescind the entire “no-excuse” mail-in voting regime. Doing so would be contrary to constitutional rights sought to be vindicated by Petitioners’ case and would be catastrophic; it would force millions of voters to vote in-person (despite COVID-19) or not at all, and it would call into question the validity of votes already sent in by mail-in voters. In the event the Court rules in favor of Petitioners’ constitutional challenge, applying the non-severability provision would lead to an undeniably absurd result – one that would itself be, by the very logic sustaining Petitioners’ challenge, unconstitutional.

For all of the foregoing reasons, in the event the Court grants Petitioners’ requested relief, it should refuse to apply the non-severability provision here.

IV. CONCLUSION

For the foregoing reasons, Petitioners’ Application should be denied or, in the alternative, deferred.

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: May 18, 2020

By: /s/ Michele D. Hangley
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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

Dated: May 18, 2020

/s/ Michele D. Hangle

Michele D. Hangle

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY
OF THE COMMONWEALTH, *et al.*,

Respondents.

No. 266 MD 2020

DECLARATION OF JONATHAN MARKS

I, Jonathan Marks, declare under the penalty of perjury pursuant to 18 Pa.C.S. § 4902 that:

I am the Deputy Secretary for Elections and Commissions for the Department of State (the “Department”) of the Commonwealth of Pennsylvania. I make this declaration in support of Respondents’ Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review.

Act 77’s Amendments to the Pennsylvania Election Code

1. On October 31, 2019, Governor Wolf signed Act 77 of 2019 into law.

This Act made significant changes to Pennsylvania’s Election Code.

2. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots.

Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

3. Act 77 did not change the deadline for applying for non-emergency absentee ballots; this deadline is still 5:00 p.m. on the Tuesday before the election. The same deadline now applies for mail-in ballot applications.

4. Act 77 extended the deadline for receipt of voted ballots, however, from 5:00 p.m. on the Friday before the election to 8:00 p.m. on the day of the election.

5. Act 77 also included provisions to ensure that counties will begin sending absentee and mail-in ballots to eligible voters as soon as the ballot is certified and official ballots are available.

6. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail. Even before the current COVID-19 emergency, the Department and the counties were preparing for this increase.

The Ongoing Efforts to Mitigate the Impact of the COVID-19 Emergency on the Primary Election

7. As the Court is undoubtedly aware, the COVID-19 pandemic is causing real and constantly evolving challenges to every aspect of Pennsylvania personal, commercial, and civic life, and presents special challenges to those

administering the primary election.

8. In March 2020, as the severity of the crisis became clear, the Department, together with the counties and the General Assembly, began taking steps to mitigate these challenges.

9. The General Assembly took a critical step toward mitigation on March 27, 2020, when it passed Act 12 of 2020, which postponed the primary election from April 28 to June 2, 2020.

10. Act 12 also included provisions to give counties flexibility in recruiting poll workers and relocating polling places, for the primary election, and allowed counties to begin pre-canvassing absentee and mail-in ballots at 7:00 a.m. on election day.

11. The Department and the counties are using the five extra weeks Act 12 provided to minimize the effect of the COVID-19 pandemic on mail-in, absentee, and in-person voting.

12. First, the Department has taken steps aimed at smoothing the process of in-person voting on election day.

13. The Department is assisting counties with planning for reductions in numbers of poll workers and available polling places, and advising counties about how they can set up their polling places to facilitate social distancing.

14. The Department has provided counties with \$13 million in sub-

grants—which the Commonwealth received from the federal government—for the counties to use towards additional staff, purchasing equipment, and otherwise ensuring the primary is administered as seamlessly as possible.

15. The Department has also procured 6,000 safety kits to provide to counties, which include masks, gloves, hand sanitizer, and other supplies for safely administering in-person voting.

16. Second, in order to alleviate crowding at polling places, the Department, the counties, and third parties are making efforts to encourage as many Pennsylvania voters as possible to vote by mail-in or absentee ballot.

17. The Department and counties have put many mechanisms in place to allow voters to request absentee or mail-in ballots. Most registered voters may sign up online on the Department’s website, and any registered voter may get an application by downloading and printing one; requesting one in person at the voter’s county election office; or calling, emailing, or writing to the Department or the voter’s county election office. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and submit them in one visit.

18. Many third parties, including nonprofits, government officials, and political candidates, are also delivering applications to potential voters.

19. The Department has created and posted on its website a toolkit that third parties can use to educate their constituents. The Ready to Vote toolkit includes templates for posters, flyers, palm cards, and other educational materials.

20. The Department and the Governor's office have devoted significant resources to educating members of the public about the availability of absentee and mail-in ballot options. For example,

- Governor Wolf has encouraged voters to apply for ballots during his frequent COVID-19 updates;
- The Department has mailed postcards to all households with registered primary voters (voters registered to either major political party), informing voters about the changed primary date and the availability of absentee and mail-in voting options;
- The Department has provided email updates to registered voters;
- The Department is also conveying this information to voters using bilingual statewide TV, radio, and streaming online broadcasts; and
- Other Pennsylvania departments have emailed updates from the Department to their own email lists.

21. In these communications, the Department has emphasized the need to apply for and return absentee and mail-in ballots promptly and has communicated the deadlines for requesting ballots and returning them.

22. Many county boards of elections have also made significant efforts to educate the public about these options for voting and encourage voters to promptly apply for ballots. For example, some counties have sent pre-stamped mail-in ballot

applications to registered voters. Other counties have communicated with their registered voters through social media, text and mail.

23. Elected officials, political parties, candidates, and public interest groups, including Common Cause and the League of Women Voters, have joined the effort, alerting their constituents and contacts to the new mail-in voting option and the application process.

The Current Status of the Ballot Application Process

24. It appears that the efforts to encourage the public to apply for mail-in and absentee ballots have, so far, been successful.

25. The Commonwealth has 7,477,057 registered primary voters. Only a certain percentage of these, however, can be expected to vote in any particular primary election.

26. Primary turnout is typically lowest in elections with no contested major party presidential race and no high-profile statewide races.

27. The June 2, 2020 primary will be such an election; neither presidential primary is contested, and the statewide races have not captured a great deal of the public's attention.

28. Statewide turnout in the last several primary elections in which federal offices were on the ballot was as follows:

- 2018: 1,563,373

- 2016 (contested races for both major party presidential nominations): 3,416,283
- 2014: 1,370,815
- 2012 (contested race for one major party presidential nomination): 1,608,341
- 2010: 1,885,648

29. Preliminary data indicates that, as of Sunday, May 17, 2020, the counties have received nearly 1.5 million applications for absentee and mail-in ballots – 1,487,047, to be exact.

30. The counties have approved 1,310,516, or approximately 88%, of the applications.

31. Preliminary data indicates that the counties have mailed 1.2 million ballots, or approximately 90% of the applications approved so far, to voters.

32. The counties have received 280,105 voted ballots, which accounts for approximately 21% of applications approved so far. Because several counties, including Philadelphia, began mailing out their ballots very recently, I expect this number to increase rapidly.

33. The Department receives real-time updates of ballot application statistics, and, if the Court would find it useful, can provide updated figures as the primary election approaches.

34. Because this is the first election in which the Commonwealth offers the option of mail-in voting, and because the effect on turnout of the COVID-19

pandemic is uncertain, it is difficult to predict exactly how many voters will seek mail-in or absentee ballots. It is unlikely, however, that this number will exceed 2 million. Therefore, it is reasonable to assume that more than 60% of the mail-in and absentee ballots that will be requested for the primary election have already been requested.

35. Over recent weeks, the counties have been adding extra personnel to help process applications and other election tasks more quickly. Many counties have also procured additional print and mailing services to streamline preparation and delivery of balloting materials.

36. While managing the application process during the COVID-19 crisis has certainly presented challenges for individual counties, so far, most counties have been able to process applications as they are made and avoid backlogs.

37. There is, of course, significant variation among counties. As of May 17, 2020, many counties had mailed ballots in response to more than 99% of their approved applications.

38. For the counties identified on pages 11-12 of Petitioner's Application and the corresponding exhibits, as of May 17, preliminary data shows the following approximate figures:

- Allegheny County had received 205,454 applications, rejected 16,809 of them, approved 183,345, and mailed out 171,343 ballots;

- Delaware County had received 68,418 applications, rejected 3,365 of them, approved 46,332, and mailed out 18,756 ballots;
- Lawrence County had received 8,340 applications, rejected 523 of them, approved 7,712 , and mailed out 7,701 ballots;
- Lehigh County had received 41,596 applications, rejected 3,240 of them, approved 35,714, and mailed out 34,480 ballots;
- Mercer County had received 9,411 applications, rejected 666 of them, approved 7,649, and mailed out 6,677 ballots;
- Montgomery County had received 140,150 applications, rejected 6,234 of them, approved 125,043 and mailed out 113,512 ballots; and
- Philadelphia County had received 150,366 applications, rejected 1,887 of them, approved 131,962 of them, and mailed out 98,435 ballots.

39. Based on the counties' progress, and assuming there are no dramatic surges in infections, weather events, or other unexpected events, I expect that the great majority of the Commonwealth's 67 counties will be able to timely process any current backlogs and handle additional applications that arrive.

40. Primarily due to the impact of COVID-19, a handful of counties have recently processed ballot applications and ballot mailings at a slower pace than others. The Department does not yet have enough information to determine whether these counties will be in a position to catch up with their pending applications and process new applications as they are received.

41. The Election Code requires counties to mail absentee and mail-in primary election ballots for all approved applications by Tuesday, May 19, 2020.

See 25 P.S. §§ 3146.5(b), 3150.15.

42. After this date, the Department will in a better position to determine which counties, if any, are likely to experience significant delays in processing and responding to timely submitted ballot requests.

43. By Friday, May 22, 2020, unless the Court directs otherwise, I will supplement this Declaration with additional information about the counties' progress.

The United States Post Office

44. Petitioners speculate that the United States Post Office ("USPS") is experiencing delays in processing of first-class mail that will extend mail times beyond the typical one to three business days.

45. As part of preparations for the June 2 primary election, the Department has been in close contact with representatives of the USPS for several months, including conversations with staff from certain of the five regional processing plants that serve Pennsylvania,

46. The Department and the counties have worked with the USPS to ensure that the envelopes used for mailing blank and returned ballots are formatted to work with the USPS's automated equipment, thereby ensuring that ballots reach their destinations as quickly as possible.

47. Envelopes containing ballots are clearly marked as such and are

segregated from other mail using “green tags,” which allows the USPS to prioritize them as official election mail and expedite them to the extent possible.

The Relief Petitioners Request

48. From a purely policy perspective, I agree with Petitioners that extending the deadline for receipt of ballots may be good policy under the circumstances, and, as with any extension, would increase the number of votes that are timely returned. This might well increase voters’ confidence in the midst of a crisis.

49. I also agree that in the event of significant backlogs in application processing due to COVID-19, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline (targeted, if necessary, to counties that are experiencing delays) might be necessary to avoid an undue burden on the right to vote.

50. The other form of relief that Petitioners request – allowing third parties to deliver voters’ mail in or absentee ballots to county election offices – would likely have negative consequences. Procedures would need to be put in place to require written authorizations for such deliveries, as are required for emergency absentee ballots. Confirming these written authorizations would likely increase the administrative burden on county election officials. Doing so would also impose a burden on individual voters to identify and authorize designated

representatives to deliver ballots on their behalf. Allowing third-party delivery of ballots might also reduce the level of assurance that an individual voter has regarding the security of her ballot.

51. Based on the information available at this time, the Department does not predict significant impediments to the ability of voters in most of the Commonwealth's counties to timely return mail-in ballots.

52. At this point, the Department cannot rule out the possibility that one or more individual counties will develop significant delays in processing applications, but do not predict that such delays will occur across the Commonwealth.

53. Given the unpredictable nature of the pandemic, the deadline extension Petitioners seek could become appropriate. If problems develop, however, it is more likely than not that they will not affect the entire Commonwealth, or that they will not require a full seven-day extension.

54. Granting a full seven-day, statewide extension at this point could have the undesired consequence of encouraging counties to turn their attention away from ballot application processing, or encouraging voters to delay requesting or mailing their ballots.

55. If significant problems develop shortly before or on the day of the election, a court could consider an extension of the ballot receipt deadline that is

tailored to those problems.

56. Pennsylvania statutes require counties to retain all absentee and mail-in ballots they receive – even those received after the deadline – for a period of two years. Therefore, late-received ballots will not be discarded before a court has the opportunity to consider whether the deadline should be extended.

57. If the Court grants the relief Petitioners seek to extend the deadline for receipt of ballots, it will cause complications and delays in counties' canvassing processes.

58. First, for ballots received after election day, counties will have to put in place a new procedure for examining postmarks; determining whether “a preponderance of the evidence” indicates whether a ballot was mailed after election day; and, potentially, allowing for challenges regarding envelopes with illegible or absent postmarks.

59. Second, during the canvassing process, counties examine each provisional ballot envelope to determine whether the elector was eligible to vote. If the county determines that the elector who submitted the provisional ballot was duly registered to cast a primary vote in that district and that the elector did not also submit an absentee or mail-in ballot, the provisional ballot will be counted. If the county determines that the elector submitted an absentee or mail-in ballot, the provisional ballot will not be counted.

60. Thus, a county cannot count a voter's provisional ballot until it has confirmed that the voter did not also return an absentee or mail-in ballot.

Therefore, counties will not be able to process provisional ballots until after the last day for receipt of absentee ballots.

61. Accordingly, a seven-day extension of the ballot receipt deadline could delay counting of all ballots until eight days or more after the election.

62. This delay, in turn, would interfere with the following deadlines, which the Court should consider extending if it extends the ballot return date: The deadline by which proof of identification for absentee and mail-in ballots must be received and verified under 25 P.S. § 3146.8(h); the deadline for counties to submit unofficial election returns to the Secretary of the Commonwealth under 25 P.S. § 3154(f); the deadline for a defeated candidate to request that a recount and recanvass not be made under 25 P.S. § 3154(h); and the deadline for the Secretary of the Commonwealth to order a recount or recanvass under 25 P.S. § 3154(g)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 2020.



Jonathan Marks

[VID-19%20Situation%20Reports/20200516nCoVSituationReportExt.pdf](#)(last visited on May 18, 2020).

3. Attached as Exhibit 2 is a true and correct copy of the United States Postal Service’s webpage entitled “Coronavirus Updates: Expected Delivery Changes,” <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes?r=8&ui-force-components-controllers-recordGlobalValueProvider.RecordGvp.getRecord=1> (last visited on May 18, 2020).

4. Attached as Exhibit 3 is a true and correct copy of the United States Postal Service’s webpage regarding Service alerts and residential service disruptions, <https://about.usps.com/newsroom/service-alerts/residential/welcome.htm> (last visited on May 18, 2020)

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Executed on May 18, 2020.



Michele D. Hangley

EXHIBIT 1

SITUATION REPORT	INCIDENT	OPERATIONAL PERIOD	REPORTING UNIT	FORM
External	COVID-19	START: 05/16/20 0800 END: 05/16/20 2000	PADOH	ICS 209 - Short

CLEARED FOR PUBLIC DISTRIBUTION

CURRENT SITUATION

The World Health Organization declared COVID-19 a pandemic on March 11, 2020.

PADOH continues coordination efforts with FEMA, PEMA, and other state agencies through the Department Operations Center (DOC) to mitigate the impacts of COVID-19.

Currently, there are **61,611** positive cases and **4,403** deaths in Pennsylvania.

As of 1500 on May 16, 2020, there were **1,456,029** cases in the U.S, and **4,599,738** worldwide. There have been **88,211** deaths in the U.S. and **310,010** throughout the world.

Epidemiological investigations and contact tracing continue throughout the state to determine potential exposure of additional persons. The PA state lab has increased capacity to account for the testing surge. Commercial and medical system labs are on line and testing for COVID-19.

Governor Wolf ordered statewide school closings beginning March 16, 2020. On March 19th, Governor Wolf ordered all non-life sustaining business to close.

On March 25, 2020, PA Legislature passed \$50 million in funding to help aid the health care system in providing more medical equipment and supplies and to meet urgent needs of patients and staff. On March 28, 2020, the Wolf administration received USDA approval for COVID-19 Disaster Food Distribution. On March 30, 2020, the White House approved a major disaster declaration for PA.

On April 1, 2020, Governor Wolf expanded the stay-at-home order to include the entire commonwealth, which has been extended to May 8, 2020. On April 3, 2020, Governor Wolf announced that as many people as possible should wear a nonmedical or homemade mask when leaving their homes.

On April 8, 2020, Governor Wolf signed an order to distribute and transfer PPE/medical supplies between medical facilities to provide critical aid to those in need. On April 10, Governor Wolf signed an executive order authorizing the early release of 1,800 inmates from state prisons to minimize the spread of COVID-19.

On April 15, 2020, Secretary Levine signed an order directing protections for critical workers who are employed at businesses that are authorized to maintain in-person operations during the COVID-19 disaster emergency.

On April 22, 2020, Governor Wolf unveiled his detailed plan for opening the commonwealth with a targeted start of May 8, 2020. This reopening will happen in three phases: red, yellow, and green. Phases will be assigned based on conditions in a county, counties, or region. In addition, Secretary Levine outlined DOH’s plans for contact tracing, case investigation, and increased testing capacities as these counties move to ease restrictions.

On May 6, 2020, Governor Wolf outlined plans to create the Commonwealth Civilian Coronavirus Corps to support recovery efforts by increasing testing and contact tracing and providing new job opportunities in the public health sector for those whose employment was terminated due to the statewide closures.

On May 7, 2020, Governor Wolf extended the stay at home order for counties in the red phase until June 4, 2020.

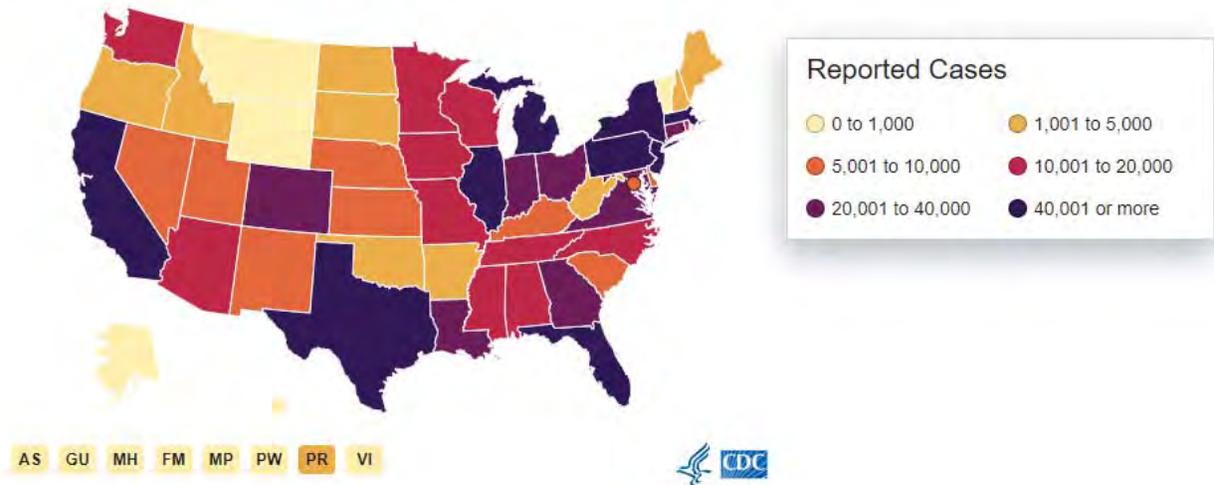
On May 8, 2020, the following 24 counties moved from the red phase to the yellow phase: Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango, and Warren.

On May 15, 2020, the following 13 counties moved from the red phase to the yellow phase: Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Fulton, Greene, Indiana, Somerset, Washington and Westmoreland. The governor also announced the following twelve counties would be moving from the red phase to the yellow phase on May 22, 2020: Adams, Beaver, Carbon, Columbia, Cumberland, Juniata, Mifflin, Perry, Susquehanna, Wyoming, Wayne, and York.

* Data sources: WHO, CDC, ECDC, NHC and DXY and local media reports

28 states report more than 10,000 cases of COVID-19.

This map shows COVID-19 cases and deaths reported by U.S. states, the District of Columbia, and other U.S.-affiliated jurisdictions. Hover over the map to see the number of cases and deaths reported in each jurisdiction. To go to a jurisdiction's health department website, click on the jurisdiction on the map.



ACCOMPLISHMENTS

- DOH State Lab is currently testing specimens for SARS-CoV-2
- Montgomery, Delaware, Bucks, Philadelphia, Erie, Allegheny, South Central, Chester, and Allentown Medical Reserve Corps activated
- Participated in joint planning meetings with PEMA on public health missions
- Delivery of resources ongoing
- DOH and PEMA established Operational Synch Matrix process
- BOL testing – no backlog
- Medical surge planning conducted, and CSC guidance released
- MRC recruitment and vetting of MRC volunteers
- Spanish menu launched for PAHEALTH line
- Version 2 of the Interim Crisis Standards of Care Plan published
- PPE distribution information disseminated
- NE CBTS open to all pre-registered symptomatic adults
- Discussions regarding testing strategies ongoing

- Ongoing discussions between DOH, PEMA, and PANG regarding planning behind targeted mobile testing
- PANG teams currently staffing [four](#) congregate care sites
- Currently 7 MRC active nursing home missions with 2 completed

CHALLENGES

- National guidance is evolving. Keep partners informed as it changes
- Assessing supply chain issues
- Addressing PPE issues
- Addressing needs of LTC facilities and other congregate settings

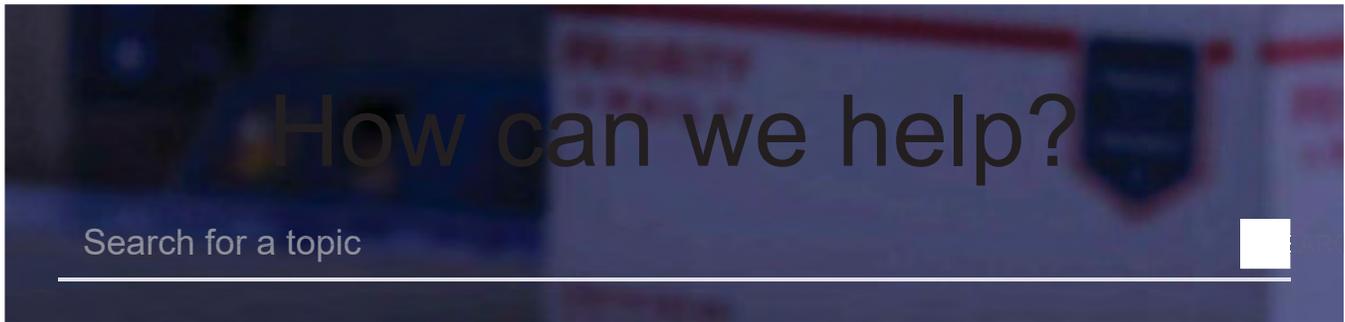
PLANNED ACTIVITIES (NEXT 24 – 72 HOURS)

- Continue development of COVID-19 Response & Mitigation Plan
- Conduct daily executive briefings
- Continue/Enhance Joint Information Center in coordination with agency partners
- Healthcare Coordination calls held weekly on Mondays, Tuesdays, and Thursdays
- County and Municipal Health Department calls held weekly, as needed
- Coordinate messaging and information requests from state agencies
- Disseminate a health alert (HAN) on updated CDC guidance as necessary
- Continue local and regional planning support efforts with partner state agencies
- Continue development of media campaign to improve general public awareness

ADDITIONAL INFORMATION

- Coronavirus informational webpage on PA DOH website live [here](#)
- Public inquiry resource account: RA-DHCOVIDQUESTIONS@pa.gov

EXHIBIT 2



[FAQs Home](#) » [Sending Mail & Packages](#) » [Mail & Shipping Services](#)

USPS® Coronavirus Updates: Expected Delivery Changes

USPS products and packages may require more time to be delivered due to limited transportation availability as a result of the ongoing COVID-19 impacts.

🕒 Apr 17, 2020 · FAQ

Article Number

000004253

Customer Information

I understand some of my mail delivery may be delayed? Why?

Postal Service Priority Mail® products and First-Class® packages may temporarily require more time to be delivered due to limited transportation availability as a result of the Coronavirus (COVID-19) pandemic.

When will this happen?

This change is effective April 17, 2020.

How will this affect delivery of Priority Mail?

Priority Mail's two-day and three-day service commitments will be extended to three days and four days, respectively. Customers will continue to receive improved product tracking and as much as \$50 in free insurance.

Feedback

Will this affect delivery of Priority Mail Express®?

Priority Mail Express service, which guarantees overnight service, and one-day service commitments for Priority Mail will not change.

Will First-Class Mail be delayed too?

There is no impact to First-Class letters and flats. However, First-Class Package Service® two and three day service commitments will be extended to three and four days respectively.

Will this affect delivery of my medicine?

Medication remains a priority in all areas of transportation, processing and delivery.

Is mail still being sent to other countries?

Global Express Guaranteed® Services also have been altered. For a full list of international and domestic updates, refer to *usps.com*.

[Back to Top](#)

Feedback

Related Information

- [Sending Mail & Packages](#)
- [Mail & Shipping Services](#)
- [Featured Tracking](#)

Related Articles

- [USPS® Coronavirus Updates for Residential Customers](#)
- [USPS® Coronavirus Updates for Business Customers](#)
- [Informed Delivery® - The Basics](#)
- [Mail Service Alerts and Updates](#)
- [U.S. Passports - The Basics](#)

Trending Articles

- [USPS Tracking® - The Basics](#)

[Where is my package?](#)

5/10/2020

USPS® Coronavirus Updates: Expected Delivery Changes

where is my package:

Informed Delivery® - The Basics

Delayed mail and packages?

Missing Mail - The Basics

Feedback

EXHIBIT 3

Service alerts

Residential service disruptions

Select one of the entries below to display disruption information for that location or event.

Georgia

5-8, 2:30 p.m. ET

New Mexico

5-4, 2 p.m. ET

Alabama

5-1, 8:30 a.m. ET

District of Columbia

4-30, 5:30 p.m. ET

New Jersey

4-23, 7:30 p.m. ET

South Carolina

4-19, 10 p.m. ET

Arkansas

4-17, 5 p.m. ET

Mississippi

4-16, 10 a.m. ET

Nevada

4-16, 8:30 a.m. ET

Virginia

4-15, 4:30 p.m. ET

California

4-10, 5 p.m. ET

New York

4-8, 2:30 p.m. ET

Minnesota

4-6, 3:30 p.m. ET

Florida

4-6, 3:30 p.m. ET

Arizona

4-4, 2 p.m. ET

Alaska

4-3, 1 p.m. ET

Maryland

4-2, 8 p.m. ET

North Carolina

4-2, 8 p.m. ET

Louisiana

4-2, 1 p.m. ET

Texas

4-1, 7 p.m. ET

Utah

3-19, 3 p.m. ET

Colorado

3-16, 5 p.m. ET

Massachusetts

2-6, 11 a.m. ET

Puerto Rico

1-17, 5 p.m. ET

Hawaii

1-14, 4:30 p.m. ET

Connecticut

11-22, 5 p.m. ET

Do you have mail coming from or going to another country?

Visit our [International alerts page](#).

Related links

- [Change of address](#)
- [Holding mail](#)
- [Contact us](#)
- [Postal holidays](#)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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14. The Department has provided counties with \$13 million in sub-

grants—which the Commonwealth received from the federal government—for the counties to use towards additional staff, purchasing equipment, and otherwise ensuring the primary is administered as seamlessly as possible.

15. The Department has also procured 6,000 safety kits to provide to counties, which include masks, gloves, hand sanitizer, and other supplies for safely administering in-person voting.

16. Second, in order to alleviate crowding at polling places, the Department, the counties, and third parties are making efforts to encourage as many Pennsylvania voters as possible to vote by mail-in or absentee ballot.

17. The Department and counties have put many mechanisms in place to allow voters to request absentee or mail-in ballots. Most registered voters may sign up online on the Department’s website, and any registered voter may get an application by downloading and printing one; requesting one in person at the voter’s county election office; or calling, emailing, or writing to the Department or the voter’s county election office. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and submit them in one visit.

18. Many third parties, including nonprofits, government officials, and political candidates, are also delivering applications to potential voters.

19. The Department has created and posted on its website a toolkit that third parties can use to educate their constituents. The Ready to Vote toolkit includes templates for posters, flyers, palm cards, and other educational materials.

20. The Department and the Governor's office have devoted significant resources to educating members of the public about the availability of absentee and mail-in ballot options. For example,

- Governor Wolf has encouraged voters to apply for ballots during his frequent COVID-19 updates;
- The Department has mailed postcards to all households with registered primary voters (voters registered to either major political party), informing voters about the changed primary date and the availability of absentee and mail-in voting options;
- The Department has provided email updates to registered voters;
- The Department is also conveying this information to voters using bilingual statewide TV, radio, and streaming online broadcasts; and
- Other Pennsylvania departments have emailed updates from the Department to their own email lists.

21. In these communications, the Department has emphasized the need to apply for and return absentee and mail-in ballots promptly and has communicated the deadlines for requesting ballots and returning them.

22. Many county boards of elections have also made significant efforts to educate the public about these options for voting and encourage voters to promptly apply for ballots. For example, some counties have sent pre-stamped mail-in ballot

applications to registered voters. Other counties have communicated with their registered voters through social media, text and mail.

23. Elected officials, political parties, candidates, and public interest groups, including Common Cause and the League of Women Voters, have joined the effort, alerting their constituents and contacts to the new mail-in voting option and the application process.

The Current Status of the Ballot Application Process

24. It appears that the efforts to encourage the public to apply for mail-in and absentee ballots have, so far, been successful.

25. The Commonwealth has 7,477,057 registered primary voters. Only a certain percentage of these, however, can be expected to vote in any particular primary election.

26. Primary turnout is typically lowest in elections with no contested major party presidential race and no high-profile statewide races.

27. The June 2, 2020 primary will be such an election; neither presidential primary is contested, and the statewide races have not captured a great deal of the public's attention.

28. Statewide turnout in the last several primary elections in which federal offices were on the ballot was as follows:

- 2018: 1,563,373

- 2016 (contested races for both major party presidential nominations): 3,416,283
- 2014: 1,370,815
- 2012 (contested race for one major party presidential nomination): 1,608,341
- 2010: 1,885,648

29. Preliminary data indicates that, as of Sunday, May 17, 2020, the counties have received nearly 1.5 million applications for absentee and mail-in ballots – 1,487,047, to be exact.

30. The counties have approved 1,310,516, or approximately 88%, of the applications.

31. Preliminary data indicates that the counties have mailed 1.2 million ballots, or approximately 90% of the applications approved so far, to voters.

32. The counties have received 280,105 voted ballots, which accounts for approximately 21% of applications approved so far. Because several counties, including Philadelphia, began mailing out their ballots very recently, I expect this number to increase rapidly.

33. The Department receives real-time updates of ballot application statistics, and, if the Court would find it useful, can provide updated figures as the primary election approaches.

34. Because this is the first election in which the Commonwealth offers the option of mail-in voting, and because the effect on turnout of the COVID-19

pandemic is uncertain, it is difficult to predict exactly how many voters will seek mail-in or absentee ballots. It is unlikely, however, that this number will exceed 2 million. Therefore, it is reasonable to assume that more than 60% of the mail-in and absentee ballots that will be requested for the primary election have already been requested.

35. Over recent weeks, the counties have been adding extra personnel to help process applications and other election tasks more quickly. Many counties have also procured additional print and mailing services to streamline preparation and delivery of balloting materials.

36. While managing the application process during the COVID-19 crisis has certainly presented challenges for individual counties, so far, most counties have been able to process applications as they are made and avoid backlogs.

37. There is, of course, significant variation among counties. As of May 17, 2020, many counties had mailed ballots in response to more than 99% of their approved applications.

38. For the counties identified on pages 11-12 of Petitioner's Application and the corresponding exhibits, as of May 17, preliminary data shows the following approximate figures:

- Allegheny County had received 205,454 applications, rejected 16,809 of them, approved 183,345, and mailed out 171,343 ballots;

- Delaware County had received 68,418 applications, rejected 3,365 of them, approved 46,332, and mailed out 18,756 ballots;
- Lawrence County had received 8,340 applications, rejected 523 of them, approved 7,712 , and mailed out 7,701 ballots;
- Lehigh County had received 41,596 applications, rejected 3,240 of them, approved 35,714, and mailed out 34,480 ballots;
- Mercer County had received 9,411 applications, rejected 666 of them, approved 7,649, and mailed out 6,677 ballots;
- Montgomery County had received 140,150 applications, rejected 6,234 of them, approved 125,043 and mailed out 113,512 ballots; and
- Philadelphia County had received 150,366 applications, rejected 1,887 of them, approved 131,962 of them, and mailed out 98,435 ballots.

39. Based on the counties' progress, and assuming there are no dramatic surges in infections, weather events, or other unexpected events, I expect that the great majority of the Commonwealth's 67 counties will be able to timely process any current backlogs and handle additional applications that arrive.

40. Primarily due to the impact of COVID-19, a handful of counties have recently processed ballot applications and ballot mailings at a slower pace than others. The Department does not yet have enough information to determine whether these counties will be in a position to catch up with their pending applications and process new applications as they are received.

41. The Election Code requires counties to mail absentee and mail-in primary election ballots for all approved applications by Tuesday, May 19, 2020.

See 25 P.S. §§ 3146.5(b), 3150.15.

42. After this date, the Department will in a better position to determine which counties, if any, are likely to experience significant delays in processing and responding to timely submitted ballot requests.

43. By Friday, May 22, 2020, unless the Court directs otherwise, I will supplement this Declaration with additional information about the counties' progress.

The United States Post Office

44. Petitioners speculate that the United States Post Office ("USPS") is experiencing delays in processing of first-class mail that will extend mail times beyond the typical one to three business days.

45. As part of preparations for the June 2 primary election, the Department has been in close contact with representatives of the USPS for several months, including conversations with staff from certain of the five regional processing plants that serve Pennsylvania,

46. The Department and the counties have worked with the USPS to ensure that the envelopes used for mailing blank and returned ballots are formatted to work with the USPS's automated equipment, thereby ensuring that ballots reach their destinations as quickly as possible.

47. Envelopes containing ballots are clearly marked as such and are

segregated from other mail using “green tags,” which allows the USPS to prioritize them as official election mail and expedite them to the extent possible.

The Relief Petitioners Request

48. From a purely policy perspective, I agree with Petitioners that extending the deadline for receipt of ballots may be good policy under the circumstances, and, as with any extension, would increase the number of votes that are timely returned. This might well increase voters’ confidence in the midst of a crisis.

49. I also agree that in the event of significant backlogs in application processing due to COVID-19, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline (targeted, if necessary, to counties that are experiencing delays) might be necessary to avoid an undue burden on the right to vote.

50. The other form of relief that Petitioners request – allowing third parties to deliver voters’ mail in or absentee ballots to county election offices – would likely have negative consequences. Procedures would need to be put in place to require written authorizations for such deliveries, as are required for emergency absentee ballots. Confirming these written authorizations would likely increase the administrative burden on county election officials. Doing so would also impose a burden on individual voters to identify and authorize designated

representatives to deliver ballots on their behalf. Allowing third-party delivery of ballots might also reduce the level of assurance that an individual voter has regarding the security of her ballot.

51. Based on the information available at this time, the Department does not predict significant impediments to the ability of voters in most of the Commonwealth's counties to timely return mail-in ballots.

52. At this point, the Department cannot rule out the possibility that one or more individual counties will develop significant delays in processing applications, but do not predict that such delays will occur across the Commonwealth.

53. Given the unpredictable nature of the pandemic, the deadline extension Petitioners seek could become appropriate. If problems develop, however, it is more likely than not that they will not affect the entire Commonwealth, or that they will not require a full seven-day extension.

54. Granting a full seven-day, statewide extension at this point could have the undesired consequence of encouraging counties to turn their attention away from ballot application processing, or encouraging voters to delay requesting or mailing their ballots.

55. If significant problems develop shortly before or on the day of the election, a court could consider an extension of the ballot receipt deadline that is

tailored to those problems.

56. Pennsylvania statutes require counties to retain all absentee and mail-in ballots they receive – even those received after the deadline – for a period of two years. Therefore, late-received ballots will not be discarded before a court has the opportunity to consider whether the deadline should be extended.

57. If the Court grants the relief Petitioners seek to extend the deadline for receipt of ballots, it will cause complications and delays in counties' canvassing processes.

58. First, for ballots received after election day, counties will have to put in place a new procedure for examining postmarks; determining whether “a preponderance of the evidence” indicates whether a ballot was mailed after election day; and, potentially, allowing for challenges regarding envelopes with illegible or absent postmarks.

59. Second, during the canvassing process, counties examine each provisional ballot envelope to determine whether the elector was eligible to vote. If the county determines that the elector who submitted the provisional ballot was duly registered to cast a primary vote in that district and that the elector did not also submit an absentee or mail-in ballot, the provisional ballot will be counted. If the county determines that the elector submitted an absentee or mail-in ballot, the provisional ballot will not be counted.

60. Thus, a county cannot count a voter's provisional ballot until it has confirmed that the voter did not also return an absentee or mail-in ballot.

Therefore, counties will not be able to process provisional ballots until after the last day for receipt of absentee ballots.

61. Accordingly, a seven-day extension of the ballot receipt deadline could delay counting of all ballots until eight days or more after the election.

62. This delay, in turn, would interfere with the following deadlines, which the Court should consider extending if it extends the ballot return date: The deadline by which proof of identification for absentee and mail-in ballots must be received and verified under 25 P.S. § 3146.8(h); the deadline for counties to submit unofficial election returns to the Secretary of the Commonwealth under 25 P.S. § 3154(f); the deadline for a defeated candidate to request that a recount and recanvass not be made under 25 P.S. § 3154(h); and the deadline for the Secretary of the Commonwealth to order a recount or recanvass under 25 P.S. § 3154(g)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 18, 2020.



Jonathan Marks

2020, and that I would update the Court after that date. *See* May 18 Declaration ¶¶ 14-43.

3. Statewide, a large majority of counties are keeping up with mail-in and absentee voting applications, with ballots being mailed out as applications are processed.

4. Some counties, however, are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest. If these obstacles persist into next week, there is a possibility that they could result in significant delays in voters' receipt of ballots.

5. As of Thursday, May 21, 2020, the counties had reported receipt of approximately 1,701,141 applications for absentee and mail-in ballots.

6. The counties had approved 1,528,212, or approximately 90%, of the applications.

7. Preliminary data indicates that the counties have mailed 1,459,871 million ballots, or approximately 96% of the applications approved so far, to voters.

8. The counties have received 441,012 voted ballots, which accounts for approximately 29% of applications approved so far.

9. Counties have continued to take steps to deal with the high volume of applications by, for example, reassigning staff to assist with ballot processing and,

in some cases, adding extra shifts at their election offices.

10. The vast majority of counties do not appear to be having difficulty managing the application process. As of May 21, 2020, more than half of the counties in the Commonwealth had mailed ballots in response to more than 90% of their approved applications.

11. Certain counties, however, are experiencing delays or backlogs.

12. For example, preliminary data shows that Montgomery County has mailed out 131,932 ballots out of the 138,363 applications it has approved. However, for reasons not within Montgomery County's control, many ballots that the county has mailed have been delayed in arriving at voters' homes. These delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.

13. Philadelphia County recently began receiving a surge of paper ballot applications. Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, Philadelphia's staff will face difficulties in promptly processing all of the outstanding applications.

14. A recent outage in Philadelphia's Verizon connection, which covered the network connection with the election database, further impeded Philadelphia's progress.

15. Preliminary data shows that as of May 21, Philadelphia County had received 181,655 applications, rejected 2,114 of them, approved 159,772, and mailed out 142,836 ballots.

16. Of the counties identified in my May 18 declaration, other than Philadelphia and Montgomery, preliminary data reported by the counties shows that:

- Allegheny County had received 242,349 applications, rejected 20,120 of them, approved 222,757, and mailed out 205,646 ballots;
- Delaware County had received 78,333 applications, rejected 4,290 of them, approved 53,851, and mailed out 42,904 ballots;
- Lawrence County had received 9,400 applications, rejected 623 of them, approved 8,813, and mailed out 8,654 ballots;
- Lehigh County had received 47,057 applications, rejected 3,991 of them, approved 43,220, and mailed out 43,011 ballots; and
- Mercer County had received 11,067 applications, rejected 807 of them, approved 9,746, and mailed out 9,569 ballots.

17. The last day for applying for a mail in or absentee ballot is Tuesday, May 26.

18. I understand that because of COVID-19 related staffing shortages or technical difficulties, a small number of other counties may face challenges in keeping up with their outstanding applications as the application deadline approaches.

19. After May 26, unless the Court instructs otherwise, I will give the

Court further information about the counties' application numbers and the existence of any backlogs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2020.



Jonathan Marks

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL CROSSEY, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, SECRETARY OF
THE COMMONWEALTH, *et al.*,

Respondents.

No. 266 MD 2020

**RESPONDENTS' BRIEF IN SUPPORT OF JURISDICTIONAL
PRELIMINARY OBJECTIONS
TO PETITIONERS' PETITION FOR REVIEW**

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I. INTRODUCTION

Respondents, Secretary of the Commonwealth Kathy Boockvar and Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, submit the following Memorandum of Law in support of their jurisdictional Preliminary Objections.¹

The Petition for Review contains two jurisdictional defects. First, the Supreme Court has exclusive jurisdiction over Petitioners' constitutional challenges to Act 77²—and more specifically the election day deadline for Commonwealth voters to return absentee and mail-in ballots. Second, Petitioners seek affirmative relief from Pennsylvania's county boards of elections and accuse the boards of delaying vote processing, making the boards of elections—who are not named as Respondents—indispensable to resolution of this litigation. For these reasons, this Court should sustain Respondents' jurisdictional Preliminary Objections.

¹ In accordance with the Court's Order of May 19, 2020, Respondents will brief their remaining Preliminary Objections at such time as the Court directs.

² Act of Oct. 31, 2019 (P.L. 552, No. 77), 2019 Pa. Legis. Serv. Act. 2019-77 (S.B. 421) (West).

II. STATEMENT OF JURISDICTION

Respondents object to the exercise of this Court’s jurisdiction because Petitioners (i) initiated their constitutional challenges to Act 77 in the wrong court and (ii) failed to join indispensable parties, as detailed *infra* Section VI.

III. STATEMENT OF THE CASE³

Four voters and the Pennsylvania Alliance for Retired Americans filed the Petition for Review—which raises constitutional claims arising from enforcement of various provisions of the Pennsylvania Election Code—in the Commonwealth Court on April 22, 2020. Specifically, Petitioners allege that Pennsylvania law places four potential burdens on voting by mail during the COVID-19 pandemic.

First, Petitioners take issue with the Pennsylvania Election Code’s requirement that, to be counted, a voter’s absentee or mail-in ballot must be received by the appropriate county board of elections “by 8:00 p.m. on Election Day[,]” which Petitioners refer to as the “Election Day Receipt Deadline.” *See* Pet. ¶ 34 (citing 25 P.S. §§ 3146.6(c), 3150.16(c)); *see also* Pet. ¶ 3. Second, Petitioners challenge the provision that “in most cases prohibits third parties from

³ For purposes of the Preliminary Objections, Respondents assume, but do not admit, the truth of the Petition’s well-pleaded factual allegations. In ruling on preliminary objections, the Court must accept well-pleaded allegations as true, but “need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Torres v. Beard*, 997 A.2d 1242, 1245 (Pa. Commw. Ct. 2010) (citations omitted).

assisting voters in delivering mail ballots[.]” *See, e.g.*, Pet. ¶ 42 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Third, Petitioners allege that “most voters who choose to return their ballots by mail must also provide their own postage,” but some individuals cannot afford this expense. *See, e.g.*, Pet. ¶ 48 (citing 25 P.S. §§ 3146.6(a); 3150.16(a)). Fourth and finally, Petitioners contend that unidentified “counties . . . rely on signature matching to determine whether mail ballots should be counted[.]” leading to ballots being arbitrarily discounted. *See, e.g.*, Pet. ¶ 54 (citing 25 P.S. § 3146.8(g)(3)).

According to Petitioners, because of COVID-19, the above provisions violate voters’ constitutional rights. To support that assertion, Petitioners posit the following is true: (i) individual voters do not want to vote in person; (ii) counties may fall behind on processing ballot applications; (iii) the United States Postal Service may be slow in returning filled-out ballots to county boards of elections; and (iv) there are additional possible barriers to voting by mail, including the (a) inability to use third-party assistance to return ballots; (b) monetary costs for postage; and (c) rejection of votes in unspecified counties using signature verification. Thus, according to Petitioners, voters are at risk of being disenfranchised. *See, e.g.*, Pet. ¶¶ 3–6.

To remedy these purported constitutional violations, Petitioners seek two forms of relief.⁴ First, Petitioners seek a declaration that (i) the failure to provide prepaid postage on absentee and mail-in ballots is unconstitutional; (ii) it is unconstitutional to fail to provide procedures for counting mail ballots returned after 8:00 p.m. on election day; (iii) it is unconstitutional to disallow third party mail ballot collection or assistance; and (iv) it is unconstitutional to fail to “provide adequate guidance to election officials when verifying mail ballots through signature matching and require notice and an opportunity to cure a mail ballot flagged for signature mismatch.” Pet. at p. 34.

Second, Petitioners seek an order requiring Respondents to: (i) provide prepaid postage on all absentee and mail-in ballots; (ii) “implement additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day . . . will be counted if otherwise eligible, to the extent that such procedures do not trigger Act 77’s non-severability clause;” (iii) “[a]llow voters to designate a third party to assist in collecting and submitting absentee or mail-in ballots and ensure that all such ballots are counted if otherwise eligible;” and (iv) “[p]rovide uniform guidance and training to election officials involved in verifying mail ballots and implement procedures to ensure that voters receive reasonable notice

⁴ Nothing in the Petition for Review states for which specific elections Petitioners are seeking relief.

and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected.” *Id.* at pp. 34–35.

On May 8, 2020—a little more than two weeks after filing the Petition for Review—Petitioners filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (the “Emergency Application”). The Emergency Application seeks an order instructing Respondents to:

- (1) provide emergency write-in ballots to all voters who request a mail ballot, designate all ballots submitted by mail as emergency ballots, and require that all emergency ballots shall be counted if they are postmarked by Election Day and received up to seven days after the election; and
- (2) permit voters to obtain assistance from third-parties in mailing and delivering their sealed mail ballots to county boards, and require that all such ballots delivered by third parties shall be counted if otherwise eligible.

Emergency Application at pp. 34–35. On Monday, May 18, Respondents filed an Opposition to Petitioners’ Emergency Application.

IV. STATEMENT OF THE QUESTIONS INVOLVED

Where Petitioners claim that enforcing the Election Day Receipt Deadline as written violates their constitutional rights, did Petitioners’ claims include “a challenge to or . . . a [request for] declaratory judgment concerning the constitutionality of” the statutory provision establishing the deadline, over which the Pennsylvania Supreme Court has exclusive jurisdiction?

Suggested Answer: Yes. *See infra* Section VI.A.

Where Petitioners seek relief that would mandate that county boards of elections take affirmative action, based on the allegation that county boards may delay processing of absentee and mail-in ballot applications, does the Court lack

jurisdiction because Petitioners have not named the county boards of election as respondents?

Suggested Answer: Yes. *See infra* Section VI.B.

V. SUMMARY OF ARGUMENT

The Court lacks jurisdiction for two reasons.

First, the Pennsylvania Supreme Court has exclusive jurisdiction over the Petition. Petitioners' claims challenging the Election Day Receipt Deadline are constitutional challenges to 25 P.S. §§ 3146.6(c) and 3150.16(c). Section 13(2) of Act 77 provides that the "Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality" of certain provisions, including those containing the Election Day Receipt Deadline. Because Petitioners challenge the Election Day Receipt Deadline on constitutional grounds, the Supreme Court has exclusive jurisdiction over the Petition for Review.

Second, Petitioners failed to join indispensable parties. Petitioners do not just seek declarations that the challenged provisions of the Election Code are unconstitutional. Rather, Petitioners also seek an injunction affirmatively requiring Respondents and the county boards of elections to (a) provide prepaid postage on all absentee and mail-in ballots; (b) implement unidentified emergency procedures to ensure that ballots delivered after the Election Day Receipt Deadline will be counted if otherwise eligible; (c) allow voters to designate a third party to assist in

collecting and submitting absentee and mail-in ballots; and (d) provide uniform guidance and training to election officials involved in verifying mail ballots and implement unidentified procedures to ensure that voters receive reasonable notice of and an opportunity to cure signature-related defects on absentee and mail-in ballots. *See* Pet. at pp. 34–35 (Prayer for Relief). Because Petitioners seek to compel action by the county boards of election—and because Petitioners allege that the county boards are violating the Pennsylvania Constitution—the counties are indispensable parties that must be joined in this litigation.

VI. ARGUMENT

A. Only the Pennsylvania Supreme Court Has Jurisdiction to Hear This Matter

The Pennsylvania Supreme Court has exclusive jurisdiction over the Petition for Review. Section 13(2) of Act 77 provides that the “Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality” of certain enumerated provisions, including Section 1306 and all of Article XIII-D of Act 77.

Section 1306 of Act 77 is codified at 25 P.S. § 3146.6. § 3146.6(c) sets forth the Election Day Receipt Deadline for absentee ballots: “[A] completed absentee 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.” Article XIII-D of Act 77 contains Section 1306–D, which is codified at 25 P.S. § 3150.16.

§ 3150.16(c) sets forth the Election Day Receipt Deadline for mail-in ballots: “[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.”

Each of the three counts in the Petition includes constitutional challenges to the Election Day Receipt Deadline. *See* Pet. ¶¶ 63, 71, 77. Petitioners do not challenge any individual county’s implementation of the deadline, or argue that the deadline must be extended to remedy other constitutional violations that make the deadline unworkable for a particular set of voters in a particular election; they allege that the Election Day Receipt Deadline *itself* is unconstitutional and cannot be applied anywhere in the Commonwealth in any upcoming election.⁵ Thus, only the Pennsylvania Supreme Court has jurisdiction to hear Petitioners’ claims, and Petitioners’ claims must be transferred there. *See* 42 Pa. C.S.A. § 5103 (stating that if a court does not have jurisdiction over a matter, the court “shall transfer the

⁵ As Respondents discussed in their response to Petitioners’ Application for Special Relief, and will further discuss in a supplemental declaration about the status of the counties’ ballot processing efforts, each of Pennsylvania’s 67 counties is facing a different set of challenges in preparing for the June 2 primary election. It is possible that, in a few counties, obstacles will arise to the timely processing and return of applications and ballots. If this happens, Respondents believe that the proper remedy would be a petition to the Court of Common Pleas of any affected county. *See, e.g.*, Ex. KK to the Memorandum in Support of Petitioners’ Application (2016 Order of Montgomery County Court of Common Pleas). Such actions, unlike this action, would not challenge Act 77 itself and thus would not be subject to the Supreme Court’s exclusive jurisdiction.

record thereof to the proper tribunal”); *see also Kneller v. Stewart*, 112 A.3d 1269 (Pa. Commw. Ct. 2015).

To the extent that Petitioners assert that they are not challenging the *constitutionality* of the Election Day Receipt Deadline and instead are merely trying to *supplement* the deadline with emergency procedures, that argument must fail. The crux of Petitioners’ claims is that enforcement of the Election Day Receipt Deadline *as written*—without any provision authorizing alternative procedures in the event of an emergency—will cause voters to be disenfranchised and thus violate their constitutional rights. Allegations in support of each constitutional count confirm as much:

- “Pennsylvania’s failure to provide additional safeguards for voters whose mail ballots, due to mail delivery disruptions, arrive at the local county board of elections office after 8:00 p.m. on Election Day will arbitrarily disenfranchise thousands of voters for reasons outside their control. . . . Thus Petitioners, and many Pennsylvanians who vote by mail, will face an impermissible risk of arbitrary disenfranchisement, in violation of their constitutional rights.” Pet. ¶ 63 (Count I);
- “Pennsylvania’s rejection of ballots delayed by mail service disruptions . . . substantially burdens the right to vote and bear heavily on certain groups of voters without sufficient justification.” Pet. ¶ 71 (Count II); and
- “Pennsylvania’s failure to provide safeguards to voters whose ballots are delivered after the Election Day Receipt Deadline, due to the postal service disruptions caused by the ongoing public health emergency, is neither a reliable nor fair way to administer voting by mail. Rejecting ballots delivered after the Election Day Receipt Deadline under these circumstances effectively requires some voters to submit their ballots blindly, with no reasonable assurance that they

will be delivered in time, even when submitted well in advance of Election Day.” Pet. ¶ 77 (Count III).

It is of no moment that Petitioners suggest additional “safeguards” might remedy these alleged constitutional violations. As enacted, the Pennsylvania Election Code and in particular §§ 3146.6(c) and 3150.16(c) do not contain those safeguards. Saying “without these safeguards (which the statute does not provide), the statute is unconstitutional,” is the same as saying “the statute is unconstitutional.”

Because Petitioners raise a challenge “concerning the constitutionality” of §§ 3146.6(c) and 3150.16(c), the Supreme Court has exclusive jurisdiction over Petitioners’ claims under Section 13(2) of Act 77. The Court must therefore transfer the Petition for Review to the Supreme Court.

B. Petitioners Failed to Join Indispensable Parties

The county boards of election are indispensable parties to this action. “In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by litigation that [the entity] must be a party of record to protect such rights[.]” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 346 A.2d 788, 789 (Pa. 1975); *see also CRY, Inc. v. Mill Serv., Inc.*, 640 A.2d 372, 375 (Pa. 1994) (stating same). “The absence of indispensable parties goes absolutely to the jurisdiction [of the court], and without their presence the court can grant no relief.” *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) (quotations and citations

omitted). The following considerations are “pertinent” to determining whether a party is indispensable: “1. Do absent parties have a right or interest related to the claim? 2. If so, what is the nature of that right or interest? 3. Is that right or interest essential to the merits of the issue? 4. Can justice be afforded without violating the due process rights of absent parties?” *DeCoatsworth v. Jones*, 639 A.2d 792, 797 (Pa. 1994) (citation omitted).

It is undeniable that Petitioners seek an injunction that would write into existence *new law* that compels *affirmative action* by the county boards of election to adopt new standards and procedures in order to count certain ballots that might otherwise be uncounted. *See* Pet. at pp. 34–35 (Prayer for Relief). The injunctive relief that Petitioners purport to seek, including “[p]rovid[ing] prepaid postage on all absentee and mail-in ballots,” “[i]mplement[ing] additional emergency procedures to ensure that ballots delivered after 8:00 p.m. on Election Day ... will be counted if otherwise eligible,” and “[p]rovid[ing] uniform guidance and training to election officials involved in verifying mail ballots and implement[ing] procedures to ensure that voters receive reasonable notice and an opportunity to cure signature-related defects on absentee or mail-in ballots before any ballot is rejected,” will require county action and the direct involvement of county election officials. As in *CRY*, where this Court held that the Department of Environmental Resources was an indispensable party because compliance with the Court’s order

would “require the cooperation of DER,” 640 A.2d. at 376, granting Petitioners’ requested relief will require cooperation and affirmative steps from the county boards of elections.

Additionally, Petitioners’ claims hinge on their expectation that the county boards of elections will actively cause properly cast votes to not be counted: “In upcoming elections, this signature matching procedure will be applied to hundreds of thousands of mail ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice, and *their ability to cast an effective vote will ultimately depend on whichever arbitrary standard is employed by their local election board.*” See, e.g., Pet. ¶ 59 (emphasis added); see also Pet. ¶¶ 54–55, 58, 67, 71, 80. Petitioners also allege that counties are “falling behind on processing mail-in ballot requests,” Pet. ¶ 35, placing voters in jeopardy of violating the Election Day Receipt Deadline. Likewise, Petitioners allege that counties, including Beaver County, will unconstitutionally fail to provide prepaid postages for mail ballots. Pet. ¶ 52. Finally, in Count III of the Petition, Petitioners allege that this conduct by the *counties*, not by Respondents, deprives voters of procedural due process. See Pet. ¶¶ 78–81. Because Petitioners allege that the county boards of election will be at least partially responsible for violating the Pennsylvania Constitution, “justice [cannot] be afforded without violating the due process rights of” the counties. *DeCoatsworth*, 639 A.2d at 797; see also *CRY*,

640 A.2d at 376 (holding that party was indispensable where it was accused of “misfeasance and malfeasance”).

Here, Petitioners were required to join the county boards of election in this litigation because they both seek affirmative relief from all of the counties and accuse all of the boards—without distinguishing amongst them—of unconstitutional conduct. The counties are entitled to defend themselves from this allegation and, if the Court decides that a Constitutional violation is taking place, to have a say in the fashioning of relief. Thus, the county boards of elections referenced by the Petitioners are necessary parties to this litigation.

VII. CONCLUSION

For the foregoing reasons, the Court should sustain Respondents’ jurisdictional Preliminary Objections.

Respectfully submitted,

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

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

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

**PETITIONERS' RESPONSE TO RESPONDENTS' AND PROPOSED INTERVENORS'
MEMORANDA OF LAW ON THIS COURT'S JURISDICTION OVER PETITIONERS'
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PRELIMINARY STATEMENT

With only a week remaining until the June 2 primary election, the Commonwealth is running out of time and solutions to protect the right to vote despite Respondents' own admission that some voters are likely to be disenfranchised. *See, e.g.*, Resp't's Prelim. Objs. ¶ 44. Respondents have even presented data and testimony confirming that counties are experiencing backlogs in processing mail ballot requests and delays in getting those ballots delivered by the U.S. Postal Service. *See Ex. A; see also Ex. B.* And despite the absence of any viable solution (other than immediate court-ordered relief) for the inevitable disenfranchisement of Pennsylvania voters, Respondents and Proposed Intervenors challenge this Court's authority to grant such relief by misapplying Act 77's exclusive jurisdiction clause, and suggest that this Court, for the first time, should require Petitioners in a voting rights action to add all 67 county election boards as defendants.¹ Their arguments fail for several reasons.

First, courts around the country, including in Pennsylvania, have repeatedly issued injunctions providing emergency relief from election-related deadlines without declaring those deadlines or underlying rules unconstitutional. *See infra* § I.A. They did so because, in the midst of an emergency that threatens voters' access to the franchise, the constitutionality of the underlying deadline or other election procedures is beside the point. Consistent with those prior rulings, this lawsuit challenges the Commonwealth's failure to implement adequate safeguards during the COVID-19 pandemic to ensure that all citizens can exercise their right to vote safely and participate in a free and equal election. Petitioners' request that the Commonwealth implement

¹ The Proposed Intervenors consist of: Reps. Mike Turzai, Speaker of the Pennsylvania House of Representatives, and Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives (collectively, "House Leaders"); Senators Joseph Scarnati, President Pro Tempore and Jake Corman, Senate Majority Leader (collectively, "Senators"); and Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, "Republican Committees").

such safeguards is not a constitutional challenge to its laws, nor do Petitioners seek a declaration that any provisions of Act 77 are unconstitutional. In fact, the House Leaders have accused Petitioners of “failing to challenge any particular statute,” and failing to identify “a single statute they consider unconstitutional,” which undermines the other opposing parties’ contentions that Petitioners’ claims are constitutional challenges to Act 77.²

Second, Respondents and Proposed Intervenors misread Act 77’s exclusive jurisdiction clause, ignoring its context and trampling several foundational rules of statutory construction along the way.³ The additional conditions accompanying the clause make clear that it was never intended to govern the forms of election-specific, emergency relief that Petitioners seek here. *Clearwater Constr., Inc. v. Northampton Cty. Gen. Purpose Auth.*, 166 A.3d 513, 518 (Pa. Commw. Ct. 2017) (“Our Supreme Court has cautioned against interpreting statutory words in isolation, urging instead that we read them in reference to the context in which they appear.”). When the General Assembly enacted the jurisdictional clause, it also imposed an April 28, 2020 deadline for bringing constitutional claims before the Supreme Court and, at the same time, delayed Act 77’s implementation in any election until the previously-scheduled April 28 primary. Act 77, §§ 13(2)-(3). In other words, the exclusive jurisdiction clause, by its terms, was limited to pre-implementation, facial challenges which could permanently undermine the “bipartisan compromise” reflected by Act 77. *See id.* Adopting Respondents’ and Proposed Intervenors’ interpretations of the clause would mean that no voters could ever assert as-applied constitutional challenges to any Act 77 provision in any future election, effectively rendering the Act

² See Proposed Preliminary Objections of House Leaders, ¶¶ 2, 13.

³ The House Leaders do not advance this argument.

unreviewable. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 418 (Pa. 2017) (recognizing legislature cannot foreclose judicial review of legislative enactments).

To expand their jurisdictional argument, the Republican Committees and the Senators also attempt to sweep pre-existing election laws into the Supreme Court's exclusive jurisdiction simply because they were restated or reprinted under a different section, or because they can be applied to the mail-in voting process introduced by Act 77. These arguments, in which the House Leaders did not join, not only ignore Pennsylvania laws governing statutory construction, but they represent a dramatic expansion of the Supreme Court's original jurisdiction, and an accompanying contraction of voters' rights to assert as-applied challenges in future elections. *See* 1 Pa.C.S. § 1953 (“[P]ortions of the statute which were not altered by the amendment shall be construed as effective from the time of enactment.”)

Finally, the county election boards are not indispensable parties to this action. Petitioners' Emergency Application implicates ministerial duties—like counting ballots that arrive after the Election Day deadline and allowing voters to designate third parties to deliver their ballots. These measures, at most, have only an incidental impact on the county boards because the additional safeguards Petitioners seek are already in place for certain categories of voters, and have been for years. *See* 25 Pa.C.S. § 3511(a) (election officials must count military-overseas ballots delivered on the seventh day after the election); *id.* § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); *DiPietrae v. City of Phila.*, 666 A.2d 1132, 1135 (Pa. Commw. Ct. 1995) (allowing disabled voters to designate an agent of their choice to delivery their mail ballot). Not a single county election official has sought to intervene in this case, and for good reason. Respondents have broad authority to administer elections and to guide the county boards'

application of election laws, and because courts presume that public officials will perform their duties properly, Respondents and Intervenors provide no basis to require 67 county election boards to participate in this lawsuit.

For these reasons and those set forth below, this Court has jurisdiction over Petitioners' Emergency Application. But in the event the Court determines that it lacks jurisdiction, the appropriate action is not to dismiss the Petition or deny the Emergency Application, but to transfer the record to the Supreme Court where it shall be treated as if originally filed on April 22, 2020, the date when Petitioners initiated this lawsuit. 42 Pa.C.S. § 5103(a).

BACKGROUND

This lawsuit challenges the Commonwealth's failure to provide its citizens with sufficient access to a free and equal election during the COVID-19 pandemic, in violation of Petitioners' constitutional rights. Pet. ¶ 2. The Petitioners include several Pennsylvania voters who, because of their advanced age, are especially vulnerable to severe illness from COVID-19. Pet. ¶¶ 12–15. As detailed in Petitioners' previous filings, the pandemic has upended virtually all aspects of daily life in Pennsylvania, including the staffing and operation of polling places, and the delivery of mail ballots. *Id.* ¶¶ 19–32. To stem the spread of the disease, the Governor has encouraged residents to stay at home, practice social distancing, and vote-by-mail. *Id.* ¶ 7. And, to date, over 1.5 million Pennsylvanians, including Petitioners, have decided to vote absentee or through mail-in voting (collectively, "mail voting" or "mail ballots") in the June 2 primary. *Id.*

The upcoming election also marks the first time that *all* eligible Pennsylvanians will have the opportunity to vote by mail, yet the COVID-19 pandemic threatens to obstruct their access to the franchise under the Commonwealth's current mail voting procedures. First, the pandemic has caused U.S. Postal Service delivery delays and county backlogs in processing ballot requests, which significantly increases the risk that voters will not receive their mail ballots in a timely

manner, and that their timely submitted ballots will not be delivered by 8 p.m. on Election Day. *Id.* ¶¶ 19–33; Mem. App. Prelim. Inj. at 9–11. Second, voters who do not maintain a supply of stamps at home must either put their health at risk and venture out to a post office or other establishment that sells stamps in order to mail their ballots, or purchase stamps online at an increased cost and sufficiently in advance of the election to allow for delivery of the stamps—which, too, is delayed because of COVID-19. Pet. ¶¶ 48–52; Mem. App. Prelim. Inj. at 28–29. Third, voters who seek to avoid the vagaries of mail delivery must risk their health and visit their local county board of elections office to deliver their ballots in person because Pennsylvania law prohibits them from seeking delivery assistance from third parties. Pet. ¶¶ 42–51; Mem. App. Prelim. Inj. at 18–19. And, finally, assuming the voter’s ballot arrives on time, they are subject to undefined ballot verification rules and procedures, including signature matching, that threaten to disenfranchise voters arbitrarily, and without notice or an opportunity to cure. Pet. ¶¶ 53–59.⁴

Lacking reasonably accessible and safe voting options during the COVID-19 pandemic, Petitioners asked this Court to declare as unconstitutional the Commonwealth’s failure to implement additional safeguards to ensure a free and equal election and to protect the right to vote, including providing prepaid postage on mail ballots; providing additional emergency procedures to allow ballots submitted by mail to be delivered after 8:00 p.m. on Election Day—to the extent that such relief does not trigger Act 77’s non-severability clause; allowing third parties to provide ballot delivery assistance; and providing uniform guidance and training to election officials that engage in signature matching as a means to verify mail ballots. Mem. App. Prelim. Inj. at 34–35; Pet. at 34–35 (Prayer for Relief).

⁴ Petitioners’ Emergency Application does not seek relief pertaining to the signature matching procedures or the lack of prepaid postage.

On May 8, 2020, Petitioners filed their Emergency Application for a preliminary injunction, seeking limited, emergency relief narrowly tailored to implement procedures that can be adopted with minimal, if any, disruption to the election administration and voting process. Specifically, Petitioners' Emergency Application requested an injunction requiring Respondents to implement the following procedures: (1) provide emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all emergency ballots if postmarked by Election Day and received by the seventh day after the election; and (2) preliminarily enjoin Pennsylvania laws prohibiting third parties from providing assistance in delivering mail ballots. Mem. App. Prelim. Inj. at 34–35.

Shortly after Petitioners filed this action, a group of organizations and a Pennsylvania voter filed a petition for review before the Pennsylvania Supreme Court, which also named Kathy Boockvar, Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries as Respondents. Petition, *Disability Rights Pennsylvania, et al., v. Boockvar, et al.*, No. 83 MM 2020 (April 27, 2020). The Supreme Court petition challenged the constitutionality of the ballot receipt deadline and sought to enjoin its enforcement for ballots postmarked by Election Day and received up to seven days after the election. *Id.* at 61-62. On May 15, the Supreme Court sustained the Respondents' first preliminary objection, but did not explain the reasons for its decision. Order, *Disability Rights Pennsylvania, et al., v. Boockvar, et al.*, No. 83 MM 2020 (May 15, 2020) (“*DRP*”).

On May 19, 2020, this Court ordered the parties to submit memoranda on “the issue of [the] Court’s jurisdiction over Petitioners Emergency Application for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review.” May 19, 2020, Order. For the reasons stated below, Petitioners submit that this Court has jurisdiction over the Emergency Application

and should grant Petitioners' requested relief to protect the right to vote in the upcoming June 2 primary election.

ARGUMENT

I. Act 77's exclusive jurisdiction clause does not apply to Petitioners' claims.

This Court has jurisdiction over Petitioners' claims, and Respondents' and Proposed Intervenor's objections fail for several reasons. First, Petitioners' claims do not challenge the constitutionality of any provision of Act 77, nor do they require the Court to declare any such provision unconstitutional, as demonstrated by courts that have taken similar actions to protect the right to vote during emergencies. Second, even if the Court determines that Petitioners' claims challenged the constitutionality of an Act 77 provision, Respondents and Proposed Intervenor misread Act 77's exclusive jurisdiction clause to apply to *all* constitutional claims by ignoring the accompanying deadline which demonstrates that the clause was not intended to apply to the forms of emergency, election-specific relief Petitioners seek here. Third, the jurisdictional clause does not extend to laws or procedures that pre-dated Act 77, like the ban on ballot delivery assistance. Fourth, the county election boards are not indispensable parties because Petitioners' Emergency Application seeks relief that only incidentally impacts the county officials' ministerial duties.

A. Petitioners' claims, which seek emergency, election-specific relief, should not be construed as constitutional challenges to Act 77.

The question before this Court on Petitioner's Emergency Application is not whether the ballot receipt deadline or any other provision of Act 77 is constitutional, but rather, whether the Commonwealth has provided its citizens with adequate opportunities to exercise their right to vote safely and to participate in a free and equal election during the ongoing public health emergency.

Courts across the country are frequently called upon to provide safeguards that protect the right to vote in times of emergency when a state's electoral structure fails to do so, and they have

repeatedly provided such relief without declaring any pre-existing regulations unconstitutional. For instance, in the 2018 general election, when a series of unforeseen events in Dougherty County, Georgia prevented some voters from “being able to send their ballots by the close of polls on November 6, 2018,” the United States District Court for the Middle District of Georgia issued a preliminary injunction temporarily enjoining the Superintendent of Elections in Dougherty County from certifying votes for the election, and in a separate order found that the Court’s intervention was necessary to protect the rights of voters who would otherwise have been subjected to “‘an unreasonable risk that their ballot will be tossed’ without any notice.” *Democratic Party of Ga. v. Burkes*, 1:18-cv-212-WLS, ECF No. 4, ECF No. 5 at 2-3 (M.D. Ga. Nov. 9, 2018). The Court ordered the defendants to count all absentee ballots received by Friday, November 9 if postmarked by Election Day (November 6), but at no point did it find or suggest that the original ballot receipt deadline was unconstitutional. *See id.*

The Georgia Order followed a pair of federal court rulings requiring elections officials to extend the voter registration deadlines before the 2016 general election in the wake of Hurricane Matthew’s destruction. In Florida, a federal court ordered the Secretary of State to direct local elections officials to extend the voter-registration deadline by one week. *See Fla. Democratic Party v. Scott*, 2016 WL 6080225, at *1 (N.D. Fla. Oct. 12, 2016). In doing so, the court did not find the registration deadline unconstitutional. Instead, it held that the state’s statutory framework permitting the governor to move or delay an election because of an emergency, but failing to allow him to extend the voter registration deadline under similar circumstances, was unconstitutional. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (“[T]his Order holds that Florida’s current statutory framework is unconstitutional.”). And the order applied statewide. *Id.* As the court explained: “Hurricane Matthew’s effects are not circumscribed to one

region of the state . . . [i]t would be grossly inappropriate, for example, to hold that aspiring eligible voters in Jacksonville could register later than those in Pensacola.” *Id.* at 1258.

Two days after the Florida ruling, a federal court in Georgia ordered the Governor and Secretary of State to extend the voter registration deadline in Chatham County—again, without finding that the deadline itself was unconstitutional—after Hurricane Matthew forced the county’s elections office to close for nearly a week. *Ga. Coal. for the People’s Agenda v. Deal*, 214 F. Supp. 3d 1344, 1346 (S.D. Ga. 2016). And courts have taken similar actions in response to a variety of emergencies and unforeseen events. *See, e.g., In re Holmes*, 788 A.2d 291, 294 (N.J. Sup. Ct. 2010) (ordering the county board of elections to count late-arrived ballots due to delayed USPS delivery caused by unprecedented anthrax attacks); *Ury v. Santee*, 303 F. Supp. 119, 124, 126-27 (N.D. Ill. 1969) (finding that Village Board of Trustees’ failure to provide adequate voting facilities “result[ed] in “excessively crowded conditions” at polling places which deprived residents’ of the right to vote, and invalidating election results). These courts recognized the judiciary’s role in enforcing and protecting voters’ constitutional rights even against threats beyond the state’s control, but, most importantly, none of them held that the need to implement emergency safeguards rendered the existing deadlines unlawful. It is simply incorrect to suggest that such relief “necessarily requires a finding that the deadline is unconstitutional.” Republican Committees Br. at 7, Senators’ Br. at 4.⁵

⁵ The Supreme Court’s recent dismissal of the Petition in *DRP*, No. 88 MM 2020, says nothing about the scope of this Court’s jurisdiction. For one, unlike the Petitioners here, *DRP* expressly challenged the constitutionality of the ballot receipt deadline itself, and the Order dismissing *DRP* did not make any express findings regarding jurisdiction. The Supreme Court’s silence on jurisdictional questions that were never raised is not precedent, as the Senators suggest, and this Court is not bound by the simple fact that “questions of jurisdiction have been passed on in prior decisions sub silentio.” *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); *see also San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (“[T]he Court’s exercise of jurisdiction . . . is not precedent for the existence of jurisdiction.”).

The Republican Committees attempt to reframe Petitioners' claims by paraphrasing and ignoring key language, but the portions of the allegations they omit demonstrate Petitioners do not challenge the constitutionality of any provision of Act 77. For instance, the Republican Committees claim that the Petition "asks the Court to declare provisions of Act 77 'unconstitutional,'" but they fail to include any language in which Petitioners so asked. To the contrary, Petitioners made clear that they "do not challenge the validity of this law . . . [h]owever, the disruptions in the voting process caused by the COVID-19 pandemic require the Commonwealth to implement additional voting procedures" Petition ¶ 34; *see also* ¶¶ 3, 40. And Petitioner's request for relief asks the Court to declare as unconstitutional the "failure to . . . provide" these additional safeguards, including "additional procedures that allow mail ballots delivered after 8:00 p.m. on Election Day, due to mail delivery delays or disruptions, to be counted." Petition, Prayer for Relief.

The Republican Committees' attempt to explain away the federal court decision in *Florida Democratic Party v. Scott* similarly departs from the actual text of the opinion. While they insist that the court found the statutory deadline unconstitutional, they do not point to a single statement in which that court so held. What the Northern District of Florida found unconstitutional was Florida's statutory framework, which failed to provide sufficient safeguards for voters affected by the hurricane, and not the statutory deadline itself. *Fla. Democratic Party*, 215 F. Supp. 3d at 1257-58. Those are distinct concepts. It was not by accident that the court, in two separate orders, never once stated that the statutory deadline was unconstitutional. *See id.*; *see also Fla. Democratic Party*, 2016 WL 6080225, at *1.

Further lacking merit are Republican Committees' attempts to sweep the Petitions' request for pre-paid postage and uniform signature matching guidelines and training into Act 77's

jurisdictional clause—an argument that neither the legislators nor Respondents make.⁶ Here, once again, their analysis is entirely untethered to the statutory language as the Republican Committees still do not explain why they believe that Act 77 requires *voters* (and no one else) to provide the postage on a mail ballot envelope, nor do they acknowledge the fact that some counties have provided prepaid postage envelopes in the past, and others are doing so currently. Ex. C at 1. Perhaps the Republican Committees believe that these counties are violating the law, but there is nothing in the statute that would support such a claim. Pennsylvania’s Election Code requires voters to submit their ballots “by mail, postage prepaid, except where franked . . .”; that simply means postage must be prepaid. 25 P.S. §§ 3146.6(a), 3150.16(a). The plain language of the statute neither requires voters to supply the stamp nor prevents election officials from providing postage pre-paid envelopes in advance, and the Republican Committees fail to explain this logical leap.

The Petition’s request for signature matching guidelines and training is even farther removed from any Act 77 provision. Pennsylvania law does not require counties to match signatures and, again, Republican Committees fail to explain how requiring uniform standards for a practice not mandated by law renders any statutory provision unconstitutional. Instead, they appear to suggest that this Court is barred from hearing constitutional challenges not only to Act 77’s provisions, but also to all practices that *could have been* regulated by the Act but were not, which is a breathtaking expansion of the exclusive jurisdiction clause that the legislature surely could not have envisioned. In any event, as explained more fully in section I.C below, the statutory provisions that the Republican Committees miscite as the target of Petitioners’ claims pre-date Act 77 and are not amendments or additions that would trigger the Act’s exclusive jurisdiction clause.

⁶ Petitioners’ Emergency Application also does not seek relief for these claims.

B. The exclusive jurisdiction clause does not apply to claims seeking election-specific, emergency relief or as-applied challenges.

Respondents' and Proposed Intervenors' jurisdictional arguments ignore several foundational principles of statutory interpretation, including the requirement that this Court strictly construe provisions decreasing its jurisdiction. 1 Pa.C.S. § 1928(7). They ask the Court to read Act 77's exclusive jurisdiction clause in isolation, without reference to the context in which it appears—including accompanying provisions that impose a deadline on claims asserted under the Supreme Court's exclusive jurisdiction—and they advance interpretations of the statute that lead to absurd results and raise serious constitutional questions. *See* 1 Pa.C.S. § 1922(1) (requiring presumption “[t]hat the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable”); *id.* § 1922(3) (requiring presumption “[t]hat the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth”).

While Section 13(2) of Act 77 confers exclusive jurisdiction on the Supreme Court to address constitutional challenges to certain provisions of the Act, the Court's analysis cannot end there. Subsection (3) states that an “action under paragraph (2),” the exclusive jurisdiction clause, “must be commenced within 180 days of the effective date of this section.” If the Court interprets the exclusive jurisdiction clause (and its accompanying deadline) to apply to claims seeking emergency, election-specific relief, or as-applied claims as Respondents and Proposed Intervenors suggest, it would bar all future challenges now that the 180 days have expired, invoking a result which is not only absurd but plainly unconstitutional—it is well-settled that a legislature cannot shield its enactments from judicial review. *See, e.g., William Penn Sch. Dist.*, 170 A.3d at 418 (“[t]he idea that any legislature . . . can conclusively determine for the people and for the courts that what it enacts in the form of law or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions.”) (alterations in original);

Robinson Twp., Wash. Cty. v. Commonwealth, 83 A.3d 901, 927 (Pa. 2013) (“[I]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts.”).

When the exclusive jurisdiction clause is read in context and with a view to its place in the overall statutory scheme, it becomes clear that the clause and its accompanying deadline refers only to facial, pre-implementation challenges to the provisions designated in Section 13(1) of Act 77. *See Clearwater Constr., Inc.*, 166 A.3d at 517-18. Indeed, the broader statutory structure and the timeline imposed for implementing Act 77 reveal the General Assembly’s intent and further illustrate this point:

- October 31, 2019:** Act 77 was enacted but *could not be applied to any election held before April 28, 2020.*
- April 28, 2020:** The deadline for asserting constitutional challenges to Act 77 before the Supreme Court under the exclusive jurisdiction clause.
- April 28, 2020:** The original primary election date (as scheduled when the General Assembly passed Act 77), and the first date by which Act 77 could be applied to any election.⁷

As the above timeline shows, the General Assembly’s deadline ensured that the exclusive jurisdiction clause would run its course and expire before a single election was *completed* under Act 77’s voting procedures, and its litigation timeline necessarily limited the scope of claims that could be asserted under the exclusive jurisdiction clause, but was silent as to the forms of temporary, emergency, and election-specific relief that Petitioners seek here. In other words, if the exclusive jurisdiction clause applied to claims for temporary relief or as-applied challenges, then no court would have jurisdiction to consider any constitutional challenge to Act 77’s provisions

⁷ This timeline did not materialize, of course, as the General Assembly, in response to the COVID-19 pandemic, enacted legislation moving the primary election to June 2.

after the April 28 deadline. This would leave voters without a forum to vindicate their constitutional rights, especially in cases where the effects of statewide emergencies threaten to deny them access to a free and equal election. And the General Assembly will have rendered its legislative enactments unreviewable, indefinitely.

Respondents appear to recognize the constitutional dilemma that their argument creates but have no answer for it. They suggest that a petition to the Court of Common Pleas would be the appropriate procedural vehicle for affected voters, yet they fail to reconcile their proposed alternate forum with their expansive interpretation of Act 77's exclusive jurisdiction clause. *See* Respondents' Br. at 8 n.5. If this Court lacks jurisdiction, then so does the Court of Common Pleas. Respondents also fail to identify any other source of authority that would permit the Court of Common Pleas to issue an appropriate remedy. Meanwhile, Proposed Intervenors fail to even acknowledge that applying the exclusive jurisdiction clause to claims seeking emergency, election-specific relief, as they suggest, would foreclose judicial review of Act 77's provisions in *all* future elections. *See In re Tr. Under Deed of David P. Kulig Dated Jan. 12, 2001*, 175 A.3d 222, 234 (Pa. 2017) (noting courts must consider "the object to be attained" by the statute and "the consequences of a particular interpretation").

In construing any statute, the Court must presume that the General Assembly "does not intend a result that is absurd . . . or unreasonable" and that "the General Assembly does not intend to violate the Constitution of the United States or this Commonwealth." 1 Pa.C.S. § 1922(1), (3). The Act's plain language and the timeline for its enforcement demonstrates that the exclusive jurisdiction clause was intended by the General Assembly to apply only to the type of broad-based, facial challenge to Act 77's provisions that can be raised well before an election, rather than the election-specific, emergency relief that Petitioners seek here. It is neither logical nor

constitutionally permissible to interpret a statute to foreclose all future as-applied challenges, *see* 1 Pa.C.S. § 1922(1), and the context in which the exclusive jurisdiction clause appears demonstrates that it was not intended to reach such claims, nor does it prevent this Court from granting relief to ensure Petitioners have access to a free and equal election during the COVID-19 pandemic.

C. The ban on ballot delivery assistance pre-dates Act 77 and is not subject to the exclusive jurisdiction clause.

Respondents and Intervenors once again invite this Court to ignore Pennsylvania’s rules of statutory construction in their attempt to sweep Pennsylvania’s long-standing ban on ballot delivery assistance into Act 77’s exclusive jurisdiction clause. By its terms, the clause is quite limited in scope. It applies only to “amendment[s]” or “addition[s]” to certain portions of the Election Code, including Sections 1306 and 1306-D which contain the delivery assistance ban. Act 77, § 13(1); *see also* 25 P.S. §§ 3146.6, 3150.16. In other words, rather than extend the exclusive jurisdiction clause to all regulations that appear in Sections 1306 or 1306-D of the Election Code, the express language of Act 77 makes clear that the Supreme Court’s exclusive jurisdiction is tethered only to the portions of the law that were added or amended.

In determining which portions of Sections 1306 or 1306-D are “amendments” or “additions,” Pennsylvania’s Statutory Construction Act is not merely a set of “generic” rules to be cast aside as the Republican Committees suggest, rather it guides the Court’s interpretation of the statute. *See Clearwater Constr., Inc.*, 166 A.3d at 517 (“Because this matter involves an issue of statutory interpretation, our analysis is guided by the principles of the Statutory Construction Act . . .”). It states that “[w]henever a section or part of a statute is amended . . . the portions of the statute which were not altered by the amendment shall be construed as effective from the time of their original enactment . . .” 1 Pa.C.S. § 1953. Section 1961 further clarifies that “[w]henever a

statute reenacts a former statute, the provisions common to both statutes shall date from their first adoption.” And when a “statute is repealed” but its provisions “are at the same time reenacted in the same or substantially the same terms by the repealing statute, the earlier statute shall be construed as continued in active operation,” and “[a]ll rights and liabilities incurred under such earlier statute are preserved and may be enforced.” 1 Pa.C.S. § 1962. All of these provisions make clear that courts must look to the substance of the enactment and distinguish between portions of the statute that were altered, and the portions that were left unchanged, and only the altered portions are considered to have been amended or newly-enacted. If the ballot delivery assistance ban retains its original effective date, *see* Republican Committees Br. at 11, Senators’ Br. at 7, then by definition it was not enacted or amended by Act 77.

These rules of construction are also consistent with the plain language of the exclusive jurisdiction clause, which distinguishes between newly-enacted and pre-existing laws. Act 77, § 13(1) (“This section applies to the amendment or addition . . .”), and further confirms that the clause does not apply to the delivery assistance ban and any other pre-existing election law. Section 1306 of Pennsylvania’s Election Code, as all parties appear to agree, has long required voters to submit their own ballots to their county election boards, *see* Art. XIII, § 1306 of Act of Jun. 3, 1937, P.L. 1333, No. 320. And the statutory language imposing this ban remains unaltered:

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. § 3146.6(a). Act 77 amended Section 1306 in several ways, to be sure, including by expanding the deadline for receipt of absentee ballots from 5 p.m. on the Friday before the election to 8 p.m. on Election Day, but because language imposing the delivery assistance ban appears in Section 1306 without alteration, Pennsylvania law requires the Court to interpret the ban—a

“portion[] of the statute which w[as] not altered by the amendment”—in its original form and to treat it as if it were “effective from the time of [its] original enactment.” 1 Pa.C.S. § 1953. So while certain sections in Act 77 may relocate or recodify statutory language, or may reprint them in bold type as the Senators argue, such technical alterations are neither “amendments” nor “additions” under Pennsylvania law. *See, e.g., Com. v. MacDonald*, 347 A.2d 290, 294 (Pa. 1975) (“Section 5903(a) of the Crimes Code was derived, without any pertinent changes, from section 524 of the Penal Code. Thus it is presumed that the General Assembly intended to retain the prior law except as it was explicitly altered.”). It is indeed telling that if a court were to enjoin Act 77 in its entirety, the delivery assistance ban would still exist in exactly the same form, which further demonstrates that the ban was not enacted by Act 77. *Wygant v. Gen. Elec. Co.*, 113 A.3d 310, 313 (Pa. 2015) (voiding of repealing statute revives the original).⁸

The same rules of construction apply to Section 1306-D, which introduces new procedures allowing voters to cast mail-in ballots, and in doing so restates verbatim the long-standing delivery assistance ban among other pre-existing laws. Section 1306-D effectively relocates, or at most, re-enacts portions of Section 1306, and its continuation of prior law, applied to a new category of voters, is nonetheless effective as of the date of its original initial enactment—which was well before Act 77. Indeed, the Pennsylvania Supreme Court has previously recognized that when a new statute incorporates pre-existing law, those rules “continue in active operation, so that all rights and liabilities incurred thereunder are preserved and may be enforced.” *See Bell v. Abraham*, 22 A.2d 753, 755 (Pa. 1941) (holding that provisions of the 1933 Banking Code expressly

⁸ Even if the Court determined that the ban on ballot delivery assistance was subject to the exclusive jurisdiction requirement, this Court would still have authority to consider such claims and provide relief for voters who cast absentee ballots.

incorporating pre-existing shareholder liability rules continued the operation of those rules from original enactment, including the rights and liabilities incurred thereunder).

The Senators and the Republican Committees advance a boundless interpretation of the exclusive jurisdiction clause, arguing that “no rules governing mail-in voting are ‘long-standing.’” But this line of reasoning suggests that every single election rule that can be applied to mail-in voting is now subject to the Supreme Court’s original and exclusive jurisdiction: from basic elector qualifications, 25 P.S. § 3150.11(a), to procedures for voter challenges, 25 P.S. § 3150.12(a), or even long-standing penalties for election law violations, 25 P.S. § 3553. The sheer scope of the Supreme Court’s original jurisdiction in challenges to voting laws would be limitless, and such an expansive interpretation of a narrow jurisdictional clause that was intended to expire only 180 days after its enactment is inconsistent with Pennsylvania laws governing statutory construction. *See* 1 Pa.C.S. § 1922.

Section 1306-D’s restatement of the long-standing ban on ballot delivery assistance could just as easily have been expressed by cross-referencing the pre-existing law in 25 P.S. § 3146.6, or by adding the term “mail-in ballot” to the previously-enacted statute, neither of which would have altered or amended the delivery assistance ban. *See* 1 Pa.C.S. § 1953. And that is effectively what the legislature did in enacting Section 1306-D and re-stating provisions from a different section of the Election Code.⁹ Pennsylvania law requires that provisions pertaining to the same subject matter should be construed as one, 1 Pa.C.S. § 1932; there is no question that the language

⁹ The legislature’s decision to copy the full text of Section 1306’s long-standing ballot delivery ban into Section 1306-D is also a technical alteration which reveals little about its intent, and, indeed, may have been compelled by Pennsylvania’s Constitution. Article III, section 6 states that “[n]o law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length.” Pa. Const. Art. III § 6.

of the pre-existing ban on ballot delivery assistance was not altered by Act 77; thus any challenges to the ban are not subject to the exclusive jurisdiction clause regardless of where it appears. It would be an absurd result to subject the same statutory language to different jurisdictional requirements. *Royal Indemn. Co. v. Adams*, 455 A.2d 135, 141 (Pa. Super. Ct. 1983) (citing *Girard Sch. Dist. v. Pittenger*, 392 A.2d 261 (Pa. 1978)).

II. The county election boards are not indispensable parties.

Respondents and Proposed Intervenors are unable to identify a single Pennsylvania authority that has ever held that all county elections boards are indispensable parties in any lawsuit seeking statewide relief to enforce the constitutional right to vote, and for good reason. When considering whether a party is indispensable under Pa. R. Civ. P. 1032(b), the fundamental question is “whether justice can be done” in their absence. *City of Phila. v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003). Lawsuits are not childhood birthday parties, and courts are not required to err on the side of inclusion. Quite the opposite: a party is indispensable only when they have such a strong interest in the outcome of the case that “a final decree cannot be made . . . without affecting [it],” and doing so would be “wholly inconsistent with equity and good conscience.” *Ross v. Keitt*, 308 A.2d 906, 907 (Pa. 1973). Four factors guide this decision: (1) whether absent parties have a right or an interest related to the claim, (2) the nature of that right or interest, (3) whether the right or interest is essential to the merits of the issue, and (4) whether there is prejudice to the absent party or justice can be afforded without violating the due process rights of absent parties. *Mechanicsburg Area Sch. Dist. v. Kline*, 431 A.2d 953, 956 (Pa. 1981). None of those factors weigh in favor of requiring Petitioners to invite every county election board in the Commonwealth to join this lawsuit, and, tellingly, not a single county election official has sought to intervene in this case.

A. County election boards do not have a right or related interest at issue.

County election officials do not have a right or interest sufficient to render them indispensable to Petitioners' claims because, at most, Petitioners' claims affect election administration practices over which the Secretary must maintain uniformity and under which counties exercise no discretion. When a lawsuit affects only ministerial duties of government officials, those officials are not indispensable to the resolution of the lawsuit. *Miguel v. McCarl*, 291 U.S. 442, 455 (1934) (holding, "although he might have been joined as a proper[] party," a disbursing officer was not an indispensable party to a lawsuit against a superior officer because his duty was "plainly prescribed" and "ministerial"); *Cf. Ross*, 308 A.2d at 907 (finding superior officers were not indispensable parties, despite their duty "to provide for the maintenance and support of a thorough and efficient system of public education," because the lawsuit alleged that the subordinate officers had abused and ignored fiscal responsibilities delegated to them by the Commonwealth).

Petitioners do not allege that county election officials have abused authority delegated to them. Far from it. Petitioners allege that the counties are acting within their statutorily prescribed power, but that the Commonwealth's failure to provide for additional safeguards during a global pandemic—namely, by counting mail ballots received after 8 p.m. on Election Day and permitting voters to rely on the assistance of others in delivering mail ballots—will deny citizens access to free and equal elections. The only case Respondents and Proposed Intervenors cite in support of their argument that county election officials have a right or interest in this case is *Mechanicsburg Area Sch. Dist.*, 431 A.2d 953, which is easily distinguishable. The issue there was whether sister school districts were indispensable to a lawsuit against the Secretary of Education over the recalculation of tax revenue subsidies. *Id.* at 956–57. The court recognized that the sister school districts had a right or interest related to the claim because they, like the petitioner school district,

were entitled to tax revenue subsidies. *Id.* But those rights or interests were *identical* in nature to the rights at issue in the lawsuit. *Id.* That is certainly not the case here. In any event, the court in *Mechanicsburg Area School District* ultimately held that even the identical interest of the sister school districts was insufficient to render them indispensable. *Id.*

B. Any purported rights or interests the counties may assert are incidentally impacted at best and are not essential to the merits of this case.

Even if ministerial duties could give rise to a right or interest sufficient to render the county election officials indispensable parties, Petitioners' requested relief will only incidentally affect the performance of those duties and does not require joinder. Respondents and Proposed Intervenor argue that several plainly prescribed, ministerial tasks that county election officials must perform in facilitating elections may be affected by a Court order, *see* 25 P.S. §§ 3146.6(c); 3150.16(c) (requiring county election officials receive the absentee and mail-in ballots and accept or discard ballots that come in right at or right after 8 p.m.); *id.* § 3150.16(b)(1) (requiring district election officials to "identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place," and "not permit electors who voted a mail-in ballot to vote at the polling place"); *id.* §§ 3146.2(a); 3146.6(c); 3150.16(c) (requiring county election officials to review, accept, discard, and process ballots), but the impact is merely incidental and does not rise to the level of being indispensable to this case. While County election officials may be required to distinguish between late ballots and timely ballots based on postmarks, canvass more ballots, and hear more challenges, those are all tasks which county election officials are already required to perform. Pennsylvania law, for instance, already requires county election officials to accept military-overseas ballots "if the voter has declared under penalty of perjury that the ballot was timely submitted" even if the postmark is unreadable, 25 Pa.C.S. § 3511(a), and permits some voters to designate an agent of their choice to delivery their mail ballot, *see DiPietrae*, 666 A.2d

at 1135. Such incidental effects on the rights or interests of a nonincluded party are not enough to render the party indispensable. *City of Phila.*, 838 A.2d at 568 (“[W]here the interest involved is indirect or incidental, joinder may not be required.”).

Nor does the requirement that county election boards pay for primary and general elections, 25 P.S. § 2645(a), render them indispensable to this lawsuit. If that were the case, every county election board would be indispensable in every case that potentially affects the conduct of elections. *But see League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (implementing court-draw reapportionment plan without county boards); *Applewhite v. Pennsylvania*, No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Jan. 17, 2014) (addressing challenge to voter ID law without county boards). The connection between Petitioners’ requested relief and the county election boards’ expenditure of funds is also tenuous and speculative. Petitioners’ emergency application requests safeguards that are already in place for some voters, *see supra* at 3–4, and Congress recently passed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), which provides \$400 million in emergency funds to states to “protect the 2020 elections from the effects of the novel coronavirus.”¹⁰ Respondent, Secretary of the Commonwealth, has committed to distributing additional funding to counties from its share of the CARES Act funds to cover “increased costs related to mail-in and absentee voting,” among other expenses.¹¹ To the extent Petitioners’ requested relief could have some unspecified effect on counties’ expenditures, “that tenuous and speculative connection does not raise the [counties] to

¹⁰ Pennsylvania Dep’t of State, *Help America Vote Act (HAVA) 2020 CARES Act Grant Fund*, <https://www.dos.pa.gov/VotingElections/Pages/2020-Federal-Grants.aspx> (last visited May 26, 2020); *see also* Resp’t’s Prelim. Obj. ¶ 15.

¹¹ *See id.*

the level of an indispensable party.” *Springdale Twp. v. Allegheny Cty. Bd. of Prop. Assessment, Appeals and Review*, 467 A.2d 74, 104 (Pa. Commw. Ct. 1983).

To be sure, county election officials also have some discretionary duties in administering elections, *see Appeal of McCracken*, 88 A.2d 787, 788 (Pa. 1952), but that discretionary power is limited by both the Election Code and the guidance of the Secretary and DOS. For instance, county election officials are charged with determining which absentee ballots count. 25 P.S. §§ 3150.16(b)(1), 3146.6(c), 3150.16(c), § 3146.2a(a.3). But the Secretary and DOS advise counties on how to make that determination. *Id.* § 1222(f) (requiring the Secretary to “promulgate regulations necessary to establish, implement and administer the SURE system”); Ex. D (directing county boards on how to record absentee ballot applications, mail absentee ballots, and count absentee ballots); *see also* Ex. E (instructing counties on the implementation of Act 77). Although county election boards are responsible for investigating violations of the election code, 25 P.S. § 2642(i), those investigations are guided by the Secretary and DOS’s interpretation of what constitutes a vote. *Id.* § 2624(h)(1) (“[The Voting Standards Board] shall have the power and duty to develop uniform and nondiscriminatory standards that define what constitutes a valid vote cast through a paper ballot and what constitutes a valid vote through each type of electronic voting system used in the Commonwealth.”); *see also id.* § 2624(c) (“The Secretary of the Commonwealth shall serve as chair of the Board.”). Similarly, county election officials have the discretion to make and issue “rules, regulations and instructions . . . as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” *Id.* § 2642(f)-(g). But that duty, too, extends only as far as the election code permits. *Id.* (“[N]ot inconsistent with law. . . .”). The Secretary and DOS also derive broad authority to administer elections from the National Voter Registration Act, 52 U.S.C. § 20509 (“NVRA”), and the Help America Vote Act,

52 U.S.C. § 21081 (“HAVA”). Those laws require each state’s chief election official to carry out the state’s election responsibilities in a uniform and nondiscriminatory manner, which includes instructing county officials on election administration issues. And “the time honored presumption that public officials will perform their duties properly,” eliminates the need for their participation in this case. *Nason v. Commonwealth*, 494 A.2d 499, 502 (Pa. Commw. Ct. 1985); *see also Wudkwysh v. Borough of Canonsburg*, 533 A.2d 1104, 1108 (Pa. Commw. Ct. 1987).

The authority of the Secretary and DOS over county election officials in the administration of elections is no mere legal fiction: the Secretary and DOS have not only exercised it to influence county election officials, they have defended their ability to do so in court. During the 2008 primary election, several county election officials prohibited voters from entering polling locations because they were wearing t-shirts endorsing candidates. Ex. F. In response, the Secretary and DOS sent a letter to county election officials advising them that the election code permits voters to passively electioneer. Ex. G. When two election judges filed a lawsuit alleging that the Secretary and DOS were “without jurisdiction or authority to interpret [provisions of the election code] and then broadcast that position to election officials as if it is the settled law of this Commonwealth,” Ex. H at 17, the Secretary and DOS argued that HAVA and the NVRA, as well as decisions of the Supreme Court of Pennsylvania, require them to “earnestly endeavor to provide the counties with [their] advice and opinion so they can act uniformly and without discrimination,” Ex. I at 14. The court agreed. Ex. F. These laws make clear that county election officials are no more indispensable to this lawsuit than county prosecutors are to a constitutional challenge involving provisions of the criminal code.

To the extent Respondents and Proposed Intervenors claim this lawsuit affects the plenary discretionary authority granted to county election officials, they are grasping at straws. County

election officials, of course, must exercise discretion in issuing subpoenas, summoning witnesses, and taking testimony. 25 P.S. § 2642(i); *Appeal of McCracken*, 88 A.2d at 788. But the requested relief will not require them to exercise any more or less discretion than they currently do, nor will it require them to exercise that discretion in a manner that is materially different from how they currently exercise it. There is nothing cerebral about the receipt deadline that requires the joinder of county election officials in this lawsuit to defend their duty to impose it. *Cf. Appeal of McCracken*, 88 A.2d at 788 (distinguishing “common sense” county election officials are required to exercise in determining what votes count from discretionary responsibilities). So too with their other discretionary duties.

Even if there is some impact on the rights or duties of county election officials, those rights or duties must be *directly* and *necessarily* impacted by the claims to warrant joined, and they are not. *Mechanicsburg Area Sch. Dist.*, 431 A.2d at 482-85. In *Mechanicsburg Area School District*, the court found that indirect effects on the rights of the nonincluded school districts were insufficient to require joinder. There, the petitioner sought to enjoin the Commonwealth from paying the final installment of school subsidies, which meant that the requested relief would have delayed reimbursements to the nonincluded school districts. *Id.* But that indirect effect did not render the other school districts indispensable. *Id.* The same follows here.

C. The county election boards will not suffer any prejudice or infringement on their due process rights.

Finally, proceeding without including county election officials will not violate their due process rights. Incidental effects on statutory duties that are subject to the guidance of superior officers do not offend Due Process. *See Banfield v. Cortés*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007) (overruling preliminary objection claiming that the case should be dismissed for failure to join the 56 counties operating DREs in part because “the Secretary could de-certify a DRE at any

time based solely on the statutory requirements for certification, and counties using certified DREs must be prepared for that possibility”). The cases cited by Respondents and Proposed Intervenors are inapposite. In *Posel v. Redevelopment Authority of Phila.*, 456 A.2d 243, 246 (Pa. Commw. Ct. 1983), the court found the nonincluded parties stood to lose property rights without due process. *Id.* There is no assertion here that the counties stand to lose substantive rights—merely that their duties will be implicated. The same is true of *CRY, Inc. v. Mill Service, Inc.*, 640 A.2d 372 (Pa. 1994). There, relief required the cooperation of a non-included party, which the defendants had no authority over. *Id.* Further, the complaint alleged that the non-included party had engaged in “misfeasance and malfeasance.” *Id.* at 376. As explained above, that is not the case here. Petitioners’ Emergency Application does not argue intentional or negligent wrong-doing on the part of the counties. Instead, Petitioners allege that the COVID-19 pandemic has resulted in voters being denied access to free and equal elections under the current voting procedures, and the pandemic has specifically impeded the delivery and receipt of mail ballots. *See Pa. Sch. Bds. Ass’n, Inc. v. Com. Ass’n of Sch. Adm’rs, Teamsters Local 502*, 696 A.2d 859, 868 (Pa. Commw. Ct. 1997) (holding Governor was an indispensable party to claim alleging that he violated his statutory and constitutional duties by approving challenged act but not to claims that merely implicated his final approval authority); *id.* (“Were we to hold otherwise, the Governor would become an indispensable party to every action challenging the constitutionality of legislation.”). Petitioners have brought no claims against, and seek no relief from, county election officials. They are, therefore, not indispensable parties.¹²

¹² Holding county election officials to be indispensable would create an absurd precedent. For example, a lawsuit challenging the constitutionality of the Election Code’s emergency absentee ballot procedures would require naming as respondents tens of thousands of judges of elections and district election officials across Pennsylvania. *See* 25 P.S. § 3146.6(b) (“An elector who has received an absentee ballot under the emergency application provisions of section 1302.1 . . . shall sign the aforementioned affidavit in any case,

D. Even if the Court agreed that the county election boards were indispensable, dismissal is not warranted because county officials can be added to this case.

In any event, failure to include an indispensable party is not a ground for dismissal; the court can instead order that the parties be added. Pennsylvania's Rules of Civil Procedure instruct that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter or that there has been a failure to join an indispensable party, the court shall order that the action be transferred to a court of the Commonwealth which has jurisdiction *or that the indispensable party be joined.*" Pa. R. Civ. P. 1032. Respondents and Proposed Intervenors cite *Powell v. Shepard*, 113 A.2d 261, 264–65 (Pa. 1955) to suggest that the failure to include an indispensable party requires dismissal, but the petition at issue in *Powell* has a problem that the petition here does not: the indispensable party could not have been added. The lawsuit in *Powell* was filed in the Court of Common Pleas of Philadelphia County. *Id.* But actions against the Secretary of Revenue, whom the court found was an indispensable party, fall within the exclusive jurisdiction of the Court of Common Pleas of Dauphin County. *Id.* Thus, because the indispensable party could not be added, the court dismissed the case for lack of jurisdiction. Here, even if the counties were indispensable parties, this court has authority to add them, thus the proper remedy is to order their joinder. Pa. R. Civ. P. 1032.

E. Petitioners' requested relief is redressable by Respondents.

The Secretary and DOS have broad authority over the administration of the Election Code, *see* 25 P.S. § 2621, which allows them to shepherd changes in the administration of elections throughout the Commonwealth. *See Baldwin v. Cortes*, 378 F. App'x 135, 138 (3d Cir. 2010)

which the local judge of elections shall then cause to be inserted in the district register with the elector's permanent registration card." Joinder is not required where doing so "could sweep in hundreds of parties and render the litigation unmanageable." *City of Phila.*, 838 A.2d at 582.

(noting that 25 P.S. § 2621’s “explicit delegation of authority to the Secretary of the Commonwealth to administer the state election scheme” permitted the Secretary to enter into a consent decree extending the deadline set out in the election code for filing nomination papers with the required signatures). Of course, because they are involved in the administration of elections, county election officials will play some role in redressing Petitioners harms. But the duties of county election officials that Petitioners’ Emergency Application implicates are ancillary to duties of the Secretary and DOS. *Compare* 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 this act.”) *with id.* § 3159 (“Upon receiving the certified returns of any primary or election from the various county boards, the Secretary of the Commonwealth shall forthwith proceed to tabulate, compute and canvass the votes cast for all candidates . . . , and upon all questions voted for by the electors of the State at large, and shall thereupon certify and file in his office the tabulation thereof.”) *and id.* § 2621(f.2) (requiring the Secretary to “order a county board to conduct a recount or recanvass of an election”); *compare id.* § 2642(f)-(g) (permitting county election boards to issue regulations and instructions to local elections officers) *with id.* § 2621(f.1) (requiring the Secretary to “develop a voluntary professional certification and poll worker training program for county election officials in consultation with county boards of elections”).

The fact that county election officials play *some* role in redressing Petitioners’ asserted injuries does not mean that the injuries are not redressable by the Secretary and DOS. Even when redressing harm depends on actions of third parties, the harms are nonetheless redressable by the Respondent when the Respondent’s action has a “predictable effect” on those third parties. *See, e.g., Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1157, 1159 n.9, 1184 n.22

(11 Cir. 2008) (holding plaintiffs’ injuries stemming from voter registration statute’s matching requirement were traceable to and redressable by Secretary, even where non-party supervisors of elections were responsible for reviewing and curing mismatches); *see also Texas v. United States*, 945 F.3d 355, 387 (5th Cir. 2019), *cert. granted sub nom. Texas v. California*, 140 S. Ct. 1262 (2020) (finding an order invalidating the Affordable Care Act’s individual mandate would redress the administrative burden imposed on states by the Affordable Care Act’s reporting requirements, which are only triggered if state employees buy health insurance through the state, because the individual mandate “predictably causes more people to buy insurance”); *cf. Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (finding harm was traceable to the Department of Commerce even though it depended on noncitizens violating their legal duty to respond to the census because noncitizens “will likely to react in predictable ways to the citizenship question”). The Secretary’s guidance regarding the administration of elections will have a predictable effect on county election officials, and Respondents and Proposed Intervenors provide no reason to suggest that the counties will not follow it. *Nason*, 494 A.2d at 502 (holding “the time honored presumption that public officials will perform their duties properly” eliminates the need for their joinder).

Finally, the Senators’ reliance on the Eleventh Circuit’s recent decision in *Jacobson v. Fla. Sec’y of State*, No. 19-14552, 2020 WL 2049076 (11th Cir. Apr. 29, 2020) glosses over key legal and factual distinctions that strip away any plausible comparison here. First, *Jacobson* is an outlier, as federal circuit courts across the country have consistently found election law claims to be redressable by secretaries of state. *See id.* at *31 (Pryor, J., concurring in part) (noting that majority’s holding “creates a circuit split” and “when confronted with cases in which defendant state officials carried out similar responsibilities with respect to challenged laws, our sister circuits

have concluded that the officials were enforcing the law sufficiently to confer standing.”); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) (“The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the . . . Secretary of State, who serves as the ‘chief election officer of the state.’”); *United States v. Missouri*, 535 F.3d 844, 846 n.1 (8th Cir. 2008) (finding Missouri’s Secretary of State’s broad responsibility to oversee the administration of elections made her the proper defendant in a challenge to an election law); *Harkless v. Brunner*, 545 F.3d 445, 451–52 (6th Cir. 2008) (same); *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280–81 (9th Cir. 2003) (same).

The underlying facts in *Jacobson* are also inapposite. Plaintiffs there challenged a provision of Florida law that determined the order in which candidate names appear on ballots. 2020 WL 2049076, at *1. The Eleventh Circuit held that injuries flowing from Florida’s Ballot Order Statute are not redressable by Florida’s Secretary of State because the supervisors of elections have independent and exclusive authority over ballot order, *id.* at *9 (citing Florida Statute § 99.121, which provides that “[t]he names of [candidates] shall be printed by the supervisor of elections upon the ballot in their proper place as provided by law”), and that the Florida Secretary of State “plays [no] role in determining the order in which candidates appear on ballots,” *id.* In contrast, as described above, Pennsylvania law affords the Secretary broad authority over local election officials in the administration of the election code. *See supra* at 25. The Respondents are therefore the appropriate parties to this action and the Court should reject Respondents’ and Intervenors’ invitations to require the participation of 67 county election boards.

CONCLUSION

For these reasons, this Court has jurisdiction over Petitioners’ Emergency Application and should grant Petitioners’ requested relief. To the extent the Court determines that it lacks jurisdiction, then the Court should transfer the record to the Supreme Court where it shall be treated

as if it were originally filed on April 22, 2020, the date when Petitioners initiated this lawsuit.

42 Pa.C.S. § 5103(a).

Dated: May 26, 2020

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Exhibit A

2020, and that I would update the Court after that date. *See* May 18 Declaration ¶¶ 14-43.

3. Statewide, a large majority of counties are keeping up with mail-in and absentee voting applications, with ballots being mailed out as applications are processed.

4. Some counties, however, are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest. If these obstacles persist into next week, there is a possibility that they could result in significant delays in voters' receipt of ballots.

5. As of Thursday, May 21, 2020, the counties had reported receipt of approximately 1,701,141 applications for absentee and mail-in ballots.

6. The counties had approved 1,528,212, or approximately 90%, of the applications.

7. Preliminary data indicates that the counties have mailed 1,459,871 million ballots, or approximately 96% of the applications approved so far, to voters.

8. The counties have received 441,012 voted ballots, which accounts for approximately 29% of applications approved so far.

9. Counties have continued to take steps to deal with the high volume of applications by, for example, reassigning staff to assist with ballot processing and,

in some cases, adding extra shifts at their election offices.

10. The vast majority of counties do not appear to be having difficulty managing the application process. As of May 21, 2020, more than half of the counties in the Commonwealth had mailed ballots in response to more than 90% of their approved applications.

11. Certain counties, however, are experiencing delays or backlogs.

12. For example, preliminary data shows that Montgomery County has mailed out 131,932 ballots out of the 138,363 applications it has approved. However, for reasons not within Montgomery County's control, many ballots that the county has mailed have been delayed in arriving at voters' homes. These delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.

13. Philadelphia County recently began receiving a surge of paper ballot applications. Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, Philadelphia's staff will face difficulties in promptly processing all of the outstanding applications.

14. A recent outage in Philadelphia's Verizon connection, which covered the network connection with the election database, further impeded Philadelphia's progress.

15. Preliminary data shows that as of May 21, Philadelphia County had received 181,655 applications, rejected 2,114 of them, approved 159,772, and mailed out 142,836 ballots.

16. Of the counties identified in my May 18 declaration, other than Philadelphia and Montgomery, preliminary data reported by the counties shows that:

- Allegheny County had received 242,349 applications, rejected 20,120 of them, approved 222,757, and mailed out 205,646 ballots;
- Delaware County had received 78,333 applications, rejected 4,290 of them, approved 53,851, and mailed out 42,904 ballots;
- Lawrence County had received 9,400 applications, rejected 623 of them, approved 8,813, and mailed out 8,654 ballots;
- Lehigh County had received 47,057 applications, rejected 3,991 of them, approved 43,220, and mailed out 43,011 ballots; and
- Mercer County had received 11,067 applications, rejected 807 of them, approved 9,746, and mailed out 9,569 ballots.

17. The last day for applying for a mail in or absentee ballot is Tuesday, May 26.

18. I understand that because of COVID-19 related staffing shortages or technical difficulties, a small number of other counties may face challenges in keeping up with their outstanding applications as the application deadline approaches.

19. After May 26, unless the Court instructs otherwise, I will give the

Court further information about the counties' application numbers and the existence of any backlogs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2020.



Jonathan Marks

Exhibit B



CONCERNED DEMOCRATIC PARTY COUNTY CHAIRS
OF SOUTH EASTERN PENNSYLVANIA
219 SPRING GARDEN STREET, PHILADELPHIA, PA. 19123
MAY 20TH, 2020

The Honorable Tom Wolf
Governor of the Commonwealth of Pennsylvania
225 Main Capitol Building
Harrisburg, PA. 17120

Dear Mr. Governor,

Without exception, your leadership during this Crisis has proven to be unparalleled, and because of your steadfast judgement you have saved this Commonwealth from a greater human tragedy, for which you will have our enduring gratitude.

Correspondingly, our concerns seemingly pale in comparison, but we nonetheless are anxious over a potential political crisis that could prove to be enormous in its consequences. By law, any ballot received by county voter services after June 2nd are to be discarded and not counted. Yet, those ballots will have been legally cast, mailed, and post-marked prior to the Primary date. Given our situation, especially in our counties that are required to remain in lockdown during the election, and as the Postal authorities have already warned that delivery currently runs four to six days, the probability of a significant number of legally cast ballots arriving late is very high. The political fallout from such a potential issue would be catastrophic. Trust in the political system will evaporate, and blame will be indiscriminately attributed.

Of course, none of that may happen. Yet, the likelihood is not sanguine. Moreover, the situation will be made even more complicated as voters will appear at the polls wanting to vote because they fear their ballots were not received in time. Assuming the worse, two options remain: either the election is postponed, or the legally cast ballots are to be counted regardless of the postal system's delivery date. To wait until June 3rd to consider the latter option is too late. Voters need to know prior to the election that their votes will be counted. We realize that this issue is probably a legislative matter, and if so, **we ask that you join us in taking a very public stand in demanding that it be resolved now.** Publicity maybe the only avenue we have available to avert this potential disaster.

Cordially,

/s/ *Joseph Foster*
JOSEPH FOSTER, CHAIR
Montgomery County Democratic Party

/s/ *Colleen Guiney*
COLLEEN GUINEY, CHAIR
Delaware County Democratic Party

Robert A. Brady
ROBERT A. BRADY, CHAIR
Philadelphia County Democratic Party

John Cordisco
JOHN CORDISCO, CHAIR
Bucks County Democratic Party

Exhibit C

**COVID-19, the Pennsylvania Primary Election and the focus on Philadelphia
Remarks by Commissioner Deeley, Chairwoman, Philadelphia Board of Elections**

Philadelphia is doing all that we can to prepare for a June 2nd Election Day, while being faced with a multitude of difficult and challenging realities. A lot of the time we are faced with decisions where there is no good option, and the best option is often times just the least bad.

Previously, I joined with elected officials from other southeastern counties and asked for Primary Day to be delayed to June 23rd, which certainly would have allowed us the most time to prepare. Although the date of June 23rd was not what was settled on, let me take this opportunity to thank you for the delay to June 2nd date. The election would not have been able to go on April 28th and the additional time has given us the ability to put together a comprehensive plan to hold an in-person election and to communicate to voters their ability to vote safely from their homes.

In recent weeks, my fellow Commissioners and I have been working in tandem with the Pennsylvania Department of State, Governor Tom Wolf, and following public health procedures to the best of our ability. COVID-19 caused the cancellation of all our Election Board training classes, an unprecedented move that was done out of the safety of our Election Board workers, our training host sites, and our staff. We are receiving calls and emails from Election Board workers and polling places saying that they are not available for the June 2nd Primary. The passage of ACT 12 allows for the consolidation of polling sites. We are currently working on our Election Day plan with these consolidated polling places. This election, a greater percentage of Philadelphia voters will cast their votes through the mail than ever before. These ballots will be counted after Election Day, it is likely that it will be a few days before the close races are able to be called. Even without a pandemic, we do not have the available staff to begin counting the absentee and mail-in ballots on Election Day.

Recently, a huge effort to highlight the option of mail-in ballots has been undertaken. The Department of State mailed every Democrat and Republican voter a postcard with the URL to the online application and they are beginning a media and social media campaign. In Philadelphia, the Commissioners are on the radio asking voters to apply. All the department's social media accounts are urging Philadelphia voters to apply for a mail-in ballot on a daily basis. We are looking into email and texting options in order to drive voters to the online form and are also exploring providing information and paper applications with the city's food distribution program. I recently passed a motion that the Board of Elections will prepay the return postage of the ballots so that voters do not have to leave their homes to buy a stamp. We have seen a significant uptick in applications, more so than we ever would have imagined. Staff of the Philadelphia Board of Elections are being reassigned and a greater number of staff are being brought back to work to process the increased number of absentee and mail-in ballot applications. As of today, Philadelphia has received over 70,000 applications. For comparison purposes, the Board received 16,101 applications for the 2012 General, 15,887 for the 2016 General, and 5,742 for the 2016 Primary.

While the large number of applications are important, they are misleading. The poor and working-class neighborhoods of the city are not keeping pace with the more affluent parts. More steps must be done to advocate voters to vote by mail. Governor Tom Wolf holds press

conferences daily, and one of his pieces of information to Pennsylvanians' should be to apply for a mail-in ballot from their local county election office. Additionally, thousands of Pennsylvania citizens are utilizing online services to apply for unemployment claims, as well as other services such as ordering alcohol from the Pennsylvania Liquor Control Board. Information should be displayed on these websites so these thousands of citizens are aware that they can – and should – vote by mail for this election. Applications and information should be put in the bags of wine and spirits that citizens are buying through curbside pickup.

Just last week, I called on the Governor and the State Legislature to act and extend the deadline to return voted ballots to the Board of Elections. Currently, voted ballots must be received by the Board of Election by 8pm on Election Day, June 2nd. I asked that, due to the unprecedented circumstances of the COVID-19 Pandemic and the resulting increase in the number of applications from voters requesting to vote from home, the deadline for County Boards of Elections to receive voted ballots be extended to June 9th and that all voted ballots received by that date and postmarked by June 2nd be accepted. June 9th is the current deadline for military and overseas absentee ballots and the postmark requirement is the same as what the courts granted to the voters of Wisconsin.

The state should act well ahead of the lawsuits that were seen in Wisconsin and Ohio, which confused voters with ever-changing information and are already starting to be filed here. The Courts have been clear, they would prefer Governors and Legislatures act to prevent these matters from coming before them, this is a bipartisan issue. Both the Democratic and Republican parties have been encouraging their voters to apply for the new, no-excuse mail-in ballots. Our staff and elections' staffs all around the state are working hard every day to process the mountain of applications we are receiving. But, the rules were not designed to handle ten times the number of applications that we typically see in a presidential general election. I'm calling on you to do the responsible thing and update the rules for this Primary to reflect the new reality. We do not want to be Wisconsin and we do not want the courts to have to step in.

Finally, I would like to address the financial crisis that the Philadelphia City Commissioners' Office is facing. The implementation of, the Governor's voting machine replacement mandate, Act 77, and now Act 12, requires funding. This funding to implement these monumental changes and meet lawmakers and voters' expectations - even prior to this pandemic – was in desperate need. For example, our new voting system has a voter verifiable paper ballot, we must now spend about \$95,000 on paper ballots per citywide election. This comes out to \$190,000 a year in new expenses on just the ballots. We just received notice that we will be receiving 878,000 in a federal Election Security grant that we could use towards Act 77 expenses. That amount does not even cover one year's base salaries of all the new clerks we have to hire to enter the voter registration forms in time to make the supplemental poll books. To this day, the Philadelphia City Commissioners have yet to receive any state grants, from the Commonwealth, to implement Act 77 or to communicate the changes to the voters, despite repeated promises. Before the COVID-19 crisis, the City of Philadelphia stepped in, seeing that the changes brought upon by Act 77 needed to be adequately addressed and increased our budget by \$10 million. Since the financial impacts of COVID-19, the administration has since rescinded that funding. Our ability to run an election under the new reality of Act 77 is in jeopardy.

To recap, we are faced with enforcing some of the greatest changes to voting in the Commonwealth in decades, yet the Commonwealth has given ZERO funding to do so, right in the middle of a pandemic.

In closing, I want to thank the staff of the Philadelphia City Commissioners Office, who have been nothing but dedicated and committed to the cause. I would also like to thank election staff workers throughout the Commonwealth who have been dealing with a crisis while performing their duties, often in an ever-changing environment. This is all being done to ensure Pennsylvanian's have their right to a free, fair election and can have their voices heard on June 2nd.

Thank you for this opportunity to provide this testimony.

Exhibit D



Reprocessing Absentee Application ID Verification Exceptions

The status reason for absentee applications that have failed an ID verification is APPR - ID NOT VERIFIED. The ballot label for these absentee applications will contain an ID watermark indicating the absentee voter's ID was not verified. The status reason can be updated to APPR - ID VERIFIED and the watermark removed if the ID verification is reprocessed with data that can be verified.

The following describes how to reprocess an absentee application ID verification exception.

The following scenarios are related to this process:

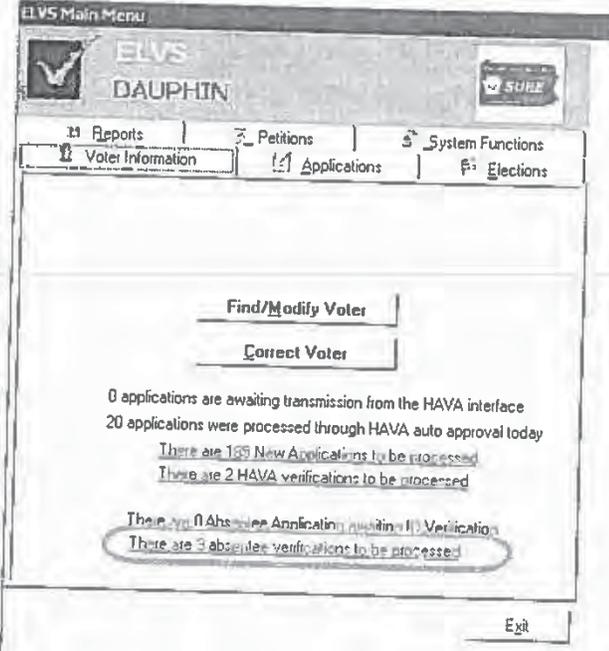
- Scenario A: Reprocessing Absentee ID Verification Exceptions through the ID Verification Exceptions Link
- Scenario B: Reprocessing Absentee ID Verification Exceptions through the Voter Record
- Scenario C: Reprocessing Absentee ID Verification Exceptions through the Applications Module

Each of these scenarios is addressed on the following pages:

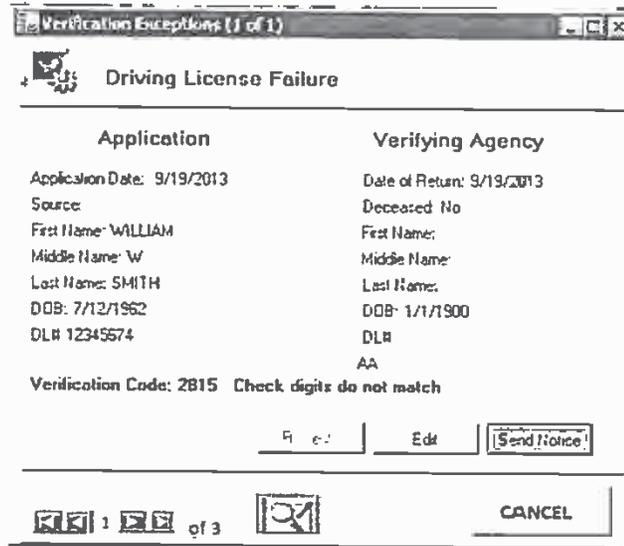
- Scenario A: page 2
- Scenario B: page 8
- Scenario C: page 14



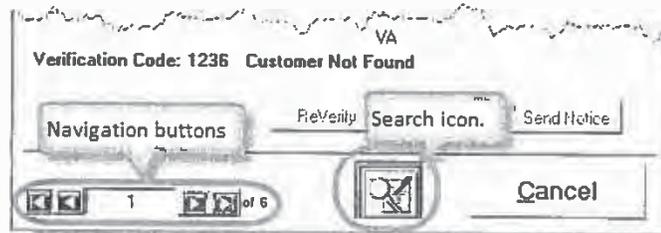
Scenario A: Reprocessing Absentee ID Verification Exceptions from the ID Verification Exceptions Link

Steps	Actions
1.	<p>Click the <u>There are xxx absentee verifications to be processed</u> link on the <i>Voter Information</i> tab.</p>  <p>The screenshot shows the 'ELVS Main Menu' for 'DAUPHIN'. The 'Voter Information' tab is active. The interface displays the following information:</p> <ul style="list-style-type: none">0 applications are awaiting transmission from the HAVA interface20 applications were processed through HAVA auto approval todayThere are 169 New Applications to be processedThere are 2 HAVA verifications to be processedThere are 0 Absentee Applications awaiting ID VerificationThere are 3 absentee verifications to be processed <p>The link 'There are 3 absentee verifications to be processed' is circled in red. Other tabs include Reports, Petitions, System Functions, Applications, and Elections. Buttons for 'Find/Modify Voter' and 'Correct Voter' are visible. An 'Exit' button is at the bottom right.</p>

2. The Verification Exceptions screen is displayed.



If necessary, use the navigation buttons or the [Search] icon to locate a specific verification exception.



Note: Please refer to "Searching for HAVA and Absentee ID Verification Exceptions" for details on using these search tools.

If the application data displayed does not match the data received from the applicant, click the [Edit] button to display the *ID Verification* tab of the absentee application.



3. The Verification History grid shows the verification type used to process the ID verification as well as the status of the verification. Because the ID was not verified, the verification status is 'User Action Required'.

Absentee Voting window showing application details for SMITH, WILLIAM W. (ID: 030002, BEAR CREEK TWP D 02). The 'ID Verification' tab is active. The 'Verification History' table shows a record with 'Verification Status' of 'User Action Required'. Below the table, the 'Birth Date' field is highlighted with a red circle, showing '05/05/1950'. A 'Reprocess' button is visible next to the birth date field.

Verification Type	Date Sent	Date Received	Verification Status	User message
Drivers License Number	9/19/2013 3:37...	9/19/2013 3:41...	User Action Required	Send Notice No Matc...

Drivers Lic: 23654789 | SSN: XXXXX 1254 | Birth Date: 05/05/1950 | Verified |

Scrolling to the right displays the date of birth used for ID verification.

Absentee Voting window showing application details for SMITH, WILLIAM W. The 'ID Verification' tab is active. The 'Verification History' table is scrolled to the right, highlighting the 'Verified DOB' column with a red circle, showing '11/22/1952'. The 'Verified' column shows 'TRUE'.

User message	Error message	Resident	Current License	Deceased	Verified DOB	Verified
Send Notice No Matc...	Check digits do not m...				11/22/1952	TRUE

4.

Enter the correct Driver's License, SSN and/or date of birth into the appropriate fields on the *ID Verification* tab and click the [Reprocess] button. The SSN, Driver's License and/or date of birth is sent for verification.

The screenshot shows the 'Absentee Voting' application window for SMITH, WILLIAM W. The 'ID Verification' tab is active. The 'Default Vote Method' is set to 'ABSENTEE'. The 'Verification History' table contains the following data:

Verification Type	Date Sent	Date Received	Verification Status	User message
Driver's License Number	9/15/2017 3:27	9/15/2017 3:41	Use Action Required	Send Notice by Mail

Below the table, the 'Drivers Lic.' field contains '23568741', the 'SSN' field contains 'XXXXXXXX5478', and the 'Birth Date' field contains '05/05/1954'. A 'Reprocess' button is highlighted. At the bottom of the window, there are buttons for 'Delete App', 'Process App', 'OK', and 'Cancel'.

The DOB sent for ID verification will be the date in the 'Birth Date' field on the *ID Verification* tab. If this field is not populated, the DOB sent for ID verification will be the one on the *Application Queue* tab (if the absentee application was processed through the *Applications* module) or the voter's record (if the absentee was processed through the *Absentee Wizard*).

Note: If both the 'Driver's Lic.' and 'SSN' fields are populated when the [Reprocess] button is clicked, both will be simultaneously sent for ID verification.



5. The Verification History grid is updated, displaying the status of the reprocessed ID verification request.
 The status-reason of the application will be 'APPR-ID VERIFICATION PEND' until the result of the ID verification is received.

6. If the ID verification process did not verify the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will remain 'APPR-ID NOT VERIFIED', the Verification History grid will reflect the status of the reprocessed ID verification attempt, the 'Driver's Lic.' and/or 'SSN' fields on the *ID Verification* tab will not be updated and the 'Verified' checkbox will remain unchecked. The ballot label queued when the first ID verification result was received will continue to contain the 'ID' watermark.

Because the Driver's License and/or SSN on the absentee application was not verified, the Driver's License and/or SSN on the voter's record will not be updated.

If the ID verification process verifies the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will automatically update to 'APPR - ID VERIFIED' and the *ID Verification* tab will reflect the auto-approval of the ID. The 'Driver's Lic.' and/or 'SSN' fields will be populated with the verified data and the 'Verified' checkbox will be marked. The ballot label queued when the first ID verification result was received will not contain the 'ID' watermark.

Because the verified Driver's License and/or SSN on the absentee application is different than the Driver's License and/or SSN on the voter's record, the Driver's License and/or SSN on the voter's record will be updated.

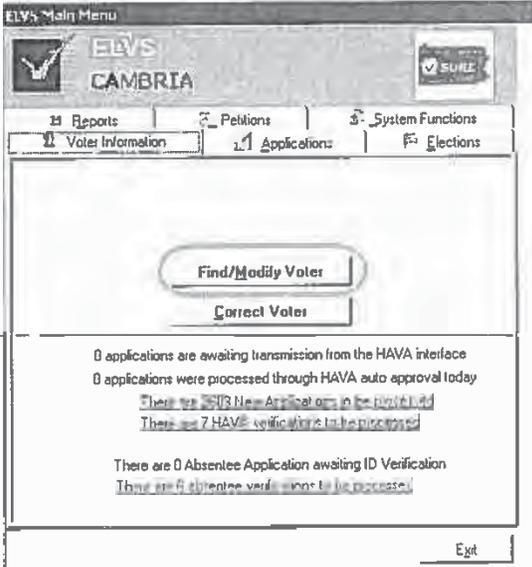
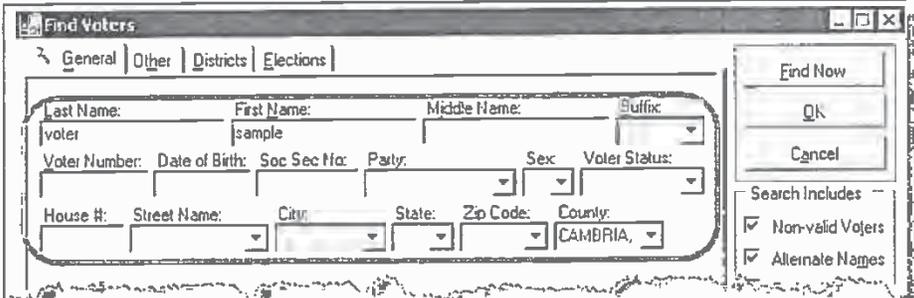
Note:

- If the DOB provided on the *ID Verification* tab is different from the voter's record, the verified DOB will not update the voter's record.
- If the ballot label was not confirmed prior to the reprocessing of the ID verification, the 'ID' watermark will be removed from the label.



7.	Click [OK] from the <i>ID Verification</i> tab to return to the Verification Exceptions screen.
8.	If there is another ID verification exception, it is displayed in the Verification Exceptions screen.
9.	<p>If the last exception was processed or the [Cancel] button clicked from the last exception, the HAVA Exception message is displayed, displaying the number of ID verifications that were processed.</p> <div data-bbox="542 655 1208 877" style="border: 1px solid black; padding: 10px; text-align: center;"><p>HAVA Exception ✕</p><p>1 HAVA exceptions have been processed 1 HAVA exceptions are waiting to be processed.</p><p><input type="button" value="OK"/></p></div> <p>Click [OK] to close the message.</p>
10.	<p>Click [Cancel] to close the Verification Exceptions screen.</p> <p>Note: The response to the ballot cannot be recorded as "RECORD - BALLOT RETURNED" until the ID is verified.</p>

Scenario B: Reprocessing Absentee ID Verification Exceptions through the Voter Record

Steps	Actions
<p>1.</p>	<p>From the SURE menu, select the <i>Voter Information</i> tab and then click the [Find/Modify Voter] button.</p>  <p>The screenshot shows the 'ELYs Main Menu' for 'ELYs CAMBRIA'. The 'Voter Information' tab is selected. A 'Find/Modify Voter' button is highlighted with a red oval. Below the menu, there are status messages: '0 applications are awaiting transmission from the HAVA interface', '0 applications were processed through HAVA auto approval today', 'There are 513 New Applications to be processed', 'There are 7 HAVA verification to be processed', and 'There are 0 Absentee Application awaiting ID Verification'. An 'Exit' button is at the bottom right.</p>
<p>2.</p>	<p>The Find Voters window opens. Populate the desired search criteria fields.</p>  <p>The screenshot shows the 'Find Voters' window with the 'General' tab selected. Fields are populated as follows: Last Name: voter, First Name: sample, Middle Name: (empty), Suffix: (dropdown), Voter Number: (empty), Date of Birth: (empty), Soc Sec No: (empty), Party: (dropdown), Sex: (dropdown), Voter Status: (dropdown), House #: (empty), Street Name: (empty), City: (empty), State: (dropdown), Zip Code: (empty), County: CAMBRIA, (dropdown). The 'Search Includes' section has 'Non-valid Voters' and 'Alternate Names' checked. 'Find Now', 'OK', and 'Cancel' buttons are on the right.</p>



3.

Click the [Find Now] button. Voters meeting the search criteria are listed in the results grid.

To open the voter's record, select the desired voter from the grid and click [OK] or double-click the desired voter record from the grid.

4.

Click the [Absentee Voting] icon to display the Absentee Voting screen.



5. Click the *ID Verification* tab on Absentee Voting screen.

The Verification History grid shows the verification type used to process the ID verification as well as the status of the verification. Because the ID was not verified, the verification status is 'User Action Required'.

Absentee Voting
 VOTER, SAMPLE
 480020-1 Select Application: 2014 GENERAL ELECTION (11/04) ID: 103736455
 LOWER PAXTON TOWNSHIP - 20TH PRECINCT

Application | Abs App Details | App Status | Ballots | Permanent Absentee | **ID Verification** | Applic

Verification History				
Verification Type	Date Sent	Date Received	Verification Status	User message
Social Security Number	9/23/2013 1:57...	9/23/2013 2:06...	User Action Required	Send Notice of No M...

Drivers Lic: SSN: Birth Date: Verified [Process](#)

County	Type	Description	Date Stored	File Size

[Add Doc](#) [Add Last Scan](#) [Delete Doc](#) [View Doc](#) [↑](#) [↓](#)

[New Entry](#) [Delete Entry](#) [Process App](#) [OK](#) [Cancel](#)

Record: 1 of 1

Scrolling to the right displays the date of birth used for ID verification.

Absentee Voting
 VOTER, SAMPLE
 480020-1 Select Application: 2014 GENERAL ELECTION (11/04) ID: 103736455
 LOWER PAXTON TOWNSHIP - 20TH PRECINCT

Application | Abs App Details | App Status | Ballots | Permanent Absentee | **ID Verification** | Applic

Verification History						
User message	Error message	Resident	Current License	Decasa	Verified DOB	Verified D
end Notice of No M...	No match found				5/5/1950	2004



6. Enter the correct Driver's License, SSN and/or date of birth into the appropriate fields on the *ID Verification* tab and click the [Reprocess] button. The SSN, Driver's License and/or date of birth is sent for verification.

Abs App Details | Application | App Status | Ballots | Permanent Absentee | ID Verification

Verification History				
Verification Type	Date Sent	Date Received	Verification Status	User message
Driver's License Number	9/19/2013 3:37	9/19/2013 3:41	User Action Required	Send Notice No Match

Drivers Lic: 23568741 SSN: ████████5478 Birth Date: 05/05/1950 Verified **Reprocess**

County	Type	Description	Date Stored	File Size

Add Doc Add Last Scan Delete Doc View Doc ↑ ↓

Delete App Process App OK Cancel

Records: 0 of 0

The DOB sent for ID verification will be the date in the 'Birth Date' field on the *ID Verification* tab. If this field is not populated, the DOB sent for ID verification will be the one on the *Application Queue* tab (if the absentee application was processed through the *Applications* module) or the voter's record (if the absentee was processed through the *Absentee Wizard*).

Note: If both the 'Driver's Lic.' and 'SSN' fields are populated when the [Reprocess] button is clicked, both will be simultaneously sent for ID verification.



7. The Verification History grid is updated, displaying the status of the reprocessed ID verification request.
 The status-reason of the application will be 'APPR-ID VERIFICATION PEND' until the result of the ID verification is received.

Absentee Voting

SMITH, WILLIAM W
 030002
 BEAR CREEK TWP D 02

Default Vote Method: ABSENTEE

Abs App Details | Application | App Status | Ballots | Permanent Absentee | ID Verification

Verification Type	Date Sent	Date Received	Verification Status	User message
Drivers License Number	5/19/2013 5:51		Pending Verification	
Social Security Number	9/19/2013 5:51		Pending Verification	

Drivers Lic: SSN: Birth Date: Verified [Refresh](#)

County Type	Description	Date Stored	File Size

[Add Doc](#) [Add Last Scan](#) [Delete Doc](#) [View Doc](#) [↑](#) [↓](#)

[Delete App](#) [Process App](#) [OK](#) [Cancel](#)

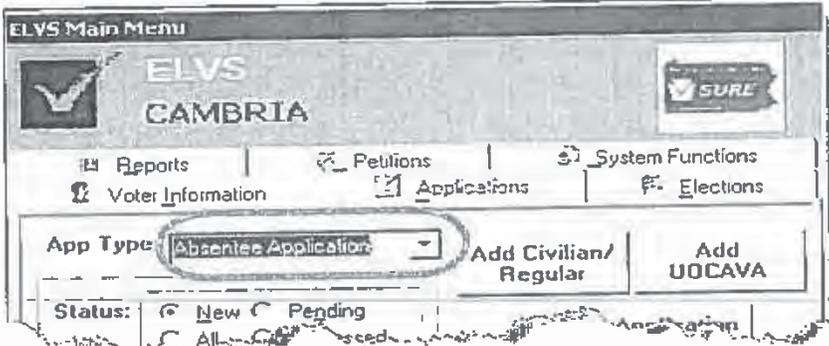
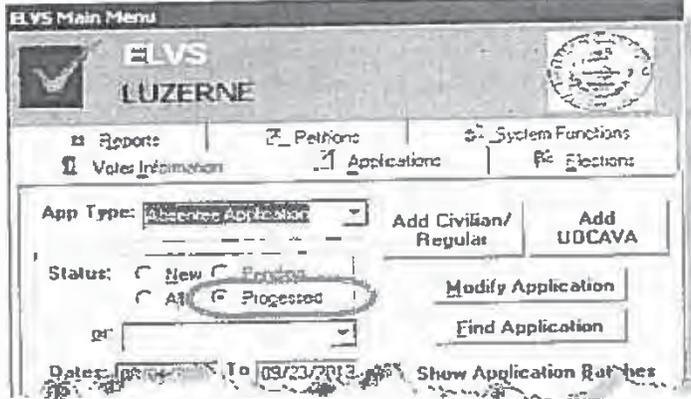
Record: 0 of 0



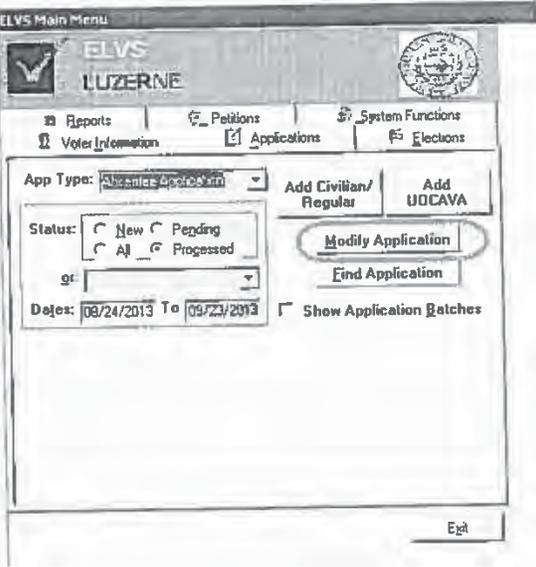
8.	<p>If the ID verification process did not verify the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will remain 'APPR-ID NOT VERIFIED', the Verification History grid will reflect the status of the reprocessed ID verification attempt, the 'Driver's Lic.' and/or 'SSN' fields on the <i>ID Verification</i> tab will not be updated and the 'Verified' checkbox will remain unchecked. The ballot label queued when the first ID verification result was received will continue to contain the 'ID' watermark.</p> <p>Because the Driver's License and/or SSN on the absentee application was not verified, the Driver's License and/or SSN on the voter's record will not be updated.</p> <p>If the ID verification process verifies the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will automatically update to 'APPR - ID VERIFIED' and the <i>ID Verification</i> tab will reflect the auto-approval of the ID. The 'Driver's Lic.' and/or 'SSN' fields will be populated with the verified data and the 'Verified' checkbox will be marked. The ballot label queued when the first ID verification result was received will not contain the 'ID' watermark.</p> <p>Because the verified Driver's License and/or SSN on the absentee application is different than the Driver's License and/or SSN on the voter's record, the Driver's License and/or SSN on the voter's record will be updated.</p> <p>Note:</p> <ul style="list-style-type: none"> • If DOB provided on the ID verification tab is different from the voter's record, the verified DOB will not update the voter's record. • If the ballot label was not confirmed prior to the reprocessing of the ID verification, the 'ID' watermark will be removed from the label.
9.	<p>Click [OK] from the <i>ID Verification</i> tab to return to close the absentee record.</p> <p>Note: The response to the ballot cannot be recorded as "RECORD - BALLOT RETURNED" until the ID is verified.</p>



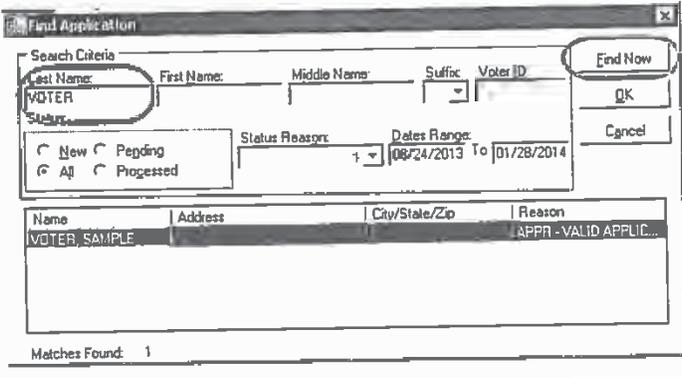
Scenario C: Reprocessing Absentee ID Verification Exceptions through the Applications Module

Steps	Actions
1.	From the SURE menu, select the <i>Applications</i> tab.
2.	Click in the 'App Type' down-down and select 'Absentee Application'. 
3.	In the 'Status' field, click the 'Processed' option. 

4. Click [Modify Application].



5. The Find Application window opens. Enter search criteria and click [Find Now].

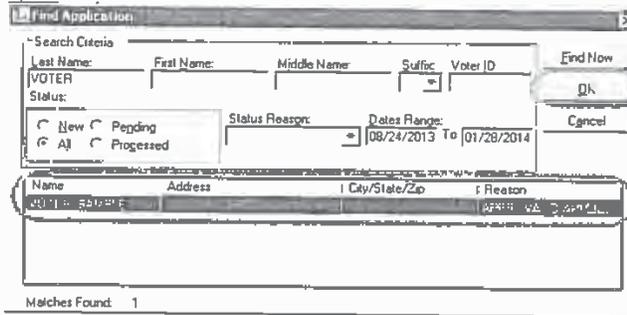


Name	Address	City/State/Zip	Reason
VOTER, SAMPLE			APPR - VALID APPLIC...

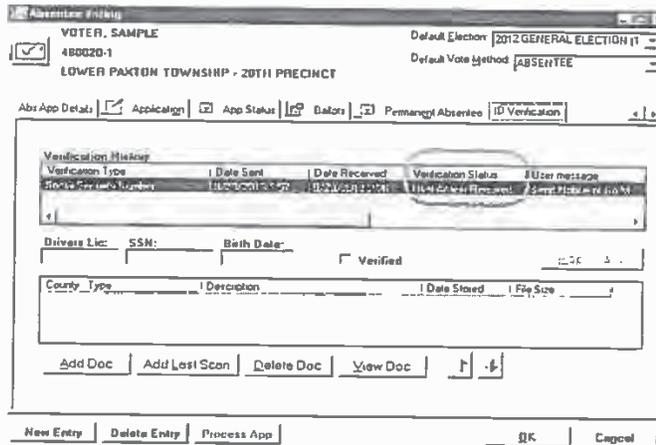
Matches Found: 1



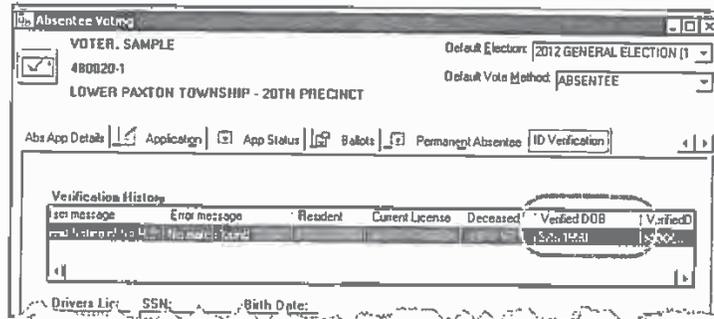
6. Select the desired application and click [OK].



7. The application is opened. Click the *ID Verification* tab on Absentee Voting screen. The Verification History grid shows the verification type used to process the ID verification as well as the status of the verification. Because the ID was not verified, the verification status is 'User Action Required'.



Scrolling to the right displays the date of birth used for ID verification





8.

Enter the correct Driver's License, SSN and/or date of birth into the appropriate fields on the *ID Verification* tab and click the [Reprocess] button. The ID provided is sent for verification.

The DOB sent for ID verification will be the date in the 'Birth Date' field on the *ID Verification* tab. If this field is not populated, the DOB sent for ID verification will be the one on the *Application Queue* tab (if the absentee application was processed through the *Applications* module) or the voter's record (if the absentee was processed through the *Absentee Wizard*).

Note: If both the 'Driver's Lic.' and 'SSN' fields are populated when the [Reprocess] button is clicked, both will be simultaneously sent for ID verification.



9. The Verification History grid is updated, displaying the status of the reprocessed ID verification request.

Absentee Voting

VOTER: SAMPLE
 480020-1
 LOWER PAXTON TOWNSHIP - 20TH PRECINCT

Default Election: 2012 GENERAL ELECTION (1)
 Default Vote Method: ABSENTEE

Abs App Details | Application | App Status | Ballots | Permanent Absentee | ID Verification

Verification Type	Date Sent	Date Received	Verification Status	User message
Driver's License Number	5/23/2013 2:22		Pending Verification	
Social Security Number	9/23/2013 2:22		Pending Verification	

Drivers Lic: SSN: Birth Date: Verified

County	Type	Description	Date Stored	File Size

Add Doc Add Last Scan Delete Doc View Doc

New Entry Delete Entry Process App

Record: 1 of 1

The status-reason of the application will be 'APPR-ID VERIFICATION PEND' until the result of the ID verification is received.



10.	<p>If the ID verification process did not verify the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will remain 'APPR-ID NOT VERIFIED', the Verification History grid will reflect the status of the reprocessed ID verification attempt, the 'Driver's Lic.' and/or 'SSN' fields on the <i>ID Verification</i> tab will not be updated and the 'Verified' checkbox will remain unchecked. The ballot label queued when the first ID verification result was received will continue to contain the 'ID' watermark.</p> <p>Because the Driver's License and/or SSN on the absentee application was not verified, the Driver's License and/or SSN on the voter's record will not be updated.</p> <p>If the ID verification process verifies the reentered Driver's License, SSN and/or date of birth, the absentee application 'Status Reason' will automatically update to 'APPR - ID VERIFIED' and the <i>ID Verification</i> tab will reflect the auto-approval of the ID. The 'Driver's Lic.' and/or 'SSN' fields will be populated with the verified data and the 'Verified' checkbox will be marked. The ballot label queued when the first ID verification result was received will not contain the 'ID' watermark.</p> <p>Because the verified Driver's License and/or SSN on the absentee application is different than the Driver's License and/or SSN on the voter's record, the Driver's License and/or SSN on the voter's record will be updated.</p> <p>Note:</p> <ul style="list-style-type: none"> • If the DOB provided on the ID verification tab is different from the voter's record, the verified DOB will not update the voter's record. • If the ballot label was not confirmed prior to the reprocessing of the ID verification, the 'ID' watermark will be removed from the label.
11.	<p>Click [OK] to close the voter's absentee record.</p> <p>Note: The response to the ballot cannot be recorded as "RECORD - BALLOT RETURNED" until the ID is verified.</p>



Recording Returned Absentee Ballots

The following describes the process to record absentee ballots returned by the voter and absentee ballots returned as undeliverable by USPS. In addition, a chart of the available absentee ballot response types with business reasons is included for your reference.

The following scenarios are related to this process:

- Scenario A: Recording Returned Absentee Ballots
- Scenario B: Using Auto-Record to Record Returned Absentee Ballots
- Scenario C: Clearing an Absentee Ballot Label Response
- Scenario D: Recording Absentee Ballots Returned as Undeliverable by USPS
- Scenario E: Recording Absentee Ballot Responses When the Bar Code Cannot Be Scanned

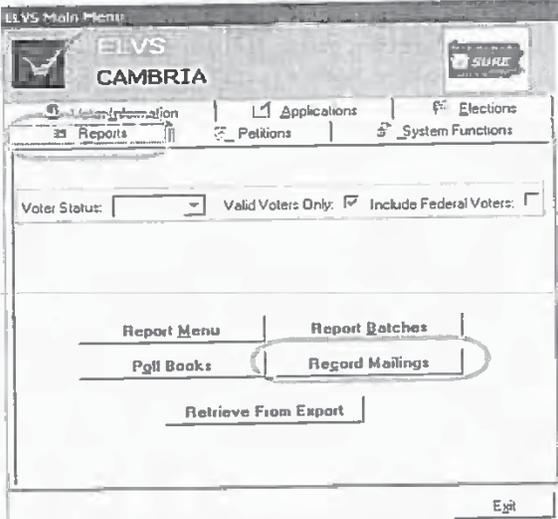
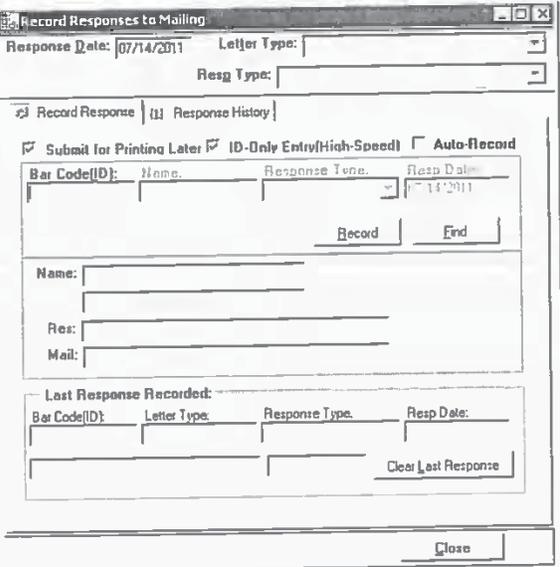
Each of these scenarios is addressed on the following pages:

- Scenario A: page 2
- Scenario B: page 6
- Scenario C: page 10
- Scenario D: page 15
- Scenario E: page 18



Scenario A: Recording Returned Absentee Ballots

The following steps are applicable to regular absentee ballots and UOCAVA absentee ballots.

Steps	Actions
<p>1.</p>	<p>Sign onto SURE VR, select the <i>Reports</i> tab and click the [Record Mailings] button.</p> 
<p>2.</p>	<p>The Record Responses to Mailings screen is displayed.</p> 

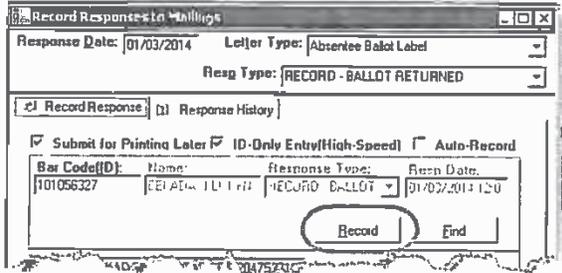
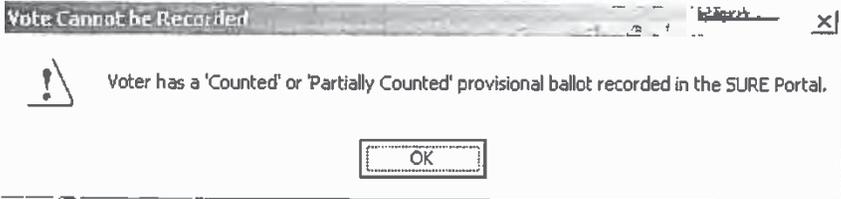
Steps	Actions								
3.	<p>Using the barcode reader, scan the barcode on the returned absentee ballot envelope.</p> <div data-bbox="678 464 1138 688" style="border: 1px solid black; padding: 10px; margin: 10px auto; width: fit-content;">  <p>020475371-1 022A-1 CEKADA, JILL LYNNE 1188 HINKSTON RUN RD MINERAL POINT, PA 15942</p> </div> <p>The fields for voter's name, signature, and address are populated. The 'Letter Type', 'Resp Date' and 'Bar Code (ID)' fields are also populated and the 'Resp Type' options are displayed.</p> <div data-bbox="581 814 1252 1486" style="border: 1px solid black; padding: 5px; margin: 10px auto;"> <p>Record Responses to Mailings</p> <p>Response Date: 01/03/2014 Letter Type: Absentee Ballot Label</p> <p>Resp Type: CANC - EMAIL BALLOT UNDELIVERABLE</p> <p><input checked="" type="checkbox"/> Record Response <input checked="" type="checkbox"/> Response History</p> <p><input checked="" type="checkbox"/> Submit for Printing Later <input checked="" type="checkbox"/> ID-Only</p> <p>Bar Code(ID): 101056327 Name: CEKADA, JILL LYNNE</p> <p>Name: CEKADA, JILL LYNNE(ID:020475371-1) <i>Signature</i></p> <p>ACTIVE - REGISTERED</p> <p>Res: 1188 HINKSTON RUN RD MINERAL POINT, PA 159</p> <p>Mail:</p> <p>Last Response Recorded:</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%;">Bar Code(ID):</td> <td style="width: 25%;">Letter Type:</td> <td style="width: 25%;">Response Type:</td> <td style="width: 25%;">Resp Date:</td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table> <p style="text-align: right;"><input type="button" value="Record"/> <input type="button" value="End"/></p> <p style="text-align: right;"><input type="button" value="Clear Last Response"/></p> <p style="text-align: right;"><input type="button" value="Close"/></p> </div>	Bar Code(ID):	Letter Type:	Response Type:	Resp Date:				
Bar Code(ID):	Letter Type:	Response Type:	Resp Date:						

Note: If the 'Letter Type' is populated before the barcode is scanned, it will be updated to match the letter type associated to the scanned barcode.

Please refer to scenario B on page 6 for information on using the 'Auto-Record' option when recording absentee ballots returned by the voter.

Please refer to scenario E on page 18 if the bar code on returned ballot cannot be scanned.



Steps	Actions
4.	<p>From the 'Resp Type' drop-down list, select the appropriate response type:</p> <ul style="list-style-type: none"> 'RECORD-BALLOT RETURNED' if the voter returned an official ballot 'RECORD - FWAB RETURNED' if the voter returned an FWAB ballot 'FWAB OVERRIDE--OFFICIAL BALLOT RECEIVED' if the voter returned an official ballot after an FWAB ballot was recorded as returned. <p>Please see the table titled 'Available Absentee Ballot Response Types with Business Reasons' on page 22 for descriptions of other ballot response types that may be used here as well as explanations of the business reasons for their use.</p> <p>Note: If an FWAB is received from a qualified unregistered voter, it can be used to register the voter through the <i>Applications</i> module in SURE VR. When processing the FWAB through the <i>Applications</i> module, select 'FWAB' from the 'Source' field on the <i>Voter Applications</i> screen.</p>
5.	<p>Click the [Record] button after populating the 'Resp Type' field.</p>  <ul style="list-style-type: none"> If the response type is RECORD-BALLOT RETURNED, RECORD - FWAB RETURNED, or FWAB OVERRIDE - OFFICIAL BALLOT and the voter has a 'Counted' or 'Partially Counted' provisional ballot, the Vote Cannot be Recorded message is displayed.  <p>Click [OK] to close the message. The vote cannot be recorded in SURE VR unless the provisional ballot is deleted.</p>

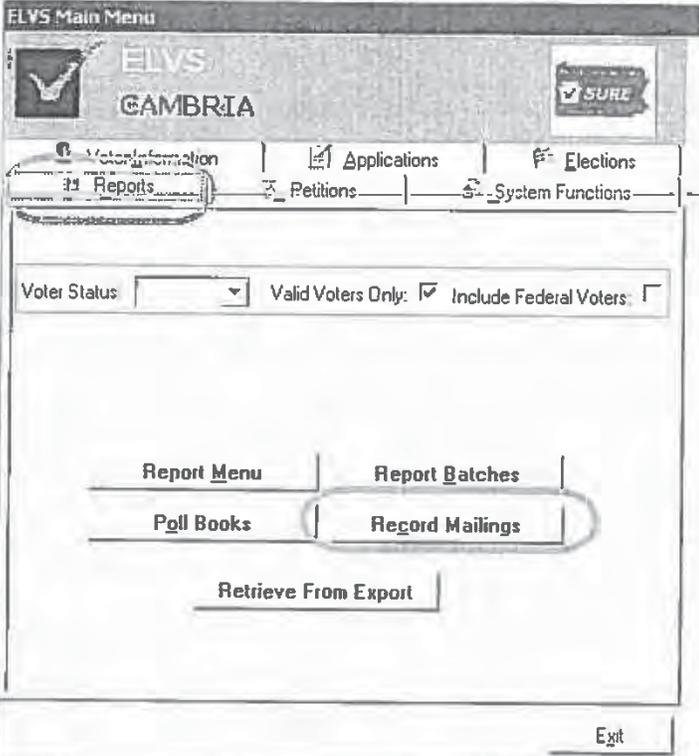


Steps	Actions
<p>6.</p>	<p>The 'Bar Code (ID)' field is cleared and the fields on the 'Last Response Recorded' area are populated with the voter's information.</p> <p>The following will occur when recording the ballot as RECORD - BALLOT RETURNED:</p> <ul style="list-style-type: none"> • The <i>Votes</i> tab of the voter record is updated to include vote history for the current election. • The <i>Ballots</i> tab on the <i>Absentee Voting</i> screen will show the ballot status as 'Record - Ballot Returned' and display the date the ballot was received. • The <i>Correspondence</i> tab of the voter record is updated to show the response was recorded. • The 'Last Voted' field on the voter's record is updated with the current election date.
<p>7.</p>	<p>Click the [Close] button to close the Record Responses to Mailings screen.</p>



Scenario B: Using Auto-Record to Record Returned Absentee Ballots

The auto-record option is convenient when many absentee ballots of the same type need to be recorded with the same response. To fully optimize the process, face all the absentee ballots with the barcode up and organize them by type and response.

Steps	Actions
1.	<p>Sign onto SURE VR, select the <i>Reports</i> tab and then click the [Record Mailings] button.</p> 

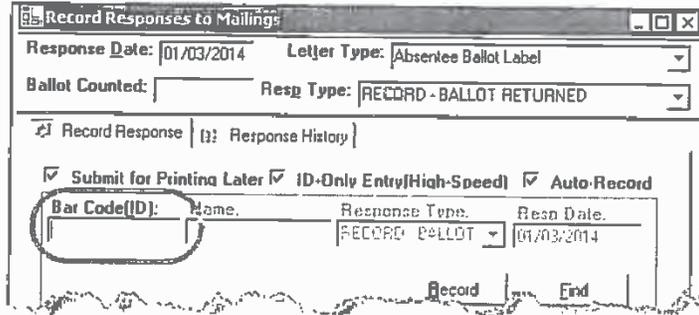


2. The *Record Responses to Mailings* screen is displayed.

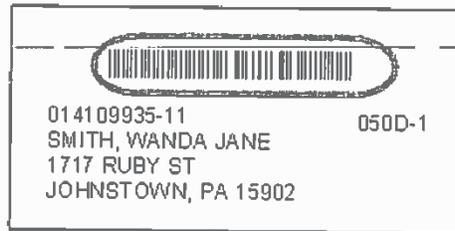
3. Populate the 'Letter Type' field with the absentee ballot type being recorded. Populate the 'Resp Type' field with the appropriate response.

4. Click the checkbox to the left of 'Auto-Record' to populate it with a checkmark.

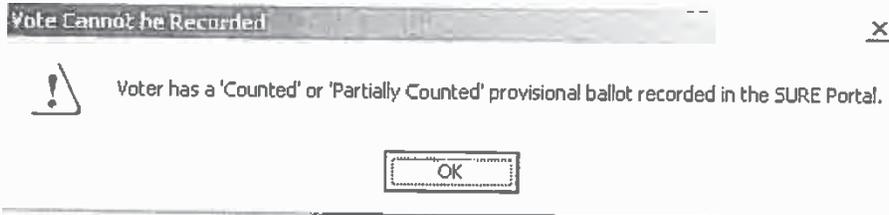
5. If necessary, put the cursor in the 'Bar Code(ID)' field by clicking in it.



6. Use the barcode scanner to scan the barcode on the absentee label.



Note: If the response type is RECORD-BALLOT RETURNED, RECORD - FWAB RETURNED, or FWAB OVERRIDE - OFFICIAL BALLOT and the voter has a 'Counted' or 'Partially Counted' provisional ballot, the **Vote Cannot be Recorded** message is displayed.



Click [OK] to close the message. The vote cannot be recorded in SURE VR unless the provisional ballot is deleted.



7. Because the 'Auto-Record' checkbox is marked, there is no need to click the [Record] button.

The fields for voter's name, signature, and address are populated. The fields in the 'Last Response Recorded' area are also populated, indicating the response was recorded.

The following actions also take place when recording the ballot as RECORD - BALLOT RETURNED:

- The *Votes* tab of the voter record is updated to include vote history for the current election.
- The *Ballots* tab on the *Absentee Voting* screen will show the ballot status as 'Record - Ballot Returned' and display the date the ballot was received.
- The *Correspondence* tab of the voter record is updated.
- The 'Last Voted' field on the voter's record will be updated with the current election date.

8. The cursor is automatically placed in the 'Bar Code(ID)' field. Use the barcode scanner to scan the barcode of the next absentee ballot label. Continue to scan the barcodes until all the absentee labels needing the same response are scanned.

Note: The 'Resp Type' field can be changed before scanning the next barcode. It will retain the selected option until a new option is selected.

9. Click the [Close] button to close the *Record Responses to Mailings* screen.



Scenario C: Clearing an Absentee Ballot Label Response

Responses to absentee ballots can be cleared immediately after the response is recorded or any time after.

Steps	Actions
<p>1.</p>	<p>If a response to an absentee ballot was recorded in error and the voter's name is displayed in the 'Last Response Recorded' area of the Record Responses to Mailing screen, click the [Clear Last Response] button.</p>
<p>2.</p>	<p>The Clear Only the Response? message is displayed.</p>



3. Click [No] or [Cancel] to close the message and return to the **Record Responses to Mailings** screen without clearing the response.
 Click [Yes] to clear the response.
 The message closes and the voter's name is removed from the 'Last Response Recorded' area.
 The voter's information remains displayed so a different response type can be selected and the [Record] button clicked.
Note: If no response should be recorded, scan the barcode of the next absentee ballot to be recorded or close the **Record Responses to Mailings** screen.

4. If a response to an absentee ballot was recorded in error and the voter's name is not displayed in the 'Last Response Recorded' area of the **Record Responses to Mailing** screen click the *Response History* tab.

Note: If necessary, open the **Record Responses to Mailings** screen by signing onto SURRE VR, clicking the *Reports* tab, and clicking the [Record Mailings] button.



5. The 'Work Station' field defaults to the computer being used. If necessary, select the computer used to record the mailing. If the computer is not known, delete the text from the field.

Record Responses to Mailings

Response Date: 01/03/2014 Letter Type: [dropdown]

Resp Type: [dropdown]

Record Response [Response History]

Work Station: DOSSUREAP Response Date Range: 01/03/2014 to BarCode(ID): [empty] Processed: Show

6. To limit the search to a specific date, edit the 'Response Date Range' fields.

Record Responses to Mailings

Response Date: 01/03/2014 Letter Type: [dropdown]

Resp Type: [dropdown]

Record Response [Response History]

Work Station: DOSSUREAP Response Date Range: 01/03/2014 to BarCode(ID): [empty] Processed: Show

7. If available, populate the 'BarCode(ID)' field with the correspondence ID. If this is not available, leave the field blank.

Record Responses to Mailings

Response Date: 01/03/2014 Letter Type: [dropdown]

Resp Type: [dropdown]

Record Response [Response History]

Work Station: DOSSUREAP Response Date Range: 01/03/2014 to BarCode(ID): [empty] Processed: Show



8. Click [Show].

9. Select the voter from the results and click [Clear Response].

Corr ID	Name	Letter Type	Response Type	Resp
190670044	MILLER	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056316	MILLER	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056319	MILLER	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056321	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056324	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056325	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20

10. The Clear Only the Response? message is displayed.



11. Click [Yes] to clear the response.

The message closes. The voter's name is removed from the search results. If applicable, use the *Record Response* tab to record the ballot as returned using the correct response type.

Click [No] or [Cancel] to close the message and return to the *Record Responses to Mailings* screen without clearing the response.

12. Click [Close] to close the *Record Responses to Mailings* screen.

Work Station	Response Date Range	BarCode(ID)	Processed	Show
DOSSUREAP	01/03/2014 to		<input checked="" type="checkbox"/>	<input type="checkbox"/>

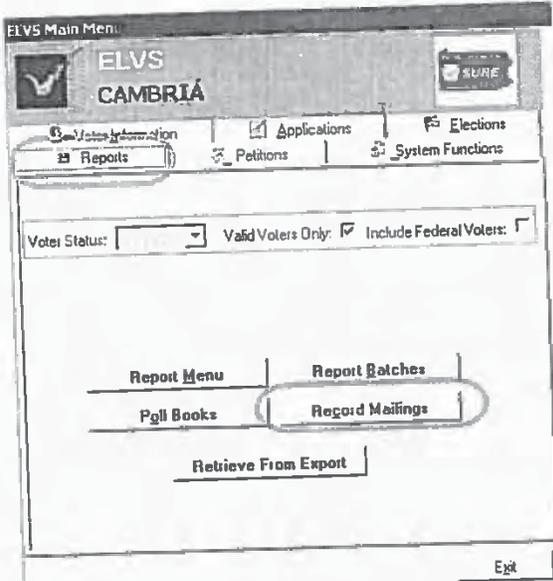
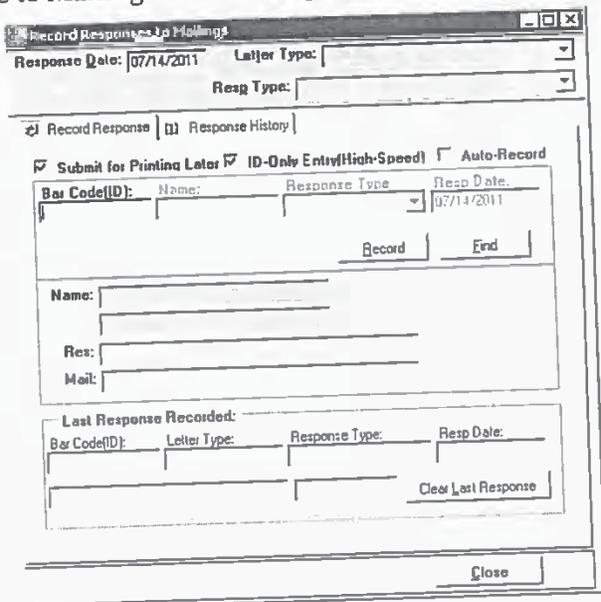
Cor ID	Name	Letter Type	Response Type	Respo
100670044	MILLER	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056318	MILLER	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056322	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056324	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20
101056325	SMITH	Absentee Ballot Label	RECORD - BALLOT R...	1/3/20

Record: 1 of 5

Clear Response Close



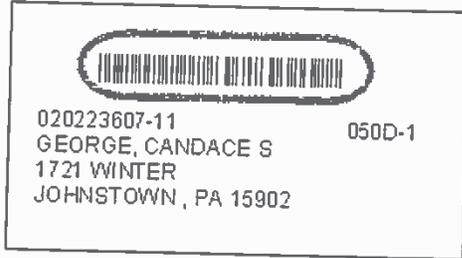
Scenario D: Recording Absentee Ballots Returned as Undeliverable by USPS

Steps	Actions
1.	<p>Sign onto SURE VR, select the <i>Reports</i> tab and then click the [Record Mailings] button.</p> 
2.	<p>The Record Responses to Mailings screen is displayed.</p> 



Steps	Actions
-------	---------

3. Using the barcode reader, scan the barcode on the returned absentee ballot envelope.



The fields for voter's name, signature, and address are populated. The 'Letter Type', 'Resp Date' and 'Bar Code(ID)' fields are also populated and the 'Resp Type' options are displayed.

Record Responses to Mailings

Response Date: 07/14/2011 Letter Type: Absentee Ballot Label

Resp Type: **CANC - UNDELIVERABLE**

Record Response Response History

Submit for Printing Later ID-Only

Bar Code(ID): 79706296 Name: GEORGE, CANDACE S ID: 020223607-11

Resp Type Options:
 CANC - NO SIGNATURE
 CANC - REPLACED
 CANC - RETURNED AFTER DEADLINE
 CANC - UNDELIVERABLE
 CANC - VOTE CANCELLED
 CANC - VOTE CHALLENGED
 PEND - NOT YET RETURNED
 RECORD - BALLOT RETURNED

Name: GEORGE, CANDACE S ID: 020223607-11
 ACTIVE - REGISTERED

Res: 1721 WINTER JOHNSTOWN, PA 15902

Mail:

Last Response Recorded:

Bar Code(ID)	Letter Type	Response Type	Resp Date

Clear Last Response

Record End

Close

Note: Please refer to scenario E on page 18 if the bar code on returned ballot cannot be scanned.



4. From the 'Resp Type' drop-down list, select 'CANC - UNDELIVERABLE' and then click the [Record] button.

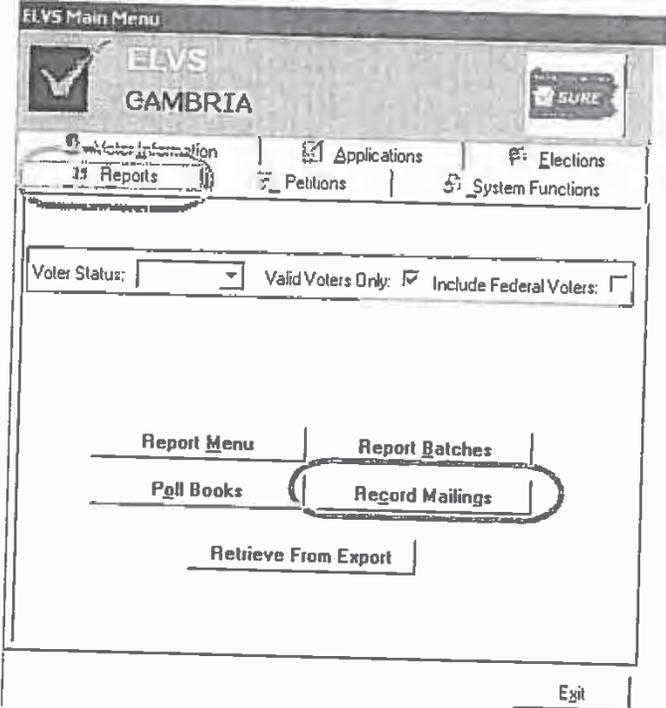
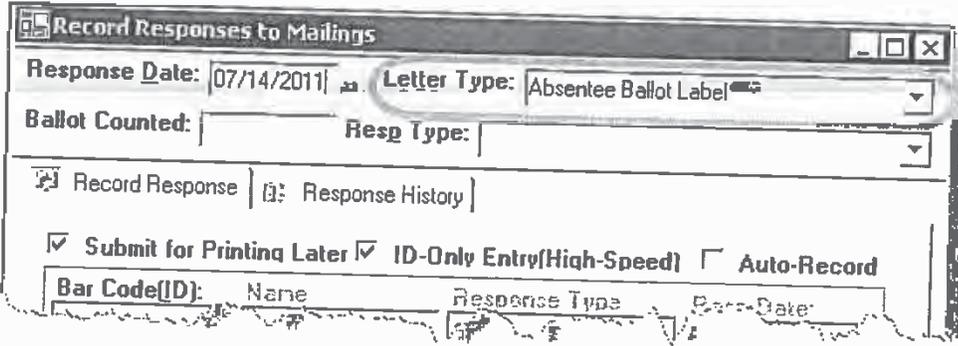
Bar Code(ID)	Name	Response Type	Resp Date
101056329	GEORGE CANCACC	CANC - UNDELIVER	01/03/2014 12:0

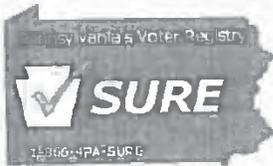
Note: Please refer to scenario B on page 6 for information on using the Auto-Record option when recording absentee ballots returned by the voter.

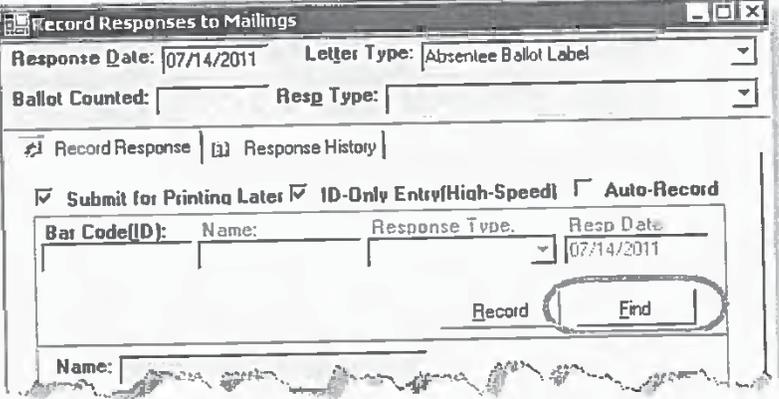
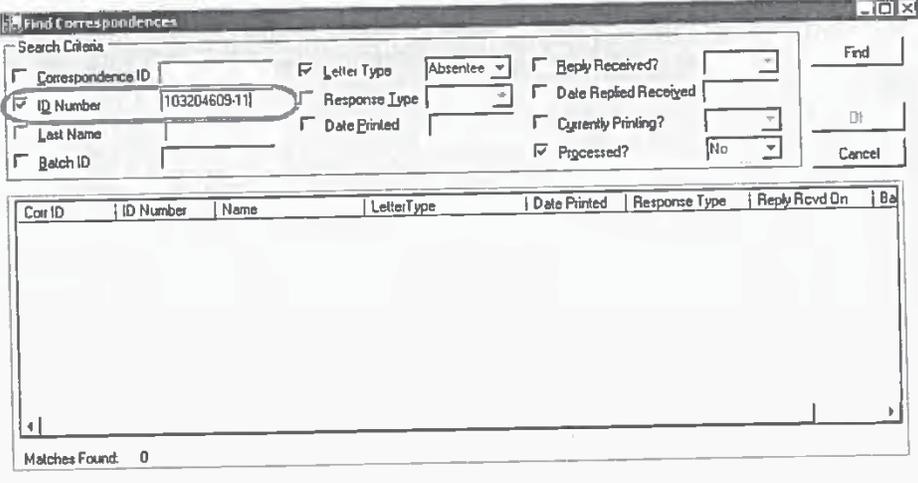
5. The 'Bar Code(ID)' field is cleared and the fields on the 'Last Response Recorded' area are populated with the voter's information. The ballot has been recorded as undeliverable.
6. Click the [Close] button to close the Record Responses to Mailings screen.



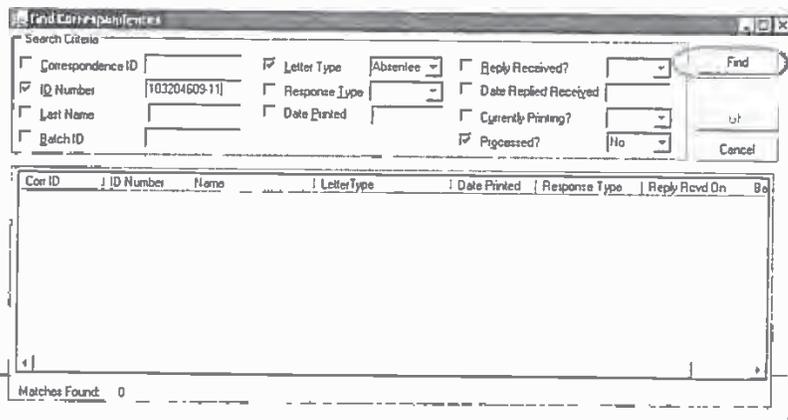
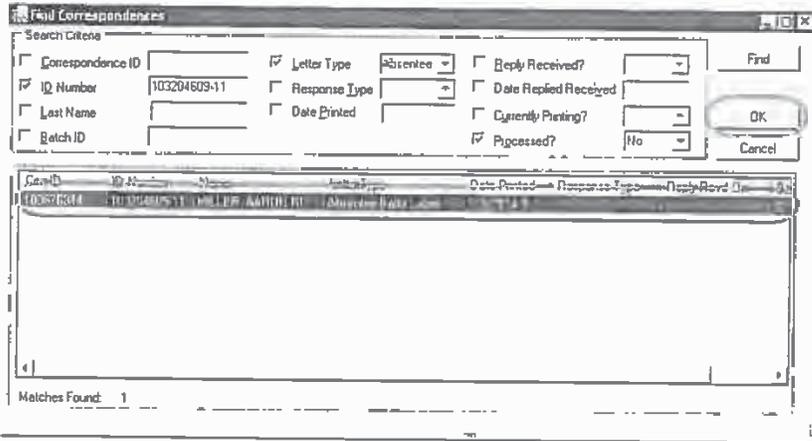
Scenario E: Recording Absentee Ballot Responses When the Bar Code Cannot Be Scanned

Steps	Actions
1.	<p>Sign onto SURE VR, select the <i>Reports</i> tab and then click the [Record Mailings] button.</p>  <p>The screenshot shows the 'ELVS Main Menu' for 'GAMBRIA'. The 'Reports' tab is selected and highlighted with a red circle. Below the navigation tabs, there are filter options for 'Voter Status', 'Valid Voters Only' (checked), and 'Include Federal Voters'. At the bottom, the 'Record Mailings' button is circled in red.</p>
2.	<p>The Record Responses to Mailings screen is displayed. Populate the 'Letter Type' field with the correct absentee label type.</p>  <p>The screenshot shows the 'Record Responses to Mailings' window. The 'Response Date' is 07/14/2011. The 'Letter Type' dropdown menu is open and shows 'Absentee Ballot Label' selected. Other fields include 'Ballot Counted', 'Resp Type', and checkboxes for 'Record Response', 'Response History', 'Submit for Printing Later' (checked), 'ID-Only Entry(High-Speed)' (checked), and 'Auto-Record'. A table at the bottom has columns for 'Bar Code(ID)', 'Name', 'Response Type', and 'Resp Date'.</p>



Steps	Actions
<p>3.</p>	<p>Click the [Find] button.</p>  <p>The Find Correspondences screen opens.</p>
<p>4.</p>	<p>Click the checkbox to the left of 'ID Number' to populate it with a checkmark and type the voter's ID into the field (the voter's ID is on the absentee label). If the voter's ID is not known, click the checkbox to the left of 'Last Name' to populate it with a checkmark and type the voter's last name into the field.</p> 



Steps	Actions
5.	<p>Click [Find].</p> 
6.	<p>Click the voter's name from the search results and click [OK].</p> 



Steps	Actions								
7.	<p>The Find Correspondences screen closes and the Record Responses to Mailings is displayed. The fields for voter's name, signature, and address are populated. The 'Letter Type', 'Resp Date' and 'Bar Code(ID)' fields are also populated and the 'Resp Type' options are displayed.</p> <div data-bbox="500 588 1307 1386" style="border: 1px solid black; padding: 5px;"> <p>Record Responses to Mailings</p> <p>Response Date: 07/14/2011 Letter Type: Absentee Ballot Label</p> <p>Resp Type: [Dropdown]</p> <p><input checked="" type="checkbox"/> Record Response <input checked="" type="checkbox"/> Response History</p> <p><input checked="" type="checkbox"/> Submit for Printing Later <input checked="" type="checkbox"/> ID-Only</p> <p>Bar Code(ID): 79706296 Name: GEORGE, CANDACE S ID: 020223607</p> <p>ACTIVE - REGISTERED</p> <p>Res: 1721 WINTER JOHNSTOWN, PA 15902</p> <p>Mail: [Empty]</p> <p>Last Response Recorded:</p> <table border="1"> <tr> <td>Bar Code(ID):</td> <td>Letter Type:</td> <td>Response Type:</td> <td>Resp Date:</td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </table> <p style="text-align: right;">Clear Last Response</p> <p style="text-align: right;">Record Find</p> <p style="text-align: right;">Close</p> </div> <p>Note: Refer to scenario A on page 2 to record the responses.</p>	Bar Code(ID):	Letter Type:	Response Type:	Resp Date:				
Bar Code(ID):	Letter Type:	Response Type:	Resp Date:						



Available Absentee Ballot Response Types with Business Reasons

Response Type	Business Reason
CANC - EMAIL BALLOT UND BATCH	Used by SURE VR when an email ballot correspondence cannot be delivered to the absentee email address. Ballots with this type of response were automatically placed in an UND ABS absentee application batch.
CANC-EMAIL BALLOT UNDELIVERABLE	Cancels an emailed ballot returned as undeliverable.
CANC - LABEL CANCELLED	Used if a ballot label is misplaced or damaged and is cancelled in order to create another one; also used to generate 2 nd ballot labels.
CANC - NO ID	Cancels ballot if absentee requiring ID is not provided.
CANC - NO SIGNATURE	Cancels ballot if county cannot obtain a signature.
CANC - REPLACED	Used to cancel a lost ballot if a replacement is sent.
CANC - RETURNED AFTER DEADLINE	Cancels the ballot if it is invalid due to being returned after the deadline.
CANC - UNDELIVERABLE	Cancels the ballot if it is returned undeliverable by the Post Office.
CANC - VOTE CANCELLED	Used, for example, if a ballot is not counted due to a voter voting at the polling place therefore voiding the absentee vote.
CANC - VOTE CHALLENGED	Used if a ballot is not counted because of a successful challenge.
FWAB OVERRIDE-OFFICIAL BALLOT RECEIVED	Used to record an Official Ballot as returned and overrides the Federal Write In Absentee Ballot previously recorded.
PEND - NOT YET RETURNED	Status the label is in after the ballot is sent and before it is returned.
RECORD - BALLOT RETURNED	Records the voter's ballot as returned prior to the deadline.
RECORD-FWAB RETURNED	Used to record a Federal Write In Ballot was received prior to the Official Ballot being returned.

Note: If an FWAB is received from a qualified unregistered voter it can be used to register the voter through the *Applications* module in SURE VR. When processing the FWAB through the *Applications* module select 'FWAB' from the 'Source' field on the Voter Applications screen.



Job Aid: Processing Absentee Applications Requiring ID Verification - Absentee Wizard

This Job Aid describes how to process absentee applications requiring ID verification through the Absentee Wizard.

Absentee applications, with the exception of UOCAVA absentee applications and absentee applications with a type of 'Alternative' or 'Permanent Alternative' require ID verification. Because UOCAVA absentee applications and absentee applications with a type of 'Alternative' or 'Permanent Alternative' are exempt from the ID verification requirement, they are not addressed in this Job Aid.

For those absentee applications requiring ID verification, SURE VR will compare the Driver's License and last 4-digits of the SSN on the voter's record to the Driver's License and SSN on the absentee application. If either the Driver's License or SSN on the absentee application matches the voter's record, the default status-reason for the absentee application will be 'APPR - ID VERIFIED'. If the application does not contain either of these numbers, if the voter record does not contain either of these numbers, or if at least one of the numbers do not match; the default status reason of the application will be set to 'APPR - ID VERIFICATION PEND' and the applicant's information will be sent for ID verification. The absentee status reason will automatically update to either 'APPR - ID VERIFIED' OR 'APPR - ID NOT VERIFIED' based on the ID verification results.

Regardless of the ID verification results, the absentee ballot label can be queued to Correspondence Batches for all absentee applications that have been processed as 'Approved'. This ensures ballot materials can be sent to voters in a timely manner; however, if ID verification is required, ballot labels cannot be recorded until proper ID verification occurs.

You may encounter the following scenarios while processing an absentee application through the Absentee Wizard:

- Scenario A: Processing an Absentee Application when the Driver's License or SSN Matches the Voter Record
- Scenario B: Processing an Absentee Application when the Driver's License or SSN Does Not Match the Voter Record
- Scenario C: Processing an Absentee Application Using the Manual Verification Method
- Scenario D: Processing an Absentee Application When No ID Has Been Provided
- Scenario E: Queuing Absentee Ballot Correspondences with the Process Absentee Utility

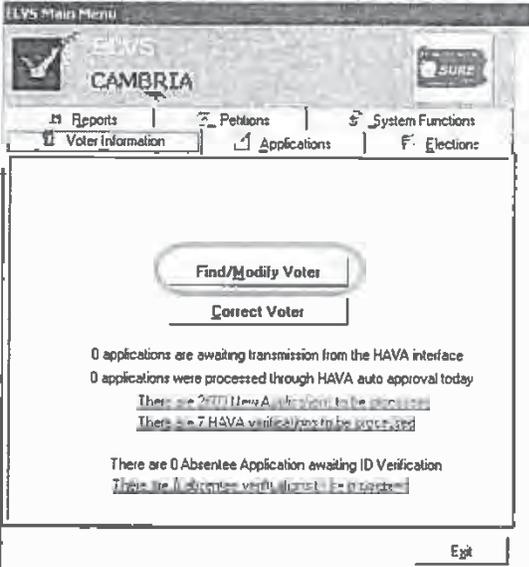
Each of these scenarios is addressed in the job aid:

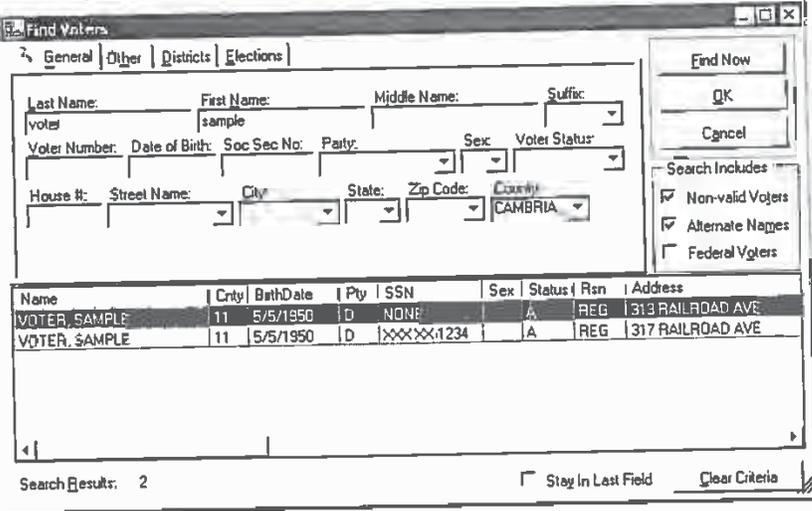
- Scenario A: page 2
- Scenario B: page 12
- Scenario C: page 22
- Scenario D: page 32
- Scenario E: page 41



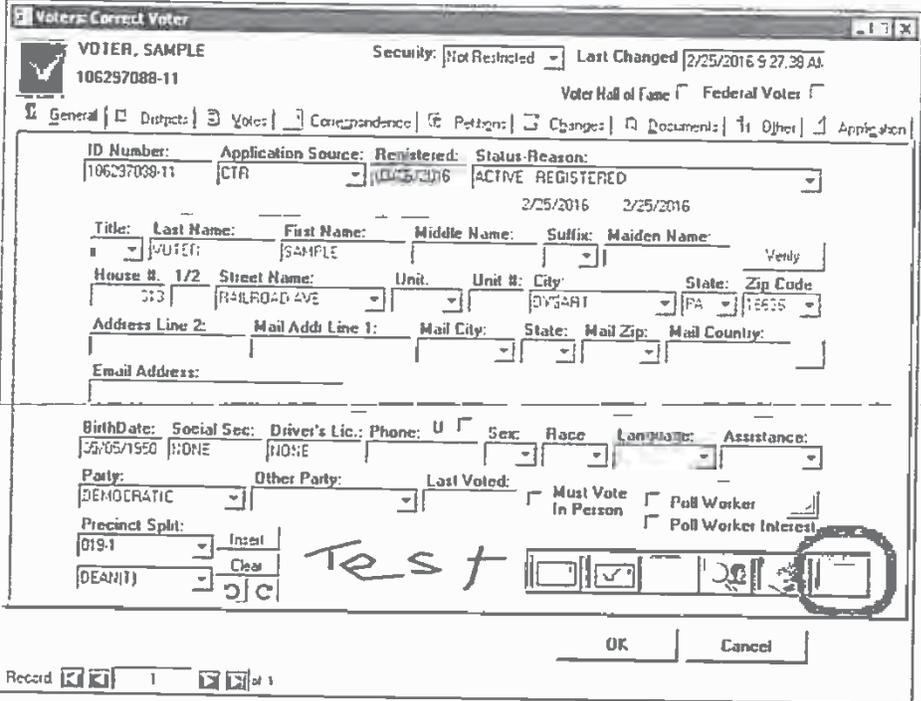
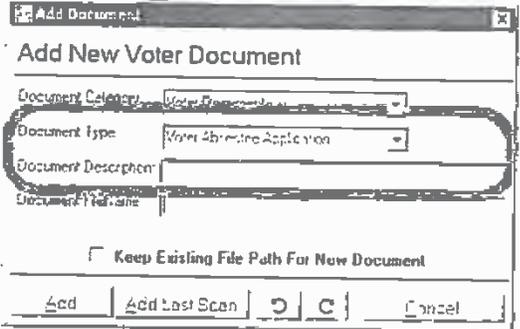
Scenario A: Processing an Absentee Application When the Driver's License or SSN Matches the Voter Record

Absentee applications processed with a Driver's License or SSN that matches the voter record will not be sent for ID verification when processed and will be approved with a 'Status Reason' of 'APPR - ID VERIFIED'.

Steps	Actions
1.	<p>From the SURE Menu, select the <i>Voter Information</i> tab and then click the [Find/Modify Voter] button.</p>  <p>The screenshot shows the 'SURE Main Menu' for 'CAMBRIA'. The 'Voter Information' tab is selected. The 'Find/Modify Voter' button is highlighted with a red oval. Below the button, there are statistics: '0 applications are awaiting transmission from the HAVA interface', '0 applications were processed through HAVA auto approval today', 'There are 29771 New Applications to be processed', 'There are 7 HAVA verifications to be processed', 'There are 0 Absentee Application awaiting ID Verification', and 'There are 11 Absentee verifications to be processed'. An 'Exit' button is at the bottom right.</p>
2.	The Find Voters window opens. Enter search criteria in the relevant fields.

Steps	Actions																											
3.	<p>Click the [Find Now] button. Voters meeting the search criteria are listed in the results grid.</p>  <p>The screenshot shows the 'Find Voters' application window. It has tabs for 'General', 'Other', 'Districts', and 'Elections'. The 'General' tab is active. Search criteria include: Last Name: voter, First Name: sample, Middle Name: (blank), Suffix: (blank), Voter Number: (blank), Date of Birth: (blank), Soc Sec No.: (blank), Party: (blank), Sex: (blank), Voter Status: (blank), House #: (blank), Street Name: (blank), City: (blank), State: (blank), Zip Code: (blank), and County: CAMBRIA. The 'Search Includes' section has checkboxes for 'Non-void Voters' (checked), 'Alternate Names' (checked), and 'Federal Voters' (unchecked). The results grid shows two records:</p> <table border="1" data-bbox="467 737 1256 810"> <thead> <tr> <th>Name</th> <th>City</th> <th>BirthDate</th> <th>Pty</th> <th>SSN</th> <th>Sex</th> <th>Status</th> <th>Rsn</th> <th>Address</th> </tr> </thead> <tbody> <tr> <td>VOTER_SAMPLE</td> <td>11</td> <td>5/5/1950</td> <td>D</td> <td>NONE</td> <td>A</td> <td>REG</td> <td></td> <td>313 RAILROAD AVE</td> </tr> <tr> <td>VOTER_SAMPLE</td> <td>11</td> <td>5/5/1950</td> <td>D</td> <td>XXXXXX1234</td> <td>A</td> <td>REG</td> <td></td> <td>317 RAILROAD AVE</td> </tr> </tbody> </table> <p>At the bottom of the window, it says 'Search Results: 2' and has buttons for 'Stay in Last Field' and 'Clear Criteria'.</p> <p>To open the voter's record, select the desired voter from the grid and click [OK] or double-click the desired voter record from the grid.</p>	Name	City	BirthDate	Pty	SSN	Sex	Status	Rsn	Address	VOTER_SAMPLE	11	5/5/1950	D	NONE	A	REG		313 RAILROAD AVE	VOTER_SAMPLE	11	5/5/1950	D	XXXXXX1234	A	REG		317 RAILROAD AVE
Name	City	BirthDate	Pty	SSN	Sex	Status	Rsn	Address																				
VOTER_SAMPLE	11	5/5/1950	D	NONE	A	REG		313 RAILROAD AVE																				
VOTER_SAMPLE	11	5/5/1950	D	XXXXXX1234	A	REG		317 RAILROAD AVE																				



Steps	Actions
4.	<p>To add the absentee application to the <i>Documents</i> tab in the voter's record, click the [Add Last Scanned] icon to open the Add Document window.</p> 
5.	<p>Select the desired option from the 'Document Type' field and enter a description in the 'Document Description' field.</p>  <p>Scan the absentee application, and click [Add Last Scan]. The document is saved to the <i>Documents</i> tab in the voter's record.</p>



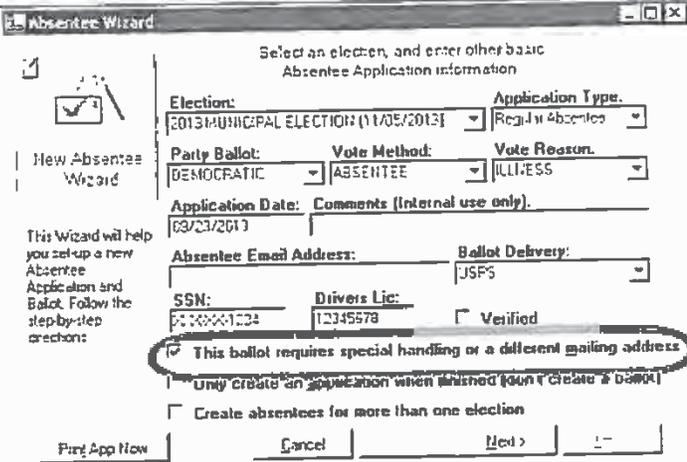
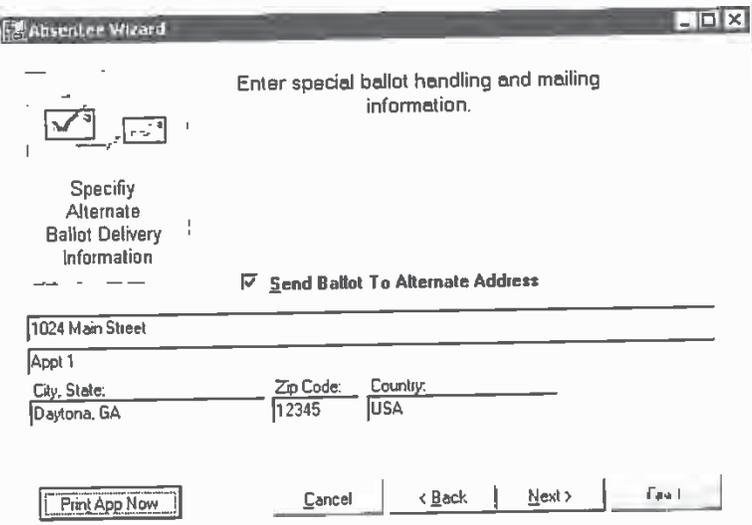
Steps	Actions
6.	<p>Click the [Absentee Voting] icon to display the Absentee Voting screen.</p>
7.	<p>Click the [New App] button on the Absentee Voting screen. The Absentee Wizard screen is displayed.</p>



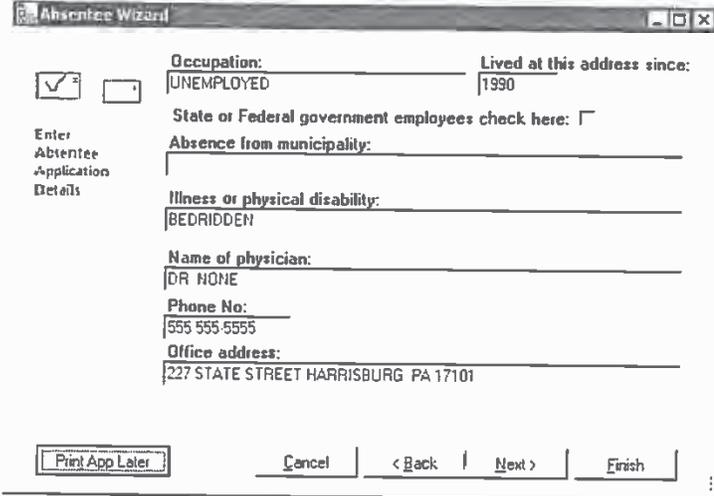
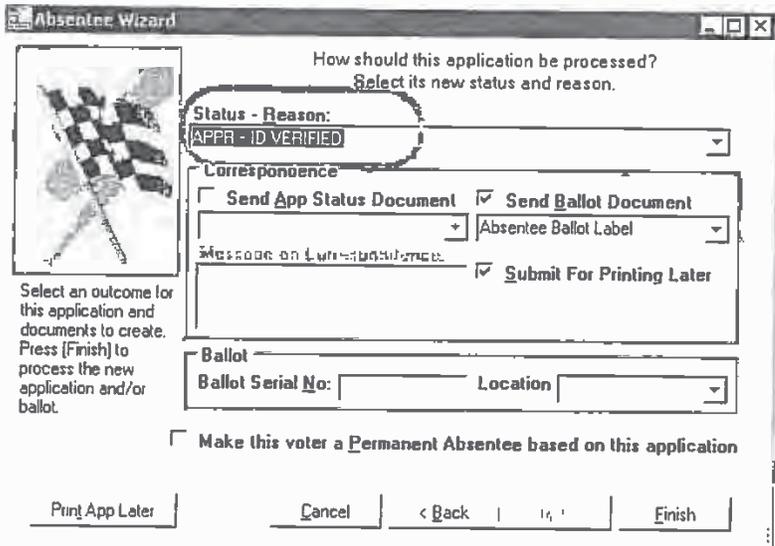
Steps	Actions

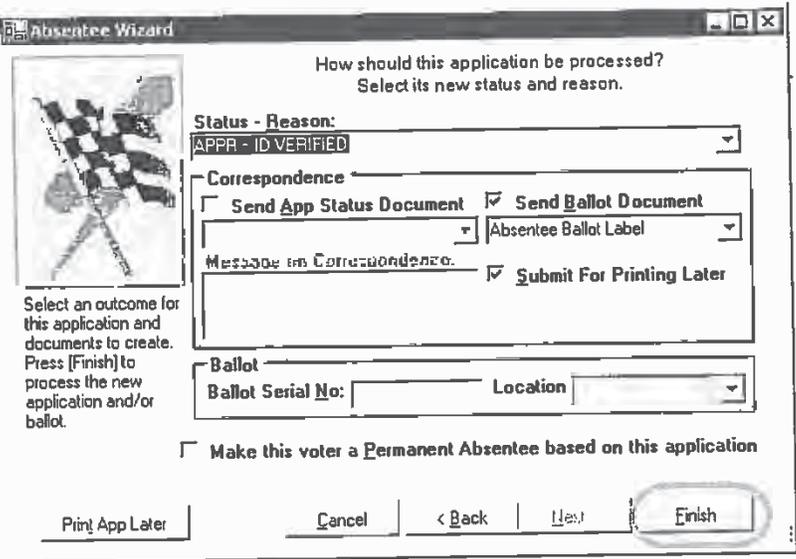
8. Populate the fields on the Absentee Wizard with the provided information, including the Driver's License and/or SSN.

If the voter specified that the ballot should be mailed to an address different from his or her residential address, check the 'This ballot requires special handling or a different mailing address' checkbox.

Steps	Actions
	 <p>Note: The 'Ballot Delivery' field defaults to 'USPS' and should not be changed for Civilian/Regular applications. Click [Next].</p>
9.	<p>If the 'This ballot requires special handling or a different mailing address' checkbox is checked, the Specify Alternate Ballot Delivery Information screen is displayed. Click the 'Send Ballot To Alternate Address' checkbox and enter the address in the resulting fields and then click [Next].</p> 



Steps	Actions
10.	<p>The Enter Absentee Application Details screen is displayed. If desired enter the information from the absentee application and then click [Next].</p> 
11.	<p>The last page of the wizard is displayed. The 'Status-Reason' is populated with 'APPR - ID VERIFIED'.</p> 

Steps	Actions
	<p>Because the Driver's License or the SSN provided on the absentee application matches the Driver's License or the SSN in the voter's record, the absentee application is processed with a status reason of 'APPR - ID VERIFIED'.</p> <p>Note: If the 'Send Ballot Document' checkbox is marked and the 'Submit For Printing Later' checkbox is cleared, the ballot label will print immediately.</p> <p>If the 'Send Ballot Document' and the 'Submit For Printing Later' checkboxes are marked, the ballot label will be queued to Correspondence Batches where it can be printed and confirmed.</p> <p>If neither the 'Send Ballot Document' nor the 'Submit For Printing Later' checkboxes are marked, the correspondence can be generated via the <i>Process Absentees</i> utility.</p> <p>If the 'Ballots and Contests Finalized' checkbox on the election record is not marked, the 'Send Ballot Document' checkbox will not be marked and the ballot cannot be immediately sent. The ballot label can be queued after the 'Ballots and Contests Finalized' checkbox in the election record is marked by using the <i>Process Absentees</i> utility.</p>
12.	<p>To complete the processing of the application, click [Finish].</p> 



Steps	Actions
13.	<p>The <i>Application</i> tab is displayed.</p>
14.	<p>Click the <i>App Status</i> tab to confirm the 'Status-Reason' of 'APPR-ID VERIFIED'.</p> <p>Click the <i>ID Verification</i> tab to view the status of the verification.</p>

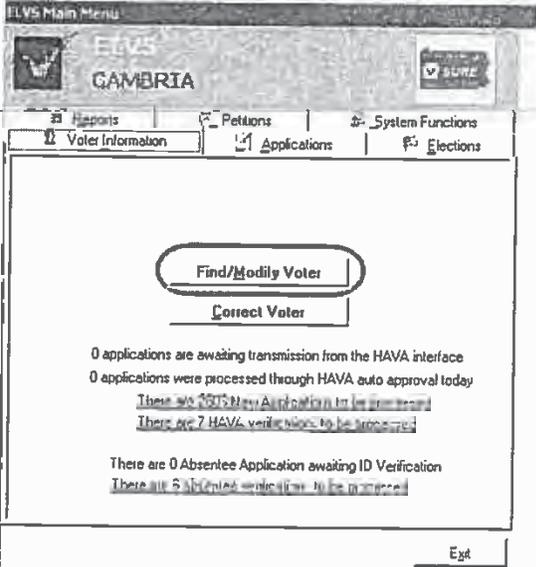


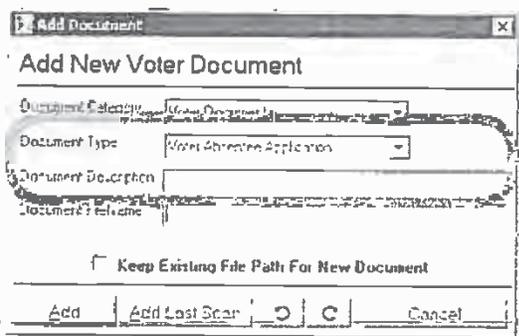
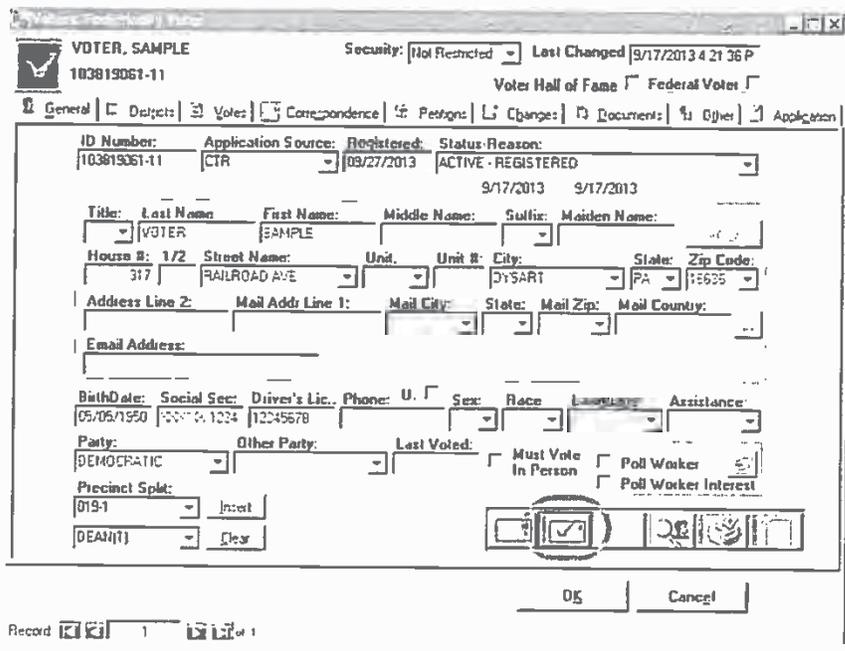
Steps	Actions																							
	<p>VOTER, SAMPLE <input checked="" type="checkbox"/> 019-1 DEAN(T) ID: 103660628 Select Application: 2013 MUNICIPAL ELECTION (11/0)</p> <p>Application Abs App Details App Status Ballots Permanent Absentee ID Verification</p> <table border="1"> <thead> <tr> <th>Verification Type</th> <th>Date Sent</th> <th>Date Received</th> <th>Verification Status</th> <th>User message</th> </tr> </thead> <tbody> <tr> <td>Drivers License Number</td> <td>9/17/2013 5:25</td> <td></td> <td>Verified Against Voter</td> <td></td> </tr> <tr> <td>Social Security Number</td> <td>9/17/2013 5:29</td> <td></td> <td>Verified Against Voter</td> <td></td> </tr> </tbody> </table> <p>Drivers Lic: 12345678 SSN: XXXXX-1234 Birth Date: <input checked="" type="checkbox"/> Verified Eprocess</p> <table border="1"> <thead> <tr> <th>County Type</th> <th>Description</th> <th>Date Stored</th> <th>File Size</th> </tr> </thead> <tbody> <tr> <td></td> <td></td> <td></td> <td></td> </tr> </tbody> </table> <p>Add Doc Add Last Scan Delete Doc View Doc</p> <p>New Entry Delete Entry Process App OK Cancel</p> <p>Record: 1 of 1</p>	Verification Type	Date Sent	Date Received	Verification Status	User message	Drivers License Number	9/17/2013 5:25		Verified Against Voter		Social Security Number	9/17/2013 5:29		Verified Against Voter		County Type	Description	Date Stored	File Size				
Verification Type	Date Sent	Date Received	Verification Status	User message																				
Drivers License Number	9/17/2013 5:25		Verified Against Voter																					
Social Security Number	9/17/2013 5:29		Verified Against Voter																					
County Type	Description	Date Stored	File Size																					
15.	At this time, the processing of the application is complete. Click [OK] to close the application and return to the voter's record.																							
16.	If necessary, use the <i>Process Absentees</i> utility to queue the ballot label.																							

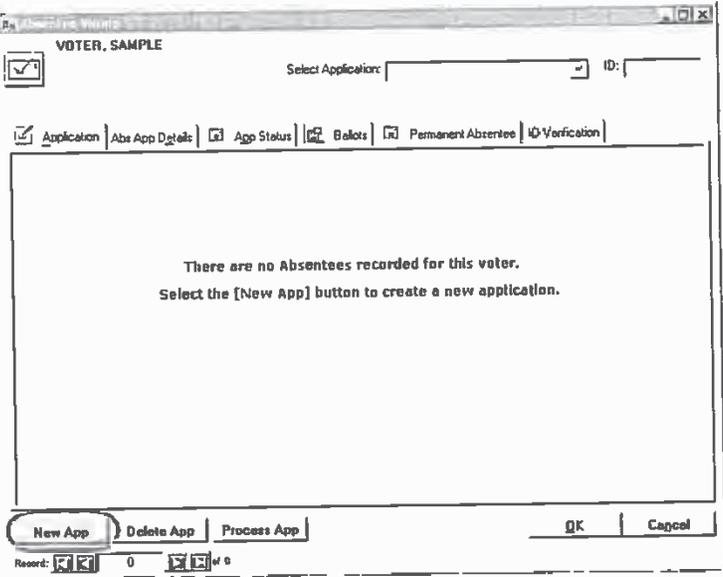
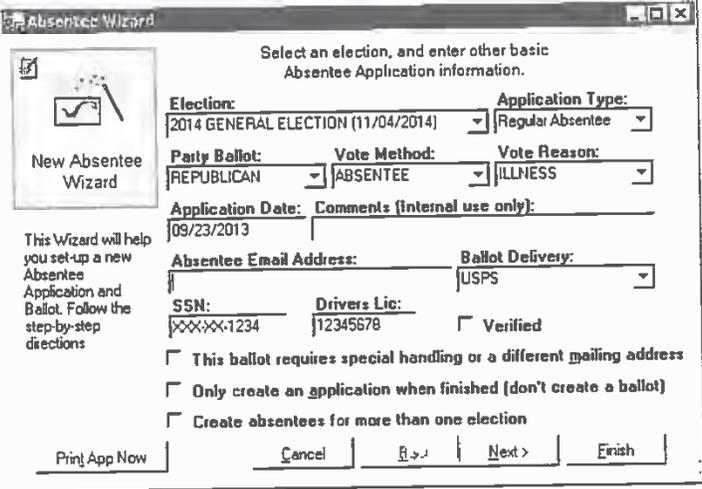


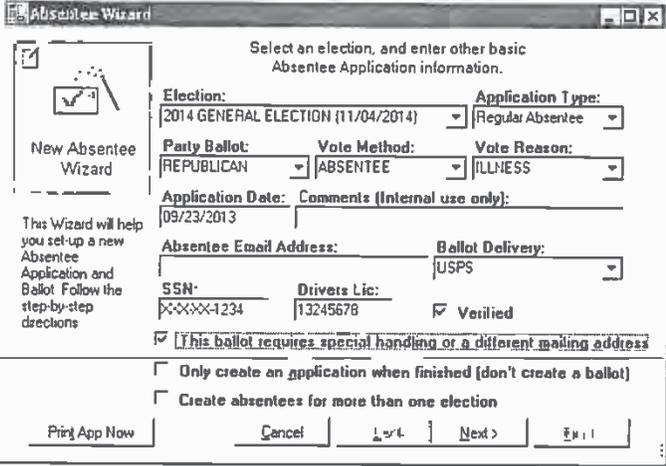
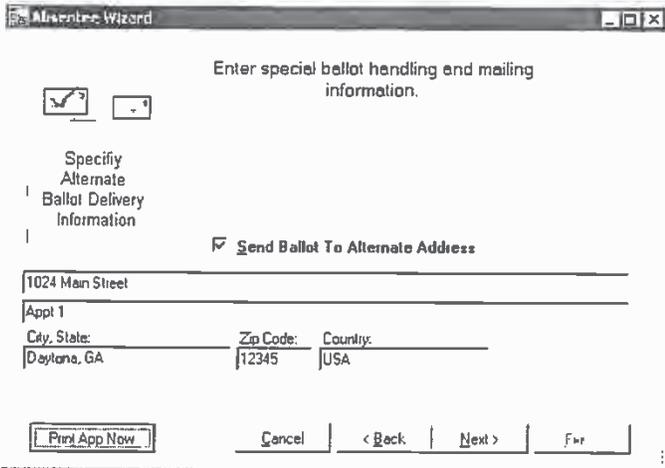
Scenario B: Processing an Absentee Application when the Driver's License or SSN Does Not Match the Voter Record

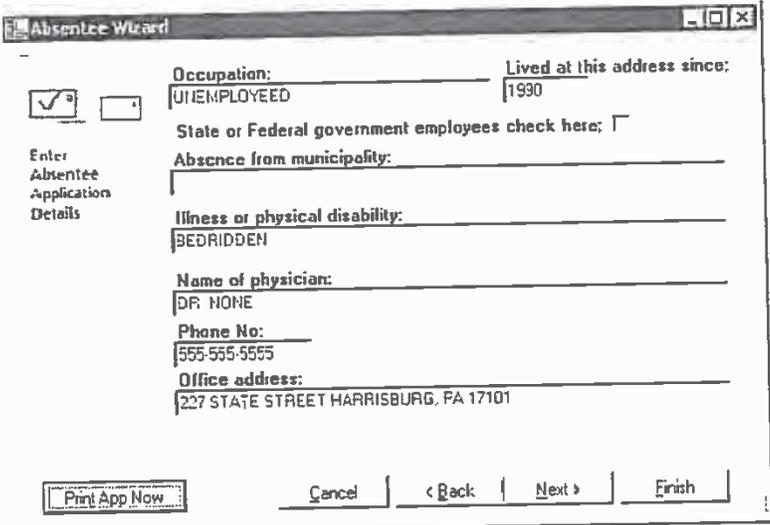
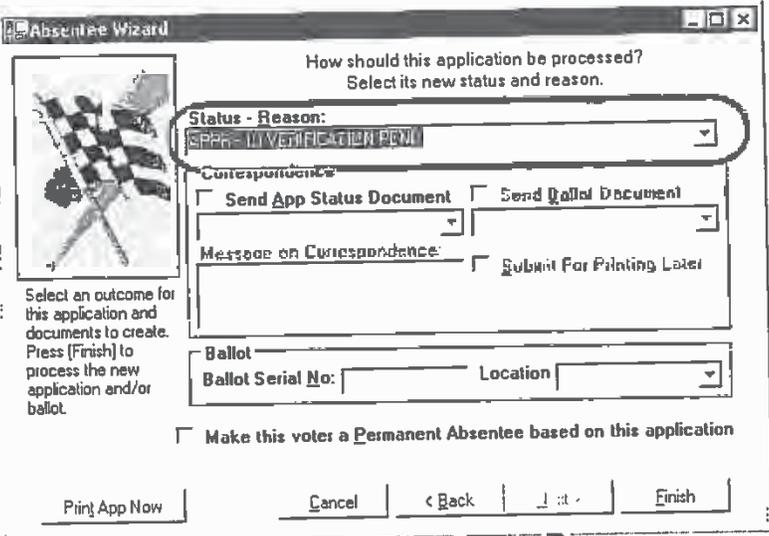
Absentee applications processed with a Driver's License and an SSN that does not match the voter record or when the voter record does not contain a Driver's License and/or a SSN will be sent for ID verification and will be have a 'Status Reason' of 'APPR - ID VERIFICATION PEND' until the results of the ID verification are received.

Steps	Actions
<p>1.</p>	<p>From the SURE Menu, select the <i>Voter Information</i> tab and then click the [Find/Modify Voter] button.</p> 
<p>2.</p>	<p>The Find Voters window opens. Enter search criteria in the relevant fields.</p>

Steps	Actions
<p>5.</p>	<p>Select the desired option from the 'Document Type' field and enter a description in the 'Document Description' field.</p>  <p>Scan the absentee application, and click [Add Last Scan]. The document is saved to the <i>Documents</i> tab in the voter's record.</p>
<p>6.</p>	<p>Click the [Absentee Voting] icon to display the Absentee Voting screen.</p> 

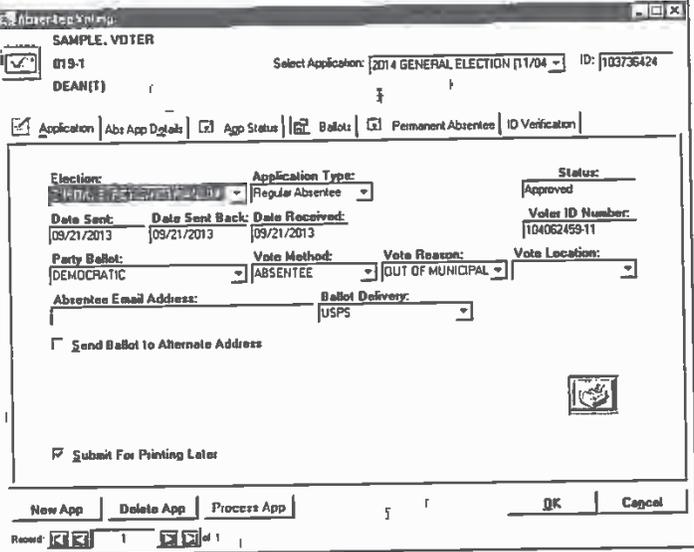
Steps	Actions
7.	<p>Click the [New App] button on the Absentee Voting screen. The Absentee Wizard screen will be displayed.</p> 
8.	<p>Populate the fields on the Absentee Wizard with the provided information, including the Driver's License and/or SSN.</p> 

Steps	Actions
	<p>If the voter specified that the ballot should be mailed to an address different from his or her residential address, check the 'This ballot requires special handling or a different mailing address' checkbox.</p>  <p>The screenshot shows the 'Absentee Wizard' window with the following fields: Election (2014 GENERAL ELECTION (11/04/2014)), Application Type (Regular Absentee), Party Ballot (REPUBLICAN), Vote Method (ABSENTEE), Vote Reason (ILLNESS), Application Date (09/23/2013), Absentee Email Address, Ballot Delivery (USPS), SSN (XXXXXXXX-1234), Drivers Lic (13245678), and a checked checkbox for 'This ballot requires special handling or a different mailing address'. Other options include 'Only create an application when finished (don't create a ballot)' and 'Create absentees for more than one election'. Buttons include 'Print App Now', 'Cancel', '< Back', 'Next >', and 'Exit'.</p>
	<p>Note: The 'Ballot Delivery' field defaults to 'USPS' and should not be changed for Civilian/Regular applications. Click [Next].</p>
<p>9.</p>	<p>If the 'This ballot requires special handling or a different mailing address' checkbox is checked, the Specify Alternate Ballot Delivery Information screen is displayed. Click the 'Send Ballot To Alternate Address' checkbox and enter the address in the resulting fields.</p>  <p>The screenshot shows the 'Specify Alternate Ballot Delivery Information' window with a checked checkbox for 'Send Ballot To Alternate Address'. The address fields are filled with: 1024 Main Street, Apt 1, City: State: (Daytona, GA), Zip Code: (12345), and Country: (USA). Buttons include 'Print App Now', 'Cancel', '< Back', 'Next >', and 'Exit'.</p> <p>Click [Next].</p>

Steps	Actions
<p>10.</p>	<p>The Enter Absentee Application Details screen is displayed. Enter the information from the absentee application and then click [Next].</p> 
<p>11.</p>	<p>The last page of the wizard is displayed. The 'Status-Reason' is populated with 'APPR - ID VERIFICATION PEND'.</p> 

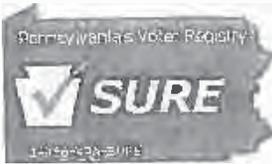


Steps	Actions
	<p>Because the Driver's License or the SSN provided on the absentee application does not match the Driver's License or the SSN in the voter's record, the absentee application is processed with a status reason of 'APPR - ID VERIFICATION PEND'.</p> <p>Note: The 'Send Ballot Document' and 'Submit For Printing Later' checkboxes cannot be marked when the status of the absentee application is 'APPR - ID VERIFICATION PENDING'. The ballot label will queue to Correspondence Batches after the result of the verification is received, even if the ID is not verified.</p>
<p>12.</p>	<p>To complete the processing of the application, click [Finish].</p> <div style="text-align: center;"> </div> <p>At this point the SSN and/or Driver's License will be sent for ID verification.</p> <p>Note: If both the SSN and Driver's License are populated on the absentee application, both will be simultaneously sent for ID verification.</p>

Steps	Actions
13.	<p>The <i>Applications</i> tab is displayed.</p> 
14.	Click the <i>ID Verification</i> tab to view the status of the verification.



Steps	Actions
	<p>The Verification History grid toward the top of the <i>ID Verification</i> tab shows the type of verification used to process the application as well as the status of the verification, which is 'Pending Verification' until the verification process is complete.</p> <p>Note: In this scenario, the SSN has been sent for verification and the current verification status is 'Pending Verification'.</p>
15.	Click the <i>App Status</i> tab to confirm the 'Status-Reason' of 'APPR-ID VERIFICATION PEND'.
16.	At this time, the processing of the application is complete. Click [OK] to close the application and return to the voter's record.
17.	If the ID verification process verifies the ID, the 'Status Reason' will automatically update to 'APPR - ID VERIFIED' and the <i>ID Verification</i> tab will reflect the auto-approval of the ID. The 'Driver's Lic.' and/or 'SSN' fields will be populated with the verified data and the 'Verified' checkbox will be marked.



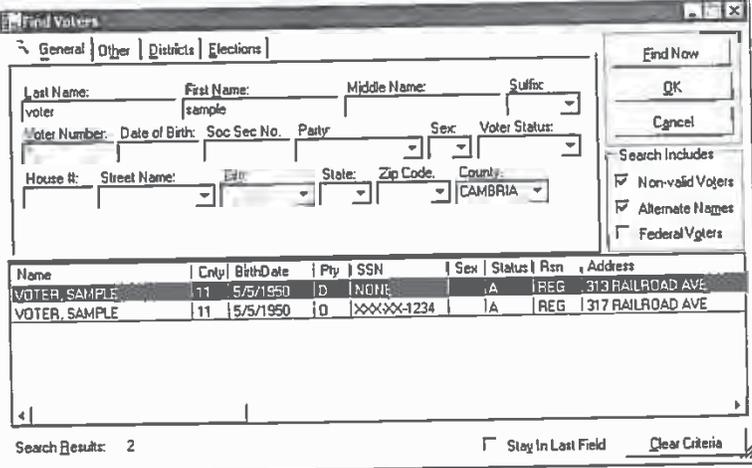
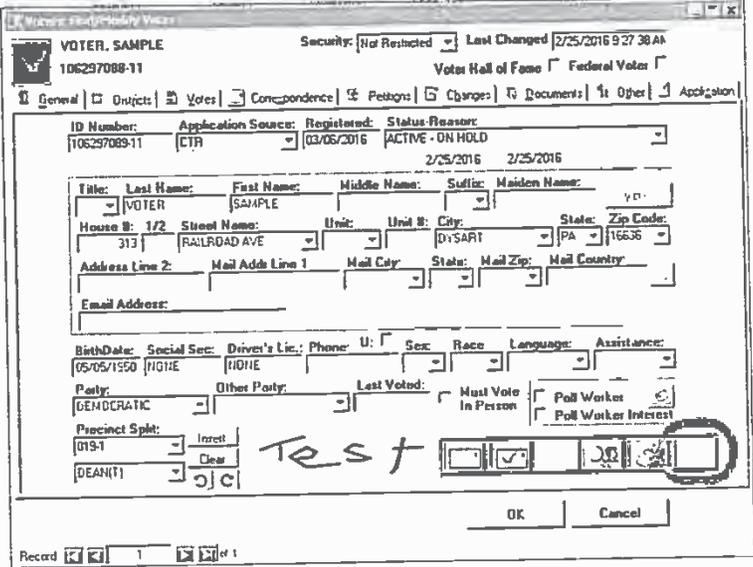
Steps	Actions
	<p>The screenshot shows the 'Absentee Wizard' interface. At the top, it displays 'Voter: SAMPLE', 'ID: 103660651', and 'Select Application: 2016 GENERAL ELECTION (11/01)'. Below this, there are tabs for 'Application', 'App Status', 'Ballots', 'Permanent Absentee', and 'ID Verification'. The 'ID Verification' tab is active, showing a 'Verification History' table with columns: Verification Type, Date Sent, Date Received, Verification Status, and User message. One entry is shown with 'Auto-Approved' status. Below the table, there are fields for 'Drivers Lic.' (12345678), 'SSN' (*****1234), and 'Birth Date'. A 'Verified' checkbox is checked. At the bottom, there are buttons for 'New App', 'Delete App', 'Process App', 'OK', and 'Cancel'.</p>
	<p>Because the verified Driver's License and/or SSN on the absentee application is different than the Driver's License and/or SSN on the voter's record, the Driver's License and/or SSN on the voter's record will be updated.</p> <p>If the ID verification process did not verify the ID, the 'Status Reason' will update to 'APPR-ID NOT VERIFIED', the Verification History grid will reflect the status, the 'Driver's Lic.' and/or 'SSN' fields on the <i>ID Verification</i> tab will not be updated and the 'Verified' checkbox will remain unchecked.</p> <p>Because the Driver's License and/or SSN on the absentee application was not verified, the Driver's License and/or SSN on the voter's record will not be updated.</p>
18.	<p>Note: Ballot labels cannot be recorded until an ID is verified.</p>



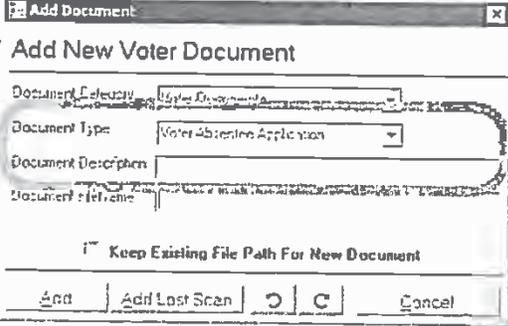
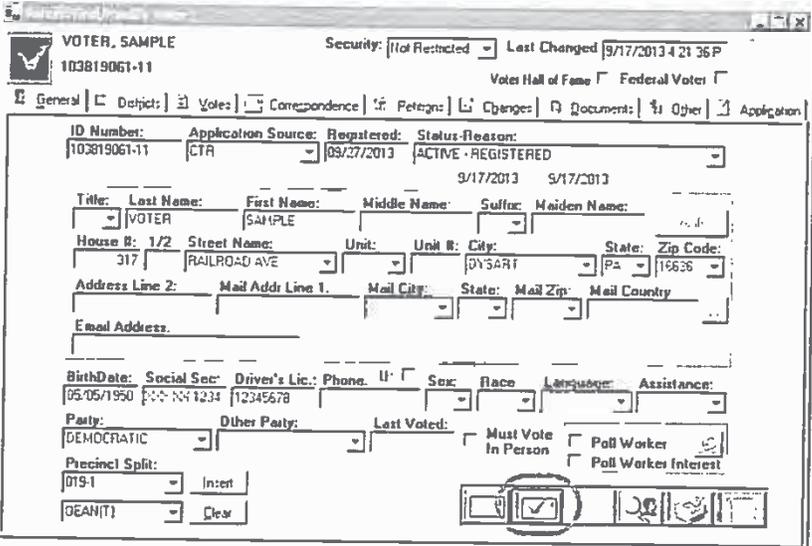
Scenario C: Processing an Absentee Application Using the Manual Verification Method

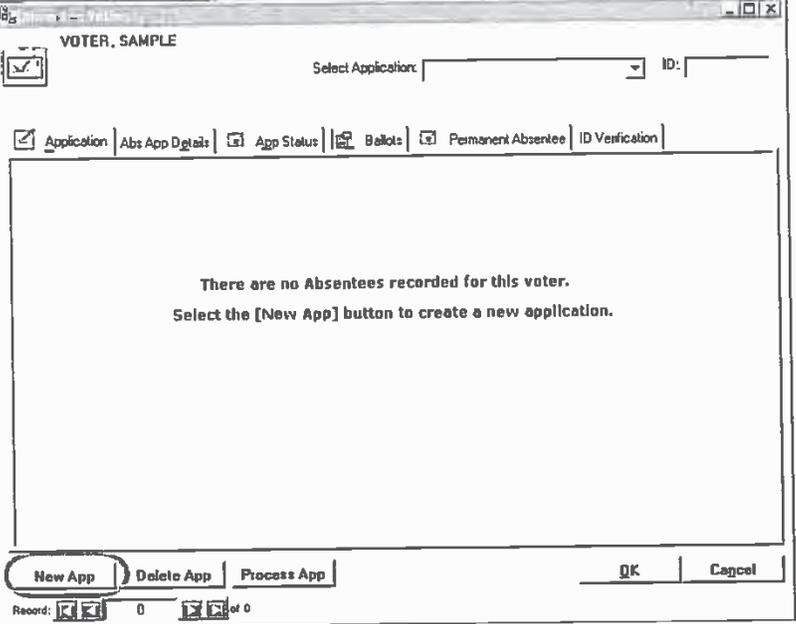
Absentee applications can be processed without a Driver's License or an SSN if the voter provides an acceptable form of ID and the ID is verified by the county. In this case, a copy of the acceptable ID can be scanned and attached to the absentee application record. Upon processing, the absentee application status will be 'APPR - ID VERIFIED'.

Steps	Actions
1.	<p>From the SURE Menu, select the <i>Voter Information</i> tab and then click the [Find/Modify Voter] button.</p> <div style="text-align: center;"> </div>
2.	The Find Voters window opens. Enter search criteria in the relevant fields.

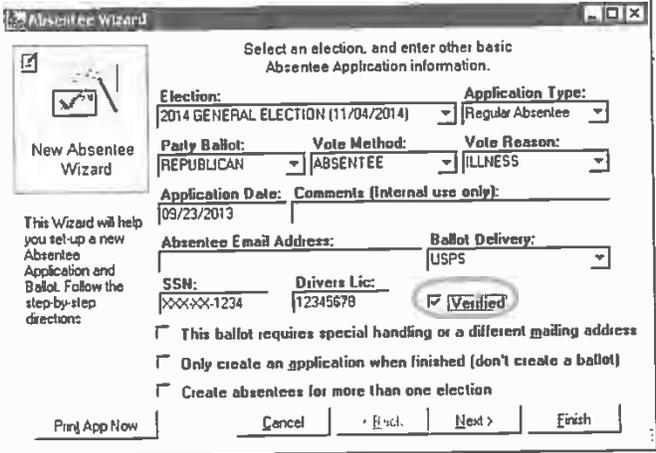
Steps	Actions
3.	<p>Click the [Find Now] button. Voters meeting the search criteria are listed in the results grid.</p>  <p>The screenshot shows the 'Find Voters' window with search criteria: Last Name: voter, First Name: sample, Middle Name: (blank), Suffix: (blank), Voter Number: (blank), Date of Birth: 5/5/1950, Soc Sec No.: (blank), Party: (blank), Sex: (blank), Voter Status: (blank), House #: (blank), Street Name: (blank), State: PA, Zip Code: (blank), County: CAMBRIA. The results grid shows two records for 'VOTER, SAMPLE' with address '317 RAILROAD AVE'. Search Results: 2. Buttons: Find Now, OK, Cancel, Stay In Last Field, Clear Criteria.</p> <p>To open the voter's record, select the desired voter from the grid and click [OK] or double-click the desired voter record from the grid.</p>
4.	<p>To add the absentee application to the <i>Documents</i> tab in the voter's record, click the [Add Last Scanned] button to open the Add Document window.</p>  <p>The screenshot shows the 'Add Document' window for voter 'VOTER, SAMPLE' (ID: 106297088-11). It displays various fields for personal information, address, and party affiliation. The 'Add Last Scanned' button is circled in red. The word 'Test' is written in the 'Last Voted' field. Buttons: OK, Cancel. Record 1 of 1.</p>



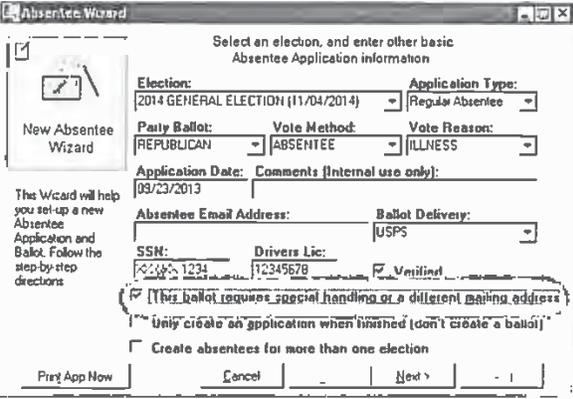
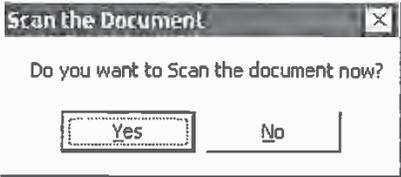
Steps	Actions
5.	<p>Select the desired option from the 'Document Type' field and enter a description in the 'Document Description' field.</p>  <p>Scan the absentee application, and click [Add Last Scan]. The document is saved to the <i>Documents</i> tab in the voter's record.</p>
6.	<p>Click the [Absentee Voting] icon to display the Absentee Voting screen.</p> 
7.	<p>Click the [New App] button on the Absentee Voting screen. The Absentee Wizard screen will be displayed.</p>

Steps	Actions
	

8. Populate the fields on the Absentee Wizard with the provided information. Examine the voter's ID. If it is an acceptable form of identification for absentee voting, click the 'Verified' checkbox. Click the checkboxes toward the bottom of the wizard as needed.





	<p>If the voter specified that the ballot should be mailed to an address different from his or her residential address, check the 'This ballot requires special handling or a different mailing address' checkbox.</p>  <p>Note: The 'Ballot Delivery' field defaults to 'USPS' and should not be changed for Civilian/Regular applications.</p> <p>Click [Next].</p>
<p>9.</p>	<p>The Scan the Document message is displayed. Click [Yes] to scan the voter's identification.</p>  <p>Note: Clicking [No] allows the absentee application to be processed without scanning the ID.</p>
<p>10.</p>	<p>Clicking [Yes] opens the Add Document window. Follow regular scanning procedures and click [Add Last Scan] to attach the copy of the ID to the absentee application record.</p>



<p>11.</p>	<p>If the 'This ballot requires special handling or a different mailing address' checkbox is checked, the Specify Alternate Ballot Delivery Information screen is displayed. Click the 'Send Ballot To Alternate Address' checkbox and enter the address in the resulting fields.</p> <p>Click [Next].</p>
<p>12.</p>	<p>The Enter Absentee Application Details screen is displayed. If desired enter the information from the absentee application and then click [Next].</p>



Absentee Wizard

Enter Absentee Application Details

Occupation: TRAVELING SALES REPRESENTATIVE Lived at this address since: 1980

State or Federal government employees check here:

Absence from municipality:

Illness or physical disability: BED RIDDEN

Name of physician: DR NONE

Phone No: 555-555-5555

Office address: 227 STATE STREET HARRISBURG PA 17101

Print App Now Cancel < Back Next > Finish

13. The last page of the wizard is displayed.

Absentee Wizard

How should this application be processed?
 Select its new status and reason.

Status - Reason: APPR - ID VERIFIED

Correspondence:

Send App Status Document Send Ballot Document

Absentee Ballot Label

Message on Correspondence: Submit For Printing Later

Ballot

Ballot Serial No: Location

Make this voter a Permanent Absentee based on this application

Print App Later Cancel < Back Next > Finish

Because the ID was manually verified, the absentee application is processed with a status reason of 'APPR - ID VERIFIED'.

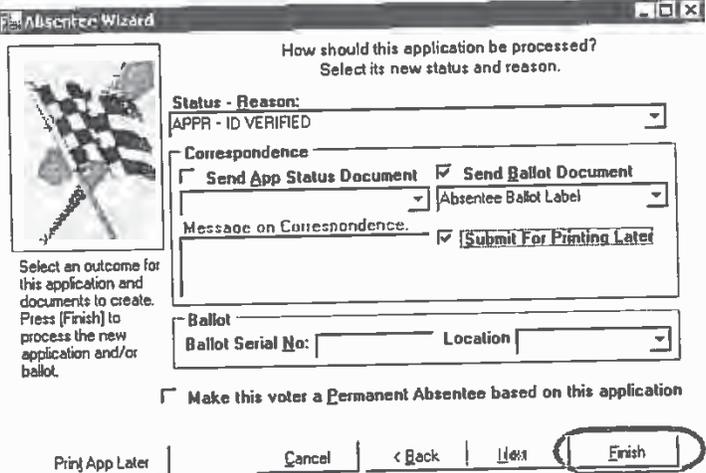
Note: If the 'Send Ballot Document' checkbox is marked and the 'Submit For Printing Later' checkbox is cleared, the ballot label will print immediately.

If the 'Send Ballot Document' and the 'Submit For Printing Later' checkboxes are marked, the ballot label will be queued to Correspondence Batches where it can be printed and confirmed.

If neither the 'Send Ballot Document' nor the 'Submit For Printing Later' checkboxes are marked, the correspondence can be generated via the *Process Absentees* utility.

If the 'Ballots and Contests Finalized' checkbox on the election record is not marked, the 'Send Ballot Document' checkbox will not be marked and the ballot cannot be immediately sent. The ballot label can be queued after the 'Ballots and Contests Finalized' checkbox in the election record is marked by using the *Process Absentees* utility.

14. To complete the processing of the application, click [Finish].



Absentee Wizard

How should this application be processed?
 Select its new status and reason.

Status - Reason:
 APPR - ID VERIFIED

Correspondence
 Send App Status Document Send Ballot Document
 Absentee Ballot Label
 Message on Correspondence: **Submit For Printing Later**

Ballot
 Ballot Serial No: _____ Location: _____

Make this voter a Permanent Absentee based on this application

Print App Later Cancel < Back Next > **Finish**



<p>15.</p>	<p>The <i>Application</i> tab is displayed.</p>
<p>16.</p>	<p>Click the <i>ID Verification</i> tab to view the status of the verification.</p>

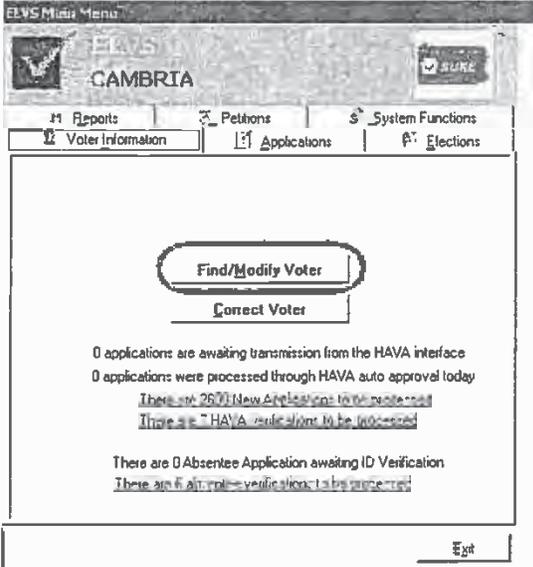


	<p>The Verification History grid toward the top of the <i>ID Verification</i> tab shows the type of verification used to process the application as well as the status of the verification.</p> <p>Note: In this scenario, the ID was manually verified; therefore, the status is 'Manual Verification'.</p>
17.	Click the <i>App Status</i> tab to confirm the 'Status-Reason' of 'APPR-ID VERIFIED'.
18.	At this time, the processing of the application is complete. Click [OK] to close the application and return to the voter's record.
19.	If necessary, use the <i>Process Absentees</i> utility to queue the ballot label

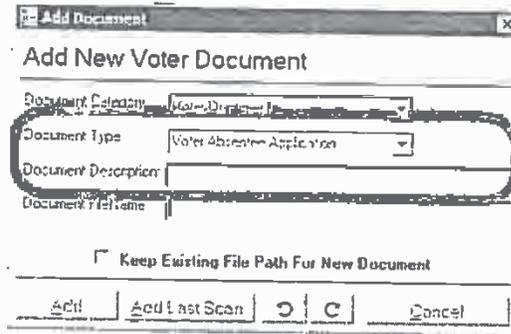


Scenario D: Processing an Absentee Application When No ID Has Been Provided

If a voter does not provide an acceptable form of ID, the system will allow the application to be approved and a ballot label created. The system will place the application into an 'APPR - ID NOT VERIFIED' status.

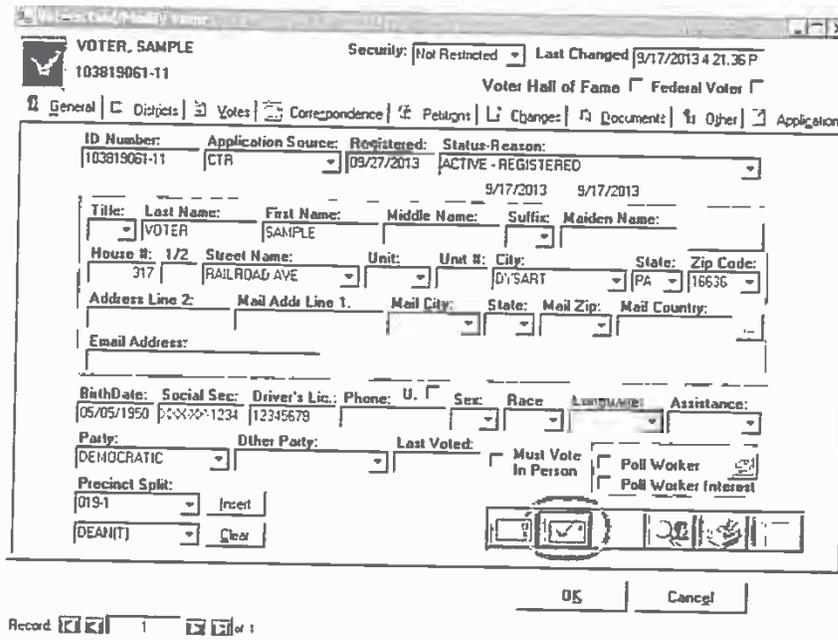
Steps	Actions
1.	<p>From the SURE Menu, select the <i>Voter Information</i> tab and then click the [Find/Modify Voter] button.</p> 
2.	The Find Voters window opens. Enter search criteria in the relevant fields.

5. Select the desired option from the 'Document Type' field and enter a description in the 'Document Description' field.



Scan the absentee application, and click [Add Last Scan]. The document is saved to the *Documents* tab in the voter's record.

6. Click the [Absentee Voting] icon to display the Absentee Voting screen.



7. Click the [New App] button on the Absentee Voting screen. The Absentee Wizard screen will be displayed.



VOTER, SAMPLE

Select Application: [] ID: []

Application | Abs App Details | App Status | Ballots | Permanent Absentee | ID Verification

There are no Absentees recorded for this voter.
Select the [New App] button to create a new application.

New App | Delete App | Process App | OK | Cancel

Record: 0 of 0

8. Populate the fields on the Absentee Wizard with the provided information.

If the voter specified that the ballot should be mailed to an address different from his or her residential address, check the 'This ballot requires special handling or a different mailing address' checkbox.

Note: The 'Ballot Delivery' field defaults to 'USPS' and should not be changed for Civilian/Regular applications.

Click [Next].



9. If the 'This ballot requires special handling or a different mailing address' checkbox is checked, the Specify Alternate Ballot Delivery Information screen is displayed. Click the 'Send Ballot To Alternate Address' checkbox and enter the address in the resulting fields.

Absentee Wizard

Enter special ballot handling and mailing information.

Specify Alternate Ballot Delivery Information

Send Ballot To Alternate Address

1024 Main Street

Apt 1

City, State: Daytona, GA Zip Code: 12345 Country: USA

Print App Now Cancel < Back Next > Finish

Click [Next].

10. The Enter Absentee Application Details screen is displayed. If desired enter the information from the absentee application and then click [Next].

Absentee Wizard

Enter Absentee Application Details

Occupation: UNEMPLOYEED Lived at this address since: 1990

State or Federal government employees check here:

Absence from municipality:

Illness or physical disability: BED RIDDEN

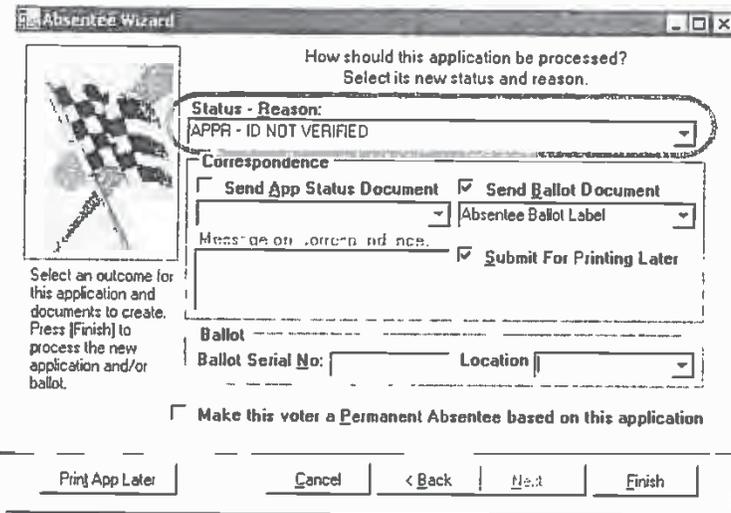
Name of physician: DR. NONE

Phone No: 555-555-5555

Office address: 227 STATE STREET HARRISBURG, PA 17101

Print App Now Cancel < Back Next > Finish

11. The last page of the wizard is displayed.



Because an ID was not verified, the absentee application is processed with a status reason of 'APPR - ID NOT VERIFIED'.

Note: If the 'Send Ballot Document' checkbox is marked and the 'Submit For Printing Later' checkbox is cleared, the ballot label will print immediately.

If the 'Send Ballot Document' and the 'Submit For Printing Later' checkboxes are marked, the ballot label will be queued to Correspondence Batches where it can be printed and confirmed.

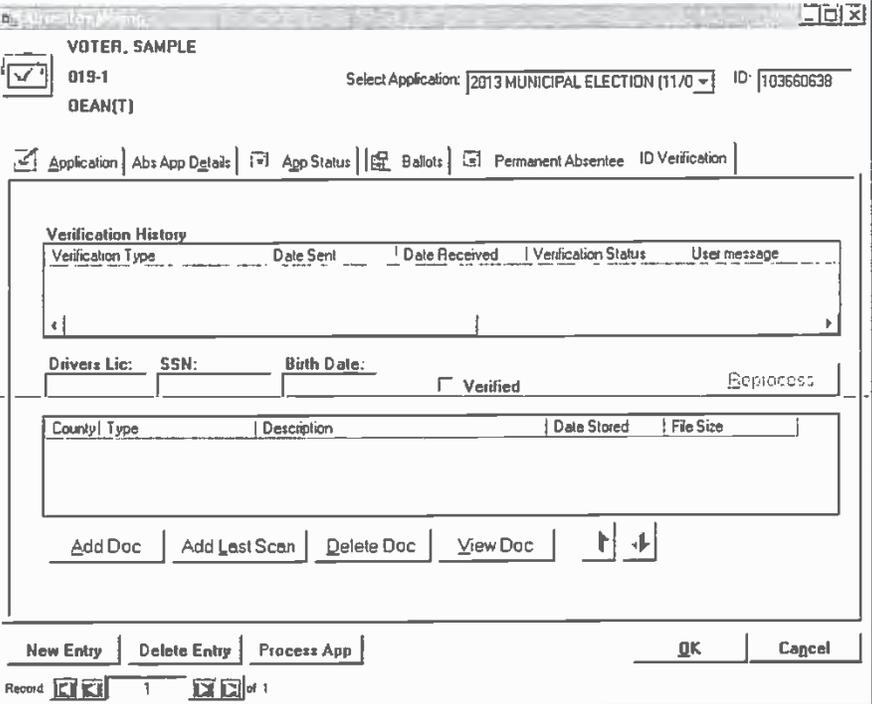
If neither the 'Send Ballot Document' nor the 'Submit For Printing Later' checkboxes are marked, the correspondence can be generated via the *Process Absentees* utility.

If the 'Ballots and Contests Finalized' checkbox on the election record is not marked, the 'Send Ballot Document' checkbox will not be marked and the ballot cannot be immediately sent. The ballot label can be queued after the 'Ballots and Contests Finalized' checkbox in the election record is marked by using the *Process Absentees* utility.

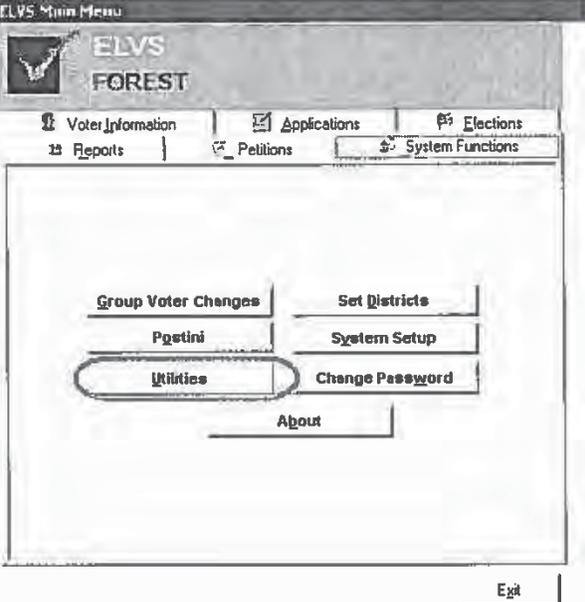
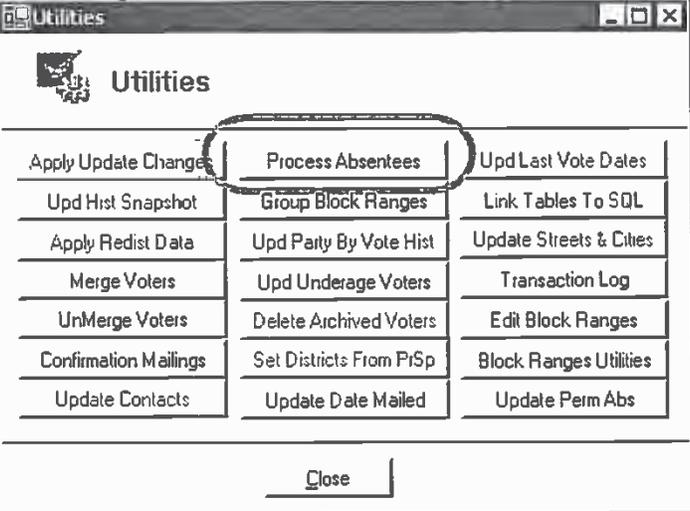
12. To complete the processing of the application, click [Finish].

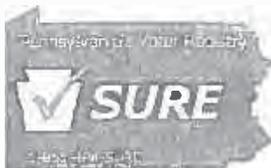
13. The *Application* tab is displayed.



14.	<p>Click the <i>App Status</i> tab and confirm the 'Status-Reason' is 'APPR-ID NOT VERIFIED'.</p> <p>Click the <i>ID Verification</i> tab to view the status of the verification.</p>  <p>The Verification History grid toward the top of the <i>ID Verification</i> tab shows the type of verification used to process the application as well as the status of the verification.</p> <p>Note: In this scenario, no ID was sent for verification; therefore, the grid is blank. If an ID is provided at a later date, please refer to the Job Aid titled "Responding to Absentee Application ID Verification Exceptions".</p>
15.	Click [OK] to close the application. At this time, the processing of the application is complete.
16.	Note: Ballot labels cannot be recorded until an ID is verified.
17.	If necessary, use the <i>Process Absentees</i> utility to queue the ballot label

Scenario E: Queuing Absentee Ballot Correspondences with the Process Absentees Utility

Steps	Actions																					
<p>1.</p>	<p>From the SURE Menu, select the <i>Systems Function</i> tab and then click the [Utilities] button.</p>  <p>The screenshot shows a window titled 'ELVS Main Menu' with the 'ELVS FOREST' logo. A menu bar contains 'Voter Information', 'Applications', 'Elections', 'Reports', 'Petitions', and 'System Functions'. The 'System Functions' menu is open, showing buttons for 'Group Voter Changes', 'Set Districts', 'Postini', 'System Setup', 'Utilities' (circled in red), and 'Change Password'. An 'About' button is at the bottom, and an 'Exit' button is at the bottom right.</p>																					
<p>2.</p>	<p>The Utilities screen opens. Click the [Process Absentees] button.</p>  <p>The screenshot shows a window titled 'Utilities' with a table of options. The 'Process Absentees' button is circled in red. The table contains the following items:</p> <table border="1" data-bbox="581 1388 1239 1696"> <tr> <td>Apply Update Changes</td> <td>Process Absentees</td> <td>Upd Last Vote Dates</td> </tr> <tr> <td>Upd Hist Snapshot</td> <td>Group Block Ranges</td> <td>Link Tables To SQL</td> </tr> <tr> <td>Apply Redist Data</td> <td>Upd Party By Vote Hist</td> <td>Update Streets & Cities</td> </tr> <tr> <td>Merge Voters</td> <td>Upd Underage Voters</td> <td>Transaction Log</td> </tr> <tr> <td>UnMerge Voters</td> <td>Delete Archived Voters</td> <td>Edit Block Ranges</td> </tr> <tr> <td>Confirmation Mailings</td> <td>Set Districts From PrSp</td> <td>Block Ranges Utilities</td> </tr> <tr> <td>Update Contacts</td> <td>Update Date Mailed</td> <td>Update Perm Abs</td> </tr> </table> <p>A 'Close' button is located at the bottom center of the window.</p>	Apply Update Changes	Process Absentees	Upd Last Vote Dates	Upd Hist Snapshot	Group Block Ranges	Link Tables To SQL	Apply Redist Data	Upd Party By Vote Hist	Update Streets & Cities	Merge Voters	Upd Underage Voters	Transaction Log	UnMerge Voters	Delete Archived Voters	Edit Block Ranges	Confirmation Mailings	Set Districts From PrSp	Block Ranges Utilities	Update Contacts	Update Date Mailed	Update Perm Abs
Apply Update Changes	Process Absentees	Upd Last Vote Dates																				
Upd Hist Snapshot	Group Block Ranges	Link Tables To SQL																				
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Merge Voters	Upd Underage Voters	Transaction Log																				
UnMerge Voters	Delete Archived Voters	Edit Block Ranges																				
Confirmation Mailings	Set Districts From PrSp	Block Ranges Utilities																				
Update Contacts	Update Date Mailed	Update Perm Abs																				



Steps	Actions
3.	<p>The Process Absentee screen opens.</p> <ol style="list-style-type: none"> 1. If needed, select the desired election from the 'Select Election' field. 2. Select the desired option from the 'Label Type' field. 3. If queuing the first ballot label, ensure the 'First - Labels Only' option is selected. 4. To see a list of voters for whom a ballot label will be queued, click the 'Show Affected Voters' checkbox. 5. If queuing for federal voters, ensure the 'Include Federal Voters' checkbox is marked. <p>Note:</p> <ul style="list-style-type: none"> ➤ To queue a ballot label for a specific voter, enter the voter's ID in the 'VoterIDNum' field. ➤ To queue ballot labels for a specific district, select the district from the 'Districts' field and choose the desired districts from the displayed list.

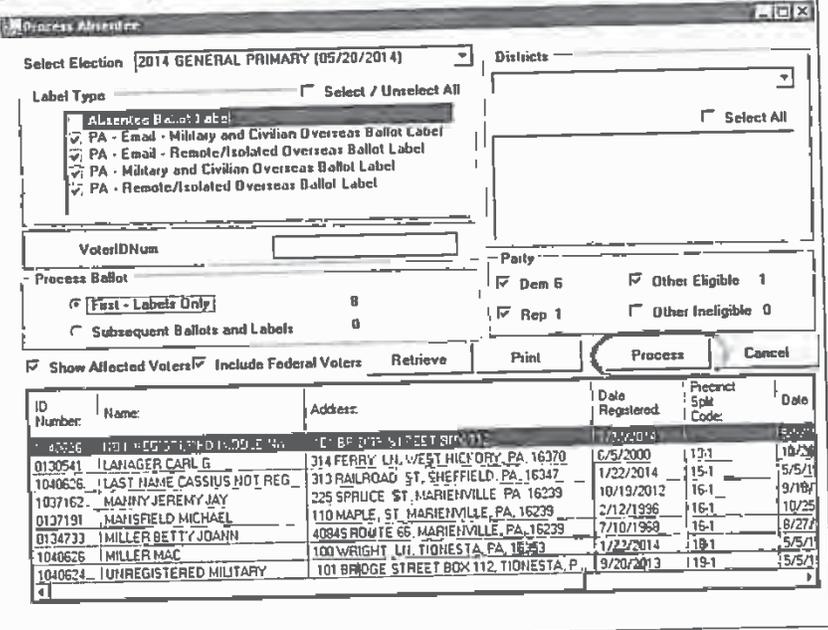
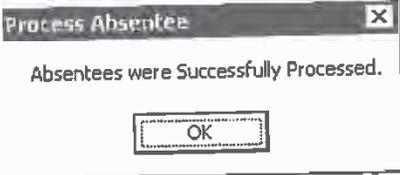
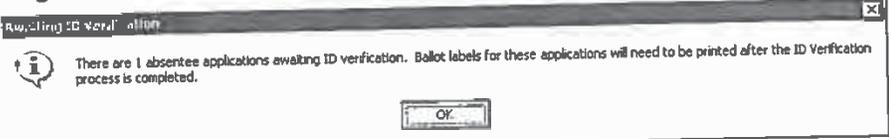


Steps	Actions
4.	<p>To see a list of voters for whom ballot labels will be queued, click [Retrieve].</p>



Steps	Actions																																																						
5.	<p>If [Retrieve] was clicked, the grid is populated with the voters for whom a ballot label will be queued.</p> <p>Note: The number of labels to be queued is displayed next to the selected option in the "Process Ballot" area and next to the selected options in the "Party" area.</p> <table border="1"> <thead> <tr> <th>ID Number</th> <th>Name</th> <th>Address</th> <th>Date Registered</th> <th>Precinct Splt Code</th> <th>De</th> </tr> </thead> <tbody> <tr> <td>1040626</td> <td>NOT REGISTERED IN PA</td> <td>10 BRIDGE STREET BOX 11</td> <td>1/22/2014</td> <td>15-1</td> <td>5/</td> </tr> <tr> <td>0130541</td> <td>LANAGER CARL G</td> <td>314 FERRY LN, WEST HICKORY PA, 16370</td> <td>6/5/2000</td> <td>13-1</td> <td>10-</td> </tr> <tr> <td>1040626</td> <td>LAST NAME CASSIUS NOT REG</td> <td>313 RAILROAD ST, SHEFFIELD PA, 16347</td> <td>1/22/2014</td> <td>15-1</td> <td>5/</td> </tr> <tr> <td>0134744</td> <td>MARKHAM DENNIS L</td> <td>749 BEAL FARL RD, SHEFFIELD, PA, 16347</td> <td>6/14/1994</td> <td>15-1</td> <td>5/</td> </tr> <tr> <td>1037162</td> <td>MANNY JEREMY JAY</td> <td>225 SPRUCE ST, MARJENVILLE, PA, 16239</td> <td>10/19/2012</td> <td>16-1</td> <td>9/</td> </tr> <tr> <td>0137191</td> <td>MANSFIELD MICHAEL</td> <td>110 MAPLE ST, MARJENVILLE, PA, 16239</td> <td>2/12/1996</td> <td>16-1</td> <td>10-</td> </tr> <tr> <td>0134733</td> <td>MILLER BETTY JOANN</td> <td>40845 ROUTE 6S, MARJENVILLE, PA, 16239</td> <td>7/10/1968</td> <td>16-1</td> <td>8/</td> </tr> <tr> <td>0134753</td> <td>IDENTIFICATION MARY</td> <td>184 MASCARD LN, TIOHESSTA, PA, 16353</td> <td>4/16/2001</td> <td>18-1</td> <td>9/</td> </tr> </tbody> </table>	ID Number	Name	Address	Date Registered	Precinct Splt Code	De	1040626	NOT REGISTERED IN PA	10 BRIDGE STREET BOX 11	1/22/2014	15-1	5/	0130541	LANAGER CARL G	314 FERRY LN, WEST HICKORY PA, 16370	6/5/2000	13-1	10-	1040626	LAST NAME CASSIUS NOT REG	313 RAILROAD ST, SHEFFIELD PA, 16347	1/22/2014	15-1	5/	0134744	MARKHAM DENNIS L	749 BEAL FARL RD, SHEFFIELD, PA, 16347	6/14/1994	15-1	5/	1037162	MANNY JEREMY JAY	225 SPRUCE ST, MARJENVILLE, PA, 16239	10/19/2012	16-1	9/	0137191	MANSFIELD MICHAEL	110 MAPLE ST, MARJENVILLE, PA, 16239	2/12/1996	16-1	10-	0134733	MILLER BETTY JOANN	40845 ROUTE 6S, MARJENVILLE, PA, 16239	7/10/1968	16-1	8/	0134753	IDENTIFICATION MARY	184 MASCARD LN, TIOHESSTA, PA, 16353	4/16/2001	18-1	9/
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<p>7.</p>	<p>Click [OK] in the resulting Process Absentee message.</p>  <p>Note: If there are regular absentee applications awaiting ID verification, the Awaiting ID Verification message will be displayed. Click [OK] to close the message.</p> 																																																
<p>8.</p>	<p>Print and confirm the absentee ballot labels through the Correspondence Batches. Please refer to the Reports User Guide for details.</p>																																																



Absentee Ballot Labels for Absentee Applications Requiring ID Verification

If an ID cannot be verified prior to the Absentee Ballot Label being printed, the letters 'ID' will be printed to the left of the barcode.

If the letters 'ID' appear to the left of the barcode, instructional documentation regarding the need to provide an acceptable form of ID must be included with the ballot material sent to the voter. Documentation regarding the ID verification requirements must be provided with the ballot materials.

1032303 11-21 DRIVER, COMMERCIAL 5120 RAVENWOOD SSA MECHANICSBURG, PA	29-08-1		ID Has Been Verified
<hr/>			
COMMERCIAL DRIVER 5120 RAVENWOOD ROAD MECHANISBURG 17050 UNITED STATES OF AMERICA	REG		
ID 	1032303 10-21 TRAVEL, TED 5120 RAVENWOOD SSA MECHANISBURG, PA	29-08-1	ID Has Not Been Verified
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Exhibit E



Pennsylvania
Applications and Balloting Guidance:
Mail-in and Absentee Ballots
and Voter Registration Changes

Date: January 10, 2020

Version: 1.0

Act 77 of 2019 provides that voters in Pennsylvania can cast their vote early by either mail-in or absentee ballot. The Act also modifies voter registration requirements. The following guidelines define both what is required by Act 77 and what is permissible under Act 77 or some other portion of the Election Code.

Voter Registration

- The voter registration deadline is now fifteen (15) days before the election. Therefore, voter registration applications must now be **received** by the county board of elections no later than fifteen (15) days before the election.
- Applicants may either return their application in person or it must be received by mail by the county board of elections by the deadline. Previously, counties accepted applications postmarked by the deadline, but that is no longer permitted.
 - Voter registration applications submitted online are timely if they are submitted before midnight on the 15th day prior to a primary or election.
- If an applicant's voter registration application is rejected, the applicant may appeal that decision to the county board of elections by the 8th day prior to Election Day.

Mail-in and Absentee Balloting – General Provisions

- Qualified voters may apply at any time before any primary or election for a mail-in or absentee ballot (up to the deadline described below), and county boards of elections **must begin** processing applications at least fifty (50) days before the primary or election. County boards of elections **may process applications earlier** than fifty (50) days before the primary or election, **if the county board of elections determines that it is better for its operational needs to do so.**
- The deadline for applying for absentee ballots has not changed, and the new mail-in ballots follows the same application deadline. Applications must be received by the county board of elections by 5:00 P.M. on the Tuesday prior to the primary or election. **However, the deadline for counties to receive voted mail-in or absentee ballots has been extended to 8:00 P.M. on Election Day.**
- **Permanent voter lists:**
 - **For the permanent absentee ballot list, only voters with a permanent illness or disability are eligible;** this section does not apply to voters expecting to be absent from the municipality.
 - Absentee voters who request to be placed on the permanent absentee list no longer have to renew their physician's certification of continued disability every four (4) years or list it on each application.

- For the permanent mail-in ballot list, any mail-in voter can request to be placed on the permanent mail-in voter list.
- Each year the county must send an application to any voter on the permanent absentee and mail-in voter lists by the first (1st) Monday in February.
- The yearly application serves as a standing request for any election that calendar year **and** for any special election until the third (3rd) Monday in February the next year.
- **Important Changes relating to Returning the Ballot:**
 - A voter who has returned a mail-in or absentee ballot may **not** vote at the polling place on Election Day.
 - If a voter requests but does not return their mail-in or absentee ballot, they may still deliver the ballot in person to a county elections office (CEO) until 8:00 P.M. on Election Day.
 - If a voter cannot return the ballot in person, the voter can vote in person at the voter's polling place on Election Day, but they may only do so by provisional ballot.
 - If a voter whose record in the district poll book indicates that the voter is not eligible to cast a ballot in person on Election Day asserts that they did not cast a mail-in or absentee ballot and is eligible to vote, the voter should be provided a provisional ballot.

Mail-in and Absentee Applications

There are three (3) ways by which voters can apply for mail-in or absentee ballots:

1. In Person
2. Online
3. By Mail

Requirements for in-person applications:

- Voters are permitted to apply in person at a CEO for a mail-in or absentee ballot.
- Voters who apply at a CEO during business hours may request to receive a mail-in or absentee ballot in person while the voter is in the office. **Note:** Please see "Optional county services" below for more information.

- Once the ballot has been finalized and printed, the county board of elections **must promptly present** the voter with the voter's mail-in or absentee ballot.
- A county board of elections **cannot decline** the voter's application for a mail-in or absentee ballot, unless there is a bona fide objection to the mail-in or absentee ballot application.
- Voters who request a mail-in or absentee ballot in person must be provided an opportunity to privately and secretly mark their ballot. **Note:** *The marking of the ballot in secret does not have to take place in the election offices. It can be provided in a nearby location.*
- Voters are permitted to deliver a mail-in or absentee ballot in-person at a CEO up to 8:00 P.M. on Election Day.

Optional County Services:

- As allowed under existing law, county election boards may provide for mail-in and absentee application processing and balloting at more than one CEO located within county borders.
- Additional business hours for CEOs may be established; hours do not have to be limited to weekdays nor to typical business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience to voters.
- If a county decides to provide additional mail-in and absentee balloting by establishing additional CEOs, the county must account for **all** of the following:
 - Each CEO must be staffed by appointed elections personnel in municipal or county-owned or leased properties selected by the county board of elections for processing applications and in-person voting of both mail-in and absentee ballots.
 - Each CEO must have a secure county network connection that is capable of connecting to the Statewide Uniform Registry of Electors (SURE), and staff trained and approved to access SURE. **NOTE:** *The Department will work with counties to establish secure connections; the county network extension must be approved by the Department.*
 - Each CEO must either have copies of all ballot styles available to be voted in the county, or an on-demand ballot printer capable of printing all ballot styles available to be voted in the county.
 - Each CEO must have a secure ballot collection receptacle to store voted mail-in or absentee ballots submitted at the location.
- When choosing a location for the CEO, counties should consider, at a minimum, the following:
 - Choose locations that serve heavily populated urban/suburban areas, as well as rural areas.

- For example, counties may want to select accessible locations near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes.
 - In rural areas, locations should be selected that are easily recognizable and accessible within the community.
- Counties may want to select locations in areas in which there have historically been delays at existing polling locations, and areas with historically low turnout.

Requirements for online or mail applications:

- After the ballot has been finalized and printed, the county board of elections **must promptly deliver or mail** the voter's mail-in or absentee ballot, and in any event must deliver ballots by the second (2nd) Tuesday before the election.
- After the county board of elections begins delivering and mailing mail-in and absentee ballots, the county must deliver or mail subsequent ballots requested within forty-eight (48) hours of receipt provided they are approved.
- Whether submitted in person or by mail, all mail-in and absentee ballots must be received by the CEO by 8:00 P.M. on Election Day.

Mail-in and Absentee Ballots

Delivery of Mail-in and Absentee Ballots

- As noted previously, counties **must** begin processing applications for mail-in and absentee ballots at least fifty (50) days before the primary or election or at an earlier time as the county board of elections determines **may** be appropriate.
- Counties **must begin delivering** mail-in or absentee ballots as soon they are certified and available.
- Counties **may** await the outcome of pending litigation that affects the contents of the ballots, but in any event the county **must** begin delivering mail-in or absentee ballots no later than the 2nd Tuesday prior to Election Day.

Collection of Mail-in and Absentee Ballots

- In addition to CEOs, counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots.
- If a county decides to provide for other ballot collection locations, the county should consider the following best practices:

- The county board of elections should pass a resolution to determine the number and locations of ballot collection locations within the county, and provide public notification of the locations.
- Ensure and document to the Department the security and chain of custody of mail-in and absentee ballots retrieved from ballot collection locations. **NOTE:** *Please contact the Department for guidance on how to document security and chain of custody.*
- Utilize a secure ballot collection receptacle that is designed for this specific purpose. **NOTE:** *Please contact the Department for guidance on factors, best practices, and examples for these receptacles.*
- Officially designate county election personnel who are sworn and authorized to remove mail-in and absentee ballots from ballot collection receptacles.
- Process mail-in and absentee ballots collected from ballot collection locations in the same manner as ballots personally delivered or mailed to the county board of elections.
- Hours of access to and collection from the ballot collection locations do not have to be limited to weekdays nor to typical business hours.
- Public notification should be provided as to the location of collection locations, and clear signage should designate the locations and explain their proper use.

###

Version History:

Version	Date	Description	Author
1.0	1.10.2020	Initial document release	Bureau of Election Security and Technology

Exhibit F

addition, Petitioners request an order compelling the Department to notify all judges of election and district election board members passive electioneering is not permitted in polling places.

Presently before me is Petitioners' application for summary relief. Because Petitioners' right to relief is not clear, I deny the application for summary relief without prejudice.

Petitioner Kraft is a judge of elections residing in Bethel Park, Pennsylvania. Petitioner John Dickinson is a minor judge of elections in Allegheny County. On September 18, 2008, Petitioners filed a declaratory judgment action in this Court's original jurisdiction. Respondents include Commonwealth Secretary Pedro Cortes (Secretary); Chet Harhut, Deputy Commissioner for the Bureau of Commissions, Elections and Legislation (Deputy Commissioner); and the Department.

Relevantly, Petitioners allege the following in their complaint. On November 4, 2008, the United States will hold a general election at which time registered voters will cast ballots for offices of the President of the United States, Representatives for U.S. Congress, Representatives for the Pennsylvania General Assembly, other Commonwealth offices, and state-wide referendums.

On September 4, 2008, Deputy Commissioner distributed a memo (Memo) to the County Boards. The substance of the Memo addressed passive electioneering. In particular, the Memo advised the County Boards that Secretary

received an August 19, 2008 letter from the American Civil Liberties Union (ACLU) and League of Women Voters seeking an interpretation of the term electioneering found in Section 1220 of the Election Code, 25 P.S. §3060(c). In its letter, the ACLU advanced a narrow interpretation of the term so as to allow voters to wear party/candidate paraphernalia in polling places.

Petitioners assert the Department's Memo incorporated and adopted the ACLU's position and, concomitantly, carved out an exception to Pennsylvania's prohibition of electioneering in the polling place. They aver the Department lacked authority to interpret the Election Code and then broadcast its interpretation across the Commonwealth. As a remedy, Petitioners seek the above relief.

In its answer and new matter, the Department alleges this Court lacks jurisdiction because Petitioners failed to join indispensable parties to the action, namely, the County Boards and, in particular, the Allegheny County Board of Elections. On the merits, the Department disputes Petitioners' characterization of the Memo, the impetus for it and its affect.²

On October 17, 2008, Petitioners filed for summary relief. I heard oral argument on Tuesday, October 28, 2008. After careful consideration of the parties' respective briefs and oral argument, I am now ready to rule.

² The ACLU petitioned this Court to intervene. By order of October 9, 2008, Senior Judge Quigley denied the petition. In a *per curiam* order, the Court denied the ACLU's reconsideration motion. On October 27, 2008, the ACLU filed a brief as *amicus curiae* in support of the Department.

I.

Section 1220 of the Election Code governs regulations in force at polling places. In relevant part, the statute provides:

(a) Until the polls are closed, no person shall be allowed in the polling place outside of the enclosed space at any primary or election, except the watchers, voters not exceeding ten at any one time who are awaiting their turn to vote, and peace officers, when necessary for the preservation of the peace. No elector shall be allowed to occupy a voting compartment or voting machine booth already occupied by another, except when giving assistance as permitted by this act.

...

(c) No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.

(d) All persons, except elections officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers, when permitted by the provisions of this act, must remain at least ten (10) feet distant from the polling place during the progress of voting.

25 P.S. §3060 (a), (c), and (d) (emphasis added).

At issue is the Department's Memo that expresses its position on passive electioneering. At length, the Memo provides:

At the annual Pennsylvania County Election Officials Conference held in Erie recently, the Department discussed with many of you its thoughts on the subject of "passive electioneering," which can include wearing tee shirts, clothing or buttons with a candidate's or political party's name, picture or emblem. On Primary Election Day, April 25, 2008, we received calls from voters as well as counties regarding this important issue. Our advice then and now remains the

same. We believe that if such electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute "electioneering" as that term is used in section 1220 of the ... Code. ...

You should be aware that on August 19, 2008, the Secretary ... received the enclosed letter from the [ACLU] and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue "implicates First Amendment free-speech rights" and urges us to adopt a narrow definition of the term "electioneer." The letter also lists examples where the ACLU and League have received complaints from voters regarding this subject.

As we discussed at the conference, the term "electioneer" is not defined in the ... Code. Furthermore, section 302(f) of the ... Code, 25 P.S. §2642(f), provides that county boards of election [county boards] (not the Department ...) shall "make and issue such rules, regulations and instructions, not inconsistent with any law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors." Furthermore, section 302(g) provides that the [county boards] shall "instruct election officers in their duties ... to the end that primaries and elections may be honestly, efficiently, and uniformly conducted."

Finally, the General Assembly has determined in section 1105-A of the ... Code [25 P.S. §3031.5³] that the Department ... may issue binding directives for the [county boards] on only one subject: "the implementation of electronic voting procedures and for the operation of electronic voting systems." This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make to the counties regarding this and other issues, must be reviewed and considered by the county boards of elections in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissioners regarding this issue.

Of primary concern is that no duly registered person be turned away at the polls. If the conduct and apparel of the voter is

³ Added by the Act of July 1, 1980, P.L. 600.

determined to be more than passive, it should be addressed by the district election officials. We understand that many district election officials distribute [garments] so that voters may cover up the clothing while they are in the process of voting. Again, care should be taken to allow individuals to vote. Furthermore, we know that many of you are now or soon will be educating your district election officials (poll workers) regarding matters such as this so that the decision that you make will be implemented uniformly and without discrimination throughout your county.

Finally, ... we believe that there is an important distinction between individual voters who wear clothing or political buttons and those who are watchers at the polling places in your county. Because watchers may be present throughout the day at the precincts and because voters cannot necessarily distinguish between watchers and district election officials, we believe it is reasonable for [county boards] to prohibit watchers from wearing any clothing or political buttons that show or advocate the election of a candidate or candidates of a specific political party.

Compl. Ex. 1 (emphasis added).

II.

In the application for summary relief, Petitioners first assert the Department lacked authority to interpret Section 1220 of the Election Code. Section 302(f) of the Election Code reserves to the County Boards the power to “make and issue such rules, and regulations and instructions, not inconsistent with law, as they may deem necessary for the guidance of voting machine custodians, elections officers and electors.” 25 P.S. §2642(f).

Alternatively, Petitioners urge that if the Department has authority to interpret Section 1220, its interpretation is in error. Specifically, the Department erred in distinguishing between passive electioneering and electioneering in

general. Commissioner's distinction implicitly recognizes passive electioneering is a form of electioneering, which is clearly prohibited by statute. Also, the Department erred by distinguishing between poll watchers and poll workers, and the Memo will cause confusion in the polling place.

Finally, Petitioners challenge the Department's interpretation of Section 1220 on the basis it violates Article VII §6 of the Pennsylvania Constitution. Article VII, §6 requires in relevant part that all laws regulating the holding of elections must be uniform throughout the Commonwealth. Petitioners claim some County Boards, or districts with counties, allow voters to wear party/candidate paraphernalia while other County Boards, or districts, do not. This results in a lack of uniformity.

III.

Initially, petitions for declaratory judgment are governed by the provisions of the Declaratory Judgments Act (DJA), 42 Pa. C.S. §§7532-51. The granting of a petition for declaratory judgment under the DJA is a matter lying within the sound discretion of a court in original jurisdiction. Gmerek v. State Ethics Comm'n, 751 A.2d 1241 (Pa. Cmwlth. 2001). Its purpose is to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered. Id. A petitioner whose rights, status, or other legal relations are affected by a statute may have determined any questions of construction arising under that statute and obtain a declaration of rights, status, or other legal relations. 42 Pa. C.S. §7533; Pennsylvania Chiropractic Fed'n v. Foster, 583 A.2d 844 (Pa. Cmwlth. 1990).

In addition, Pennsylvania Rule of Appellate Procedure 1532(b) provides:

[a]t any time after the filing of a petition for review in an ... original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear.

In ruling on an application for summary relief, the court must view the evidence in the light most favorable to the non-moving party and enter judgment only if there is no genuine issue of material facts and the right to judgment is clear as a matter of law. McSpadden v. Dep't of Corr., 886 A.2d 321 (Pa. Cmwlth. 2005).

A.

On the preliminary issue of jurisdiction, I reject the Department's assertions Petitioners failed to join indispensable parties. A party is indispensable when his rights are so connected with the claims of the litigants that no decree can be made without impairing those rights. Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988). Failure to join or serve parties as required by statute is a jurisdictional defect, and may be raised by a court on its own motion at any time, even on appeal. Polydyne, Inc. v. City of Phila., 795 A.2d 495 (Pa. Cmwlth. 2002).

The County Boards are not indispensable parties. With regard to Allegheny County, Petitioners' averments regarding the conduct of elections in this County are used to illustrate a lack of uniformity in the interpretation of Section 1220. See Compl. ¶¶34-35. As to all County Boards, Petitioners do not aver that any County Board promulgated rules inconsistent with the Election Code which would require its participation in this matter. Thus, I conclude this Court has jurisdiction over Petitioners' declaratory judgment action.

I also note there is no impediment to the Department joining the Allegheny County Board, or to any County Board seeking to intervene if it wishes to participate.

B.

Turning to the merits of Petitioners' application, the parties agree the Department lacks authority to adopt rules it deems necessary for the guidance of electors. See Section 201 of the Election Code, 25 P.S. §2621 (powers and duties of the secretary of the commonwealth). This power is reserved to the County Boards. 25 P.S. §2642(f).

On review, there is nothing in the Memo evidencing the Department's intent to establish a rule regarding passive electioneering. To the contrary, the Memo specifically directs the County Boards to their solicitors and commissioners for further guidance on this issue. Petitioners failed to allege the Memo constitutes a binding directive on the County Boards and have not provided any authority to support such a conclusion. Thus, I conclude the Department has authority to advise County Boards of its position on issues that may come before them.

Under the facts alleged, however, I am not convinced Petitioners' right to relief is clear. Petitioners rely on this Court's decisions in Kaolin Mushroom Farms, Inc. v. Pennsylvania Labor Relations Board, 702 A.2d 1110 (Pa. Cmwlth. 1977) and Western Psychiatric Institute & Clinic of the University of Pittsburgh of the Commonwealth System of Higher Education v. Commonwealth of Pennsylvania, 330 A.2d 257 (Pa. Cmwlth. 1974), for the proposition that under

Pennsylvania law, a person engages in electioneering when he wears a political button or other political insignia which is designed to promote the success or defeat of any candidate for office or ballot issue.

These cases do not advance Petitioners' argument. They arise in the context of labor relations and did not deal with the direct issue of what constitutes electioneering. More importantly, however, the voters in these cases did not engage in the conduct at issue. Rather, active members of the political party or pro-union employees engaged in conduct outside the polling place that went beyond wearing tee shirts and buttons. Under these circumstances, labor law recognizes that electioneering comments are gauged by a less than exacting standard when made by third parties such as pro-union employees, rather than by parties to the election itself. Montgomery County v. Pennsylvania Labor Relations Board, 769 A.2d 554 (Pa. Cmwlth. 2001). This may translate to a similar standard for electors who are showing support for a party, candidate, or issue while exercising their constitutional right to vote.

In addition to the above cases, Petitioners direct the Court's attention to the statutes of our sister states to support their claims electioneering includes wearing party/candidate paraphernalia.⁴ Upon inspection, however, each state law definitively sets forth the prohibited conduct, and in some cases, defines the term

⁴ See 15 Del. C. §4942(d); K.S.A. §25-2430; Minn. Stat. Ann. §211B.11; Mont. Code Ann. §13-35-211; N.J. Stat. Ann. §19-34-19; Tenn. Code Ann. §2-7-111; Tex. Stat. Ann.; Vermont Stat. Ann. §2508.

electioneering.⁵ Our General Assembly declined to define the term, thus leaving its meaning subject to interpretation.⁶

In such cases, the Statutory Construction Act of 1972 requires that words be construed according to the rules of grammar and according to their common usage. 1 Pa. C.S. §1903. Electioneer is defined as “to take an active part in the election; [specifically]: to work for the election of a candidate or party.” Merriam-Webster’s Collegiate Dictionary 370 (2001).

However, I need not define the contours of the term “electioneer” at this early stage. This is because there are other material matters not sufficiently developed, thereby precluding summary relief.

Chief among my concerns is the advice in the Memo which treats persons within the polling place differently based on the activity in which they engage. This distinction lacks any statutory basis. More particularly, Section 1220

⁵ See also Am. Fed. of State, County & Mun. Employees, Council 25 v. Terri Lynn Land & Christopher M. Thomas, (E.D.S.D. Mich., No. 08-14370, filed October 28, 2008) (upholding secretary of state’s determination that statute prohibiting posting, displaying, or distribution of campaign material prohibited voters from wearing party and candidate paraphernalia).

⁶ At oral argument, Petitioners asserted the Supreme Court defined the term electioneering in Williams v. Commonwealth, 91 Pa. 493 (1880), which predated the Election Code. Because the General Assembly did not define electioneer in subsequent legislation, Petitioners contend, the General Assembly is presumed to have intended the same construction be placed on the term. See 1 Pa. C.S. §1922. I reject this argument because the Supreme Court did not construe the term electioneer in Williams but merely recited the statutory definition. Moreover, subsequent amendments to the statute at issue in Williams deleted electioneering as prohibited conduct. Compare Williams, with Section 1839 of the Election Code, 25 P.S. §3539 (relating to bribery of electors) and PA. CONST., art. VII, §7 (same).

designates who may be a polling place: poll watchers, voters not exceeding 10, peace officers, election officers, clerks, machine inspectors, and overseers. 25 P.S. §3060(a), (d). Subsection (c) then provides “no person in the polling place shall electioneer” 25 P.S. §3060(c) (emphasis added). Given the General Assembly specifically identified persons who may be in the polling place, the prohibition of electioneering contained in subsection (c) must apply to all individuals who may lawfully be there. The statutory framework does not distinguish between poll workers, poll watchers, voters or any other person in the polling place; thus, there is no statutory basis to treat voters differently than any one else in the polling place.

Taken to its logical conclusion, the interpretation urged by the Department, that the term “electioneering” does not include expressive apparel or other reasonable personal adornments, could allow poll watchers and others in the polling place to express themselves in a similar fashion or to challenge restrictions on their ability to do so. These possible consequences of the interpretation were not addressed by the parties. See 1 Pa. C.S. §1921 (c) (6) (in ascertaining legislative intent, the consequences of a particular interpretation may be considered).

Further, the Memo bases its distinction on the possibility that voters cannot necessarily distinguish between poll watchers and district election officials; therefore, poll watchers should be treated the same as poll workers. While this speculation has appeal, neither factual basis nor full discussion was offered to

support it. Similarly, no factual basis was offered to support Petitioners' claims of voter confusion.

Because these aspects of the case deserve further development, I conclude Petitioners' right to relief is not yet clear.

C.

Finally, I dismiss Petitioners' argument that the Memo violates Article VII, §6 of the Pennsylvania Constitution. In relevant part, the Constitution states:

All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State....

PA. CONST. art. VII, §6. Petitioners, however, failed to plead a violation of our state constitution.

D.

Because I believe Petitioners' right to relief is not clear at this time, I deny the application for summary relief, without prejudice, thus leaving the Memo undisturbed for the present.

One can imagine a voter's sartorial zeal which would test the limits of advice in the Memo. In the end, however, a court cannot mandate common sense or good taste. Rather, your writer is confined to encouraging all participants to calmly exercise both.


ROBERT SIMPSON, Judge

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Exhibit G

Commonwealth of Pennsylvania
Department of State
September 4, 2008

TO: County Boards of Election

FROM: Chet Harhut, Commissioner

SUBJECT: Passive Electioneering

At the annual Pennsylvania County Election Officials Conference held in Erie recently, the Department discussed with many of you its thoughts on the subject of "passive electioneering," which can include wearing tee shirts, clothing or buttons with a candidate's or political party's name, picture or emblem. On Primary Election Day, April 25, 2008, we received calls from voters as well as counties regarding this important issue. Our advice then and now remains the same. We believe that if such electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute "electioneering" as that term is used in section 1220(c) of the Pennsylvania Election Code, 25 P.S. § 3060(c).

You should be aware that on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the American Civil Liberties Union of Pennsylvania (ACLU) and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue "implicates First Amendment free-speech rights" and urges us to adopt a narrow definition of the term "electioneer." The letter also lists examples where the ACLU and the League have received complaints from voters regarding this subject.

As we discussed at the conference, the term "electioneer" is not defined in the Pennsylvania Election Code. Furthermore, section 302(f) of the Election Code, 25 P.S. § 2642(f), provides that the county boards of elections (not the Department of State) shall "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 elections." 25 P.S. § 2642(f). Furthermore, section 302(g) provides that the county boards of elections shall "instruct election officers in their duties . . . to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

Finally, the General Assembly has determined in section 1105-A of the Election Code that the Department of State may issue binding directives for the county boards of elections on only one subject: "the implementation of electronic voting procedures and for the operation of electronic voting systems." 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make

to the counties regarding this and other issues, must be reviewed and considered by the county boards of elections in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissioners regarding this issue

Of primary concern is that no duly registered person be turned away at the polls. If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials. We understand that many district election officials distribute jackets, sweaters, sweatshirts or other garments so that voters may cover up the clothing while they are in the process of voting. Again, care should be taken to allow individuals to vote. Furthermore, we know that many of you are now or soon will be educating your district election officials (poll workers) regarding matters such as this so that the decision that you make will be implemented uniformly and without discrimination throughout your county.

Finally, as some of you have asked, we believe that there is an important distinction between individual voters who wear clothing or political buttons and those who are watchers at the polling places in your county. Because watchers may be present throughout the day at the precincts and because voters cannot necessarily distinguish between watchers and district election officials, we believe it is reasonable for county boards of elections to prohibit watchers from wearing any clothing or political buttons that show or advocate the election of a candidate or candidates of a specific political party.

If you, your solicitor, or your commissioners would like to discuss this issue with the Department, we suggest that you contact Deputy Chief Counsel Larry Boyle at (717) 783-1657.

Enclosure

C: Harry VanSickle, Deputy Secretary

Exhibit H

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Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**Richard Kraft &
 John Dickinson**

Plaintiffs

v.

**Chet Harhut, Individually and in
 his capacity as Commissioner, Bureau of
 Commissions, Elections and Legislation,
 Pennsylvania Department of State;
 Pennsylvania Department of State;
 Pedro A. Cortes, Individually and in
 his capacity as Secretary of the
 Commonwealth of Pennsylvania**

Defendants.

ELECTION LAW MATTER

NO. 451 MD 2008

RECEIVED & FILED
 COMMONWEALTH COURT
 OF PENNSYLVANIA
 2008 SEP 18 P 1:54

Application for Expedited Consideration of an Election Case

Plaintiffs, Richard Kraft and John Dickinson, by their attorney, Linda A. Kerns, Esquire, hereby request Expedited Consideration of their Complaint for Declaratory Judgment, and aver as follows:

1. The Commissioner of the Commonwealth's Bureau of Commissions, Elections and Legislation illegally advised, via written memorandum, all Pennsylvania local County Board of election officials that they could allow voters to enter polling places on November 4, 2008 while wearing t-shirts, stickers, buttons or other partisan paraphernalia endorsing specific candidates or political parties.

2. Pennsylvania law prohibits the conduct endorsed by the aforementioned memorandum. The applicable statute states, in pertinent part: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by the act. 25 P.S. § 3060 (c).
3. The popular press reported on the aforementioned memorandum so that the illegally issued, erroneous advice has become entrenched in the public conscience.
4. The Complaint requests that the Defendants rescind and make null and void the September 8, 2008 Memorandum and communicate said rescission to all parties who received the communication.
5. The Complaint also requests that the Court issue an order prohibiting the Department of State from disseminated unauthorized and legally erroneous opinions regarding the Pennsylvania Election Code.
6. The Complaint also requests that the Court direct the Judges of Elections to enforce the Pennsylvania Election Code.
7. A true and correct copy of the file stamped Complaint for Declaratory Judgment is attached as Exhibit 1.
8. The subject matter of the complaint encompasses important issues, affecting the health, safety and welfare of citizens of the Commonwealth.
9. The clock is ticking, as the Election is scheduled for November 4, 2008, only forty-seven (47) days away.
10. Time is of the essence as the erroneous information must be rescinded in advance of the election and election board members in each of the Commonwealth's polling places need to have a clear statement of the law that they must enforce.
11. Plaintiffs are in need of the Court's immediate assistance in this matter.

Wherefore, Plaintiffs respectfully request that this Court consider this matter on an expedited basis.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'L.A. Kerns', written over a horizontal line.

Linda A. Kerns, Esquire
September 18, 2008

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Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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**Chet Harhut, Individually and in
his capacity as Commissioner, Bureau of
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Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
his capacity as Secretary of the
Commonwealth of Pennsylvania**

Defendants

:
:**ELECTION LAW MATTER**

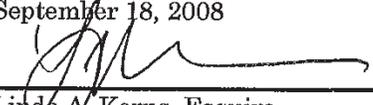
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:**NO. 451 MD 2008**

VERIFICATION

I, Linda A. Kerns, Esquire, hereby state that I am the attorney for the plaintiffs in the caption action, that I am authorized to verify the facts in the foregoing document and the averments are true and correct to the best of my knowledge, information and belief.

The undersigned understands that the statements made herein are subject to the penalties of 18 Pa. C.S. § 4904 for unsworn falsification to authorities.

September 18, 2008



Linda A. Kerns, Esquire

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: ELECTION LAW MATTER

: NO. 451 MD 2008

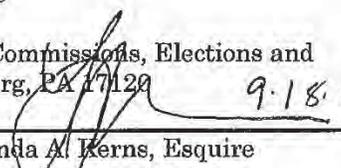
CERTIFICATE OF SERVICE

I, Linda A. Kerns, Esquire, do hereby certify that I caused to be served on September 18, 2008, true and correct copies of the Plaintiffs' Application for Expedited Consideration of an Election Case, via overnight mail service and/or hand delivery, upon the following:

Pennsylvania Department of State
305 North Office Building, Harrisburg, PA 17120

Pedro Cortez, Secretary of the Commonwealth
305 North Office Building, Harrisburg, PA 17120

Chet Harhut, Deputy Commissioner Bureau of Commissions, Elections and
Legislation, 305 North Office Building, Harrisburg, PA 17120


Linda A. Kerns, Esquire

9.18.08

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Commonwealth of Pennsylvania**

Defendants.

ELECTION LAW MATTER

NO. 451 MB2008

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
18 SEP 2008 09 50

Ex 1

COMPLAINT
DECLARATORY JUDGMENT

Plaintiffs, Richard Kraft and John Dickinson by their attorney, Linda A. Kerns, Esquire, bring this action against defendants, Chet Harhut, Individually and in his capacity as Commissioner, Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State; Pennsylvania Department of State; and Pedro A. Cortes, Individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, and in support thereof, aver as follows:

INTRODUCTION

1. This action is necessary because the Commissioner of the Commonwealth's Bureau of Commissions, Elections and Legislation illegally advised, via written memorandum, all Pennsylvania local County Boards of election officials that they could allow voters to enter polling places on November 4, 2008 while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office. "). (A copy of the Memorandum is attached hereto as Exhibit 1). This type of "electioneering" is prohibited by Pennsylvania law and has been disallowed for over a century.
2. Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, for the Department of State of the Commonwealth of Pennsylvania, ("Department of State") issued a memorandum on September 8, 2008 to all County Boards of Election purporting to define "electioneering" as used the Pennsylvania Election Code, 25 P.S. Section 3060(c), and specifically stating: "if such

electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute 'electioneering' . . ." (the "Memorandum). This statement is internally self-conflicting and would be impossible to enforce in a uniform manner as it is open to innumerable interpretations.

3. The Memorandum was prompted by an August 14, 2008 letter from the American Civil Liberties Union of Pennsylvania ("ACLU Letter"), requesting that the Secretary of the Commonwealth of Pennsylvania provide a written opinion to the county boards of elections clarifying that voters be permitted to "wear t-shirts, stickers, and buttons endorsing candidates for office" in the polling place. (A copy of the ACLU letter is attached hereto as Exhibit 2). However, the Pennsylvania Election Code, 25 P.S. § 3060 (c) states: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act."

4. Plaintiff seeks a declaration that the Pennsylvania Election Code prohibits electioneering, passive or otherwise, inside a polling place.

PARTIES

5. Plaintiff, Richard Kraft is a Pennsylvania resident residing in Bethel Park, Pennsylvania where he serves as a Judge of Elections in Pennsylvania.

6. Plaintiff, John Dickinson is a Pennsylvania resident residing in Pittsburgh, Allegheny County, Pennsylvania where he serves as a Minority Inspector of Elections.

7. Defendant, Pennsylvania Department of State is a Pennsylvania government entity with an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

8. Defendant Pedro A. Cortes, the Secretary of the Commonwealth, has an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

9. Defendant, Chet Harhut, Deputy Commissioner, Bureau of Commissions, Elections and Legislation, has an office located at 305 North Office Building, Harrisburg, Pennsylvania, 17120.

VENUE

10. Exclusive jurisdiction over the subject matter of this Complaint is vested in the Commonwealth Court of Pennsylvania by the provisions of the Judicial Code, 42 Pa. C. S. A. § 761(a)(1).

BACKGROUND

11. A general election is scheduled for November 4, 2008 at which registered voters of the Commonwealth of Pennsylvania will cast ballots for several offices, including the President of the United States, Representative to the United States Congress, 203 seats of the Pennsylvania House of Representatives, 25 seats of the Pennsylvania Senate, certain Commonwealth Constitutional Officers and also for Statewide Ballot Referendums

12. The citizens of Pennsylvania have an interest in secure and peaceful elections, providing each voter the opportunity to vote as he/she so desires, in a system conducted with uniformity across the Commonwealth. Indeed, the Constitution of the Commonwealth of Pennsylvania, in the section on Election and Registration Laws, specifically states: "All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State . . ." Article VII, Section 6.

The Pennsylvania Election Code Governs Conduct at Polling Places

13. Pennsylvania law governs conduct of both election officials and voters at polling places. The relevant provision of the Election Code, long the law of the Commonwealth, states:

§ 3060. Regulations in force at polling places

- (a) Until the polls are closed, no person shall be allowed in the polling place outside of the enclosed space at any primary or election, except the watchers, voters not exceeding ten at any one time who are awaiting their turn to vote, and peace officers, when necessary for the preservation of the peace. No elector shall be allowed to occupy a voting compartment or voting machine booth already occupied by another, except when giving assistance as permitted by this act.
- (b) No elector, except an election officer, clerk, machine inspector or overseer, shall be allowed to re-enter the enclosed space after he has once left it, except to give assistance as provided by this act.
- (c) No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.
- (d) All persons, except election officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers, when

permitted by the provisions of this act, must remain at least ten (10) feet distant from the polling place during the progress of the voting.

(e) When the hour for closing the polls shall arrive, all qualified electors who have already qualified, and are inside the enclosed space, shall be permitted to vote; and, in addition thereto, all those qualified electors who are in the polling place outside the enclosed space waiting to vote and all those voters who are in line either inside or outside of the polling place waiting to vote, shall be permitted to do so, if found qualified.

(f) It shall be the duty of the judge of election to secure the observance of the provision of this section, to keep order in the voting room, and to see that no more persons are admitted within the enclosed space than are permitted by this act. The judge of election may call upon any constable, deputy constable, police officer or other peace officer to aid him in the performance of his duties under this section. 25 P.S. § 3060.

14. Traditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office, acting in accordance with section (c) of the above referenced statute, which states: "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act," This enforcement of the Pennsylvania Election Code has long protected our citizens' health, safety and welfare, and is designed to ensure the public's confidence in the electoral process.

Polling Places Should Be Free from Persuasion

15. The reasons for keeping polling places free from persuasion, coercion or undue influence are obvious and have long been the law in this Commonwealth, and indeed in our Nation, as we consider voting rights to be the cornerstone of our democracy.

16. Maintaining our polling places as partisan-free safe harbors ensures each voter may exercise this most sacred of constitutional rights without danger of intimidation or confusion, especially because voters milling about a polling place may be indistinguishable from election officials stationed within. Preventing all those who enter the sanctuary of polling places from electioneering or soliciting votes once within that safe harbor establishes a bright line rule, without the potential jeopardy of obfuscation arising from different ad hoc decisions made by local election officials, from polling place to polling place. A voter in Clarion, Allegheny County, should be subject to the identical protections, and restrictions, as a voter in Aliquippa, Beaver County, or in the City of Philadelphia, Philadelphia County or anywhere else in our Commonwealth.

**Pennsylvania Election Code Prohibits Electioneering
Within a Polling Place**

17. The statute states: "No person, when within the polling place, shall electioneer or solicit votes. . . ." Such broad and forceful language clearly prohibits all electioneering, notably without excluding a specific type, be it passive or otherwise. Drafters used the word "shall," traditionally a word expressing determination and certainly not ambiguity. The Supreme Court of Pennsylvania

has noted that the word “shall” carries an “imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of November 4, 2003 General Election*, 843 A.2d 1223 (Pa. 2004); see also BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) (“In common or ordinary parlance, and in its ordinary signification, the term “shall” is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.”). Similarly, in *In re: Nomination of Flaherty*, 770 A.2d 327, 332 (Pa. 2001), when interpreting the language as used in the Pennsylvania Election Code (“Election Code”), the Pennsylvania Supreme Court cited to *1 Pa.C.S. § 1921(b)*, which states: “When interpreting statutes, we note that if ‘the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.’” The *Flaherty* court specifically found that the word “shall” must be interpreted as a mandate given the “. . . importance of insuring the integrity of the election process. . .” 770 A.2d 327, 332. Accordingly, the Pennsylvania Supreme Court refused to apply a “relaxed standard” when interpreting the provisions of the Election Code. *Id.* at 336.

18. To protect our inviolable rights, the term “electioneering” should be defined and interpreted broadly, as the legislature intended, not narrowly, to allow anomalies that could rise to the level of a partisan free-for-all in the sanctuary of our Commonwealth’s polling places.

Time and Again Our Courts have Prohibited Even Passive Electioneering

19. Courts have attempted to define electioneering in a variety of contexts. In *Western Psychiatric Institute and Clinic of the University of Pittsburgh of the Commonwealth System of Higher Education v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board*, 16 Pa. Cmwlth.204, 330 A.2d 257 (1974), the Commonwealth Court of Pennsylvania found that a Union organizer seen in the building wearing a campaign button was clearly electioneering.

20. In the case of *Marlin v. District of Columbia Board of Elections & Ethics*, 236 F. 3d 716 (C.A.D.C. 2001), held that a county board of elections could prevent a voter from voting if the voter wore a sticker supporting a candidate. *Id.* at 720. The plaintiff had been prohibited from voting in a primary election while wearing a sticker supporting a candidate, since the board of elections believed wearing a sticker violated election regulations prohibiting political activity which interferes with the orderly conduct of elections and defining political activity as “any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting.” *Id.* at 718.

Pennsylvania Department of State issued an Erroneous and Misleading Memorandum to the County Boards of Election

21. On or about September 8, 2008, Chet Harhut, Commissioner, Bureau of Commissions, Elections and Legislation, for the Department of State of the Commonwealth of Pennsylvania, issued the Memorandum to all County Boards of Election in Pennsylvania on the subject of Passive Electioneering.

22. The Memorandum incorporated a letter dated August 14, 2008 from the American Civil Liberties Union of Pennsylvania sent to Pedro A. Cortes, the Secretary of the Commonwealth of Pennsylvania (the "Letter"). See Exhibit 1.

23. The Letter urges the Secretary to adopt an impermissibly "narrow definition of the term 'electioneer'" so that voters would be permitted to "wear candidate t-shirts, buttons, stickers, and similar items into the polling place in order to cast their votes." The defamation being promoted by the ACLU violates the Pennsylvania Election Code.

24. The ACLU Letter requests that a written opinion be disseminated to the county boards of elections, advocating the position of the ACLU.

25. Significantly, the ACLU, as defined on its website www.aclupa.org, is purportedly a "nonprofit, nonpartisan organization" made up of two organizational entities: the ACLU and the American Civil Liberties Foundation, a 501(c) nonprofit corporation. Thus, the ACLU is simply an entity, no better or worse than any other and has no specific authority in the Commonwealth of Pennsylvania, by statute or otherwise.

26. The Pennsylvania Department of State adopted the position in the ACLU Letter and sent it to all Pennsylvania County Boards of Elections, carving out a heretofore nonexistent "passive electioneering" exception to the statute, usurping not only our elected legislators but also encroaching on the authority of the Commonwealth Court. This exception promoted by the Department of State violates the Election Code.

27. Ensuring that our polling places are “electioneering free zones” preserves the peace by preventing not only intimidation, but also the contentiousness that can arise from a citizen, waiting patiently to vote, being sandwiched between other persons politicizing the process, creating a tinder box of rabbleroxing. For this very reason, our Legislature prohibited all electioneering: passive, aggressive, verbal, non-verbal, soft, loud, or otherwise.

28. Allowing individual, so-called passive electioneering also permits large scale, coordinated so-called passive electioneering. If passive electioneering is condoned, nothing would prevent a partisan group from synchronizing a battalion of like-minded individuals, sporting political accoutrements, to descend on a polling place, presenting a domineering, united front, certain to dissuade the average citizen who may privately hold different beliefs.

29. Expressly allowing so-called passive electioneering also encourages stepped up intimidation in the penumbra of polling places. Green-lighting the wearing of buttons, hats, T-shirts and other partisan accessories inside a polling place implicitly authorizes champions of one party or another to stand outside and outfit passers-by. Otherwise unadorned voters are then encouraged to participate in so-called passive electioneering, which on a grand scale rises to the level of overreaching intimidation in a place that has traditionally been free of politicizing.

30. The Department of State was without jurisdiction or authority to interpret *sua sponte* a statute and then broadcast that position to election officials as if it is the settled law of this Commonwealth.

**The Misleading and Erroneous Memorandum has been
Reported in the General Press**

31. Subsequently, the *Philadelphia Inquirer*, and then the Associated Press, reported on the Memorandum, with headlines such as "Voters can wear campaign buttons to polls, Pa. says." Attached hereto and made a part hereof as Exhibit 3 is a true and correct copy of just one of the articles appearing in the press. Thus, a piece of correspondence written by an ACLU staff attorney has risen to the level of the law of this Commonwealth, in the eyes of the press, and, presumably, the general public and district election board members.

32. Apparently, recognizing the threat to the electoral process caused by the misleading and inaccurate Memorandum, Chet Harhut of the Department of State sent out an email to County Election Officials (the "Email") requesting that individual counties discuss the Memorandum and Letter with their solicitors, along with a U.S. Supreme Court case, *Burson v. Freeman*, 504 U.S. 191 (1992) suggesting that each county may want to pass a resolution. Attached hereto and made a part hereof as Exhibit 4 is a true and correct copy of the Email. Thus, in a matter of weeks, County Election Officials received a Memorandum, Letter and Email regarding "electioneering" in polling places which, although prohibited by statute, has now been bandied about in a virtual echo chamber of uncertainty.

33. Unfettered electioneering within a polling place, even if some may consider it "passive," will lead to chaos, confusion and non-uniformity in our Pennsylvania polling places. This enforcement of the Pennsylvania Election Code

has long protected our citizens' health, safety and welfare, and is designed to ensure the public's confidence in the electoral process.

Issues have Plagued Polling Places in the Commonwealth

34. By way of example, Allegheny County, in particular, faces a plethora of partisan election problems, in part as cited in the ACLU Letter and in part for reasons very different than those raised by the ACLU Letter. Plaintiffs believe, and therefore aver, that election judges at many polling places in Allegheny County, and likely in other counties as well, have attempted to enforce the statute so that there is a level playing field where every voter can cast their ballot in peace. However, in the past, partisans have set up shop directly outside polling places, distributing buttons and badges, creating a virtual parade of voters, ornamented with the images of the candidate of their choice. Those voters then proceed into the polling place, as walking billboards for the candidate of their choice, encouraged by those stationed outside to continue the electioneering within the actual voting area. While the gauntlet of electioneering outside the polling can often be aggressive and overbearing, all voters are guaranteed by the statute that once he/she reaches the inside of the polling place they shall be free from persuasion and electioneering, passive or otherwise. The practice of any form of electioneering, including the so-called passive electioneering, while arguably permissible outside is not allowed by statute to enter the safe holder world of the polling place.

35. Upon information and belief, complaints have been made by at least one Inspector of Elections and Judge of Elections in Allegheny County to the

Allegheny County Board of Elections about the practice of electioneering described herein during the primary election held on April 22, 2008. However, despite such complaints, a representative of the Allegheny County Board of Elections stated that voters were permitted to wear a candidate's shirt, button or sticker into the voting booth.

36. Upon information and belief, despite the fact that "passive electioneering" is open and notorious at several polling places in Allegheny County, at other polling places in Allegheny County, voters are expressly forbidden from entering polling places while wearing any badge, sticker, button or shirt that either endorses or promotes a candidate for political office.

37. Plaintiffs believe, and therefore aver, that the enforcement of the statutory ban on any type of electioneering inside the polling place has not been uniformly enforced in Allegheny County. To this day, the Allegheny County Board of Elections has neither defined nor clarified the meaning of electioneering nor has it indicated that it will enforce the statutory law.

38. The Memorandum, and the press reports describing it, will only serve to create further confusion as to what is electioneering and whether or not it is permitted within polling place in not only Allegheny County, but also in other polling places throughout the Commonwealth.

39. Plaintiffs believe and therefore aver that the confusion caused by the Memorandum means that members of election boards at election districts will be forced to become "fashion police" in trying to decide what articles of apparel or

paraphernalia are acceptable and which are not. Disputes will likely arise within the polling place and this will disrupt the electoral process, compromise the integrity of the election and affect the health and safety of the voters. The disputes within the polling places could very well rise to the level of acrimonious and heated exchanges as often occurs outside the polling place on election day. The courts will likely be inundated on election day with a plethora of suits and claims filed regarding what is and what is not permissible "soft electioneering."

40. If various Boards of Elections do not specifically adopt a resolution stating that the statute bans all forms of electioneering within the polling place (including the wearing of campaign paraphernalia and clothing), disruptions at the polling place as described herein will occur on Election Day and the voters' right of a safe harbor will be denied.

41. The Plaintiffs requested relief is also required since the Memorandum supports permitting the "soft electioneering" and hence if various county Boards of Election, adopt resolutions to enforce the ban currently in the statute, they face the prospect of challenges from those such as the ACLU that support the soft electioneering, as the Memorandum gives improper comfort and support to such challenges.

42. Our statute, designed to protect the voter, fails, if it is not uniformly interpreted and enforced in such situations. Someone of differing viewpoints or who perhaps is older, frail, or uncertain, could be dissuaded from voting with their heart or even become uncomfortable or afraid to enter into the polling area and the voting

booth. Plaintiffs believe, and therefore aver, that they have received conflicting instructions on these issues directly from the County Board of Elections further compounding the confusion. All of this puts the voter at risk. Furthermore, it is a violation of the statute, which guarantees the voter the right to a safe harbor within the polling area to exercise one of our most cherished Constitutional rights, the right to freely vote for our government's leaders. In the last moments before casting their ballot, voters should be given the opportunity to make final decisions without any electioneering influence. Our legislature and state Constitution, guarantee that right.

43. Pennsylvania polling places generally include a Judge of Elections, as well as majority and minority inspectors, a machine inspector, poll watchers and voters waiting to vote. Election work by definition is not a full time or career position, but rather a concerned citizen, working a long and tiring day (usually starting before 7:00 am until after 8:00 pm). Additionally, and noteworthy to consider, not all polling places are fully staffed, due to shortages in personnel and the sheer magnitude of coordinating so many workers (some volunteer, others low paid) on a single day.

44. Election workers may not be familiar with the law or the nuance between a statute and a seemingly authoritative letter from the Department of State. Additionally, election workers could be swayed by newspaper articles or snippets on the evening news on this issue.

45. Such ambiguity causes chaos and uncertainty, which could then lead to a slippery slope of outright abuse and partisan shenanigans that election workers simply are not equipped to handle, however well-intentioned. In fact, to burden our election workers with such vague and conflicting direction as to their role, is a disservice to their good intentions and could dissuade participation in future elections.

46. Our duly elected legislature did not leave the practice of electioneering up to the whim and caprice of election officials across the Commonwealth. Therefore, an unelected official from the Department of State should not be allowed to essentially change our law with a few keystrokes.

47. To prevent further harm, the Department of State must immediately issue a second memorandum, rescinding the "opinion" on passive electioneering as outlined in the September 8, 2008 document.

**COUNT I – DECLARATORY JUDGMENT AS TO CHET HARHUT,
INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER, BUREAU
OF COMMISSIONS, ELECTIONS AND LEGISLATION, PENNSYLVANIA
DEPARTMENT OF STATE; PENNSYLVANIA DEPARTMENT OF STATE;
PEDRO A. CORTES, INDIVIDUALLY AND IN HIS CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA**

48. Plaintiffs incorporate the allegations of Paragraphs 1 through 47 of this Complaint by reference as though fully set forth herein.

49. The Department of State issued an erroneous and misleading opinion Memorandum to County Boards of Elections.

50. The Department of State incorporated correspondence from the Pennsylvania ACLU in the Memorandum, thus adopting and disseminating a private entity's doctrine as if it was the settled law of this Commonwealth.

51. An actual, immediate and justiciable controversy exists between plaintiffs and the Pennsylvania Department of State concerning the definition of the term "electioneering."

52. Plaintiffs are in need of the Court's assistance in resolving the parties' differing interpretations of the statute.

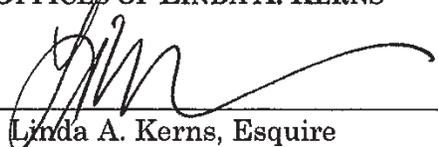
WHEREFORE, plaintiffs respectfully request that this Court issue declarations as follows:

- A. Chet Harhut, Individually and in his capacity as Commissioner, Bureau of Commissions, Elections and Legislation, and the Pennsylvania Department of State and Pedro Cortes shall immediately rescind and make null and void the September 8, 2008 Memorandum on the subject of Passive Electioneering and communicate this to all parties who received the Memorandum and the clarification e-mail;
- B. The Pennsylvania Department of State shall be prohibited from disseminating unauthorized and legally erroneous opinions regarding the Pennsylvania Election Code.
- C. County Boards of Elections shall immediately notify all Judges of Elections and district election board members that they must enforce the Pennsylvania

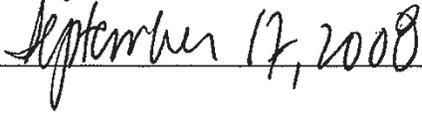
Election Code, specifically Section 3060(c): "No person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act;" which means no "soft electioneering in polling places."

LAW OFFICES OF LINDA A. KERNS

BY: _____


Linda A. Kerns, Esquire
Attorney for Plaintiffs

DATE: _____



LINDA A. KERNS, ESQUIRE
Attorney ID No. 84495
LAW OFFICES OF LINDA A. KERNS
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102
Tele: 215-246-3425/Fax: 215-701-4154

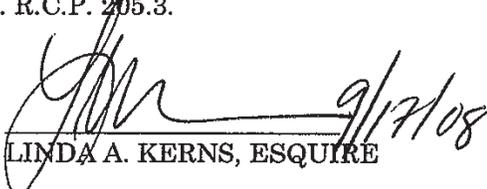
Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft &	:	ELECTION LAW
John Dickinson	:	MATTER
	:	
Plaintiffs	:	NO.
	:	
v.	:	
	:	
Chet Harhut, Individually and in	:	
his capacity as Commissioner, Bureau of	:	
Commissions, Elections and Legislation,	:	
Pennsylvania Department of State;	:	
Pennsylvania Department of State;	:	
Pedro A. Cortes, Individually and in	:	
his capacity as Secretary of the	:	
Commonwealth of Pennsylvania	:	
	:	
Defendants	:	
	:	

CERTIFICATE OF ATTORNEY

I, Linda A. Kerns, attorney for the plaintiffs in this matter, hereby certify that the original pleading in this matter was properly signed and verified by each plaintiff, and the verifications attached to the within pleading are true and correct facsimile copies of their signatures and if any other party requires the filing of the original signature I will file same pursuant to Pa. R.C.P. 205.3.


LINDA A. KERNS, ESQUIRE

LINDA A. KERNS, ESQUIRE

Attorney ID No. 84495

Attorney for Plaintiffs

LAW OFFICES OF LINDA A. KERNS

1500 Market Street, 12th Floor, East Tower

Philadelphia, PA 19102

Tele: 215-246-3425/Fax: 215-701-4154

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**Richard Kraft &
John Dickinson**

Plaintiffs

v.

**Chet Harhut, Individually and in
his capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
his capacity as Secretary of the
Commonwealth of Pennsylvania**

Defendants

**ELECTION LAW
MATTER**

NO.

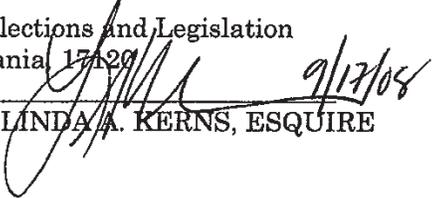
CERTIFICATE OF SERVICE

I, Linda A. Kerns, do hereby certify that I caused to be served on September 18, 2008, true and correct copies of Richard Kraft's and John Dickinson's Complaint for Declaratory Judgment, via overnight mail service and/or hand delivery, upon the following:

Pennsylvania Department of State
305 North Office Building, Harrisburg, Pennsylvania, 17120.

Pedro Cortez
Secretary of the Commonwealth
305 North Office Building, Harrisburg, Pennsylvania, 17120

Chet Harhut
Deputy Commissioner Bureau of Commissions, Elections and Legislation
305 North Office Building, Harrisburg, Pennsylvania, 17120


LINDA A. KERNS, ESQUIRE

LINDA A. KERNS, ESQUIRE
Attorney ID No. 84495
LAW OFFICES OF LINDA A. KERNS
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102
Tele: 215-246-8425/Fax: 215-701-4154

Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**Richard Kraft &
John Dickinson**

Plaintiffs

v.

**Chet Harhut, Individually and in
his capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
his capacity as Secretary of the
Commonwealth of Pennsylvania**

Defendants.

**ELECTION LAW
MATTER**

NO.

VERIFICATION

Richard Kraft hereby states that he is the Plaintiff in the captioned action;
that he is authorized to take this verification and that the facts set forth in the
foregoing Complaint are true and correct to the best of his knowledge, information
and belief

The undersigned understands that the statements made therein are subject
to the penalties of 18 Pa. C.S. §4904 for unsworn falsification to authorities.

Date: September 17, 2008


Richard Kraft

LINDA A. KERNS, ESQUIRE
Attorney ID No. 84495
LAW OFFICES OF LINDA A. KERNS
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102
Tele: 215-246-3425/Fax: 215-701-4154

Attorney for Plaintiffs

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**Richard Kraft &
John Dickinson**

Plaintiffs

v.

**Chet Harhut, Individually and in
his capacity as Commissioner, Bureau of
Commissions, Elections and Legislation,
Pennsylvania Department of State;
Pedro A. Cortes, Individually and in
his capacity as Secretary of the
Commonwealth of Pennsylvania**

Defendants.

**ELECTION LAW
MATTEE:**

NO.

VERIFICATION

John Dickinson hereby states that he is the Plaintiff in the captioned action; that he is authorized to take this verification and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

The undersigned understands that the statements made therein are subject to the penalties of 18 Pa. C.S. §4904 for unsworn falsification to authorities.

Date: September 17, 2008



John Dickinson

Exhibit 1

Commonwealth of Pennsylvania
Department of State
September 8, 2008

TO: County Boards of Election
FROM: Chet Harhut, Commissioner
SUBJECT: Passive Electioneering

At the annual Pennsylvania County Election Officials Conference held in Erie recently, the Department discussed with many of you its thoughts on the subject of "passive electioneering," which can include wearing tee shirts, clothing or buttons with a candidate's or political party's name, picture or emblem. On Primary Election Day, April 25, 2008, we received calls from voters as well as counties regarding this important issue. Our advice then and now remains the same. ~~We believe that~~ if such electioneering remains passive and the voter takes no additional action to attempt to influence other voters in the polling place, then the wearing of clothing or buttons would not constitute "electioneering" as that term is used in section 1220(c) of the Pennsylvania Election Code, 25 P.S. § 3060(c).

You should be aware that on August 19, 2008, the Secretary of the Commonwealth received the enclosed letter from the American Civil Liberties Union of Pennsylvania (ACLU) and the League of Women Voters of Pennsylvania asking us to provide an opinion clarifying this issue. The authors of the letter believe that this issue "implicates First Amendment free-speech rights" and urges us to adopt a narrow definition of the term "electioneer." The letter also lists examples where the ACLU and the League have received complaints from voters regarding this subject.

As we discussed at the conference, the term "electioneer" is not defined in the Pennsylvania Election Code. Furthermore, section 302(f) of the Election Code, 25 P.S. § 2642(f), provides that the county boards of elections (not the Department of State) shall "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 elections." 25 P.S. § 2642(f). Furthermore, section 302(g) provides that the county boards of elections shall "instruct election officers in their duties . . . to the end that primaries and elections may be honestly, efficiently, and uniformly conducted." 25 P.S. § 2642(g).

Finally, the General Assembly has determined in section 1105-A of the Election Code that the Department of State may issue binding directives for the county boards of elections on only one subject: "the implementation of electronic voting procedures and for the operation of electronic voting systems." 25 P.S. § 3031.5(a). This issue relating to apparel in the polling place would not fall within the scope of electronic voting procedures or the operation of electronic voting systems. As such, the various suggestions and recommendations that we make

to the counties regarding this and other issues, must be reviewed and considered by the county boards of elections in conjunction with their solicitors. Therefore, we ask that those of you receiving this memo confer with your solicitor and commissioners regarding this issue

Of primary concern is that no duly registered person be turned away at the polls. If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials. We understand that many district election officials distribute jackets, sweaters, sweatshirts or other garments so that voters may cover up the clothing while they are in the process of voting. Again, care should be taken to allow individuals to vote. Furthermore, we know that many of you are now or soon will be educating your district election officials (poll workers) regarding matters such as this so that the decision that you make will be implemented uniformly and without discrimination throughout your county.

Finally, as some of you have asked, we believe that there is an important distinction between individual voters who wear clothing or political buttons and those who are watchers at the polling places in your county. Because watchers may be present throughout the day at the precincts and because voters cannot necessarily distinguish between watchers and district election officials, we believe it is reasonable for county boards of elections to prohibit watchers from wearing any clothing or political buttons that show or advocate the election of a candidate or candidates of a specific political party.

If you, your solicitor, or your commissioners would like to discuss this issue with the Department, we suggest that you contact Deputy Chief Counsel Larry Boyle at (717) 783-1657.

Enclosure

C: Harry VanSickle, Deputy Secretary

Exhibit 2



RECEIVED
2008 AUG 19 AM 9:35
DEPT OF STATE
OFFICE OF
THE SECRETARY

August 14, 2008

Eastern Region Office
PO Box 40008
Philadelphia, PA 19106
215.592.1513 T
215.592.1343 F

Central Region Office
PO Box 11761
Harrisburg, PA 17108
717.238.2258 T
717.236.6895 F

Western Region Office
313 Atwood Street
Pittsburgh, PA 15213
412.681.7736 T
412.681.8707 F

Pedro A. Cortés,
Secretary of the Commonwealth
210 N. Office Building
Harrisburg, PA 17120

Re: Request to clarify meaning of 25 Pa. Cons. Stat. Ann. §
3060(c), which prohibits electioneering within polling place

Dear Secretary Cortés,

We are writing to ask you to provide an opinion clarifying that the definition of "electioneer," as used in the Pennsylvania Election Code, 25 Pa. Cons. Stat. Ann. § 3060(c), does not apply to and/or prohibit voters from casting ballots while wearing partisan T-shirts, stickers, and buttons. "Electioneer," a term that is not defined by the election code or Pennsylvania case law, has been interpreted inconsistently by poll workers and has led to confusion about what voters may wear into polling places when they cast their ballots. We respectfully request that you provide an opinion to the county boards of elections clarifying the meaning of "electioneer" as that term is used in § 3060(c). And because the statute implicates First Amendment free-speech rights, we urge you to adopt a narrow definition of the term "electioneer" that would explicitly allow voters to wear candidate t-shirts, buttons, stickers, and similar items into the polling place in order to cast their votes.

We received complaints from people in Mt. Lebanon, Pa., and in Ardmore, Pa., who were prohibited from voting in the April 22, 2008, primary because they wore t-shirts endorsing candidates for office into the polling place.¹ And we have learned that the website for the Centre County Board of Elections informs voters that they will be asked to remove "any campaign material that is

¹ The complainants were permitted to vote if they agreed to remove their t-shirts or turn them inside out. We have received similar complaints in recent elections from elsewhere in Allegheny County, as well as Lancaster and York Counties.

exposed (hat, shirt, button, etc.)” before voting.² But practice varies from one polling place to another. Identical t-shirts and other forms of “passive” electioneering, such as candidate stickers and buttons, were permitted during the primary election in other Allegheny County polling places, for example.

25 Pa. Cons. Stat. Ann. § 3060(c) states that “[n]o person, when within the polling place, shall electioneer or solicit votes for any political party, political body or candidate, nor shall any written or printed matter be posted up within the said room, except as required by this act.” Only poll watchers, voters in the course of voting and those providing assistance to them, election officers, clerks, machine inspectors, overseers, and peace and police officers are allowed within ten feet of the polling place. *Id.* at § 3060(d). Accordingly, the statute’s prohibition of electioneering within the polling place applies only to voters and those persons necessary to facilitate and oversee the voting process. Although the state can constitutionally prohibit the latter category of persons from wearing items endorsing candidates for office while performing their election-day duties, when that restriction is applied to voters themselves — who must go to the polling place to exercise their right to vote — it implicates important First Amendment rights.

Because of the First Amendment interests involved, county boards of elections and individual poll workers should not be permitted to decide for themselves whether voters who wear candidate t-shirts, buttons, and stickers to the polls are engaged in electioneering. According such broad discretion to poll workers has the potential to result in unconstitutional viewpoint discrimination,³ and voters’ First Amendment rights should not depend on which county they happen to live in. There is obvious confusion about what acts constitute electioneering under the statute and a concurrent need on the part of county boards of elections and poll workers for guidance on this issue.

That guidance should define the term “electioneer” narrowly. When First Amendment freedoms are at issue, “government may regulate only with narrow specificity.”⁴ Simply wearing a t-shirt, sticker, or button endorsing a candidate is not “electioneering” within the plain meaning of the word, which is defined by Merriam-Webster as “to take an active part in an election; specifically: to work for the election of a candidate or party.” Any decision to depart from the plain

² Elections and Voter Registration, Centre County Board of Elections, available at <http://www.co.centre.pa.us/elections/elect.asp>.

³ *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-131 (1992) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority.”) (internal quotations and citations omitted).

⁴ *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963).

meaning of the word and include passive acts like wearing a candidate t-shirt, sticker, or button in the statute's prohibitions must be made by the legislature.

For all of these reasons, we request that you provide a written opinion to the county boards of elections by September 2, 2008, clarifying that voters who are present in the polling place to cast their ballots are permitted to wear t-shirts, stickers, and buttons endorsing candidates for office. We also ask that you provide us with a copy of that opinion. Please contact us at (412) 681-7864 if you have any questions about this request.

Sincerely,



Sara J. Rose, Staff Attorney
Witold J. Walczak, Legal Director
ACLU of Pennsylvania

Andrea Mulrine, President
League of Women Voters of Pennsylvania

Exhibit 3



Posted on Tue, Sep. 9, 2008

Voters can wear campaign buttons to polls, Pa. says

HARRISBURG - Voters who show up at the polls wearing campaign buttons or T-shirts should be allowed to cast ballots, the Pennsylvania Department of State has told county elections officials.

> State Elections Commissioner Chet Harhut said that, as long as a voter does not try to campaign in the polling place, his or her attire should not matter. Harhut's position was outlined in a memo sent out last week. "Of primary concern is that no duly registered person be turned away at the polls," Harhut said. "If the conduct and apparel of a voter is determined to be more than passive, it should be addressed by the district election officials."

> The Pennsylvania chapter of the American Civil Liberties Union had sought clarification about the issue because of voter complaints in recent elections from Allegheny, Lancaster, Montgomery and York Counties.

> Harhut said it is reasonable for counties to prohibit poll watchers from wearing clothing or buttons that "show or advocate the election of a candidate or candidates of a specific political party." - AP

>

Find this article at:

http://www.philly.com/philly/news/pennsylvania/20080909_Voters_can_wear_campaign_buttons_to_polls__Pa__says.html?adString=ph.news/pennsylvania;!category=pennsylvania;&randomOrd=091408015557

Check the box to include the list of links referenced in the article.

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Exhibit 4

Linda A Kerns

From: Tabas, Lawrence [Lawrence.Tabas@obermayer.com]
Sent: Sunday, September 14, 2008 8:49 PM
To: Linda A Kerns
Subject: FW: Electioneering

-----Original Message-----

From: Boyle, Larry [mailto:LLBOYLE@state.pa.us]
Sent: Wednesday, September 10, 2008 8:51 AM
To: Tabas, Lawrence
Subject: Electioneering

Lawrence,

Here is an email that we sent out to the counties today regarding this issue. The email below is similar to the discussions I have had with county election directors and solicitors who have called me. In fairness to other counties that have not called me, we thought it best to send this to all the counties.

Thank you for calling Al today to discuss this issue further.

Sincerely,

Louis Lawrence Boyle
Deputy Chief Counsel
Pennsylvania Department of State
210 North Office Building
Harrisburg, PA 17120
Phone: 717.783.1657 I Fax: 717.214.9899
llboyle@state.pa.us
www.dos.state.pa.us

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-----Original Message-----

From: Harhut, Chet
Sent: Tuesday, September 09, 2008 5:13 PM
To: Adams - Dutko, Monica; Allegheny - Wolosik, Mark; Armstrong - Buzard, Wendy J.; Beaver - Mandity, Dorene; Bedford - Koenig, Margaret A.; Berks - Olivieri, Deborah; Blair - Burns, Linda; Blair - Crowl, Shirley; Bradford - Smithkors, Renee; Bradford - Zbyszinski, Marie; Bucks - Dean, Deena K.; Butler - Young, Regis L.; Cambria - Smith, Fred R.; Cameron - Munz, Brenda; Carbon - Leffler, Kenneth J.; Centre - McKinley, Joyce; Chester - Forsythe, Jim; Clarion - Kuzmovich, Ronn; Clarion - Moore, Sally; Clearfield - Bumbarger, Donna; Clearfield - Clark, Linda; Clinton - Bame, Constance; Clinton - Conrad, Kathy; Columbia - Reichart, Joanne K.; Crawford - Mushrush, Melanie; Cumberland - Brown, Penny; Cumberland - Salzarulo, Bethany; Dauphin - Boyer, Mary Ann; Dauphin - Chiavetta, Steven G. ; Delaware - Hagan, Laureen; Delaware - Headley, Mary Jo; Elk - Frey, Kim; Erie - Drayer, Sharon A.; Fayette - Lint, Laurie A.; Forest - Hitchcock, Jean Ann; Franklin - Aines, Jennie M.; Franklin - Aines, Jennie M.; Franklin - Hart, John A.; Fulton - Wible, Richard L.; Greene - Pratt, Frances; Huntingdon - McNeal, Sandra; Indiana - Maryai, Robin; Indiana-Streams, Debra; Jefferson - Crumlish, Thomas; Jefferson - Lupone, Karen; Juniata - Stong, Eva M.; Lackawanna - Medalis, Marion; Lackawanna - Young, Maryann Spellman; Lancaster - Ernst, Carole; Lancaster - Skilling, Diane; Lancaster - Stehman, Mary Z.; Lawrence - Gabriel, Marlene D.; Lebanon -Yingst, Nick; Lehigh - Sterner, Stacy; Luzerne -

Piazza, Leonard C., III; Lycoming - Adams, Sandra P.; McKean - Codiway, Judy; Mercer - Greenburg, Jeff; Mifflin - Laub, Nancy K.; Monroe - Bryan, LaShawn; Monroe - May-Silfee, Sara; Montgomery - Allen Patricia; Montgomery - Passarella, Joseph; Montour - Brandòn, Holly A.; Montour - Dyer, Darlis; Montour - Woodruff, Theresa; Northampton - Rumsey, Debi; Northampton- Howey Erney; Northumberland - Deitrick, Samuel S.; Northumberland - Thew, Mary; Perry - Delancey, Bonnie L.; Perry Co. Voter Registration; Philadelphia - Lee, Bob; Philadelphia - Rubin, Bill ; Pike - Orben, Gary R.; Pike -Goldsack, Yalanda; Potter - Lewis, Sandra; Schuylkill - Dries, Elizabeth J.; Schuylkill - Wiscount, Dave; Snyder - Dauberman, Michelle L.; Snyder - Heintzelman, Veda M.; Snyder - Nace, Patricia; Somerset - Pritts, Tina; Sullivan - Panichi, Joyce; Susquehanna - Watts, Laura; Tioga - Coxe, George F., Jr.; Union - Radel, Glenda; Union - Robinson, Diana; Union - Sheesley, Cindy; Union - Showers, John R.; Union - Zerbe, Kim; Venango - Jones, Denise M.; Venango - Saltarelli, Sue; Warren - Matve, Pamela; Warren - Snavley, Monica; Warren - Zuck, Lisa; Washington - Spahr, Larry; Wayne - Furman, Cindy; Westmoreland - Lechman, Beth; Westmoreland - Montini, James; Wyoming - Ball, Florence; Wyoming - Crispell, Marisa; York - Suchanic, Nikki
Subject: Electionerring
Importance: High

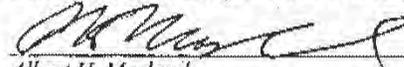
Dear County Election Officials,

Since we have sent you the memo from the Department and the letter we received from the ACLU, we have heard from a number of counties regarding this issue. If you have not already done so, you should show both our memo of September 4 and the ACLU letter of August 14 to your solicitor and discuss with your solicitor the case of *Burson v. Freeman*, 504 U.S. 191 (1992), in which the U.S. Supreme Court upheld a TN statute prohibiting the wearing of campaign buttons or clothing within the established boundary of an election precinct. Although the TN law is different from the PA Election Code, this case could be the basis for a county passing a resolution exercising its powers to regulate the polling place conduct and decorum to prohibit the display of campaign clothing or paraphernalia.

Thank You,
Chet

Exhibit I

NOTICE TO PLEAD TO ALL PARTIES
You are hereby notified to file a written
response to the New Matter set forth in this Answer
with New Matter pursuant to Pa. R.A.P. 1516(b)
within thirty (30) days from service hereof.


Albert H. Masland
Attorney for Respondents

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft and John Dickinson,

Petitioners,

v.

Chet Harhut, Commissioner, Bureau of
Commissions, Elections and Legislation, and Pedro
Cortés, Secretary of the Commonwealth of
Pennsylvania,

Respondents

Docket No. 451 M.D. 2008

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
2008 SEP 25 P 3:27

**ANSWER AND NEW MATTER OF RESPONDENTS HARHUT AND CORTÉS TO THE
PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING A
DECLARATORY JUDGMENT**

AND NOW come Respondents Chet Harhut, Commissioner, Bureau of Commissions,
Elections and Legislation, and Pedro A. Cortés, Secretary of the Commonwealth, through their
undersigned counsel and pursuant to Pa. R.A.P. 1516(b), to answer the Petition for Review¹ in
the nature of a complaint seeking declaratory judgment filed by Petitioners in the above-

¹ Petitioners commenced their action for declaratory judgment with a "Complaint."
However, this Court by order entered September 18, 2008, indicated that "[t]he Complaint shall
be regarded and acted upon as a petition for review addressed to this Court's original
jurisdiction." Thus, Respondents will refer to the Complaint as a Petition for Review and to the
parties as Petitioners and Respondents.

captioned matter, and to assert defenses thereto in the form of New Matter. In response to the averments made in the Petition for Review, Respondents answer as follows:

RESPONSE TO INTRODUCTION

To the extent the "Introduction" of Petition for Review requires a response, its statements regarding the Department of State's Memorandum (Memorandum) of September 8, 2008 (Petitioners' Exhibit 1) to the County Boards of Elections are conclusions of law to which no response is required.

1. The averments made in ¶ 1 of the Petition for Review state conclusions of law to which no response is required. To the extent that any averment is considered to be an averment of fact, it is DENIED. In contrast to the averment and conclusion of law in the first sentence of ¶ 1, Commissioner Harhut clearly stated in the third paragraph of the Memorandum that the Pennsylvania Election Code provides that the county boards of elections may make such reasonable rules as they deem appropriate for elections. Furthermore, the Petition for Review is factually incorrect and is internally inconsistent where it states in the second sentence that "passive electioneering" (as described in the Memorandum) has been disallowed in Pennsylvania for over a century. In fact, as the Petition for Review later recognizes in ¶¶ 34 through 37, all county boards of elections have not reached the same legal conclusion that Petitioners have.

2. ADMITTED in part and DENIED in part. Though the first sentence of ¶ 2 is factually accurate, it does not include significant portions of the Memorandum, as discussed in the paragraph above. The averments made in the last sentence of ¶ 2 of the Petition for Review state conclusions of law to which no response is required, nor does this sentence provide sufficient details to which Respondents may reply. By way of further answer, many county boards of elections have in fact been interpreting "electioneering" precisely in the manner suggested by the Memorandum.

3. DENIED. The Memorandum was not prompted by the ACLU letter of August 14, 2008. Rather, the issue first arose on Primary Election Day, April 22, 2008, when the Department of State (Department) received calls from both citizens and counties regarding voters wearing tee shirts in polling places. The Department responded essentially the same on April 22 as it did in the Memorandum of September 8, 2008, stating its opinion that voters appearing at the polls with tee shirts or buttons should be permitted to vote. However, the Department stressed that the determination is one to be made by the county boards of elections, citing to 25 P.S. §§ 2642(f) & (g). During the months following the primary, the Department expressed its view on this subject before several other audiences containing county commissioners, judges and solicitors, and received no contrary opinions until August 19, 2008. After these discussions, the Department learned of the letter received from the American Civil Liberties Union (ACLU). In contrast to Petitioners' incorrect assumptions, the Department issued the Memorandum to alert all counties, including those not engaged in the other discussions, about this issue so that they could discuss it with their solicitors and commissioners, and thereby consider it in advance of Election Day when the issue could arise. Although Petitioners quote 25 P.S. § 3060(c), they fail to point out that the General Assembly has not defined the term "electioneering."

4. The averments made in ¶ 4 of the Petition for Review state conclusions of law to which no response is required.

PARTIES

5. ADMITTED.

6. ADMITTED.

7. ADMITTED in part and DENIED in part. The Department's main office and the office of the Secretary are at Room 302 North Office Building, not Room 305 as alleged.

8. ADMITTED in part and DENIED in part. The office of the Secretary is at Room 302 North Office Building, not Room 305 as alleged.

9. ADMITTED in part and DENIED in part. The office of the Commissioner is at Room 210 North Office Building, not Room 305 as alleged.

VENUE

10. ADMITTED.

BACKGROUND

11. ADMITTED.

12. The averments made in ¶ 12 of the Petition for Review state conclusions of law to which no response is required.

13. ADMITTED.

14. The averments made in ¶ 14 of the Petition for Review state conclusions of law to which no response is required. To the extent that any statement is considered to be an averment of fact, it is DENIED. As noted in answer to ¶ 1, the Petition for Review is factually incorrect and is internally inconsistent where it states in the first sentence of ¶ 14:

“Traditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office....” In fact, as the Petition for Review later recognizes in ¶¶ 34 through 37, all county boards of elections have not reached the legal conclusion favored by Petitioners. By way of further answer, to the extent that there is an inference that the Memorandum will endanger the health, safety and welfare of Pennsylvania citizens, it is specifically DENIED.

15. The averments made in ¶ 15 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum specifically

distinguishes between the apparel of voters as opposed to those serving in the polling place as election officials and watchers. Tee shirts or buttons worn by the latter would be improper within the polling places. Furthermore, 25 P.S. §§ 2677 and 2678 require the judge of elections and inspectors of election to take an oath to “impartially and faithfully perform [their] duty.” However, it is specifically DENIED that any such action by a voter would constitute undue influence in the polling place.

16. The averments made in ¶ 16 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, many counties have conducted their elections in accordance with the Memorandum and have not adversely impacted the so-called “sanctuary” of the polling place. Petitioners’ lofty prose belies the fact that they are making much ado about nothing. Finally, Petitioners’ picture of the polling place as a bustling marketplace, with voters milling about, overlooks the guidelines found in the Election Code, at 25 P.S. § 3060(a), which provides that no more than ten voters at any one time may be “awaiting their turn to vote.” The voters in line are clearly distinguishable from those administering the process of voting.

17. The averments made in ¶ 17 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, Respondents specifically DENY that a voter wearing a tee shirt or button in a polling place is engaged in any type of electioneering or solicitation of votes. Petitioners appear to be under the illusion that voters arrive at the polling place as non-partisans and do not decide to become partisan until presented with the implements of voting. The Election Code is under no such illusion and recognizes that people are partisans but should not attempt to influence others within the polling place. It is crucial that the election

officials maintain the appearance of neutrality, but a voter waiting in line need not appear to be a *tabula rasa*.

18. The averments made in ¶ 18 of the Petition for Review state conclusions of law to which no response is required.

19. The averments made in ¶ 19 of the Petition for Review state conclusions of law to which no response is required. Furthermore, in the case cited by Petitioners, *Western Psychiatric Institute v. PLRB*, 16 Pa. Commw. 204, 330 A.2d 257 (1974), this Court made no reference to the term “electioneering” as used in the Pennsylvania Election Code. In fact, the parties in that case – the union and the employer – entered into an agreement, which included “that the cut off date for electioneering shall be 12:01 midnight on the day of the election.” *Id.*, 16 Pa. Commw. at 212. In spite of this agreement, there were numerous instances of soliciting votes both within and outside of the site of the election.

20. The averments made in ¶ 20 of the Petition for Review state conclusions of law to which no response is required. Furthermore, in the case cited by Petitioners, *Marlin v. District of Columbia Board of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), there was a statute which specifically defined “political activity,” unlike the Pennsylvania Election Code, which does not define the term “electioneering.” In the absence of such clarity, to interpret this term in a manner that could result in turning away a duly registered voter from the polling place is a far greater harm than permitting the individual to vote.

21. ADMITTED.

22. ADMITTED in part and DENIED in part. The Memorandum referenced a letter dated August 14, 2008, from the American Civil Liberties Union of Pennsylvania sent to Pedro A. Cortés, Secretary of the Commonwealth of Pennsylvania (“the Letter”), and included a copy

of the Letter with the Memorandum. It is DENIED that the Memorandum incorporated the Letter.

23. The averments made in ¶ 23 of the Petition for Review state conclusions of law to which no response is required.

24. ADMITTED in part and DENIED in part. It is ADMITTED that the Letter requests that a written opinion be provided to the county board of elections. It is not only DENIED that the Letter requested the Department to advocate the opinion of the ACLU, but it is also DENIED that the Memorandum constitutes any advocacy on behalf of any organization. Rather, the Memorandum was designed to assist county boards of elections with their determination, with an overarching goal of ensuring that no eligible voter is prohibited from voting.

25. ADMITTED in part and DENIED in part. The first sentence of ¶ 25 of the Petition for Review is ADMITTED. The averments made in the last sentence of ¶ 25 of the Petition for Review state conclusions of law to which no response is required, nor does this sentence provide sufficient details to which Respondents may reply.

26. It is specifically DENIED that the Department "adopted the position" of the ACLU. As stated in ¶ 3 of the Answer, the issue first arose on Primary Election Day, April 22, 2008, when the Department received calls from both citizens and counties regarding citizens wearing tee shirts in polling places. The Department responded essentially the same on April 22 as it did in the Memorandum of September 8, 2008, stating its opinion but also stating that the determination is one to be made by the county boards of elections (citing to 25 P.S. §§ 2642(f) & (g)). The other averments made in ¶ 26 of the Petition for Review state conclusions of law to which no response is required.

27. The averments made in ¶ 27 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, as previously noted, many county boards of elections have traditionally interpreted the Election Code, at 25 P.S. § 3060, in a manner similar to the Memorandum without incident or anything approaching incendiary activity.

28. The averments made in ¶ 28 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, Petitioners' conclusions constitute clear hyperbole, which defies the ability to respond.

29. The averments made in ¶ 29 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, as previously noted, many county boards of elections have traditionally interpreted 25 P.S. § 3060 in a manner similar to the Memorandum without incident.

30. The averments made in ¶ 30 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, it is specifically DENIED that the Department is without authority to share its opinion with election officials. The symbiotic relationship between the Department and county elections officials requires the Secretary to reach out to county officials on numerous issues. The National Voter Registration Act (NVRA) at section 10, 42 U.S.C. § 1973gg-8, and the Help America Vote Act (HAVA) at section 702, 42 U.S.C. § 1973ff-1, provide for a chief election official to carry out the State responsibilities under the law. Furthermore, Title III of HAVA is entitled "Uniform and Nondiscriminatory Election Technology and Administration Requirements." Both the NVRA and HAVA also require that the responsibilities under each act are to be carried out in a uniform and nondiscriminatory manner. (42 U.S.C. § 1973gg-6(b)(1) and 42 U.S.C. § 15481.) *See also Bush*

v. Gore, 531 U.S. 98 (2000). Prior to these laws and this case, the Department's typical advice to counties was to consult with their solicitors. After these laws and this case, in keeping with the requirements of these laws and the Supreme Court's guidance, the Department has earnestly endeavored to provide the counties with its advice and opinions so that they can act uniformly and without discrimination. It is further DENIED that this Memorandum was issued *sua sponte*. To the contrary, the issue of electioneering was raised and discussed for over four months before the Memorandum was issued.

31. The averments made in ¶ 31 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Department regrets that it has been unable to control the press on numerous issues, and that situation is unlikely to change.

32. ADMITTED in part and DENIED in part. It is ADMITTED that Chet Harhut, Commissioner of the Department of State's Bureau of Commissions, Elections and Legislation, sent an e-mail to county elections officials ("the E-mail"), requesting county officials to discuss with their solicitors the Memorandum, the Letter, and the U.S. Supreme Court decision in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, the Tennessee statute specifically delineated what could not be worn in a polling place, unlike the Election Code, which does not define the term "electioneering." The other averments made in ¶ 32 of the Petition for Review are DENIED.

33. The averments made in ¶ 33 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, it is clear from the Petition for Review that there is currently no uniformity in how the section of the Election Code at issue is interpreted and applied. It is difficult to see how providing guidance could create chaos and confusion.

34. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 34 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 34 of the Petition for Review, and therefore deny them.

35. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 35 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 35 of the Petition for Review, and therefore deny them.

36. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 36 of the Petition for Review acknowledge this fact, they are ADMITTED. Respondents are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 36 of the Petition for Review, and therefore deny them.

37. Respondents believe, and therefore aver, that the Board of Elections of Allegheny County has for years interpreted the section of the Election Code at issue in a manner similar to the Memorandum. To the extent that the averments in ¶ 37 of the Petition for Review acknowledge this fact, they are ADMITTED. To the extent that Allegheny County elections officials are enforcing the statute in accordance with the suggestions in the Memorandum,

Respondents submit that the county does in fact “enforce the statutory law,” notwithstanding Petitioners’ averments to the contrary.

38. The averments made in ¶ 38 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum was designed to assist the counties in their interpretation of the statute and not “to create further confusion.”

39. The averments made in ¶ 39 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the opinions stated in the Memorandum were specifically designed to obviate the need for “fashion police,” which would be required by Petitioners’ interpretation.

40. The averments made in ¶ 40 of the Petition for Review state conclusions of law to which no response is required. By way of further response, many county boards of elections have traditionally followed the approach suggested in the Memorandum.

41. The averments made in ¶ 41 of the Petition for Review state conclusions of law to which no response is required.

42. The averments made in ¶ 42 of the Petition for Review state conclusions of law to which no response is required. By way of further response, 25 P.S. § 3060(a) provides that “[n]o elector shall be allowed to occupy a voting compartment or voting machine booth already occupied by another, except when giving assistance as permitted by this act,” thus ensuring the secrecy of the vote. Petitioners’ description of the eggshell-skull voter overlooks this important protection.

43. ADMITTED.

44. Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶ 44 of the Petition for Review, and therefore deny them. By

way of further response, Petitioners seemingly attribute the same low opinion of the mentality of voters (see ¶ 42) to election officials. Respondents specifically DENY such characterization.

45. The averments made in ¶ 45 of the Petition for Review state conclusions of law to which no response is required. By way of further response, no specific facts are stated or documented in ¶ 45. Furthermore, Petitioners' conclusions constitute clear hyperbole, which defies the ability to respond.

46. The averments made in ¶ 46 of the Petition for Review state conclusions of law to which no response is required. By way of further answer, the Memorandum was not an attempt to change the law. To the contrary, it was an attempt to assist county elections officials in interpreting this statute, which does not define "electioneering."

47. The averments made in ¶ 47 of the Petition for Review state conclusions of law to which no response is required.

RESPONSE TO COUNT ONE

48. Respondents incorporate by reference ¶¶ 1-47 of this Answer as if fully set forth herein.

49. DENIED. The Department issued the Memorandum expressing its opinion, but also stating that the determination is one to be made by the county boards of elections (citing to 25 P.S. §§ 2642(f) & (g)).

50. ADMITTED in part and DENIED in part. The Department did enclose a copy of the ACLU Letter with the Memorandum. It is DENIED that the Department adopted and disseminated a private entity's doctrine as if it was settled law in the Commonwealth. By way of further response, see the answer to ¶ 3, *supra*, which is incorporated herein by reference.

51. The averments made in ¶ 51 of the Petition for Review state conclusions of law to which no response is required.

52. The averments made in ¶ 52 of the Petition for Review state conclusions of law to which no response is required.

WHEREFORE, Respondents Pedro A. Cortés, Secretary of the Commonwealth, and Chet Harhut, Commissioner of the Bureau of Commissions, Elections and Legislation, respectfully request that this Honorable Court dismiss Petitioners' Petition for Review.

NEW MATTER

53. Respondents incorporate by reference ¶¶ 1-52 of their Answer as if fully set forth herein.

54. Petitioners seek declaratory and injunctive relief against the Secretary of the Commonwealth and Commissioner Harhut. However, Petitioners make specific allegations against Allegheny County in ¶¶ 34-38 of the Petition for Review, but they did not include Allegheny County or its board of elections as a party. Due to the allegations in the Petition for Review against Allegheny County, Allegheny County and/or its board of elections is an indispensable party to this action for declaratory judgment. Absent joinder of Allegheny County or its board of elections, this Court lacks jurisdiction to proceed under the Declaratory Judgments Act.

55. The relief sought by Petitioners would directly impact all 67 county boards of elections, which have primary responsibility for the conduct of elections in general and polling place activity in particular. See 25 P.S. §§ 2642(f) and (g). For this reason the Memorandum emphasizes that the regulation of activity within a polling place is the responsibility of the county boards of elections and their judges of elections, not the Secretary or the Department. Petitioners' failure to join any county board of elections or a class of counties means that

Petitioners have failed to join the only entities that have the power and duty to regulate polling places. The counties are necessary and indispensable parties to this case, and this Court lacks jurisdiction and power to consider this matter on its merits or to consider a proper statewide remedy.

56. Petitioners allege that the Memorandum will cause confusion at the polling places and that, “[t]raditionally, election officials have prohibited voters from entering polling places while wearing t-shirts, stickers, buttons or other paraphernalia endorsing specific candidates for office.” Petition for Review, ¶ 14. However, Petitioners also allege in ¶ 35 of the Petition for Review that the Allegheny County Board of Elections permits voters to wear a candidate’s shirt, button or sticker into the voting booth. Therefore, the confusion over how to define “electioneering” preceded the Memorandum, and the Memorandum merely gave the Department’s opinion on how “electioneering” may be interpreted, after several requests to do so, since it is not defined in the Election Code.

57. The Department’s intention in issuing the Memorandum was to emphasize that no duly registered voter should be turned away from the polls and that county elections officials should train their district election officials on this subject so that they implement a policy uniformly and without discrimination throughout their county. Though Petitioners allege that there is harm in individuals wearing buttons or tee shirts to the polling places, Respondents maintain that there is greater harm in denying an individual the right to vote because that individual wore a certain tee shirt to the polling place.

58. The decision whether to allow individuals to wear a tee shirt or a button into the polling place has been, and remains, one for the county board of elections and the judges of elections in their respective precincts, in accordance with the Election Code at 25 P.S. §§ 2642(f)

& (g). Some counties, such as Allegheny County (as Petitioners have specifically pointed out), allow voters to wear a tee shirt or a button into the polling place. Thus far, the “rabbleroxing” and “synchroniz[e]d . . . battalio[n]s of like-minded individuals” showing up at the polls has not occurred. Therefore, the harm that Petitioners allege has not been experienced and is entirely unlikely to occur.

WHEREFORE, Respondents Pedro A. Cortés, Secretary of the Commonwealth, and Chet Harhut, Commissioner of the Department’s Bureau of Commissions, Elections and Legislation, respectfully request that this Honorable Court dismiss Petitioners’ Petition for Review

DATE: September 25, 2008

By: 

ALBERT H. MASLAND
Attorney I.D. No. 36511
Chief Counsel

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Harhut, Commissioner of the Bureau of
Commissions, Elections and Legislation*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft and John Dickinson,
Petitioners,

v.

Chet Harhut, Commissioner,
Bureau of Commissions, Elections and
Legislation, and Pedro A. Cortés,
Secretary of the Commonwealth of
Pennsylvania

Respondents

Docket No. 451 M.D. 2008

VERIFICATION

Chet Harhut hereby states that he is one of the Respondents in the above-captioned matter; that he is authorized to take this verification and that the facts set forth in the foregoing Answer and New Matter are true and correct to the best of his knowledge, information and belief.

The undersigned understands that the statements made therein are subject to the penalties of 18 Pa. C.S. §4904 for unsworn falsification to authorities.

Date: September 25, 2008



Chet Harhut

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Kraft and John Dickinson, :
Petitioners, :
 :
v. : Docket No. 451 M.D. 2008
 :
Chet Harhut, Commissioner, :
Bureau of Commissions, Elections and :
Legislation, and Pedro A. Cortés, :
Secretary of the Commonwealth of :
Pennsylvania :
Respondents :

CERTIFICATE OF SERVICE

I, Albert H. Masland, attorney for Respondents in the above-referenced matter, hereby certify that I served via facsimile and regular mail, on September 25, 2008, the Answer and New Matter upon the following:

Linda A. Kerns, Esquire
Law Offices of Linda A. Kerns
1500 Market Street, 12th Floor, East Tower
Philadelphia, PA 19102



Albert H. Masland, Esquire
Chief Counsel
Pa. Sup. Ct. ID # 36511
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Office of Chief Counsel
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(717) 783-0736

Attorney for Respondents

Dated: September 25, 2008

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Counsel for Petitioners

*Admitted pro hac vice.

**Not admitted in Pennsylvania.

Pro hac vice application pending.

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

**PETITIONERS' APPLICATION FOR LEAVE TO FILE A REPLY IN SUPPORT OF
THEIR EMERGENCY APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF
A PRELIMINARY INJUNCTION**

Petitioners request leave of the Court to file a Reply in support of their Emergency Application for Preliminary Injunction for Special Relief in the Nature of a Preliminary Injunction and for Expedited Review (“Emergency Application”), dated May 8, 2020. Petitioners’ proposed Reply is attached as Exhibit A.

Petitioners submit this Reply to address arguments raised in Respondents’ and Proposed Intervenor’s Opposition briefs, and to bring to the Court’s attention recent developments concerning the processing and delivery of mail ballots which are relevant to Petitioners’ Emergency Application. The submission is supported by good cause and is intended to assist the Court in resolving the Emergency Application.

Petitioners further submit that the developments set forth in their proposed Reply and accompanying exhibits and declarations, along with the May 22, 2020 Supplemental Declaration of Jonathan Marks submitted by Respondents, confirm that Petitioners are entitled to emergency relief.

Dated: May 28, 2020

Marc E. Elias*
Uzoma N. Nkwonta*
Emily R. Brailey*
Stephanie I. Command*
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

ORDER GRANTING APPLICATION FOR LEAVE TO FILE REPLY
BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR
PRELIMINARY INJUNCTION

AND NOW, this day of , 2020, upon consideration of Petitioners' Application for Leave to File a Reply in Support of Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction ("Emergency Application"), it is hereby **ORDERED** that the Application is **GRANTED**. The Chief Clerk is directed to accept for filing the Reply in Support of Petitioners' Emergency Application that was submitted as Exhibit A to Petitioners' Application for Leave to File a Reply.

BY THE COURT:

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Notaries,

Respondents.

No. 266 MD 2020

PETITIONERS' REPLY IN SUPPORT OF EMERGENCY APPLICATION
FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY
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As Respondents’ own admissions and recent statements from county election boards have shown, there is nothing speculative about Petitioners’ claims. Election officials are struggling to keep up with the over 1.8 million mail ballot requests submitted by Pennsylvania voters; applications are not being processed with enough time for voters to receive ballots and send them back by Election Day; the United States Postal Service is in fact facing delays of up to 10 days; counties are still sounding the alarm with increasing urgency; and now, with less than a week before the election, even Respondents cannot deny that people will be disenfranchised for the same reasons Petitioners identified three weeks ago in their Emergency Application.

Pennsylvania voters and election officials can ill-afford to wait and see whether the ballots they requested will arrive on time, or whether they will be delivered by 8:00 pm on June 2. One county has even taken the extraordinary step of filing an emergency petition in its Court of Common Pleas seeking an extension until June 9 to receive mail ballots—the same timeframe in which counties accept ballots from military and overseas voters, and which Petitioners have requested here—because of delays in processing ballot requests and mailing ballots to voters.¹ Ex. 6, ¶¶ 8-15. The mail ballot application and delivery delays, however, are not limited to one county, nor are the effects of the COVID-19 pandemic. So even assuming a Court of Common Pleas could provide relief (though the recent dismissal of the Montgomery County Board of Elections’ Petition casts doubt on that proposition) relying on a piecemeal approach subjects voters elsewhere who are affected by similar burdens on the franchise to varying standards, depending on where they live and the willingness of their county boards to file suit. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016) (“Hurricane Matthew’s effects are not

¹ The Court of Common Pleas dismissed this petition without explanation on May 27, 2020.

circumscribed to one region of the state . . . [i]t would be grossly inappropriate, for example, to hold that aspiring eligible voters in Jacksonville could register later than those in Pensacola.”).

The Commonwealth is running out of time to protect voters from widespread disenfranchisement, but this Court has the authority to act. Petitioners seek modest, emergency accommodations for the June 2 primary to allow ballots that were mailed by June 2 to be counted if they are delivered to the county board of elections by June 9, and to permit voters, especially those who are vulnerable to the effects of COVID-19, to seek assistance in delivering their ballots rather than incur the very real risk that their ballots will not be delivered on time through the mail. Neither form of relief is extraordinary; both measures are already built into the electoral process and have been implemented for years by election officials for certain categories of voters. *See* 25 Pa.C.S. § 3511(a) (election officials must count military-overseas ballots delivered by the seventh day after the election); *id.* § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135 (Pa. Commw. Ct. 1995) (allowing disabled voters to designate an agent of their choice to deliver their mail ballot). Extending these safeguards to additional voters is not only a feasible remedy, but it imposes minimal burdens at best that are far outweighed by the consequences of allowing the election to proceed despite the counties’ and Respondents’ warnings of potential disenfranchisement.²

² This Memorandum addresses arguments made by Respondents and Proposed Intervenors. The Proposed Intervenors consist of: Reps. Mike Turzai, Speaker of the Pennsylvania House of Representatives, and Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives (collectively, “House Leaders”); Senators Joseph Scarnati, President Pro Tempore and Jake Corman, Senate Majority Leader (collectively, “Senators”); and Republican Party of Pennsylvania, Republican National Committee, and National Republican Congressional Committee (collectively, “Republican Committees”).

ARGUMENT

Petitioners meet all six of the required elements for preliminary injunctive relief.³ Contrary to Respondents' and Proposed Intervenors' claims, the Emergency Application is supported by extensive evidence, which has now been corroborated by Respondents and county election officials who acknowledge that some voters will be disenfranchised absent court-ordered relief. Such denial of the franchise violates the Pennsylvania Constitution, and injunctive relief that protects the right to vote plainly serves the public interest. What is more, Petitioners' Emergency Application is quite modest and narrowly tailored in seeking to extend safeguards and procedures that are already in place and are currently being implemented for certain categories of voters. Enforcing the fundamental right to vote will prevent widespread disenfranchisement, an injury that far outweighs any corresponding burden to the Commonwealth. This Court should therefore grant Petitioners' Emergency Application.

I. Petitioners have demonstrated a clear right to relief.

A. Petitioners' claims are not speculative and have been corroborated by Respondents' own evidence.

When Petitioners filed their Emergency Application, counties had warned that their limited resources were no match for the surge of mail ballot applications. Moreover, it was already clear that COVID-19's impact on the U.S. Postal Service threatened to delay the subsequent delivery of mail ballots—both from county election boards to voters and then back to the counties. As Election Day nears, it has become unmistakably clear that the Commonwealth has failed to provide safe and reliable means to vote for many citizens.

³ Respondents challenge only three of the six elements required for preliminary injunctive relief, *see* Mem. Opp'n Prelim. Inj. at 19, thus Petitioners should be deemed to have satisfied the elements requiring a showing that (1) greater injury would result from refusing an injunction than granting it; (2) a preliminary injunction will, as closely as is possible, restore the parties to their status as it existed immediately prior to the COVID-19 pandemic, and (3) a preliminary injunction will not adversely affect the public interest.

1. In-person voting in the Commonwealth is severely restricted because of COVID-19 and counties' plans to consolidate polling places.

Petitioners' Emergency Application explained that counties planned to significantly consolidate polling places per the authority granted in Act 12. Mem. App. Prelim. Inj. at 6-7. And doing so would limit access to in-person voting and, by packing more voters into fewer spaces, would also increase the health risks for those who appear at the polls. To date, counties have not only consolidated their polling places by the 60 percent permitted under Act 12, but some have consolidated polling locations by nearly 90 percent with authorization from the Secretary. Ex. 1. In response to one county's consolidation efforts, the House Leaders even acknowledged that significantly reducing the number of polling places "threatens public health" and "artificially concentrates voters" into fewer locations, which "is completely at odds with the recommendation of social distancing," and "undermines the core of our Republic—free and fair elections." Ex. 2 at 3.

2. Counties are unable to keep up with mail ballot requests.

There is nothing speculative about the backlogs of mail ballot applications and the delays in distributing mail ballots as Respondents' own data shows. According to Respondents, on May 22, nearly 173,000 applications were still pending, and almost 70,000 ballots had yet to be mailed to voters whose applications were approved. Marks Supp. Decl. ¶¶ 6, 7. And as of this afternoon, the number of voters who have applied for absentee ballots has grown to nearly 1.8 million. Meredith Supp. Decl. ¶ 12.

If there was any doubt that this backlog is insurmountable under current conditions, some counties have even confirmed that they will not be able to deliver ballots to voters in time for them to be counted on June 2. In Mercer County, officials are barely keeping pace with the incoming mail ballot requests, stating "[a]s fast as we can put them out, they're coming in even faster." Ex. 3.

Mercer County does not foresee a lull before Election Day because it predicts that requests for mail ballots will double immediately before the deadline. *Id.*; Ex. 4 (counties across the state expect a surge of requests before the deadline). Indeed, between May 17 and 26, at least 501,117 new mail ballot requests were submitted, with at least 73,019 submitted on May 26 alone. Meredith Supp. Decl. ¶ 13; *see also* Ex. 4 (tens of thousands of voters have been applying for mail ballots every day leading up to the deadline). At least a week or more is required for counties to approve a mail ballot application, print and prepare the ballot, and mail it to the voter. Ex. 4. This timing does not account for the time that the U.S. Postal Service requires to actually deliver the ballots to and from voters and counties.

In Allegheny County, the situation is even more dire. The second most populous county in the Commonwealth is facing a backlog of at least 80,000 mail ballots waiting to be sent to voters. Ex. 5. And even before the final delivery of applications on Tuesday's deadline, Philadelphia County faced almost 20,000 outstanding ballot applications to process, and almost 17,000 approved applications for which ballots still had to be sent to voters. Marks Supp. Decl. ¶ 15. Delaware County has publicly stated that voters will be receiving ballots close to or on Election Day. Ex. 4. These backlogs exist despite county employees working upwards of 14-16 hours per day to process applications. *See, e.g., id.*

Montgomery County has taken the extraordinary step of filing an emergency petition, apparently based on the recommendation of the Department of State ("DOS"), in the Court of Common Pleas requesting permission to count ballots received by June 9, 2020. Ex. 6 ¶ 17. Not only is Montgomery County facing backlogs and delays, but now hundreds of ballots have been returned to the Board of Elections because of a glitch in the SURE system. *Id.* All of the wrongly returned ballots were from addresses that included apartment or unit numbers, disproportionately

affecting renters who are often lower income voters. *Id.*; Ex. 7. That Petition was dismissed without explanation earlier today. Ex. 8.

County officials have been clear that these backlogs mean that many voters will not be able to receive a ballot and send it back in time to arrive on June 2. Ex. 9; *see also* Ex. 4 (Delaware County Commissioner stating she is “very worried that people are going to be disenfranchised”); Rozzi Decl. ¶ 7. Worse still, some of the counties that have come forward are located in areas where the prevalence of COVID-19 is highest. Marks Supp. Decl. ¶ 4. Voters are therefore caught in a Catch 22: voting by mail imposes a significant risk of disenfranchisement, while voting in person imposes significant health risks, especially given the consolidation of polling places. Absent the Court’s intervention, tens of thousands of Pennsylvania voters (and perhaps even more) will be left without a safe, reliable option to exercise their right to vote and to a free and equal election.

3. U.S. Postal Service delivery of mail ballots has been delayed.

Even in an alternate reality where all counties were able to keep up with mail ballot requests, Respondents have also conceded that mail delivery delays have prevented voters from receiving their mail ballots in a timely manner. In Montgomery County, the DOS reports that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes” and “these delays make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” Marks Supp. Decl. ¶ 12. Montgomery County election officials attribute these delays to mail delivery and stated in their Petition that “the United States Post Office confirmed that absentee and mail-in ballots . . . could take up to ten days to be delivered.” Ex. 6 ¶ 11; *see also* Rozzi Decl. ¶ 6.

These statements not only corroborate Petitioners’ claims, but they also mirror remarks made by Secretary Boockvar at a town hall meeting earlier this month where she claimed that mail

delivery is taking twice as long as usual in the Commonwealth.⁴ Indeed, Petitioner Dwayne Thomas waited almost two weeks before receiving his ballot on May 26; Mr. Thomas now has less than one week for his ballot to be received by June 2, but mail delivery in the Commonwealth may take up to 10 days. Thomas Decl. ¶ 3-4; Rozzi Decl. ¶ 6; Ex. 6 ¶ 11.

The effects of delayed mail delivery and mail ballot application backlogs on voters' access to the franchise cannot be reasonably disputed. As the application deadline neared, counties witnessed a large surge in mail ballot requests, including at least 501,117 between May 17 and 26 and at least 73,019 submitted on May 26 alone. Meredith Decl. ¶ 13. Already at capacity, the counties and the U.S. Postal Service cannot process these applications and get them to the voters in time for the voters to then mail them back so that the counties will receive them by June 2. Rozzi Decl. ¶ 7. Tens of thousands of voters (including Petitioner Thomas), and potentially more, are at risk of disenfranchisement absent relief from this Court.

B. Petitioners are likely to prevail on the merits.

Almost by the hour, undisputed, corroborating evidence is mounting to show that the threat of disenfranchisement that Petitioners sought to address in their Emergency Application is imminent. Because there can be no more doubt as to the evidence that supports their claims, Petitioners are likely to succeed in their election-specific, as-applied challenge to the Commonwealth's failure to provide access to a free and equal election during the COVID-19 pandemic.

⁴ May 6 Town Hall, Secretary Boockvar remarks at 12:10, <https://www.senatorhughes.com/newsroom/audio/>

1. Petitioners are likely to succeed in showing that the Commonwealth has denied voters access to a free and equal election.

Petitioners are not asking for a “perfect” election, or to relieve general, incidental burdens on the right to vote, but instead request that Respondents take reasonable actions to ensure that Pennsylvanians are afforded a free and equal election as COVID-19 is toppling normal election procedures this year. Respondents rely on *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), to argue that the Free and Equal Elections Clause does not protect the right to vote generally, but instead targets only the exclusion of specific classes, vote dilution, or gerrymandering. Mem. Opp’n Prelim. Inj. at 36-37. The language of the opinion does not support Respondents’ restrictive interpretation of the Free and Equal Elections Clause; if anything, *League of Women Voters* illustrates its vast breadth:

[E]lections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; ***when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.***

178 A.3d at 810 (quoting *Winston v. Moore* 91 A. 520, 523 (Pa. 1914)) (emphasis added); *see also id.* at 814 (holding that the Free and Equal Elections clause reaches “all aspects of the electoral process, to the greatest degree possible”). *League of Women Voters* makes clear that the Free and Equal Elections clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* (quotation and citation omitted); *see also City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1324 (Pa. 1986) (holding that the Free and Equal Elections Clause protects against regulations that deny the franchise). While the Clause may have been applied in prior redistricting or vote dilution cases, nothing about its text or the courts’ opinions in those cases implies that the Clause is so limited; in

fact, they plainly suggest the opposite: that the Free and Equal Elections Clause applies in this context, where voters' rights to cast their ballots and have those ballots counted are impaired or denied. *Winston*, 91 A. at 523.

The present circumstances have laid bare the real threat of disenfranchisement in the Commonwealth, and, contrary to the Republican Committees' claims, it is simply not relevant that COVID-19 was not of the Commonwealth's making. *See, e.g., Fla. Democratic Party*, 215 F. Supp. 3d at 1258 (extending Florida's voter registration deadline in response to a hurricane). As Petitioners already explained in their Emergency Application, this Court and many others have agreed that states must institute emergency procedures during a natural disaster to protect the right to vote. Mem. App. Prelim. Inj. at 19-21 (citing cases). Proposed Intervenors make no attempt to deny this, and Respondents, to their credit, do not advance this argument for good reason. Having encouraged its citizens to vote by mail, the Commonwealth must provide them accessible means to do so safely and reliably during the current pandemic. *Cf. Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted."). Proceeding without additional safeguards, given the inevitable disenfranchisement that awaits many voters who cast mail ballots, does not guarantee the kind of free and equal election that the framers contemplated.

The Court should also reject the House Leaders' suggestion that it must wait until disenfranchisement occurs or until chaos ensues on Election Day before issuing relief. *See House Leaders' Mem. Opp'n Prelim. Inj.* at 13. The threats to the franchise that Petitioners have identified are all but certain to occur: increases in mail ballot applications *have* led to backlogs, counties *do* need more time to process mail ballot applications, and mail ballot deliveries *have been* delayed.

Supra, I.A.2-3. No legal principle or authority requires citizens to sit back and allow themselves to be disenfranchised before enforcing their constitutional right to vote. *See, e.g., Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F.Supp.3d 1251, 1267–68 (N.D. Ga. 2018) (rejecting argument that plaintiffs’ claims of disenfranchisement were “conjectural and hypothetical” because there was a “very substantial risk of disenfranchisement” with Georgia’s exact-match voter-registration system); *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008); *Applewhite v. Commonwealth*, 54 A.3d 1, 5-6 (Pa. 2012) (Todd, J., dissenting) (explaining that lower court abused its discretion when it failed to find irreparable harm resulting from voter identification law because disenfranchisement “was likely to occur”); *Applewhite*, 54 A.3d at 9 (McCaffery, J., dissenting) (“[W]here the potential for harm to the cherished right to vote to uncountable numbers of citizens is substantially threatened, and where this harm cannot be remedied by any post-election lawsuit, contrary to the Commonwealth Court’s astounding belief, the need for immediate judicial action cannot be denied.”).

2. The failure to permit mail ballot delivery assistance during the COVID-19 pandemic violates the Equal Protection Clauses of the Pennsylvania Constitution.

As an initial matter, the prohibition on mail ballot delivery assistance during the COVID-19 pandemic imposes a severe burden on the right to vote because it denies voters access to the franchise. When restrictions on the right to vote are severe, those restrictions “must be narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted). Otherwise known as strict scrutiny. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (“[W]hen a state’s classification ‘severely’ burdens the fundamental right to vote . . . strict scrutiny is the appropriate standard.”). Because voters do not have safe and reliable access to in-person or mail voting—since in-person voting or returning ballots by hand risks their health and returning ballots by mail requires voters to incur a significant

risk of disenfranchisement—the absence of ballot delivery assistance amounts to a severe burden on the right to vote. At least one court under similar circumstances recently recognized that a law limiting (not even banning) ballot delivery assistance burdened the right to vote and triggered strict scrutiny. *See Ex. 10 (Driscoll et al. v. Stapleton*, No. DV 20-408, Conclusions of Law ¶ 4 (Mt. Dist. Ct. May 22, 2020)).

The cases cited by Respondents are inapposite, as the burdens at issue in those cases did not threaten to completely disenfranchise *any* voters, let alone a number comparable to those at risk here. *See In re Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) (reviewing requirement that potential candidates for Governor in primary election obtain 100 signatures from ten counties); *In re Nader*, 905 A.2d 450, 459 (Pa. 2006) (reviewing assignment of stenographer and transcript costs to candidates and their campaigns); *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (reviewing certification of electronic voting machines). When courts are confronted with laws that threaten complete disenfranchisement, even when those laws affect far fewer voters than will be affected in the upcoming election, they have held that such laws impose a severe burden on the franchise. *See, e.g., Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted “substantial” burden on voters); *Ga. Coal. for People’s Agenda, Inc.*, 347 F. Supp. 3d at 1264 (finding severe burden where 3,141 individuals ineligible to register); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding severe burden when fewer than 100 qualified voters were disenfranchised).

Even if the Court finds that the burden is less than severe, under the *Anderson-Burdick* balancing test the burden, however slight, must be justified by sufficiently weighty governmental interest. Respondents’ and Proposed Intervenors’ arguments demonstrate that the purported state

interests here are only loosely related, if at all, to ballot delivery and are certainly not sufficient to outweigh the risk of disenfranchisement. For one, they rely heavily on *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, a decision that simply interprets the language of the statute imposing the ban, and describes the potential policy concern that may have motivated its adoption, but says nothing about the weight of those concerns nor did the court attempt or have any reason to balance those concerns against any countervailing voter interest. 843 A.2d 1223, 1232 (Pa. 2004). The *Anderson-Burdick* analysis requires the Court to determine whether the interests advanced in favor of a regulation are sufficiently weighty to justify its burden on voters, and on this point, this Court’s decision in *DiPietrae v. City of Philadelphia* is far more instructive. 666 A.2d at 1135. The constitutional (both state and federal) rights of Pennsylvania voters to participate in the electoral process during a public health pandemic are not meaningfully distinguishable from the rights of disabled voters that this Court sought to protect in *DiPietrae*. *Id.* at 1135. In striking the balance between the two, this Court held that a “proviso” limiting the number of households that an agent could serve was “a reasonable means of balancing the rights of a disabled person who wishes to vote with the public need to insure a fair election.” *Id.* at 1135-36. Voters who, because of the health risks posed by COVID-19, have opted (and in some cases were forced, in light of the severe polling place consolidations) to vote by mail are entitled to no less protection. *See id.*

Respondents and Proposed Intervenors point to no evidence that *ballot delivery assistance* which is already occurring in Pennsylvania has led to more fraud. Instead, they attempt to lump all forms of absentee voting fraud together to justify a specific, narrow restriction that has nothing to do with, and would not have been prevented by, rules that require only the voter to send their absentee ballot to county election boards. Indeed, the Commonwealth’s asserted interest in preventing fraud does not allow it to impose restrictions indiscriminately—there must be a

sufficient connection between the regulation and the fraud it seeks to address, and that connection is absent here because the ban on ballot delivery assistance is an ineffective fraud-prevention tool. *See Applewhite*, 2014 WL 184988, at *21 (noting absence of “a nexus between photo identification . . . and the integrity of elections[] when prior elections accepted a number of types of proof to verify identity”). Pennsylvania voters can submit their ballots by mail, or, in some counties, in a dropbox without anyone knowing who physically delivered the ballot. Indeed, that is how the perpetrators of the fraudulent scheme in North Carolina’s Ninth Congressional District race avoided detection: they delivered ballots through the post office or returned them “back to the voter for hand-delivery to the local Board of Elections.” N.C. State Bd. of Elections Order ¶ 65, Ex. 11. It defies logic to suggest that a ban on obtaining ballot delivery assistance (even from immediate family members), which would be undetectable in many cases, would deter individuals who plan to forge ballots and commit fraud. Instead, the requirement unduly burdens and punishes those who attempt to follow the letter of the law and are least likely to be engaged in misconduct.

In any event, courts across the country have found assertions of voter fraud that rely on isolated incidents to be insufficient to support laws suppressing ballot delivery assistance. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1007 (9th Cir. 2020) (rejecting the argument that a single incident in North Carolina established that Arizona had a legitimate interest in outlawing non-fraudulent ballot collection); Ex. 10 (*Driscoll et al. v. Stapleton*, No. DV 20-408, Conclusions of Law ¶ 4 (Mt. Dist. Ct. May 22, 2020)); *cf.* Ex. 12 (*Priorities USA et al. v. Nessel*, No. 19-13341 (E.D. Mich. May 22, 2020) (noting that vague assertions of voter fraud were not a state interest sufficient to support a motion to dismiss). Even if the Court assigns those isolated instances of fraud some weight, neither Respondents nor Proposed Intervenors have shown that the ballot delivery assistance ban was necessary to prevent them. Indeed, they cannot make such a

claim because even the instances of fraud they identified occurred with the ban in place, and would still be illegal even if the ban were no longer the law. *See Hobbs*, 948 F.3d at 1046; McCool Supp. Decl. ¶¶ 4, 5.

Finally, Respondents' argument that a suspension of the ban on ballot delivery assistance would be unworkable lacks any basis in fact. The Commonwealth has permitted third parties to deliver absentee ballots on behalf of certain categories of voters for well over two decades. *DiPietrae*, 666 A.2d 1132. Election officials have undoubtedly developed procedures to receive these ballots from third parties—as such allowances were, and still are, required by law—and Respondents cite no evidence suggesting that those procedures could not be applied to voters affected by COVID-19 who require assistance to vote by mail.

3. This case is distinguishable from *Disability Rights*.

Proposed Intervenor's attempts to draw conclusions from the Supreme Court's dismissal order in *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020 (May 15, 2020) (“*DRP*”) are misplaced. As Petitioners explained in their Memorandum on this Court's jurisdiction, the *DRP* Order did not explain the Supreme Court's reasons for its dismissal and this case involves different legal claims and evidence, thus Respondents' and Proposed Intervenor's attempts to invoke that ruling here are entirely conjectural. *See also* Mem. Resp. Jurisdiction at 9 n.5.

To the extent the Supreme Court's dismissal was based on the absence of evidence that the alleged harm was imminent, *Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020) (Wecht, J., concurring), that is plainly not the case here. As explained above, Petitioners' Emergency Application is accompanied not only by concrete evidence and supporting declarations, but is also corroborated by Respondents' own submissions and public statements from county election boards. As Justice Wecht explained in his concurrence in *DRP*: “actual evidence of disruption in the United States Postal Service's mail delivery service may be

probative of Petitioners' constitutional claims, and would be relevant to a future challenge on similar grounds." *Id.*

C. Absent an injunction, Petitioners and other Pennsylvania voters will suffer irreparable harm.

Absent an injunction, tens of thousands of eligible votes (and perhaps more) will be discarded at 8:01 pm on June 2. The Petitioners in this case, and thousands of other voters, are facing real, irreparable harm. *See Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986). Petitioner Thomas, for instance, will be irreparably harmed if the requested injunction is not granted because the evidence confirms that mail ballot delivery will be delayed, but Mr. Thomas mailed his ballot only six days before election day. Thomas Decl. ¶ 4. Though he mailed his ballot well before June 2, there is a real risk that it may nonetheless arrive after Election Day and he will be disenfranchised. And there are tens of thousands more like him.

Respondents and Proposed Intervenors must burrow quite deep into the sand to deny the breadth of concrete evidence—submitted by Petitioners *and* Respondents—foreshadowing disenfranchisement. It is now clear that tens of thousands of applications need to be processed and ballots need to be sent in the week before the primary, that processing the applications and sending ballots to voters may take the counties at least a week to complete, and that mailing the ballots may take up to—or more than—seven days each way. Marks Supp. Decl. ¶¶ 6, 12, 13, 15-16; Meredith Supp. Decl. ¶ 12; Rozzi Decl. ¶ 6; Ex. 4. And, as previously explained, mail service is delayed by much more than that. Ex. 6. At least one county has come forward and asked the Commonwealth to extend the deadline by which they can count votes to June 9. *Id.* This is concrete evidence that demonstrates a real and imminent risk of irreparable harm. *League of Women Voters of N.C.*, 769 F.3d at 247 (“[O]nce the election occurs, there can be no do-over and no redress,” and

thus the injury that Petitioners will face absent an injunction will be irreparable). Neither Respondents nor Proposed Intervenors offer persuasive evidence or authority claiming otherwise.

D. Petitioners' requested injunction is reasonably suited to abate the elevated threat of disenfranchisement in the upcoming elections and is not factually impossible.

Petitioners are not asking this Court to upend the electoral process; quite the opposite. The Emergency Application seeks safeguards that are already built into the Pennsylvania's Election Code and are currently being implemented for certain categories of voters (and have been for years). *See, e.g.*, 25 Pa.C.S. § 3511(a) (election officials must count military-overseas ballots delivered by the seventh day after the election); *id.* § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); *DiPietrae*, 666 A.2d at 1135 (allowing disabled voters to designate an agent of their choice to deliver their mail ballot). The requested relief protects the franchise using already-existing procedures to minimize the risk of large-scale disenfranchisement from mail service disruptions and ballot processing delays during the COVID-19 pandemic, which have also been upheld by other courts. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020) (granting stay but leaving intact district court order extending the received-by deadline for ballots submitted by Election Day). The Deputy Secretary for the DOS's Elections Commission acknowledges that this relief will allow more Pennsylvanians to vote during the pandemic. Marks Decl. ¶ 48 ("From a purely policy perspective, I agree with Petitioners that extending the deadline for receipt of ballots may be good policy under the circumstances, and, as with any extension, would increase the number of votes that are timely returned."); *id.* ¶ 49 ("I also agree that in the event of significant backlogs in application processing due to COVID-19, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline . . . might be necessary to avoid an undue

burden on the right to vote.”). Petitioners seek no more than what is required to ensure access to the franchise.

Any relief, moreover, must be granted statewide: COVID-19 does not recognize county lines or municipal boundaries, nor are the U.S. Postal Service’s well-recognized problems limited to a single locality. The challenges Petitioners have described and demonstrated with evidence place Pennsylvania’s entire electoral infrastructure at risk during these extraordinary circumstances. *See Fla. Democratic Party*, 215 F. Supp. 3d at 1258 (extending relief to whole state). And a seven-day window to ensure that delayed mail ballots can be counted is appropriate to prevent the specific harm that is resulting from the COVID-19 pandemic. Meredith Supp. Decl. ¶ 6. Far greater relief has been granted to abate constitutional violations triggered by extreme circumstances. *See, e.g., In re General Election-1985*, 531 A.2d 836 (Pa. Commw. Ct. 1987) (affirming the suspension of an election after extreme weather forced Washington County to declare a state of emergency); *Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969) (ordering a new election because of “excessively crowded conditions” at polling places).

Respondents and Proposed Intervenors attempt to poke holes in the relief Petitioners seek to no avail. The Senators argue that it is impossible to impose a postmark deadline on ballots that contain pre-paid postage, Senators’ Response at 50-51, but Petitioners’ Emergency Application does not seek relief in the form of prepaid postage. Even if it did, it is not impossible to both pay for the return postage on mail ballots and determine their timeliness based on when that ballot is mailed. *See Wash. Rev. Code* §§ 29A.40.091; 29A.40.110. In Washington State, if a postmark is missing or illegible, the ballot is counted when it is dated by the voter on or before Election Day. *Id.* § 29A.40.110. Although the Senators are almost correct—*business reply* mail is affixed with a barcode instead of stamped to cancel the postage, but an envelope that simply contains pre-paid

postage is stamped—they miss the forest from the trees. States that have postmark deadlines also have back-up plans for when postmarks are missing or illegible—indeed, *so does Pennsylvania*. See 25 Pa.C.S. § 3511(b) (election officials must accept military-overseas ballots with late or unreadable postmarks if the voter declares under penalty of perjury that the ballot was timely submitted); see also Alaska Stat. § 15.20.081; Cal. Elec. Code § 4103; 10 Ill. Comp. Stat. Ann. 5/19-8; Iowa Code §§ 53.17, 53.17A; Md. Code Regs. 33.11.03.08; Wash. Rev. Code § 29A.40.110; W. Va. Code § 3-2-6.⁵

The Supreme Court of Pennsylvania has “aptly recognized[] the fundamental rights guaranteed by our organic charter ‘cannot lawfully be infringed, even momentarily.’” *League of Women Voters v. Commonwealth*, 181 A. 3d 1083, 1085 (Pa. 2018) (quoting *Pap’s A.M. v. City of Erie*, 571 Pa. 375, 402 (2018)). Here, Petitioners are seeking reasonable relief to protect the right to vote during a public health crisis and judicial intervention is necessary to ensure that the Commonwealth implements adequate safeguards to allow its citizens to participate safely and effectively in the political process.

E. Greater injury would result from refusing the injunction than from granting it, and the requested injunction will not substantially harm the other interested parties.

The balance of the robust factual background discussed above, which details the injuries Petitioners and countless Pennsylvania voters will face absent an injunction, weighs heavily in Petitioners’ favor. *Marcellus Shale Coal. v. Dep’t of Env’tl. Prot. of Commonwealth*, 185 A.3d 985,

⁵ Respondents aver that permitting ballot delivery assistance will actually contribute to the spread of the virus. Mem. Opp’n Prelim. Inj. at 48. This suggestion is both unsupported by evidence and defies logic. Ballot delivery assistance could easily be achieved without defying social distancing: a voter could set their sealed absentee ballot on their porch right before the person assisting them in delivering or mailing it arrives. There is no contact required, and permitting it could result in fewer people attempting to return ballots in person to avoid the vagaries of mail delivery.

1014 (2018) (Donohue, J., Concurring and Dissenting); *see also Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016).

The ballot receipt deadline will not result in a cascade of complications and delays in the election management process, as Respondents and Proposed Intervenors suggest, and, tellingly, the county election boards that have weighed in do not echo the same sentiments. Their concern is the denial of the franchise that will occur absent relief from the Court. Counties would of course remain free to tabulate and report ballots in their possession on election night, and, once again, the relief sought here aligns with procedures already in place for military and overseas voters. *See* 25 Pa.C.S. § 3511(a).

The House Leaders’ and Senators’ reliance on *Maryland v. King*, 567 U.S. 1301 (2012) is also misplaced because whatever abstract harm the Commonwealth will suffer from the inability to conduct its elections as originally planned—as if COVID-19 does not exist—is far outweighed by the imminent threat to the constitutional right to vote. As the U.S. District Court for the Northern District of Georgia detailed in *Georgia State Conference of the NAACP v. Fayette County Board of Commissioners*, 118 F. Supp. 3d 1338, 1348 (N.D. Ga. 2015):

[*Maryland v. King*] did not involve voting rights; instead, it concerned the stay of a judgment that would have enjoined a state law regarding collection of defendants’ DNA prior to being convicted. In that case, Chief Justice Roberts noted that in addition to the general harm of enjoining a duly enacted state law, there was “ongoing and concrete harm to Maryland’s law enforcement and public safety interests.” 567 U.S. at 1301. Here, there are no attendant public safety concerns.

So too here. At most, *Maryland* suggests that the Commonwealth might face a “general harm” if a duly enacted state law is enjoined, but that is nowhere near tantamount to the irreparable injury voters will face if this Court does not grant relief.

Also distinguishable is *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), in which the U.S. Supreme Court cautioned that court orders can “result in voter confusion and consequent incentive to remain away from the polls,” which supposedly increases in risk “[a]s an election draws closer.” The underlying purpose of this so-called “*Purcell* principle” is to avoid “changing the electoral *status quo* just before the election,” which would cause “voter confusion and electoral chaos.” Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. St. U. L. Rev. 427, 428 (2016). But here, the electoral status quo *already* has been upended—not by any judicial order, but by the COVID-19 pandemic and the consequent delays in processing mail ballot requests and in delivering ballots. Petitioners’ requested relief will alleviate the burdens that the COVID-19 pandemic has injected into the electoral process and ensure that Pennsylvania voters have access to a free and equal election. Additionally, none of the response briefs offer any explanation as to why allowing additional time for ballots to be delivered—thereby expanding voters’ opportunities to return mail ballots—will result in voter confusion. To the extent that voters believe that the ballot receipt deadline still applies and return their ballots accordingly, their votes will, of course, still be counted. Ultimately, Petitioners’ requested relief will result in more voters being able to cast their ballots and ensures those ballots will be counted. Thus, *Purcell* is not applicable here.

F. A preliminary injunction will promote, not adversely affect, the public interest.

Neither aspect of Petitioners’ requested injunction will adversely affect the public interest, which “favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). Indeed, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (internal quotation marks omitted). Although the House Leaders suggest that denying the injunction would preserve the integrity of the Commonwealth’s electoral process,

they fail to offer any argument—let alone evidence—regarding why counting ballots postmarked on or before Election Day would compromise election integrity in any way. *See McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1228 (4th Cir. 1995) (“electoral ‘integrity’ does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction” (quotation marks omitted)). Nor is there evidence that connects ballot delivery assistance, which has been permitted for some categories of voters for years, to increased fraud. Petitioners’ requested relief plainly serves the public interest.

G. An injunction will restore the parties to their status as it existed before the COVID-19 pandemic upended Pennsylvania’s elections.

The Commonwealth’s duty to hold, and voters’ ability to participate in, a free and equal election has been fundamentally altered by COVID-19, and thus action is required to restore the previous status. *See Ambrogi v. Reber*, 932 A.2d 969, 979 (Pa. Super. Ct. 2007). It makes no difference that a virus—rather than an act of government—is at the heart of the problem. Mem. App. Prelim. Inj. at 19-21 (collecting cases establishing that courts grant emergency election-related motions during national emergencies). Because Petitioners’ requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, to exercise their right to vote, and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution, Pa. Const. art. I, §§ 1, 26—this Court should issue the requested preliminary injunction.

II. Petitioners’ Emergency Application is timely.

Proposed Intervenors’ concerns about the timing of relief before the primary are also misplaced. First and foremost, Pennsylvania has never adopted the reasoning in *Purcell v. Gonzalez*, 549 U.S. 1 (2004). Proposed Intervenors admit as much. Senators’ Mem. Opp’n Prelim. Inj. at 41.

Second, Proposed Intervenors argue that Petitioners are seeking relief too close to an election, but at the same time suggest that Petitioners' harms are speculative, implying that Petitioners must wait to be disenfranchised before filing suit. Convenient as it may be to occupy both sides of this timing argument, it reveals the fundamental flaw in their position: it is *never* an appropriate time, according to Proposed Intervenors, to enforce the constitutional right to vote, particularly in response to newly developing impediments to voting. When a lawsuit is filed sufficiently in advance of an election, Proposed Intervenors argue that it's not ripe, or that the claims are too speculative. Senators' Mem. Opp'n Prelim. Inj. at 23-24. Then, as election day nears and the threat of disenfranchisement becomes imminent, they pivot to *Purcell, id.* at 41-43, and insist that it is too late to change anything. This transparent attempt to lock the courthouse doors on voters seeking access to the franchise is especially misplaced here, where Petitioners filed suit nearly six weeks before the primary election and sought emergency relief just over two weeks later. Many courts have granted similar relief within similar—or shorter—time frames. *See, e.g., Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *1 (N.D. Fla. Oct. 16, 2016) (motion filed less than five weeks before election); *Ga. Coal. for the People's Agenda v. Kemp*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (motion filed less than four weeks before election); *Fla. Democratic Party v. Scott*, No. 4:16CV626-MW/CAS, 2016 WL 6080225 (N.D. Fla. Oct. 12, 2016) (motion filed four weeks before election); *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008) (motion filed on Election Day). And the counties whose interests Proposed Intervenors repeatedly invoke have requested similar relief even going as far as to file an action (unsuccessfully) in the Court of Common Pleas. In light of the inevitable disenfranchisement that will result if the primary election proceeds without

Petitioners' requested safeguards, the Court can and should intervene to protect the constitutional right to vote.

CONCLUSION

For the foregoing reasons, along with the reasons set forth in Petitioners' related filings, including the Memorandum in Support of Petitioners' Emergency Application and Petitioners' Memorandum on this Court's Jurisdiction over Petitioners' Emergency Application, Petitioners respectfully request this Court grant their Emergency Application for Special Relief in the Nature of a Preliminary Injunction.

Dated: May 28, 2020

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

Civil Action No. 266 MD 2020

SUPPLEMENTAL DECLARATION OF DWAYNE THOMAS

I, Dwayne Thomas, declare as follows:

1. My name is Dwayne Thomas. I am over the age of 18 and I make this supplemental declaration based upon my personal knowledge and experience, and in support of Petitioners' application for preliminary injunction in the above-captioned matter.

2. I am 70 years old, a resident of Fayette County, and registered to vote in Pennsylvania. I am a retired mineworker. Currently, I am the President of the Pennsylvania Alliance for Retired Americans (the "Alliance").

3. As I indicated in my first declaration, I have voted in-person at the polls on election day for nearly every election for the past five decades. This year, COVID-19 has spread throughout Pennsylvania and I understand that people over the age of 65 are particularly vulnerable to the virus. I had wanted and hoped to vote in person at the polls for the June 2, 2020, primary. I was waiting to apply for a mail ballot until I could be sure that in-person voting was not a safe option

for me. I finally concluded that voting in-person is not viable because of the health threat, and on May 15, 2020, I mailed my application to vote by mail.

4. I received my ballot on May 26 and mailed it back on May 27. At this point, I am concerned that I will not have enough time to vote by mail before Election Day because mail delivery is delayed by more than a week. I have experienced delays in mail delivery in my area when I try to send letters or packages, and these delays have only gotten worse since COVID-19 began spreading across the county. I do not want to deliver my ballot in person because I am concerned about my health and the spread of COVID-19.

5. To avoid having my ballot delivered late, if I could, I would ask someone I trust to deliver my ballot for me. If my ballot did not have to arrive by Election Day to count, which would give me more time to mail the ballot, then I would feel more comfortable sending my ballot through the mail. And, as I mentioned in my prior declaration, if third party mail ballot delivery assistance were permitted, the Alliance would be involved in these efforts to ensure our senior members have an opportunity to vote safely in the primary and general election.

Executed on May 27, 2020

Respectfully submitted,
DocuSigned by:
Dwayne Thomas _____
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Dwayne Thomas

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
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Pennsylvania Alliance for Retired Americans,

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of the Bureau of Election Services and
Notaries

Respondents.

Civil Action No. 266 MD 2020

DECLARATION OF PAUL ROZZI

I, Paul Rozzi, declare as follows:

1. I served as a letter carrier with the United States Postal Service for over 32 years. I retired on December 31, 2016, and have been the President of the Pennsylvania State Association of Letter Carriers since that time. I remain familiar with postal service operations, including those that impact the delivery of mail ballots.

2. U.S. Postal Service mail delivery involves a multi-step process. When someone puts a letter in their mailbox, a letter carrier picks it up. It is then taken to a local post office. From the local post office, the mail is shipped to a processing plant. At the processing plant, clerks sort the mail by destination route. After it is processed, the sorted mail is then shipped back to the appropriate local post office for final delivery. Letter carriers pick the mail up from the local post office and deliver it to its final destination.

3. Beginning in 2012, following a reduction in the number of mail processing plants, mail delivery operations changed. Mail that was formerly processed locally is now processed in

regional processing plants. That means that even mail sent within the same county or even municipality must first be routed through a regional processing plant before it is shipped back to the original county or municipality for final delivery. For example, mail sent from Erie, Pennsylvania, is shipped either to Pittsburg, Pennsylvania, or Buffalo, New York, for processing, even if the final delivery destination for that mail is in Erie, Pennsylvania.

4. Because of this operational change, local mail is not delivered as quickly as it was prior to 2012. And because the mail must travel longer distances, there is more opportunity for disruptions, like weather or COVID-19, to delay its delivery. For that reason, the delivery times are not only delayed, they are increasingly variable. Adding to the variability, mail does not always take the same path to its ultimate destination.

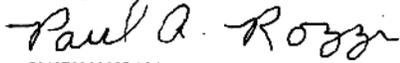
5. In addition to closing processing plants in 2012, as a cost-cutting measure, the Postal Service also reduced the number of postal worker shifts. Shifts are adhered to. So wherever in the process certain mail is at the end of the shift, it stays. That could mean that, just by chance, a piece of mail sent on the same day as a different piece of mail could take an extra day, or several days, if weekends or holidays are involved, to be delivered simply because the first piece of mail did not advance to the next stage of processing before the end of a shift and the second did.

6. Based on my knowledge and experience with the postal service, I would allot seven days for delivery of mail. It is possible that it will be delivered sooner than within seven days. But it is also possible that it will take more seven days, even for local delivery.

7. I have reviewed the Supplemental Declaration of Dr. Marc Meredith. Based on my knowledge and experience with the postal service, I am confident that there is a significant risk that mail ballots will not be delivered to voters in time for voters to return them by mail. There are currently 53,939 mail ballots (including absentee and mail-in ballots) that have been processed by

county election officials but have not yet been sent to voters. Those ballots must not only be delivered to voters, but voters must also send them back to their election officials. While some of those ballots may make it through the entire process outlined above—twice—before the June 2 primary election, many of those ballots will likely not make it through that process in time.

Date: May 27, 2020

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

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Kathy Boockvar, Secretary of the
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the Bureau of Election Services and Notaries,

Respondents.

Civil Action No. 266 MD 2020

SUPPLEMENTAL DECLARATION OF DR. DANIEL MCCOOL

1. I have been asked by the plaintiffs in this case to reply to the Republican Committees' "Memorandum in Opposition to Petitioners' Emergency Application...." In that memorandum, the Republican Committees claim that I "demonstrate[d] a shocking ignorance of Pennsylvania's election history" (p. 23) because I did not include in my report two cases of voter fraud, and a Pennsylvania Supreme Court case. I will respond to each of these.

A. *Marks v. Stinson* (1994)

2. It is instructive that the Republican Committees had to go back in time over a quarter of a century to find this case of voter fraud. One case hardly constitutes a "history of documented instances of 'massive absentee ballot fraud'" (p. 23). In my report, I cite the available evidence of voter fraud that has been compiled by the Heritage Foundation, going back to 1998. The Heritage Foundation data bank of proven voter fraud in Pennsylvania includes 22 cases. We may now add to that score the *Marks* case, out of tens of millions of votes cast. Presumably, if we went back in history another 200 years or so we might uncover additional cases. The point I made

in my report—that voter fraud is exceedingly rare in Pennsylvania—is not contradicted by the addition of the *Marks* case to this diminutive total.

3. The *Marks* case certainly qualifies as voter fraud, but it had nothing to do with a state-wide vote-by-mail system, and did not involve the issue of ballot collectors going door to door and simply collecting ballots from consenting voters. Rather, it involved absentee ballots that require a voter to provide an excuse—either absence from their jurisdiction or a physical disability. Some voters, primarily Blacks and Hispanic Americans, were purposely misled by the Stinson campaign: “A racially discriminatory strategy was conducted by the defendants by actively misrepresenting and abusing the use and vote by minority Latino, Afro-American, elderly and other absentee ballot voters” (*Marks v. Stinson*. 1994a: 14). The District Court did not “examine the validity of individual ballots” (*Marks v. Stinson*. 1994b: 886). Also, the ballots in question totaled somewhere between 11 and 1,000, out of 38,818 total votes cast in that jurisdiction.

4. Perhaps the most important aspect of the Stinson vote scam is that they got caught. There were procedures in place that were not followed, and this led to opportunities to cheat the system. Deviation from these procedures made it evident that one party was gaming the system. With proper safeguards, any electoral system that relies on mail delivery can be conducted with integrity and security; that is why the extremely low rate of voter fraud convictions in states that have vote-by-mail, or mail-centric, systems, is no higher than states that primarily rely on traditional polling places (see pp. 8-9 of my report).

B. The Murphy Case

5. The second case the Republican Committees provided was merely a newspaper account describing an indictment of former congressman Austin Murphy for tampering with absentee ballots at a nursing home in a 1997 primary election (Pitz. 1999). Murphy claimed he

simply assisted some people in a nursing home with filling out their ballots. Initially, nine ballots were challenged, and later 39 ballots were rejected due to mismatched signatures (Pitz. 1999: Heltzel. 1999). Murphy was initially charged with multiple crimes, but only convicted of violating the state election code. The case had nothing to do with ballot delivery assistance, and the tampered ballots did not change the outcome of the election (A.P. and Local Wire Reports). The Murphy case illustrates that there are multiple statutes on the books to use against perpetrators of the serious crime of vote fraud.

6. With just a few moments of research, the Republican Committees could have discovered that this case is one of the 22 cases I cite in my report from the Heritage Foundation data bank (see; https://www.heritage.org/voterfraud/search?state=PA&combine=&year=&case_type=All&fraud_type=All&page=0). Thus, it **was** included in my report, and not a result of “shocking ignorance.”

C. In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election

7. The third case that the Republican Committees cited was a state Supreme Court case regarding ballot collection. In that case, 56 absentee ballots were delivered by third parties on behalf of individuals who were not disabled. The parties did not address how the case would affect the outcome of the election, but the court presumed it did not because the ballots in question were not counted (pp. 235 of the decision). The Republican Committees, in their memorandum, cite this language from the Court’s decision: the ban on ballot collection provides “some safeguard that the ballot was filled out by the actual voter, and not be a perpetrator of fraud, and that once the ballot has been marked by the actual voter in secret, no other person has the opportunity to tamper with it, or even destroy it” (p. 24 of the memorandum). In this case, the only violation committed was that a small number of voters had someone else deliver their ballots for them.

There was no evidence that any voter's privacy was violated, no evidence that any of the ballots had been tampered with or destroyed, and no evidence that there was any perpetration of fraud. The only factor that made the 56 ballots ineligible was how they were transported.

D. Conclusion

8. It is important to note that all three of these cases involved the absentee balloting process. Absentee balloting has a long tradition in American voting history, with widespread use beginning in the Civil War: "Concerns about fraud generally were alleviated by tight procedural rules and requirements that absentee ballots be identical to conventional ones" (Keyssar. 2000: 151). Absentee balloting has been especially popular among active-duty service men and women (Hall. 2014: 141-165). President Trump recently touted the advantages of absentee voting: "Absentee Ballots [sic] are a great way to vote for the many senior citizens, military, and others who can't get to the polls on Election Day" (Trump. 2020).

9. Obviously, a very small number of absentee voter fraud cases should not indict the entire system; absentee voting remains an integral and respected part of America's electoral system. The same is true for voting by mail in general; a handful of cases, out of hundreds of millions of votes cast, is not an indication that the vote-by-mail process is inherently flawed.

10. Another lesson from these cases is that cheating in elections does not pay. Mr. Marks went to the state senate, but only a few months later was defeated by his Democratic opponent in the general election. Mr. Stinson probably would have won if he had not engaged in nefarious activities. In the Murphy case, part of his motive was to get his wife elected as a township election judge (a job that pays \$60/election). She declined that office amid the embarrassment caused by her husband's misjudgment. In the case of Mr. Harris in North Carolina's 9th District (the Republican Committees refer to this case on p. 23 of their memo), Mr. Harris failed in his bid

to get elected in a race that should have been a shoe-in. Engaging in voting fraud is more likely to result in a criminal conviction rather than an electoral victory. That is because states take the crime of voter fraud seriously because it strikes at the heart of our most fundamental right—the right to vote in free and fair elections. The extreme rarity of voter fraud in the U.S. is clear testimony that the prevailing ethos in American politics is for clean elections. The real “shocking ignorance” is the focus on a minute handful of voter fraud cases while ignoring the overwhelming evidence that fraud is not a significant problem in America. The voluminous academic literature I cited in my report clearly support this conclusion.

11. An additional conclusion regarding these cases is that they are not part of some wide-spread conspiracy to destroy election integrity; these are sporadic and isolated cases that failed in their objective of changing the outcome of an election. And in the few cases where illegal activity has taken place, they have involved members of both major parties; there is no partisan slant on the actual act of voter fraud, only on the *claims* regarding voter fraud.

12. Another important point is that none of these cases involved ballot delivery assistance. This leads to a hypothetical question: *Could* fraud be perpetrated while in the act of ballot assistance? Yes, but fraud can take place, and has taken place, in all forms of voting, including traditional in-person voting. People *could* try to steal ballot boxes, or stuff them with fake ballots. People *could* steal bags of mail coming from over-seas military personnel who are using absentee voting. People *could* bribe election officials to miscount ballots. But like nearly all of claims regarding voter fraud, these statements are *conditional*; they are based on *conjecture* that something might happen, even though it has either never happened in the past, or is so rare as to be a microscopic portion of all votes cast. And, on the very rare occasion when fraud occurs, it is dealt with decisively using existing laws that focus on criminal conduct.

13. In my opinion, the Republican Committees' memorandum reinforces the conclusions reached in my report; they had to reach into the last century to find two isolated cases of voter fraud. Those cases, added to the 21 other cases cited in my report—out of tens of millions of votes cast—clearly indicate that voter fraud is extremely rare in Pennsylvania, and is not an objectively verifiable rationale for banning ballot assistance or voting by mail.

Signed



Daniel McCool

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries

Respondents.

Civil Action No. 266 MD 2020

SUPPLEMENT DECLARATION OF DR. MARC MEREDITH

I. Executive Summary

1. On May 7th, I completed and signed a declaration in this case, *Crossey v. Bookvar* (Civil Action No. 266 MD 2020). All of the conclusions that I reach in my May 7th declaration remain unchanged. After I completed this declaration, I became aware of additional data that further support the conclusions that I reach. I incorporate my May 7th report herein by reference.

2. On May 19th, I downloaded data provided by the Pennsylvania Department of State to the website [opendataPA](https://data.pa.gov).¹ These data contain deidentified information about the status of mail ballot applications approved by each of the 67 Pennsylvania counties as of May 18th. The data show that a total of 1,350,022 mail ballots applications had been approved. These data do not include information on mail ballot applications that were pending (i.e., neither approved nor denied).

¹ Data downloaded from https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2020-Primary-Election-Mail-Ballot-Requests-Departm/853w-ecfz?fbclid=IwAR1dpHfGjga9Oq_gExT2RFe_0QJupbtKN3ZpxtPd6qykJZO7OWY0M1P0oMM.

3. These data show that statewide about 7 percent (95,524) of approved mail-ballots have not been sent to the voter. In four counties, more than 10 percent of approved mail-ballots have not been sent to the voter. These are Delaware County (about 52 percent), Philadelphia County (about 25 percent), Northumberland (about 13 percent), and Cumberland County (about 12 percent). As a point of comparison, the Wisconsin Election Commission reported that 15 days before the Wisconsin primary on April 7, 2020 that about 6 percent (33,842) of the mail-ballot applicants had not been sent their ballot.²

4. This comparison between Pennsylvania and Wisconsin likely understates how far behind Pennsylvania is where Wisconsin was in processing mail ballot requests 15 days before their election. This is because there are also a substantial number of pending applications for mail ballots that are not included in the data downloaded from opendataPA. The Department of State's response to motion for preliminary injunction included information on the number of applications received, approved, rejected, and mailed in seven counties as of May 18 (Declaration of Jonathan Marks ¶ 28). These data are summarized below in Table 1. In column 5, I calculated the number of pending applications by subtracting the number of approved and rejected applications from the total number of applications received. In these seven counties, there were about 53,000 pending applications, in addition to the 87,000 approved ballots that had not yet been mailed. In four of the seven counties, there were more pending applications than approved ballots to be mailed. Even if no other county had pending applications, this means at least 10 percent of Pennsylvanians who requested mail ballots had not received them, as their ballots had yet to be mailed as of May 18. And I assess that it is exceedingly unlikely that these were the only seven counties that had a substantial number of pending applications in the Commonwealth. Table 1, for example, does not

² Data downloaded from <https://elections.wi.gov/node/6767>.

include data on pending applications from Northumberland or Cumberland counties, which had the third and fourth most approved applications that had not been mailed, respectively.

Table 1: Ballots Not Processed and Not Mailed in Selected Counties

	(1)	(2)	(3)	(4)	(5)	(6)	(7)
County	Received	Accepted	Rejected	Mailed	Pending (1) - (2) - (3)	Not Mailed (2) - (4)	% Unfulfilled ((5) + (6)) / ((1) - (3))
Allegheny	205,454	183,345	16,809	171,343	5,300	12,002	9.2%
Delaware	68,418	46,332	3,365	18,756	18,721	27,576	71.2%
Lawrence	8,340	7,712	532	7,701	96	11	1.4%
Lehigh	41,596	35,714	3,240	34,480	2,642	1,234	10.1%
Mercer	9,411	7,649	666	6,677	1,096	972	23.6%
Montgomery	140,150	125,043	6,234	113,512	8,873	11,531	15.2%
Philadelphia	150,366	131,962	1,887	98,435	16,517	33,527	33.7%
Total	623,735	537,757	32,733	450,904	53,245	86,853	23.7%

5. The fact that Pennsylvania is behind where Wisconsin was 15 days prior to its election is concerning because my declaration asserts that in Wisconsin’s April 7 election that “evidence suggests at least tens of thousands, and possibly more than one hundred thousand, additional mail ballots were counted in the Wisconsin election because the mail-ballot deadline was extended by six days after Election Day (p. 24)”. The Wisconsin Elections Commission subsequently released a report more precisely detailing when absentee ballots were received.³ This report highlights that 79,054 ballots were received between April 8, 2020 and April 13, 2020 that would not have counted if the absentee ballots were required to be received by April 7, 2020, as is normally required. An additional 2,659 ballots were not counted because they were received after April 13, 2020.

6. My assessment is that counties across the Commonwealth are currently struggling to process mail ballot applications and distribute mail ballots in a timely way and will ultimately distribute ballots too late for some voters to have their ballot received by June 2. This conclusion

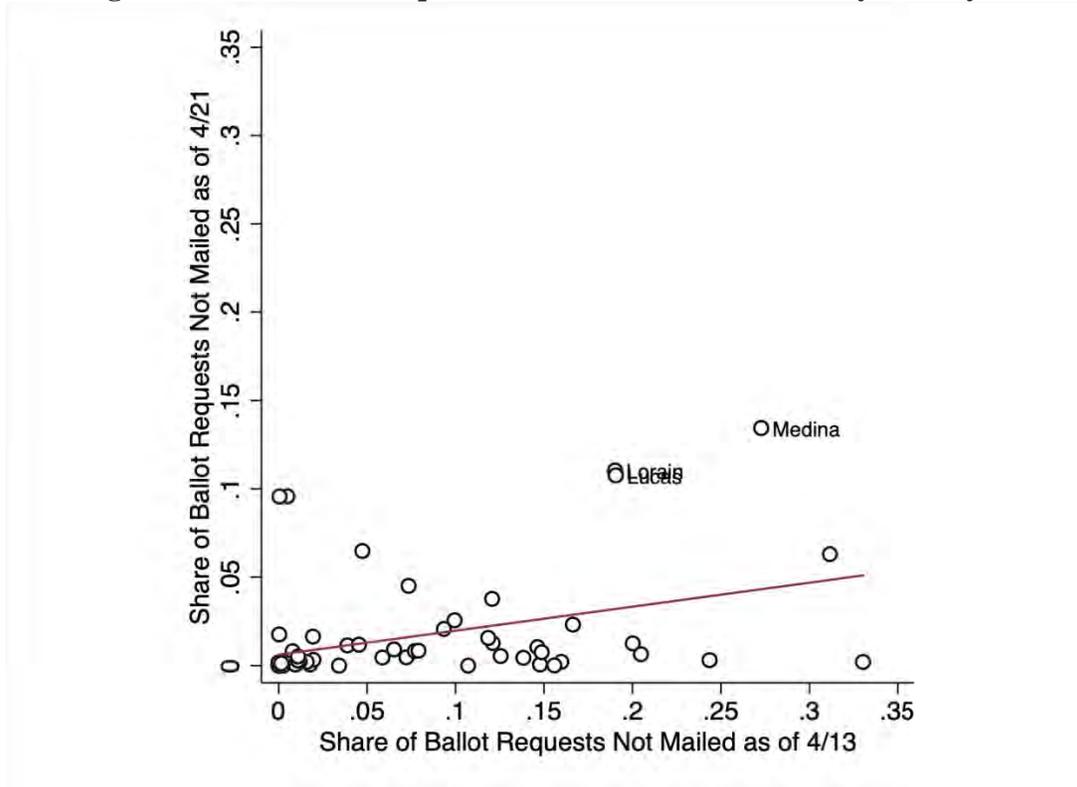
³ Wisconsin Elections Commission, “April 7, 2020 Absentee Voting Report” (accessed from <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf> on May 21, 2020), p. 7.

is informed in part by data collected from Ohio's April 28 election. I collected data on individual-level absentee ballot applications, distribution, and receipt for the 68 Ohio counties that had these data posted on May 18, 2020.⁴ I used these data to construct a measure of the share of unfulfilled mail-ballot requests, analogous to what I presented for the selected Pennsylvania counties in column 7 of Table 1. I focused on the share of unfulfilled mail-ballot requests on April 13 and April 21. I focus on April 13 because, on that date, Ohio was 15 days away from its primary election, which is the same number of days between Pennsylvania's May 18 data and the June 2 primary election. I focus on April 21 because a mail ballot needs to be sent 7 days before an election to ensure it can be returned by Election Day given standard United States Postal Service (USPS) delivery time guarantees (see p. 18 of my original declaration).

7. Figure 1 shows that the share of mail-ballot applications that weren't mailed 15 days before the election in a county associates with the share of mail-ballot requests that weren't mailed 7 days before the election in the county. The p-value on the associations is less than .001, indicating that the null hypothesis of no relationship between these two measures is rejected at standard levels of statistical significance. The three of the counties (Lorain, Lucas, and Medina) that failed to mail at least 10 percent of requested ballots 7 days prior to Election Day also failed to mail between 19 and 28 percent of requested ballots 15 days prior to Election Day. Column 7 of Table 1 shows a comparable rate of unfulfilled ballot applications in Pennsylvania in Mercer County (about 24 percent), and a higher rate of unfulfilled ballot applications in Delaware County (about 71 percent) and Philadelphia County (about 34 percent), when you combine ballots that have not been sent to approved applicants and pending applications.

⁴ I searched for these data using the link: <https://lookup.boe.ohio.gov/vtrapp/<COUNTY NAME>/avreport.aspx> (e.g., <https://lookup.boe.ohio.gov/vtrapp/Preble/avreport.aspx>). 20 of the 88 counties did have data posted. Some of these counties posted similar data on their county's board of elections website. Because they were not formatted the same and did not always contains the same information, I did not include these data in my analysis.

Figure 1: Mail Ballot Requests Not Sent Ballots in Ohio by County and Date



Note: Line represents a bivariate least squares regression line when predicting the share of unmailed ballot requests in a. Ohio county on April 21 with the share of unmailed ballot requests in the same county on April 13. The slope of the line is .135 ($p < .001$) showing the share of ballot requests unmailed on April 13 significantly predicts that share of ballot requests unmailed on April 21.

8. The Ohio data also show that voters who are not sent a ballot within 15 days of Election Day are at a heightened risk of being disenfranchised because their ballot is not received by Election Day. Table 2 focuses on the universe of mail ballot applications that were received at least 15 days before the Ohio's April 28 election in the 68 Ohio counties for which I have data. These data show that just under 10 percent of Ohio voters who requested absentee ballots had not been sent the ballot that they had requested at least 15 days before (i.e., by April 13) the April 28 election. I earlier established that the share of Pennsylvanians who had not been sent their requested mail ballot by May 18 is at least this high. These Ohio data also show that the likelihood

that a mail ballot was received by April 28, and thus could count, depended on whether it was sent to the voter at least 15 days before the election. About 4.4 percent of ballots sent to voters within 14 days of the election were received by the county after Election Day, and hence did not count, as compared to about 1 percent of ballots sent to voter at least 15 days before the election. Voters sent their mail ballots later were also less likely to return their ballot, consistent with some voters not returning a mail ballot because they did not believe it would be received in time.

Table 2: Delivering Mail Ballots Late Disenfranchised Voters in Ohio

County sent ballot by 4/13/2020?	N	County received ballot		
		By 4/28/2020	After 4/28/2020	Never
Yes	489,470	460,759	4,796	23,915
		94.1%	1.0%	4.9%
No	52,185	45,986	2,299	3,900
		88.1%	4.4%	7.5%

9. Tens of thousands of Ohio voters were disenfranchised because mail ballots had to be received by Election Day to count. Table 3 shows that 35,482 ballots were received after Election Day in the 68 Ohio counties for which I have data. This understates the total number of voters whose mail ballot was received after Election Day, because only about 54 percent of the ballots cast in this election were cast in one of these counties for which I have data.⁵ Table 3 also shows that a substantial number of mail ballots would have been received after Election Day even if Ohio had required that mail-ballot applications be received at least seven days prior to Election Day, like Pennsylvania. Table 3 shows that 22,649 of the 35,482 mail ballots received after Election Day were requested on an application that was received 7 days or more before Election Day.

⁵ From data on ballots cast reported on <https://liveresults.ohiosos.gov/> on May 19, 2020. The share of ballots cast is smaller than the percentage of counties because the three largest counties (Cuyahoga, Franklin, and Hamilton) did not have data available on the website described in footnote 4.

Table 3: Ballots Received After Election Day in Ohio Counties with Data

When County Received Mail Ballot Application?	N	County received ballot		
		By 4/28/2020	After 4/28/2020	Never
By 4/13/2020	541,655	506,745 93.6%	7,095 1.3%	27,815 5.1%
4/14/2020 - 4/21/2020	249,178	212,659 85.3%	15,554 6.2%	20,965 8.4%
4/22/2020 - 4/25/2020	95,188	62,558 65.7%	12,833 13.5%	19,797 20.8%
Total	886,021	781,962 88.3%	35,482 4.0%	68,577 7.7%

10. My conclusion is that the Ohio and Wisconsin data are informative about what is likely to happen in Pennsylvania because mail-ballot applicants are not being mailed ballots in a timely way. Failing to send mail ballots in a timely way disenfranchises voters even when COVID-19 is not present, because not all voters will understand their options if their mail ballot is received too close to Election Day to ensure it is received by Election Day under standard USPS delivery time guarantees. And as my original declaration details, polling place voting is not an option for some voters. COVID-19 expands the subset of voters for whom polling place voting is not an option. There is still a substantial amount of COVID-19 infection occurring in Pennsylvania. According to the COVID Tracking project, there were 5,675 positive and 48,045 negative COVID-19 tests in Pennsylvania between May 12 and May 19.⁶ This means that about 1 in 2,256 Pennsylvanians tested positive for COVID-19 during that week and that about 11 percent of the COVID-19 tests came back positive.⁷

11. Data suggest that the risk of contracting COVID-19 in Pennsylvania currently is at least as high as it was in Wisconsin and Ohio leading up to their elections. The COVID Tracking project shows that there were 1,227 positive and 11,137 negative COVID-19 tests in Wisconsin

⁶ Accessed from <https://covidtracking.com/data/state/pennsylvania#historical> on May 21, 2020.

⁷ Population estimate from <https://www.census.gov/quickfacts/PA> (accessed on May 21, 2020).

between March 31 and April 6.⁸ This means that about 1 in 4,745 Wisconsinites tested positive for COVID-19, and that about 10 percent of tests came back positive, in the week leading up to its election.⁹ The COVID Tracking project also shows that there were 2,403 positive and 25,589 negative COVID-19 tests in Ohio between April 20 and April 27.¹⁰ This means that about 1 in 4,864 Ohioans tested positive for COVID-19 and that about 9 percent of tests came back positive in the week leading up to its election.¹¹

12. On May 27th, I again downloaded data provided by the Pennsylvania Department of State to the website opendataPA. These data showed that mail ballots had not been sent to 53,939 of the 1,798,250 voters who submitted an approved mail-ballot application. Again, these data do not include mail-ballot applications that had not been processed. In three counties more than 10 percent of the voters who had submitted an approved mail-ballot application had not been sent their ballot: Delaware County (about 27 percent), Mercer County (about 10 percent), and Fayette County (about 10 percent).¹²

13. The data described in paragraph 12 also show that a large number of mail-ballot applications were received near the end of the mail-ballot request period. Table 4 shows the total number of mail-ballot requests were received by day for mail ballot applications approved by May 26 (i.e., the late day to request a mail ballot). These counts do not include mail-ballot requests that have been received by the county, but not yet been processed by May 26. Table 4 shows that at least 501,117 mail ballots were requested between May 17 and May 26, including at least 73,019 of mail ballots that were requested on May 26. The fact there have been a large number of ballots

⁸ Accessed from <https://covidtracking.com/data/state/wisconsin#historical> on May 21, 2020.

⁹ Population estimate from <https://www.census.gov/quickfacts/WI> (accessed on May 21, 2020).

¹⁰ Accessed from <https://covidtracking.com/data/state/ohio> on May 21, 2020.

¹¹ Population estimate from <https://www.census.gov/quickfacts/OH> (accessed on May 21, 2020).

¹² Data downloaded from https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2020-Primary-Election-Mail-Ballot-Requests-Departm/853w-ecfz?fbclid=IwAR1dpHfGjga9Qq_gExT2RFe_0QJupbtKN3ZpxtPd6qykJZO7OWY0M1P0oMM.

requested over this time period means that there will be a sizable number of unprocessed mail ballot applications if even a small share of the mail ballot requests received over this time period remain unfulfilled.

**Table 4: Approved Mail Ballot Applications Requested on 5/17 – 5/26
(approved as of 5/26)**

Date	Requests	Total Requests
5/17/20	16,989	16,989
5/18/20	41,399	58,388
5/19/20	56,084	114,472
5/20/20	63,272	177,744
5/21/20	59,989	237,732
5/22/20	62,253	299,985
5/23/20	48,098	348,083
5/24/20	43,269	391,352
5/25/20	36,746	428,098
5/26/20	73,019	501,117

Date: May 27, 2020



Dr. Marc Meredith

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
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Pennsylvania Alliance for Retired Americans,

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Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

**DECLARATION OF ADAM BONIN IN SUPPORT OF PETITIONERS' REPLY
SUPPORTING THEIR APPLICATION FOR PRELIMINARY INJUNCTION**

I, Adam C. Bonin, declare as follows:

1. I am over the age of 18 and competent to testify as to the matters set forth herein.
2. I am the founder of The Law Office of Adam C. Bonin, located at 121 S. Broad Street, Suite 400, Philadelphia, PA 19107.
3. I submit this declaration in support of Petitioners' Application for Preliminary Injunction.
4. Attached as **Exhibit 1** is a true and correct copy of an article titled "County announces consolidated voting places for June 2 Pa. primary" written by Julian Routh on May 15, 2020 and published by The Pittsburgh Post-Gazette. The article is publicly available at <https://www.post-gazette.com/news/vote2020/2020/05/15/allegheny-County-announces-consolidated-voting-places-for-June-2-Pa-primary/stories/202005150141>.
5. Attached as **Exhibit 2** is a true and correct copy of a letter signed by Speaker of the Pennsylvania House of Representatives Mike Turzai, 46th Legislative District Member Jason

Ortitay, 54th Legislative District Member Bob Brooks, 39th Legislative District Member Michael Puskaric, 40th Legislative District Member Natalie Mihalek, and Lori Mizgorski from the 30th Legislative District and addressed to Secretary of State Kathryn Boockvar on May 21, 2020. The letter is publicly available at <http://www.pahousegop.com/Display/SiteFiles/1/2020/allegHENYPOLL.pdf>.

6. Attached as **Exhibit 3** is a true and correct copy of an article titled “Mail-in ballot requests swamp Mercer County elections office” written by Eric Poole and published by The Herald on May 13, 2020. The article is publicly available at https://www.sharonherald.com/news/local_news/mail-in-ballot-requests-swamp-mercer-county-elections-office/article_2275e4c8-b78a-5d87-a710-cf9cd77f3c2e.html.

7. Attached as **Exhibit 4** is a true and correct copy of an article titled “Thousands of Pennsylvania voters might not get their mail ballots in time to actually vote” written by Jonathan Lai on May 26, 2020 and published by The Philadelphia Inquirer. The article is publicly available at <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-20200526.html>.

8. Attached as **Exhibit 5** is a true and correct copy of an article titled “Allegheny County election officials describe around-the-clock efforts amid ‘perfect storm’” written by Julian Routh on May 19, 2020 and published by The Pittsburgh Post-Gazette. The article is available at <https://www.post-gazette.com/news/politics-local/2020/05/19/Allegheny-County-election-board-officials-voters-mail-in-ballots-applications/stories/202005190160>.

9. Attached as **Exhibit 6** is a true and correct copy of an emergency petition filed by the Montgomery County Board of Elections in the Court of Common Pleas of Montgomery County requesting an extension of time to accept voted absentee and mail-in ballots from the

qualified registered electors of Montgomery County received by the Montgomery County Board of Elections between Tuesday, June 2, 2020 after 8:00 P.M. and Tuesday June 9, 2020 at 5:00 P.M. The emergency petition is publicly available on the court's docket.

10. Attached as **Exhibit 7** is a true and correct copy of a tweet written by journalist Jonathan Lai using the twitter handle @Elaijuh and published on May 26, 2020 at 2:37 P.M. The tweet is publicly available at <https://twitter.com/Elaijuh/status/1265351449053102080>.

11. Attached as **Exhibit 8** is a true and correct copy of a court order from the Court of Common Pleas of Montgomery County denying an emergency petition filed by the Montgomery County Board of Elections. The order was filed on May 27, 2020, in the matter of *In re Extension of Time for Absentee Ballots to be Received and Counted in the 2020 Primary Election*, No. 2020-06413.

12. Attached as **Exhibit 9** is a true and correct copy of an article titled "Key swing state warns of November election 'nightmare'" written by Holly Otterbein on May 24, 2020 and published by Politico. The article is publicly available at <https://www.politico.com/news/2020/05/24/pennsylvania-election-nightmare-275410>.

13. Attached as **Exhibit 10** is a true and correct copy of a district court order granting a preliminary injunction. The order is written and signed by district judge Donald L. Harris on May 22, 2020 for the Montana Thirteenth Judicial District Court in Yellowstone County. The order is publicly available on the court's docket.

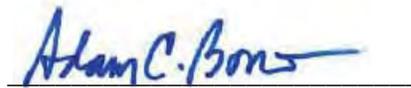
14. Attached as **Exhibit 11** is a true and correct copy of an order from the State Board of Elections in Wake County, North Carolina, in the matter of *Investigation of Election Irregularities Affecting Counties within the 9th Congressional District*, ordering a schedule of new elections. The order was signed on March 13, 2019 by Chair Robert B. Cordle.

15. Attached as **Exhibit 12** is a true and correct copy of a district court order granting in part and denying in part a motion to dismiss. The order is written and signed by district court judge Stephanie Dawkins Davis on May 22, 2020 for the United States District Court for the Eastern District of Michigan, Southern Division. The order is publicly available on the court's docket.

I declare under penalty of perjury that the foregoing is true and correct. I understand that false statements herein are subject to the penalties of 18 P.S. § 4904 relating to unsworn falsification to authorities.

Executed on May 28, 2020

Respectfully submitted,



Adam C. Bonin

EXHIBIT 1



COVID-19: Click to view our complete coverage, updates on the pandemic



County announces consolidated voting places for June 2 Pa. primary



JULIAN ROUTH ✓
Pittsburgh Post-Gazette
jrouth@post-gazette.com

MAY 15, 2020 5:54 PM

Allegheny County will operate 147 polling locations for the June 2 primary election, the elections division announced Friday.

The number — significantly smaller than in previous elections — is the result of a weeks-long attempt to consolidate polling places, in anticipation of staffing shortages and concerns over the viability of in-person voting amid the COVID-19 pandemic.

The county released the list of locations — one in each municipality and 18 across the city of Pittsburgh’s 32 voting wards



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The Post-Gazette compiled the list of polling locations in a [public spreadsheet available here](#). The county says its elections website will be updated by Monday, but it “cannot give [voters] a time frame on when the state’s polling place locator information will be updated,” officials said in a statement.



Julian Routh

Pennsylvania: Here's how to register to vote before tonight's deadline

The county normally operates about 1,300 polling locations, staffed by 6,500 workers. With the spread of COVID-19 having already postponed the primary contests, the elections board’s resolution warned of the consequences of having too many in-person locations.

“Due to their fear of being exposed to the virus, many members of the local election boards have stated either that they will not serve or are reluctant to serve on Primary Election Day,” the resolution read. “Accordingly, there is a strong likelihood that many local polling districts will not have local election board members sufficient to properly conduct the June 2 Primary Election.”



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that physical distancing and other mitigation measures may be followed on Election Day.”

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The county plans to send postcards to all households with eligible voters, advising them of where they are supposed to vote.

“There will also be additional outreach and information to the public and voters between now and Election Day, including on social media,” the county’s statement said.

Voters are encouraged to visit www.alleghenycounty.us/elections for information as it becomes available.

Julian Routh: jrouth@post-gazette.com, 412-263-1952, Twitter @julianrouth.

First Published May 15, 2020, 5:54pm

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MUST READ

EXHIBIT 2

MIKE TURZAI
Speaker of the House

Room 139 Main Capitol Building
PO Box 202028
Harrisburg, PA 17120-2028
Phone: (717) 772-9943



House of Representatives
Commonwealth of Pennsylvania
Harrisburg

125 Hillvue Lane
First Floor
Pittsburgh, PA 15237
Phone: (412) 369-2230

May 21, 2020

Kathryn Boockvar
Secretary
Pennsylvania Department of State
302 North Office Building
Harrisburg, Pennsylvania 17120

*** HAND DELIVERED ***

Dear Secretary Boockvar:

We are writing as a follow up to our conversation Tuesday concerning the Pennsylvania Department of State's conveniently undated letter of approval to Allegheny County's recent application to the Department to drastically consolidate in-person voting locations for the upcoming Primary Election. Written by Deputy Secretary of Elections and Commissions Jonathan Marks, the undated letter was written to "Allegheny County Officials", not to legislators. The letter does not seem to have been published in a public forum.

It is apparent, based on our conversation, that the Department of State has not done its diligence in discharging its statutory responsibilities as outlined Article XVIII-B, specifically, § 1802-B(A)(3):

(3) Two or more polling places may be consolidated, except that the consolidation of polling places may not result in more than a 60% reduction of polling place locations in the county, except for necessitous circumstances and as approved by the Department of State. Two or more polling places may be located in the same building.

Allegheny County has 1,218,000 citizens who live in 130 municipalities. According to a letter dated April 27, 2020 (on which no legislator is copied), written by Jerry Tyskiewicz, Director, Department of Administrative Services of Allegheny County, to Secretary Boockvar, the County presently has "1,323 polling places." In that letter, Tyskiewicz seeks to reduce the "polling place locations to no fewer than 138 polling place locations" for the June 2, 2020 primary election. On May 15, 2020 Allegheny County's Amie Downs issued a press release setting forth a reduced list which, given our count, included 147 "polling place locations." In the undated letter written by Jonathan Marks, the Deputy Secretary of Elections and Commissions, Allegheny County was authorized to reduce the number to "211 polling places" for the June 2, 2020 primary.

We do not believe that it was necessary to reduce any number of polling places for this primary election on June 2, 2020, for the reasons enumerated later in this letter and would ask that all polling places be restored.

Using Director Tyskiewicz's number of "1,323 polling places," we recognize that the Allegheny County Board of Elections had the statutory authority, for this primary election only, to reduce polling places down to 530 without seeking Department of State approval. Even such a decision, however, would have been unwise and unnecessary. Clearly, the authorization to reduce them to 211 requires Department of State approval because it is beneath the 530 statutory limit, but that can only be done for "necessitous circumstances." This standard was clearly not met and the statute has been violated for the reasons set forth below.

While the necessity to reduce polling places was contemplated in permitting these changes, it was weighed against the value of allowing as much open access to voters as possible and avoiding large-scale gathering of people, which is entirely consistent with the Pennsylvania Department of Health's and the Centers for Disease Control and Prevention's guidelines to assist in reducing the spread of COVID-19. In this instance:

- 1) No material evidence was provided to justify the reduction in polls below 530 polling places. Therefore, not only were "necessitous circumstances" not demonstrated, there were not even any "circumstances" demonstrated.
- 2) There was no notice provided prior to Allegheny County's "here's the plan" press release on the afternoon of May 15. No legislators from Allegheny County were copied on the April 27 Tyskiewicz letter nor was the letter made public. The undated letter of approval to reduce polls to "211 polling places" signed by Deputy Secretary Marks was to Allegheny County Officials. It was not a public document.
- 3) Finally, the Department of State's decision in the undated letter is untimely.

Further, not only is the decision violative of the statute as set forth above, the decision to reduce the number of polling locations on the primary date is an affront to good faith decision making in a democracy and to rational and fair public policy. Secretary Boockvar, your approval of Allegheny County's ill-conceived plan was not just unjustified, it threatens the public health, promotes voter disenfranchisement, and will result in severe voter confusion that undermines the core of our Republic – free and fair elections. This is problematic for the following reasons:

- 1) It effectively disenfranchises voters who will go to their regular polling place, which will not be there, and they will simply go home frustrated.
- 2) It disenfranchises voters who will see longer lines and less social distancing and will leave without voting.
- 3) There was no public notice of these changes until they were announced on Friday, May 15th by a press release. This was 18 days before election day.
- 4) There is no evidence that a significant number of poll workers were contacted to determine whether they could adequately staff their polls on election day.
- 5) There was no input sought from legislators with respect to this proposal.
- 6) There is no data that was presented to support reducing polling locations or to suggest that it would be safer. In fact, the data is to the contrary. By way of example, Allegheny County has 1,218,000 citizens. Sadly, as of May 18, 2020, we have suffered the loss of 143 of our county's

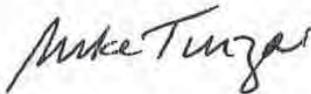
fellow citizens attributable to COVID-19. Of those 143 citizens, 112 were residents of nursing homes, personal care homes or assisted living facilities. That means that 78 percent of those whose death was attributable to COVID-19 in Allegheny County lived in a senior setting. The risk to the general population is significantly lower and did not necessitate any change.

- 7) The approved consolidation plan, however, increases that risk as it artificially concentrates voters into consolidated polling places. It is less safe to funnel more voters into fewer locations and is completely at odds with the recommendation of social distancing.

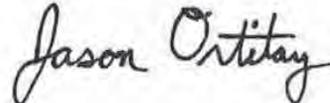
In our conversation, the Department offered no coherent or legal reason why it approved Allegheny County's request to dramatically limit access to in-person voting. The reason is clear – there truly is not and never was a “necessitous circumstance” as required by the law. Instead, the Department merely accepted Allegheny County's deficient application rather than investigate and make independent determinations about the necessity of the proposed changes. That failure, coupled with the approval the Department has issued, raises serious questions regarding the Department's commitment to the statutory obligations under Act 12 of 2020.

Given these facts, we insist that the Department revise its approval of Allegheny County's application and immediately require the County to return to the standard “1,323 polling places.” At a minimum, the County must be required to allow for at least 530 polling locations in 530 separate buildings based on an equitable pro rata basis.

Sincerely,



Mike Turzai
Speaker, Pennsylvania House of Representatives
Member, 28th Legislative District



Jason Ortity
Member, 46th Legislative District



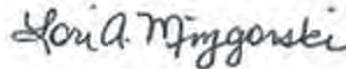
Bob Brooks
Member, 54th Legislative District



Michael Puskaric
Member, 39th Legislative District



Natalie Mihalek
Member, 40th Legislative District



Lori Mizgorski
30th Legislative District

Cc: Honorable Tom Wolf, Governor of Pennsylvania
Other Allegheny County State Senators and State Representatives

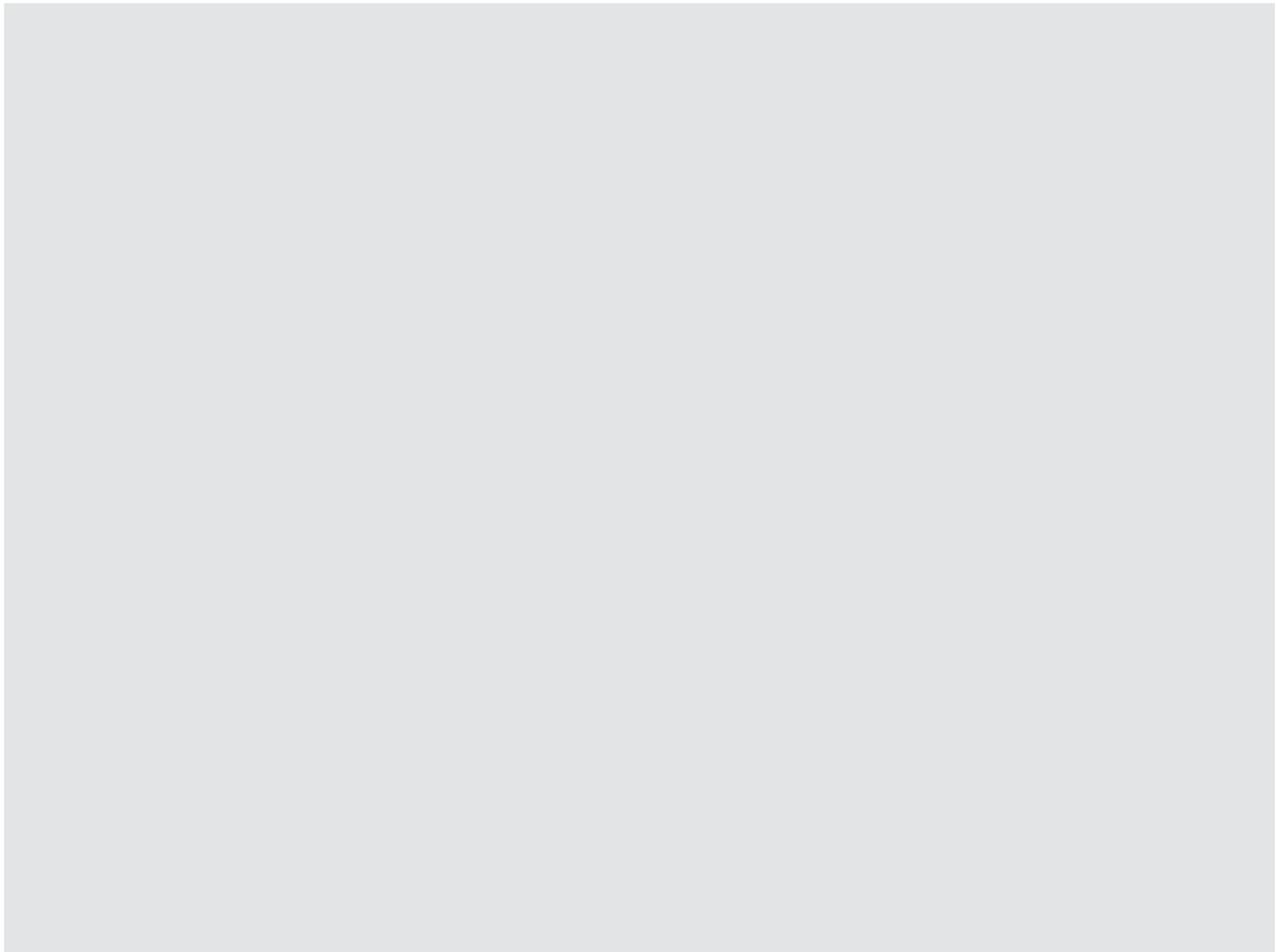
EXHIBIT 3

Mail-in ballot requests swamp Mercer County elections office

[sharonherald.com/news/local_news/mail-in-ballot-requests-swamp-mercer-county-elections-office/article_2275e4c8-b78a-5d87-a710-cf9cd77f3c2e.html](https://www.sharonherald.com/news/local_news/mail-in-ballot-requests-swamp-mercer-county-elections-office/article_2275e4c8-b78a-5d87-a710-cf9cd77f3c2e.html)

By ERIC POOLE Herald Assistant Editor |
News

May 13,
2020



Mercer County Elections sirector Jeff Greenburg takes a phone call at the courthouse as bllots are being brought in from precincs on a past election night. The mailman is expected to be delivering vastly more ballots in future elections.JASON KAPUSTA | Herald file

MERCER — Workers in the Mercer County Bureau of Voter Registration and Election office have been working overtime to deal with the influx of requests for vote-by-mail ballots for Pennsylvania’s June 2 primary election.

Department Director Jeff Greenburg said the staff in his office has been working 12-to-14-hour days, and on Saturdays as well, in an attempt to keep up with demand for mail-in ballots. He estimated that the department has processed and mailed out 6,000 ballots, with another 2,500 requests to go.

"As fast as we can put them out, they're coming in even faster," he said.

In the June 2 election – originally scheduled for April 28 but postponed due to restrictions from the COVID-19 pandemic – Pennsylvania residents will vote on Republican and Democratic nominees for president, U.S. representatives and state legislators.

Greenburg said the March 17 special election posed another problem for the county's election department by delaying preparation for the primary. Instead, Mercer County's election workers had to focus on the election to fill the 8th state House District seat vacated when former state Rep. Tedd Nesbit was elected to become a county Common Pleas Court judge.

The 8th District covers eastern Mercer County and northwestern Butler County.

Republican Tim Bonner, a Pine Township-based attorney, won the seat over Butler County business owner Phil Heasley, the Democratic nominee. The two candidates are both running again for their parties' nomination June 2.

"We lost about four weeks' worth of work," Greenburg said. "We were required to focus solely on running an election."

But there is positive news. He said the polling locations are almost fully staffed. There remain two poll worker vacancies in Hempfield Township's 2nd District.

All but one of Mercer County's polling sites will be in operation on Election Day, with the only exception being Trinity Living Center, Grove City's 3rd Precinct. The senior citizens' residence is unable to host a voting site to protect its residents from the pandemic.

Voters will instead vote at the Grove City Masonic Hall on West Main Street, the same location as they used in the March 17 special election.

Greenburg said the state is providing 59 of the voting precincts with protection kits that include gloves and masks for election workers, alcohol wipes and cotton swabs for voters to use as a disposable stylus when using the ballot marking device.

Voters should bring their own pens, with blue or black ink, to their polling locations, and wear masks. However, Greenburg said no voter will be turned away for failing to wear a mask, and pens, which will be cleaned between uses, will be available.

However, if things continue the way they're going, most voters might be filling out their ballots from the comfort and safety of their homes.

This will be the first election where the state's registered voters are allowed to request mail-in ballots with no restrictions. Previously, the only mail-in ballots available were for absentee voting, and residents had to assert that they could not go to their polling place on Election

Day, either because they would be out of the area or because they were physically unable to get to their voting location.

In the 2016 primary — with the Republicans and Democrats both running contested nomination races — Mercer County had fewer than 1,000 total absentee ballots. Now, with two weeks to go before the May 26 mail-in ballot application deadline, the county has nearly 10 times that number.

Greenburg said he expects the figure to rise. Traditionally, requests for mail-in ballots double in the final two weeks before the deadline. If that holds for this election, Mercer County could end up fielding 17,000 absentee ballots for this election.

In 2016, a little more than 28,000 Mercer County registered voters cast ballots in that year's presidential primary.

With the possibility of thousands more requests, Greenburg urged people not to wait until the last minute, or even the last days, if they're considering applying to vote by mail.

"If you think you're going to vote by mail, do it now," he said.

INFORMATION on how to get an absentee or mail-in ballot is available on the county elections website, www.mcc.co.mercer.pa.us/election

EXHIBIT 4

Thousands of Pennsylvania voters might not get their mail ballots in time to actually vote

I [inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-20200526.html](https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-20200526.html)

by Jonathan Lai, Updated: May 26, 2020- 3:42 PM



County elections officials are warning that thousands of Pennsylvania voters who apply for mail ballots could receive them too late for their votes to be counted.

HEATHER KHALIFA / Staff Photographer

Tens of thousands of Pennsylvania voters have been applying for mail ballots every day leading up to Tuesday's deadline.

It's unclear how many will receive them in time to actually vote in next week's primary.

"There are going to be many people who are still going to be receiving their ballots very close to election day or on election day," Delaware County Councilwoman Christine Reuther said. "I'm very worried that people are going to be disenfranchised."

Reuther and other county elections officials across the state are warning that an unexpected surge of mail ballots this year, combined with uncertain mail delivery times and coronavirus-related staffing changes, could lead thousands or even tens of thousands of voters to receive their ballots without enough time to mail them back. Some will likely not

even receive them until after the election. Others will put their ballots in the mail and expect them to be counted, never knowing their votes arrived after the June 2 election day deadline.

The coronavirus pandemic is making every step of the vote-by-mail process take longer than usual. After a voter requests a ballot, it can take a few days to process that application, a day or two to print and prepare the ballot, and a few days for it to be delivered. All told, it can take a week or more for ballots to arrive in a voter's mailbox.

"It becomes a series of falling dominoes, with things backing up," said Randall O. Wenger, chief clerk of Lancaster County's board of elections.

Pennsylvania 2020 Newsletter

Interested in how Pennsylvania is shaping the 2020 election? Sign up to receive our newsletter every Wednesday.

Pennsylvania 2020 Newsletter

And Pennsylvania law sets a strict deadline: Absentee ballots must be received by county elections officials by 8 p.m. on election day to be counted, regardless of when they were mailed. Postmarks don't count. That deadline actually gives voters more time than they used to have, after lawmakers expanded what was one of the country's tightest absentee-ballot deadline windows.

But a one-week turnaround that might work under normal circumstances doesn't work in a pandemic, county officials said. And they worry the problem will be even worse in November, when turnout is higher.

» READ MORE: *Pennsylvania's 2020 election results were already going to be delayed. Coronavirus will make it even worse.*

Some officials, including in Philadelphia and its suburbs, are calling on state lawmakers to pass legislation to allow ballots to be counted if they're postmarked by election day. Others hope courts will step in to intervene and are closely watching a case pending in state court.

Montgomery County filed an emergency petition in Common Pleas Court on Tuesday seeking to extend the deadline by one week. That would allow ballots to still be counted if they arrive within a week of the election. Voters could be disenfranchised without the change, the county said.

"Without a doubt, the deadlines for applying for an absentee ballot and also the date by which it can be returned, [lawmakers] should deal with that today," said Lee Soltysiak, Montgomery County's chief operating officer and clerk of its elections board. "But if they

don't, that should really be the first order of business for November. And I think we'll have the proof ... after this primary that thousands of voters will very likely not have their votes counted."

A new election law allows any Pennsylvania voter to vote by mail. The pandemic-driven surge in requests for mail ballots has come at a faster and faster clip in the days leading up to the deadline.

"It's hard because they come in so fast ... it's unrelenting," said Gail Humphrey, chief clerk for Bucks County. Her elections staff now processes ballots for 16 hours a day to try to keep up. She's had to seek help from other departments.

"They arrived like the cavalry," Humphrey said.

Similarly, Philadelphia elections staff have been supplemented in recent weeks by city employees from other departments, with dozens helping stuff envelopes and get ballots out in time.

"As you might imagine, the City Commissioners Office has received a significant influx of mail-in ballot applications and completed ballots," James R. Engler, chief of staff to Mayor Jim Kenney, wrote in an email Friday calling for city departments to send three to five people each to work over the weekend or Tuesday. "Unfortunately, due to the current backlog, the City is in jeopardy of not getting ballots out to voters in time for the June 2nd primary and we need your support."

The call to arms appears to have worked, with the city clearing out the backlog Monday afternoon before the last-day crush of applications.

Delivery of election mail isn't taking any longer than normal, a spokesperson for the United States Postal Service said, though voters and officials have complained of longer delivery times than they're used to.

To account for any possible delays, elections officials should "allow one week for delivery" of a ballot to voters, said Ray V. Daiutolo Sr., the regional USPS spokesperson. Similarly, voters returning ballots should "mail their completed ballots at least one week before the due date."

That's a two-week round-trip, meaning a voter who requested a ballot Tuesday, and has it put in the mail Friday or Saturday, might not even receive it until after election day.

"I think that's the scariest part for every county right now," Humphrey said. "People have until May 26 [to apply], but we have no control over the U.S. mail."

Elections officials also worry that voters who do receive their ballots by election day will either recognize they can't get them back in time and give up — or mail them back without realizing they won't be received in time. Would-be voters aren't notified if their ballots arrive after election day, leaving them with no idea their votes never counted.

Voters should turn in their mail ballots as soon as possible, Pennsylvania Secretary of State Kathy Boockvar said in a conference call with reporters last week.

"Do not wait to send in your ballot. ... As soon as you get it, please send it in," she said, urging voters to "mail it super fast" or drop it off at their county board of elections.

For voters who don't have time to mail their ballots back, counties are rushing to set up drop boxes. Ballots put in them by 8 p.m. on election day will count.

Voters who request mail ballots and then show up at the polls are not allowed to cast a normal vote, but must instead use a provisional ballot, which is only counted after county officials confirm they did not also vote by mail.

County drop boxes

County elections officials in Philadelphia and the suburbs are setting up drop boxes for voters who receive their ballots without enough time to return them by mail. [Contact county elections officials for more information.](#)

Bucks County

The county has installed a metal box outside the administration building at 55 East Court Street in Doylestown.

Chester County

The county has placed a drop box in the lobby of the Government Services Center at 601 Westtown Road in West Chester.

Delaware County

The county is planning to place drop boxes inside each polling place, under the supervision of poll workers. Voters will be able to enter a polling place without waiting in the in-person voting line and submit their mail ballots.

Montgomery County

The county has installed drop boxes at the following five locations:

- One Montgomery Plaza at 425 Swede Street in Norristown
- Green Lane Park at 2144 Snyder Road in Green Lane
- Montgomery County Community Connections Office at 421 West Main Street in Lansdale
- South Hall of Montgomery County Community College at 101 College Drive in Pottstown
- Eastern Court House Annex at 102 North York Road in Willow Grove

Philadelphia

The city has installed a drop box by the south portal of City Hall. Elections officials are also working with City Council to set up election day drop-off sites in each of the city's 10 Council districts.

Mail ballot applications are due by 5 p.m. Tuesday and can be submitted online. To check on the status of a ballot, use the state's online tool or contact your county elections office. Completed ballots must be received by county elections officials by 8 p.m. on election day, June 2.

Staff writer Jonathan Tamari contributed to this article.

EXHIBIT 5



MENU



COVID-19: Click to view our complete coverage, updates on the pandemic



Allegheny County election officials describe around-the-clock efforts amid 'perfect storm'



JULIAN ROUTH ✓
Pittsburgh Post-Gazette
jrouth@post-gazette.com

MAY 19, 2020

9:42 PM

Convening for one last public board meeting before Pennsylvania's primary contests in two weeks, Allegheny County officials gave insight Tuesday into the difficulties facing their elections division as it processes a backlog of thousands of mail-in ballot applications and prepares for in-person voting in the midst of a pandemic.

Officials insisted that staffers in the elections division are working around the clock — three every morning, three shifts — to send



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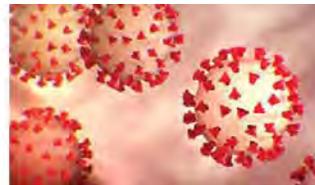


As those sit in the queue, applications continue to stream into the office every day — adding to the more than 225,000 applications it has received so far and the 189,000 it's processed, officials said.

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Julian Routh

Nonprofit law firm drops suit against Allegheny County's maintenance of voter rolls

And as mail-in applications continue to flood their mailboxes, elections officials find themselves having to recruit poll workers for in-person voting precincts, make sure those workers are equipped with sanitary equipment and educate voters about where they're actually supposed to vote when the day comes.

All of this is what County Councilman and elections-board



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Board member and County Councilwoman Bethany Hallam said her biggest concern remains how the elections division will have time to process all the mail-in ballot requests, "especially considering folks can request mail-in ballots up to one week before Election Day."

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"I'm just worried about the timeline being two weeks out from election with 80,000-plus ballots yet to be mailed out," Ms. Hallam said, directing her inquiry to David Voye, who manages the election division.

Mr. Voye said the county is currently looking into "resourcing mailing companies" to do the mailing for them and help "pick up on the backlog."

He also stressed that if there are voters who don't receive their mail-in or absentee ballots on time, they can still vote a provisional ballot on Election Day. If it's determined later that they already returned a mail-in ballot to the county, "the provisional will not be counted," Mr. Voye said.

When asked by Ms. Hallam about voters who checked online to see their ballot was mailed out on May 1 but haven't yet received it Mr. Voye said the system is undated at the point a shipping



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"It doesn't sound like a long process, but when you're doing thousands of them, it takes time," Mr. Voye said.

One thing the county has crossed off its to-do list, officials said, is that they've sent mail-in ballot applications to all registered Democratic and Republican voters, as promised. The last batch of applications went out on May 13, Mr. Voye said. More than 600,000 have been sent in total.

"I know they're hitting mailboxes," Mr. Voye said, noting that he hasn't received any calls from voters worrying about the status of receiving an application.

Meanwhile, the county continues to recruit poll workers to staff the 147 polling locations on primary day. Officials said they've recruited between 1,100 and 1,200 poll workers, close to their original target of 1,300 to 1,400.

"We feel confident that we should be able to have it adequately staffed by Election Day," Mr. Voye said.



Ms. Hallam — who joined her board colleagues in voting to increase poll worker pay to \$200 — said that some poll workers have contacted her to say they've volunteered their efforts to the county and have been told they're not needed. Mr. Voye insisted the county doesn't want to turn anyone away, and said he is sure they can accommodate workers who are interested.

Before June 2, the county will mail every household information about changes in polling place, and post signage at defunct locations on Election Day directing voters where to go, Mr. Voye



MENU



being given printed guidance, will receive infection protection kits from the state — each with a personal bottle of hand sanitizer, gloves, masks, sanitary wipes and blue marking tape to mark off six-foot increments on the floor.

If “everything goes as planned” on Election Day, the county will start scanning and tallying the mail-in and absentee ballots at 7 a.m. — as permitted — and will be ready to put those results into the database shortly after polls close at 8 p.m., Mr. Voye said. Then, they’ll only have to scan the votes that were cast in-person.

The county has decided not to use precinct scanners this election “because we had so few poll workers trained on it,” Mr. Voye said.

Instead, votes will be tabulated and scanned at a central warehouse, which will require officials to transport ballot boxes the night of the election — a multi-step process that the county insists is monitored for security at each point.

Julian Routh: jrouth@post-gazette.com, 412-263-1952, Twitter @julianrouth.



First Published May 19, 2020, 9:42pm

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five months at current

In this March 1, 2020, file photo,

Suburban Pittsburgh counties say they are ready for June 2 primary

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2 Tom Wolf ann NEWS
update to status of
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2020.

All Pa. counties will be in 'yellow' by June 5, some going green next week

3 Kaufmann' BUSINESS
over the entrance of the
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Smithfield Street in
Downtown on Tuesday, May
26, 2020.

Of mice and men: Kaufmann's deal falls apart as residents cope with rodents, other maintenance issues

4 State corne SPORTS
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Penn State's Lamont Wade on 'evil' in the world, Colin Kaepernick and more

5 nis Vodzak, an LOCAL
host, at his Historic Day
House in the North Side.
Vodzak saw a 100 percent
drop in his bookings as of late
March.

Gutted by pandemic, Airbnb hosts consider options moving forward



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In general, which candidate do you think will perform better in 'swing states' in the November presidential election?

- President Trump
- Joe Biden
- It will be a toss-up
- Other / No opinion

NEXT

EXHIBIT 6

Case# 2020-06413-0 Docketed at Montgomery County Prothonotary on 05/26/2020 12:43 PM, Fee = \$289.50. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MONTGOMERY COUNTY BOARD OF ELECTIONS

NO. 2020-06413

CIVIL COVER SHEET

State Rule 205.5 requires this form be attached to any document commencing an action in the Montgomery County Court of Common Pleas. The information provided herein is used solely as an aid in tracking cases in the court system. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

Name of Plaintiff/Appellant's Attorney: MAUREEN E CALDER, Esq., ID: 68055

Self-Represented (Pro Se) Litigant

Class Action Suit Yes No

MDJ Appeal Yes No

Money Damages Requested

Commencement of Action:

Amount in Controversy:

Petition _____

Case Type and Code

Miscellaneous: _____

Other _____

Other: EMERGENCY PETITION _____

Case# 2020-06413-0 Docketed at Montgomery County Prothonotary on 05/26/2020 12:43 PM, Fee = \$289.50. The filer certifies that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

PUBLIC HEALTH EMERGENCY COURT COVER SHEET

CIVIL CRIMINAL FAMILY ORPHANS

Due to the Public Health Emergency, the Montgomery County Court of Common Pleas has limited operations for **EMERGENCY MATTERS ONLY**. A list of what is considered an emergency matter is available on the Court's website - www.montcopa.org/285/County-Courts

Every Emergency Petition or Emergency Motion filed during this time will be sent directly to a Judge after service has been made. THE JUDGE WILL DECIDE WHETHER THIS IS AN EMERGENCY AND HOW IT WILL BE ADDRESSED. If the Judge deems the matter is an emergency - a conference, hearing or argument may be scheduled by technology or in-person. Please complete all requested information, including telephone numbers and email addresses of all parties named in the captions, or their attorney's names and phone numbers and email addresses.

SERVICE: The party initiating the Emergency Petition or Emergency Motion must (1) serve the other side with a **TIME STAMPED** copy before the petition or motion will be forwarded to the Judge, and (2) file the original Certificate of Service with the applicable filing office.

CASE NUMBER:

MAUREEN CALDER, ID: 68055

IN RE: :

Attorney for Plaintiff **OR** Pro se Party

EXTENSION OF TIME FOR ABSENTEE AND MAIL-IN BALLOTS TO BE RECEIVED AND COUNTED IN THE 2020 PRIMARY ELECTION

MCalder@montcopa.org / cell 570-574-9833

Phone Number(s) and Email Address(es)

VS.

ID: _____

Attorney for Defendant **OR** Pro se Party

Phone Number(s) and Email Address(es)

THE FILING PARTY HEREBY CERTIFIES THAT HE/SHE HAS MADE A GOOD FAITH EFFORT TO RESOLVE THIS MATTER PRIOR TO THE FILING OF THE ATTACHED EMERGENCY PETITION.

ORDER

AND NOW, this _____ day of _____, 20____, Judge _____ has deemed this petition/motion:

is an emergency, and has scheduled a conference/hearing/argument for:

By Technology _____ In-Person

is an emergency, and orders: _____

is **not** an emergency, and Court Administration is directed to schedule this in due course.

Other: _____

BY THE COURT:

_____ J.

**IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA**

IN RE: :
EXTENSION OF TIME FOR : Civil Action
ABSENTEE AND MAIL-IN BALLOTS : Docket No. _____
TO BE RECEIVED AND COUNTED IN :
THE 2020 PRIMARY ELECTION :

ORDER

AND NOW, this _____ day of May, 2020, upon consideration of the Emergency Petition of the Montgomery County Board of Elections for an Extension of Time for the Voted Absentee and Mail-in Ballots of the Qualified Registered Electors of Montgomery County to be Counted for the 2020 Primary Election, and any opposition thereto, it is hereby ORDERED and DECREED, that said Petition is GRANTED as follows:

The Montgomery County Board of Elections shall accept all absentee and mail-in ballots received by the Montgomery County Board of Elections any time before Tuesday, June 9, 2020, at 5:00 p.m.

It is further ORDERED and DECREED that The Montgomery County Board of Elections shall consider for tabulation during the official tabulations, all civilian absentee and mail-in ballots received at the Montgomery County Board of Elections by Tuesday, June 9, 2020, at 5:00 p.m..

BY THE COURT:

J.

**IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA**

IN RE:	:	
EXTENSION OF TIME FOR	:	Civil Action
ABSENTEE AND MAIL-IN BALLOTS	:	Docket No. _____
TO BE RECEIVED AND COUNTED IN	:	
THE 2020 PRIMARY ELECTION	:	

**EMERGENCY PETITION OF THE MONTGOMERY COUNTY BOARD OF
ELECTIONS REQUESTING AN EXTENSION OF TIME TO ACCEPT VOTED
ABSENTEE AND MAIL-IN BALLOTS FROM THE QUALIFIED REGISTERED
ELECTORS OF MONTGOMERY COUNTY RECEIVED BY THE MONTGOMERY
COUNTY BOARD OF ELECTIONS BETWEEN TUESDAY, JUNE 2, 2020
AFTER 8:00 P.M. AND TUESDAY JUNE 9, 2020 AT 5:00 P.M.**

Petitioner, the Montgomery County Board of Elections (“Board of Elections”), by its undersigned attorneys, the Montgomery County Solicitor’s Office, hereby petitions this Honorable Court for permission to extend the deadlines for the Absentee and Mail-in Voters of Montgomery County to submit their voted Ballots to Board of Elections until 5:00 p.m. on Tuesday, June 9, 2020. In support of this Petition, the Montgomery County Board of Elections avers as follows:

1. Pursuant to 25 P.S. §2641, *et seq.*, the Montgomery County Board of Elections has jurisdiction over the conduct of elections, including the 2020 Primary Election scheduled for Tuesday June 2, 2020.
2. In early March of 2020, the highly infectious coronavirus (COVID-19) spread through the United States causing a public health emergency to be declared in the Commonwealth of Pennsylvania.
3. On March 8, 2020, Montgomery County declared the existence of a disaster emergency in Montgomery County due to the widespread outbreak of COVID-19 affecting the residents of Montgomery County.

4. Pennsylvania Governor Tom Wolf issued a Stay-at-Home Order that was effective for Montgomery County residents as of March 23, 2020 and remains in effect until June 4, 2020.

5. The statutory deadline for application of an absentee and mail-in ballot is 5:00 p.m. on Tuesday, May 26, 2020. *See, 25 P.S. §§3146.2a(a), 3150.12a(a)*¹

6. The Montgomery County Board of Elections has caused said absentee and mail-in ballots to be mailed to the aforementioned qualified electors in accordance with 25 P.S. §§3146.5, 3150.15.

7. The Montgomery County Board of Elections has received and processed over 154,000 civilian absentee and mail-in ballot applications for the upcoming election and has approximately three thousand applications that it intends to process within the next day.

8. As of the date of this filing, the Montgomery County Board of Elections has only received approximately twenty-five percent of the absentee and mail-in ballots that it sent to eligible electors.

9. The Montgomery County Board of Elections has received numerous reports from individuals who have not received their absentee or mail-in ballots, despite the fact that the ballots were mailed to them.

10. Additionally, both the Democratic and Republican party officials of Montgomery County have received reports from constituents that they still have not received their absentee or mail-in ballots.

¹ Pursuant to 25 P.S. §3146.2a(a) “except as provided in subsections (a.1) and (a.2), applications for absentee ballots shall be received in the office of the county board of elections not earlier than fifty (50) days before the primary or election and not later than five o’clock p.m. of the first Tuesday prior to the day of any primary or election.” Similarly, 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. 25 P.S. §3150.12a(a).

11. On Thursday, May 21, 2020, the United States Post Office confirmed that absentee and mail-in ballots that had been mailed could take up to ten days to be delivered.

12. The Statewide Uniform Registry of Electors (SURE) system is a secure computer database that contains all registered electors in the Commonwealth. All absentee and mail-in ballot applications are processed through the SURE system.

13. On March 27, 2020, the Bureau of Election Security and Technology of the Pennsylvania Department of State implemented a SURE system enhancement that resulted in errors appearing on address labels for the absentee and mail-in ballots mailed to eligible electors.

14. Specifically, the system no longer recognized fields containing apartment numbers resulting in hundreds of ballots being mailed to apartment complexes with no way to deliver to the specific addresses within those complexes.

15. The United States Post Office has returned a number of these ballots to the Montgomery County Board of Elections because the address labels contained incomplete addresses and were undeliverable. The Montgomery County Board of Elections has added apartment numbers to those ballots that were missing them and mailed them again. However, there are potentially many more ballots that were sent out without apartment numbers that could be returned to the Montgomery County Board of Elections during the next week.

16. All qualified electors who appropriately applied for civilian absentee and mail-in ballots before the aforementioned statutory deadline are required to return their voted absentee and mail-in ballots to the County Board of Elections by 8:00 p.m. on Tuesday, June 2, 2020 in order for the voted ballot to be considered for tabulation. *See* 25 P.S. §§ 3146.6, 3150.16.

17. On Friday, May 22, 2020, the Montgomery County Solicitor and the attorney for the Pennsylvania Department of State discussed possible ways in which the Montgomery County Board of Elections could proceed in order ensure that the absentee and mail-in voters of

Montgomery County could have their ballots counted if received after the statutory deadline set forth above. The Department of State suggested that the Montgomery County Board of Elections could exercise the option to petition the Montgomery County Court of Common Pleas for an extension of the deadline to receive completed absentee ballots.

18. After review, the Montgomery County Board of Elections now petitions this Honorable Court to extend the statutory deadline until June 9, 2020 at 5:00 p.m. for the County Board of Elections to receive completed absentee and mail-in ballots to be counted in the June 2, 2020 Primary.

19. As such, the Montgomery County Board of Elections respectfully requests this Honorable Court to extend the statutory deadline for absentee and mail-in ballots to be received by the Board to be counted for all offices on the ballot, from 8:00 p.m. Tuesday, June 2, 2020 to 5:00 p.m., Tuesday, June 9, 2020.

20. Moreover, the Montgomery County Board of Elections respectfully requests that any absentee or mail-in ballots received before 5:00P.M.on Tuesday, June 9, 2020 be counted during official tabulation.

21. This extended deadline would align with the existing deadline for military and overseas ballots which must be counted if received by the Board of Elections by 5:00 p.m. on the seventh day following the election. *See*, 25 Pa.C.S.A. § 3511 (a).

22. No person, political party and/or candidate would be negatively affected by this relief.

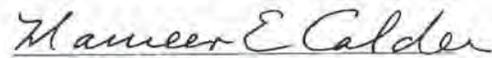
23. It is well-settled that the purpose of the Election Code is to ensure fair elections, including an equal opportunity for all eligible electors to participate in the election process. *In re PrimaryElection – 1985*, 109 Pa.Cmwlth. 604, 608, 531 A.2d 836, 839 (Court postponed the date of the Primary Election for 11 precincts that suffered extensive flooding, loss of electricity, heat,

and water during extreme weather conditions) (*citing, In re Mayor, City of Altoona, Blair County*, 413 Pa. 305, 196 A.2d 371 (1964)). An election that involves members of the electorate who could be deprived of their opportunity to participate because of circumstances beyond their control would be inconsistent with the purpose of the Election Code. *Id.*

24. The Montgomery County Board of Elections seeks this extension so that all of the duly qualified electors of Montgomery County are able to participate in the election process.

WHEREFORE, the Montgomery County Board of Elections respectfully requests this Honorable Court to GRANT its Emergency Petition to extend the 8:00 p.m., June 2, 2020 deadline to June 9, 2020 at 5:00 p.m. for all civilian absentee and mail-in ballots to be returned to the Montgomery County Board of Elections so that they can be tabulated for all offices that the electors have chosen to vote on at the official tabulations.

Respectfully submitted,



Maureen E. Calder
Attorney ID No. 68055
John A. Marlatt
Attorney ID No. 210141
Joshua M. Stein
Attorney ID No. 90473

Montgomery County Solicitor's Office
One Montgomery Plaza, Suite 800
Norristown, PA 19404
(610) 278-3033
Attorneys for Petitioner.
Montgomery County Board of Elections

Dated: May 26, 2020

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:	:	
EXTENSION OF TIME FOR	:	Civil Action
ABSENTEE AND MAIL-IN BALLOTS	:	Docket No. _____
TO BE RECEIVED AND COUNTED IN	:	
THE 2020 PRIMARY ELECTION	:	

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 26th day of May, 2020, she served a true and correct copy of the Emergency Petition of the Montgomery County Board of Elections Requesting an Extension of Time to Submit Absentee and mail-in Ballots, via email upon the following:

Joseph Foster, Chairman
Montgomery County Democratic Committee

Liz Preate Havey, Chairman
Montgomery County Republican Committee

Maureen E. Calder
Maureen E. Calder, Esquire

Dated: May 26, 2020 —

EXHIBIT 7



Jonathan Lai 🇺🇸 賴柏羽 ✓
@Elaijuh



Wanna hear about a PA election system design problem?

Look at this screenshot of the online application form for requesting a mail ballot.

Note the "Address Line 2" field, which normally you might think to use to include your apartment number.

Not on this form.

BALLOT REQUEST APPLICATION

Deadline Alert: If you plan to vote by absentee or mail-in ballot in the 2020 GENERAL PRIMARY, your completed application must be received in the county office by 5:00 PM on 05/26/2020. Your voted ballot must be received in your county election office by 8:00 PM on 06/02/2020. A late application will not be accepted, even if it was postmarked before the deadline. Please note: Only absentee ballots are available for use in the special elections held before the 2020 primary election. Ball Mail-in and absentee ballots may be used for the 2020 primary and subsequent elections.

Please provide your current address of residence. (as it appears on your voter record)

County of Residence: [dropdown]

Your Address: [text]

Address Line 1: [text]

Address Line 2: [text]

Unit Type (if applicable): [dropdown]

Unit # (if applicable): [text]

City: [text]

2:37 PM · May 26, 2020 · [Twitter Web App](#)

9 Retweets **13** Likes



EXHIBIT 8

IN THE COURT OF COMMON PLEAS OF
MONTGOMERY COUNTY, PENNSYLVANIA

IN RE:
EXTENSION OF TIME FOR
ABSENTEE AND MAIL-IN BALLOTS
TO BE RECEIVED AND COUNTED IN
THE 2020 PRIMARY ELECTION

Civil Action
Docket No. 2020-06413

ORDER

AND NOW, this 27th day of May, 2020, upon consideration of the
Emergency Petition of the Montgomery County Board of Elections for an
Extension of Time for the Voted Absentee and Mail-In Ballots of the Qualified
Registered Electors of Montgomery County to be Counted for the 2020 Primary
Election, it is hereby ORDERED and DECREED, that said Petition is DENIED.

BY THE COURT:


_____ J.



2020-06413-0002 5/27/2020 11:14 AM # 12746674
Rcpt#Z3871479 Fee:\$0.00 Order
Main (Public)
MontCo Prothonotary

THIS DOCUMENT WAS DOCKETED AND SENT ON 05/27/2020

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EXHIBIT 9

Key swing state warns of November election 'nightmare'

[politico.com/news/2020/05/24/pennsylvania-election-nightmare-275410](https://www.politico.com/news/2020/05/24/pennsylvania-election-nightmare-275410)

ZACH MONTELLARO

2020 elections

The outcome in Pennsylvania could remain up in the air long past Election Day.



Pennsylvania Gov. Tom Wolf signed no-excuse mail-in ballot voting and other reforms into law late last year, making the June 2 primary the first test of those changes. | Matt Rourke/AP Photo

PHILADELPHIA — Pennsylvania could determine the presidency. But it might not be clear for days who won the state on Nov. 3.

Election officials throughout the critical battleground, which is implementing no-excuse mail-in voting for the first time ever amid a pandemic, say they are unlikely to finish counting those ballots the night of the general election.

Advertisement

If the race is close enough — as it was in 2016, when Donald Trump carried the state by only

44,000 votes — that could mean the status of one of the nation's biggest swing states could remain up in the air long past Election Day.

“My nightmare is that on Election Day in November, you're waiting for Montgomery County's results to declare Pennsylvania to declare who wins the White House,” said Montgomery County Commissioner Ken Lawrence, a Democrat who chairs the Board of Elections there. “The reality is that all of our counties are going to be in that same situation, and it will take a while to actually count the ballots.”



[politico/morning consult poll](#)

Republicans and Democrats barrel toward collision on voting by mail

Less than two weeks away from Pennsylvania's primary, some state election officials said they lack the funding and staff needed to handle the massive influx of mail-in ballots they've received for that race. They also said the fact that they legally can't start counting those ballots until the morning of Election Day is complicating matters. In addition to delaying a final tally, the chaos and confusion could sow distrust ahead of the general election and give fodder to those seeking to discredit its results.

"I've had a lot of people reach out to me so far. They got the wrong party ballot sent to them. They got the wrong district ballot sent to them. And now I'm having people getting multiple ballots sent to them. These are the things that are inevitable when you rush the implementation of mail-in voting like we did here," said Allegheny County Democratic Councilwoman and election board member Bethany Hallam. "But I'm worried that, if Donald Trump loses in November, do the Republicans use all these examples of errors with mail-in voting as their excuse to invalidate election results?"

Democratic Gov. Tom Wolf signed no-excuse mail-in ballot voting and other reforms into law late last year, making the June 2 primary the first test of those changes. Prior to the coronavirus outbreak, election officials expected to have months, if not years, to acclimate voters to the option of voting by mail. Instead, they've been forced to transform the system overnight.

Advertisement

In Philadelphia, whose metro area is the most populous part of the state, officials predicted before the pandemic that they would get 70,000 to 90,000 applications for mail-in and absentee ballots in the primary. Through Thursday, with several days to go until the deadline, they had already received about 158,000. They said the previous record, set in a presidential general election, was roughly 23,000.

The deluge has led to a backlog: Officials said last week about 18,000 ballots are still waiting to be sent to city voters.

In Pittsburgh's Allegheny County, the second biggest county in the state, the situation is worse: It had a backlog of 80,000 ballots last week. It has received more than 225,000 mail-in and absentee ballot applications through Thursday — compared with the 10,000 absentee ballots it gets in a typical presidential primary, officials said,

white house

Trump takes mail-in voting grievances to Michigan

"We don't just have a perfect storm. We have perfect storms," said Republican Al Schmidt, one of the three Philadelphia city commissioners who oversee elections here. "We have new voting technology. We have an election reform that pushed back all the deadlines. And we have mail-in ballots and the pandemic."

Though election officials said they will process all of the mailed-in votes and that most of the errors with the ballots have been minor, they worry that news reports like thousands of ballots with flawed instructions being sent to voters in suburban Philadelphia's Montgomery County will lead to increased suspicion of the new voting method.

It's unclear which party will be harmed more by such doubts. In low-income and minority neighborhoods in Democratic-dominated Philadelphia, voters have requested mail-in ballots at lower rates than those in more affluent areas. Overall, though, 69 percent of applications processed for mail and absentee ballots in the state have come from Democratic voters, compared with 30 percent from Republicans, which some GOP insiders in the state blame on Trump's opposition to the voting method.

Trump has railed against mail-in voting, claiming without evidence that it is "a very dangerous thing for this country because they're cheaters." On Wednesday, he incorrectly said that Michigan — like Pennsylvania, a Rust Belt giant that is critical to the president's path to reelection — is sending absentee ballots to 7.7 million voters and threatened to withhold funding to the state "if they want to go down this Voter Fraud path!"

The state is sending applications, not the actual ballots, to all registered voters.

MOST READ



Advertisement

Pennsylvania has not sent mail-in ballot applications to all eligible voters during the primary, though some local governments, such as Allegheny County, have. Secretary of State Kathy Boockvar is open to the possibility of sending mail-in ballot applications to every voter in the general election “with the necessary additional resources,” according to spokeswoman Wanda Murren. An aide to Wolf said the governor will make a determination on the idea “based on experience in the primary, as we understand county processing capacity and other factors.”

Boockvar also supports allowing election officials to start counting mail ballots before Election Day, but that would require action by the state Legislature.

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Ahead of the primary, some election officials said unrealistic deadlines mean some voters won't get their mail-in ballots in time. The final day a voter can apply for such a ballot is May 26, but election administrators must receive it just a week later.

“The reality is if you apply on May 26 for your mail-in ballot, there's no way we're going to get it mailed out to you and you're going to mail it back before June 2,” Lawrence said.

Montgomery County and other areas are putting out drop boxes so voters in that situation can deliver their ballots in person.

Officials said hiring freezes and budget cuts that have been implemented because of the pandemic are making a bad situation worse. In Philadelphia, commissioners planned to hire about 50 more employees to help process the new law permitting voting by mail. But they were able to bring in only 25 before the coronavirus hit.

Mayor Jim Kenney also initially proposed a \$10 million increase to the City Commissioners Office this year, but withdrew the bump in a revised budget plan that he unveiled after the virus spread. Election officials throughout Pennsylvania said the \$14 million allocated to the state for election assistance in the CARES Act is far from enough.

“We would probably need millions in order to really adequately fulfill the huge lift,” said Lisa Deeley, a Democratic Philadelphia city commissioner. “My office has been a whirlwind.”

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EXHIBIT 10

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBYN DRISCOLL; MONTANA
DEMOCRATIC PARTY; and
DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,

Plaintiffs,

vs.

COREY STAPLETON, in his official capacity
as Montana Secretary of State,

Defendant.

Cause No. DV 20-408

JUDGE DONALD L. HARRIS

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
MEMORANDUM, AND
ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

INTRODUCTION

Plaintiffs Robyn Driscoll, Montana Democratic Party, and Democratic Senatorial Campaign Committee have sued Defendant Corey Stapleton, in his official capacity as Montana Secretary of State, to enjoin enforcement of the Ballot Interference Prevention Act, Mont. Code Ann. § 13-35-701 *et seq.*, and the election day receipt deadline for absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont. Code Ann. § 13-19-106(5)(b). Pending before the Court is Plaintiffs' Motion for Preliminary Injunction. The parties have agreed to submit the issue of whether the Court should issue a preliminary injunction based upon the parties' briefs and affidavits. Both parties have waived their right to a hearing under Mont. Code Ann. §27-19-

1 303. The preliminary injunction issues have been fully briefed and the matter is now ripe
2 for decision.

3 **I. The Ballot Interference Protection Act.**

4 Except for election officials or United States postal workers, the Ballot Interference
5 Protection Act (BIPA) restricts who can collect a voter's voted or unvoted ballot. Mont.
6 Code Ann. § 13-35-703. BIPA permits only caregivers, family members, household
7 members, or acquaintances to collect ballots, but prohibits them from collecting and
8 conveying more than six ballots. Mont. Code Ann. § 13-35-703(2) and (3). The BIPA also
9 requires every caregiver, family member, household member, or acquaintance who
10 delivers another person's ballot to sign a registry and provide: (1) the individual's name,
11 address, and phone number; (2) the voter's name and address; and (3) the individual's
12 relationship to the voter whose ballot is being delivered. Mont. Code Ann. § 13-35-704.
13 The BIPA imposes a \$500.00 fine for each ballot unlawfully collected. Mont. Code Ann.
14 § 13-35-705.
15

16 **II. The Absentee Ballot Election Day Receipt Deadline.**

17 The absentee ballot election day receipt deadline (Receipt Deadline) requires
18 absentee ballots to be received at a designated election office, polling place, place of
19 deposit, or by an authorized election official before 8:00 p.m. on election day. Mont. Code
20 Ann. § 13-13-201(2)(e)(i)-(iv). Absentee ballots received after the 8:00 p.m. election day
21 deadline are not counted. Mont. Code Ann. § 13-13-201(3); Mont. Code Ann. § 13-13-
22 211(3); Mont. Code Ann. § 13-19-106(5)(b).
23
24
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27

1 **III. Plaintiffs Alleged Constitutional Violations.**

2 Plaintiffs claim that, without furthering any legitimate state interests, the BIPA and
3 Receipt Deadline significantly burden the right to vote and infringe upon the rights to free
4 speech, association, and due process. The Plaintiffs argue that the BIPA and Receipt
5 Deadline violate the fundamental constitutional rights of suffrage, assembly, speech, and
6 due process under Montana’s Constitution. Mont. Const. art. II, § 13, § 6, § 7, and § 17¹.
7
8 Unless enjoined, Plaintiffs assert that the BIPA and Receipt Deadline will make it
9 significantly more difficult for many Montanans to vote or to have their votes counted.

10 **IV. State’s Justifications for the BIPA and Receipt Deadline.**

11 The State argues that the BIPA is necessary to prevent fraud when absentee
12 ballots are collected and delivered. The State contends that the Receipt Deadline is
13 necessary to treat absentee voters the same as in person voters and to provide timely,
14 accurate election results. Because the BIPA and Receipt Deadline are alleged to serve
15 legitimate and compelling state interests, the State argues that the laws are constitutional.
16 The State further argues that Plaintiffs have failed to establish a *prima facie* case showing
17 that a preliminary injunction is necessary.
18

19 **V. Preliminary Injunction Requirements.**

20 Under Mont. Code Ann. § 27-19-201, a preliminary injunction may be granted:

- 21
22 (1) when it appears that the applicant is entitled to the relief demanded and
23 the relief or any part of the relief consists in restraining the commission or
24 continuance of the act complained of, either for a limited period or
25 perpetually;
26 (2) when it appears that the commission or continuance of some act during
27 the litigation would produce a great or irreparable injury to the applicant;
 (3) when it appears during the litigation that the adverse party is doing or

¹ Because of time constraints, the Court will address the Plaintiffs’ Article II, Section 13 claim and reserve ruling upon the other alleged constitutional violations at this time.

1 threatens or is about to do or is procuring or suffering to be done some act
2 in violation of the applicant's rights, respecting the subject of the action, and
tending to render the judgment ineffectual;

3 (4) when it appears that the adverse party, during the pendency of the
4 action, threatens or is about to remove or to dispose of the adverse party's
property with intent to defraud the applicant, an injunction order may be
granted to restrain the removal or disposition;

5 (5) when it appears that the applicant has applied for an order under the
6 provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

7 The above subsections are disjunctive, "meaning that findings that satisfy one subsection
8 are sufficient." *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm'rs of Sweet Grass Cty.*,
9 2000 MT 147, ¶ 27 (quoting *Stark v. Borner*, 226 Mont. 356, 359, 735 P.2d 314, 317
10 (1987)). Consequently, only one subsection of Mont. Code Ann. 27-19-201 needs be met
11 to support the issuance of a preliminary injunction. See *Stark*, 735 P.2d at 317.

12 Additionally, the "grant or denial of injunctive relief is a matter within the broad discretion
13 of the district court based on applicable findings of fact and conclusions of law." *Weems v.*
14 *State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276,
15 ¶ 10).

17 Further, the district court "does not determine the underlying merits of the case in
18 resolving a request for preliminary injunction." *Weems*, ¶ 18. And "[i]n the context of a
19 constitutional challenge, an applicant for preliminary injunction need not demonstrate that
20 the statute is unconstitutional beyond a reasonable doubt, but 'must establish a *prima*
21 *facie* case of a violation of its rights under' the Constitution." *Id.* (quoting *City of Billings v.*
22 *Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251
23 (1997)). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to
24 further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie*, *Black's Law*
25 *Dictionary* (10th ed. 2014)). Because Plaintiffs have moved for a preliminary injunction
26
27

1 based on constitutional challenges, they must establish a *prima facie* case of a
2 constitutional violation.

3 Section 13 of Montana's Constitution states: "All elections shall be free and open,
4 and no power, civil or military, shall at any time interfere to prevent the free exercise of the
5 right of suffrage." Mont. Const. art. II, § 13. The right of suffrage is a fundamental
6 right. See e.g. *State v. Riggs*, 2005 MT 124, ¶ 47 (citations omitted) ("A right is
7 'fundamental' under Montana's Constitution if the right ... is found in the Declaration of
8 Rights.")
9

10 Because voting rights are fundamental, statutes like the BIPA and the Receipt
11 Deadline that allegedly infringe upon the right to vote "must be strictly scrutinized and can
12 only survive scrutiny if the State establishes a compelling state interest and that its action
13 is closely tailored to effectuate that interest and is the least onerous path that can be
14 taken to achieve the State's objective." *Montana Env'tl. Info. Ctr. v. Dep't. of Env'tl. Quality*,
15 1999 MT 248, ¶ 63; *Finke v. State ex. Rel. McGrath*, 2003 MT 48, ¶ 15. The State must
16 "prove the compelling interest by competent evidence." *Wadsworth v. State*, 275 Mont.
17 287, 911 P.2d 1165, 1174 (1996). Merely alleging that a compelling interest exists is not
18 enough to justify interference with the exercise of a fundamental right. *Id.*
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21 VI. Findings of Fact.

22 1. In support of their Motion for Preliminary Injunction, the Plaintiffs submitted
23 the following Affidavits:

- 24 a. Affidavit of Kenneth Mayer, Ph.D.
25 - expert opinions on voter suppression effects of BIPA and Receipt
26 Deadline;
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- b. Affidavit of Trent Bolger
- Montana Democratic Party Get Out the Vote (GOTV), absentee ballot collection, Receipt Deadline;
- c. Affidavit of Beth Brenneman
- Disability Rights of Montana, absentee ballot collection, Receipt Deadline;
- d. Affidavit of Shelbi Dantic
- Montana Conservation Voters, absentee ballot collection, Receipt Deadline;
- e. Affidavit of Robyn Driscoll
- Chair, Montana Democratic Party, GOTV, absentee ballot collection;
- f. Affidavit of Mary Glueckert
- College student, MontPIRG, ASUM, student voting, absentee ballot collection;
- g. Affidavit of Denver Henderson
- Missoula County Election Advisory Committee, BIPA, absentee ballot collection, Receipt Deadline, COVID-19;
- h. Affidavit of Sophie Moon
- MontPIRG, student voting, Receipt Deadline, working class voters, minority voters;
- i. Affidavit of Linda Stoll
- Montana Association of County Clerk and Recorders; BIPA, absentee ballot collection, absentee ballot tracking, absentee ballot verification, proposed BIPA amendments, Native American voting;
- j. Affidavit of Mary Hall
- Chief election official for Thurston County, Washington; postmark deadline, counting postmarked ballots after Election Day;
- k. Affidavit of Marci McLean
- Executive director of Montana Native Vote and Western Native Voice; GOTV for Indigenous voters on reservations in Montana BIPA.

1 2. The Court finds that, without exception, all Affidavits were verified and that
2 the material allegations in each Affidavit were made positively and not upon information
3 and belief.

4 3. The Court finds that, for the purposes of determining whether the Plaintiffs
5 have presented a *prima facie* case for a preliminary injunction, the statements made by
6 the Affiants are credible and based upon extensive personal experience. The Court further
7 finds that the expert opinions expressed by Dr. Mayer are credible and persuasive. Dr.
8 Mayer has extensive education, training, and experience in the field of election
9 administration, the impact of direct and indirect costs² on voter turnout, and the
10 relationship between socioeconomic and educational status on the ability to absorb voting
11 costs³. The methodology Dr. Mayer used is widely recognized and accepted in his field.
12 Dr. Mayer's expert testimony has been accepted by both state and federal courts⁴. His
13 research has been published in many peer reviewed journals⁵. The Court finds that the
14 State has not challenged Dr. Mayer's opinions.

15 4. Based upon Plaintiffs' Affidavits, the Court finds that the BIPA and Receipt
16 Deadline will significantly suppress voter turnout by disproportionately burdening voters
17 who are Native American⁶, elderly⁷, disabled⁸, poor⁹, parents working low-wage jobs¹⁰,
18 college students¹¹, first-time voters¹², and voters who have historically relied on GOTV and
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23 ² Includes administrative burdens and compliance costs.

24 ³ Affidavit of Dr. Kenneth Mayer at 2-3

25 ⁴ *Id.*

26 ⁵ *Id.*

27 ⁶ Affidavit of Linda Stoll

⁷ Affidavit of Trent Badger and Affidavit of Robyn Driscoll

⁸ Affidavit of Beth Brenneman

⁹ Affidavit of Robyn Driscoll and Affidavit of Mary Glueckert

¹⁰ Affidavit of Shelbi Dantic

¹¹ Affidavit of Mary Glueckert and Affidavit of Sophie Moon

¹² Affidavit of Mary Glueckert

1 ballot collection services like those provided by Western Native Voice¹³, MontPIRG¹⁴,
2 Disability Rights Montana¹⁵, Forward Montana¹⁶, Montana Conservation Voters¹⁷,
3 unionized labor¹⁸, and the Montana Democratic Party¹⁹.
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5 5. The Court further finds that, in opposing the Plaintiffs' Motion for Preliminary
6 Injunction, the State failed to present any evidence to dispute the Plaintiffs' evidence (1)
7 that the BIPA and Receipt Deadline statutes disproportionately burden the voters identified
8 in paragraph 4 above or (2) that the statutes significantly suppress voter turnout by making
9 voting more burdensome and costly for absentee voters.
10

11 6. The Court finds that the BIPA and Receipt Deadline statutes will only
12 exacerbate voter suppression because of the COVID-19 pandemic. Requiring absentee
13 voters to line up, fill out a registry form, and be quizzed by an election official before
14 delivering someone else's ballot violates the social distancing required to prevent the
15 unnecessary spread of COVID-19. Because a significant percentage of absentee voters
16 deliver their ballots shortly before or on election day, long lines and crowded election
17 offices will be commonplace²⁰. The BIPA's registry requirement eliminated the previous
18 use of secure ballot drop boxes that election officials could place at various sites
19 throughout a community or county to make absentee voting easy, convenient, and safe.
20 The COVID-19 pandemic will only increase absentee voting, thereby amplifying the voter
21 suppression effects of the BIPA and Receipt Deadline²¹.
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24 ¹³ Affidavit of Dr. Kenneth Mayer

25 ¹⁴ Affidavit of Mary Glueckert

26 ¹⁵ Affidavit of Beth Brennehan

27 ¹⁶ Affidavit of Dr. Kenneth Mayer

¹⁷ Declaration of Shelbi Dantic

¹⁸ Affidavit of Denver Henderson

¹⁹ Affidavit of Dr. Kenneth Mayer

²⁰ Affidavit of Dr. Kenneth Mayer

²¹ *Id.*

1 7. Based upon Dr. Mayer's Affidavit, the Court finds that there has never been
2 a documented case of absentee ballot collection fraud in Montana.

3 8. The Court finds that the Receipt Deadline disproportionately burdens voters
4 who mail their absentee ballots when compared to voters who vote in person. The Receipt
5 Deadline requires mailed absentee ballots to be received by 8:00 p.m. on election day. If a
6 mailed absentee ballot is not received by 8:00 p.m. on election day, it is not counted. The
7 Receipt Deadline deadline disenfranchises voters who vote before election day, but whose
8 ballots are not delivered by the United States Postal Service until after election day.
9 Delivery times can vary as much as two weeks in Montana depending upon a voter's
10 location²². Even if living in the same city, delivery times can vary from one to seven days.

11 9. The Court finds that the disparity and inconsistency of how long it takes to
12 deliver a mailed absentee ballot significantly burdens absentee voters (1) because they
13 must vote at least a week before the election to have a good chance of having their vote
14 counted; (2) because they have less time and information to decide how to vote; and (3)
15 because there is no guarantee that, even by voting a week early, their ballot will be
16 delivered in time to be counted.

17 10. The Court also finds that there is considerable confusion and
18 misunderstanding among voters about when they must vote by mail. Many believe, based
19 upon filing income tax returns and paying property taxes, that their vote will be counted if
20 postmarked on or before election day. Others reasonably believe that their mailed ballot
21 will be delivered expeditiously if mailed a day or two before election day, especially if
22 mailed to their local election office.
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²² *Id.*

1 11. The Court finds that this misunderstanding and confusion disproportionately
2 burdens first time voters, persons with less education, and persons who have historically
3 relied on ballot collection services.

4 12. The Court finds that, during the current 2020 election cycle, the combined
5 effects of the BIPA and Receipt Deadline will cause thousands of Montanans to not vote or
6 will result in their votes not being counted.

7 13. Though the State alleges that the BIPA promotes the State's compelling
8 interest in preventing voting fraud, the Court finds that the State has failed to present any
9 evidence of absentee ballot collection fraud in Montana.

10 14. The Court finds that the BIPA serves no legitimate purpose: it does not
11 enhance the security or integrity of absentee voting; it does not reduce the costs or
12 burdens of conducting elections; it does not make absentee voting easier or more efficient;
13 it does not reduce confusion about absentee voting requirements; and it does not increase
14 voter turnout.

15 15. The Court finds that not a single election official in Montana supported the
16 BIPA in legislative hearings; nor has the State presented any evidence from any election
17 official that the BIPA: (1) will promote the integrity, security or efficiency of absentee voting;
18 (2) will reduce election costs or burdens; and (3) will increase voter turnout. The evidence
19 from election officials has been just the opposite. In fact, one election official from Cascade
20 County who testified before the State Administration and Veteran Affairs Committee on
21 February 27, 2020 characterized the BIPA as the "Voter Suppression Act of 2018."
22 Plaintiffs' Ex.3 at p. 24.

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1 16. The Court finds that the State also failed to present any evidence that the
2 Receipt Deadline promotes a compelling state interest.

3 17. The Court finds that the Receipt Deadline fails to treat in person and
4 absentee ballot voters uniformly. As long as in person voters are in line by 8:00 p.m. on
5 election day, their ballots are counted no matter how many hours after the 8:00 p.m.
6 deadline they actually vote. Not so with absentee voters, whose votes will not be counted if
7 received after the 8:00 p.m. deadline even if they voted days before the deadline.

8 18. While the State has a compelling interest in accurately tabulating and
9 reporting election results in a timely fashion, the State failed to present any evidence that
10 the Receipt Deadline furthers that interest. The State does not limit the time period for
11 certifying election results; Montana counts federal write-in ballots for military and overseas
12 votes until the Monday after election day and provisional ballots are not even counted until
13 six days after election day. The State failed to present any evidence that using a postmark
14 deadline, where all mailed ballots are counted if postmarked on or before election day and
15 received by the same deadline for federal write-in ballots for military and overseas voters,
16 would frustrate the State's ability to timely certify election results. The Court finds that, by
17 using a postmark deadline, the State can accurately and timely certify election results
18 without disenfranchising the thousands of eligible voters whose ballots are now ignored
19 under the Receipt Deadline.

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22 **VII. Conclusions of Law.**

23 1. The Plaintiffs have satisfied their burden of presenting a *prima facie* case
24 through credible and persuasive evidence that the BIPA and Receipt Deadline statutes
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1 | burden and interfere with the fundamental right to vote guaranteed by article II, section 13
2 | of Montana's Constitution.

3 | 2. The State has failed to demonstrate through competent evidence that there
4 | is any compelling state interest that warrants the burdens and interference on the right to
5 | vote imposed by the BIPA and Receipt Deadline statutes.

6 | 3. If a preliminary injunction is not granted, the BIPA and Receipt Deadline
7 | statutes will cause irreparable harm to thousands of Montana voters by preventing
8 | absentee ballot voters from voting or by disenfranchising those whose absentee ballots
9 | are received after election day.

10 | 4. This Court concludes that the BIPA and Receipt Deadline statutes are
11 | subject to strict scrutiny and that the State must demonstrate though competent evidence
12 | that the statutes further compelling state interests. This Court's decision to grant a
13 | preliminary injunction, however, would not change even under the balancing test
14 | advocated by the State, i.e. balancing the burdens the statutes impose against the
15 | interests the state advances for burdening voting rights. The Court has found that the BIPA
16 | and Receipt Deadline statutes advance no legitimate state interests, yet place significant
17 | burdens on the fundamental right to vote. The State would not prevail even under the
18 | balancing test it advocates.

19 | 5. Based upon the evidence submitted thus far, the Court concludes that the
20 | Plaintiffs are likely to prevail on the merits and would be entitled to a permanent injunction
21 | to enjoin the enforcement of the BIPA and Receipt Deadlines statutes.

22 | 6. The Court concludes that, pursuant to Mont. Code Ann. § 27-19-201(1) and
23 | (2), a preliminary injunction should issue enjoining the enforcement of the BIPA and
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1 Receipt Deadline statutes because the BIPA and Receipt Deadline statutes violate the
2 right to vote. The Court reserves ruling upon whether these statutes also violate additional
3 constitutional rights as Plaintiffs allege.

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5 **VIII. Memorandum.**

6 While not essential to the Court's Findings of Fact and Conclusions of Law, the
7 Court will address the additional arguments asserted by the State.

8 **1. Plaintiffs' delay in seeking a preliminary injunction.**

9 The State argues that Plaintiffs' preliminary injunction motion should be denied
10 because Plaintiffs' delay in seeking a preliminary injunction until just before the June 2
11 primary election undermines their claim of irreparable harm. Def.'s Resp. 2. In Montana,
12 the right to vote is a fundamental right guaranteed by Montana's Constitution. *State v.*
13 *Riggs*, 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm
14 for the purpose of determining whether a preliminary injunction should be issued." *Mont.*
15 *Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15 (citing *Elrod v. Burns*, 427 U.S. 347,
16 373 (1976)). As set forth above, the Plaintiffs have shown the BIPA and the Receipt
17 Deadline violate Montanans' constitutional right to vote. The Plaintiffs have demonstrated
18 irreparable harm for the purposes of determining whether a preliminary injunction should
19 be issued.
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22 The State also argues that Plaintiffs should be estopped from complaining about
23 irreparable harm due to their delay in bringing the case. Def.'s Resp. 2. The cases the
24 State cites to support its argument, however, are inapplicable here because those courts
25 were faced with determining irreparable injury for copyright, trademark, and antitrust and
26 trade violations, not constitutional violations. Def.'s Resp. 2-3 (citing *Oakland Tribune, Inc.*
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1 | *v. Chronical Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Garcia v. Google, Inc.* 768
2 | F.3d 733, 746 (9th Cir. 2015); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2nd Cir.
3 | 1985)). The Plaintiffs have shown irreparable harm per se by presenting a *prima facie*
4 | case that the BIPA and Receipt Deadline statutes violate Montanans' constitutional right
5 | to vote.
6 |

7 | **2. Timing of preliminary injunction.**

8 | The State also argues that the U.S. Supreme Court has "repeatedly emphasized"
9 | its disfavor of altering election rules by injunction on the eve of an election because such
10 | orders can result in "voter confusion and consequent incentive to remain away from the
11 | polls." Def.'s Resp. 3 (quoting *Rep. Nat'l Comm. V. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452,
12 | 453-54 (2020) (*pur curiam*); *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). However, the U.S.
13 | Supreme Court explained:
14 |

15 | [i]mportantly, in their preliminary injunction motions, the plaintiffs did not ask
16 | the District Court allow ballots mailed and postmarked after election day . . .
17 | be counted . . . [t]hat is a critical point in the case . . . the District Court
18 | unilaterally ordered absentee ballots mailed and postmarked after election
19 | day . . . still be counted . . . [e]xtending the date by which ballots may be
20 | cast by voters—not just received by the municipal clerks but cast by
21 | voters—for an additional six days after the scheduled election day
22 | fundamentally alters the nature of the election.

23 | *Rep. Nat'l Comm.* 206 L. Ed. 2d 452 at 1206-7.

24 | *Rep. Nat'l Comm.* is not applicable here for several reasons. First, the relief sought
25 | by the Plaintiffs here is the relief granted by this Court. Second, this Court is not altering
26 | the "date by which ballots may be cast by voters," but rather whether absentee ballots
27 | postmarked on or before election day can be counted. The preliminary injunction does not
"fundamentally alter the nature of the election". *Id.* Third, the injunction here will not result
in voter confusion nor will it disenfranchise voters. Instead, the Court's preliminary

1 | injunction will mitigate the voter suppression effects of the BIPA and Receipt Deadline
2 | statutes. Specifically, those absentee ballots received by the election office after the
3 | Receipt Deadline and those delivered by persons outside the statutory exceptions in
4 | BIPA will now be counted. Because the preliminary injunction granted here does not
5 | “fundamentally alter the nature of the election” or result in voter confusion or
6 | disenfranchisement, the State’s reliance on *Rep. Nat’l Comm* is misplaced. *Id.*

8 | **3. BIPA’s passage by referendum.**

9 | The State next argues that because the BIPA was passed by Montana voters by a
10 | wide majority, the referendum was a “demonstration of a compelling state interest.” Def.’s
11 | Resp. at 6 (citing *Montana Auto. Ass’n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303
12 | (1981)). In *Montana Auto. Ass’n*, the Montana Supreme Court stated that “the statewide
13 | vote on I-85 is a demonstration of a compelling state interest in the enactment of I-85.” *Id.*
14 | However, the Court also declared portions of the initiative unconstitutional. *Id.* While the
15 | Montana Supreme Court has recognized that a statewide initiative passed by Montana
16 | voters can indicate a compelling state interest, initiatives must still pass constitutional
17 | muster. Whether enacted by the legislature or by voter referendum, statutes cannot
18 | violate the Constitution. The State’s argument that the BIPA’s enactment by referendum
19 | shields the BIPA from constitutional scrutiny is mistaken.

22 | **4. Voter fraud in other states.**

23 | The State argues that voter fraud in other states constitutes a compelling state
24 | interest for adopting the BIPA. The State contends that Montana “need not wait for
25 | evidence of fraud [in Montana] to justify preventative measures.” Def.’s Resp. at 7. The
26 | State’s argument ignores the Plaintiffs’ evidence: (1) that the BIPA targets **non-fraudulent**
27 |

1 absentee ballot collection in Montana; (2) that Montana already has a comprehensive set
2 of statutes that prohibit and criminalize fraudulent voting activities, Mont. Code Ann. § 13-
3 35-101 *et seq.*; and (3) that while the BIPA suppresses voting, it does nothing to advance
4 the integrity or security of Montana elections. The State failed to present any evidence that
5 Montana's pre-BIPA statutory scheme for preventing voter fraud would be insufficient to
6 deter fraudulent absentee ballot collection practices. To put in perspective the success of
7 Montana's pre-BIPA statutes prohibiting voter fraud, for the decade from 2006 through
8 2016, there has not been a single case of ballot collection fraud even though voters cast
9 7,079,953 absentee or mail ballots in Montana.²³

11 For those reasons, the State's reliance on the Morley blog-posting entitled "Election
12 Modifications to Avoid During the Covid-19 Pandemic," Lawfare (Apr. 17, 2020), is
13 misplaced. Morley warns that elections officials should avoid adopting new election
14 strategies in response to the Covid-19 epidemic that may create unforeseen problems with
15 election administration and security. Morley identifies one such strategy as authorizing
16 absentee ballot collection. Morley advises that "election officials should reject ... the use of
17 third-party 'designated persons' – frequently referred to as 'ballot harvesters' – to collect
18 absentee ballots from voters (except in jurisdictions where state law expressly authorizes
19 their use)." Morley recommends that, "[e]lection officials should not expand the use of
20 third-party ballot harvesting, particularly as a response to the pandemic." Morley's
21 concerns do not support the BIPA. The BIPA was not enacted in response to COVID-19;
22 the BIPA targets non-fraudulent absentee ballot collection; and Montana has permitted
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²³ Affidavit of Dr. Kenneth Mayer

1 third-party absentee ballot collection for many years without a single case of fraud being
2 reported.

3 Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

4 **IT IS HEREBY ORDERED:**

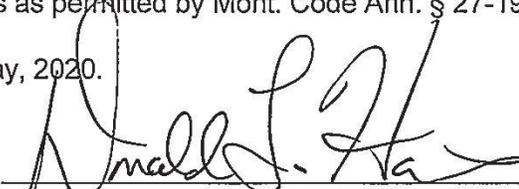
5 1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED**;

6 2. The Defendant and his agents, officers, employees, successors, and all
7 persons acting in concert with each or any of them are **IMMEDIATELY** restrained and
8 prohibited from enforcing the provisions of the Ballot Interference Prevention Act, Mont.
9 Code Ann. § 13-35-701 *et seq.* and the election receipt deadline for absentee ballots set
10 forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont.
11 Code Ann. § 13-19-106(5)(b) pending resolution of the Plaintiffs' request that the
12 Defendant be permanently enjoined from enforcing the statutes cited above;

13 3. All absentee ballots postmarked on or before election day shall be counted,
14 if otherwise valid, provided such ballots are received by the deadline for federal write-in
15 ballots for military and overseas voters; and

16 4. The Court waives the requirement that the Plaintiffs post a security bond for
17 the payment of costs and damages as permitted by Mont. Code Ann. § 27-19-306(1)(b)(ii).

18 DATED this 22nd day of May, 2020.

19 
20 _____
21 DONALD L. HARRIS, District Court Judge

22 cc: Peter M. (Mike) Meloy
23 Matthew Gordon
24 J. Stuart Segrest, Asst. A.G.
25 Aislinn W. Brown, Asst. A.G.
26 Hannah Tokerud, Asst. A.G.

EXHIBIT 11

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE
STATE BOARD OF ELECTIONS

IN THE MATTER OF:)
INVESTIGATION OF)
ELECTION IRREGULARITIES)
AFFECTING COUNTIES)
WITHIN THE 9TH)
CONGRESSIONAL DISTRICT)

ORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS ("State Board") upon the State Board's own motion at a public evidentiary hearing held February 18, 2019 through February 21, 2019 in the manner prescribed by a Notice of Hearing and Amended Order of Proceedings issued February 4, 2019. At the evidentiary hearing, congressional candidate Jeff Scott appeared *pro se*; congressional candidate Dan McCready appeared through counsel, Marc E. Elias (admitted *pro hac vice*), Jonathan Berkon (admitted *pro hac vice*), and John R. Wallace; congressional candidate Dr. Mark E. Harris appeared and was represented by counsel David B. Freedman, Dudley A. Witt, Alex C. Dale, and Christopher S. Edwards; judicial candidate Vanessa Burton appeared and was represented by Sabra J. Faires and William R. Gilkeson, Jr.; and judicial candidate Jack Moody appeared and was represented by Timothy R. Haga. The Mark Harris for Congress Committee was represented by John E. Branch, III. Additional candidates were provided notice of the evidentiary hearing, but did not appear.

After receiving testimony and other evidence submitted over a four-day hearing, and after reviewing written submissions and hearing arguments from the parties, and having weighted the representations of agency staff, the State Board finds, concludes and orders the following:

I. INTRODUCTION

A new election is the gravest remedy available to this State agency that has, for a century, supervised elections meant to ensure “[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.” N.C. CONST. art. I, § 2.

And yet, the substantial record before the State Board of Elections in this case lead this Board to unanimously conclude that the 2018 General Election for North Carolina’s 9th Congressional District was corrupted by fraud, improprieties, and irregularities so pervasive that its results are tainted as the fruit of an operation manifestly unfair to the voters and corrosive to our system of representative government. A new election is necessary not only in the congressional contest, but also in two local contests caught in the long shadow of uncertainty caused by absentee ballot fraud funded principally by the Mark Harris for Congress Committee. Tampering, obstruction and disguise have obscured the precise number of votes either unlawfully counted or excluded, but substantial evidence supports our conclusion that the absentee ballot scheme and other irregularities cast doubt on the outcome of each contest subject to this Order.

II. PROCEDURAL HISTORY

1. In the November 6, 2018 General Election, North Carolina's Ninth Congressional District ("CD-9") spanned eight counties along the State's central southern border. Moving west to east, CD-9 included a portion of Mecklenburg County; all of Union, Anson, Richmond, Scotland, and Robeson Counties; and substantial parts of Cumberland and Bladen Counties. In that election, the candidates seeking to represent CD-9 in the 116th Congress were Republican nominee Mark Harris, Democratic nominee Dan McCready, and Libertarian nominee Jeff Scott.

2. After counties canvassed the votes, Harris led McCready by an apparent margin of 905 votes, which constituted slightly more than one-quarter of one percent of all ballots tallied in that contest.

3. The number of returned absentee by mail ballots far exceeded the margin between Harris and McCready, with more 10,500 tallied districtwide.

4. On November 27, 2018, the date designated by statute for canvass of federal, judicial and multicounty contests, the State Board of Elections and Ethics Enforcement unanimously declined to canvass the 2018 General Election for CD-9 after a briefing from agency investigators and counsel in closed session. The State Board of Elections and Ethics Enforcement — the predecessor to the present State Board of Elections — recessed its canvass

meeting for three days to allow agency staff time to review investigatory information. Following additional briefings from agency investigators and staff, that Board on November 30, 2018, again declined to canvass results for CD-9, citing “claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters in Congressional District 9.” The Board voted 7-2 to hold an evidentiary hearing “pursuant to its authority under G.S. §§ 163A-1180 and 163A-1181 to assure that the election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election” and to stay the issuance of certificates of elections in three other contests in which the apparent outcome could have been reversed by returned or non-returned absentee by mail ballots in Bladen and Robeson counties: Seat 2 on the District Court in Judicial District 16B, Bladen County Commissioner District 3, and Bladen Soil and Water Conservation District Supervisor.

5. On December 1, 2018, the Board, through Chair J. Anthony Penry, issued subpoenas to various entities, including the Mark Harris for Congress Committee (“Harris Committee”). After Mr. Penry resigned, Governor Roy Cooper appointed Joshua D. Malcolm as Chair on December 3, 2018.

6. On December 3, 2018, noting the compelling need for public disclosure in the stay of certification, Chair Malcolm instructed the State Board’s executive director to “undertake a review of materials that may be

produced on a rolling basis in a manner reasonably calculated to serve the public interest without compromising the investigation.” The State Board began posting materials through a website portal that provided public access to thousands of pages of evidentiary documents, investigative reports, and election records, including a substantial number of records regarding alleged absentee ballot fraud in Bladen County referred to state and federal prosecutors after the 2016 General Election. The referral was made by the State Board at a public hearing in December 2016 subsequent to a staff investigation.

7. On December 17, 2018, Chair Malcolm issued an Order of Proceedings that prescribed procedures for the evidentiary hearing, established a briefing schedule, and noticed a hearing date of January 11, 2019, among other things.

8. In the fall of 2018, a three-judge panel of the Superior Court of Wake County held that creating the State Board of Elections and Ethics Enforcement violated the constitutional separation of powers, but acted on December 11, 2018, to allow that Board to remain in place until noon on December 28, 2018. *See Order Extending Stay, Cooper v. Berger et al.*, 18 CVS 3348 (N.C. Super. Ct. Wake County, December 11, 2018).

9. On December 27, 2018, the General Assembly enacted Session Law 2018-146, establishing a State Board of Elections composed of five

gubernatorial appointees. The enactment included a provision directing that the new State Board would be appointed effective January 31, 2019.

10. At noon on December 28, 2018, the State Board of Elections and Ethics Enforcement was dissolved by Court order, and Governor Cooper transmitted a letter to chairs of the North Carolina Democratic Party and the Republican Party of North Carolina requesting their recommendations for interim members to avoid a month in which the Board would lack seated members. *See* Letter from the Office of the Governor to State Democratic Party Chair Wayne Goodwin and State Republican Party Chair Robin Hayes (Dec. 28, 2019). Appointment of an interim State Board would have allowed for the evidentiary hearing to proceed as scheduled on January 11, 2019.

11. On December 30, 2019, however, the State Republican Party notified the Governor of its intent to initiate legal action to block any interim appointments made to the State Board, contending that the Board must remain vacant until January 31, 2019. *See* Letter from John M. Lewis, State Republican Party's General Counsel, to William C. McKinney, Office of the Governor's General Counsel (Dec. 30, 2019).

12. On January 3, 2019, citing the absence of a seated State Board, candidate Mark Harris initiated legal proceedings to compel the issuance of a certificate of election. *See* Petition for Writ of Mandamus and Appeal from the Failure of the State Board to Act, *Harris v. Bipartisan State Board of Elections*

and Ethics Enforcement, 19 CVS 0025 (N.C. Super. Ct. Wake County).

13. On January 11, 2019, the United States House of Representatives' Committee on House Administration, by and through its Chair, Zoe Lofgren, transmitted a letter to the State Board's executive director, stressing the Committee's duty under Clause 1(k) of House Rule X to review the election returns and qualification of each member and specifying that a state's "certificate is not ultimately determinative of the House's course of action as . . . the final arbiter of who is the rightful claimant to its seats." See Letter from Rep. Zoe Lofgren, Chair of the Committee on House Administration, to Kim Westbrook Strach, Executive Director of the State Board of Elections (Jan. 11, 2019).

14. On January 22, 2019, Senior Resident Superior Court Judge Paul C. Ridgeway held a hearing on the Petition for Mandamus and the Appeal in *Harris*. Following arguments by the parties, Judge Ridgeway ruled in open court that the State Board of Elections and Ethics Enforcement possessed statutory authority to initiate proceedings necessary to ensure the election was without fraud or corruption; that the Board had acted within its lawful authority to delay certification during the pendency of those proceedings; and that Harris had failed to establish any clear legal right to certification before the Board concluded its review. The Court, therefore, denied the Petition and the Appeal. See Order, *Harris*, 19 CVS 0025 (N.C. Super. Ct. Wake County,

January 25, 2019).

15. On January 31, 2019, Governor Cooper appointed all members of the new State Board of Elections, who held an organizational meeting that afternoon to select Robert B. Cordle to serve as Chair and Dr. Stella E. Anderson to serve as Secretary.

16. On February 4, 2019, Chair Cordle issued a Notice of Hearing and Amended Order of Proceedings that prescribed the procedures and evidentiary standards that would govern the hearing announced for February 18, 2019. The Order also established a process by which affected candidates could request to compel the attendance of individuals who they may wish to call as witnesses. On February 8, 2019, Chair Cordle granted all requests for witness subpoenas and issued additional investigative subpoenas to a selection of entities, including the Harris Committee, requiring productions identical to those required under subpoenas issued by the predecessor State Board of Elections and Ethics Enforcement.

17. The Board held a public evidentiary hearing between February 18 and February 21, 2019, in the courtroom of the North Carolina State Bar in Raleigh.

18. At the end of the hearing, the Board voted unanimously to order a new election for CD-9, Bladen County Commissioner District 3, and Bladen Soil and Water Conservation District Supervisor. The Board continued its

hearing as to Seat 2 on the District Court in Judicial District 16B to allow agency staff additional time to review a number of factors distinctively relevant to that contest, and a separate Order will be entered as to that matter. The Board further allowed affected candidates to submit proposed findings of fact and conclusions of law by February 27, 2019.

II. FINDINGS OF FACT

A. In the months after the State Board declined to certify a winner in the contest for CD-9, and before the Board held its evidentiary hearing, the Board staff conducted a investigation into the irregularities and improprieties affecting elections in certain counties within that congressional district.

19. The Board employs an executive director, in-house investigations team, data analysts, and counsel who carry out the work of Board investigations. During their investigation into election irregularities affecting counties within CD-9, Board staff uncovered overwhelming evidence that a coordinated, unlawful, and substantially resourced absentee ballot scheme operated during the 2018 General Election in Bladen and Robeson Counties.

20. In the absence of seated Board members, between December 28, 2018, and January 31, 2019, agency staff continued their collection and review of communications, financial records, and other documents produced under more than a dozen subpoenas.

21. As part of the Board staff's thorough review, Board investigators attempted to interview 401 voters, successfully interviewed 142 voters, and

also interviewed 30 subjects and other witnesses.

22. Subpoenas issued by the predecessor Board and by the present State Board yielded records in excess of one hundred thousand pages, including communications, financial information and phone records.

23. Three distinct categories of irregularities occurred in Bladen and Robeson Counties during the 2018 General Election: (1) absentee by mail irregularities in Bladen and Robeson Counties; (2) disclosure of early voting results in Bladen County; and (3) a lack of office security in the Bladen County Board of Elections Office (“Bladen CBE”).

24. The absentee by mail irregularities were enabled by a well-funded and highly organized criminal operation, coordinated by Leslie McCrae Dowless Jr. and others, and funded principally by the Harris Committee through its consulting firm Red Dome Group. Bladen County Sheriff James McVicker and other candidates also paid Dowless.

B. The number of absentee ballots in some manner affected by the operation run by Dowless, exceeded the apparent margin between Harris and McCready based on unofficial results.

25. After the 2018 General Election, districtwide, the apparent results of CD-9 were as follows: Harris 139,246, McCready 138,341, and Scott 5,130. Accordingly, Harris led by a margin of 905 votes, or 0.3% of the total number of votes tallied.

26. Districtwide, the apparent absentee by mail votes were as follows: Harris 4,027, McCready 6,471, and Scott 153.

27. In Bladen County, where Dowless and his workers were found to have concentrated their activity, the apparent absentee by mail votes were as follows: Harris 420, McCready 258 , and Scott 6.

28. In Robeson County, where Dowless and his workers were also active, the apparent absentee by mail votes were as follows: Harris 259, McCready 403, and Scott 18.

29. In the 2018 General Election, Bladen CBE received 1,369 requests for absentee by mail ballots purportedly submitted by or on behalf of voters residing in the portion of Bladen County within CD-9. Some portion of these requests were fraudulently submitted under forged signatures, including a deceased voter. Bladen CBE sent absentee by mail ballots to 1,323 voters and did not send absentee by mail ballots to 46 voters for whom or by whom request forms were purportedly submitted.

30. Of the 1,323 absentee by mail ballots sent to Bladen County voters within CD-9, 728 (55.03%) were returned, and 595 (44.97%) were not returned.

31. In the 2018 General Election, the Robeson County Board of Elections ("Robeson CBE") received 2,321 requests for absentee by mail ballots purportedly submitted by or on behalf of voters in Robeson County, the entirety of which is located within CD-9. Robeson CBE sent absentee by mail ballots

to 2,269 voters and did not send absentee by mail ballots to 52 voters for whom or by whom request forms were purportedly submitted.

32. Of the 2,269 absentee by mail ballots sent to Robeson County voters, 776 (34.20%) ballots were returned, and 1,493 (65.80%) were not returned.

C. Board Investigators found significant absentee by mail irregularities in Bladen and Robeson Counties.

33. In April 2017, Harris personally hired McCrae Dowless to conduct an absentee ballot operation leading up to and during the 2018 elections.

34. In June 2017, Harris hired the consulting firm Red Dome Group. Thereafter, McCrae Dowless was paid by Harris Committee through Red Dome. Red Dome would bill the Harris Committee for these expenses.

35. Other candidates and organizations, including but not limited to Bladen County Sheriff candidate James McVicker, paid Dowless for absentee ballot operations during the 2018 elections.

36. Dowless hired workers he paid in cash to collect absentee request forms, to collect absentee ballots, and to falsify absentee ballot witness certifications.

37. Initially, Dowless told workers he would pay them \$150.00 per 50 absentee ballot request forms collected and \$125.00 per 50 absentee ballots collected, but he also sometimes paid other amounts per ballot or a flat

weekly rate.

38. Dowless's absentee ballot operation was arranged into two phases: (1) the collection of absentee by mail request forms; and (2) the collection of absentee ballots.

1. Phase One of Dowless's operation involved paying individuals to collect and submit absentee by mail request forms, some of which were fraudulent.

39. In addition to using blank forms to solicit voters to request to vote absentee by mail, Dowless and his workers prepared request forms utilizing forms obtained from previous elections to "pre-fill" the form so that workers could return to those voters and have the voters sign the request form. The pre-filled section would sometimes include voters' Social Security numbers, driver's license numbers, and dates of birth.

40. "Phase One" of Dowless's operation was arranged into four known components. First, Dowless's workers obtained absentee by mail request forms from voters. Second, Dowless's workers returned absentee by mail request forms to Dowless for payment. Third, Dowless would photocopy and retain copies of all absentee by mail request forms for later use in subsequent elections or for other purposes. Fourth, Dowless or his workers would deliver absentee by mail request forms to the appropriate CBE Office.

41. In the 2018 General Election, at least 788 absentee by mail request forms in Bladen County were submitted by McCrae Dowless or his workers.

42. In the 2018 General Election, at least 231 absentee by mail request forms in Robeson County were submitted by McCrae Dowless's workers, though an email suggests the number may have been at least 449. The records logs maintained by Robeson CBE did not appear complete, so a correct count could not be made. In the 2018 General Election, county boards of elections were not required by law or rule to maintain logs of absentee request forms.

43. Red Dome Group principal Andy Yates testified that Dowless called him regularly to provide updates on the number of absentee by mail requests he had collected, and that another Red Dome contractor provided Dowless lists of voters who had been sent ballots.

44. On September 24, 2018, at 10:10:25 a.m., Andy Yates emailed Beth Harris the following:

Of the absentees that have been sent out in Robeson so far, after reviewing them with McCrare [sic], we believe that 181 of them are from his list. They have more yet to turn into the BofE in Robeson. McCrae's team has generated a total of 449 requests in Robeson and will be generating more.

Ex. 30.

45. Lisa Britt worked for Dowless during the 2018 General Election. She testified that Dowless's operation included efforts to "pre-fill" absentee by mail request forms based on information previously obtained and retained by Dowless, who developed the practice of saving photocopies of absentee by mail request forms that he and his workers collected during past elections.

Absentee by mail request forms were copied at an office used by Dowless and his workers. Copies were maintained without redactions, such that Dowless possessed sensitive voter data, including voters' Social Security numbers, driver's license numbers, dates of birth, and signatures. Lola Wooten previously worked in an absentee ballot operation distinct from the operation conducted by Dowless. However, Wooten and Dowless communicated frequently by phone during the 2018 general election and Britt, along with others, assisted and/or observed Wooten making photocopies of absentee by mail request forms brought by Wooten to Dowless's Office.

46. Because Dowless maintained photocopies of completed absentee by mail request forms from prior elections—including voters' signatures and other information used to verify the authenticity of a request—Dowless possessed the capability to submit forged absentee by mail request forms without voters' knowledge and without detection by elections officials.

47. Dowless's workers were deployed primarily in Bladen and Robeson Counties, though additional activities were carried out in other counties.

48. Dowless paid Britt and other workers based on the number of voters for whom they secured absentee by mail request forms: for every 50 request forms, the amount was between \$150.00 and \$175.00, plus additional money for gas and food, Britt testified. We find her testimony credible.

49. Dowless would pay Britt and other workers in cash once they had submitted 50 absentee by mail request forms to him.

50. Harris testified he was aware that Dowless paid his workers based on the number of absentee by mail request forms each worker collected and returned to Dowless. Harris explained that his Committee would pay Dowless around \$4 or \$4.50 per request form. Harris further testified that he had asked Dowless during their initial meeting, “don’t you pay [your workers] hourly?” [to which Dowless responded], “[n]o, if you pay people hourly down here they’ll just sit under a tree.” We find Harris’ testimony on this issue credible.

51. Andy Yates testified, and the Board finds it credible, that he was aware Dowless “wouldn’t always turn [absentee by mail request forms] in as soon as he got them.” There is substantial evidence that Dowless engaged in the practice of collecting then withholding absentee by mail request forms, submitting them to the elections office at times strategically advantageous to his ballot operation. Dowless would track which ballots had been mailed by elections officials using publicly available data.

52. Some portion of the absentee by mail request forms submitted by Dowless and his workers were forged. Britt admitted that she had completed the top portion of an absentee by mail request form submitted on behalf of a deceased individual, James Spurgeon Shipman. Britt denied having forged Shipman’s purported signature at the bottom of the request form, which was

signed months after Shipman had died, and Britt claimed not to know who had forged Shipman's signature on the bottom of the form.

53. Dowless and his workers engaged in a systematic effort to avoid detection of their unlawful activities.

54. Britt forged the signature of her mother, Sandra Dowless, on a number of witness certifications on the absentee by mail container envelopes. Dowless told Britt that she had witnessed too many absentee by mail container envelopes under her signature, and Britt began forging her mother's signature.

55. Dowless and his workers discussed and enacted strategies designed to avoid raising any "red flags" with elections officials. Dowless was aware that Britt was forging Sandra Dowless's signature at the time the forgeries occurred.

56. During the general election, some voters discovered that absentee by mail request forms were submitted on their behalf, but without their knowledge, consent, or signature, to the Bladen CBE. At least two of these forms were submitted by Dowless employee Jessica Dowless along with other forms she was directed to deliver by Dowless.

57. In October 2018, the State Board of Elections Office sent a mailing to every voter who had requested an absentee ballot in Bladen County for the general election. The letter informed voters of their rights and warned voters that ballot collection efforts were unlawful. The mailing stated elections

officials would never come to a voter's home to collect their absentee by mail ballot. Of the letters sent, 184 were returned as undeliverable. It is unknown whether some portion of the 184 associated absentee by mail requests may have been fraudulent or undeliverable due to hurricane damage.

2. *Phase Two of Dowless's operation involved paying workers to collect absentee by mail ballots, some of which were unsealed and unvoted, and deliver them to Dowless.*

58. Dowless and his workers sought and obtained information from local county board of elections staff to determine when individual voters had been sent absentee by mail ballots in response to their request forms, so that Dowless or his workers could return to voters' homes shortly after absentee by mail ballots were received.

59. Some absentee by mail ballots unlawfully collected by Dowless and his workers were not properly witnessed by two witnesses or a notary public. Dowless's workers would sign the witness certification when they had not witnessed the voter mark his or her ballot in their presence.

60. Dowless and his workers collected at least some of the absentee by mail ballots unsealed and unvoted.

61. After Dowless's workers collected absentee by mail ballots from voters, they would deliver the absentee by mail ballots to Dowless in order to collect their payment in cash.

62. Dowless frequently instructed his workers to falsely sign absentee by mail ballot container envelopes as witnesses, even though they had not witnessed the voter mark the ballot in their presence. During the 2018 General Election, the Witness' Certification section printed on the absentee return envelope reads as follows:

I certify that: • I am at least 18 years old • I am not disqualified from witnessing the ballot as described in the WARNING on the flap of this envelope • The Voter marked the enclosed ballot in my presence, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this Absentee Application and Certificate, or caused it to be signed • I respected the secrecy of the ballot and the Voter's privacy, unless I assisted the Voter at his/her request

The following was printed on the flap of the absentee ballot envelope in the 2018 General election: "Fraudulently or Falsely completing this form is a Class I felony under Chapter 163 of the N.C. General Statutes."

63. In some cases, Dowless's workers fraudulently voted blank or incomplete absentee by mail ballots at Dowless's home or in his office. Kimberly Robinson testified that she turned over her unmarked ballot to Lisa Britt and Ginger Eason, workers paid by Dowless. We find her testimony credible.

64. In some cases, ballots that had been collected unsealed and unvoted were returned to the county board of elections bearing fraudulent witness signatures and were accepted and counted.

65. Dowless and his workers engaged in various practices to avoid detection by election officials. Those practices included: (1) delivering small batches of ballots to the post office; (2) ensuring that ballots were mailed from a post office that was geographically close to where the voter lived; (3) ensuring that witnesses signed and dated absentee by mail container envelopes with the same date as the voter; (4) ensuring that witnesses signed in the same color ink as the voter, which included tracing over existing signatures to ensure conformity; (5) ensuring that stamps were not placed in such a way as to raise a red flag for local elections administrators; (6) taking some collected ballots back to the voter for hand-delivery to the local Board of Elections; and (7) limiting the number of times a witness's signature appeared on the ballot; and (8) forging witness signatures on ballot envelopes.

66. From past experience, Dowless considered certain practices to be "red flags" that could trigger suspicion by elections officials. Dowless was careful to keep an arms' length distance from certain actions he directed his workers to do, such as falsely witnessing ballots, filling out ballots, and tracing over signatures of witnesses to match the ink color of the voter. Dowless had publicly made false statements to conceal his ballot collection activities by denying he "ever touched a ballot" or instructed any of his workers to collect. Ex. 35. Both Mark Harris and Andy Yates testified that Dowless specifically told that neither he nor his workers ever collected ballots. Lisa Britt and Kelly

Hendrix both testified that ballot collection was a part of Phase Two as directed by Dowless.

67. Lisa Britt testified, and we find it credible, that Dowless once scolded her for placing stamps on absentee by mail container envelopes in an idiosyncratic way that might alert local elections officials to Dowless's unlawful operation (i.e. affixing the stamp upside-down). Britt understood Dowless's warning to mean that placing the stamps in a particular way might alert elections officials that someone was unlawfully handling and mailing absentee by mail ballots on behalf of voters.

68. In order to avoid detection of Dowless's operation, Britt and Dowless's other workers would sign the witness certifications on absentee by mail container envelopes using the same color ink that the voter had used, and copying the same date that appeared next to the voter's signature, even if the witness certification was completed on some other date. Britt testified, and we find it credible, that the strategy was instituted to "throw off the elections board." At times when a certification was signed in a different color ink than the voter's, Dowless's workers would, at his direction, trace over the witness signature and date using ink similar in color to the ink used by the voter.

69. Britt explained the ballot collection and witnessing process as follows. If a voter did not have the witnesses for the ballot, the workers would take the ballots back to Dowless. They were paid to collect the ballots, but

were not paid as much for collecting ballots as for request forms.

70. Britt testified regarding her payment arrangement with Dowless for the collection of absentee by mail ballots. She said she believed they had been paid \$125 for 50 ballots, and that she worked about two or three weeks picking up ballots at that rate. Once they realized it was harder to convince voters to turn over their absentee by mail ballots than request forms, they were just paid a flat weekly rate of about \$200 per week. We find her testimony credible.

71. Ginger Eason and Cheryl Kinlaw similarly admitted in videotaped interviews that they were paid by Dowless to push votes for Harris, and to return collected ballots to Dowless, who had stacks of ballots on his desk throughout the 2018 General Election. Exs. 103, 104.

72. Britt testified the workers were sent back out to voters' homes once their ballots came back in the mail, to explain to the voters, that if the ballot wasn't correctly witnessed by two voters that the board of elections would reject and the vote would not count. If the voter had two witnesses available when she arrived, the voter would use his or her two witnesses. But in the event that they didn't have someone available to witness their signature on the ballot container envelope, the workers would explain to the voter they could witness it for the voter, or have it witnessed and mail it for the voter. We find her testimony credible.

73. Britt claimed that she did not fill in or vote any of the absentee by mail ballots that she personally collected, but she admitted, and we find, that she had filled in races on ballots that were collected by Dowless's other workers.

74. Affected voter Kimberly Robinson's testimony corroborated Britt's admission that Dowless and his associates had collected unsealed and unvoted absentee by mail ballots. Robinson testified that, after she received an absentee by mail ballot in the mail in the fall of 2018, Britt and Ginger Eason came to her home in a van and took her unsealed, unvoted ballot. Robinson explained that she signed the ballot container envelope, and that Ginger Eason signed the ballot container envelope as a witness in front of her, but that no one signed as the second witness. Robinson explained that she gave Britt and Eason her blank absentee by mail ballot because "McCrae usually helped me out," by voting her ballot, since she "didn't know who to vote for" or "much about politics." We find her testimony credible.

75. Multiple affiants and other witnesses similarly reported that Dowless and his associates collected or attempted to collect absentee by mail ballots, including unsealed and/or unvoted ballots. *See* Ex. 107 (C. Eason Aff.); Ex. 10 (D. Montgomery Aff.); Ex. 8 (E. Shipman Aff.); Ex. 9 (E. Shipman Suppl. Aff.); Ex. 84 (press reports of statements by affected voters Kirby Wright and Doris Hammonds).

76. We find that Dowless and his workers collected absentee ballots in violation of North Carolina law.

77. We find that Dowless and/or his workers marked the ballots of other individuals in violation of North Carolina and federal law.

78. Other absentee by mail ballots voted in the General Election were otherwise unlawful. For example, Lisa Britt, who testified that she currently is and was at all relevant times on probation for a felony offense involving the sale of “pills” and was therefore ineligible to vote, voted in the November 2018 General Election. Britt claimed that Dowless told her that, because her probation was not out of Bladen County, that she was still eligible to vote in Bladen County.

79. Dowless appeared at the evidentiary hearing on this matter but refused to testify when called as a witness by the State Board’s staff. Through counsel, Dowless stated that he would not testify unless granted immunity in the manner allowed under Chapter 163. The State Board declined to grant immunity, and Dowless did not testify. As provided in its Amended Order of Proceedings, the State Board may draw, and does now draw, an adverse inference from Dowless’s refusal to testify or to be interviewed by the State Board’s investigators throughout the duration of its investigation. Dowless’s refusal to testify supports our findings otherwise supported by other testimony heard by Dowless on February 18, 2019, including that Dowless or those

working at his direction engaged in unlawful activities during the 2018 General Election, including witness tampering and intimidation, absentee ballot harvesting, forgery, and a scheme to obstruct the conduct of the 2018 General Election.

D. Harris personally hired McCrae Dowless to conduct an absentee ballot operation leading up to and during the 2018 elections.

80. Prior to hiring Dowless to work for his 2018 campaign, Mark Harris was aware of the absentee by mail voting results in Bladen County in the 2016 Republican Primary Election. In Bladen County during the 2016 Republican Primary Election, Todd Johnson received 221 absentee by mail votes, Mark Harris received 4 absentee by mail votes, and incumbent Robert Pittenger received 1 absentee by mail vote.

81. In an email bearing the subject line “Anomalous Voting in Bladen County” sent to Mark Harris and Beth Harris on June 7, 2016, John Harris, their son, explained why the available data from the 2016 Republican Primary led him to conclude that “absentee by mail votes look very strange.” *See* Ex. 53. John Harris’s email pointed out to Mark Harris and Beth Harris three anomalies in Bladen absentee mail voting. First, Todd Johnson received a significantly disproportionate share of absentee by mail votes in comparison to Johnson’s share of one-stop and Election Day votes. Second, Bladen County featured an unusually high number of absentee by mail votes overall—

approximately 22% of all absentee by mail votes cast in CD-9, compared to only 2% of Election Day and one-stop votes cast in CD-9. Third, there was a disproportionately large share of African American voters among Bladen County absentee by mail voters relative to other counties. *See id.*

82. In an interview conducted after the Board had declined to certify the CD-9 election, Mark Harris stated that he learned that Dowless conducted Todd Johnson's absentee mail ballot program in Bladen County a couple weeks after the June 6, 2016 Republican primary election from a friend, Judge Marion Warren. Harris stated that according to Judge Warren, "McCrae was a guy from Bladen County. He was a good old boy that knew Bladen County politics, that he, you know, did things right, and that he knew election law as better -- better than just about anybody he knew of." Ex. 38, Tr. 3:7-3:11.

83. On March 8, 2017, Mark Harris sent a text message to former Judge Marion Warren. The text message followed up on a previous conversation regarding a proposed trip to Bladen County during which Judge Warren would connect Mark Harris to the key people that could help him carry that part of the county in a future U.S. House CD-9 race. Mark Harris specifically referenced McCrae Dowless in this text message, describing him as "the guy whose absentee ballot project for Johnson could have put me in the U.S. House this term, had I known, and he had been helping us." Ex. 61.

84. On April 6, 2017, Mark Harris met Dowless at Bladen County

Commissioner Ray Britt's furniture store in Bladen County and discussed Dowless's absentee ballot program.

85. Prior to hiring Dowless, Mark Harris was warned by his son that Dowless may have engaged in the unlawful collection of ballots during the 2016 Republican primary election.

86. On April 6, 2017 or April 7, 2017, Mark Harris and Beth Harris spoke with John Harris over the telephone about Dowless's absentee ballot program, at which time John Harris stated his concerns about Dowless to Mark Harris, including that Dowless had engaged in collecting ballots in 2016 and John Harris testified that his general sense that Dowless was "kind of a shady character." John Harris also reminded Mark Harris about the analysis that John Harris had set forth in his June 7, 2016, email regarding absentee ballot results for Johnson in Bladen County in 2016, including that ballots had popped up in "batches," strongly suggesting that Dowless and his affiliates were collecting bundles of ballots and mailing them *en masse*.

87. John Harris testified that McCrae Dowless told Mark Harris that he never touched absentee ballots, but that John Harris did not believe Dowless because the numbers did not add up and relayed this information to Mark Harris during the April 6, 2017 or April 7, 2017 phone call. We find this testimony credible.

88. On April 7, 2017, John Harris, Mark Harris and Beth Harris exchanged a series of emails following the April 6, 2017 or April 7, 2017 phone call between the three regarding Dowless. In those emails, John Harris specifically informed Mark Harris and Beth Harris that he was “fairly certain” Dowless’s operation was involved in illegal activities, namely “that they collect the completed absentee ballots and mail them all at once.” John Harris provided the text of and citation to the relevant North Carolina law that makes such practice illegal. Ex. 55. John Harris’s conclusion was based, at least in part, on evidence in public voting data showing that ballots had been returned in batches to the Bladen County Board of Elections office, leading John Harris to believe that Dowless and his affiliates had been mailing stacks of ballots at a time. *See id.*

89. Mark Harris was aware that Dowless had a prior criminal conviction before he hired Dowless. He denied knowledge of any convictions related to perjury or fraud.

90. Mark Harris hired Dowless on or around April 20, 2017.

91. John Harris provided credible testimony that Dowless offered his father, Mark Harris, the choice between “a gold plan, a bronze plan, and a silver plan,” with the different plans being tethered to the amount of people that Dowless would be able to employ or put “on the ground.”

92. On April 20, 2017, Mark Harris wrote a check for \$450.00, drawn on Harris's personal checking account, and made payable to the terminated North Carolina independent expenditure political committee Patriots for Progress. Ex. 60. Mark Harris testified that Dowless directed him to write a check to Patriots for Progress in order to retain Dowless's services. We find his testimony on this issue credible.

93. On May 4, 2017, Mark Harris wrote a second check for \$2,890.00, drawn on Harris's personal checking account, and made payable to Patriots for Progress. *See* Ex. 60. Mark Harris testified that the second check to Patriots for Progress was to fund start-up costs for Dowless's operation, including workers and office space. We find his testimony on this issue credible.

E. Dowless's Operation was Well-Funded. The Harris Committee Funded Dowless's Operation Through Payments to Red Dome.

94. Andy Yates testified that he and Red Dome officially started with the Harris Committee at the beginning of July 2017, but that Dowless had already been hired by the Harris campaign began earlier in 2017 in that Harris and Dowless had already agreed upon Dowless's fees. We find this testimony credible.

95. Beginning in July 2017, all fees and payments to Dowless were made through Red Dome.

96. During both the primary and the general election, Red Dome submitted invoices to the Harris Committee and was reimbursed for payments made to Dowless.

97. All members of the Harris Committee's staff, except for Mark and Beth Harris, were paid by the Harris Committee through Red Dome.

98. In total, the Harris Committee paid Red Dome \$525,088.95 between August 1, 2017, and November 26, 2018. Ex. 142.

99. For the 2018 General Election, the Harris Committee paid Red Dome \$289,980.50 between May 3, 2018, and November 26, 2018. *See id.*

100. Andy Yates testified, and we find it credible, that as of the date of his testimony, the Harris Committee still had outstanding invoices from Red Dome that were unpaid or partially unpaid, which totaled approximately \$51,515.50. *See Ex. 28 at 24* (Yates testified that \$11,000 was still owed on this partially paid invoice); *id.* at 27 (\$7,881.50); *id.* at 28 (\$32,634.00).

101. In total, Red Dome paid Dowless \$131,375.57 between July 3, 2017, and November 7, 2018. *See Board's Preview of Evidence at slide 15.*

102. For the 2018 General Election, Red Dome paid Dowless \$83,693.57 between June 8, 2018, and November 7, 2018. *Id.*

103. Approximately \$15,000 of the \$131,375.57 that was paid to Dowless by Red Dome was for work performed by Dowless for other clients of Red Dome.

104. Yates testified the Harris Committee paid Dowless a flat fee of \$1,625 per month for the general election, plus additional sums to fund payments made to Dowless's workers and other expenses Dowless incurred on behalf of the Harris Committee. This was an increase from the \$1200 per month that the Harris Committee paid Dowless for the primary election. The total sum paid by the Harris Campaign to Dowless exceeded the sum paid to other significant individuals, including the campaign manager.

105. Additional sums paid to Dowless were based on verbal representations made by Dowless of his expenses.

106. Red Dome and the Harris Committee relied on Dowless's representations of his expenses and took Dowless's verbal representations at face value.

107. Andy Yates testified that no documentation was required of Dowless for payment of his expenses or for proof of activities regarding his absentee ballot program, and no documents were sent or received by Red Dome to verify Dowless's activity.

108. In addition to the absentee ballot activities already described, Dowless paid individuals to put out and take up yard signs and to work at local festivals and parades. He also paid individuals to work the polls in Bladen, Robeson and Cumberland Counties during early voting, on the day of the primary, and on the day of the general election. An unknown portion of the

payments from Red Dome to Dowless funded this activity. Red Dome also paid and/or reimbursed Dowless for the cost of office space, as well as associated costs for utilities, internet, office supplies, office staff and paper copies or office copier expenses.

109. John Harris testified that he spoke with Andy Yates about general concerns that John Harris had about Mark Harris's decision to hire Dowless, including that Dowless was a "shady character." John Harris also testified that he did not describe his concerns regarding Dowless to Yates in as stark of terms as he had described his concerns about Dowless to Mark Harris. We find his testimony credible.

110. Andy Yates was aware that Dowless had a prior criminal conviction before he began making payments to Dowless. He denied knowledge of any convictions related to perjury or fraud.

111. Between July 3, 2017, and November 7, 2018, Bladen County Sheriff Jim McVicker paid Dowless \$5,000 for what is alleged to have been get-out-the-vote activity. *See* Board's Preview of Evidence at slide 16.

112. The McVicker Committee also contracted with Red Dome for services related to phone services, robocalls, and ring-less voicemail. In total, McVicker paid Red Dome a total of \$8,000 in the 2018 election cycle.

F. The Harris Committee failed to comply fully with subpoenas lawfully issued by this State Board and its predecessor.

113. The Harris Committee failed to comply fully with subpoenas issued by the State Board of Elections and Ethics Enforcement on December 1, 2018, and identical subpoenas by the State Board of Elections on February 6, 2019, despite repeated invitations to supplement its production.

114. Each subpoena was identical in scope, and required production of “emails, text messages” and other records in the possession of the Harris Committee regarding absentee voting efforts and Dowless, among other items. The covered period ran from January 2016 through December 1, 2018.

115. On December 4, 2018, agency counsel assisted the Harris Committee, at the Committee’s request, by suggesting preliminary search terms, but counsel “emphasized . . . that the initial list of search terms would not, and could not, limit the scope of the subpoena.” Ex. 56.

116. The Harris Committee, through counsel, initially produced certain records running from July 2017 forward. On January 15, 2019, agency counsel transmitted correspondence challenging the legal basis on which the Harris Committee refused to produce records dated before July 2017. *Id.* On February 8, 2019, the Harris Committee supplemented its production with additional responsive records that predated July 2017.

117. On February 17, 2019, agency counsel requested written

confirmation that the Committee had “provided any documents related to absentee ballot activity, Dowless, or planning related to future absentee ballot activities, dated on or after March 1, 2017,” and cited the subpoena. *Id.* The Harris Committee, through its counsel John Branch, confirmed the same:

[T]his will confirm that we produced all responsive, non-objectionable (per the attorney-client privilege, the attorney work product doctrine, or the spousal privilege) documents related to absentee ballot activity, Dowless, or planning related to future absentee ballot activities from March 1, 2017 to December 1, 2018 which we found using the agreed-to methods of searching for the documents (i.e. the State Board’s queries) and the quality control efforts we undertook to make sure, to the best extent we reasonably could, that all responsive documents were found.

Id.

118. At no time before the evidentiary hearing, however, did the Committee produce responsive communications between John Harris and Mark Harris regarding the nature and legality of Dowless’s operation (Exs. 54 and 55) or communications between Mark Harris and Judge Marion Warren in which Harris sought to secure a connection to “the guy whose absentee ballot project . . . could have put me in the US House this term, had I known, and he had been helping us” (Ex. 61). Indeed, the Committee only attempted to supplement its production to include communications with John Harris after it became clear that John would testify, and mere minutes before the State called John as its witness.

119. Late in the evening after John Harris testified, the Committee supplemented its production with more than 800 pages, including

communications with Judge Warren (Ex. 61).

120. Among other reasons cited for the Committee's failure to make a complete production, counsel John Branch indicates that the Committee had operated under a mistaken understanding of its obligations under the subpoenas. We find the explanation unpersuasive, as the productions were clearly responsive. The Harris Committee failed to comply fully with the lawful subpoenas by this Board, and that such non-compliance contributes to cumulative doubt cast on the congressional election.

121. This Board cannot allow parties or their counsel to behave in this manner, and the Board will take further action as it deems appropriate separate from this Order.

G. Expert Findings

122. Dr. Stephen Ansolabehere, a professor of Government at Harvard University, explained in his report that patterns of absentee by mail voting in the 2018 General Election in Bladen and Robeson Counties differed significantly from the remainder of CD-9 and from elsewhere in the State. *See* Ex. 73. We find this information credible.

123. Dr. Michael Herron, a professor of Government at Dartmouth University, explained in his report that Harris's mail-in absentee support in Bladen County was greater than the absentee by mail support for any other comparable Congressional candidate in any general election since 2012 in

both North Carolina and three comparable states. *See* Ex. 74 at 26-28, 27 t.8. We find this information credible.

124. We find Dr. Stephen Ansolabehere credible in his conclusion that the rates at which voters who requested absentee by mail ballots in Bladen and Robeson counties but did not return their absentee ballots are statistical outliers compared to CD-9 and the rest of the state. Elsewhere in CD-9, of voters who requested an absentee ballot, 10% did not vote at all. But in Bladen County, 337 voters requested an absentee ballot but did not vote at all (approximately 26% of people who requested absentee ballots). In Robeson County, 832 voters requested an absentee ballot but did not vote at all (approximately 36% of people who requested absentee ballots). These were the two highest rates of nonvoting in both CD9 and the state as a whole. *See* Ex. 73, at 63.

125. We also find Dr. Stephen Ansolabehere credible in his conclusion that both frequent voters and occasional voters in Bladen and Robeson had much higher non-return rates than similar voters elsewhere in the state. Elsewhere in CD-9, 9.7% of frequent voters (i.e. voters who voted in more than four of the last six elections) did not return their absentee ballots or otherwise vote. Elsewhere in CD-9, brand new voters who requested an absentee ballot are a little bit less likely to vote than experienced voters: about 14%. However, in Bladen and Robeson Counties in CD-9, 41.7% of frequent voters did not

return their absentee ballots or otherwise vote. A similarly high proportion of new voters (48%) did not return their absentee ballots or otherwise vote. Ex. 73, at 67, 67 t.7. We find this information credible.

H. Dowless Engaged in Efforts to Obstruct the Board's Investigation and Tamper with Witnesses.

126. Efforts were made to obstruct the Board's investigation and the testimony to be provided at the hearing.

127. Lisa Britt testified that Dowless blindsided her with a videotaped interview with WBTV reporter Nick Ochsner, which was first aired on or around December 12, 2018. Britt claimed that when she arrived at Dowless's house after work one afternoon, Dowless told her that a friend of his that he had spoken with a few times was coming to take a videotaped statement from Britt regarding the allegations that Dowless and his workers had been collecting ballots. Britt testified that what she said in that interview with Ochsner was not truthful, and it was revealed during the hearing that Britt had previously provided contradictory statements to Board Investigator, Joan Fleming, by the time the interview was filmed. We find her testimony credible.

128. Lisa Britt further testified that on or around February 14, 2019, just one week before the hearing, Dowless asked her to come to his residence where he provided her a slip of paper coaching her on how she should testify

at the hearing. Britt took a picture of the slip of paper and provided that picture by text to Board Investigator, Joan Fleming. That text message, which was moved into evidence, reads:

I can tell you that I haven't done anything wrong in the election and McCrae Dowless has never told me to do anything wrong, and to my knowledge he has never done anything wrong, but I am taking the 5th Amendment because I don't have an attorney and I feel like you will try to trip me up. I am taking the 5th.

Ex. 7. We find her testimony credible, and Britt later produced the original copy of the slip of paper.

129. Britt testified that there was also a meeting at Dowless's house sometime after reports began circulating that Dowless was involved in the absentee by mail irregularities in CD-9, and after the Board declined to certify the results of the CD-9 race, during which Dowless told a group of his workers, including Britt, that, "as long as we stick together, we will be fine." We find Britt's testimony credible. At the same meeting, Dowless stated that there were no films or videos of their activities.

I. Bladen County Early Voting Results Were Improperly Tabulated on November 3, 2018

130. Bladen County one-stop early voting results were improperly and unlawfully tabulated at 1:44 p.m. on November 3, 2018. *See* Ex. 18.

131. The physical tape that was printed when early voting results were tabulated displayed early voting results for United States House District 9,

Bladen County Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor. *See Ex. 18.*

132. Early voting judges Michele Maultsby, Coy Mitchell Edwards and Agnes Willis signed the tape on November 3, 2018. *See Ex. 18.*

133. Michele Maultsby, Coy Mitchell Edwards and Agnes Willis testified that they were unaware that it is unlawful to tabulate early voting results before Election Day, stating that they had been incorrectly trained to always tabulate results at the end of early voting. We find their testimony credible.

134. Coy Mitchell Edwards and Agnes Willis viewed early voting results for Bladen County Sheriff on November 3, 2018.

135. At least four other first shift poll workers were present at the one-stop site when results were tabulated and had access to early voting results for United States House District 9, Bladen County Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor. *See Ex. 19*

136. Testimony at hearing described a meeting held between the early voting worker, Agnes Willis, and the director of elections in Bladen CBE, Cynthia Shaw, in which Director Shaw inquired how the early voting results had gotten out into the community. Testimony indicated that the conversation occurred when the early voting worker returned the early voting equipment to the Bladen CBE office shortly after early voting ended

on Saturday, November 3, 2019.

137. During the last day of one-stop early voting in the 2018 Primary Election, and before early voting results could be lawfully tabulated, Dowless represented that Harris had “988 of the votes in Bladen.” Ex. 70. The final sum of absentee by mail votes and one-stop votes canvassed by the Bladen CBE was 889 votes for Harris.

J. Bladen County Board of Elections Office Security Concerns

138. The Bladen County Board of Elections shares office space with the Bladen County Veterans Affairs Administration. Non-elections personnel had access to Board of Elections office space. Ex. 65.

139. The room in the Bladen County Board of Elections office where the results tabulation computer is located is directly across a common hallway from an office occupied by Veterans Affairs staff. *See* Ex. 65.

140. A photo taken by a county board member and sent to investigators on November 6, 2018, shows that the key to the ballot room, which is labeled with a keychain marked “Ballot Rm,” hung on a wall in an area of the Board of Elections Office accessible to non-elections personnel. The photo was sent by text message with the message: “Same spot they have always been.” Ex. 63.

141. Another picture of those same keys, which was taken by a Board investigator on November 29, 2018, shows the keys hung on the same wall Ex. 64.

142. A photo taken by Board investigators shows the ballot room left open, with the keys to the room left unattended in the door. Ex. 66.

143. The Bladen County Board of Elections unanimously voted to update security by resolution passed on June 12, 2018, but the Board's request for funding was inexplicably denied by the Bladen County Board of Commissioners and no updates were made. *See* Ex. 68.

144. In October of 2018 the United States Department of Homeland Security conducted a review of the physical security at the Bladen County Board of Elections office in 2018 and provided a list of options to mitigate existing vulnerabilities, increase resilience and implement protective measures. *See* Ex. 67.

K. Fraud, improprieties, and irregularities occurred to such an extent that they taint the results and cast doubt on the fairness of contests held for Congressional District 9, Bladen Soil and Water Conservation District Supervisor, and Bladen County Commissioner, District 3 in the 2018 General Election.

145. The fraud, improprieties, and irregularities identified in Paragraphs 1 through 144, *supra*, operate cumulatively under the unique circumstances of this case to taint the results and cast doubt on the fairness of contests held for Congressional District 9, Bladen Soil and Water Conservation District Supervisor, and Bladen County Commissioner, District 3 in the 2018 General Election.

146. Indeed, Harris himself testified as follows near the conclusion of the State Board's evidentiary hearing on this matter:

Through the testimony I have listened to over the past three days, I believe a new election should be called. It has become clear to me that the public's confidence in the Ninth District seat [in the] general election has been undermined to an extent that a new election is warranted.

We find his assessment of public confidence credible.

III. CONCLUSIONS OF LAW

147. Sufficient notice of the evidentiary hearing and of other procedural rights was provided to all candidates who competed for election to the U.S. Representative for North Carolina's Ninth Congressional District; Seat 2 on the District Court in Judicial District 16B; Bladen County Commissioner District 3; and the Bladen Soil and Water Conservation District Supervisor. All candidates were afforded due process and the opportunity to present and cross-examine witnesses at the evidentiary hearing.

148. The State Board has general supervisory authority over the primaries and elections in the State and the authority to promulgate reasonable rules and regulations for the conduct of such primaries and elections as it may deem advisable. G.S. § 163A-741(a). This includes the authority to "investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county municipality

or special district.” G.S. § 163A-741(d).

149. The State Board has the authority to “initiate and consider complaints on its own motion” and “take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.” G.S. § 163A-1180.

150. That authority includes the power to order a new election when: (1) ineligible voters sufficient in number to change the outcome of the election were allowed to vote in the election, and it is not possible from examination of the official ballots to determine how those ineligible voters voted and to correct the totals; (2) eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting; (3) other irregularities affected a sufficient number of votes to change the outcome of the election; or (4) irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness. G.S. § 163A-1181(a).

151. The findings of fact set forth above reflect numerous irregularities that occurred in the November 6, 2018, general election in Bladen and Robeson Counties, and many of those irregularities occurred as a result of a coordinated, unlawful, and well-funded absentee ballot scheme operated by McCrae Dowless on behalf of Mark Harris. The scheme perpetrated fraud and

corruption upon the election and denied the voters in affected contests “the opportunity to participate in a free and fair election . . . the purity and validity of said election being suspect and doubtful.” *See Appeal of Judicial Review by Republican Candidates for Election in Clay Cty.*, 45 N.C. App. 556, 569 (1980) (hereinafter *Clay County*) (affirming State Board’s order of a new election after absentee ballots were illegally collected, certain ballots showed evidence of having not been sealed, vote buying occurred, and other administrative misconduct occurred).

152. It is neither required nor possible for the State Board to determine the precise number of ballots affected in circumstances such as this. *See Clay County*, 45 N.C. App. at 573 (holding that the State Board would have been “derelict” had it failed to call for a new election when there was no showing that the violations that occurred were sufficient to change the outcome of the election but “a cloud of suspicion ha[d] been cast on all the absentee ballots cast in the election”).

153. As set out in the Findings of Fact, and in light of the unique circumstances set forth therein, including the pervasive, wrongful, and fraudulent scheme undertaken by Dowless and his workers on behalf of Mark Harris and the Harris Committee, this Board concludes unanimously that irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness.

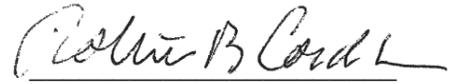
It is, therefore, ORDERED:

A new election shall be conducted in Congressional District 9 under the following schedule:

- a. Primary election: May 14, 2019;
- b. Second primary (if necessary): September 10, 2019;
- c. General election (if no second primary): September 10, 2019; and
- d. General election (if second primary): November 5, 2019.

And a new general election for Bladen Soil and Water Conservation District Supervisor and for Bladen County Commissioner, District 3, shall be held on May 14, 2019 as indicated above.

This the 13th day of March, 2019.


Robert B. Cordle
Chair

CERTIFICATE

I, Josh Lawson, general counsel to the North Carolina State Board of Elections, do hereby certify that agency staff posted the foregoing document(s) in the manner directed by Paragraph 6 of the Amended Order of Proceedings issued February 4, 2019, and by Federal Express delivery to the parties indicated below:

<https://dl.ncsbe.gov/index.html?prefix=State Board Meeting Docs/Congressional District 9 Portal/>

Dan K. McCready
Candidate, U.S. House (2018)
c/o Marc Elias
Jonathan Berkon
700 13th Street, NW, Suite 600
Washington, D.C. 20005

John Wallace
3737 Glenwood Ave.
Suite 260
Raleigh, NC 27612

Mark E. Harris
Candidate, U.S. House (2018)
c/o David Freedman
860 West Fifth Street
Winston-Salem, NC 27101

Alex Dale
127 Racine Drive
Wilmington, NC 28403

John Branch
128 E. Hargett Street, Third Floor
Raleigh, NC 27601

Jeff Scott
Candidate, U.S. House (2018)
1300 Blueberry Ln.
Charlotte, NC 28226

Russell Priest
Candidate, Bladen Board of Commissioners
307 Keith Ave.
Elizabethtown, NC 28337

Earl Storms
Candidate, Bladen Soil & Water
405 Storms Rd.
Bladenboro, NC 28320

Wayne Edge
Candidate, Bladen Board of Commissioners
2202 First Ave.
Elizabethtown, NC 28337

Tim Gause
Candidate, Bladen Soil & Water
137 Marvin Hammond Dr.
Bladenboro, NC 28320

Charles Wendell Gillespie
Candidate, Bladen Soil & Water
874 Dewitt Gooden Rd.
Elizabethtown, NC 28337

This the 13th day of March, 2019.



Josh Lawson,
General Counsel
N.C. State Board of Elections

EXHIBIT 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRIORITIES USA, *et al.*,

Case No. 19-13341

Plaintiffs

Stephanie Dawkins Davis

v.

United States District Judge

DANA NESSEL,

Defendant.

_____ /

**OPINION AND ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO DISMISS (ECF No. 29)**

I. PROCEDURAL HISTORY

Plaintiff, Priorities USA, originally filed this action challenging two Michigan statutes, one governing the absentee ballot process in Michigan and the other governing transportation to polling places. (ECF No. 1). Defendant, Michigan Attorney General Dana Nessel, moved to dismiss the complaint on December 20, 2019. (ECF No. 10). Shortly, thereafter, District Judge Marc A. Goldsmith, to whom this matter was previously assigned, entered an order allowing Priorities to file an amended complaint to address the issues raised in the motion to dismiss. (ECF No. 13). On January 27, 2020, plaintiffs filed an amended complaint, adding two additional plaintiffs, Rise, Inc. and Detroit/Downriver Chapter of the A. Philip Randolph Institute (DAPRI). (ECF No. 17). Defendant filed a motion to dismiss the amended complaint on February

10, 2020. (ECF No. 27). This matter is fully briefed. (ECF Nos. 40, 44). The Court held a hearing via video, pursuant to notice, on May 8, 2020. (ECF No. 56).

For the reasons set forth below, defendant's motion to dismiss the amended complaint is **GRANTED** in part and **DENIED** in part. Counts III and VII are **DISMISSED** and all remaining counts are left intact.

II. FACTUAL BACKGROUND AND THE AMENDED COMPLAINT

Priorities is a 501(c)(4) nonprofit corporation and a "voter-centric progressive advocacy and service organization." (ECF No. 17, PageID.92, ¶ 7). Its "mission is to build a permanent infrastructure to engage Americans by persuading and mobilizing citizens around issues and elections that affect their lives." *Id.* It engages in activity to "educate, mobilize, and turn out voters" in Michigan, and states that it "expects to" make expenditures and contributions towards those objectives in upcoming Michigan state and federal elections. *Id.*

Rise is also a 501(c)(4) nonprofit organization that "runs statewide advocacy and voter mobilization programs in Michigan and California, as well on a number of campuses nationwide." (ECF No. 17, PageID.93, ¶ 8). Rise claims that "efforts to empower and mobilize students as participants in the political process ... are critical to Rise's mission because building political power within the student population is a necessary condition to achieving its policy goals." *Id.* Rise launched its second state-specific campaign in Michigan in 2019, and says it has

eleven student organizers who are paid to organize their campuses including voter education and turnout activities. Rise plans to continue this program through the 2020 elections. *Id.* at 9. This effort has included and will continue to include engaging their fellow students in grassroots voter education, registration, and turnout activities, including on-campus, get-out-the-vote drives and canvasses. *Id.*

DAPRI is a local chapter of a national 501(c)(3) nonprofit organization. It is a membership organization “with a mission to continue to fight for Human Equality and Economic Justice and to seek structural changes through the American democratic process.” (ECF No. 17, PageID.95, ¶ 14). It has members who are “involved in voter registration, get-out-the-vote activities, political and community education, lobbying, legislative action, and labor support activities in Michigan. *Id.* DAPRI’s members have “provided rides” to and from the polls for the community on election day and intends to continue to do so and to expand this work in future elections. *Id.* at ¶ 16. DAPRI acknowledges that Proposal 3 makes absentee voting available to all, and says that it would like to educate voters about the opportunity to vote absentee. (ECF No. 17, PageID.96, ¶ 17).

The Absentee Ballot Law provides that, in order to receive an AV ballot, a voter must request an application and submit that application to the voter’s local clerk. For both primaries and regular elections, an elector may apply for an AV ballot at any time during the 75 days preceding the primary or election. Mich.

Comp. Laws § 168.759(1)-(2). In both cases, “the elector shall apply in person or by mail with the clerk” of the township or city in which the elector is registered.

Id. Subsection 759(3) provides that:

(3) An application for an absent voter ballot under this section may be made in any of the following ways:

(a) By a written request signed by the voter.

(b) On an absent voter ballot application form provided for that purpose by the clerk of the city or township.

(c) On a federal postcard application.

(4) An applicant for an absent voter ballot shall sign the application. A clerk or assistant clerk shall not deliver an absent voter ballot to an applicant who does not sign the application. A person shall not be in possession of a signed absent voter ballot application except for the applicant; a member of the applicant’s immediate family; a person residing in the applicant’s household; a person whose job normally includes the handling of mail, but only during the course of his or her employment; a registered elector requested by the applicant to return the application; or a clerk, assistant of the clerk, or other authorized election official. A registered elector who is requested by the applicant to return his or her absent voter ballot application shall sign the certificate on the absent voter ballot application.

(5) The clerk of a city or township shall have absent voter ballot application forms available in the clerk’s office at all times and shall furnish an absent voter ballot application form to anyone upon a verbal or written request.

Mich. Comp. Laws §§ 168.759(3)-(5)

Where a form application is used, under § 759(5), the “application shall be in substantially the following form,” which then provides the body of the form and includes a general “warning” and a “certificate” portion for “a registered elector” delivering a completed application for a voter. Mich. Comp. Laws § 168.759(5).

The warning must state that:

It is a violation of Michigan election law for a person other than those listed in the instructions to return, offer to return, agree to return, or solicit to return your absent voter ballot application to the clerk. An assistant authorized by the clerk who receives absent voter ballot applications at a location other than the clerk’s office must have credentials signed by the clerk. Ask to see his or her credentials before entrusting your application with a person claiming to have the clerk’s authorization to return your application.

Id.

Similarly, the certificate for a registered elector returning an AV ballot application must state that:

I am delivering the absent voter ballot application of [the named voter] at his or her request; that I did not solicit or request to return the application; that I have not made any markings on the application; that I have not altered the application in any way; that I have not influenced the applicant; and that I am aware that a false statement in this certificate is a violation of Michigan election law.

Id.

Under § 759(6), the application form must include the following instructions for an applicant:

Step 1. After completely filling out the application, sign and date the application in the place designated. Your signature must appear on the application or you will not receive an absent voter ballot.

Step 2. Deliver the application by 1 of the following methods:

(a) Place the application in an envelope addressed to the appropriate clerk and place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service, parcel post service, or common carrier.

(b) Deliver the application personally to the clerk's office, to the clerk, or to an authorized assistant of the clerk.

(c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver the application to the clerk for the applicant.

(d) If an applicant cannot return the application in any of the above methods, the applicant may select any registered elector to return the application. The person returning the application must sign and return the certificate at the bottom of the application.

Mich. Comp. Laws § 168.759(6).

Consistent with these statutes, § 759(8) provides that “[a] person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor.” Mich. Comp Laws

§ 168.759(8). Section 931 also provides for penalties associated with distributing and returning AV ballot applications. *See* Mich. Comp. Laws §§ 168.931(1)(b)(iv) and (1)(n).

Based on these provisions, there are two ways to apply for an AV ballot: (1) a written request signed by the voter, and (2) on an AV ballot application form provided for that purpose. In both cases, the voter applies by returning a written request or form application to the voter's local clerk in person or by mail. Mich. Comp. Laws §§ 168.759(1), (2), (6). Clerks have also been instructed by the Secretary of State for a number of years to accept applications sent by facsimile and email. Voters who cannot appear in person to deliver their application or cannot mail their application or return it by email or facsimile, may have an immediate family member deliver their application, or a voter may request another registered voter to return the application. Mich. Comp. Laws §§ 168.759(4), (5), (6). Thus, only persons authorized by law, i.e. those described in § 759(4), may return a signed application for an AV ballot to a local clerk. Mich. Comp. Laws §§ 168.759(4)-(5).

What plaintiffs call the "Voter Transportation Ban" can be found at Mich. Comp. Laws § 168.931, and provides, in part:

(1) A person who violates 1 or more of the following subdivisions is guilty of a misdemeanor:

* * *

(f) A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying voters, other than voters physically unable to walk, to an election.

Mich. Comp. Laws § 168.931(1)(f) (hereinafter “Voter Transportation Law”).

Under this provision, a person cannot pay for the transportation of a voter to the polls unless the voter is physically unable to walk. This language has existed in some form since 1895, *see* 1895 P.A. 35, and has been a part of Michigan’s modern election law since it was reenacted in 1954 P.A. 116. It was amended by 1982 P.A. 201 to replace the term “carriage” with the current term “motor vehicle.” Plaintiffs allege that they are “expending and diverting additional funds and resources” in get-out-the-vote (GOTV), voter education efforts, mobilization, and turn-out activities “at the expense of” other efforts in Michigan and in other states. (ECF No. 17, PageID.98, ¶ 25). Plaintiffs further allege that they are required to expend “additional resources” to educate their employees, volunteers, and partners about the statutes and how to comport their activities with the law. *Id.*

Plaintiffs challenge the Voter Transportation Law (Mich. Comp. Laws § 168.931(1)(f)) (*see* ECF No. 17 PageID.101-107, ¶¶ 33-47) and what they call the “Absentee Ballot Organizing Ban” (hereinafter the “Absentee Ballot Law”) (Mich. Comp. Laws § 168.759(4), (5), (8)) (*see* ECF No. 17, PageID107-112, ¶¶ 48-55). More particularly, they contend that the Absentee Ballot Law is (1) unconstitutionally vague and overbroad under the First and Fourteenth

Amendments (Count I); (2) violative of their Speech and Association rights under the First and Fourteenth Amendments (Count II); (3) an undue burden on the fundamental right to vote under the Fourteenth Amendment (Count III); and (4) a violation of Section 208 of the Voting Rights Act of 1965 (Count IV). Similarly, they assert that the Voter Transportation Law is (1) unconstitutionally vague and overbroad under the First and Fourteenth Amendments (Count V); (2) violative of their Speech and Association rights under the First and Fourteenth Amendments (Count VI); (3) an undue burden on the fundamental right to vote under the Fourteenth Amendment (Count VII); and (4) a violation of the Section 208 of the Voting Rights Act of 1965 (Count VIII). (ECF No. 17).

III. ANALYSIS AND CONCLUSION

A. Standing

1. Standard of Review

As explained in *McQueary v. Colvin*, 2017 WL 63034, at *3 (W.D. Ky. Jan. 5, 2017), a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction “can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack).” *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). “A facial attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition

as true and construed in the light most favorable to the nonmoving party.”

McQueary, at *3 (quoting *Ritchie*, 15 F.3d at 598); *see also Cartwright*, 751 F.3d at 759 (“A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the Court takes the allegations of the complaint as true for purposes of the Rule 12(b)(1) analysis”). “A factual attack, on the other hand, is not a challenge to the sufficiency of the pleading’s allegations, but a challenge to the factual existence of subject matter jurisdiction.” *McQueary*, at *3 (quoting *Ritchie*, 15 F.3d at 598). And, where a plaintiff relies on evidence outside the complaint to support a standing claim, the challenge is factual, and the Court instead must assess the factual basis for jurisdiction by weighing the evidence tendered. *Forgy v. Stumbo*, 378 F. Supp. 2d 774, 776 (E.D. Ky. 2005) (citing *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004)); *see also Kardules v. City of Columbus*, 95 F.3d 1335, 1347 n. 4 (6th Cir. 1996) (The Sixth Circuit has recognized a district court's authority to consider extrinsic evidence when addressing the issue of standing.). Defendant primarily makes a facial attack, with the exception of her voter representation challenges pertaining to Counts III and VII, which require the court to consider evidence outside of the amended complaint.

2. Injury-in-fact

To establish standing, a plaintiff must show a concrete and particularized injury that is actual or imminent, a causal connection between the injury and the conduct complained of, and likelihood that a favorable decision will redress the injury. *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (citing *H.D.V.–Greektown, LLC v. City of Detroit*, 568 F.3d 609, 616 (6th Cir. 2009)). In addition to suing on behalf of its members, an entity may sue “on its own behalf because it has suffered a palpable injury as a result of the defendants’ actions.” *Id.* (citing *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 332–33 (6th Cir. 2002)). At the motion to dismiss stage, the court “presumes that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990). When reviewing a motion to dismiss on the basis of standing, the court “must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The plaintiff does, however, bear the burden of establishing standing and must “clearly allege facts demonstrating each element.” *Parsons v. U.S. Dept. of Justice*, 801 F.3d 701, 710 (6th Cir. 2015) (quoting *Warth*, 422 U.S. at 518).

Plaintiffs allege they are injured by the laws because the statutes proscribe political expression in which they desire to engage. (ECF No. 17, PageID.97, ¶ 23). The statutes proscribe offering to assist voters with absentee ballot applications, restrict possession of absentee ballot applications, and ban paying a third party to transport voters to the polls. Plaintiffs want to do each of these things, and they assert that they have no choice but to abstain from engaging in that conduct because the statutes ban it. Accordingly, the challenged statutes harm plaintiffs even in the absence of prosecutions, they posit, because they are required to abstain from engaging in constitutionally protected political expression. (ECF No. 17, PageID.97-98, ¶ 23).

Plaintiffs also allege in the complaint that the challenged statutes frustrate the plaintiffs' mission of, and efforts in, educating, mobilizing, and turning out voters in Michigan by reducing the transportation options of Michigan citizens to get to polling places and by criminalizing the acts of individuals and organizations that want to (1) transport individuals to vote and (2) assist voters with registering for or returning absentee ballot applications. (ECF No. 17, PageID.98, ¶ 24). They also say that they are expending and diverting additional funds and resources in GOTV, voter education efforts, mobilization, and turn-out activities in Michigan, and for Priorities and Rise, this is happening at the expense of its efforts in other states, in order to combat the effects of the Voter Transportation Law and

Absentee Ballot Law. (ECF No. 17, PageID.98-99, ¶ 25). Plaintiffs say they are required to expend additional resources and employee time to educate their employees, volunteers, and partners about the Voter Transportation and Absentee Ballot Laws to avoid exposing them to criminal prosecution. *Id.* Specifically, Rise and DAPRI focus programming on getting students to the polls. Because of the Voter Transportation Law, volunteers and DAPRI will have to recruit and train volunteers to drive students to vote rather than renting large capacity vehicles such as buses or leveraging existing resources like the Detroit Bus Company and Uber. (ECF No. 17, PageID.99, ¶ 26). Plaintiffs also allege an injury caused by both laws because they abstained from political expression proscribed by these statutory restrictions out of a credible fear of prosecution. Plaintiffs allege that defendant and other state officials have refused to disavow enforcement of the Voter Transportation Law and the Absentee Ballot Law. (ECF No. 17, PageID.99, ¶ 27; *see also*, ¶¶ 28, 30, 31, 32).

Defendant asserts three purported defects in the amended complaint such that plaintiffs have failed to establish standing: (1) insufficient facts to support a “credible threat of prosecution”; (2) insufficient facts to support their claim that they will have to “divert resources” to comply with the statutes; and (3) plaintiffs fail to allege that they have any members who are Michigan voters and they do not

sufficiently allege how they as institutions have been injured by the challenged statutes.

a. Threat of Prosecution

Defendant's standing argument as to the credible threat of prosecution does not address head-on plaintiffs' allegations that the statutes preclude them from engaging in constitutionally protected political expression. The Supreme Court has made clear that the burden of establishing a credible threat of prosecution is fairly minimal in this specific context. When an individual is subject to a threat of enforcement, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (“[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights”)); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007) (“[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat”). Rather, the Supreme Court has held that a plaintiff satisfies the injury-in-fact requirement where he alleges “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Id.* (quoting *Babbitt*

v. Farm Workers, 442 U.S. 289, 298 (1979)). In the motion to dismiss context, a plaintiff “must plead—and in later stages of litigation, prove”—“an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.” *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Defendant overlooks the appropriate standard for “credible threat of prosecution” where a statute implicates the First Amendment. “Within the context of the First Amendment, the Supreme Court has enunciated concerns that justify a lessening of the usual prudential requirements for a pre-enforcement challenge to a statute with criminal penalties.” *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284-85 (6th Cir. 1997) (citing *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984)). The harm alleged in First Amendment cases is the “chilling effect” on the constitutionally protected right to free expression, which, the Supreme Court has stated, is “of transcendent value to all society.” *Id.* (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). Indeed, a statute prohibiting activity protected by the First Amendment leads to “self-censorship, a harm that can be realized even without an actual prosecution.” *Id.* (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988); *Dombrowski*, 380 U.S. at 486-87 (the practical value of the First Amendment right may be destroyed

if not vindicated before trial)). Thus, the appropriate inquiry in pre-enforcement challenges in First Amendment cases “usually focuses on how imminent the threat of prosecution is and whether the plaintiff has sufficiently alleged an intention to refuse to comply with the statute in order to ensure that the fear of prosecution is genuine and the alleged chill on First Amendment rights is concrete and credible, and not merely imaginative or speculative.” *Id.* (citing *Steffel v. Thompson*, 415 U.S. at 459; *Babbitt*, 442 U.S. at 301-03). The Sixth Circuit has explained that parties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to “‘chill’ the exercise of free speech and expression,” a constitutionally protected right. *Id.* (quoting *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995)).

Here, plaintiffs have plainly alleged their intention to violate the statutes and alleged that defendant, and all county prosecutors in the State of Michigan have refused to disavow enforcement:

28. On October 8, 2019, Plaintiff Priorities USA through counsel sent a letter to Secretary of State Jocelyn Benson with Defendant copied on the correspondence laying out Priorities USA’s concerns about the Voter Transportation Ban and the Absentee Ballot Organizing Ban. The letter requested an official opinion by Defendant regarding the constitutionality of the statute and generally requested a response by October 21, 2019. Neither Secretary Benson nor Defendant responded to the letter.

30. On January 11, 2020, Plaintiff Priorities USA through counsel sent a letter to Defendant stating that it is both “contemplating spending money to transport Michigan voters to the polls ... by, among other things, funding local efforts to hire vehicles to transport voters to the polls” and “contemplating deploying staff and volunteers to (1) educate Michigan voters about their options to use and request absent voter ballot applications; (2) distribute absent voter ballot applications; (3) offer to return absent voter ballot applications; and (4) actually return absent voter ballot applications.” Priorities USA expressed concern that these activities would violate the criminal statutes at issue in this litigation. Priorities USA requested that Defendant “commit to not prosecuting Priorities USA, its agents, and others who engage in such activities.” Priorities USA requested a response “to be received no later than January 23, 2020.” Again, Defendant did not respond.

* * *

31. On January 10, 2020 via email and on January 13, 2020 via U.S. first class mail, Plaintiff Priorities USA sent letters to all 83 county prosecutors in the State of Michigan with a duty to enforce the Absentee Ballot Organizing Ban and the Voter Transportation Ban. Mich. Comp. Laws § 169.940. Those letters were substantively identical to the one sent to Defendant, requested an assurance that the prosecutors would not enforce the statutes at issue in this litigation against Plaintiffs if they engaged in activity proscribed by the statute. The letters requested a response by January 23, 2020. Five prosecutors responded but refused to commit to not prosecute. The other seventy-eight prosecutors declined to respond.

32. As of the filing of this Amended Complaint, Defendant and the eighty-three county prosecutors responsible for enforcement of the Absentee Ballot

Organizing Ban and the Voter Transportation Ban
continue to refuse to disavow prosecution of Plaintiff
Priorities USA and others wishing to engage in activity
covered by the challenged statutes.

(ECF No. 17, PageID.100-101). Plaintiffs expressly laid out their plans and how their plans violated the statutes at issue. Plaintiffs' plan involves the expression of core political speech and defendant did not disavow enforcement. *See League of Women Voters v. Hargett*, 400 F.Supp.3d 706 (M.D. Tenn. 2019) (“[E]ncouraging others to register to vote” is “pure speech,” and, because that speech is political in nature, it is a “core First Amendment activity.”) (quoting *League of Women Voters of Fla. v. Browning*, 863 F.Supp.2d 1155, 1158 (N.D. Fla. 2012)). It is evident from the amended complaint that plaintiffs are self-censoring based on defendant's refusal to disavow enforcement. Accordingly, plaintiffs have sufficiently alleged a credible threat of prosecution necessary to support their First Amendment claims.

b. Diversion of resources

Contrary to defendant's suggestion that the Sixth Circuit rejected the diversion of resources theory of standing in *Fair Elections Ohio v. Husted*, the theory is alive and well in this Circuit. As plaintiffs point out, a multitude of cases support this theory. *See Mote v. City of Chelsea*, 284 F.Supp.3d 863, 887 (E.D. Mich. 2019) (organization had standing when it diverted resources to secure the defendant's Americans with Disabilities Act compliance, because “that diversion of resources ha[d] impacted its capacity to provide the range of other services that

it offers to disabled persons”); *Zynda v. Arwood*, 175 F.Supp.3d 791, 804 (E.D. Mich. 2016) (finding organizational standing due to diversion of resources); *Ne. Ohio Coal. for the Homeless (“NEOCH”) v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016) (finding standing where the organization “overhauled” its election strategy and redirected its focus to in-person voting instead of absentee voting). In *Fair Elections Ohio*, the Court found that, in the context of summary judgment, the plaintiff had failed to provide sufficient evidence of a diversion of resources. Plaintiffs here are not yet held to a summary judgment standard and their amended complaint contains a number of examples of how they are diverting resources in order to comply with the statutes at issue. *See* ECF No. 17, ¶ 26 (Plaintiffs “will have to recruit and train volunteers to drive students to voting rather than renting large capacity vehicles such as buses or leveraging existing resources like the Detroit Bus Company...and Uber”); ¶ 25 (Plaintiffs “are expending and diverting additional funds and resources in GOTV, voter education efforts, mobilization, and turn out activities in Michigan, at the expense of [their] other efforts...in order to combat the effects of the Voter Transportation Ban and the Absentee Ballot Organizing Ban. Plaintiffs are required to expend additional resources and employee time to educate their employees, volunteers, and partners about the Voter Transportation Ban and the Absentee Ballot Organizing Ban to avoid exposing them to criminal prosecution.”). Defendant says these allegations are insufficient,

pointing to the extensive facts put forth by the plaintiff in *Zynda*. However, *Zynda* involved a factual attack on subject matter jurisdiction and thus, the Court considered evidence outside the pleadings. Defendant has not made a factual attack with respect to these claims. Similarly, defendant also points to the factual record in *Mote*, but that case involved a motion for summary judgment, which places an entirely different burden on the non-moving party. And notably, contrary defendant’s suggestion in the reply, there is no threshold of “significance” of the injury to the organization that must be exceeded to render the harm sufficiently concrete under Article III. *Mote*, 284 F.Supp.3d at 888. Rather, the Supreme Court holds that even unquantifiable and intangible harms may qualify as injuries in fact, and the impairment of the organizations’ operations need only be “perceptible” to suffice. *Id.* (citing *Havens*, 455 U.S. at 379; *Spokeo, Inc. v. Robins*, — U.S. —, 136 S.Ct. 1540, 1549 (2016)).

Additionally, *Fair Elections Ohio* is distinguishable in several important respects. First, unlike the present case, the organizational plaintiff in *Fair Elections* was only asserting the rights of third-parties. Second, the trial court found standing because the plaintiff had learned of the disenfranchisement of late jailed voters (who, unlike those hospitalized just before an election, were not afforded the ability to obtain an absentee ballot if jailed after 6:00 pm on the Friday before Election Day) “late in the game.” Accordingly, the organization was not

able to modify its voting rights placards or print new supplemental materials and had to use its small staff to teach election volunteers that a pre-election arrest could result in the loss of a chance to vote. *Id.* at 459. The Court of Appeals observed that the mere fact that the plaintiff organization's materials and training were inaccurate did not establish constitutional standing because even if relief were granted, the organization would still be required to train its employees correctly on the law and change its materials accordingly. Thus, any injury was not fairly traceable to the defendant's conduct. Here, most of plaintiffs' claims are not based on third-party standing and their allegations of diverted resources are not based on being "late to the game." Rather, they allege that they must recruit volunteers to perform activities (driving voters to the polls) when they could simply purchase such services, absent the Voter Transportation Law. Additionally, they allege that resources spent on combating the effects of the laws could be used for other GOTV activities. Accordingly, the court is not persuaded that *Fair Elections Ohio* compels it to conclude that plaintiffs here failed to sufficiently allege a diversion of resources theory of standing.

The court is also not persuaded by defendant's argument that *NEOCH* is inapplicable here because it involved a recently amended law. While that was a salient point in *NEOCH* in order to distinguish it from *Fair Elections Ohio*, the Court does not read *NEOCH* to suggest that an organization may only challenge

changes in the law. Indeed, such a suggestion would foreclose untold litigation. *See Democratic Party of Ga., Inc. v. Crittenden*, 347 F.Supp.3d 1324, 1337 (N.D. Ga. 2018) (“It is immaterial whether the organizational injury resulted from a change in the law or a change in election-year conditions and circumstances that bring into focus potential problems with the state’s statutory framework.”).

And, as plaintiffs point out, the statutes at issue must be viewed in light of the changes in circumstances and technology. The Voter Transportation Law was passed long before hired vehicle transportation in the form of rideshare companies such as Uber and Lyft, and short-term rental companies like ZipCar became part of the modern transportation system. Uber’s rides-to-the-polls promotion, which benefited voters everywhere in the country except for Michigan in 2018, did not exist in 1982 when the law was amended. (ECF No. Dkt. 17, ¶ 41). And the Absentee Ballot Law predates Proposal 3, which dramatically increases the role of absentee ballot voting in Michigan’s elections. (ECF No. 17 ¶¶ 2, 17). The Court thus concludes, under Rule 12(b)(6), that plaintiffs meet the injury-in-fact standard, based on a diversion of resources.

3. Representative Capacity

Defendant next asserts that, to the extent plaintiffs are asserting the rights of unidentified non-parties, they cannot meet the Supreme Court’s prudential standing requirements. That is, plaintiffs are attempting to advance the legal rights of others

(voters and other organizations who are purportedly affected by the laws) and thus, they have alleged no particularized injury.

In response, plaintiffs point out that six of their eight causes of action rely on their own rights and injuries as organizations. The only claims that might be subject to a prudential standing analysis are the claims of undue burden on the fundamental right to vote (Counts III and VII) because plaintiffs assert the legal rights of third-parties – voters themselves. Plaintiffs contend that both DAPRI and Rise have prudential standing to assert these claims. More specifically, plaintiffs argue that DAPRI and Rise have prudential standing to assert the rights of Michigan voters because they enjoy (1) a close relationship between them and the voters who hold the rights; or (2) disallowing them to assert these claims would hinder voters’ ability to protect their own interest. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Because this is a prudential standing doctrine, the Court has “been quite forgiving with these criteria in certain circumstances.” *Id.* Plaintiffs aver that such circumstances are at play here, where “enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” *Id.*

The court disagrees with plaintiffs’ analysis. The “forgiving circumstances” referenced in *Kowalski* are not present here. For example, the First Amendment rights of the non-party voters are not implicated as in *Secretary of State of Md. v.*

Joseph H. Munson Co., Inc., 467 U.S. 947 (1984). Nor have plaintiffs identified a “special relationship” between them and the as-yet unidentified voters like the doctor-patient relationship present in *Doe v. Bolton*, 410 U.S. 179 (1973). Rather, the present circumstances are more like those reviewed in *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2016). In *Fair Elections Ohio*, the plaintiffs were organizations and could not vote. And just as in this case, the plaintiffs wanted to assert the right to vote of unidentifiable individuals. The Court found neither a “close relationship” between the plaintiff organization and the unidentified voters nor a “hindrance” to the voters’ ability to protect their own rights. *Id.* at 461 (citing *Kowalski*, at 129-30). More specifically, the Court concluded that the relationship between the plaintiff organization and the voters it sought to help did not resemble the close relationship of the lawyer-client or doctor-patient relationships recognized by the Supreme Court in *Kowalski*. *Id.* Plaintiffs’ contention that they have developed relationships with categories of voters (e.g. “hourly wage workers,” “senior voters,” “low-income voters”) based on their respective missions and outreach efforts in various communities is an unavailing distinction. Plaintiffs have not pointed to any authority suggesting that the type of relationship they have described is sufficiently close to meet the standard. The most that the court can discern from plaintiffs’ description is that the plaintiffs have targeted their efforts toward unidentified future voters within the described

categories. As to how the targeted voters have come to regard the plaintiffs is left unaddressed. Since, as discussed above, the plaintiffs do not meet the standard for a special relationship, at minimum, a more fulsome picture of their relational dynamics with these future voters is necessary for the court to gauge the “closeness” of the relationship. As it stands, the current picture does not line up with the precedential authority discussed. Plaintiffs suggest that the doctrine of prudential standing has been called into doubt. However, even if true, this court is bound to follow applicable precedent from superior courts. The Supreme Court mandates that when “precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [inferior court] should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.” *Zynda v. Arwood*, 175 F.Supp.3d 791, 812 (E.D. Mich. 2016) (quoting *Tenet v. Doe*, 544 U.S. 1, 10-11 (2005) (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))). Accordingly, the court adheres to applicable precedent regarding prudential standing. See *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 373 F.Supp.3d 807, 826 (W.D. Ky. 2019) (quoting *W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329 (11th Cir. 2018) (citing U.S. Const. art. III § 1) (“In our judicial system, there is only one Supreme Court, and we are not it. As one of the ‘inferior Courts,’ we follow its decisions.”)).

Furthermore, plaintiffs’ argument addressing hindrance centers on the difficulties that the persons who their organizations target for outreach have in voting, rather than what, if any, obstacles they might face in asserting their legal rights to bring their claims. (*See* ECF Nos. 22-5, 22-6). That is, plaintiffs’ argument, and the affidavits on which they rely, focus on the non-parties being hindered from voting, not on them being hindered in challenging the laws, which is part of the core holding in *Kowalski*. *Id.* An example of a “hindrance” can be found in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Supreme Court held that the NAACP, in resisting a court order that it reveal the names of its members, could assert the First and Fourteenth Amendments rights of its members to remain anonymous. The Court reasoned that “(t)o require that (the right) be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.” *Id.* at 459; *see also Singleton v. Wulff*, 428 U.S. 106, 116 (1976). Plaintiffs here have not identified how persons affected by the contested laws are hindered from challenging those laws in the manner prescribed by *Kowalski* and its antecedents. For these reasons, the court concludes that plaintiffs Rise and DAPRI do not have standing to assert the claims set forth in Counts III and VII of the amended complaint and those claims are dismissed.¹

¹ Plaintiffs do not claim that Priorities has standing to assert these claims and accordingly, this issue will not be addressed.

B. Failure to State a Claim

1. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must first comply with Rule 8(a)(2), which requires “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A plaintiff is also obliged “to provide the grounds of his entitlement to relief,” which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555 (citations and internal quotation marks omitted)).

In *Iqbal*, the Supreme Court explained that a civil complaint only survives a motion to dismiss if it “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. And, while a complaint need not contain “detailed” factual allegations, its “[f]actual allegations must be

enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.” *Id.* (quoting *Twombly*, 550 U.S. at 555 (citation and internal quotation marks omitted)); *see also League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (the factual allegations in a complaint need not be detailed but they “must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief.”).

2. Absentee Ballot Law

The parties disagree on whether the *Anderson-Burdick* balancing test applies to the inquiry of whether plaintiffs’ complaints about the Absentee Ballot Law state claims of constitutional proportions. The “flexible balancing approach” also known as the *Anderson- Burdick* framework, after *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982), “can sometimes make it hard to fit First Amendment challenges to election laws into ordinary constitutional categories.” *League of Women Voters v. Hargett*, 400 F.Supp.3d 706, 721 (M.D. Tenn. 2019) (citing *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016)). When a state’s law “‘severely’ burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard.” *Hargett*, 400 F.Supp.3d at 721 (citing *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (quoting *Burdick*, 504 U.S. at 434)). But, in cases with no actual

burden on a right to vote or other constitutional right, “a straightforward rational basis standard of review should be used.” *Id.* (citing *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-09 (1969); *Biener v. Calio*, 361 F.3d 206, 214-15 (3d Cir. 2004)). As acknowledged in *Hargett*, “[t]he distinction between ‘severe burdens’ and ‘lesser’ ones,” however, “is often murky,” *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016) (citation omitted), and “most cases fall in between these two extremes.” *Obama for Am.*, 697 F.3d at 429.

As explained in *Hargett*, the rationale for *Anderson- Burdick* assumes that “‘election cases rest at the intersection of two competing interests,’ namely, an individual’s right to vote versus a state’s prerogative to regulate the right to vote.” *Id.* (quoting *Mich. State A. Philip Randolph Inst. v. Johnson*, 749 Fed. Appx. 342, 349 (6th Cir. 2018) (quoting *Ohio Democratic Party*, 834 F.3d at 626)). Yet, some election-related laws implicate more than those two sets of concerns. *Id.* Specifically, laws that govern election-related speech and association, go beyond the mere intersection between voting rights and election administration, and turn toward the area where “the First Amendment ‘has its fullest and most urgent application.’” *Id.* (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). In this area, the Supreme Court applies “exacting scrutiny” rather than *Anderson- Burdick* when a case involves election-related speech as opposed to “the

mechanics of the electoral process.” *Id.* (quoting *McIntyre*, 514 U.S. at 345, 347 (reviewing law banning the circulation of anonymous literature intended to affect an election).

The *Hargett* court compared the law at issue before it to those evaluated by the Supreme Court in *Meyer v. Grant*, 486 U.S. 414 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). The statute at issue in *Hargett* was challenged as unconstitutionally vague under the Fourteenth Amendment and violative of the First Amendment. The challenge targeted key provisions of a statute governing voter registration drives and related activities. In *Buckley*, the Supreme Court struck down three Colorado restrictions on petition circulators: “(1) the requirement that initiative-petition circulators be registered voters; (2) the requirement that they wear an identification badge bearing the circulator’s name; and (3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator.” 525 U.S. at 186, 205, 119 S.Ct. 636 (citations omitted). *Hargett* also recognized that the Supreme Court explicitly rejected the argument that the logistical aspects of collecting signatures could be easily separated from the regulation of speech because “[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Id.* at 723 (quoting *Meyer*, 486

U.S. at 421). The Supreme Court concluded that the regulation of the petition-drive activities at issue “involve[d] a limitation on political expression subject to exacting scrutiny.” *Meyer*, 486 U.S. at 420 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)). “[T]he First Amendment,” the Court explained in *Buckley*, “requires us to be vigilant” when such activities are regulated, “to guard against undue hindrances to political conversations and the exchange of ideas.” 525 U.S. at 192 (citing *Meyer*, 486 U.S. at 421). As a result, the Court held that the prohibitions were unconstitutional because they “significantly inhibit[ed] communication with voters about proposed political change, and [were] not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions.” The Court emphasized the laws’ tendency to result in “speech diminution” by “decreas[ing] the pool of potential circulators” of petitions. *Id.* at 194; *see also Bailey v. Callaghan*, 715 F.3d 956, 969 (6th Cir. 2013) (referencing *Meyer* as an example of the rule that the First Amendment applies “not only to laws that directly burden speech, but also to those that diminish the amount of speech by making it more difficult or expensive to speak”) (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 337 (2010); *Meyer*, 486 U.S. at 424)).

Importantly, the Sixth Circuit has recognized that the principles elucidated in *Meyer* and *Buckley* are not limited to the circulation of initiative petitions. *See*

Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 316 (6th Cir. 1998) (applying *Meyer- Buckley* framework to law governing solicitation of political contributions). The *Hargett* court concluded that a “person’s decision to sign up to vote is more central to shared political life than his decision to sign an initiative petition.” *Id.* at 724. Moreover, a discussion of whether to register to vote plainly “implicates political thoughts and expression.” *Id.* (quoting *Buckley*, 525 U.S. at 195).

Hargett’s rationale is persuasive. Unlike cases involving the mere administrative process or the mechanics of the electoral process, here, the Absentee Ballot Law, as interpreted by plaintiffs and as set forth in the amended complaint, involves the regulation of political speech. The court sees little difference between discussions of whether to register to vote and discussions of whether to vote absentee. As set forth above, plaintiffs want to deploy staff and volunteers to (1) educate Michigan voters about their options to use and request absent voter ballot applications; (2) distribute absent voter ballot applications; (3) offer to return absent voter ballot applications; and (4) return absent voter ballot applications. Such actions necessarily involve political communication and association, and thus, just as in *Hargett*, the exacting scrutiny standard found in *Meyer* and *Buckley* is applicable here.

a. Vagueness

According to plaintiffs, it is not clear from the face of the statute whether soliciting includes passive conduct that induces a voter to entrust her absentee ballot application to a third party or offers of assistance that do not explicitly involve a request. Several statutory provisions are implicated by plaintiffs' claim. First, § 759(4) provides that a person must not possess an absentee voter ballot application unless they are a "registered elector requested by the applicant to return the application." Subsection § 759(5) requires the registered elector to certify that he or she is delivering the absentee voter ballot application at the request of the applicant that he or she "did not solicit or request to return the application" and that he or she did not "influence[] the application." Subsection § 759(8) provides that "[a] person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor." Defendant maintains that the conduct being prohibited is plain and clear. One must not "solicit or request" to return an absentee ballot application. Defendant asserts that the words "solicit" and "request" are not ambiguous or vague and are readily understood in their ordinary and common meaning. Simply put, according to defendant, the statute prohibits a person from asking to return an absentee ballot application.

“[B]asic principles of due process set an outer limit for how vague a statutory command can be if a person is going to be expected to comply with that command.” *Hargett*, at 727 (citing *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 251 (6th Cir. 2018)).

Specifically, a statute is unconstitutionally vague under the Fourteenth Amendment if its terms “(1) ‘fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or (2) ‘authorize or even encourage arbitrary and discriminatory enforcement.’” *Id.* at 246 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). “[A] more stringent vagueness test should apply’ to laws abridging the freedom of speech” *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). That standard can be “relaxed somewhat” if the law at issue “imposes civil rather than criminal penalties and includes an implicit scienter requirement.” *Id.* (citing *Hoffman Estates*, 455 U.S. at 499).

Defendant contends that plaintiffs could make a factual recitation of a voters’ right to request assistance in conjunction with delivering an application and thus, the statute is not vague. Yet, does so strictly limiting plaintiffs’ ability to speak about the absentee ballot application process cure any vagueness challenge? Essentially, defendant’s interpretation bars all explanation or communication except a rote recitation of the statute’s language. This interpretation exemplifies

why the term “solicitation” in this context might be unconstitutionally vague. The term may be perfectly understood in some contexts, *see e.g., Platt v. Bd. of Commissioners on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 261 (6th Cir. 2018), but deemed vague in other contexts. Here, the statute does not explain what is meant by the ban on solicitation and accordingly “does not sufficiently specify what those within its reach must do in order to comply.” *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 621 (1976). As plaintiffs explain in their brief:

Presumably an individual solicits or requests to assist a voter when he says, “May I return your absentee ballot application for you?” But what about if an individual tells a voter “I would be happy to return your absentee ballot application for you” or “I am returning your neighbor’s absentee ballot application” or “I am forbidden from ‘soliciting’ or ‘requesting’ to return your absentee ballot application, so I can’t ask you, but if you ask me then I would be happy to assist”? Although none can be banned under the First Amendment, ... it is not clear which, if any, the challenged provision permits.

(ECF No 40, PageID.770). The court concludes that plaintiffs have plausibly alleged that even if the law covers only a narrow range of conduct as described by defendant (only formal, direct requests to assist), the apparent inexactness of the statutory ban on solicitation may capture a broader range of speech and association. Accordingly, at this stage of the proceedings, plaintiffs have sufficiently stated a claim for unconstitutionally vagueness.

Defendant also contends that even if the statute could be applied to more conduct or speech, this court could provide a limiting construction of the statute to include only the conduct encompassed within a common understanding of the statute's words.² It does not appear, however, that such a proffered limiting construction is generally addressed in the context of a motion to dismiss. The cases on which defendant relies were postured in other procedural contexts, including summary judgment, after an evidentiary hearing, and an appeal from a post-trial conviction. *See Green Party of Tenn. v. Hargett*, 700 F.3d 816 (6th Cir. 2012) (summary judgment); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (appeal from post-trial conviction); *Broadrick v. State of Okl. ex rel. Oklahoma State Pers. Bd.*, 338 F. Supp. 711, 714 (W.D. Okla. 1972), *aff'd sub nom. Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (affirmed by Supreme Court after evidentiary hearing below). Other cases address a limiting construction in the

² Defendant's argument may be inartfully worded, but in circumstances such as those presented in this case, such a limiting construction is not typically provided by the court. As explained in *Belew v. Giles Co. Adult-Oriented Establishment Board*, 2005 WL 6369661 (M.D. Tenn. Sept. 30, 2005), due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.'"). Rather, such a limiting construction must come from a state court or enforcement agency. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)) (In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.).

context of hearings/trials on preliminary or permanent injunctions. *See e.g.*, *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982) (Preliminary injunction hearing/trial held below); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (Motion for permanent injunction).

Accordingly, in the court's view, this issue is best left addressed in the context of the parties' pending motion for preliminary injunction.

b. Burden on Speech and Association

Defendant maintains that essentially, the Absentee Ballot Law only implicates conduct and its burden on speech is minimal. However, as set forth above in detail, it is difficult to distinguish the political speech at issue here from that in *Hargett*, *Meyer*, and *Buckley*. Accordingly, the court rejects defendant's "conduct only" argument. Defendant also argues that any burden caused by the law is minimal and is outweighed by the State's interest "in preserving the integrity of the ballot application process." (ECF No. 27, PageID.418). To withstand exacting scrutiny, the Absentee Ballot Law must have a substantial relationship with a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 340; *John Doe #1 v. Reed*, 561 U.S. 186, 196 (2010) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."). Defendant argues that the Absentee Ballot Law preserves the integrity of absentee voting by increasing the likelihood that a voter will entrust

her application with someone who is trustworthy and accountable. According to plaintiffs, this argument requires the court to resolve a factual dispute—that is, whether a registered voter is more or less trustworthy than an unregistered voter—which is beyond the scope of a 12(b)(6) motion. *Sims v. Mercy Hosp. of Monroe*, 451 F.2d 171, 173 (6th Cir. 1971). And, plaintiffs point out that whether a voter requests assistance from a stranger or is solicited by a stranger to provide assistance, a voter still decides to entrust a stranger with delivering an application, which undermines’ defendant’s position.

Plaintiffs maintain that the Absentee Ballot Law is insufficiently tailored to address the State’s interest in preventing voter fraud as it targets the application process, not the casting of ballots. Plaintiffs also point out that Michigan has robust laws protecting absentee voting and also “retains an arsenal of safeguards” to prevent voting fraud. *Buckley*, 525 U.S. at 204. There are seven Michigan criminal laws that address voting fraud, including laws that specifically target absentee voting fraud, which plaintiffs argue dramatically diminishes the need for the Absentee Ballot Law. *See Buckley*, 525 U.S. at 204–05 (relying on alternatives also in place to prevent fraud including criminal penalties in striking down a restriction on political expression); *Meyer*, 486 U.S. at 427 (same).

Plaintiffs also argue that the registration requirement is not fairly designed to serve any important government interest, as the *Buckley* decision recognized in

similar circumstances when it struck down a Colorado law allowing only registered voters to circulate initiative petitions because it was likely to result in “speech diminution.” *Id.* at 193-94. There, the record reflected that there were 400,000 voting eligible persons who were not registered to vote. *Id.* at 193. The Supreme Court therefore concluded that “[b]eyond question, Colorado’s registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions.” *Id.* at 183. Here, plaintiffs allege that there are at least 750,000 persons who are eligible to vote but are not registered to vote residing in Michigan. (ECF No. 17 ¶ 70). And there are millions of U.S. citizens who do not reside in Michigan, some of whom would participate in plaintiffs’ efforts to encourage and assist voters to vote absentee but for the registration requirement. Plaintiffs maintain that the registration requirement should suffer the same fate as the registration requirement in *Buckley*. Whether or not plaintiffs ultimately prevail on this basis, considering the cases discussed above, plaintiffs have stated a claim under the First Amendment.

The Absentee Ballot Law also proscribes non-family or household members from soliciting or requesting to help a voter to return an absentee ballot application. Mich. Comp. Laws § 168.759(4), (5). Plaintiffs maintain that this ban is subject to strict scrutiny because it operates differently based on the identity of the speaker, *see Citizens United*, 558 U.S. at 340-41, and because it is a content-

based restriction on speech. *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (ban on an entire subject is content-based and subject to strict scrutiny). Regardless of which level of scrutiny applies, defendant does not explain how the requirement for delivery by a “registered elector” helps to ensure that the voter’s application is properly delivered and that the voter identified on the application does want to obtain and vote by absentee ballot. Accordingly, plaintiffs have stated claim under the First Amendment.

c. Preemption

Plaintiffs’ amended complaint alleges that § 208 of the Voting Rights Act preempts the Absentee Ballot Law because it prohibits voters with limited English proficiency or some disability from receiving assistance from persons of their choice. (ECF No. 17, ¶¶ 71-77 (Count IV)). According to the amended complaint, the Absentee Ballot Law (1) completely bars certain individuals from providing voters with assistance and (2) categorically prohibits persons who would otherwise be eligible from providing assistance to a voter if they asked to provide help to do so. (ECF No. 17 ¶¶ 75–76). Defendant maintains that no conflict exists.

Section 208 provides:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.

52 U.S.C. § 10508. The VRA defines the terms “vote” and “voting” to include:

[A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

52 U.S.C. § 10310.

Conflict preemption occurs where compliance with both a federal and state regulation is physically impossible, or “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade v. Nat’l Solid Wastes Mgmt Ass’n*, 505 U.S. 88, 98 (1992). According to defendant, § 208 plainly contemplates that it is the voter who is seeking the assistance. And, § 759 also contemplates that it is the voter who will request someone else to return their AV ballot application. Accordingly, defendant argues that the prohibition against a person actively soliciting to return a voter’s application without a preceding request by the voter to do so does not conflict with the voter’s rights under § 208 to affirmatively seek assistance.

Plaintiffs allege that it is impossible for the two laws to coexist. Section 208 expressly provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.” 52 U.S.C. § 10508. But the Absentee Ballot Law

restricts who a voter may choose to assist them in voting. Defendant's argument misses the primary point -- § 759 does not permit a voter to request just anyone to assist them. Rather, unless the person is a member of the voter's household or family, or an elector registered in Michigan, a voter cannot seek his or her assistance. Section 208, on the other hand, provides that a voter may be given assistance by anyone of that voter's choice. *See e.g., Project Vote v. Blackwell*, 455 F.Supp.2d 694, 703 (N.D. Ohio 2006) (The pre-registration, training, and affirmation requirements imposed by Ohio law for only a selected class of persons (those who are compensated for registering voters) conflicted with the National Voting Registration Act's requirement that State programs to protect election integrity must be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965."). Given this apparent conflict, which defendant does not propose to resolve, at a minimum, plaintiffs have stated a claim for preemption.

3. Voter Transportation Law

Plaintiffs argue the same standard applies to the court's review of the Voter Transportation Law as the Absentee Ballot Law. They argue that the Voter Transportation Law regulates political expression protected by the First Amendment because it regulates political spending; that is, the Transportation Law imposes an unconstitutional \$0 spending limit on transporting voters to the polls. (ECF No. 17 ¶ 44). Plaintiffs maintain that the act of transporting voters to the

polls is a recognized element of voter registration and get-out-the-vote drives. *See e.g.*, 11 C.F.R. § 114.4(d)(1) (“Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.”). They also point to *Emily’s List v. Fed. Election Comm’n*, which observed that people “are entitled to spend and raise unlimited money for” “advertisements, get-out-the-vote efforts, and voter registration drives.” 581 F.3d 1, 16 (D.C. Cir. 2009).

Because it is an element of get-out-the-vote efforts, plaintiffs allege that the act of spending money to transport voters to the polls is political speech protected by the First Amendment. *See id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (noting that “expenditure ceilings impose . . . severe restrictions on protected freedoms of political expression and association”). Additionally, the Transportation Law regulates rides-to-the-polls efforts, which are a common organizing activity for political organizations who seek to encourage political activity. (ECF No. 17 ¶ 35). Accordingly, plaintiffs maintain that the conduct regulated by the Voter Transportation Law is protected political expression under the same body of case law that applies to the Absentee Ballot Law discussed above. The court agrees and the same exacting scrutiny standard is applicable.

a. Vagueness

The Voter Transportation Law provides as follows:

(f) A person shall not hire a motor vehicle or other conveyance or cause the same to be done, for conveying

voters, other than voters physically unable to walk, to an election.

Mich. Comp. Laws § 168.931(1)(f). A person who violates this provision is guilty of a misdemeanor. Mich. Comp. Laws § 168.931(1). Defendant acknowledges that the statute does not define the term “hire” but points to a Michigan Court of Appeals decision interpreting the term in another context to mean “‘to engage the services of for wages or other payment,’ or ‘to engage the temporary use of at a set price.’” *Tech & Crystal, Inc v. Volkswagen of Am, Inc.*, 2008 WL 2357643, at *3 (Mich. App. June 10, 2008) (quoting Random House Webster’s College Dictionary (1997)). According to defendant, the statute means that a person cannot engage the service of a vehicle for a fee to transport a voter to an election unless the voter is physically unable to walk to the election. But the statute does not otherwise prohibit a person from paying for expenses incurred in transporting a voter by vehicle so long as it does not amount to hiring for the service. Defendant maintains that this interpretation renders the statute understandable by a person of ordinary intelligence according to the common meaning of its words and thus, it is not vague.

Plaintiffs maintain that defendant does not define what it means to “hire” a vehicle; instead she only lists activities that the Transportation Law does not prohibit: ECF No. 27 at 45 (paying for expenses); ECF No. 27 at 49 (paying for gas); ECF No. 27 at 41 (using company or personal vehicles driven by employees

or volunteers); ECF No. 27 at 49 (providing free rides to the polls). Plaintiffs contend that these pronouncements make it no more clear to plaintiffs, other citizens, and law enforcement, what is allowed and not allowed.

As explained above, “basic principles of due process set an outer limit for how vague a statutory command can be if a person is going to be expected to comply with that command.” *Hargett*, at 727 (citing *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court*, 894 F.3d 235, 251 (6th Cir. 2018)). Specifically, a statute is unconstitutionally vague under the Fourteenth Amendment if its terms “(1) ‘fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits’ or (2) ‘authorize or even encourage arbitrary and discriminatory enforcement.’” *Id.* at 246 (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). “[A] more stringent vagueness test should apply’ to laws abridging the freedom of speech” *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). That standard can be “relaxed somewhat” if the law at issue “imposes civil rather than criminal penalties and includes an implicit scienter requirement.” *Id.* (citing *Hoffman Estates*, 455 U.S. at 499).

Defendant’s very argument illustrates why plaintiffs have plausibly set forth facts demonstrating the Transportation Law may be unduly vague. It is simply not clear whether plaintiffs can contract with Uber to transport a voter and claim that it

is merely paying for “expenses” associated with transportation or whether an employee can provide rides to the polls while earning a salary or being paid hourly. Accordingly, the court concludes that plaintiffs have stated a claim that the Transportation Law is unconstitutionally vague.

The court must briefly address an issue defendant raised in the reply brief. In the reply, defendant articulates, for the first time, her proposed limiting construction that the Transportation Law only captures *quid pro quo* activities; that is, it only bans paying for rides to the polls where that expenditure is made in exchange for a vote on an issue or for a candidate. The court will not, however, address an issue raised for the first time in the reply. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008) (“Raising the issue for the first time in a reply brief does not suffice; reply briefs reply to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court’s consideration. Further the non-moving party ordinarily has no right to respond to the reply brief, at least not until oral argument. As a matter of litigation fairness and procedure, then, we must treat [such issues] as waived.”). Moreover, as explained above, it does not appear that such a proffered limiting construction is generally addressed in the context of a motion to dismiss. Thus, as concluded above with regard to the limiting construction offered

for the Absentee Ballot Law, this issue is best left addressed in the context of the parties' pending motion for preliminary injunction.

b. Burden on Speech and Association

Defendant maintains that driving a voter to an election is not speech. The Court disagrees. As set forth above, the Transportation Law regulates political expression/spending. Defendant also contends that any burden is minimal and is outweighed by the State's interest in protecting voters from undue influence, helping to preserve the integrity of Michigan's elections. Defendant points to the number of ways a voter can receive free transportation to the polls and asserts that plaintiffs can cover driver expenses. According to defendant these minimal burdens are far outweighed by the State's interest in protecting voters from undue influence from any perceived "*quid pro quo*" arrangements when drivers are paid to take voters to the polls.

Plaintiffs maintain that the Transportation Law is not, as required, "closely drawn to serve a cognizable anti-corruption interest." *Emily's List*, 581 F.3d at 18 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008); *Valeo*, 424 U.S. at 26–27). For example, under defendant's interpretation of the law, a private bus company could provide free rides to the polls, but plaintiffs could not hire that same bus company to provide free rides to the polls. Plaintiffs point out that the Supreme Court has rejected the notion paid petition circulators are more likely to

engage in corrupt behavior than a volunteer circulator (*Meyer*, 486 U.S. at 426).

Accordingly, it is of questionable reasoning to suggest that paying drivers to transport voters to the polls contributes to corruption more than using employee or volunteer drivers.

Additionally, under exacting scrutiny, the State must show that the Voter Transportation Law bears a substantial relationship to a sufficiently important governmental interest. In the court's view, plaintiffs have stated a claim that the Voter Transportation Law is not substantially related to preventing *quid pro quo* corruption, or to preventing the exercise of "undue influence" on voters. The Voter Transportation Law does not, apparently, prohibit providing free transportation to voters, which would also confer a benefit of value on voters. Defendant also suggests that the law does not prohibit paying for transportation expenses. Yet, the law bans any hired transportation to the polls even if the ride is unrelated to support for a particular candidate or issue. And, as plaintiffs correctly point out, the State's interest in preventing *quid pro quo* arrangements is addressed in other laws on the books. *See Buckley*, 525 U.S. at 204-05 (relying on alternatives also in place to prevent fraud including criminal penalties in striking down a restriction on political expression). Indeed, Michigan Law makes it a crime to actually enter into a *quid pro quo* arrangement with a voter, Mich. Comp.

Laws § 168.932(a), or to promise or receive something of value for deciding for whom to vote, *id.* § 168.931(1)(a), (b).

Importantly, plaintiffs' amended complaint alleges that the Transportation Law poses a significant burden on rides-to-the-polls efforts. The diminution of such opportunities is unconstitutional. *See Meyer*, 486 U.S. at 416; *Buckley*, 525 U.S. at 193. In *Meyer* and *Buckley*, the Supreme Court reasoned that the challenged laws would diminish political expression by shrinking the pool of people available to assist the proponents of initiative petitions. *Buckley*, 525 U.S. at 194; *Meyer*, 486 U.S. at 423. Similarly, plaintiffs plausibly allege that because Michigan law limits the options available to ride organizers, the number of voters that organizers can transport is necessarily diminished as is their opportunities for political engagement and interaction. (ECF No. 17 ¶¶ 24, 38, 92). Accordingly, plaintiffs have stated a claim that the Voter Transportation Law is an impermissible burden on expressive activity.

c. Preemption

Defendant maintains that the Transportation Law is not expressly preempted by federal law, specifically 11 C.F.R. § 114.4, which provides:

Voter registration and get-out-the-vote drives permitted. A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. Voter registration and get-out-the-vote

drives include providing transportation to the polls or to the place of registration.

Defendant argues that the federal provision permits plaintiffs to provide transportation to the polls, as does the state statute. Defendant asserts that plaintiffs can utilize its employees or volunteers to provide such rides. They are only barred from “hiring” or paying a person or entity to transport voters to the polls, unless the voters are physically unable to walk to the polls. Defendant maintains that the federal statute does not guarantee plaintiffs the right to “hire” or pay a person or entity to transport voters, only the opportunity to “provide” transportation.

Plaintiffs’ argument is more focused than as characterized by defendant. Here, plaintiffs argue that the Federal Election Campaign Act (FECA) expressly preempts the Transportation Law. “Express preemption exists where either a federal statute or regulation contains explicit language indicating that a specific type of state law is preempted.” *State Farm Bank v. Reardon*, 539 F.3d 336, 341-42 (6th Cir. 2008). FECA, which provides a uniform national regulation of political spending in federal elections, contains an express preemption provision that states, in relevant part, that “the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.” 52 U.S.C. § 30143. The scope of preemption was

further defined by the Federal Elections Commission in 11 C.F.R. § 108.7. Section 108.7 incorporates FECA's preemption statute and provides:

(b) Federal law supersedes State law concerning the—

* * *

(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

Plaintiff's amended complaint alleges that the Voter Transportation Law functions as a limitation on expenditures by criminalizing disbursements for providing transportation to the polls for all elections including federal elections. *Weber v. Heaney*, 793 F.Supp.1438, 1452 (D. Minn. 1992), aff'd, 995 F.2d 872 (8th Cir. 1993) (finding that § 108.7 is "probably the most persuasive evidence that [FECA's preemption provision] was intended to preempt all state laws purporting to regulate congressional campaign expenditures"). Because the Voter Transportation Law attempts to regulate permissible expenditures in federal elections, plaintiffs contend that it is expressly preempted. (ECF No. 17, ¶¶ 44-47). Given the plausible conflict between FECA's express preemption of state laws on political expenditures and the Transportation Law's limitation on expenditures for transportation to the polls, which is a permissible expenditure in federal elections, plaintiffs have stated a claim for express preemption.

Plaintiffs have also stated a claim for conflict preemption. Plaintiffs point to two federal regulations promulgated pursuant to FECA expressly permitting disbursements to provide transportation to the polls for voters. 11 C.F.R.

§ 114.3(c)(4)(i) (permitting corporations to make disbursements to provide transportation to the polls for certain employees and establishing the scope of permissible express advocacy); *id.* § 114.4(d)(1) (permitting corporations to make disbursements to provide transportation to the polls for the general public and employees outside the restricted class covered by 11 C.F.R. § 114.3). Plaintiffs concede that the text of these regulations permits corporations to “provide” transportation, significantly, it does so in the context of making “disbursements,” that is, spending money, to provide these services. Accordingly, the court agrees with plaintiffs that they have stated claim for preemption based on the plausibly alleged conflict between the Voter Transportation Law and the federal regulations allowing corporations to use funds to provide transportation to the polls.

C. Declaratory Relief

Defendant asserts that plaintiffs have not sufficiently alleged that a prosecution by the Attorney General, or any local prosecutor for that matter, is imminent or likely to come to pass under § 931(1)(f) or § 759(3)(8), and therefore, this case is not ripe for a pre-enforcement review under the Declaratory Judgment Act. *See United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir.1988) (articulating factors to consider regarding ripeness). Defendant also argues that the factual record in this case is not sufficiently developed to permit a fair and complete hearing as to plaintiffs’ prospective claims

as to these statutes. *Id.* And finally, no significant hardship will result to plaintiffs should this Court refuse to consider these prospective claims. *Id.*

In response, plaintiffs maintain that they have alleged an ongoing injury in that the challenged laws have and will force them to divert resources, (ECF No. 17, ¶ 25), and that the challenged laws have chilled conduct in which plaintiffs would have otherwise engaged. (ECF No. 17, ¶¶ 7–17, 24–26). That ongoing impact makes plaintiffs’ claims ripe for review. Plaintiffs also contend that defendant misconstrues the purpose of the Declaratory Judgment Act. As Justice Rehnquist noted, “the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity.” *Steffel v. Thompson*, 415 U.S. 452, 480 (1974) (Rehnquist, J., concurring). The law does not “require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced. The plaintiff’s own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). In such cases, plaintiffs can eliminate the threat of prosecution by not doing what they claim the right to do, but that “[does] not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced.” *Id.* The “very purpose” of the Declaratory Judgment Act is to ameliorate “[t]he dilemma posed by that

coercion—putting the challenger to the choice between abandoning his rights or risking prosecution.” *Id.* at 130 (internal quotation marks omitted).

In the court’s view, plaintiffs’ argument carries the day. As the Sixth Circuit has held, pre-enforcement review is usually granted under the Declaratory Judgment Act when a statute “imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity.” *Nat’l Rifle Ass’n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (quoting *Minnesota Citizens Concerned for Life v. Federal Election Comm’n*, 113 F.3d 129, 132 (8th Cir. 1997)). The Declaratory Judgment Act provides federal courts with the discretion to “declare the rights and other legal relations of any interested party seeking such declaration....” *Louisville City Sch. Dist. Bd. of Educ. v. Ohio Ass’n of Pub. Sch. Employees (OAPSE)/AFSCME Local 4 AFL-CIO*, 2020 WL 1930131, at *4 (N.D. Ohio Apr. 21, 2020); 28 U.S.C. § 2201(a). But the Declaratory Judgment Act does not “create an independent basis for federal subject matter jurisdiction.” *Heydon v. MediaOne of Se. Mich., Inc.*, 327 F.3d 466, 470 (6th Cir. 2003). The Declaratory Judgment Act provides that a district court may declare the rights and legal relations of the parties, so long as there is an “actual controversy....” 28 U.S.C. § 2201(a). “The ‘actual controversy’ requirement under the Declaratory Judgment Act is coextensive with Article III’s case or controversy requirement.” *Hayden v. 2K Games, Inc.*, 375 F. Supp. 3d 823, 829 (N.D. Ohio 2019) (citing *Teva Pharm.*

USA, Inc. v. Novartis Pharm. Corp., 482 F.3d 1330, 1338 (Fed. Cir. 2007)). As such, federal courts must ensure that all suits, including those seeking a declaratory judgment, satisfy the longstanding justiciability requirements of standing, ripeness, and mootness. *See Nat. Rifle Ass'n of Am. v. Magaw*, 132 F.3d at 279-80. As set forth above in great detail, the court has already assessed that plaintiffs have sufficiently alleged standing in this matter. Defendant's perfunctory argument that the claims before this Court are not ripe have already been addressed above in the context of standing. Contrary to defendant's argument, plaintiffs are not required to risk prosecution (in order to presumably "develop" the record) when they have sufficiently alleged that they are refraining from protected First Amendment activity, as proscribed by the statutes at issue in this case.

Accordingly, for the reasons set forth above, defendant's motion to dismiss the amended complaint is **GRANTED** in part and **DENIED** in part. Counts III and VII are **DISMISSED** and all remaining counts are left intact.

IT IS SO ORDERED.

Date: May 22, 2020

s/Stephanie Dawkins Davis
Stephanie Dawkins Davis
United States District Judge