

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. 83 WM 2020

JACQUELYN CRAMER,

Petitioner

v.

**KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of
Pennsylvania; and JESSICA MATHIS, in her capacity as Director of the
Bureau of Election Services and Notaries of the Pennsylvania Department of
State,**

Respondents

**ANSWER TO EMERGENCY APPLICATION FOR
EXTRAORDINARY JURISDICTION**

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DATE: September 14, 2020

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INTRODUCTION

With less than two months before Election Day, Petitioner Jacquelyn Cramer asks this Court to re-write Pennsylvania's Election Code to enable all Pennsylvanians to receive their election ballots through the Internet, just in case they do not arrive on time in the mail. This requested relief is inappropriate on every level. Initially, while county boards of election have not yet begun to mail out ballots, they will start to do so as soon as ballots are finalized in the next several weeks. Cramer's hypothetical injury may never actually manifest, and thus, she lacks standing. And once she does receive a ballot, likely in a matter of weeks, there will be no controversy, making this matter moot.

Whatever the wisdom of Cramer's proposal, nothing in the text of the Election Code supports it. The Commonwealth's Election Code does not provide for the procedures she demands; to grant relief, the Court would have to require procedures that go beyond what the legislature contemplated when it enacted the Code. As this Court has so often said, it may not, under "the guise of statutory interpretation," take "it upon itself to rewrite [a] statute." *Pleasant Hills Constr. Co., Inc. v. Public Auditorium Auth.*, 784 A.2d 1277, 1281 (Pa. 2001). And even if the law permitted Cramer's preferred procedures, implementing new, complicated, and potentially insecure processes in the week before a major election presents risks that would make relief inappropriate.

According to nearly every election security expert in the country, electronic delivery of ballots is considered less secure and more vulnerable to attack, and therefore should be limited to only extremely rare circumstances, such as for overseas voters and voters with disabilities. Moreover, county election offices, which were largely closed to the public due to COVID-19 in the months leading up to the primary, are now open. Voters can go in person to their county election offices, apply for their ballot in person (or inform the office they have yet to receive their applied-for ballot and void the old one and receive a new one), and complete and cast their ballot all in one visit to the office.

Lastly, it would violate principles of sovereign immunity for this Court to impose the sweeping mandatory injunction that Cramer requests.

Accordingly, Cramer cannot show that she has a right to any relief, let alone one that so clear that it would warrant this Court's exercise of its extraordinary jurisdiction.

STATEMENT OF THE CASE

A. Mail-in Voting under the Election Code

On October 31, 2019, Governor Wolf signed Act 77 of 2019 (Act 77) into law, amending the Election Code to permit, for the first time, no excuse mail-in voting for all qualified electors. 25 P.S. § 3150.11. Voters have until October 27, 2020, to request a ballot in this year’s General Election.¹ 25 P.S. § 3150.12a(a). Voters can submit an application for a mail-in ballot over the Internet, through the mail, or in person. *See* 25 P.S. § 3150.12. Upon receipt and approval of a mail-in ballot application, county boards of election commence delivery of official mail-in ballots (as soon as the ballot is certified) and the ballots are available. 25 P.S. § 3150.15. Thereafter, as additional applications are received and approved, the county boards must deliver or mail official mail-in ballots within 48 hours. *Id.* If a voter presents her application in person at the office county board of elections, she may request receipt of her ballot while in the office. 25 P.S. § 3146.5(b)(2). The board must then “promptly present the voter with [her] . . . mail-in ballot.” *Id.*

¹ Similar provisions apply to absentee ballots, which are available only to voters who are unable to attend their polling places in person for various reasons. *See* 25 P.S. § 3146.1. Cramer has not alleged that she is a qualified absentee elector; therefore, except where otherwise noted, this Answer discusses only the statutory provisions applicable to mail-in ballots.

Upon approval of their application to vote by mail, an elector receives a ballot, an envelope marked “Official Election Ballot” (hereafter the “internal envelope”), and a second larger envelope containing “the form of declaration of the elector, and the address of the elector’s county board of election and the local election district of the elector” (hereafter the “external envelope”). 25 P.S. § 3150.16; 25 P.S. § 3150.14. To vote by mail, electors mark the ballot with pencil or black or blue ink, enclose the ballot in the internal envelope, and then place that envelope in the larger external envelope for mailing. 25 P.S. § 3150.16(a).

“The elector shall then fill out, date and sign the declaration printed on [the exterior] envelope.” *Id.* The ballot may be mailed or “deliver[ed] in person to” a location designated by the county board of election. *Id.*

Any elector who votes through a mail-in ballot is obviously not eligible to vote again at a polling place on election day. 25 P.S. § 3150.16(b). And mail-in ballots for which “proof of identification has not been received or could not be verified” will only be counted if “proof of identification is received and verified prior to the sixth calendar day following the election[.]” 25 P.S. § 3146.8(h)(2). In the event of an issue with a voter’s mail-in ballot, the voter has the option of casting a provisional ballot. *See* 25 P.S. § 3050(a.2).

During the 2020 primary election, nearly 1.5 million Pennsylvanians successfully cast absentee or mail-in ballots.²

B. *Crossey v. Boockvar*, 108 M.M. 2020 (Pa.) and *Pennsylvania Democratic Party v. Boockvar*, 68 M.M. 2020 (Pa.)

Presently before the Court are two cases regarding mail-in and absentee voting. *Crossey v. Boockvar*, No. 108 MM 2020 (Pa.), which is before this Court pursuant to a jurisdictional provision in Act 77, raises the issue of, *inter alia*, whether recent service slowdowns at the United States Postal Service require an extension of the deadline by which mail-in and absentee ballots must be returned. *See* Act 77 § 13(2), (3). *Pennsylvania Democratic Party v. Boockvar*, No. 133 MM 2020 (Pa), which is before this Court pursuant to its extraordinary jurisdiction, includes the following issues: (a) whether mail-in ballots may be delivered in person to designated drop-off locations other than the official office address of the county board of elections; (b) given the United States Postal Service’s warning that it cannot guarantee timely delivery of mail-in ballots by the statutory deadline, should county election boards count all returned ballots postmarked by 8:00 p.m. on Election Day as valid if received by November 6, 2020; and (c) may mail-in ballots delivered without the inner secrecy envelope (i.e. “naked ballots”) be counted.

² Pa. Dep’t of State, Pa. 2020 Primary Election, Act 35 of 2020 Report at 13, 22 (Aug. 1, 2020) (hereinafter Act 35 Report), available at <https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf>

C. Cramer v. Boockvar, 83 W.M. 2020 (Pa.)

On September 1, 2020, Cramer initiated this action by filing a Petition for Review in the Commonwealth Court. See Application for Extraordinary Jurisdiction, Exhibit A. A mere two days later, Cramer filed the present application, before any ballots have been mailed, asking this Court to exercise extraordinary jurisdiction over the action she initiated in Commonwealth Court. With less than two months before Election Day, Cramer asks this Court not to interpret the Election Code, but to create an entirely new electoral process directing the Secretary to establish a system for Internet delivery of ballots “as a last resort or fail safe” and to do so just in case a “timely-requested mail-in or absentee ballot fails to arrive with sufficient time for it to be filled out and timely returned.” Application at 42.³

Downplaying the obvious practical difficulties and utter lack of legal support for creating such a system at the last minute, Cramer argues that Pennsylvania’s statutory scheme contemplates, and even requires, the new procedures she demands. It does not. She relies upon Section 3508 of the Uniform Military and Overseas Voters Act, 25 Pa.C.S. § 3508, a state statute which effectuates Federal law, see 52 U.S.C. § 20301, and allows a narrow class of voters, namely, those who serve in the

³ Barring those remedies, Cramer asks that a voter be permitted to “designate an agent to pick-up a replacement for a previously-requested ballot that the voter did not receive.” Application at 42.

military and/or live overseas, to receive ballots *via* the Internet. Even though the General Assembly was assuredly aware of the potential for the Internet delivery of ballots to voters, since it enacted 25 Pa.C.S. § 3508, it did not make this option more broadly available to the electorate. And given this expression of legislative intent, Cramer must hinge her entire statutory argument on the phrase “deliver” as allowing for Internet delivery of mail-in ballots. As detailed below, it does not do so.

THIS COURT SHOULD DECLINE TO EXERCISE EXTRAORDINARY JURISDICTION OVER THIS CASE

Pursuant to 42 Pa.C.S. § 726, this Court may, “in any matter pending before any court . . . 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 justice to be done.” As this Court has stated, however, extraordinary jurisdiction is used “sparingly,” and “the presence of an issue of an issue of immediate public importance is not alone sufficient to justify extraordinary relief.” *Washington County Com’rs v. Pennsylvania Labor Relations Bd.*, 417 A.2d 164, 167 (Pa. 1980) (quoting *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 430 (1978)). Extraordinary jurisdiction may be appropriate “in order to conserve judicial resources, expedite the proceedings, and provide guidance to the lower courts on a question that is likely to recur.” *Commonwealth v. Morris*, 771 A.2d 721, 731 (2001). Further, this Court will not exercise extraordinary jurisdiction “unless the record clearly demonstrates a petitioner’s rights.” *Id.* “Even a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief.” *Philadelphia Newspapers*, 387 A.2d at 430 n.11.

In her application, Cramer references only the public importance of elections and does not even attempt to articulate how the record clearly demonstrates her rights or that the novel issue she raises is likely to recur. There is good reason for her

failure in this regard; the record, far from clearly demonstrating such rights, offers no support for them whatsoever and the issue is not likely to recur.

The Secretary agrees generally that certain issues regarding the upcoming general election can raise issues of immediate public importance. Indeed, for this reason the Secretary sought this Court's extraordinary jurisdiction in *Pa. Democratic Party*. But in contrast to that case, which involves verifiable factual averments and developed legal arguments grounded in authority, Cramer's application offers unsubstantiated factual averments, undeveloped, scattered references to certain legal concepts, and speculation about hypothetical events that may never occur.

Moreover, and most fundamentally, unlike *Pa. Democratic Party*, Cramer does not ask this Court to sit as jurists and interpret an existing statute. Instead, she asks this Court to sit as legislators and create a statute that she believes ought to be enacted. That is not this Court's function.

Finally, as argued more fully below, Cramer all but concedes that she lacks standing and that her claim is not ripe for review, as she asks this Court to make Internet delivery of ballots available not in the first instance, but as a last resort in the event a timely requested ballot does not arrive *via* the mail. Cramer's proposed remedy is premised entirely on a hypothetical scenario, and this Court's decisions in *Crossey* and *Pa. Democratic Party* may obviate the need for this Court to fashion a remedy for that hypothetical scenario.

Asking this Court to take legislative action, much of it eschewed by the General Assembly, to address events that may never occur, presents an exceedingly flawed vehicle for this Court to exercise its sparingly used extraordinary jurisdiction.⁴ It should not do so here.

⁴ Though her primary focus is on extraordinary jurisdiction, Cramer also makes passing reference to this Court's King's Bench jurisdiction. For the same reasons that this case is exceedingly flawed for this Court's extraordinary jurisdiction, it is also an exceedingly flawed candidate for King's Bench.

ARGUMENTS

I. Cramer's Claim is Not Justiciable.

Not only does Cramer fail to demonstrate a *clear* legal right to relief that would warrant invocation of this Court's extraordinary jurisdiction, but her claim fails entirely, both on jurisprudential grounds and on her interpretation of the Election Code that is not based on the Code at all.

A. Cramer lacks standing because her claimed injury is not imminent.

In Pennsylvania, standing and ripeness are jurisprudential matters that must be resolved as a threshold matter. *Markham v. Wolf*, 136 A.3d 134, 140 (Pa. 2016); *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 717 (Pa. 2009). “[A] person who is not adversely impacted by the matter [s]he seeks to challenge does not have standing to proceed with the court system’s dispute resolution process” because courts “do not render decisions in the abstract or offer purely advisory opinions.” *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 659 (Pa. 2005). Instead, “the resolution of real and concrete issues” is required. *Markham*, 136 A.3d at 140. In short, the plaintiff must be “aggrieved.” *Id.*

A plaintiff is aggrieved when she has a “substantial, direct and immediate interest in the claim sought to be litigated.” *Bergdoll v. Kane*, 731 A.2d 1261, 1268 (Pa. 1999). Most importantly here, for the interest to be immediate, the causal connection must not be remote or speculative. *Markham*, 136 A.3d at 140.

Similarly, ripeness ensures that courts do not entangle themselves in abstract disagreements or render advisory opinions based on “hypothetical events that might occur in the future.” *Philadelphia Entertainment and Development Partners v. City of Philadelphia*, 937 A.2d 385, 392 (Pa. 2007); *see also Robinson Twp. v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013) (noting the “considerable overlap between” standing and ripeness).

Here, Cramer cannot establish that she is aggrieved. Her remarkable request for relief—to have this Court engraft a “fail safe” or “back up” plan onto the Election Code for mail-in voting—hinges entirely on her ballot “fail[ing] to arrive on time by mail.” Application at 39, 41. This claimed injury is remote and speculative. It is built upon “ifs” and “coulds” about events Cramer believes are “likely” to occur, but such contingencies are no substitute for “real and concrete” harms. Application at 41; *see O’Shea v. Littleton*, 414 U.S. 488, 497 (1974) (series of “ifs” – “if [plaintiffs] proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to discriminatory practices” – were “speculation and conjecture,” insufficient to show immediacy so as to confer standing) (emphasis added).⁵

⁵ It is curious that Cramer also requests that absentee ballots be delivered via the Internet. Application at 54. Cramer does not assert that she qualifies as an absentee elector under the limited exceptions permitting absentee voting contained in 25 P.S. § 3146.1. Therefore, she lacks standing to assert such a claim. *See Porter*

That Cramer alleges she did not receive a ballot in the mail back in June, for the primary election, Application at 9, does not confer standing for the upcoming general election. As “Supreme Court caselaw teaches,” a “past injury . . . is an insufficient predicate for [injunctive] relief.” *American Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992), citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (to establish standing for injunctive relief plaintiff had to establish that “*all* police officers in [the City] *always* [engage in the same, specific unlawful conduct against] any citizen with whom they happen to have an encounter”) (emphasis in original);⁶ *see also Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 980-81 (6th Cir. 2020), *petition for cert. filed* Docket No. 19-1399 (“variety of [alleged] election administration problems,” amounting to “*prior* system vulnerabilities, *previous* equipment malfunctions, and *past* election mistakes,” did “not create a cognizable imminent risk of harm” and so the plaintiffs lacked standing); Application at 54 (requesting injunction).

v. Commonwealth, 303 M.D. 2019, 2020 WL 4342721, *4 (Pa. Cmwlth. July 29, 2020) (petitioners lacked standing to challenge subsection of statute that they conceded did not apply to them).

⁶ In Pennsylvania, as noted, standing implicates jurisprudential concerns, while in the federal courts, “standing is both constitutional and prudential in nature.” *Fumo v. City of Phila.*, 972 A.2d 487, 500 n.5 (Pa. 2009). Nevertheless, “the Pennsylvania courts have found federal decisions on standing helpful.” *Id.*

The same rule applies here. Cramer’s fear does not create an imminent risk that she will not timely receive her ballot in the future.⁷ Cramer tacitly recognizes this. She calls her proposed remedies a “last resort.” Application at 43, 47. But if she receives her ballot in the mail, she will not need to resort to these remedies at all. Even if likelihoods were a valid consideration for purposes of standing, the likelihood is that Cramer will receive her ballot in the mail. Nearly 1.5 million voters who requested an absentee or mail-in ballot for the primary election received a ballot⁸ and cast it.⁹ Additionally, county election offices, which were largely closed to the public due to COVID-19 in the months leading up to the primary, are now

⁷ Even if Cramer’s speculative claim came to fruition and her ballot never arrived in the mail, the Election Code already contains a “fail-safe” or “back-up plan,” actually enacted by the General Assembly. Voters are permitted to cast a provisional ballot, 25 P.S. § 3150.16 (b)(2), just as more than 42,000 voters did in the primary election. See Act 35 Report at 22, *supra* n.2. Notice of that option is provided on the voter’s mail-in ballot. 25 P.S. § 3150.13(e), and voters can go to the Department of State’s website to check that their provisional ballot was counted. <https://www.pavoterservices.pa.gov/Pages/ProvisionalBallotSearch.aspx>

⁸ Voters are not left wondering if their ballot has been mailed. The Department of State, through its website, [pavoterservices.pa.gov](https://www.pavoterservices.pa.gov)., allows for voters to check the status of both their application and ballot: the former as to the date the application was received and processed, and the latter as to when mailed to the voter and received by her local county board of elections. <https://www.pavoterservices.pa.gov/pages/ballottracking.aspx> Voters may also provide their e-mail address to receive notifications about the status of their application and ballot. <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>

⁹ Act 35 Report at 21, *supra* n.2.

open. Voters can go in person to their county election offices, apply for their ballot in person and complete and cast their ballot all in one visit to the office. Voters can also inform the office they have yet to receive their applied-for ballot, void the old one, and receive a new one. Cramer’s “last resort” rewriting of our Election Code, therefore, is unnecessary even under her hypothetical.

B. Cramer’s claim will likely be rendered moot in weeks.

Once Cramer receives her ballot, her claim will be rendered moot. The doctrine of mootness “stands on the predicate that a subsequent change in circumstances has eliminated the controversy so that the court lacks the ability to issue a meaningful order, that is, an order that can have any practical effect.” *Burke ex rel. Burke v. Independent Blue Cross*, 103 A.3d 1267, 1271 (Pa. 2014). Like standing, mootness “is intertwined with the precept that Pennsylvania courts do not issue purely advisory opinions.” *Id.*; see *Rendell v. Pa. State Ethics Comm’n*, 983 A.2d 708, 717 (Pa. 2009).

By the time this Court decides this matter, Cramer’s claim may already be rendered moot. As even Cramer recognizes, county boards of election will begin mailing ballots as soon as ballots are finalized in the coming weeks. Application at 7, citing 25 P.S. § 3150.12a; see *Trump v. Boockvar*, No. 2:20-cv-966, 2020 WL 5407748, *10 (W.D. Pa., Sept. 8, 2020) (Ranjan, J.) (noting same). Once Cramer receives her ballot, this change will moot the controversy. There will be no need for

this Court to graft onto the Election Code Cramer’s proposed remedies of “last resort” when she already has her ballot in hand. Application at 5.¹⁰

Further, none of the exceptions to the mootness doctrine are applicable here. The “capable of repetition yet evading review exception” does not apply because it requires proof that “there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.” *Assoc. of Pa. State Coll. & Univ. Faculties v. Pa. Labor Relations Bd.*, 8 A.3d 300, 306 n.6 (Pa. 2010), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Once Cramer receives her ballot, and because she may cast only a single ballot, it cannot reasonably be expected that she will be sent another untimely ballot this election. *See Mistich v. Pa. Bd. of Prob. & Parole*, 863 A.2d 116, 121 (Pa. Cmwlth. 2004) (issue of sentencing credit did not fall within mootness exception since repetition would only occur if petitioner committed another crime and was returned to jail).

¹⁰ Again, the Election Code already affords voters a “back-up” plan, allowing them to cast a provisional ballot at their polling place. Back in April, the Secretary issued guidance to county boards of elections on how to minimize voters’ exposure to COVID-19 “so Pennsylvanians can safely exercise their right to vote during this COVID-19 emergency.” Pa. Dep’t of State, Election Operations During COVID-19, Apr. 28, 2020, available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_ElectionOperationsDuringCOVID19.pdf; Press Release, *Secretary of State Boockvar Offers Important Reminders About Voting in Tuesday’s Primary*, May 29, 2020, available at <https://www.media.pa.gov/Pages/State-details.aspx?newsid=386>. Further, with millions of Pennsylvania voters expected to cast their vote by mail, it is expected that polling places will be less crowded.

Nor is mootness overcome in this instance by the importance of these issues. That exception applies ““only in rare instances.”” *Assoc. of Pa. State Coll. & Univ. Faculties*, 8 A.3d at 306 n.6 (quoting *In re Gross*, 382 A.2d 116, 120 (Pa. 1978)). In light of the petition’s speculative allegations about voters not timely receiving their ballots for the general election, Application at 39-41, and the lack of any factual record to support those allegations, Cramer has not shown that this case involves “concrete harm to society” so as to warrant invocation of this rarely-used exception to the mootness doctrine. *See Driscoll v. Zoning Bd. of Adjustment of City of Phila.*, 201 A.3d 265, 272 (Pa. Cmwlth. 2018) (noting that this exception applies to matters involving “concrete harm to society”).

II. Even if This Case Were Justiciable, Cramer Cannot Demonstrate Clear Entitlement to the Novel and Extra-Statutory Procedures She Seeks.

In her Application, Cramer argues that the mere possibility she may not timely receive her ballot constitutes a denial of her fundamental right to vote, Application at 51, and that the constitutionally required remedy is a mandatory injunction setting in place a complex new set of voting procedures less than two months before the election. Application at 53-56. Cramer cannot meet her heavy burden of showing that she is entitled to the relief she seeks—let alone that she has the “clear entitlement” necessary for this Court to exercise its extraordinary jurisdiction.

Like extraordinary jurisdiction, a party seeking a permanent injunction “must establish that the right to relief is clear.” *Big Bass Lake Cmty. Assoc. v. Warren*, 23 A.3d 619, 626 (Pa. Cmwlth. 2011). A party must also establish that there is an urgent necessity to avoid an injury which cannot be compensated for by damages, and greater injury will result in refusing rather than granting the relief requested.” *Id.* “The case for a mandatory injunction,” such as the one sought by Cramer here, “must be made by a very strong showing, one stronger than that required for a restraining-type injunction.” *Id.* And “[e]ven where the essential prerequisites of a permanent injunction are satisfied, the court must narrowly tailor its remedy to abate the harm.” *Id.*

Here, extraordinary relief is not warranted, because Cramer cannot show that the new procedures she seeks are required as a constitutional matter. She cites no precedent or authority demonstrating her entitlement to these procedures. Moreover, as a legal matter, Cramer has identified the wrong standard for evaluating whether the Pennsylvania Constitution requires the Court to order adoption of the procedures Cramer seeks. Courts have repeatedly rejected the argument that neutral voting regulations are subject to strict scrutiny. As this Court has explained, “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015).

Cramer suggests that her complicated policy prescriptions would not be difficult for the Commonwealth to adopt. This assertion is quite obviously not true.¹¹ In addition, Cramer suggests that her position is supported legally by the Pennsylvania Election Code. It is not.

The General Assembly enacted the Election Code in 1937 to provide a comprehensive and uniform regulatory framework for elections in Pennsylvania. *See* 25 P.S. §§ 2601-3591; *see also* Pa. Const. art. VII, § 6 (providing for uniformity of election laws). This past fall, the General Assembly enacted Act 77 of 2019 to amend the Election Code to permit no excuse mail-in voting for qualified electors. *See* 25 P.S. §§ 3150.11-3150.17. Act 77, which is now in full effect during the COVID-19 pandemic, extends the opportunity to vote by mail to all qualified electors, thus reducing the need for voters to congregate in large numbers at polling places.

A full and fair reading of the Election Code demonstrates that the General Assembly has implicitly rejected Cramer’s desired procedures. Under the Election Code, the “delivery” of ballots to voters can ordinarily be accomplished by the voter

¹¹ *See, e.g.*, “Some states have embraced online voting. It’s a huge risk,” Politico, <https://www.politico.com/news/2020/06/08/online-voting-304013> (6/8/20).

obtaining the application in person at the county board of elections¹² or by mail. 25 P.S. §§ 3150.12, 3150.15. The requirements for providing a ballot to voters set forth in this section clearly envisions the delivery of a physical, paper ballot – either in person or by mail. There is nothing in the statute that suggests that delivery may be done electronically, through an agent, or by any other method. In fact, Section 3150.14 specifically refers to the “mailing envelope addressed to the elector.” The use of a mailing envelope is consistent with delivery in person or by mail, but not electronically.

Section 3150.15 of the Election Code provides for the delivery or mailing of mail-in ballots to voters. 25 P.S. § 3150.15. Cramer argues that because the term “delivery” is not defined in the statute and because “Internet delivery” is permitted

¹² 25 P.S. § 3146.5 provides as follows: “Notwithstanding any other provisions of this act and notwithstanding the inclusion of a mailing address on an absentee or mail-in ballot application, a voter who presents the voter’s own application for an absentee or mail-in ballot within the office of the county board of elections during regular business hours may request to receive the voter’s absentee or mail-in ballot *while the voter is at the office*. This request may be made orally or in writing. Upon presentation of the application and the making of the request and upon approval under sections 1302.2 and 1302.2-D the county board of elections shall promptly present the voter with the voter’s absentee or mail-in ballot. If a voter presents the voter’s application within the county board of elections’ office in accordance with this section, a county board of elections may not deny the voter’s request to have the ballot presented to the voter while the voter is at the office unless there is a bona fide objection to the absentee or mail-in ballot application.” (emphasis added).

for military and overseas voters,¹³ the Court should find that county boards of election are both authorized and required by the Election Code. However, this is directly contrary to the principles of statutory construction.

Cramer is correct that the Election Code, as required by federal law, provides for the electronic delivery of absentee and mail-in ballots to military personnel and overseas voters. *See* 25 P.S. § 3146.2; 25 Pa.C.S. § 3508; 52 U.S.C. § 20301. However, this does not support her conclusion that the term “delivery” should be interpreted broadly to mean that the General Assembly intended to permit the delivery of all mail-in ballots by electronic means.

The fact that the General Assembly expressly provided for the use of electronic means to deliver ballots to military personnel and overseas voters, for whom the mail is less reliable and expeditious, shows it was aware of the possibility of allowing electronic-based delivery. Likewise, the General Assembly has authorized voters to use electronic means to request mail-in ballots. 25 P.S. § 3150.12. This also shows, however, that the failure to generally provide for the electronic delivery of ballots to the majority of voters was a deliberate choice. *See County of Allegheny v. Workers’ Comp. Appeal Bd. (Parker)*, 177 A.3d 864, 874 (Pa. 2018) (as a matter of statutory construction one must listen attentively not only

¹³ 25 Pa.C.S. § 3508; 25 P.S. § 3146.2.

to what a statute says, but what it does not say; thus, an inference can be drawn from the General Assembly's decision on what not to include within a statutory framework). Not only does the Election Code not support Cramer's construction, the selective allowance of electronic delivery by the General Assembly requires a contrary result.

Cramer's reliance on Florida's election law proves the point with emphasis. Florida law permits a designated agent to pick up a voter's ballot, and Cramer argues that this Court should create a similar provision for Pennsylvania. However, while Florida is certainly entitled to enact such a provision, it is not binding on the General Assembly and there is absolutely no reason to rely on it in interpreting Pennsylvania's Election Code. The question before the Court is not what the General Assembly could have done, but what it actually did. If nothing else, Cramer's reliance on another state's election law to support her position shows that she is unable to find that support even by reference to the Election Code, let alone through traditional rules of statutory construction.

Moreover, Cramer fails to address the real security concerns raised by what she proposes. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election. Appeal of John Pierce, et al.*, 843 A.2d 1223 (Pa. 2004) ("Appeal of John Pierce") (holding that the Election Code's "in person" delivery requirement was mandatory and that absentee ballots delivered by third parties on behalf of voters

should not be counted); *see also John Doe #1 v. Reed*, 561 U.S. 186, 197 (2010) (state has a compelling interest in preserving the integrity of the electoral process which is particularly strong in regards to efforts to fight potential fraud). According to election security experts, electronic delivery of ballots is considered less secure and more vulnerable to attack, and should only be used extremely rarely, such as for overseas voters and voters with disabilities.¹⁴ And, there are other options available, such as the Act 77 mandate to counties that voters may go in person to their county election offices, apply for their ballot in person (or inform the office they have yet to receive their applied-for ballot and void the old one and receive a new one), and complete and cast their ballot all in one visit to the office. 25 P.S. § 3146.5(b)(2).

Cramer fails to recognize that the new voting system would inevitably mean the creation and distribution of multiple ballots intended for the same voter. Indeed, by design, Cramer’s proposal would allow voters to print ballots from the Internet

¹⁴ It is no answer to these concerns simply to point out that a federal court has ordered the use of an allegedly similar ballot-delivery method to address the legal rights of certain voters with disabilities. *See Drenth v. Boockvar*, Docket No. 1:20-cv-00829, 2020 WL 2745729 (M.D. Pa., May 27, 2020). Not only are voters with disabilities required to be given certain accommodations under federal law, 42 U.S.C. § 12132 (Americans with Disabilities Act); 29 U.S.C. § 794 (Rehabilitation Act), but providing special ballot-delivery avenues to such a small, discrete group of voters does not raise the same security concerns as making such ballot-delivery methods available to potentially every elector in the Commonwealth. *Cf. In re Canvass*, 843 A.2d at 1223 (explaining that “the necessity to accommodate the[] voting rights” of voters with disabilities “under federal law” did not mean that all voters should be allowed to deliver completed absentee ballots via a third party).

or email based on a representation that the ballot mailed to them from their county board of election has not yet arrived. Because ballots are typically mailed to voters without any delivery confirmation, there would be no easy way of verifying whether the voter's representation was, in fact, truthful. And even in the absence of any malicious intent, it is inevitable that certain voters who print and mail a ballot would then receive and—in an abundance of caution—return the ballot mailed to them by their county board, meaning that county boards would receive multiple ballots from the same voter and would be required to devote resources to rejecting the duplicates. The current Election Code is designed to avoid the possibility of such duplicates: electors who have applied for a mail-in or absentee ballot are allowed to vote by regular ballot at polling places only by spoiling the mail-in or absentee ballot in front of the judge of elections at the polling place. *See* 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3). The injunction sought by Cramer would eliminate that safeguard without specifying adequate alternative measures to ensure the integrity of the election or minimizing the burden upon county election administrators.

In sum, this Court has a duty to uphold the integrity of the Commonwealth's electoral process. Permitting the electronic delivery of ballots could affect the integrity of the election and would add fuel to the fire for those who already question the integrity of our electoral systems. This is a particular concern where, as here, the Department of State and county boards of election would have insufficient time

to properly develop and test the necessary procedures to carry out Cramer’s proposed plans prior to the Election. This would only exacerbate the potential for errors, both unintended and those resulting from fraudulent activity.

III. Sovereign Immunity Bars the Petition Because the Requested Relief Amounts to a Sweeping Mandatory Injunction.

The relief Cramer seeks is barred by the doctrine of sovereign immunity. Sovereign immunity prohibits suits against the Commonwealth that “seek to compel *affirmative action of the part of state officials.*” *Fawber v. Cohen*, 532 A.2d 429 433-34 (Pa. 1987) (emphasis in original) (citation omitted); *accord Stackhouse v. Commonwealth*, 892 A.2d 54, 61 (Pa. Cmwlth. 2006) (“sovereign immunity bars claims seeking mandatory injunctions to compel affirmative action by Commonwealth officials”).

Here, Cramer does not seek merely a declaration that a statute is invalid or a “prohibitory injunction[] to restrain state action.” *See Stackhouse*, 892 A.2d at 61. Rather, she seeks an affirmative injunction requiring the Secretary to establish – in less than two months – what are essentially new means of voting for every elector in the Commonwealth. In her own words, she seeks to “[e]njoin Respondent to . . . [e]stablish a process by which voters . . . 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”—which measures Cramer does not attempt to specify—“along with all materials necessary

to cast that ballot.” Application, at 54. Moreover, “[i]n the alternative or in addition to [this] relief,” Cramer asks this Court to “enjoin Respondents to . . . [e]stablish a system by which voters . . . may download, vote, and return . . . an emergency write-in ballot package.” *Id.* at 55. A clearer example of a mandatory injunction requiring a host of affirmative acts by Commonwealth officials—indeed, the establishment of new “system[s]” and “process[es]”—is difficult to imagine. Tellingly, Cramer cannot identify any remotely comparable precedent supporting the issuance of such an injunction. That is unsurprising; such an injunction is barred by sovereign immunity.

CONCLUSION

This Court should deny the application for extraordinary jurisdiction.

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CERTIFICATE OF COUNSEL

I hereby certify that this Answer contains 6,152 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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

/s/ J. Bart DeLone

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CERTIFICATE OF SERVICE

I, J. Bart DeLone, Chief Deputy Attorney General, do hereby certify that I have this day served the foregoing Answer, via U.S. First Class Mail and electronic mail, on the following:

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