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IN THE SUPREME COURT OF PENNSYLVANIA

JACQUELYN CRAMER,

Petitioner,

v.

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

Respondents.

No.

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EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF

PURSUANT TO RULE 3309, 42 Pa.C.S. § 726

AND KING'S BENCH POWERS

INTRODUCTION

This lawsuit is about protecting the fundamental right to vote guaranteed by the Pennsylvania Constitution, while ensuring that Pennsylvania voters do not have to choose between exercising that fundamental right and protecting their health. In the context of the Covid-19 pandemic and unprecedented delays in the delivery of U.S. mail, fail-safe alternatives for expedited delivery of ballots are required to ensure that every eligible voter who requests a mail-in or absentee¹ ballot obtains a ballot in time to vote without needing to go to the polls. This relief is necessary and appropriate to permit the citizens of the Commonwealth to vote *safely* for local, state, and national leaders during a pandemic that has required massive disruptions of daily life. Despite efforts to address the pandemic's impact on other aspects of the voting process, no other pending litigation or government proposal addresses how to ensure timely delivery of ballots when, as expected, significant quantities of ballots are not delivered in time or not delivered at all. This Petition does that.

¹ The terms "mail-in ballot" and "absentee ballot" are generally intended to be used interchangeably for the purposes of this petition.

As the November 2020 election approaches, the threat of the Covid-19 pandemic looms over Pennsylvanians' ability to have their voices heard in the Fall. Epidemiologists and infectious disease experts alike have stated that Covid-19 transmission will continue at the current rate or higher through the Fall. No vaccine or widely available therapeutic treatments have yet been shown to significantly alter the trajectory of the Covid-19 outbreak, and, in any event, no such interventions are expected to be widely available and administered such that they could have any meaningful impact by November 2020. Thus, because Covid-19 transmission will at least be as serious in November 2020 as it is today, relief is necessary to protect the voting rights of eligible Pennsylvanians who, in the context of the ongoing pandemic, will be required to vote by mail or absentee ballot in November.

Caused by a novel coronavirus and transmitted by asymptomatic and otherwise-healthy or presymptomatic, Covid-19-positive individuals, as well as the symptomatic, Covid-19 threatens the health of millions of Americans, especially elderly people and those with preexisting medical conditions, many of which, like cancer, obesity, and diabetes, are common. As infections and deaths continue to mount, the fallout from Covid-19 has severely strained health care systems, the economy, and all levels and branches of government.

This public health crisis continues to endanger the machinery of our democracy by threatening massive disruptions in election administration, especially in a presidential election year that was on track for exceptionally high registration rates and turnout. During the primary season, many states were compelled to take drastic measures to counteract the spread of Covid-19, including postponing elections, which bought some time for state and local election officials' to prepare. Pennsylvania postponed its primary to June 2, 2020, but the unprecedented surge in voting by mail nevertheless strained the systems of ballot preparation and delivery. At least thousands of voters who requested mail or absentee ballots never received those ballots in the mail or received them too late to actually vote by them. Now, heading into a presidential election with a projection of an even higher demand for mail-in ballots, the U.S. Postal Service's (the "USPS") operations have been severely disrupted by policy changes and the decommissioning of mail sorting machines, threatening continued mail ballot delivery delays and failures this fall. For these reasons, voters need a fail-safe option to receive a replacement mail or absentee ballot if their previously-requested ballot does not arrive in time by USPS mail.

The Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5. The Commonwealth

recognizes the right of suffrage as a “fundamental” right. *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999) (citation omitted). The right to vote is “the most treasured prerogative of citizenship It may not be impaired or infringed upon in any way except through the fault of the voter himself.” *Appeal of Norwood*, 116 A.2d 552, 553 (Pa. 1955).

Courts in the Commonwealth have repeatedly held that elections are free and equal when they are “open to all qualified electors”; “every voter has the same right as any other voter”; “each voter . . . has the right to cast his ballot and have it honestly counted”; “the *regulation of the right to exercise the franchise does not deny the franchise itself*”; and “*no constitutional right of the qualified elector is subverted or denied.*” *In re 1991 Pa. Legis. Reapportionment Comm’n*, 609 A.2d 132, 142 (Pa. 1992), *abrogated on other grounds by Holt v. 2011 Legis. Reapportionment Comm’n*, 38 A.3d 711 (Pa. 2012), (emphasis added) (internal quotation marks omitted) (quoting *City Council of City of Bethlehem v. Marcincin*, 515 A.2d 1320, 1323 (Pa. 1986)).

Elections are not “free and equal” when thousands of Pennsylvania voters are disenfranchised due to the consequences of a pandemic or must risk their lives to ensure their votes will be counted. Fortunately, there are measures this Court can order to ensure that eligible Pennsylvania voters receive a ballot, even when election office or USPS delays prevent them from arriving on time by mail.

Petitioner’s proposed remedies in these circumstances—electronic delivery of absentee and mail ballots to affected voters, authorizing such voters to use a downloadable write-in ballot, and authorizing them to designate a person to pick up their previously-requested ballot in the week before the election—will ensure that voters who have not received their timely-requested ballots can still receive their ballots in time to vote without going to the polls.

DESCRIPTION OF PARTIES

Petitioner Jacquelyn Cramer is a 72-year-old retiree with hypertension, high cholesterol, and glaucoma, who is, and, at all relevant times, has been, a permanent resident of O’Hara Township and a registered voter of Allegheny County, Pennsylvania. In May, she applied for a mail ballot for the primary election held on June 2, 2020 as well as for the November 2020 election. She did not receive the ballot she requested for the June election. Ms. Cramer went to her polling place to see whether she could safely vote in person. However, she was not able to even park in the parking lot; the polling place was very crowded. Ms. Cramer quickly realized that she could not vote in person because of the crowded conditions and resulting danger of contracting Covid-19. Because Ms. Cramer lives with and cares for her 94-year-old mother, she could not risk contracting Covid-19 or transmitting it to her mother. Her mother had breast cancer with metastases to one lung and the mediastinum and, as a result, had one third of a lung removed. She also has high

blood pressure. Due to the risks posed by Covid-19, her mother has not left their home since March 13 and has only been outside on the back patio. Ms. Cramer is strictly following social distancing protocols, and has limited her ventures outside the home to grocery shopping, obtaining prescriptions and eyeglasses, doctor appointments, and critical errands that can be accomplished without leaving her vehicle. Ms. Cramer is a regular voter in all elections, including local elections.

Respondent Kathy Boockvar is the Secretary of the Commonwealth of Pennsylvania and is sued in her official capacity only. In that capacity, she is Pennsylvania's Chief Election Official and a member of the Governor's Executive Board. Respondent Boockvar's responsibilities include the general supervision and administration of Pennsylvania's elections and election laws. 25 P.S. § 2621, *et. seq.*

Respondent Jessica Mathis is the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State and is sued in her official capacity only. In that capacity, she supervises and administers Pennsylvania's elections and electoral process.

STATEMENT OF JURISDICTION

For the reasons discussed below, this Court has jurisdiction to consider and decide this case pursuant to its Extraordinary Jurisdiction authority under 42 Pa.C.S. § 726 and its King's Bench powers. 42 Pa.C.S. § 726 ("Notwithstanding

any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done”); *Commonwealth of Pennsylvania v. Williams*, 634 Pa. 290, 302 (2015) (“King’s Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law”).²

BASIS FOR EXTRAORDINARY JURISDICTION

This case presents urgent, time-sensitive constitutional issues of great public importance that directly impact the voting rights of millions of Pennsylvanians in the upcoming November 3, 2020 general election. At the time of this filing, the 2020 election is just 61 days away. Further, County Boards will begin mailing out mail-in ballots in less than two weeks, on September 14. *See* 25 P.S. § 3150.12a. Due to the time-sensitive nature of this case, and the profound importance of protecting Pennsylvanians’ fundamental right to participate in the political process by voting for their preferred representatives, the Supreme Court should exercise its

² Petitioner has instituted suit in the Pennsylvania Commonwealth Court against Respondents seeking declaratory and injunctive relief. A true and correct copy of that Complaint is attached hereto as Exhibit A.

plenary jurisdiction pursuant to 42 Pa.C.S. § 726 (authorizing the Supreme Court to “assume plenary jurisdiction” “in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance”) or its King’s Bench powers.

The likelihood that some voters will be disenfranchised because they do not receive their timely requested mail-in ballots in time to vote is high if the Commonwealth does not take immediate action to establish a fail-safe process. As explained above, numerous Pennsylvanians who timely applied for mail-in ballots for the 2020 primary election (held June 2, 2020) did not receive their ballots in time to vote and were thus forced to make a choice between their health and their right to vote. This disenfranchisement must and can be prevented from recurring if this Court orders Petitioner’s requested relief. The Commonwealth’s failure to deliver mail-in ballots on time for the primaries, which generally see lower turnout than the general election, suggests that the same problem will occur on an even larger scale if action is not taken to ensure that voters have a fail-safe option if their mail-in ballots are not delivered on time to vote in the November 2020 general election. *See, e.g.,* Pennsylvania Department of State, *Voting & Election Statistics* (available at <https://bit.ly/2Et4pcQ>). The likelihood that mail-in ballots will not be delivered in time for the general election is further evidenced by the July 29, 2020 notice sent to the Secretary of the Commonwealth of Pennsylvania

from the USPS General Counsel warning that voters may well be disenfranchised due to mail delivery delays. *See* Exhibit B, Letter from United States Postal Service to Secretary of the Commonwealth of Pennsylvania (July 29, 2020). The USPS letter indicated that election officials should allow one week for delivery of blank ballots to voters, and that voters should similarly allow one week for their return. *Id.* However, for the June 2 primary election, thousands of voters whose ballot requests had been submitted at least *one month in advance* of the election had not been mailed their ballots by two weeks before. *See* Exhibit C, Kanter Cohen Declaration.

This Court has previously exercised extraordinary jurisdiction in other election-related litigation that required a prompt and final decision. *See, e.g.,* Order, *Pennsylvania Democratic Party v. Boockvar*, 133 MM 2020 (Sept. 1, 2020) (granting extraordinary jurisdiction to address voting issues prior to the November 2020 general election); *In re Appeal of Jones*, 505 Pa. 602 (1984) (exercising extraordinary jurisdiction over action in which appellant challenged the recount of ballots for the election of a representative in the General Assembly); *Sprague v. Cortes*, 145 A.3d 1136 (Pa. 2016) (exercising extraordinary jurisdiction over an action to decide whether wording on a ballot measure to change the constitutional mandatory retirement age of judges was impermissibly misleading); *Perzel v. Cortes*, 582 Pa. 103 (2005) (exercising extraordinary jurisdiction over an action to

compel the Secretary of the Commonwealth to honor a writ of election issued between sessions of the House of Representatives to fill vacant seats); *Loeper v. Mitchell*, 506 U.S. 828, 113 S.Ct. 88, 121 L.Ed.2d 50 (1992) (exercising extraordinary jurisdiction over action raising issues of redistricting for upcoming primary elections); *Mezvinsky v. Davis*, 500 Pa. 564 (1983) (exercising extraordinary jurisdiction in action challenging procedures for electing judges in the Commonwealth). Like those actions, this action requires a prompt final decision to protect Pennsylvanians' constitutional right to vote. The upcoming general election will decide contests for local, state, and federal office, including the selection of legislators, judges, and the President of the United States. Like previous cases in which this Court has exercised its extraordinary jurisdiction, the issues in this case bear directly upon the integrity and fairness of the upcoming general election, and, in turn, the integrity of the governmental bodies that result from that election. This court has explained that “[t]he guarantee of participation in selection of judgeships found in Art. 5, § 13(a) may not permissibly be eroded.” *Mezvinsky v. Davis*, 500 Pa. at 568. The same principle applies to the judicial elections at stake in the upcoming general election, and further with respect to the guarantee of Article I, Section 5 of the Pennsylvania Constitution that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5.

This Court has the unique authority and discretion to provide a prompt and final decision to resolve this issue of great public importance. If this case is left in the Commonwealth Court, by the time a decision is rendered and an appeal is decided, it will likely be too late to take the necessary action to protect Pennsylvanians' voting rights. However, by exercising extraordinary jurisdiction pursuant to 42 Pa.C.S. § 726 or its King's Bench powers, this Court can mandate that appropriate and necessary action be taken to ensure that Pennsylvanians who properly requested a mail-in ballot are able to exercise their constitutional right to participate in the election of their local, state, and federal representatives. For those reasons, Petitioner respectfully requests that this Court (1) exercise extraordinary jurisdiction over this matter, and (2) resolve the pressing legal issues necessary to ensure that Pennsylvanians who properly and timely request a mail-in ballot for the upcoming general election are able to participate by exercising their constitutional right to vote.

FACTUAL ALLEGATIONS

In December 2019, health officials in mainland China detected a novel coronavirus, SARS-CoV-2, which causes a disease known as Covid-19. On January 30, 2020, the World Health Organization ("WHO") declared Covid-19 to be a "Public Health Emergency of International Concern." On March 11, 2020, the WHO declared that it had become a pandemic. Covid-19 has now spread

throughout the world, including to every state in the United States and throughout Pennsylvania.

The novel coronavirus that causes Covid-19 continues to spread at an unprecedented pace around the world and particularly within the United States. As of September 1, 2020, there have been over six million confirmed cases in the United States and more than 183,000 deaths nationwide.³ As of the evening of August 28, 2020, the Pennsylvania Department of Health Services had confirmed 132,834 positive cases of coronavirus in Pennsylvania and 7,655 deaths in the Commonwealth.⁴

Covid-19 is highly contagious in significant part because of its capacity for asymptomatic and presymptomatic transmission. The disease is highly lethal, particularly for people with underlying health conditions or comorbidities.

According to the U.S. Centers for Disease Control and Prevention (“CDC”), individuals are at higher risk of severe complications and death from Covid-19 if they are 65 years or older or have underlying health conditions and diseases,

³ See *U.S. COVID-19 Cases and Deaths by State*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Sep. 1, 2020).

⁴ *COVID-19 Data for Pa.*, Pa. Dep’t of Health, <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx> (last visited Aug. 31, 2020); *Weekly Report for Deaths Attributed to COVID-19*, Pa. Dep’t of Health (Aug. 28, 2020), <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Death%20Reports/Weekly%20Report%20of%20Deaths%20Attributed%20to%20COVID-19%20--%202020-08-28.pdf>.

including cancer, chronic kidney disease, chronic obstructive pulmonary disease, serious heart conditions, obesity (body mass index (“BMI”) of 30 or higher), Type 2 diabetes, sickle cell disease, and immunocompromised state from a solid organ transplant.⁵ In addition, the CDC cautions that people with the following conditions *may* also be at increased risk from Covid-19: moderate to severe asthma; cerebrovascular disease; cystic fibrosis; hypertension; immunocompromised state from blood or bone marrow transplant; immune deficiencies; HIV; use of corticosteroids or use of other immune weakening medicines; neurological conditions; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; and Type 1 diabetes.⁶

Severe Covid-19 cases can cause pneumonia, acute respiratory distress syndrome, kidney failure, liver failure, strokes, heart attacks, cardiac inflammation, and gastrointestinal infections, among others.⁷ Furthermore, everyone is at some risk of severe complications and death from Covid-19, as health officials have also associated Covid-19 with pulmonary embolism and stroke in younger patients

⁵ See *People with Certain Medical Conditions*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Aug. 14, 2020).

⁶ *Id.*

⁷ Meredith Wadman et al., *How does coronavirus kill? Clinicians trace a ferocious rampage through the body, from brain to toes*, *Science* (Apr. 17, 2020), <https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes>.

without known risk factors⁸ and inflammatory disease in young children.⁹ Many critical care patients ultimately die.

The threat of airborne transmission of SARS-CoV-2, the virus that causes Covid-19, in indoor settings like polling places is real, substantial, and not meaningfully mitigated by any of the available protective measures.

The virus spreads through respiratory droplets that can suspend in the air and then be transmitted when inhaled. These respiratory droplets are emitted when an individual coughs and sneezes, or even when an individual is simply talking. And because these droplets are somewhat large, they can travel short distances in the air (around 6 feet) to infect those who come into contact with them. In other words, these large respiratory droplets create the risk of spread from close quarters with infected individuals. Although masks and hand hygiene can mitigate the spread of the respiratory droplets, they cannot completely prevent transmission, especially

⁸ Robert Glatter, M.D., *Why is COVID-19 Coronavirus Causing Strokes in Young And Middle-Aged People?*, Forbes (Apr. 27, 2020), <https://www.forbes.com/sites/robertglatter/2020/04/27/why-is-COVID-19-coronavirus-causing-strokes-in-young-and-middle-aged-people/#598e78fe34df>.

⁹ Pam Belluck, *New Inflammatory Condition in Children Probably Linked to Coronavirus, Study Finds*, N.Y. Times (last updated May 21, 2020), <https://www.nytimes.com/2020/05/13/health/coronavirus-children-kawasaki-pmis.html>.

when masks are not constructed or worn properly¹⁰ and where Pennsylvania law does not require voters to wear masks at polling places.

There is a gathering scientific consensus that Covid-19 spreads as an aerosol; in other words, through direct inhalation even in settings where two individuals do not have contact with each other. Aerosol transmission is much harder to control via traditional control methods, such as handwashing or masks, than transmission through large droplets. During aerosol transmission, small respiratory droplets can linger in the air in small particles known as “droplet nuclei.” Because of the particles’ smaller size, they can travel further distances—some evidence suggests up to 25 feet—and expand the range in which people can be infected. As a result of this type of airborne spread, one’s risk of infection increases in indoor, poorly-ventilated areas where multiple people are congregated, even when individuals maintain social distance.

Moreover, since Covid-19 can be transmitted by symptomatic, presymptomatic, and asymptomatic people, individuals can spread the disease before realizing they are infected. The CDC has also warned that presymptomatic and asymptomatic Covid-19-positive individuals can transmit the disease to

¹⁰ See *CDC on Homemade Masks*, Ctrs. For Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-make-cloth-face-covering.html> (last updated July 6, 2020); *How to Wear Masks*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-to-wear-cloth-face-coverings.html> (last updated Aug. 7, 2020).

others.¹¹ As a result, voters can spread the disease at a polling place before they even realize they are infected.

The long-term effects of Covid-19 on health are unknown. But medical experts are increasingly seeing evidence that infection can have long-lasting effects. Current evidence suggests that infected patients can suffer from long-term damage, including lung scarring, heart damage, and neurological and mental health effects.¹²

Leading epidemiologists anticipate that the pandemic will continue throughout the end of 2020 and likely well into 2021, if not beyond. Given the current prevalence and transmission of Covid-19, as well as the failures of federal, state, and local governments to bring the virus under control, it is highly likely that Covid-19 will continue to circulate at its current level or at an even higher level through October and November of 2020. Herd immunity is unlikely to be reached in Pennsylvania or the United States by the time voting occurs this Fall, and an effective vaccine is extremely unlikely to have been tested, manufactured in sufficient quantities, and widely distributed before November. And while some drugs have some efficacy in reducing the duration of the illness, pharmaceutical

¹¹ *How It Spreads*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html> (last updated June 16, 2020).

¹² Lois Parshley, *The emerging long-term complications of Covid-19, explained*, Vox (June 12, 2020), <https://www.vox.com/2020/5/8/21251899/coronavirus-long-term-effects-symptoms>.

treatments are unlikely to have a substantial impact on the transmission of the virus and the risk of severe disease or death by November 2020.

Covid-19 has severely affected the Commonwealth of Pennsylvania. As new infections continue to grow, many voters, especially those at high risk, continue to self-isolate for fear of contracting Covid-19 and for fear of transmitting the disease, regardless of whether they have symptoms of the disease.

Covid-19 will have an unprecedented impact on the nation's upcoming elections. Before the Covid-19 pandemic, the Brookings Institution predicted that "turnout in 2020 could break all records and test our election machinery as it has never been tested before."¹³ Other experts also anticipate record-breaking turnout in the 2020 presidential election.¹⁴ Even with the pandemic in full effect, experts continue to predict a record turnout, perhaps the highest in over a century.¹⁵

¹³ William A. Galston, *What does high voter turnout tell us about the 2020 elections?*, Brookings Inst. (Nov. 20, 2019), <https://www.brookings.edu/blog/fixgov/2019/11/20/what-does-high-voter-turnout-tell-us-about-the-2020-elections/>.

¹⁴ See, e.g., Susan Milligan, *Preparing for a Voter Surge*, U.S. News & World Report (Sept. 20, 2019), <https://www.usnews.com/news/elections/articles/2019-09-20/experts-predict-huge-turnout-in-2020>; Nate Cohn, *Huge Turnout Is Expected in 2020. So Which Party Would Benefit?* N.Y. Times (July 15, 2019), <https://www.nytimes.com/2019/07/15/upshot/2020-election-turnout-analysis.html>; Ronald Brownstein, *Brace for a Voter-Turnout Tsunami*, The Atlantic (June 13, 2019), <https://www.theatlantic.com/politics/archive/2019/06/2020-election-voter-turnout-could-be-record-breaking/591607/>.

¹⁵ William A. Galston, *Election 2020: A once-in-a-century, massive turnout?*, Brookings Inst. (Aug. 14, 2020), <https://www.brookings.edu/blog/fixgov/2020/08/14/election-2020-a-once-in-a-century-massive-turnout/>.

The CDC has recommended that states encourage mail-in voting in elections whenever possible in order to combat the spread of Covid-19.¹⁶ Governor Tom Wolf in fact encouraged voters to request a mail ballot for the June 2, 2020 election in order to vote safely during the pandemic.¹⁷

On March 6, 2020, Governor Wolf signed an emergency disaster declaration to increase support to state agencies involved in the response to the virus. The order directed the Pennsylvania Emergency Management Agency Director to assume command and control of statewide emergency operations and directed all departments and agencies to use all available resources and personnel as necessary to cope with the emergency situation.¹⁸

On March 13, 2020, President Donald Trump proclaimed a National Emergency concerning Covid-19. On March 19, 2020, Governor Wolf ordered all non-life-sustaining businesses in Pennsylvania to close their physical locations to

¹⁶ *Considerations for Election Polling Locations and Voters*, Ctrs. for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last visited Aug. 23, 2020).

¹⁷ Press Release, *Gov. Wolf Encourages Voters to Apply for a Mail-in Ballot* (Apr. 22, 2020) <https://www.governor.pa.gov/newsroom/gov-wolf-encourages-voters-to-apply-for-a-mail-in-ballot/>.

¹⁸ Proclamation of Disaster Emergency, Commonwealth of Pa. Off. of the Governor (Mar. 6, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf> (“Governor's Proclamation”).

slow the spread of Covid-19.¹⁹ The Supreme Court upheld the Governor’s order as a proper exercise of the police power and consistent with statutory and constitutional authority. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872 (Pa. 2020).

On March 25, 2020, in light of the devastating impact of Covid-19 was having on the state of Pennsylvania, the legislature voted to delay the state’s primary election by five weeks, postponing the election from April 28 to June 2, 2020.²⁰ The Governor signed the bill on March 27, 2020.²¹ Under the statute, registered voters had until 5 p.m. on May 26, 2020 to sign up to vote by mail, and until 8 p.m. on Election Day to return their voted ballot.

On April 1, 2020, Governor Tom Wolf issued an order directing individuals to stay at home in all 67 of Pennsylvania’s counties. Importantly, the Executive Order specified that “gatherings of individuals outside of the home are generally

¹⁹ Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are not Life Sustaining, Commonwealth of Pennsylvania Office of the Governor (Mar. 19, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>.

²⁰ 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422); Commonwealth of Pa. Legis. Journal, *Session of 2020, 204th of the Gen. Assembly* (Mar. 25, 2020), <https://www.legis.state.pa.us/WU01/LI/SJ/2020/0/Sj20200325.pdf#page=11>; see also Jan Murphy, *Bill delaying Pa. primary to June 2 heads to Gov. Wolf’s desk*, Penn Live (Mar. 25, 2020), <https://www.pennlive.com/news/2020/03/postponement-of-pa-primary-to-june-2-wins-legislative-approval.html>.

²¹ Pa. Act of Mar. 27, 2020, P.L. 41, No. 12.

prohibited except as may be required to access, support, or provide life-sustaining services.”²²

On May 7, 2020, as part of ongoing disease management protocols, the Governor issued an Amendment to his original stay-at-home order.²³ The Amendment extended the effect of the original Executive Order through June 4, 2020, while noting that its “requirements may be suspended for specific counties as part of the gradual and strategic approach to reopening the Commonwealth.”²⁴ Over the course of the next month, the Commonwealth began to allow businesses previously deemed non-life-sustaining to reopen on the condition that they follow safety guidance for staff, customers, and facilities.

The Disruption of the U.S. Postal Service

The U.S. Postal Service (“USPS”) is experiencing severe delays in delivering mail, and these problems have already impacted voters. The *Philadelphia Inquirer* estimated that 92,000 more Pennsylvanians would have

²² Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home, Commonwealth of Pennsylvania Office of the Governor (Apr. 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf> (“Executive Order”).

²³ Amendment to Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home, Commonwealth of Pennsylvania Office of the Governor (May. 7, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/05/20200507-TWW-Stay-at-Home-Order-Amendment.pdf> (“The Amendment”).

²⁴ *Id.*

voted in the June 2020 primary but for processing and delivery delays in the last three weeks before the primary election.²⁵

The recently-appointed Postmaster General Louis DeJoy has ordered a number of policy changes that have already caused severe backlogs around the country. First, he has ended overtime pay for USPS employees and instructed carriers to depart processing facilities for their routes at specified times each day, regardless of whether mail scheduled to go out that day remains unprocessed. Second, over 650 mail sorting machines have been removed and/or decommissioned nationwide. In Pennsylvania, “[a]t least 26 mail scanning and sorting machines have been taken offline—and, in most cases, promptly trashed or taken offsite — at eight mail processing sites this summer across the state. . . . In Scranton, for example, only machines used to handle mail surges were removed, while Harrisburg’s initial process capacity has been halved with the loss of a postage canceling device.”²⁶ According to USPS itself, the reduction in mail

²⁵ Jonathan Lai, *Pa. ’s mail ballot problems kept tens of thousands from voting in a pandemic primary*, Phila. Inquirer (July 30, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballot-deadlines-disenfranchisement-20200730.html>.

²⁶ Emily Previti, *The postal service has been removing machines from Pennsylvania sorting facilities. How is that affecting the state’s election planning?*, WITF (Aug. 21, 2020), <https://www.witf.org/2020/08/21/the-postal-service-has-been-removing-machines-from-pennsylvania-sorting-facilities-how-is-that-affecting-the-states-election-planning/>.

sorting capacity in Philadelphia alone is 310,000 pieces of mail per hour.²⁷ Postmaster General DeJoy informed Congress that he had no intention of ordering the restoration or reinstallation of any of the mail sorting machines taken offline.

Indeed, the Commonwealth, along with other states, recently sued USPS in federal court for election-related service reductions, including failure to properly postmark Election Mail, and failure to adhere to USPS's longstanding practice of treating Election Mail as high priority, first class mail.²⁸

USPS itself has reported a substantial decline in its capacity and speed nationwide.²⁹ Since the recent changes were implemented, service performance for pre-sort first class mail and marketing mail processing times are both down by nearly 8 points from their baselines.³⁰ Additionally, USPS threatened Pennsylvania election officials, warning that voters may well be disenfranchised due to mail delivery delays.³¹

²⁷ Erin Cox et al., *Postal Service warns 46 states their voters could be disenfranchised by delayed mail-in ballots*, Washington Post (Aug. 14, 2020), https://www.washingtonpost.com/local/md-politics/usps-states-delayed-mail-in-ballots/2020/08/14/64bf3c3c-dcc7-11ea-8051-d5f887d73381_story.html.

²⁸ Complaint, *Pennsylvania et al. v. DeJoy*, No. 2:20-04096 (E.D. Pa. Aug. 21, 2020).

²⁹ U.S. Postal Service, *Service Performance Measurement: PMG Briefing* (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

³⁰ *Id.* at 5, 17.

³¹ Ex. B, Letter from United States Postal Service to Secretary of the Commonwealth of Pennsylvania (July 29, 2020).

Requesting, Casting, and Returning a Mail-in or Absentee Ballot in Pennsylvania

In 2019, Pennsylvania enacted (and modified in March 2020) a law allowing any registered, qualified elector to cast a mail ballot. 25 P.S. §§ 3150.11-3150.12b; *see* Act of Oct. 31, 2019 (“Act 77”), P.L. 552, No. 77. Voters who meet specific qualifications may also vote with an absentee ballot. 25 P.S. § 3146.1. To receive a mail-in or absentee ballot under the Pennsylvania Election Code, voters must apply for a ballot. 25 P.S. §§ 3146.2, 3150.12. Voters with a PennDOT license can currently do so online,³² while voters without a PennDOT ID must submit a paper request.³³

Pennsylvania law provides for two categories of ballots that may be submitted via mail: “absentee” ballots and “mail-in” ballots. Absentee ballots are available to, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on Election Day due to work, and people who cannot vote in person because of a religious holiday. 25 P.S. § 3146.1. Any registered voter, regardless of whether they qualify for an absentee ballot, may vote by a “mail-in”

³² *Voting by Mail-in or Absentee Ballot*, Pa. Dep’t of State, Votes PA, <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx> (last visited Aug. 27, 2020).

³³ *Id.*

ballot, without providing a justification. 25 P.S. §§ 3150.11–3150.12b; *see* Act 77.

The deadline for voters to apply for an absentee ballot or a mail-in ballot is “five o’clock P.M. of the first Tuesday prior to the day of any primary or election.” 25 P.S. §§ 3146.2a(a), 3150.12a(a). “A qualified elector ... may apply at any time before any primary or election for an official mail-in ballot” 25 P.S. § 3150.12.

Registered voters in Pennsylvania can apply for and obtain mail-in ballots in a variety of ways: in person at any County Board of Elections office; on a form addressed to the Secretary of the Commonwealth or the board of elections office of the county in which the qualified elector's voting residence is located; or online at <https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin>. Voters have the option to be added to a “permanent mail-in voting list,” for which a mail-in ballot application effective for the remaining elections in the calendar year will automatically be mailed to a voter at the beginning of each year. 25 P.S. § 3150.12(g).

The same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. Voters must apply for an absentee or mail-in ballot by “five o’clock P.M. [on] the first Tuesday prior to the day of any primary or election.” 25 P.S. §§ 3146.2a(a), 3150.12a(a). If the application is approved, the board must deliver or mail the ballot to the voter. *See* 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a)(1), 3146.5, 3150.15. The voter’s absentee or mail-in ballot must be

received by the county board of elections “on or before eight o’clock P.M. the day of the primary or election” to count, 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

Overseas and military voters are able to obtain absentee ballots delivered electronically. “A covered voter may request that a ballot and balloting materials be sent to the voter by mail or by Internet delivery.” 25 Pa.C.S. § 3508.

County Boards of Elections must

commence to deliver or mail official mail-in ballots as soon as a ballot is certified and the ballots are available. While any proceeding is pending in a Federal or State court which would affect the contents of any ballot, the county board of elections may await a resolution of that proceeding but in any event, shall commence to deliver or mail official mail-in ballots not later than the second Tuesday prior to the primary or election.

25 P.S. § 3150.15. As additional applications are received and approved, the county boards are required by statute to deliver or mail official mail-in ballots to the additional electors within 48 hours of receipt. *Id.*

The same “deliver or mail” language, as well as the timeframe to deliver or mail the ballot, applies to absentee ballots as well. 25 P.S. § 3146.5.

If a voter has requested a mail ballot or absentee ballot, they may not vote by regular ballot in person on Election Day, unless the voter brings the ballot to the polls to be spoiled. 25 P.S. §§ 3146.3(e), 3150.13(e). Voters can personally hand-deliver their own ballot to their county board of elections office by 8:00 p.m. on

Election Day. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). Those voters who never received their requested ballot have only one option: cast a provisional ballot in person. 25 P.S. §§ 3146.3(e), 3150.16(b)(2).

In *Drenth v. Boockvar*, a federal judge granted a TRO ordering the Commonwealth of Pennsylvania to provide digitally accessible write-in ballots (“AWIBs”) to blind Pennsylvania voters for the June 2 primary election. No. 1:20-CV-00829, 2020 WL 2745729 (M.D. Pa. May 27, 2020). Following that order, on August 12, 2020, the Department finalized a contract for a remote ballot marking system with a vendor, Democracy Live. The system will be in use for the November 2020 general election. This system is

a cloud-based platform that will allow county election officials to upload their ballot definition files exported from their county’s election management software associated with the voting system in use in that county. Once the ballot definition files are uploaded by the county election officials, the remote ballot marking system will create an accessible ballot for the voter. An eligible voter who applies for an accessible ballot will be able to access the ballot through a web link. The voter will then be able to vote on the accessible ballot by marking his choices and will be able to use a variety of assistive technologies while doing so.

Drenth v. Boockvar, No. 1:20-CV-00829, 2020 WL 4805621, at *3–4 (M.D. Pa. Aug. 18, 2020) (record citations omitted).

The Department has also resolved to issue guidance to county boards of elections in time for the November 2020 election that would instruct the boards to

send a return envelope that is larger than the security envelope to voters voting through the remote ballot marking system and that would instruct counties to accept the return envelopes as long as the voter's signature appeared anywhere on the envelope. *Id.* at *4. Thus, the infrastructure to provide downloadable, printable replacement mail or absentee ballots already exists in Pennsylvania.

Risks of Forcing Voters to Appear In Person to Vote

The threat of contracting Covid-19, which is particularly acute in confined spaces like polling sites, has fundamentally changed election administration in Pennsylvania.

Voting in person creates substantial health risks. The virus may be spread through close contact with other persons, even if an individual wears a mask to the polls—which, in any event, is not required under Pennsylvania law. Moreover, the use of shared voting machines and interactions with instruments that many others have touched also may spread Covid-19. In addition, due to airborne spread, voters also face risk from congregating in poorly ventilated areas where multiple people are coming in and out of the same location, such as polling places, even when individuals maintain social distance.

Forcing voters to appear to vote in person creates an unnecessarily high risk of transmission of Covid-19 because voters will potentially be forced to stand in long lines to cast their votes on Election Day. They will also have to congregate in

confined polling places with election workers and other voters, contrary to social distancing guidelines.

The risk of long lines and crowded polling places is particularly acute where many counties have eliminated significant numbers of polling places due to the inability to recruit the necessary number of poll workers. Montgomery County reduced its polling places by 60 percent in the June primary, and Philadelphia reduced its polling places by 77 percent.³⁴

Petitioner and voters in the same circumstances each face an increased risk of severe illness or death if they contract Covid-19 due their ages and pre-existing conditions. If Petitioner and similarly situated voters do not receive their mail ballot in time to cast it in the General Election on November 3, 2020, they will have to choose between exercising their right to vote and their health—possibly even their lives.

Failures to Process Absentee and Mail-in Ballot Requests and Deliver Ballots to Voters

Following the enactment of Act 77 and subsequent amendments, Pennsylvania has substantially increased access to and reliance on absentee and

³⁴ Jonathan Lai, *Philly will have way fewer polling places for next month's primary because of coronavirus. Find yours here.*, Phila. Inquirer (May 12, 2020), <https://www.inquirer.com/politics/election/philadelphia-new-polling-places-2020-primary-20200512.html>.

mail ballots for the 2020 elections. Whereas the 2016 presidential primary saw only 107,000 voters receive approval to cast an absentee ballot, more than 1.8 million voters applied for and were approved to vote by mail for the 2020 June presidential primary.³⁵ Due to the pandemic, this volume far outpaces the expected use of the vote-by-mail system when it was enacted.³⁶ Of the 2.8 million votes cast in the 2020 primary election, approximately half—or 1.4 million—ultimately were cast by mail.³⁷ Importantly, the increase in mail-in ballots was accompanied by a dramatic reduction in polling places, particularly in some of Pennsylvania’s most populous counties.³⁸

Nevertheless, voters in the June primary election faced catastrophic and systemic failures to timely prepare and deliver ballots by mail. The total number of voters disenfranchised in the June primary is unknown. But the facts on the ground

³⁵ Jonathan Tamari & Jonathan Lai, *What we’re watching for in Tuesday’s unprecedented Pa. primary election*, Phila. Inquirer (June 2, 2020), <https://www.inquirer.com/news/pa-primary-2020-what-to-watch-20200602.html>.

³⁶ Andrea Hsu et al., *'Swing County, USA' Prepares For Unprecedented Influx Of Ballots By Mail*, Nat’l Public Radio (July 21, 2020), <https://www.npr.org/2020/07/21/893115504/swing-county-u-s-a-prepares-for-unprecedented-influx-of-ballots-by-mail>.

³⁷ Mark Scoloro, *Some Counting Continues, a Week After Pa.’s Primary*, Associated Press (June 9, 2020), <https://www.usnews.com/news/best-states/pennsylvania/articles/2020-06-09/some-counting-continues-a-week-after-pennsylvanias-primary>.

³⁸ Alecia Reid, *Pandemic Forces Pa. Elections Offs. To Consolidate Polling Sites By 75% For Primary*, CBS Philly (May 13, 2020), <https://philadelphia.cbslocal.com/2020/05/13/pandemic-forces-philadelphia-elections-officials-to-consolidate-polling-sites-by-75-for-primary>; *see also* Letter from Mike Turzai, Jason Orititay, Bob Brooks, Michal Puskaric, Natalie Mihalek and Lori Mizgorski to Kathryn Boockvar (May 21, 2020), *available at* <http://www.pahousegop.com/Display/SiteFiles/1/2020/allegHENYPOLL.pdf>.

are sobering at best. Thousands of voters received their ballots too late to cast them.³⁹ Pennsylvania's Election Code required counties to mail out absentee and mail ballots for approved applications by Tuesday, May 19,⁴⁰ yet state data indicates that they were unable to do so. As of May 21, statewide, a mere 11 days before the primary, county boards of elections had not yet sent out absentee or mail ballots for 241,270 voters who had submitted applications, and had not approved 172,929 applications.⁴¹ More specifically, while 1,528,212 overall applications had been approved, the counties had only mailed 1,459,871 of those ballots.⁴² In other words, at least 68,321 approved mail or absentee voters received their ballots very close to the election or after it, jeopardizing those voters' ability to complete and return those ballots in a timely fashion. More than fifty thousand voters in Pennsylvania who had requested a mail or absentee ballot voted provisionally in person.⁴³

³⁹ Jonathan Lai, *Tens of thousands of Pa. mail ballots were turned in after the deadline. Nov. could be worse.*, Phila. Inquirer (June 10, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-election-20200610.html>.

⁴⁰ Suppl. Decl. of Jonathan Marks ¶ 2, Deputy Sec'y for Elections and Comm'ns for Pa., *Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. May 22, 2020) [Marks Decl.], <http://www.pacourts.us/assets/files/page-1305/file-9375.pdf>, Ex. C.

⁴¹ *Id.* ¶¶ 5-7.

⁴² *Id.*

⁴³ Pa. Dep't of State, Pa. 2020 Primary Election, Act 35 of 2020 Report at 14, 22 (Aug. 1, 2020), <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf>.

Delays and backlogs were particularly acute in many populous counties. Local officials, overwhelmed by the unprecedented increase in ballot requests and simultaneously stymied in their ability to work together in person due to social distancing, undertook heroic efforts to fulfill vote-by-mail requests. But as one group of officials aptly put it, “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.”⁴⁴

Montgomery County, which experienced more than a ten-fold increase in ballot requests, typified the challenges counties faced in timely delivering ballots.⁴⁵ To accommodate the increase in ballot requests, county officials worked nights and evenings, but the county was unable to secure the additional staff it needed to process ballots because of the statewide lockdown.⁴⁶ In the face of those staffing challenges, as well as the strain of working in accordance with social distancing guidelines, errors proliferated. As of May 21, the county had not sent ballots to approximately 6,431 approved mail or absentee voters.⁴⁷ Those who did receive a timely ballot faced challenges, too. Montgomery County also sent the wrong

⁴⁴ Senate of Pa., Cnty. Election Off. Notes for Senate Hearing, at 2 (April 30, 2020), <https://stategovernment.pasenategop.com/wp-content/uploads/sites/30/2020/04/tioga-county.pdf>.

⁴⁵ Decl. of Karley Sisler, Director of the Office of Voter Services for Montgomery County, *Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. May 6, 2020) [Sisler Decl.], https://moritzlaw.osu.edu/electionlaw/litigation/documents/Crossey_Boockvar_3.pdf.

⁴⁶ *Id.* ¶ 4.

⁴⁷ Marks Decl. ¶ 12.

ballots to 1,984 voters as a result of a computer error.⁴⁸ Unfortunately, despite weeks of voter complaints, the county realized that the issue was widespread a mere two weeks before Election Day.⁴⁹ Over five thousand voters in the county who had requested mail or absentee ballots voted provisionally in the county.⁵⁰

Philadelphia County also struggled to meet its obligations to send voters ballots in a timely manner. Due to a combination of factors—including a surge of paper ballot applications (which take longer to process than online applications), Covid-19-related staffing shortages and social distancing rules, and an outage in Philadelphia’s Verizon connection (which covered the network connection with the election database) —the county faced a significant backlog in its delivery of mail-in ballots to voters.⁵¹ As of May 21, Philadelphia County had mailed out only 142,836 ballots, though it had approved 159,772 mail-in ballot requests.⁵² In other words, the county had not yet sent ballots to almost ten percent of approved voters, or 16,936 people. In addition, the county had failed to process another 19,769

⁴⁸ Jonathan Lai, *Montgomery Cnty. sent 2,000 Pa. voters the wrong ballots for next week’s primary*, Phila. Inquirer (May 26, 2020), <https://www.inquirer.com/politics/election/montgomery-county-pa-wrong-primary-ballots-20200526.html>.

⁴⁹ *Id.*

⁵⁰ Pa. Dep’t of State, Pa. 2020 Primary Election, Act 35 of 2020 Report at 14, 22 (Aug. 1, 2020), <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf>.

⁵¹ Marks Decl. ¶¶ 13-14.

⁵² Marks Decl. ¶ 15.

applications.⁵³ Those delays had direct consequences for voters, as more than 14,600 ballots in the county would ultimately arrive after the original Election Day deadline of June 2.⁵⁴ Similarly, Allegheny County had 9,400 ballots arrive after the original deadline, Montgomery County had more than 5,800, Delaware County had 2,500, and Bucks County had more than 1,200.⁵⁵

Because Covid-19 is statistically far riskier for those over the age of sixty-five, voters in that age group are more likely to face significant health risks when voting in person. However, thousands of voters over the age of sixty-five who requested mail or absentee ballots far in advance of the June primary had not received them two weeks before the election. Department of State data suggests that, two weeks before the election, county officials had failed to mail ballots to at least 6,700 voters over the age of sixty-five whose ballot requests had been approved at least one month in advance. One week before the election, there were at least 7,000 absentee or mail-in ballots that had not yet been mailed to voters

⁵³ *Id.*

⁵⁴ Jonathan Lai, *Tens of thousands of Pa. mail ballots were turned in after the deadline. Nov. could be worse.*, Phila. Inquirer (June 10, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-election-20200610.html>.

⁵⁵ *Id.*

over the age of sixty-five with approved applications and where those voters ultimately did not have a ballot marked as returned.⁵⁶

In light of challenges to voters from Covid-19 and civil unrest, on June 1, 2020, Governor Tom Wolf signed an executive order extending the deadline for county election offices in Allegheny, Dauphin, Delaware, Erie, Montgomery and Philadelphia counties to receive absentee or mail ballots to 5 p.m. on June 9, 2020. Under the executive order, all ballots still had to be postmarked no later than Tuesday, June 2, 2020.⁵⁷ State data suggests that delays in delivering ballots may have led to as many as 75,700 mail-in ballots arriving after the June 2 Election Day deadline.⁵⁸ Of course, the executive order was no consolation to the thousands of voters who did not receive their ballot before June 2.

Data from the Department of State suggests that at least a thousand voters with approved applications *never* received their ballots in the mail or otherwise. While all of these voters had their applications for mail ballots submitted and

⁵⁶ OpenDataPA, *2020 Primary Election Mail Ballot Requests*, Commonwealth of Pennsylvania, <https://data.pa.gov/Government-Efficiency-Citizen-Engagement/2020-Primary-Election-Mail-Ballot-Requests-Departm/853w-ecfz/data> (last updated Aug. 3, 2020); Exhibit C, Kanter Cohen Declaration.

⁵⁷ Exec. Order 2020-02: Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties, Commonwealth of Pennsylvania Governor's Office (Jun. 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/06/20200601-EO-Deadline-Extention.pdf>.

⁵⁸ Jonathan Lai, *Tens of thousands of Pa. mail ballots were turned in after the deadline. Nov. could be worse.*, Phila. Inquirer (June 10, 2020), <https://www.inquirer.com/politics/election/pa-mail-ballots-deadline-2020-primary-election-20200610.html>.

approved by the May 26 deadline, the Department of State has no record of these voters having been mailed a ballot. Thus, while thousands of voters received their ballots too late to cast and deliver or *postmark* them by June 2, some voters never received them *at all*. Given the health risks associated with voting in person, failure to deliver these ballots in a timely fashion was not just administrative error; it was a dangerous impediment to these voters' ability to cast a ballot in the June primary, particularly those voters at high risk for severe complications from Covid-19.

The challenges in Delaware County were particularly striking. As the County noted, the

consequences of the COVID-19 pandemic have converged into a perfect storm in which requests for mail-in and absentee ballots have far exceeded the Bureau of Elections' expectations and capacity to process. Notwithstanding the heroic efforts of the Bureau and its staff to preserve the constitutional rights of all Delaware County citizens, it simply was unable to process all mail-in requests by the statutory deadline.⁵⁹

As of May 21, Delaware County had 31,139 ballot applications (forty percent of the total applications it had received) for which it had either (a) not processed the application or (b) not yet sent out a ballot, despite the application being approved.⁶⁰

⁵⁹ Emergency Pet. ¶ 11, *In re: Extension of Time for Absentee and Mail-in Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. CV-2020-003416 (Delaware Cnty. Ct. C.P. 2020), <https://www.delcopa.gov/electionsbureau/pdfs/2020/BOEPetitionforExtension.pdf>.

⁶⁰ Marks Decl. ¶ 16.

Ultimately, the significant backlog in mail-in and absentee ballots caused the county to mail thousands of ballots in the days leading up to the election, including mailing approximately 5,760 to 6,000 ballots the day before the election.⁶¹ Overall, the County states that it mailed between 24,240 and 25,250 ballots between May 29 and June 1, thereby very likely depriving the affected voters of an opportunity to submit those ballots by June 2.⁶² The County acknowledged that most of those would “not be received in time for voters to return them by the deadline.”⁶³ The Governor included Delaware County in his executive order extending the deadline for receiving mail ballots.⁶⁴ However, that extension almost certainly proved insufficient for many affected voters, as it is inconceivable that each of the approximately 25,000 voters could receive, complete, and timely return a ballot mailed to them just one or two days before the election.

Not only did Delaware County mail ballots late, but in the chaos leading up to Election Day, county officials also identified between 400 to 500 voters that

⁶¹ Emergency Pet. ¶ 13, *In re: Extension of Time for Absentee and Mail-in Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. CV-2020-003416 (Delaware Cnty. Ct. C.P. 2020), <https://www.delcopa.gov/electionsbureau/pdfs/2020/BOEPetitionforExtension.pdf>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jonathan Lai, *Courts extend Pa. mail ballot deadlines in Bucks and Delaware Counties*, Phila. Inquirer (June 2, 2020), <https://www.inquirer.com/politics/election/bucks-delaware-county-mail-ballot-deadlines-extended-20200602.html>.

they were certain would not receive their ballots until *after* Election Day.⁶⁵

Because those voters' ballots would not arrive before the election, officials had originally simply given up on sending them. Instead, the county changed course, asking the Delaware County Court of Common pleas, in an emergency petition, for an extension. The court obliged, and in an order on June 2, Election Day itself, allowed those 400 to 500 voters to have their ballots counted so long as they were returned by 5 p.m. on June 12, even if those ballots were not mailed or postmarked by June 2.⁶⁶

USPS has faced challenges across the country as states increase access to absentee voting to avoid the spread of Covid-19.⁶⁷ As Karley Sisler, Director of the Office of Voter Services for Montgomery County, noted, delays in working with the postal service significantly hindered the county's ability to distribute ballots and resulted in an increase in delivery times.⁶⁸ The delays made it difficult for voters who requested ballots in a timely fashion to submit those ballots before the

⁶⁵ Emergency Pet. ¶ 14, *In re: Extension of Time for Absentee and Mail-in Ballots to be Received by Mail and Counted in the 2020 Primary Election*, No. CV-2020-003416 (Delaware Cnty. Ct. C.P. 2020), <https://www.delcopa.gov/elections bureau/pdfs/2020/BOEPetitionforExtension.pdf>.

⁶⁶ *Id.*; see also Order, *In Re: Extension of Time*, at 2-3 (Delaware Cnty. Ct. C.P. (June 2, 2020)), <http://www.pacourts.us/assets/files/page-1305/file-9439.pdf>.

⁶⁷ Brian Naylor, *As More Ams. Prepare To Vote By Mail, Postal Serv. Faces Big Challenges*, Nat'l Public Radio (May 30, 2020), <https://www.npr.org/2020/05/30/865258362/as-more-americans-prepare-to-vote-by-mail-postal-service-faces-big-challenges>.

⁶⁸ Sisler Decl. ¶ 6.

June 2 election.⁶⁹ And USPS delays—which are certain to be aggravated under pandemic conditions and have already increased due to recent policy changes—caused problems at every step of the vote-by-mail process, including the receipt of applications, delivery of ballots, and return of those ballots. Moreover, even when voters did timely receive their ballots, additional mail delivery issues continued to arise. One media report found that completed mail ballots were being returned to voters instead of delivered to the elections office in Allegheny County.⁷⁰ While it is not clear just how many voters were disenfranchised due to the mail delivery errors, postal carriers said they had never seen the issue occur “at this scale,” and one postal supervisor claimed that mail-in ballots were being returned to voters “all over Pittsburgh.”⁷¹

All of these factors made it extremely difficult to process and deliver ballots to voters. Voters like Petitioner Cramer who requested their ballots weeks in advance of the June primary never received their ballots in the mail—not before, on, or after Election Day. Put simply, the absence of a fail-safe in the face of these systematic problems jeopardized the rights of thousands of voters, ultimately

⁶⁹ Marks Decl. ¶ 12.

⁷⁰ Juliette Rihl, *Reports emerge of completed mail-in ballots being returned to voters instead of delivered to Allegheny Cnty. elections off.*, Public Source (June 1, 2020), <https://www.publicsource.org/reports-emerge-of-completed-mail-in-ballots-being-returned-to-voters-instead-of-delivered-to-allegheny-county-elections-office/>.

⁷¹ *Id.*

leaving them with an unconscionable choice: risk their health by voting in person or forfeit their fundamental right to vote.

Due to the systemic challenges in delivering mail-in ballots and the absence of a back-up plan to deliver the ballots any other way, an unprecedented number of voters were forced to cast provisional ballots in the June 2020 primary.⁷²

Montgomery County also struggled to procure enough provisional ballots for voters who did not receive their ballots in the mail.⁷³ “Montgomery County had 60,000 provisional ballots flown in Monday from its printer in Ohio in preparation for high demand at polling places, and a roving team of seven county staffers—dedicated exclusively to provisional ballots—ha[d] been responding to restock polling places as they run low.”⁷⁴ Even if voters decided to risk voting in person, provisional ballots alone were an insufficient safeguard.

Turnout in the June election totaled approximately 2.8 million.⁷⁵ It is inevitable that counties will not be able to handle nearly double the volume of mail

⁷² *Lots of mail ballots and voter enthusiasm for Pa. primary. But results could take days: Live updates*, Phila. Inquirer (June 2, 2020), <https://www.inquirer.com/politics/election/live/pa-2020-primary-election-philadelphia-live-updates-results-20200602.html> (“Officials work to restock supplies as voters show up to polls after not receiving mail ballots”).

⁷³ *Lots of mail ballots and voter enthusiasm for Pa. primary. But results could take days: Live updates*, Phila. Inquirer (June 2, 2020), <https://www.inquirer.com/politics/election/live/pa-2020-primary-election-philadelphia-live-updates-results-20200602.html>.

⁷⁴ *Id.*

⁷⁵ Mark Scolforo, *Some counting continues, a week after Pa. ’s primary*, WHYY (June 9, 2020), <https://whyy.org/articles/some-counting-continues-a-week-after-pennsylvanias-primary/>.

ballot requests in a timely fashion this Fall. Pennsylvania had 8,599,294 registered voters as of June 2, 2020.⁷⁶ In 2016, 6,115,402 voters cast ballots for President.⁷⁷ If the same number of voters vote in November and if, as in June, around half of those voters cast mail-in/absentee ballots,⁷⁸ municipal clerks will need to process a *minimum* of 3 million ballot requests and successfully deliver the same number by mail in the Fall. Assuming the 1 to 1.25 ratio of returned mail-in ballots to total issued mail-in ballots holds from the June primary election,⁷⁹ then clerks will need to issue over 3.5 million mail-in ballots.

Due to the lack of adequate funding, staffing, and supplies, Pennsylvania election officials at the state and local level will not be able to fully meet the demand in a timely way with such an enormous increase in mail-in and absentee ballot requests. Respondents appear to acknowledge this conclusion as well, insofar as the Secretary of State has expressed her desire to provide counties

⁷⁶ Pa. Dep't of State, *2020 Voter Registration Statistics – Off.*, Commonwealth of Pa. (June 2, 2020), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2020%20Primary%20VR%20Stats%20%20FINAL.pdf>.

⁷⁷ Pa. Dep't of State, *2016 Presidential Election*, Commonwealth of Pa., <https://electionreturns.pa.gov/General/SummaryResults?ElectionID=54&ElectionType=G&IsActive=0> (last visited Aug. 25, 2020).

⁷⁸ Marc Levy, *Fixing Pa. mail-in vote glitches goes down to wire*, The Times (Aug. 24, 2020), <https://www.timesonline.com/story/news/2020/08/24/fixing-pennsylvania-mail-vote-glitches-goes-down-wire/3424779001/>.

⁷⁹ OpenDataPA, *2020 Primary Mail Ballots Returned %*, Commonwealth of Pennsylvania, <https://data.pa.gov/dataset/2020-Primary-Mail-Ballots-Returned-/m5hb-icht> (last visited Aug. 25, 2020); Exhibit C, Kanter Cohen Declaration.

assistance in what she deems “a very, very challenging job.”⁸⁰ But the Commonwealth has not proposed how voters can be guaranteed the ability to vote in light of the twin obstacles of the pandemic and unprecedented delays in delivery of U.S. mail. Indeed, expanded access to mail-in applications, greater time for counties to count ballots, and other tweaks around the edges cannot solve the problem of an overwhelming demand for mail-in and absentee ballots and a lack of staff and resources to match that demand.

The only way to overcome these obstacles is to provide a fail-safe means of delivering ballots on an expedited basis if they fail to arrive on time by mail. Three such alternatives readily present themselves. Petitioner’s proposed remedies of electronic delivery of absentee ballots and/or authorizing voters to use a downloadable write-in ballot, and allowing a voter to designate a person to pick up their previously-requested ballot in the week before the election, will significantly alleviate the burden on voters statewide. Providing such a fail-safe option is the only way to guarantee that at-risk voters can access the ballot in the likely event that counties are once again overwhelmed by a deluge of mail-in ballot requests. Respondents cannot and will not be able to guarantee that the labor-intensive tasks of processing over 3.5 million ballot requests, entering data and printing labels for

⁸⁰ Jan Murphy, *Pa. primary election ‘went remarkably smoothly’ despite many challenges*, Penn Live (June 3, 2020), <https://www.pennlive.com/news/2020/06/pa-primary-election-went-remarkably-smoothly-despite-many-challenges.html>.

all those ballots, and then mailing them off will not once again cause the system to overload. Respondents cannot guarantee that USPS will timely deliver ballots to mail-in and absentee voters. And, most importantly, Respondents cannot guarantee they will do any of these things in the context of an ongoing, if not resurgent, public health crisis. Given the concrete evidence of a systemic failure to keep up with the demand for mail-in and absentee ballots in a much lower turnout primary election, action should be taken to safeguard voters' constitutional rights by providing alternatives as a fail-safe to protect voters' rights. A presidential election is no time to leave voters without a fail-safe and allow electoral disarray to proceed unabated.

ARGUMENT

- 1. Respondents have the duty and authority to ensure that Pennsylvanians who properly requested a mail-in or absentee ballot are able to cast such a ballot in the upcoming election.**

Respondents are responsible for ensuring that Pennsylvanians who properly requested a mail-in or absentee ballot are able to cast such a ballot, and have the authority to take necessary action to fulfill those duties. The Secretary prescribes the form of absentee and mail-in ballot applications, 25 P.S. § 3146.2, 3150.12, the form and contents of envelopes for absentee and mail-in ballots, 25 P.S. § 3146.4, 3150.14, and the form of absentee and mail-in ballots themselves, 25 P.S. § 3146.3, 3150.13. The Code also empowers the Secretary to “develop an electronic

system through which all qualified electors may apply for” absentee and mail-in ballots. 25 P.S. § 3146.2, 3150.12. For military and overseas voters, the Secretary must “[e]stablish an electronic transmission system through which a covered voter may apply for and receive voter registration materials, military-overseas ballots and other information.” 25 Pa.C.S. § 3503. The Secretary is also a member of the Voting Standards Development Board, which is established within the Department of State “for the purpose of developing uniform and nondiscriminatory standards that define what constitutes a vote.” 25 P.S. § 2624. The Secretary also administers the SURE system, which serves both as the voter registration database as well as the system for processing absentee and mail ballots. 25 Pa.C.S. § 1222(f).

2. Respondents must provide fail-safe remedies for ballot preparation and delivery failures to protect Pennsylvanians’ fundamental constitutional right to vote in the context of the pandemic.

The following proposed remedies for the disenfranchisement caused by ballot preparation and delivery failures are intended to serve as last resorts or fail-safes for voters such as Petitioner. They should not be used by voters or election officials in the first instance, but rather only after a timely-requested mail-in or absentee ballot fails to arrive with sufficient time for it to be filled out and timely returned. If a timely-requested ballot does not arrive in the mail, then voters such as Petitioner must be afforded a fail-safe alternative: (a) delivery of the ballot electronically, (b) access to and permission to vote a state write-in ballot, like those

ordered in the TRO as to the June election in *Drenth v. Boockvar*; or (c) a voter may designate an agent to pick up a replacement for a previously-requested ballot that the voter did not receive. Granted, these solutions to the constitutional problem of ballot preparation and delivery failures may not work for all voters, particularly those who lack printers or who cannot identify a person who is able to pick up the ballot in person on their behalf. But for the many Covid-19 vulnerable voters who simply cannot safely vote in person, these fail-safes will prove their only available means to vote when a ballot does not arrive in the mail timely or at all.

A. *Electronic Delivery of Mail/Absentee Ballots*

The Pennsylvania Election Code instructs county boards of elections to “deliver or mail” absentee and mail-in ballots to absentee and mail-in electors, respectively. 25 PA.C.S. § 3146.5, 3150.15. 23.24. The word “deliver” is not defined in any Definitions section of Chapter 25, which governs elections. *See* 25 P.S. §§ 2602, 2745, 2831, 3001, 3031.1, 3035.1, 3150.1, 3150.21, 3241, 3595.102, 3596.102; 25 Pa.C.S. §§ 701, 1102, 3502. A military or overseas voter “may request that a ballot and balloting materials be sent to the voter by mail or by internet delivery.” 25 P.S. § 3508(c), reflecting the Legislature’s judgment that internet delivery is a form of “delivery.”

The VotesPA website offers several options for military or overseas voters to obtain an absentee or mail-in ballot via email.⁸¹ Voters can also either mark the box that says e-mail preference in block 5 on the Federal Post Card Application Form or contact their local County Election Office by e-mail or phone. After completing one of these options, the voter then receives an e-mail telling them that their ballot is ready, which they can then download from www.pavoterservices.pa.gov.

25 PA C.S. § 3508(c) requires for military and overseas voters, but neither mandates or prohibits internet delivery of domestic civilian ballots. Leaving the form of delivery unspecified as to domestic civilian voters preserves a broader range of delivery options, including, for example, in-person delivery. Accordingly, nothing in the Election Code precludes county boards of elections from fulfilling their statutory mandate to “deliver or mail” absentee and mail-in ballots to voters by electronically transmitting the ballot.

Indeed, one federal court has already recognized that online delivery of ballots represents a reasonable accommodation in light of Covid-19. In *Drenth v. Boockvar*, a federal judge granted a TRO ordering the Commonwealth of Pennsylvania to provide digitally accessible write-in ballots to blind Pennsylvania

⁸¹*Info. for Mil. and Overseas Voters*, Pa. Dep’t of State, Votes PA, <https://www.votespa.com/Voting-in-PA/Pages/Military-and-Overseas-Voters.aspx> (last visited on Sept. 2, 2020).

voters for the June 2 primary election. *Drenth v. Boockvar*, No. 1:20-CV-00829 (M.D. Pa. May 27, 2020). The Court, in issuing its order, noted that failure to provide an electronic ballot would effectively force blind voters, who may not be able to fill out a paper ballot without assistance, to “choose between forfeiting their right to vote privately and independently or risking their health and safety by traveling to a polling place to vote in person.” *Id.* at 13. The court therefore required the state to provide blind voters with a list of the candidates on the ballot for their voting district along with an accessible electronic form on which they could type in their choices for each office. After filling out their ballot digitally, blind voters could print out the ballot and mail it in, just as would occur with any absentee ballot. As such, leveraging electronic delivery of ballots could help voters who do not timely receive their mail-in or absentee ballot to avoid the same dilemma, whereby they are forced to choose between their health and their right to vote. The Pennsylvania Department of State has already committed to using Democracy Live’s OmniBallot in November to ensure that blind and disabled voters are able to exercise their right to cast a ballot in private.⁸² This system must be expanded as a fail-safe for voters who request and do not receive their ballots so

⁸² Madasyn Lee, *Pa. implements OmniBallot tool for blind voters in November election* (August 30, 2020), <https://triblive.com/news/pennsylvania/state-implements-omniballot-tool-for-blind-voters-in-november-election/>.

that everyone—including those particularly vulnerable to Covid-19—is able to cast their ballot without jeopardizing their health.

The difficulty Respondents, county election boards, and the USPS face in trying to fully keep up with the demand for mail-in and absentee ballots during this Covid-19 pandemic requires an alternative fail-safe option of electronic delivery of ballots. It need not and should not be a first resort; it is a last resort. However, to prevent disenfranchisement when ballots fail to arrive timely in the mail such that voters can timely cast and return them, Petitioner respectfully requests that this Court order Respondents to establish a fail-safe system to electronically deliver and/or instruct county election directors to electronically replace mail or absentee ballots to voters who timely requested those ballots be delivered by mail but did not receive them by the eighth day before an election. Electronic delivery will greatly alleviate the administrative burden on county election directors' offices in mailing out replacement absentee ballots for those that do not arrive timely in the mail.

B. Write-In Absentee Ballots

A downloadable ballot is not new to Pennsylvania, which already implements the Federal Write-in Absentee Ballot (“FWAB”). Used for military and overseas voters under Pennsylvania’s enactment of federal law, the FWAB is downloadable and printable at:

<https://www.fvap.gov/uploads/FVAP/Forms/fwab2013.pdf>. The voter must assemble the envelope, and the voter fills out both a voter information sheet and the official back-up ballot. Pennsylvania law requires a military or overseas voter to first apply for an absentee ballot with the federal postcard application before using the FWAB.⁸³ FWABs are counted under various rules that allow for the voter's intent to be determined without regard to misspellings, abbreviations, or the like. *See* 52 U.S.C. § 20303(c). These ballots are accepted for state offices under Pennsylvania law. 25 Pa.C.S. § 3510.

The principle behind allowing use of the FWAB is that a voter who is overseas will face hardship or potential disenfranchisement if this option is not made available to them. The Covid-19 pandemic now threatens many *domestic* civilian voters with hardship and potential disenfranchisement. In the context of the pandemic, their right to vote is entitled to the same protection.

Affording domestic civilian voters the right to cast downloadable write-in ballots, similar to overseas civilian voters who use downloadable ballots, would also cure the state constitutional violations caused by the lack of a fail-safe option for voters who request an absentee or mail-in ballot during this pandemic.

Petitioner respectfully requests that this Court order this as relief in the alternative or in addition to the electronic delivery of ballots in the narrow circumstance where

⁸³ 25 Pa.C.S. § 3506.

a voter timely requests a mail-in absentee ballot but does not receive that ballot by the eighth day before the November 3, 2020 general election.

C. *Use of An Agent to Retrieve Replacement for Undelivered, Timely Requested Ballot*

While electronic delivery methods will benefit many voters who do not receive their timely-requested ballots, some at-risk voters who do not receive their ballots will not have access to the technology needed to retrieve their ballot electronically.

In some states, including Florida, a voter may designate an agent to retrieve their vote-by-mail ballot.⁸⁴ Under that state’s law, voters “may designate in writing a person to pick up the ballot for the elector; however, the person designated may not pick up more than two vote-by-mail ballots per election, other than the designee’s own ballot, except that additional ballots may be picked up for members of the designee’s immediate family.”⁸⁵ The designated person is required to provide written authorization by the voter and provide the designated person’s picture ID card, and must complete a state-designed affidavit stating that the person is authorized by the voter to pick up the ballot.⁸⁶

⁸⁴ Fla. Stat. Ann. § 101.62(4)(c)(4).

⁸⁵ *Id.*

⁸⁶ *Id.*; see also Fla. Dept. of State, Affidavit Pick-Up Vote-By-Mail Ballot for a Voter, Form DS-DE 37, <https://dos.myflorida.com/media/701775/dsde37.pdf>; cf. Mich. Comp. Laws § 168.759(b)

Allowing voters to designate an individual to pick up a timely requested mail-in or absentee ballot that was not received in time would provide an additional fail-safe for those voters who either cannot access the Internet or who cannot print out an electronically-delivered ballot.

COUNT I
EMERGENCY DECLARATORY AND INJUNCTIVE RELIEF FOR
VIOLATION OF FREE AND EQUAL ELECTIONS CLAUSE

Petitioner re-alleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

The right to vote is a fundamental right in the Commonwealth of Pennsylvania. Pa. Const. art. I, § 5. Article I, Section 5 of the Pennsylvania Constitution provides that “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” *Id.* The Pennsylvania Supreme Court recently reviewed the history of the Free and Equal Elections Clause, affirming 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 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

(2020) (emergency ballot process includes opportunity to have a ballot delivered to the applicant through a deputy or election assistant, or at the election official’s official to a person named by the voter in the application).

as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

League of Women Voters v. Commonwealth, 645 Pa. 1, 110, 178 A.3d 737, 810 (2018) (quoting *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 523 (1914)); *see also Applewhite*, 2014 WL 184988, at *19 (quoting same).

Echoing the expansive right to suffrage contemplated by the Pennsylvania Constitution, courts in the Commonwealth have repeatedly held that the right of suffrage “is a fundamental one” and the “most treasured prerogative of citizenship through which other rights flow.” *Applewhite v. Commonwealth of Pa.*, No. 330 M.D. 2012, 2014 WL 184988, at *19 (Jan. 17, 2014) (internal quotations marks and citations omitted).

In the context of the 2020 general election, the Covid-19 pandemic, and delays in the delivery of election mail predicted by both the Commonwealth and the USPS, the failure to provide all voters who requested them with mail or absentee ballots in time to vote forces these voters to vote in person. For voters who are at high risk for complications or death from Covid-19 or who are caring for or living with such individuals, that failure renders exercising Pennsylvania’s fundamental right to vote so difficult or risky as to amount to an effective denial.

The failure to timely provide all voters with ballots and the further failure to provide voters with a fail-safe alternative for ballot delivery denies Petitioner and

similarly situated individuals the right to vote in violation of the Free and Equal Elections Clause of the Pennsylvania Constitution.

Many qualified voters in Pennsylvania with a Covid-19-vulnerable household member cannot cast a ballot in person for fear that they or their household member will become infected with Covid-19, develop complications, and die. If they do not receive their mail ballots in time to vote them and have them be counted, they will be disenfranchised as Petitioner was in June.

Article VII, § 6 of the Pennsylvania Constitution provides:

All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class

Pa. Const. art. VII, § 6.

No compelling state interest justifies the disenfranchisement of voters due to any administrative burden of processing requests for replacement mail or absentee ballots via alternative ballot delivery methods such as online access, email, or designee pick-up.

Accordingly, in the context of the deadliest pandemic in one hundred years and the massive influx of mail or absentee ballot applications that cannot all be timely processed by election officials or timely delivered by USPS, the lack of fail-safe options to deliver replacement mail or absentee ballots to voters who do not

receive their initially-requested mail or absentee ballots in the mail poses insurmountable burdens on the fundamental right to vote. This practice violates the guarantee of “free and equal” elections under the Pennsylvania Constitution.

An actual controversy exists between Petitioner and Respondents regarding Petitioner’s rights and Respondents’ obligations under the Pennsylvania Constitution, Act 77 and other above-mentioned laws. Entry of declaratory relief pursuant to 42 Pa.C.S. §§ 7532 and 7533 is necessary to address and resolve such controversy. Such relief should be entered on emergency basis to ensure that it can be implemented in time to protect Petitioner’s and other Pennsylvania voters’ rights in the 2020 General Election. Supplemental relief in the nature of a permanent injunction should be entered pursuant to 42 Pa.C.S. § 7538(a) to effectuate such declaratory relief.

PRAYER FOR RELIEF

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

a. Declare that, in the context of the 2020 general election, the Covid-19 pandemic and delays in delivery of election mail predicted by both the Commonwealth and the USPS, the failure to provide all voters who requested them with mail or absentee ballots in time to vote them by mail violates Pa. Const. art. I, § 5. Article I, Section 5, and Act 77.

b. Enjoin Respondents to remedy the lack of a fail-safe option for voters who previously and timely requested a mail-in or absentee ballot by mail delivery but who do not receive that ballot in the mail, for the November general election and additional elections held during the course of the pandemic, by:

1. Establishing a process by which voters who previously and timely requested a mail-in or absentee ballot by mail delivery but who do not receive that ballot in the mail in time to submit it, may have a ballot electronically delivered to them, *e.g.*, accessed online and downloaded through the Democracy Live platform, and/or emailed to the voter with appropriate security measures, along with all the materials necessary to cast that ballot including its certificate envelope;

2. Causing to be counted in the November 2020 general election results mail-in or absentee ballots that are electronically delivered, *e.g.*, accessed online and downloaded through the Democracy Live platform, and/or emailed to voters, and are timely returned in any way permitted under Pennsylvania law or court orders by voters who previously and timely requested a mail-in or absentee ballot by mail delivery but did not receive that ballot in the mail in time to vote it; and

3. Prohibiting the rejection and/or refusal to count and certify as part of official election results mail-in and absentee ballots that were electronically

delivered, *e.g.*, accessed online and downloaded through the Democracy Live platform, and/or emailed to voters that are timely returned in any way permitted under Pennsylvania law or court orders by voters who previously and timely requested a mail-in or absentee ballot by mail delivery but did not receive that ballot in the mail in time to vote it; and;

c. In the alternative or in addition to the relief outlined in subsection (b), for the duration of the pandemic, enjoin Respondents to:

1. Establish a process including a uniform statewide form by which voters who previously and timely requested a mail-in or absentee ballot by mail delivery and who do not receive their requested ballot, and cannot retrieve and print out such ballot via alternative electronic delivery methods as set out above, be authorized to, via affidavit, designate an individual who can retrieve the unvoted ballot from the election board and deliver it to the voter;

2. Establish a system by which voters who previously and timely requested a mail ballot or an absentee ballot by mail delivery, may download, vote, and return in any way permitted under Pennsylvania law or court orders an emergency write-in ballot package, containing a write-in ballot, instructions for filling out the ballot, a candidate list for the voter's precinct, and a bar code sufficient to identify the ballot envelope;

3. Direct county officials to permit voters who previously and timely requested a mail-in ballot or an absentee ballot by mail delivery, to download, vote, and return in any way permitted under Pennsylvania law or court orders an emergency write-in ballot package, containing a write-in ballot, instructions for filling out the ballot, a candidate list for the voter's precinct, and a bar code sufficient to identify the ballot envelope;

4. Direct county officials to process and count emergency write-in ballots submitted under paragraph (c)(2)-(3) above that are timely returned in any way permitted under Pennsylvania law or court orders by voters who previously and timely requested a mail-in or absentee ballot by mail delivery;

5. Count and certify as part of official election results emergency write-in ballots submitted under paragraph (c)(2)-(3) above that are timely returned in any way permitted under Pennsylvania law or court orders by voters who previously and timely requested a mail-in or absentee ballot by mail delivery;

d. Declare that electronic ballot delivery, the downloading of ballots, and ballot pick-up via a designated person are all fully consistent with existing Pennsylvania statute requiring election officials to "deliver or mail official" ballots to voters, 25 P.S. §§ 3150.15, 3146.5; and

e. Award any other relief as is just and necessary.

Dated: September 3, 2020

Respectfully submitted,

/s/ David Newmann

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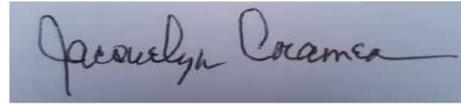
*Not admitted in Pennsylvania; *pro hac vice* motion to be filed.

VERIFICATION

I state that I am a Petitioner in this matter, and that the factual averments set forth in the foregoing Petition for Review, as they relate to me personally, are true and correct to the best of my knowledge, information, and belief.

I understand that the statements herein are made subject to the penalties of 18 Pa. Cons. Stat. § 4904 relating to unsworn falsification to authorities.

DATED: ___Sep. 2, 2020___

A rectangular box containing a handwritten signature in black ink. The signature appears to read "Jacquelyn Cramer".

(Signature)

Jacquelyn Cramer