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**IN THE SUPREME COURT OF PENNSYLVANIA**

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MELINDA DELISLE; JACQUES DELISLE; ADAM  
DELISLE; BRYAN IRVIN; CHARLES CELLA,  
DEBORAH CELLA; MARY CAY CURRAN; ELIZA  
HARDY JONES; KRISTA NELSON; EILEEN  
MCGOVERN; CEDRIC HARDY,

Petitioners,

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.

No.

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

Pursuant to Rule 1531(a) of the Pennsylvania Rules of Civil Procedure  
Petitioners, through their counsel, hereby move for special relief in the form of a  
preliminary injunction enjoining Respondents Secretary of the Commonwealth  
Kathy Boockvar and Director Jessica Mathis from enforcing, during the upcoming  
June 2020 primary, Act 77's requirement that mail-in and absentee ballots be  
received by election day. In support of their application, Petitioners hereby  
incorporate (1) the Verified Petition for Review in this action filed May 25, 2020,

and (2) the Memorandum in Support of Preliminary Injunction filed along with this application. Petitioners further state the following:

### **BACKGROUND**

1. As set forth in the Petition for Review filed May 25, 2020, and in the Memorandum accompanying this application, enforcement of Act 77's received-by-election-day deadline for absentee and mail-in violates the Pennsylvania Constitution as applied to the June 2, 2020 primary in the midst of the COVID-19 pandemic.

2. Under Act 77, enacted October 31, 2019, a mail-in or absentee ballot will not be counted unless it is received by a county election board "on or before eight o'clock P.M. the day of the primary or election." 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

3. While the Department of State asserted in previous litigation before this Court that it was then-speculative that problems would arise making it difficult for voters to return their ballots by the received-by deadline for the June 2 primary, the Department of State now admits that certain counties face extreme backlogs in processing applications and a backlog in mailing out the ballots. *See Ex. A.* The Department of State further acknowledges that mail delivery has slowed in certain parts of the Commonwealth and is delaying receipt by voters of absentee and mail-in ballots that have been mailed. *See id.* The Department now concedes that

“[s]ome counties ... are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest,” and that “these obstacles . . . could result in significant delays in voters’ receipt of ballots.” Ex. A ¶ 4.

4. As of May 21, according to the Department of State, **241,270** voters had submitted an application for an absentee or mail-in ballot but had not yet been sent a ballot by their county board of elections. Philadelphia County has a backlog of 36,705 applications, which the Department of State admits is going to get worse because the County “recently began receiving a surge of paper ballot applications.” Ex. A ¶ 14. The Department of State admits that, “[b]ecause these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, Philadelphia’s staff will face difficulties in promptly processing all of the outstanding applications.” *Id.* The backlog is even worse in Delaware County: it has a backlog of 31,139 absentee and mail-in ballot applications—an astounding 40% of the total applications received—that either had not been processed or for which the voter had not yet been sent a ballot despite their application being approved. *Id.* ¶ 16.

5. The Department of State now also admits that there have been mail-delivery delays in Montgomery County: “many ballots that the county has mailed have been delayed in arriving at voters’ homes,” and “[t]hese delays may make it more difficult for voters who requested ballots well in advance of the application

deadline to return those ballots on time.” Ex. A ¶ 12. The Chair of the Montgomery County Board of Elections has separately confirmed that “mail delivery times have been slower than normal.” Ex. B.

6. Given these admitted backlogs at county boards of elections and mail delays, it is now undeniable that tens or hundreds of thousands of eligible Pennsylvania voters who timely requested absentee and mail-in ballots by the May 26, 2020 deadline for the primary will not receive their ballots until close to election day, June 2, or until election day itself. Indeed, the Department of State’s data shows that the number of applications being submitted is still growing at an exponential rate. Voters who receive their absentee or mail-in ballots close to June 2 will either be disenfranchised because they mail back the ballots and miss the arrival deadline through no fault of their own, or they will be forced to risk their lives to vote in person. Even then, they will only be able to vote by provisional ballot for the June 2 primary.

7. Among these voters who face disenfranchisement are Petitioners, who are Pennsylvania voters who submitted their mail ballot applications—some submitted the applications weeks ago—but have not yet received their mail ballots.

8. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction “in the interest of justice and consistent with the usages and principles of law.” The

standard for obtaining a preliminary injunction under this rule is the same as that for a grant of a preliminary injunction pursuant to the Pennsylvania Rules of Civil Procedure. *Shenango Valley Osteopathic Hosp. v. Dep't of Health*, 451 A.2d 434, 441 (Pa. 1982). Preliminary injunctive relief may be granted at any time following the filing of a Petition for Review. *See* Pa. R. App. P. 1532(a).

### **INJUNCTIVE RELIEF**

9. The Court in deciding whether to issue a preliminary injunction considers whether (1) the petitioner is likely to prevail on the merits; (2) an injunction is necessary to prevent immediate and irreparable harm; (3) greater injury would result from refusing the injunction than from granting it, and granting it will not substantially harm other interested parties; (4) the injunction will not adversely affect the public interest; (5) the injunction will properly restore the parties to their status immediately prior to the passage of the law; and (6) the injunction is reasonably suited to abate the offending activity. *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 501-02 (Pa. 2014).

10. As explained in greater detail in the accompanying Memorandum, Petitioners meet all of the elements for the entering of a preliminary injunction in this case.

11. *First*, Petitioners are likely to succeed on the merits of their claims. Enforcement of the received-by deadline amid the COVID-19 pandemic will place

unconstitutional burdens on the ability to cast a ballot by forcing many voters to risk their health by voting in person, and will disenfranchise a significant number of eligible Pennsylvania voters whose absentee and mail-in ballots arrive too late. And the received-by deadline will have an extraordinarily disparate impact on voters in different regions of the Commonwealth. Respondents have now acknowledged that application-processing and mail-delivery delays are not uniform across the state, and that the backlogs (and thus the disenfranchisement) while impacting voters around the Commonwealth are disproportionately affecting voters in Pennsylvania's southeastern region, which not coincidentally is the region most affected by COVID-19.

12. Enforcement of the received-by deadline will thus violate the guarantee of Article I, Section 5 of the Pennsylvania Constitution, which provides that “[e]lections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

13. Enforcement of the deadline will also violate the Pennsylvania Constitution's equal protection guarantees.

14. *Second*, enjoining enforcement of the received-by deadline will prevent several forms of immediate and irreparable harm. The received-by deadline threatens to deprive Petitioners and a large number of Pennsylvanians of

their fundamental right to vote. It will cause many voters to endanger their health by voting in person to avoid having their mail-in ballot arrive too late.

15. *Third*, these immediate irreparable harms dramatically outweigh any injury the Commonwealth might claim from having to consider ballots timely if sent on or before the day of the primary. Two courts recently approved the same preliminary injunctive relief Petitioners seek: the U.S. Supreme Court in Wisconsin and a state court in Montana applying that state's free elections clause. Many other states already consider mail ballots timely if postmarked on or the day before election day, showing that such sent-by-election-day rules are manageable and impose no significant administrative burden.

16. *Fourth*, the public interest strongly favors an injunction that will avoid a widespread deprivation of the right to vote and will protect public health by reducing the number of citizens forced to vote in person.

17. *Fifth*, an injunction will restore Pennsylvania voters to the pre-COVID-19 status quo, when voters did not need to risk their lives to ensure their votes would be counted

18. *Finally*, the narrow injunction that Petitioners seek—to prevent enforcement of the received-by deadline during the upcoming primary election given the pandemic—is reasonably tailored to the offending activity.

19. Under ordinary principles of severability, the received-by deadline is severable from the remainder of Act 77. While Act 77 has a boilerplate non-severability provision, that provision is not controlling under this Court's precedent, and applying the provision here would be unconstitutional because it would result in wholly eliminating no-excuse mail-in voting during a deadly pandemic, exacerbating the very constitutional violations underlying Petitioners' claims.

20. Act 77's purported statute of limitations also cannot constitutionally be applied to this case. Pennsylvania precedent is clear that prospective constitutional challenges cannot be foreclosed on timeliness grounds, and that is certainly the case with an as-applied challenge like this where the facts giving rise to the as-applied claim arose after the purported limitations period had run.

### **EXPEDITED TIMING**

21. The Commonwealth has a primary election scheduled for June 2, 2020—eight days from today. Petitioners seek an injunction that will prevent enforcement of the received-by deadline for that upcoming primary election in order to prevent irreparable constitutional injury that will occur absent the injunction. Petitioners thus respectfully submit that the interests of all parties as well as the general public will be best served by a schedule that allows this Court

to resolve Petitioners' application for a preliminary injunction as soon as possible to ensure that such injunction could be implemented in time for the primary.

22. Petitioners request that this Honorable Court therefore set an expedited schedule for briefing and hearing in this application, and propose the following schedule:

- Respondents file a response and/or brief in opposition to preliminary injunction by Wednesday, May 27, 2020.
- Preliminary injunction hearing held at the Court's convenience thereafter, if the Court determines that a hearing is warranted.

**WHEREFORE**, for all the foregoing reasons, and those stated in the Petition for Review and Memorandum accompanying this application, Petitioners respectfully request that this Honorable Court grant their application for special relief in the nature of a preliminary injunction, and enter an order that:

- a. Enjoins Respondents, their agents, officers, and employees from enforcing the received-by deadline for absentee and mail-in ballots in 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) for the June 2, 2020 primary, and enjoin Respondents to direct county boards of elections not to enforce the received-by deadline in the June 2, 2020 primary, based on the public health emergency related to COVID-19.
- b. Enjoins Respondents, their agents, officers, and employees, for the 2020 primary election, to consider timely any absentee or mail-in ballot, and to direct county boards of elections to consider timely any absentee or mail-in ballot, if:
  1. The ballot is received in the office of the county board of elections by 8 p.m. on June 2, 2020;
  2. The ballot is postmarked on or before the day of the primary election, and is received in the office of the county board of elections no later than June 9, 2020. A “postmark” shall be any type of mark applied by the USPS or any delivery service to the

return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day;

3. If the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is delivered by the United States Postal Service to the office of the county board of elections no later than June 3, 2020.

**FURTHERMORE**, Petitioners respectfully request that this Honorable Court shorten the time for Respondents' response and/or brief in opposition to a preliminary injunction pursuant to Pa. R. App. P. 123(b), and set a schedule for expedited briefing and hearing on this application in accordance with the proposed order submitted with this application.

Dated: May 25, 2020

Respectfully submitted,

/s/ Mary M. McKenzie

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**IN THE SUPREME COURT OF PENNSYLVANIA**

MELINDA DELISLE; JACQUES DELISLE; ADAM DELISLE; BRYAN IRVIN; CHARLES CELLA, DEBORAH CELLA; MARY CAY CURRAN; ELIZA HARDY JONES; KRISTA NELSON; EILEEN MCGOVERN; CEDRIC HARDY,

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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.

No.

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

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

**IT IS FURTHER ORDERED** that Respondents, their agents, officers, and employees are **ENJOINED** from enforcing the received-by deadline for absentee and mail-in ballots in 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) for the June 2, 2020 primary, and are **ENJOINED** to direct county boards of elections not

to enforce the received-by deadline in the 2020 primary or general elections, based on the public health emergency related to COVID-19.

**IT IS FURTHER ORDERED** that Respondents, their agents, officers, and employees are **ENJOINED**, for the 2020 primary election, to consider timely any absentee or mail-in ballot, and to direct county boards of elections to consider timely any absentee or mail-in ballot, if:

1. The ballot is received in the office of the county board of elections by 8 p.m. on June 2, 2020;
2. The ballot is postmarked on or before the day of the primary or general election, and is received in the office of the county board of elections no later than June 9, 2020. A “postmark” shall be any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day;
3. If the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is delivered by the United States Postal Service to the office of the county board of elections no later than June 3, 2020.

BY THE COURT:

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IN THE SUPREME COURT OF PENNSYLVANIA

MELINDA DELISLE; JACQUES DELISLE; ADAM DELISLE; BRYAN IRVIN; CHARLES CELLA, DEBORAH CELLA; MARY CAY CURRAN; ELIZA HARDY JONES; KRISTA NELSON; EILEEN MCGOVERN; CEDRIC HARDY,

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Respondents.

No.

**ORDER GRANTING EMERGENCY APPLICATION FOR EXPEDITED BRIEFING AND HEARING SCHEDULE, AND TRUNCATING RESPONSE TIME**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2020, upon consideration of Petitioners' Petition for Review, Emergency Application for Special Relief in the Nature of a Preliminary Injunction, and Memorandum in Support, it is hereby **ORDERED** that the parties proceed pursuant to the following schedule for briefing and hearing in this case:

Respondents shall file their response to this application and/or brief in opposition to the preliminary injunction no later than Wednesday, May 27, 2020.

A hearing on Petitioners' application is set for \_\_\_\_\_, 2020.

BY THE COURT:

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**IN THE SUPREME COURT OF PENNSYLVANIA**

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PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No. \_\_\_\_\_

**MEMORANDUM IN SUPPORT OF PETITIONERS' EMERGENCY  
APPLICATION FOR SPECIAL RELIEF  
IN THE NATURE OF A PRELIMINARY INJUNCTION**

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## INTRODUCTION

In response to a previous lawsuit filed in this Court in April, the Department of State asserted that it was speculative that problems would arise making it difficult for voters to meet the deadline for receipt of their mail ballots in the June 2 primary. Specifically, the Department argued that there was no concrete evidence that there would be: (a) a surge in absentee and mail-in ballot applications before the May 26 application deadline for the June 2 primary; (b) backlogs at the county boards of elections in processing applications and sending voters their ballots; or (c) delays in mail-delivery times. This Court sustained the Department of State's preliminary objection and dismissed the action with prejudice based on the then-speculative nature of the claims.

Things have changed. The Department of State now *admits* that all of the problems it previously characterized as speculative have come to pass. In a declaration dated May 22, 2020, just days ago, the Deputy Secretary for Elections and Commissions, Jonathan Marks, confirmed that “[s]ome counties ... are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest.” Supp. Decl. of Jonathan Marks ¶ 4, *Crossey v. Boockvar*, No. 266 MD 2020 (May 22, 2020) (“Marks 5/22 Decl.”) (attached as Ex. A).<sup>1</sup> Deputy Secretary Marks

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<sup>1</sup> Marks filed this declaration in a separate case pending in the Commonwealth Court. The respondents and the proposed intervenors there have all argued that the

asserted that “these obstacles”—which include “delays” in mail delivery, “backlogs” in processing applications, and “COVID-19 related staffing shortages and technical difficulties” —“could result in significant delays in voters’ receipt of ballots.” Marks 5/22 Decl. ¶¶ 4, 11, 13, 14, 18, 19. Given the new facts admitted by the Department, it is undeniable that tens or hundreds of thousands of voters will be unable to return their ballots by the June 2 deadline for the primary.

Regarding mail delays, Deputy Secretary Marks’ May 22 declaration indicates that delivery times have slowed in some areas: “for reasons not within Montgomery County’s control, *many ballots that the county has mailed have been delayed in arriving at voters’ homes.*” Marks 5/22 Decl. ¶ 12 (emphasis added). Deputy Secretary Marks asserted that “[t]hese delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” *Id.* The Chair of the Montgomery County Board of Elections has confirmed that “*mail delivery times have been slower than normal.*” Ex. B at 1 (emphasis added).

With respect to backlogs at county boards of elections, the situation described in Deputy Secretary Marks’ May 22 declaration is bleak:

- Statewide, just 11 days before the primary, **241,270** voters had submitted an application for an absentee or mail-in ballot but had not yet been sent a ballot by their county board of elections. Marks 5/22 Decl. ¶ 4.

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Commonwealth Court lacks jurisdiction because the Pennsylvania Supreme Court has exclusive jurisdiction over matters relating to mail ballots under Act 77.

- As of May 21, Philadelphia had a backlog of **36,705** applications that either had not been processed or for which the voter had not been sent a ballot despite their application being approved. Making matters worse, the County “recently began receiving a surge of paper ballot applications.” Marks 5/22 Decl. ¶ 13. “Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, *Philadelphia’s staff will face difficulties in promptly processing all of the outstanding applications.*” *Id.* (emphasis added).
- Delaware County had a backlog of **31,139** ballot applications—an astounding 40% of the total applications received—that either had not been processed or for which the voter had not yet been sent a ballot despite their application being approved. *Id.* ¶ 16.
- Allegheny County had a backlog of over 17,000 applications that had been approved but for which the voter had not yet been sent a ballot. *Id.* ¶ 16.
- An unidentified “small number of other counties” likewise “may face challenges” processing applications and sending ballots to votes due to “COVID-19 related staffing shortages and technical difficulties.” *Id.* ¶ 18.

It is readily apparent why these substantial backlogs developed (and why they will continue to grow in the coming days leading up to the primary). Deputy Secretary Marks’ May 22 declaration shows that the number of absentee and mail-in ballot applications has continued to grow exponentially as the May 26 application deadline draws near. In just the four days from May 17 to 21, more than **214,000 voters** across the Commonwealth submitted applications.

In light of these new developments, there can no longer be any serious claim that it is “speculative” that the received-by-election-day deadline for absentee and

mail-in ballots will disenfranchise a staggering number of Pennsylvania voters and force many other voters to risk their health and lives to vote. Given the existing backlogs in county boards of elections and delays in mail delivery, it is a factual certainty that tens of thousands of voters, if not more, will receive their absentee or mail-in ballots on the Saturday or Monday before the election, or even on election day. Because of the received-by deadline, these voters will then face a perilous choice: either mail the ballot and risk that it will arrive too late, or risk their lives and the lives of their families to vote in person. For many of the voters who choose to mail their ballots, the ballots will arrive too late and will not be counted. Voters who choose to vote in person will be taking a grave risk. Indeed, the risk will be especially pronounced for voters in the southeastern counties that have the largest COVID-19 outbreaks, which not coincidentally are the same counties experiencing the greatest backlogs and delays.

Petitioners are 11 Pennsylvania voters who are experiencing precisely these harms. Each Petitioner applied for an absentee or mail-ballot—anywhere from twelve weeks ago to today—but has not yet received their ballot and now faces the prospect of disenfranchisement next week.

In these extraordinary circumstances, enforcement of the received-by deadline violates the Pennsylvania Constitution. The deadline violates Pennsylvania's Free and Equal Elections Clause. Elections are not "free" when

tens or hundreds of 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. And elections are not “equal” when voters in one region of the Commonwealth—southeast Pennsylvania—face grossly disparate disenfranchisement and burdens on their right to vote because they have the misfortune of living in the region that has been hit hardest by a deadly virus. The received-by deadline for absentee and mail-in ballots violates Pennsylvania’s Equal Protection Clause in the present circumstances for similar reasons.

No longer able to deny that the received-by deadline will disenfranchise many thousands of voters, the Department of State has suggested recently that relief from the deadline should be limited to particular counties, and should be granted through individual petitions filed in the relevant Courts of Common Pleas.<sup>2</sup> But establishing different deadlines in different counties—when there are statewide elections on the ballot—is not a tenable solution. Among other issues, such a result would invite a new rash of litigation in federal courts from those who oppose easing any restrictions on voting, arguing that having different deadlines for different counties violates the federal Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000).

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<sup>2</sup> *See* Resp. Br. in Supp. of Jurisdictional POs at 8 n.5, *Crossey*, No. 266 MD 2020.

This Court can and should prevent the constitutional injuries to Petitioners and voters across the Commonwealth by preliminarily enjoining enforcement of the received-by-election-day deadline for the June 2, 2020 primary, and ordering that any absentee or mail-in ballot must be counted so long as the voter mails it by election day and the county board of elections receives it within seven days of election day. All the factors for preliminary relief are satisfied. Petitioners are overwhelmingly likely to succeed on the merits of their claims, and preliminary relief is needed to avoid irreparable harm to Petitioners and thousands of other Pennsylvania voters in the June primary.

## **BACKGROUND**

### **A. Voting by Mail in Pennsylvania**

Pennsylvania law provides for two categories of ballots that may be submitted via mail: “absentee” ballots and “mail-in” ballots.<sup>3</sup> 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 who

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<sup>3</sup> Petitioners draw these facts primarily from their Verified Petition for Review and the exhibits attached to this application, all of which are properly subject to judicial notice under 225 Pa. Code Rule 201. *See, e.g., Hill v. Dep’t of Corr.*, 64 A.3d 1159, 1165 n.3 (Pa. Commw. Ct. 2013) (taking judicial notice of information on government agency website).

does not qualify for an absentee ballot may vote by “mail-in” ballot, without providing a justification. 25 P.S. §§ 3150.11–3150.12b; *see* Act of Oct. 31, 2019 (“Act 77”), P.L. 552, No. 77.

As relevant to this case, the same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters. The deadline for voters to apply for an absentee ballot or a mail-in ballot is “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 a voter submits an application and the county board of elections determines that the voter meets the statutory requirements for an absentee ballot or a mail-in ballot, the board sends the absentee or mail-in ballot to the voter via U.S. Postal Service mail. *See* 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a)(1). The voter must then complete and return the ballot. To be counted, 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.” 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

Voters who timely request an absentee or mail-in ballot but do not receive the ballot with sufficient time before election day face significant hurdles in exercising their right to vote. For the June 2, 2020 primary, any voter who requested an absentee or mail-in ballot may only cast a provisional ballot at a

polling place, even if the voter has not submitted the absentee or mail-in ballot.

Act 77 §§ 1306(b)(2), 1306-D(b)(2).<sup>4</sup>

## **B. The COVID-19 Pandemic**

Voting by absentee or mail-in ballot will be the safest way for millions of Pennsylvania citizens to vote in this year's elections given the grave health risks of voting in person at a polling place during the COVID-19 pandemic.

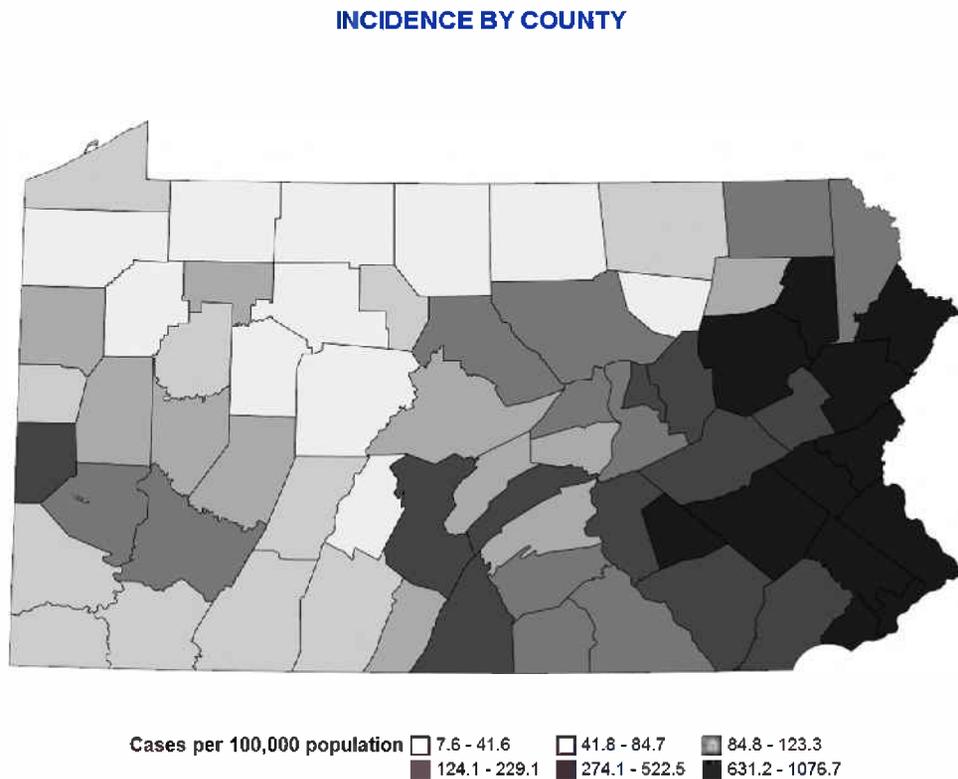
As of May 24, 2020, the Pennsylvania Department of Health has reported 67,713 cases of COVID-19 in Pennsylvania, resulting in 5,124 deaths. Ex. C. at 1. At current rates, by the end of this week Pennsylvania's COVID-19 death toll will exceed the combined deaths from the September 11 terrorist attacks and the surprise attack on Pearl Harbor. COVID-19 disproportionately afflicts and kills minorities, people with disabilities, and people over age 60. In Pennsylvania, African Americans comprise 30% of the persons who have contracted COVID-19

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<sup>4</sup> Some voters can personally hand deliver their own ballot to their County Board of Elections office by 8 p.m. on election day. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But voting by hand-delivering a ballot to a county board of elections similarly forces voters to risk their health, as those offices are usually located in public buildings that can be highly trafficked, particularly on election day. Even if a county board of elections places a secure drop box for ballots outside their physical office, hand-delivering a ballot to such a drop box also presents barriers. The county board of elections can be a long distance from voters' residences, not easily or safely accessible by public transportation in a pandemic, and are not accessible to absentee voters who are outside their county of residence or have a disability that prevents them from traveling. *See* 25 P.S. §§ 3146.1(j), (l).

(for whom racial data is available), even though African Americans comprise just 12% of the total population. *Id.* at 6.

The virus has also disproportionately affected communities in eastern Pennsylvania. The following map produced by the Pennsylvania Department of Health shows that counties in the eastern part of the Commonwealth have by far the highest number of known cases per capita:



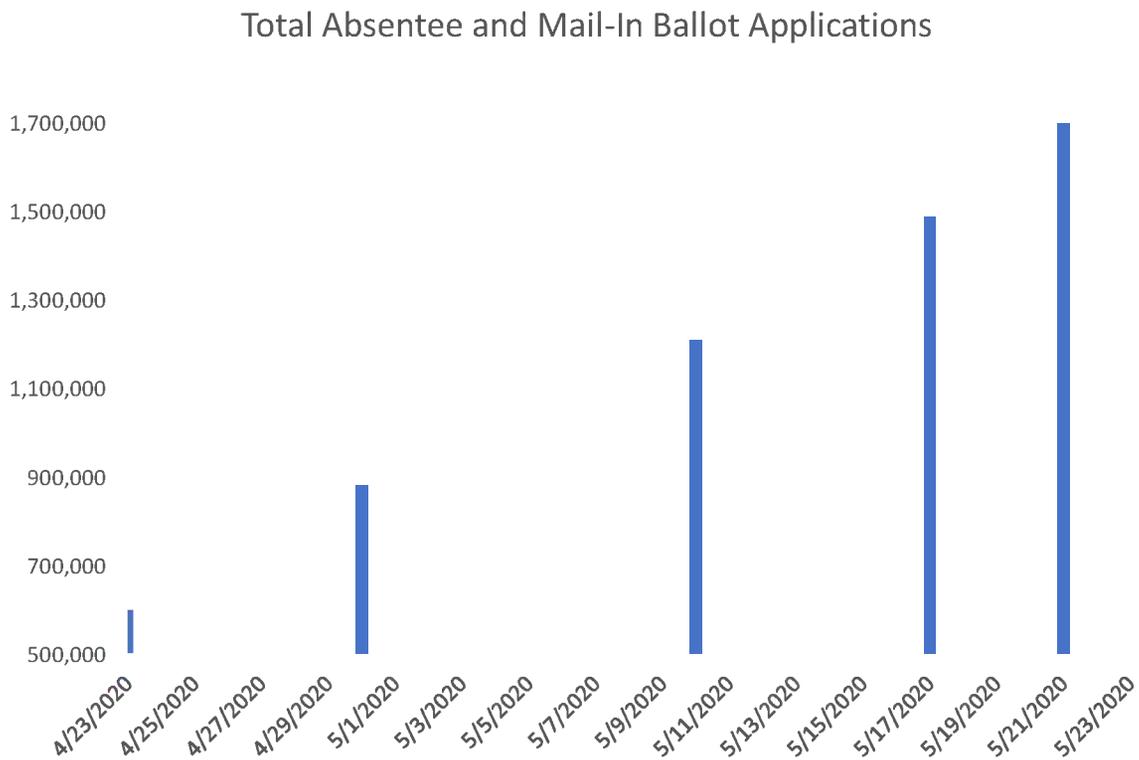
Ex. C at 8.

Polling places are the type of crowded environments that, according to public-health officials, promote the transmission of COVID-19. Indeed, the CDC

has encouraged the adoption of “voting methods that minimize direct contact with other people and reduce crowd size,” including mail-in voting. Ex. D at 1.

**C. COVID-19’s Impact on the Processing and Delivery of Absentee and Mail-in Ballots**

Given the risks posed by the COVID-19 pandemic, the number of absentee and mail-in ballot applications for the June 2, 2020 primary have surpassed election officials’ expectations by orders of magnitude. And the number of applications has continued to grow exponentially as the May 26, 2020 application deadline draws near. Based on information published by the Department of State, the following chart shows the total number of applications submitted over the last month:



As the above data shows, *in just the four days between May 17 and May 21, more than 214,000 applications for absentee and mail-in ballots were submitted.* The trajectory of this data, along with recent experience in other jurisdictions, indicate that this exponential growth will continue through the May 26, 2020 application deadline.

Thus, while the Department of State disputed in the previous litigation before this Court that there would be a surge in applications “toward the end of the application period,” *Disability Rights*, DOS PI Opp. at 8, that is exactly what has happened. And while the Department of State disputed that the growth in applications would be “exponential,” *id.* at 9, that too is exactly what has happened.

The unprecedented increase in absentee and mail-in ballot applications has resulted in extreme backlogs and delays in the county boards of elections in approving applications and then sending approved applicants their blank ballots. On May 22, 2020, Deputy Secretary Marks submitted a declaration in a separate matter pending in the Commonwealth Court<sup>5</sup> admitting that “[s]ome counties, ... are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest.” Marks 5/22 Decl. ¶ 4. Deputy Secretary Marks’ declaration detailed

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<sup>5</sup> As mentioned, the respondents and the proposed intervenors in *Crossey* have argued that the Commonwealth Court lacks jurisdiction because the Pennsylvania Supreme Court has exclusive jurisdiction over these matters pursuant to Act 77.

that, as of May 21, 2020, counties had received 1,701,141 applications for absentee and mail-in ballots, but had processed and approved only 1,528,212 of them and had actually mailed ballots to only 1,459,871 of these voters. *Id.* In other words, 11 days before the June 2 primary, 241,270 voters had applied for an absentee or mail-in ballot but had not been sent the ballot by their county.

Deputy Secretary Marks explained that the “backlogs,” “delays,” and various other “difficulties” are particularly extreme in the counties in southeastern Pennsylvania that have been ravaged by COVID-19. “Philadelphia County recently began receiving a surge of paper ballot applications.” Marks 5/22 Decl. ¶ 13. “Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, Philadelphia’s staff will face difficulties in promptly processing all of the outstanding applications.” *Id.* Making matters worse, “[a] recent outage in Philadelphia’s Verizon connection, which covered the network connection with the election database, further impeded Philadelphia’s progress.” *Id.* ¶ 14.

“[A]s of May 21, Philadelphia County had received 181,655 applications, rejected 2,114 of them, approved 159,772, and mailed out 142,836 ballots.” Marks 5/22 Decl. ¶ 15. In other words, just 11 days before the primary, Philadelphia had not even processed 19,769 applications, and there were an additional 16,939 applications that had been approved but for which voters had not yet been sent

their ballots, making for a total backlog of 36,705 applications in just this single county. The backlog will only increase as Philadelphia receives more mail ballot applications between May 22 and the May 26 deadline.

The situation is even worse in Delaware County. As of May 21, “Delaware County had received 78,333 applications, rejected 4,290 of them, approved 53,851, and mailed out 42,904 ballots.” Marks 5/22 Decl. ¶ 16. In other words, 11 days before the primary, Delaware County had not even processed 19,769 applications (26% of total applications in the county), and there were an additional 10,947 applications that had been approved but for which voters had not yet been sent their ballots. That makes for a total backlog of 31,139 applications, which is an astounding 40% of the total applications received in Delaware County. The backlog will only increase as Delaware receives more mail ballot applications between May 22 and the May 26 deadline.

As of May 21, Allegheny County had approved 222,757 applications but mailed out only 205,656, making for a backlog of over 17,000 ballots that had not yet been sent to voters. Marks 5/22 Decl. ¶ 16. The backlog will only increase as Allegheny receives more mail ballot applications between May 22 and the May 26 deadline.

Thus, while the Department of State asserted in the previous litigation before this Court that “there is nothing ‘concrete’ about Petitioners’ predictions of

backlogs” in the county boards of elections, *Disability Rights*, DOS Br. in Supp. of POs at 12, the evidence of such backlogs is now entirely concrete. The backlogs are here and not going away, and there is nothing remotely speculative about them.

Because of the existing application-processing backlogs, even if there are no delays in the standard mail-delivery times of 1-3 business days, tens or hundreds of thousands of voters will not receive their absentee or mail-in ballots until just days or less before the June 2 primary. Given the existing backlogs, it is an unassailable fact that counties—particularly in southeastern Pennsylvania—will not mail tens of thousands of ballots (if not more) to voters until Tuesday, Wednesday, or Thursday of this week, and the voters will not receive these ballots until Saturday, Monday, or Tuesday, with Tuesday being election day.

Worse yet, there is now undisputed evidence that there are mail delays in delivering ballots. Deputy Secretary Marks attested in his May 22 declaration that “for reasons not within Montgomery County’s control, many ballots that the county has mailed have been delayed in arriving at voters’ homes,” and that “[t]hese delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” Marks 5/22 Decl. ¶ 12 (emphases added).

On May 22, 2020, the Chair of the Montgomery County Board of Elections confirmed that “[c]oncerns over the spread of COVID-19 have created a high

demand for mail-in voting and mail delivery times have been slower than normal.” While Montgomery County announced that it will create drop-off boxes in light of these mail delays, it will only have five drop-off locations across the entire county, and voters without a car will face particular difficulties reaching those locations.

Thus, while the Department of State asserted in the previous litigation before this Court that there was no evidence “that postal service delays in Pennsylvania exist now or will affect the primary three weeks from now,” *Disability Rights*, DOS Br. in Supp. of POs at 13, the Department of State now admits that such postal delays do exist and will make it “more difficult for voters ... to return [their] ballots on time.” Marks 5/22 Decl. ¶ 12.

Given the now-admitted, extreme backlogs in processing absentee and mail-in ballot applications in certain counties, and the now-admitted delays in mail delivery in at least one heavily populated county, enforcing the received-by-election-day deadline for absentee and mail-in ballots in the June 2, 2020 primary will disenfranchise tens or hundreds of thousands of Pennsylvanians whose ballots will arrive after the deadline through no fault of the voter. And the received-by deadline will force a substantial number of others to risk their health and lives, and the health and lives of their families and neighbors, by voting in person at a polling place because the voter did not receive their absentee or mail-in ballot sufficiently long enough before election day to mail it back.

Indeed, the burdens of voting in person will be particularly great because polling places for the June 2 primary have been consolidated all around Commonwealth due to the COVID-19 crisis. For example, “[t]he state’s two most populous counties, Philadelphia and Allegheny, alone are shifting from the more than 2,100 polling places they open in a typical election to fewer than 500—3 in 4 regular locations in these jurisdictions will not be open on June 2.”<sup>6</sup> Similarly, Montgomery County officials have reduced the number of polling places by 60% for the June 2 primary election in response to the COVID-19 outbreak<sup>7</sup> and in Delaware County there will be 238 fewer polling places.<sup>8</sup>

#### **D. Petitioners’ Injuries**

Petitioners are 11 registered Pennsylvania voters who have all requested mail-in ballots for the June 2, 2020 primary but have not received their ballot. Several Petitioners submitted applications for their ballots weeks or even months ago, Verified Pet. ¶¶ 13, 15, 19, 20, while the others requested their ballots in the last few days, *id.* ¶¶ 14, 16, 17, 18, 21, 22, 23. All of the Petitioners wish to avoid

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<sup>6</sup> <https://seventy.org/media/press-releases/2020/05/13/massive-polling-place-consolidation-announced-for-the-june-2-primary>.

<sup>7</sup> [https://www.pottsmmerc.com/news/montgomery-county-officials-reduce-polling-places-under-pandemic-election-plan/article\\_925f3e3e-93a8-11ea-8c91-2369be893bb1.html](https://www.pottsmmerc.com/news/montgomery-county-officials-reduce-polling-places-under-pandemic-election-plan/article_925f3e3e-93a8-11ea-8c91-2369be893bb1.html).

<sup>8</sup> [https://www.delcotimes.com/news/coronavirus/pandemic-forces-dramatic-changes-in-delco-election-procedures/article\\_389603b4-90a2-11ea-a4c4-1b7d54d5ea21.html](https://www.delcotimes.com/news/coronavirus/pandemic-forces-dramatic-changes-in-delco-election-procedures/article_389603b4-90a2-11ea-a4c4-1b7d54d5ea21.html).

voting in person for the June 2 primary due to the health risks of being in a crowded location in the midst of the pandemic. Given that they have not yet received their mail-in ballots, and the application-processing backlogs and mail delays in their counties, all of the Petitioners face a severe risk of being disenfranchised by the deadline that their mail-in ballots must be received by their county board of elections by June 2.

### **ARGUMENT**

To warrant a preliminary injunction, a party need not “establish his or her claim absolutely,” but rather must show only that “substantial legal questions must be resolved to determine the rights of the respective parties.” *Fischer v. Dep’t of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982). Where a party shows that substantial legal questions must be resolved, a preliminary injunction is warranted if there is a “threat of immediate and irreparable harm,” “the injunction does no more than restore the status quo,” and “greater injury would result by refusing the requested injunction than granting it.” *Id.*; see also, e.g., *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 590-91 (Pa. 2014).

Petitioners’ claims not only “raise important questions that are deserving of serious consideration and resolution,” *Fischer*, 439 A.2d at 1174, they are overwhelmingly likely to succeed on the merits. In the context of the COVID-19 pandemic, enforcing the received-by deadline during the June 2 primary plainly

violates Pennsylvania’s Free and Equal Elections Clause and equal protection guarantees. The other factors are satisfied as well. Petitioners and thousands of other Pennsylvania voters face irreparable harm: they face the risk of disenfranchisement and/or of contracting a deadly disease.

**I. The Received-By Deadline Violates Article I, Section 5 of the Pennsylvania Constitution in the Context of the COVID-19 Pandemic**

**A. Article I, Section 5 Broadly Protects Against Barriers to Voting and Differential Treatment Among Voters**

Article I, Section 5 of 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.” This provision “mandates clearly and unambiguously, and in the broadest possible terms, that all elections conducted in this Commonwealth must be ‘free and equal.’” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). As this Court has emphasized, “the Free and Equal Elections Clause has no federal counterpart” and thus “acts as a wholly independent protector of the rights of the citizens of our Commonwealth” with respect to elections. *Id.* at 802.

Article I, Section 5’s Free and Equal Elections and Suffrage Clauses both protect the right to vote, which “[t]he Commonwealth recognizes ... as ‘fundamental’ and pervasive of other basic civil and political rights.” *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at \*18 (Pa. Commw. Ct.

Jan. 17, 2014) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)).

“[T]he right of suffrage is the most treasured prerogative of citizenship” and “may not be impaired or infringed upon in any way except through the fault of the voter himself.” *Norwood Election Contest Case*, 116 A.2d 552, 553 (Pa. 1955).

In light of the fundamental imperative of safeguarding the right to vote, the “plain and expansive sweep of the words ‘free and equal,’” and the history of the provision, this Court held in *League of Women Voters* that the Free and Equal Elections Clause “should be given the broadest interpretation, one which governs all aspects of the electoral process.” 178 A.3d at 815. Specifically, the Clause requires that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” *Id.* at 804. It “guarantees [Pennsylvania] citizens an equal right, on par with every other citizen, to elect their representatives,” *id.*, and forbids interferences with the right to vote “based considerations of the region of the state in which [voters] live[,],” *id.* at 808.

This Court has held 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 as to amount to a denial*; and when no constitutional right of the qualified elector is subverted or denied him.” *League of Women Voters*, 178 A.3d at 810 (emphases added) (quoting *Winston v. Moore*, 91 A. 520, 523 (1914)); *see also DeWalt v. Bartley*, 24 A. 185, 186 (1892) (“The test is whether legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial.”).

Consistent with the Free and Equal Elections Clause’s broad text and purpose, this Court has expressly held that the Clause “does not require a showing” that the General Assembly acted with illicit “intent[]” in passing the relevant law. *League of Women Voters*, 178 A.3d at 807. The “legislature ... is prohibited by this clause from interfering with the exercise of” the right to vote on equal terms, “even if the interference occurs by inadvertence.” *Id.* at 810.

Here, in the context of the COVID-19 pandemic, enforcing the deadline that absentee and mail-in ballots must be received by election day will violate the Free and Equal Elections Clause by inflicting both of the constitutional injuries that the Clause was designed to prevent. The received-by deadline will prevent the June 2 primary from being “free”; the election will not be “open and unrestricted, ... to the greatest extent possible” and voting for many citizens will be “so difficult as to

amount to a denial.” *League of Women Voters*, 178 A.3d at 804, 810. The deadline will also necessarily prevent the primary from being “equal”; voters will experience grossly disparate burdens in their ability to cast an effective ballot based on “the region of the state in which they live[.]” *Id.* at 808-09.

**B. Pennsylvania’s June 2 Primary Will Not Be Free If the Received-by Deadline Remains in Effect**

Pennsylvania’s June 2 primary will not be “free” within the meaning of Article I, Section 5 if absentee and mail-in ballots that are sent by election day, but are received after election day, are not counted. The facts now admitted by the Department of State make this conclusion unavoidable.

Based on the latest data reported by the Department of State, as of May 21, there were 241,270 voters across the Commonwealth who had submitted an application for an absentee or mail-in ballot for the June 2 primary but had not yet been sent a ballot by their county board of elections. Marks 5/22 Decl. ¶ 4. These backlogs are particularly acute in the counties that have been hardest by COVID-19, in which the alternative of voting in person poses the greatest risks.

Philadelphia is experiencing the dual problems of a last-minute “surge of paper ballot applications” and “COVID-19 related staffing shortages and social distancing rules,” which the Department of State admits will cause “difficulties in promptly processing all of the outstanding applications.” *Id.* ¶¶ 13-15. Because of these problems, Philadelphia has a backlog of 36,705 applications and growing.

*Id.* Delaware County has an alarming backlog of 31,139 applications—40% of the total applications thus far received—that have not been processed or for which the voter has not been sent a ballot. *Id.* ¶ 16.

Moreover, the Department of State and the Montgomery County Board of Elections now state that Montgomery County is experiencing mail delays that are preventing voters from timely receiving their absentee and mail-in ballots.

According to the Department of State, in Montgomery County, “many ballots that the county has mailed have been delayed in arriving at voters’ homes,” making it “more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” Marks 5/22 Decl. ¶ 12; *see also* Ex. B.

Given these massive backlogs and mail delays, and the fact that the numbers of applications across the Commonwealth are only continuing to increase as the May 26, 2020 application deadline nears, it is now a certainty that tens of thousands of Pennsylvania voters, if not more, will receive their absentee and mail-in ballots on the Saturday or Monday before the election, or on election day itself, at which point it will be too late to mail the ballot back and be assured it will arrive by election. These voters will conclude that the only way to ensure their votes are counted is to vote in person, and will face the stark choice of risking losing their right to vote by mailing the ballot, or endangering their health and lives by voting in person.

Elections cannot be “free” when voters must risk their lives to vote. The received-by-election-day deadline for absentee and mail-in ballots will make voting “so difficult as to amount to a denial” of the right to vote for many Pennsylvanians. *League of Women Voters*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523); accord *Applewhite*, 2014 WL 184988, at \*19 (permanently enjoining Voter ID law under Article I, Section 5 because “the Voter ID Law renders Pennsylvania’s fundamental right to vote so difficult to exercise”).

The received-by deadline will also render the June 2 primary not free given the sheer number of voters who will be disenfranchised because they choose to mail their ballots back and the ballot arrives too late. Elections are not “free” when legions of voters who followed the rules are disenfranchised due to the consequences of a global pandemic and due to their government’s failure to process their applications in time. “Disenfranchising voters ‘through no fault of the voter himself’ is plainly unconstitutional.” *Applewhite*, 2014 WL 184988, at \*23 (quoting *Norwood*, 116 A.2d at 553) (alteration omitted). The received-by deadline will deny these voters their right under the Free and Equal Elections Clause “to cast [their] ballot and have it honestly counted.” *League of Women Voters*, 178 A.3d at 810 (quoting *Winston*, 91 A. at 523).

For similar reasons, the received-by deadline will violate the Suffrage Clause of Article I, Section 5, because the government’s delays in processing

absentee and mail-in ballots and sending voters their ballots, along with the delays in mail delivery, will burden or outright prevent the free exercise of the franchise through no fault of the voter.

In short, in the context of the COVID-19 crisis, Pennsylvania’s current received-by deadline unconstitutionally burdens the right to vote under the Suffrage Clause and violates the Free and Equal Elections Clause’s guarantee that “all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth.” *Id.* at 804.

**C. Pennsylvania’s June 2 Primary Will Not Be Equal If the Received-by Deadline Remains in Effect**

Pennsylvania’s June 2 primary also will not be “equal” if the received-by deadline remains in force. The deadline will deny “citizens an equal right, on par with every other citizen,” to have their ballots counted in the election. *League of Women Voters*, 178 A.3d at 804. The deadline will give Pennsylvania voters an unequal opportunity to have their votes counted, including based on the geographic area where they live.

As described, the application-processing backlogs and mail-delivery delays now recognized by the Department of State are largely centered in southeastern Pennsylvania—in counties such as Montgomery, Philadelphia, and Delaware Counties. Not coincidentally, Montgomery, Philadelphia, and Delaware Counties are in the region of the Commonwealth hit hardest by the COVID-19 pandemic.

As Deputy Secretary Marks acknowledges in his May 22 declaration, the counties experiencing the greatest problems are “in areas where the prevalence of COVID-19 is highest.” Marks 5/22 Decl. ¶ 4.

The disenfranchisement and severe burden on the right to vote caused by the received-by deadline will be greatest in these counties, where each of the Petitioners resides. Because of the application-processing backlogs, mail delays, and other difficulties hampering the system, those counties will have a grossly disproportionate share of voters who will receive their absentee and mail-in ballots on the Saturday or Monday before the election, or on election day itself. Voters in these counties, at grossly disproportionate rates compared to voters in other regions of the Commonwealth, will face the Hobson’s choice of risking that their ballot will arrive too late if mailed back and risking their health by voting in person to ensure their vote is counted.

Indeed, because the risks of voting in person during a pandemic vary across the population—along axes like age, race, and disability status—the ability of two similarly situated individuals who have requested mail-in ballots to vote in person if necessary will differ significantly. Of two voters who timely requested mail-in ballots but who fear that their vote will not be counted if they vote by mail, a younger, healthier voter will be more realistically able to remedy the situation by voting in person.

The arbitrary, differential treatment of voters of different regions, races, and health statuses is precisely what the Free and Equal Elections Clause was written to “end, once and for all.” *League of Women Voters*, 178 A.3d at 808. The framers of Pennsylvania’s Constitution sought to eradicate “laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs.” *League of Women Voters*, 178 A.3d at 808. It is unfathomable to think that these same framers would have countenanced disfavoring voters based on whether they live in a region whether the outbreak of a deadly virus has been more prevalent, or whether a particular voter is ability to withstand—or risk exposure to—the virus. That is especially true because those at greatest risk from COVID-19 include Pennsylvania’s most socially and economically disadvantaged citizens.

In short, the undisputed facts now show—with certainty—that for the June 2 primary, the received-by deadline will treat voters unequally in whether their votes are counted and the burdens they face in ensuring their votes are counted, violating the Pennsylvania Constitution’s guarantee that citizens across the Commonwealth have “an equal right, on par with every other citizen, to elect their representatives.” *League of Women Voters*, 178 A.3d at 804.

#### **D. Counting Ballots Sent by Election Day Will Remedy the Violation**

Enjoining the received-by deadline so as to allow the counting of ballots that are sent by election day will remedy the Article I, Section 5 violations described above. Voters who timely request an absentee or mail-in ballot by the May 26 deadline and receive the ballot on or before June 2 will no longer be forced to choose between disenfranchisement and risking their lives. A mailed-by deadline will preserve the right to vote for tens or hundreds of thousands of Pennsylvanians whose ballots would have been discarded if the received-by deadline remained in effect. For these same reasons, counting absentee and mail-in ballots sent by election day will alleviate the disparate treatment resulting from the received-by deadline based on geography, age, disability, and race. It will “guarantee[] [Pennsylvania] citizens an equal right, on par with every other citizen,” to have their votes counted in the June 2 primary, just as the Free and Equal Elections Clause demands. *League of Women Voters*, 178 A.3d at 804.

#### **II. The Received-By Deadline Violates Equal Protection in the Context of the COVID-19 Pandemic**

Applying the received-by deadline to an election held in the midst of a global pandemic would also violate the Pennsylvania Constitution’s equal protection guarantees. Art. I, §§ 1, 26.

Strict scrutiny applies when a state law provides for differential treatment of citizens in their exercise of “a fundamental right,” *William Penn Sch. Dist.*, 170

A.3d at 458, and the “right to vote” is a “fundamental” right, *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015). For all the reasons already explained, the received-by deadline will necessarily result in differential treatment of similarly situated voters in the exercise of their fundamental right to vote based on variation across counties due to the pandemic in application-processing and mail-delivery times. As described, voters in southeastern Pennsylvania will be disproportionately disenfranchised based on the now-established application-processing delays and/or mail-delivery delays in the area. Allowing for differential treatment of citizens in their ability to exercise their fundamental right to vote based on whether they live in a county that has been hit hardest by a pandemic offends any conception of equal protection.

Enforcement of the deadline amid the COVID-19 pandemic necessarily will give rise to another, more pernicious form of differential treatment: The ability of citizens to cast their votes will depend on their capacity and willingness to risk their health and safety by voting in person as an alternative to submitting a timely requested mail-in ballot that otherwise would not be counted. The deadline thus disfavors particular groups, including the elderly. This is a prototypical “den[ial] [of] the enjoyment of a[] civil right,” as well as “discriminat[ion] ... in the exercise of a[] civil right,” violating Article I, Section 26.

Although the state may enact “reasonable, non-discriminatory restrictions” on voting “to ensure honest and fair elections that proceed in an orderly and efficient manner,” *Banfield*, 110 A.3d at 176-77, the received-by deadline is neither reasonable in this context nor non-discriminatory. And, as explained, the government has no compelling interest in imposing a received-by deadline rather than a sent-by deadline.

The Commonwealth has no legitimate interest, let alone a compelling one, in imposing a deadline that will inevitably cause this arbitrary disenfranchisement, which is also geographically and racially disproportionate. The abstract goals of ensuring that elections are orderly and administered uniformly is not sufficient to support widespread, arbitrary disenfranchisement in the face of a public-health crisis. And even if it were, the enforcement of a strict received-by date is not necessary to further that interest. Counting all ballots sent by election day achieves the same goal of uniformity and orderliness, and there is no evidence that enforcing a sent-by deadline, rather than a received-by deadline, imposes any additional administrative burden.

Even if strict scrutiny did not apply, the challenged provisions would be subject to an “intermediate” (or “heightened”) standard of review because they unquestionably involve an “important” right. *William Penn Sch. Dist.*, 170 A.3d at 458. For a law to pass intermediate scrutiny, “the government interest [must] be an

‘important’ one” and “that the classification be drawn so as to be closely related to the objectives of the legislation.” *James v. SEPTA*, 477 A.2d 1302, 1307 (Pa. 1984). Enforcing the received-by deadline amid the COVID-19 pandemic, especially in light of the massive application-processing delays and other problems recently acknowledged by Respondents, fails intermediate scrutiny as well.

Finally, even absent heightened scrutiny, enforcing the challenged provisions during the COVID-19 crisis violates equal protection under this Court’s rational-basis test. “[T]reating people differently under the law” must further a legitimate state interest and must be reasonably related to that interest. *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995). In other words, government classifications must be “reasonable rather than arbitrary.” *Id.*

Enforcement of the received-by deadline will arbitrarily disenfranchise voters and thus does not pass the rational-basis test. There is “no rational reason” to disenfranchise certain voters based on delays entirely outside their control in processing their applications and delivering ballots, and to offer, as the only potential recourse, that those voters risk their lives to vote in person. *Curtis*, 666 A.2d at 260.

### **III. Petitioners Meet All Other Requirements for Preliminary Relief**

Petitioners have shown a likelihood of success on the merits for the reasons explained above, and they amply meet all of the other requirements for preliminary

relief for the June 2 primary. It is clear that (1) an injunction is necessary to prevent immediate and irreparable harm; (2) greater injury would result from refusing the injunction than from granting it, and granting it will not substantially harm other interested parties; (3) the injunction will not adversely affect the public interest; (4) the injunction will properly restore the parties to the status quo; and (5) the injunction is reasonably suited to abate the offending activity. *SEIU Healthcare*, 104 A.3d at 501-02.

**A. An Injunction Is Needed to Prevent Immediate Irreparable Harm**

Enforcement of the received-by deadline for the June 2 primary election will impose acute, irreparable injury in three ways.

*First*, as explained, the received-by deadline threatens to disenfranchise a large number of Pennsylvanians—tens or even hundreds of thousands—including Petitioners. The right to vote in Pennsylvania is fundamental: it “is pervasive of other basic civil and political, rights, and is the bedrock of our free political system.” *Bergdoll*, 731 A.2d at 1268-69 (citation omitted). For that reason, Pennsylvania courts hold that threatened infringement of the right to vote is a paradigmatic irreparable injury. “The right to vote, fundamental in Pennsylvania, is irreplaceable, necessitating its protection before any deprivation occurs.” *Applewhite*, 2014 WL 184988, at \*26. “Deprivation of the franchise is neither compensable nor reparable by after-the-fact legal remedies, necessitating

injunctive and declaratory relief.” *Id.* The received-by deadline will irreparably harm Petitioners and every person whose vote is potentially discarded because it arrived too late.

*Second*, the received-by deadline will cause irreparable harm to voters who choose to vote in person rather than risk that their mail-in ballot will arrive too late. Forcing voters to “endanger[] their health” by going to the polls in person is an injury that unquestionably “supplie[s] the irreparable harm requirement,” *Fischer*, 439 A.2d at 1174. If even a single person contracts COVID-19 because they voted in person due to the received-by deadline, that is a grave harm that this Court should take all measures to avoid.

*Third*, the received-by deadline will force many voters to cast their votes significantly earlier than they otherwise would, without having made a fully informed decision. That is a fundamental constitutional injury of its own. *Supra* pp. 30-33; *see Applewhite*, 2014 WL 184988, at \*19 (quoting *Winston*, 91 A. at 523) (enjoining Voter ID law that burdened, rather than fully denied, the right to vote).

#### **B. Greater Injury Would Result From Refusing an Injunction**

Absent an injunction, Petitioners and many others will be disenfranchised for reasons beyond their control. Others will be forced to risk their health to ensure that their vote may be cast. These grave injuries dramatically outweigh any

injury the Commonwealth might claim from having to consider ballots timely if sent on or before the day of the primary.

Petitioners seek a reasonable and easily administrable remedy. Indeed, multiple courts have approved similar relief in recent litigation in light of the COVID-19 crisis. In Wisconsin, the U.S. Supreme Court modified the lower court's injunction to allow for the counting of absentee ballots that were postmarked by election day. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020). This injunction allowed roughly 79,000 people whose absentee ballots arrived in the week after the election to vote safely by mail. Ex. E at 7 (Wisconsin Election Commission report); *see Applewhite*, 2014 WL 184988, at \*26 (finding balance of equities was in challengers' favor where absence of injunction would "add to the chaos" surrounding voting procedures).

Just days ago, a Montana state court preliminarily enjoined that state's received-by-election day deadline for its June 2 primary. *See Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020) (attached as Ex. F). The court relied on Montana's free elections clause, which provides that "[a]ll elections shall be free and open." *Id.* at 5 (quoting Mont. Const. art II, § 13). The court held that, "[i]f a preliminary injunction is not granted, the . . . Receipt Deadline will cause irreparable harm to thousands of Montana voters by preventing absentee ballot

voters from voting or by disenfranchising those whose absentee ballots are received after election day.” *Id.* at 12. The court ordered that “[a]ll absentee ballots postmarked on or before election day shall be counted” in the June 2 primary. *Id.* at 17.

Moreover, at least eleven states that allow voting by mail consider mailed ballots timely if postmarked on election day or the day prior, confirming that such sent-by-election-day rules are manageable and impose no significant administrative burden.<sup>9</sup>

The balance of the injuries overwhelmingly favors an injunction.

### **C. An Injunction Will Not Adversely Affect the Public Interest**

Courts have repeatedly recognized that the public has an overwhelming interest in enjoining unconstitutional government action, particularly when that action infringes on voting rights. *See Applewhite*, 2014 WL 184988, at \*19.

Independently, this Court has recognized that injunctions protecting public health serve the public interest. *See SEIU*, 104 A.3d at 509. Accordingly, an injunction here “will protect, rather than harm the public.” *Id.*

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<sup>9</sup> Alaska Stat. § 15.20.081(e); Cal. Elec. Code § 302; Iowa Code Ann. § 53.17(2), (3); Md. Code Regs. § 33.11.03.08(B); N.Y. Elec. Law § 8-412(1); N.C. Gen. Stat. Ann. § 163A-1310(b)(2)(b); N.D. Cent. Code Ann. § 16.1-07-09; Tex. Elec. Code § 86.007(a)(2); Utah Code § 20A-3-306 (2)(b); Wash. Rev. Code § 29A.40.091(4); W. Va. Code § 3-3-5(g).

**D. An Injunction Will Restore Voters to the Pre-COVID Status Quo**

Enjoining enforcement of the received-by deadline “will properly restore the parties to their status as it existed prior to the alleged wrongful conduct.”

*Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009).

“The status quo to be maintained by a preliminary injunction is the *legal status* that preceded the pending controversy.” *York Grp., Inc. v. Yorktowne Caskets, Inc.*,

924 A.2d 1234, 1244 (Pa. Super. 2007) (emphasis added). The legal status that

preceded the controversy here was that elections in Pennsylvania (in the pre-pandemic world) guaranteed the right to vote for all Pennsylvania citizens in

accordance with the Pennsylvania Constitution. Before COVID-19, voters did not need to risk their lives to ensure their votes would be counted. That is no longer

true with the onset of COVID-19 and its interaction with the received-by deadline.

COVID-19 has altered the legal status such that the June 2 primary will not

guarantee the constitutional rights of Pennsylvania voters if the received-by

deadline is enforced. A preliminary injunction that enjoins the received-by

deadline is necessary to restore the ability of Pennsylvania voters to safely cast

their ballots in an election that protects their constitutional rights.

**E. The Injunction Is Tailored to Abate the Constitutional Violations**

Petitioners seek a narrow injunction preventing enforcement of the received-by deadline during the upcoming primary election given the COVID-19 pandemic.

Specifically, Petitioners request that this Court order the counting of absentee and mail-in ballots: (1) if the ballot is received by the county board of elections by 8 p.m. on election day (which is the current requirement); (2) if the ballot is postmarked by election day and received within a week of the election; or (3) if the ballot has no postmark, a postmark with no date, or an illegible postmark, the ballot is received via USPS no later than June 3, the day after election day, since any ballots received via USPS on June 3 necessarily were sent by the voters by June 2 at 8 p.m. or earlier, *see* Ex. G.

This injunction will ensure that fewer Pennsylvanians are disenfranchised and do not need to risk their health at the polls to guarantee that their votes are counted. But the relief Petitioners seek is not unlimited—under the proposed injunction, ballots must still be sent by election day to be counted. Moreover, the proposed criteria can be administered without difficulty; indeed, West Virginia applies the same criteria for counting absentee ballots. West Virginia counts absentee ballots if they are postmarked by election day or if they are received via mail by the day after election day. *See* W. Va. Code § 3-3-5(g).

The proposed injunction hews closely to “the offending activity” and, at minimum, is “reasonably tailored” to that activity, which is all that is necessary to support an injunction. *SEIU*, 104 A.3d at 509; *accord, e.g., Beaver Cty. ex rel.*

*Beaver Cty. Bd. of Comm'rs v. David*, 83 A.3d 1111, 1119 (Pa. Commw. Ct. 2014).

#### **IV. The Received-By Deadline Is Severable From the Remainder of Act 77**

Under ordinary principles of severability, the received-by deadline is severable from the remainder of Act 77, which can undoubtedly stand on its own. While Act 77 has a boilerplate non-severability provision, that provision is not controlling under this Court's precedent, and applying the provision here would be unconstitutional because it would result in wholly eliminating no-excuse mail-in voting during a deadly pandemic, exacerbating the very constitutional violations Petitioners seek to remedy.

##### **A. Act 77 Easily Stands Alone Without the Received-By Deadline**

Pennsylvania law “establishes a presumption of severability.” *Stilp v. Commonwealth*, 905 A.2d 918, 970 (Pa. 2006). Under § 1925 of the Statutory Construction Act, “[t]he provisions of every statute shall be severable,” and

[i]f any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 P.S. § 1925.

Section 1925’s “specific, cogent standard ... both emphasizes the logical and essential interrelationship of the void and valid provisions, and also recognizes the essential role of the Judiciary in undertaking the required analysis.” *Stilp*, 905 A.2d at 970. In short, § 1925 “mandate[s] severance ... where a statute can stand alone absent the invalid provision.” *Id.*

Severing an invalid provision, and allowing the remainder of a statute to stand, was the norm in Pennsylvania long before enactment of § 1925, under well-settled common law that had “its origins in principles of jurisprudential restraint.” *Stilp*, 905 A.2d at 970 (citations omitted). Thus, over a century ago, this Court held that statutes are presumptively severable, and that the presumption can be overcome only “if the part which is void is vital to the whole, or the other provisions are so dependent upon it, and so connected with it, that it may be presumed the legislature would not have passed one without the other, the whole statute is void.” *Id.* (quoting *Rothermel v. Meyerle*, 20 A. 583 (1890)).

Applying these baseline principles of severability here, the received-by deadline for absentee and mail-in ballots is plainly severable from the remainder of Act 77. In Act 77, the General Assembly enacted numerous changes to Pennsylvania election laws, including the adoption of a comprehensive new system for no-excuse mail-in voting available to all Pennsylvania voters. Regardless of the received-by deadline, that system is “easily capable of being executed in

accordance with the General Assembly’s manifest intention” to make mail-in voting available to all Pennsylvania voters, without requiring an excuse as was needed under the prior regime. *Stilp*, 905 A.2d at 973. Nothing in Act 77 “depends upon” the received-by deadline. *Id.* (quoting 1 P.S. § 1925). In other words, every other provision of Act 77 can continue to operate without change if the received-by deadline is enjoined in the manner that Petitioners request. The remainder of Act 77, including its comprehensive system for universally available mail-in voting, is “easily capable of being executed” with a deadline requiring voters to send their ballots by election day. *Id.*

**B. Act 77’s Non-Severability Provision Is Unenforceable and Unconstitutional in the Context of this Case**

Act 77 contains a non-severability provision that purports to require the invalidation of all of its provisions, including by purporting to withdraw the availability of no-excuse mail-in voting across the entire Commonwealth, if any portion of the Act is held unconstitutional. That provision, which was enacted before the emergence of COVID-19, provides in full: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.” *See* Act 77 § 11. But “this Court has never deemed nonseverability clauses to be controlling in all circumstances.” *Stilp*, 905

A.2d at 978. Act 77’s non-severability provision does not bind the Court and is unenforceable and unconstitutional in the context of this case.

Even in the absence of COVID-19, Act 77’s non-severability provision would not be an “inexorable command” that binds this Court. *Stilp*, 905 A.2d at 972-74. In *Stilp*, this Court declined to apply an *identically worded* non-severability provision, *id.* at 973, refusing to allow the General Assembly to “dictate the effect of a judicial finding that a provision in an act is ‘invalid.’” *Id.* at 976. Here, as in *Stilp*, Act 77’s “boilerplate” non-severability provision “sets forth no standard for measuring nonseverability, but instead simply purports to dictate to the courts how they must decide severability.” *Id.* at 973; *see also id.* at 974 (non-severability provision improperly “dictate[s] to the Judiciary the effect of a finding of unconstitutionality as to any individual provision in” a statute). The General Assembly cannot “dictate the effect of a judicial finding that a provision in an act is ‘invalid,’” *id.* at 977, as Act 77’s non-severability provision purports to do. And as in *Stilp*, enforcement of Act 77’s non-severability provision would “intrude upon the independence of the judiciary and impair the judicial function,” because the provision’s effect would be to prevent judicial review and coerce this Court to permit an unconstitutional condition (the received-by deadline) being imposed on the exercise of the franchise. *Id.* at 980.

Moreover, in the context of the COVID-19 pandemic, applying the non-severability provision to void Act 77 in its entirety would itself be unconstitutional. Invalidating Act 77's no-excuse mail-in voting scheme and its expanded absentee voting provisions in the middle of the pandemic would disenfranchise a massive number of Pennsylvanians, and would disproportionately burden voters of certain ages, African-American voters, and voters with disabilities. It would force nearly every eligible voter in Pennsylvania—millions of citizens—to choose between voting and risking their lives, including the hundreds of thousands of Pennsylvania voters who have already submitted mail-in ballot applications for the June primary, and the growing numbers of voters who have already received, marked, and returned their mail-in or absentee ballots. Invalidating all of Act 77's provisions therefore would violate Pennsylvania's Free and Equal Elections Clause, Suffrage Clause, and equal protection guarantees in its own right.

Put differently, if Petitioners are correct that the received-by deadline for absentee and mail-in ballots violates the Pennsylvania Constitution by abridging Pennsylvanians' ability to vote during the pandemic, then eliminating all no-excuse mail voting in a pandemic necessarily would violate the Pennsylvania Constitution as well. A non-severability clause cannot be applied to produce an unconstitutional result, particularly one that compounds the unconstitutionality of the substantive provision that was challenged in the first place.

As this Court explained in *Stilp*, non-severability clauses are ordinarily “superfluous” anyway. *Id.* at 978. The General Assembly, “once confronted with a judicial ruling that a provision of a statute is unconstitutional, may always revisit the subject anew.” *Id.* Severing the invalid provision, while leaving the remainder of the statute intact, “leaves it to the legislative body to assess whether the statute, as affected by the judicial interpretation, is acceptable.” *Id.* If the General Assembly wished to eliminate all no-excuse mail-in voting in Pennsylvania amidst a pandemic (which we doubt), it could attempt to enact a new statute doing so.

This Court can and should hold that Act 77’s received-by deadline for absentee and mail-in ballots is unconstitutional in the context of the COVID-19 pandemic and sever the provision from the remainder of the Act as applied in these circumstances.<sup>10</sup>

#### **V. Act 77’s Purported Statute of Limitations Does Not Preclude This Suit**

Although Act 77 purports to impose a 180-day statute of limitations on actions challenging the constitutionality of the received-by deadline, see Act 77 § 13(3), that statute of limitations cannot constitutionally be applied to this case.<sup>11</sup>

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<sup>10</sup> To be clear, Petitioners do not seek any ruling or relief that would trigger Act 77’s non-severability provision, and Petitioners would withdraw this motion and dismiss this action if the non-severability provision were going to apply.

<sup>11</sup> A statute of limitations is an affirmative defense. Thus, the Court need not consider Act 77’s purported limitations period unless respondents properly invoke it. Petitioners address it here out of an abundance of caution.

First, statutes of limitations can never apply to foreclose prospective constitutional challenges to Pennsylvania statutes. As this Court has held in the analogous context of laches, “laches and prejudice can never be permitted to amend the Constitution.” *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1988). Laches cannot “bar an attack upon the constitutionality of a statute as to its future operation, especially where the legislation involves a fundamental question going to the very roots of our representative form of government and concerning one of its highest prerogatives.” *Id.* at 188-89 (quoting *Wilson et ux. v. Philadelphia School Dist.*, 195 A. 90, 99 (Pa. 1937)). This rule that laches cannot “prevent the court from declaring an act void in violation of the constitution” has been part of Pennsylvania law for over a century. *Id.*

A statute of limitations is no different. Pennsylvania statutes cannot be insulated from judicial review by legislative fiat. To hold otherwise would contravene Article I, Section 10 of the Constitution, which declares that “[a]ll courts shall be open; and every man for an injury done him ... shall have remedy by due course of law, and right and justice administered without sale, denial or delay.” Holding that a statute of limitations may bar this Court from assessing the prospective constitutionality of a statute would effectively allow the legislature to “amend the Constitution,” *Sprague*, 550 A.2d at 188, and would leave millions of

Pennsylvanians for generations to come with no remedy to address denials of the right to vote or any other constitution violation of the legislature's choice.

Even under the lesser, intermediate scrutiny standard this Court applies to statutes of limitations or repose limiting common-law tort remedies, the 180-day limitations period would fail. *See Yanakos v. UPMC*, 218 A.3d 1214 (Pa. 2019). To be clear, this intermediate scrutiny standard does not apply in the context of prospective constitutional challenges; the legislature has no authority to eliminate or limit such challenges and statute of limitations are therefore per se invalid. But even if the common-law standard applied here, the 180-day limitations period is not “substantially related to achieving an important government interest.” *Id.* at 1222. There is no important government interest in imposing an arbitrary 180-day limitations clock on challenges to a statute that will govern voting in Pennsylvania for years to come. If Respondents invoke this limitations period, they will be unable to satisfy their burden to justify it under intermediate scrutiny. *Id.* at 1223.

Even if the 180-day statute of limitations could be constitutionally applied in the context of a *facial* challenge to Act 77's received-by deadline, it still could not constitutionally foreclose an *as-applied* challenge like this one. As-applied challenges turn on the application of a law to specific facts and circumstances. The General Assembly cannot prevent citizens from bringing an as-applied constitutional challenge where the facts and circumstances underlying the

challenge arose after the purported statute of limitations has lapsed. That is the case here. The backlogs in county boards of elections and mail delays giving rise to Petitioners' claims have only now fully crystalized, in late May 2020.

Petitioners allege that it is now beyond dispute that county boards of elections are unable to process mail applications in time for the received-by deadline, that Petitioners and other Pennsylvania voters have sent in ballot applications and have not yet received their ballots (including because of admitted mail delays), and that they will be deprived of the right to vote in the absence of action from this Court because it is now too late for them to receive their ballots in time to fill them out and ensure they will be received by June 2. Since these specific facts and circumstances arose *after* the 180-day period ended, it would violate the Pennsylvania Constitution to hold that the 180-day period nonetheless bars Petitioners' lawsuit.

Application of the 180-day limitations period is especially unwarranted given this Court's dismissal with prejudice of a prior lawsuit challenging the received-by deadline on the ground that those petitioners' claims were too speculative at that time. *See Order, Disability Rights Pennsylvania v. Boockvar*, No. 88 MM 2020 (Pa. May 15, 2020). The *Disability Rights Pennsylvania* suit was filed one day before the 180 days had run, and respondents argued in their first preliminary objection that petitioners had not stated a constitutional violation

because petitioners’ allegations about a backlog in ballot application processing were just “theories” and were too “speculative” at that time to support a claim that “Pennsylvanians will be deprived of the right to vote.” DOS POs at 11, 13. This Court dismissed on the basis of that preliminary objection. *See* Order at 1-2, *Disability Rights Pennsylvania*; *see also* Concurring Statement of Justice Wecht at 1-2 (concurring and noting that “circumstances may change” but that “the possibility that votes may be suppressed due to late ballot delivery, as presently alleged, is too remote at this time to constitute a cognizable injury”).

In light of the Court’s disposition of *Disability Rights Pennsylvania*, it simply cannot be that Petitioners are time-barred from bringing this action, now that the facts have crystallized and the problems giving rise to Petitioners’ constitutional injuries are no longer speculative by any means.

Accordingly, if Respondents raise the 180-day limitations period, the Court should hold that it cannot constitutionally be applied.

### **CONCLUSION**

For the reasons stated above, Petitioners request that the Court enter a preliminary injunction barring enforcement of the received-by deadline for absentee and mail-in ballots in 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c) for the June 2, 2020 primary, and requiring the counting of non-military and non-overseas absentee or mail-in ballots if: (1) the ballot is received by the county

board of elections by 8 p.m. on election day; (2) the ballot is postmarked by election day and received by June 9, 2020 (where a “postmark” is defined as any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day); or (3) for ballots with no postmark, a postmark with no date, or an illegible postmark, the ballot is received via USPS no later than June 3, 2020. A proposed order is attached.

Dated: May 25, 2020

Respectfully submitted,

*/s/ Mary M. McKenzie*

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**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that this Brief contains 10,834 words, exclusive of the supplementary matter as defined by Pa.R.A.P. 2135(b).

Dated: May 25, 2020

By: /s/ Mary M. McKenzie  
Mary M. McKenzie

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**IN THE SUPREME COURT OF PENNSYLVANIA**

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MELINDA DELISLE; JACQUES DELISLE; ADAM  
DELISLE; BRYAN IRVIN; CHARLES CELLA;  
DEBORAH CELLA; MARY CAY CURRAN; ELIZA  
HARDY JONES; KRISTA NELSON; EILEEN  
MCGOVERN; CEDRIC HARDY,

Petitioners,

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.

No.

**DECLARATION OF SAMUEL F. CALLAHAN IN SUPPORT OF  
PETITIONERS' EMERGENCY APPLICATION FOR SPECIAL RELIEF  
IN THE NATURE OF A PRELIMINARY INJUNCTION**

I, Samuel F. Callahan, declare and say as follows:

1. I am over the age of eighteen (18) and competent to testify as to the matters set forth herein.
2. I am an associate at the law firm Arnold & Porter Kaye Scholer LLP, located at 601 Massachusetts Avenue, N.W., Washington, D.C. 20001.
3. I submit this affidavit in support of Petitioners' Emergency Application for Special Relief in the Nature of a Preliminary Injunction.
4. Attached as Exhibit A is a true and correct copy of the Supplemental Declaration of Jonathan Marks, filed on May 22, 2020 in *Crossey v. Boockvar*, No. 266 MD 2020 (Commw. Ct.).
5. Attached as Exhibit B is a true and correct copy of a May 22, 2020 News Release from the Montgomery County Board of Commissioners titled "Montgomery County Announces Five Secure Ballot Drop-Off Box Locations for June 2 Primary Election," available at <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/5174>.
6. Attached as Exhibit C is a true and correct copy of the Pennsylvania Department of Health's official COVID-19 data as of May 24, 2020, available at <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.
7. Attached as Exhibit D is a true and correct copy of the Centers for Disease Control and Prevention's March 27, 2020 "Recommendations for Election

Polling Locations,” available at <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

8. Attached as Exhibit E is a true and correct copy of an excerpt from the Wisconsin Election Commission’s April 7, 2020 Absentee Voting Report, published May 15, 2020, available at <https://elections.wi.gov/sites/elections.wi.gov/files/2020-05/April%202020%20Absentee%20Voting%20Report.pdf>.

9. Attached as Exhibit F is a true and correct copy of the Findings of Fact, Conclusions of Law, Memorandum, and Order Granting Plaintiffs’ Motion for Preliminary Injunction in *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020).

10. Attached as Exhibit G is a true and correct copy of the Declaration of Paul Rozzi, filed on May 3, 2020 in *Disability Rights Pennsylvania v. Boockvar*, No. 83 MM 2020.

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

Respectfully submitted this the 25th day of May, 2020.

/s/ Samuel F. Callahan  
Samuel F. Callahan

# **EXHIBIT A**



2020, and that I would update the Court after that date. *See* May 18 Declaration ¶¶ 14-43.

3. Statewide, a large majority of counties are keeping up with mail-in and absentee voting applications, with ballots being mailed out as applications are processed.

4. Some counties, however, are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest. If these obstacles persist into next week, there is a possibility that they could result in significant delays in voters' receipt of ballots.

5. As of Thursday, May 21, 2020, the counties had reported receipt of approximately 1,701,141 applications for absentee and mail-in ballots.

6. The counties had approved 1,528,212, or approximately 90%, of the applications.

7. Preliminary data indicates that the counties have mailed 1,459,871 million ballots, or approximately 96% of the applications approved so far, to voters.

8. The counties have received 441,012 voted ballots, which accounts for approximately 29% of applications approved so far.

9. Counties have continued to take steps to deal with the high volume of applications by, for example, reassigning staff to assist with ballot processing and,

in some cases, adding extra shifts at their election offices.

10. The vast majority of counties do not appear to be having difficulty managing the application process. As of May 21, 2020, more than half of the counties in the Commonwealth had mailed ballots in response to more than 90% of their approved applications.

11. Certain counties, however, are experiencing delays or backlogs.

12. For example, preliminary data shows that Montgomery County has mailed out 131,932 ballots out of the 138,363 applications it has approved. However, for reasons not within Montgomery County's control, many ballots that the county has mailed have been delayed in arriving at voters' homes. These delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.

13. Philadelphia County recently began receiving a surge of paper ballot applications. Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, Philadelphia's staff will face difficulties in promptly processing all of the outstanding applications.

14. A recent outage in Philadelphia's Verizon connection, which covered the network connection with the election database, further impeded Philadelphia's progress.

15. Preliminary data shows that as of May 21, Philadelphia County had received 181,655 applications, rejected 2,114 of them, approved 159,772, and mailed out 142,836 ballots.

16. Of the counties identified in my May 18 declaration, other than Philadelphia and Montgomery, preliminary data reported by the counties shows that:

- Allegheny County had received 242,349 applications, rejected 20,120 of them, approved 222,757, and mailed out 205,646 ballots;
- Delaware County had received 78,333 applications, rejected 4,290 of them, approved 53,851, and mailed out 42,904 ballots;
- Lawrence County had received 9,400 applications, rejected 623 of them, approved 8,813, and mailed out 8,654 ballots;
- Lehigh County had received 47,057 applications, rejected 3,991 of them, approved 43,220, and mailed out 43,011 ballots; and
- Mercer County had received 11,067 applications, rejected 807 of them, approved 9,746, and mailed out 9,569 ballots.

17. The last day for applying for a mail in or absentee ballot is Tuesday, May 26.

18. I understand that because of COVID-19 related staffing shortages or technical difficulties, a small number of other counties may face challenges in keeping up with their outstanding applications as the application deadline approaches.

19. After May 26, unless the Court instructs otherwise, I will give the

Court further information about the counties' application numbers and the existence of any backlogs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 22, 2020.

A handwritten signature in black ink, appearing to read "Jonathan Marks", written in a cursive style.

---

Jonathan Marks

# **EXHIBIT B**



# NEWS

## MONTGOMERY COUNTY BOARD OF COMMISSIONERS

VALERIE A. ARKOOSH, MD, MPH, CHAIR  
KENNETH E. LAWRENCE, JR., VICE CHAIR  
JOSEPH C. GALE, COMMISSIONER

**Contact:** Teresa Harris | Public Affairs Manager | 610-278-3062 | [tharris@montcopa.org](mailto:tharris@montcopa.org)

### FOR IMMEDIATE RELEASE:

#### **Montgomery County Announces Five Secure Ballot Drop-Off Box Locations for June 2 Primary Election**

**Norristown, PA (May 22, 2020)** – Montgomery County officials announced that five secure ballot drop-off boxes have been installed throughout the County to help voters meet the deadline for the June 2 Primary Election. Completed mail-in ballots and absentee ballots may be dropped off starting Saturday, May 23, and must be placed in the drop-off boxes by 8 p.m. on Election Day, June 2.

“Concerns over the spread of COVID-19 have created a high demand for mail-in voting and mail delivery times have been slower than normal,” said Kenneth E. Lawrence Jr., Chair, Montgomery County Board of Elections. “Installing ballot drop-off boxes is another step we are taking to ensure ballots are returned to our office by the Election Day deadline. Ballots placed in the secure ballot boxes will be delivered to Voter Services daily and stamped as received.”

#### **2020 Primary Election Secure Ballot Drop Box Locations**

##### **Norristown - One Montgomery Plaza – Walk-up drop-off**

###### **425 Swede Street, Norristown, PA 19401**

The drop-off box is located in the lobby. Free parking is available at the Airy Street parking lot on the corner of Airy and DeKalb Streets. The drop box is accessible daily from 7 a.m. to 8 p.m. through Election Day, June 2 with the exception of Memorial Day, May 25. Memorial Day hours will be from 9 a.m. to noon.

##### **Green Lane - Green Lane Park – Drive-up drop-off**

###### **2144 Snyder Road, Green Lane, PA 18054**

The drop-off box is available from 9 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 2 p.m., Saturday and Sunday with the exception of Memorial Day, May 25 and Election Day, June 2. Memorial Day hours will be from 9 a.m. to noon. Election Day hours will be from 9 a.m. to 8 p.m.

##### **Lansdale - Montgomery County Community Connections Office – Drive-up drop-off**

###### **421 West Main Street, Lansdale, PA 19446**

The drop-off box is available from 9 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 2 p.m. on Saturday and Sunday with the exception of Memorial Day, May 25 and Election Day, June 2. Memorial Day hours will be from 9 a.m. to noon. Election Day hours will be from 9 a.m. to 8 p.m.

**Pottstown - Montgomery County Community College Pottstown Campus – Drive-up drop-off**  
**101 College Drive-South Hall, Pottstown, PA 19464**

The drop-off box is available from 9 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 2 p.m., Saturday and Sunday with the exception of Memorial Day, May 25 and Election Day, June 2. Memorial Day hours will be from 9 a.m. to noon. Election Day hours will be from 9 a.m. to 8 p.m.

**Willow Grove - Eastern Courthouse Annex – Drive-up drop-off**  
**102 North York Road, Willow Grove, PA 19090**

The drop-off box will be available from 9 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 2 p.m., Saturday and Sunday with the exception of Memorial Day, May 25 and Election Day, June 2. Memorial Day hours will be from 9 a.m. to noon. Election Day hours will be from 9 a.m. to 8 p.m.

Before you drop your mail-in ballot into the drop-off box, make sure you place your voted ballot inside the official return envelope, securely seal the official return envelope and sign and date the back of the official return envelope.

The deadline to apply for a mail-in ballot is May 26, but officials are urging voters to apply immediately to ensure adequate turnaround. Mail-in ballots must be received by the Montgomery County Office of Voter Services, or in one of the drop-off boxes by June 2 at 8 p.m. Postmark dates do not apply. You may apply for a mail-in or absentee ballot at [www.votespa.com](http://www.votespa.com).

For more information about the June 2 primary election and where to vote, visit [www.montcopa.org/voterservices](http://www.montcopa.org/voterservices) or call 610.278.3280.

###

# **EXHIBIT C**

# COVID-19 Data for Pennsylvania\*

\* Map, tables, case counts and deaths last updated at 12:00 p.m. on 5/24/2020

Source: Pennsylvania National Electronic Disease Surveillance System (PA-NEDSS) as of 12:00 a.m. on 5/24/2020

Page last updated: 12:00 p.m. on 5/24/2020

## Case Counts, Deaths, and Negatives

<b>Total Cases*</b>	<b>Deaths</b>	<b>Negative**</b>	<b>Recovered***</b>
67,713	5,124	328,382	60%

\* Total case counts include confirmed and probable cases.

\*\* Negative case data only includes negative PCR tests. Negative case data does not include negative antibody tests.

\*\*\* Individuals who have recovered is determined using a calculation, similar to what is being done by several other states. If a case has not been reported as a death, and it is more than 30 days past the date of their first positive test (or onset of symptoms) then an individual is considered recovered.

<b>Confirmed Cases</b>	<b>Probable Case by Definition and High-Risk Exposure</b>	<b>Probable Case by Serology Test and Either Symptoms or High-Risk Exposure</b>
65,906	1,807	531

## Hospital Data

[View hospital data](#) (desktop version)

[View hospital data](#) (mobile version)

## Trajectory Animations

[COVID-19 Trajectory Animations](#)

## Positive Cases by Age Range to Date

Age Range	Percent of Cases*
0-4	< 1%
5-12	< 1%
13-18	2%
19-24	6%
25-49	37%
50-64	25%
65+	29%

\* Percentages may not total 100% due to rounding

## Hospitalization Rates by Age Range to Date

Age Range	Percent of Cases*
0-4	< 1%
5-12	< 1%
13-18	< 1%
19-24	1%
25-49	16%
50-64	26%
65+	57%

\* Percentages may not total 100% due to rounding

## Death Data

**[View COVID-19 death data](#)****County Case Counts to Date**

<b>County</b>	<b>Total Cases</b>	<b>Negatives</b>
Adams	226	2722
Allegheny	1777	26461
Armstrong	58	1119
Beaver	554	3293
Bedford	37	644
Berks	3885	10311
Blair	46	2421
Bradford	44	1323
Bucks	4867	16992
Butler	219	3391
Cambria	57	3220
Cameron	2	118
Carbon	229	2039
Centre	146	1879
Chester	2390	10419
Clarion	29	644
Clearfield	34	943
Clinton	50	517
Columbia	344	1204
Crawford	22	979
Cumberland	592	4235
Dauphin	1099	8910
Delaware	6179	17938
Elk	6	287
Erie	209	3866

Fayette	94	2914
Forest	7	64
Franklin	734	4666
Fulton	14	192
Greene	27	704
Huntingdon	228	748
Indiana	89	1151
Jefferson	7	471
Juniata	95	309
Lackawanna	1491	5523
Lancaster	2854	13987
Lawrence	74	1140
Lebanon	909	4129
Lehigh	3651	12611
Luzerne	2645	9679
Lycoming	158	1996
McKean	11	490
Mercer	104	1338
Mifflin	58	1138
Monroe	1304	5109
Montgomery	6525	30605
Montour	50	3143
Northampton	2911	11832
Northumberland	170	1277
Perry	47	623
Philadelphia	17384	50067
Pike	477	1869
Potter	4	132
Schuylkill	585	4181
Snyder	38	364

Somerset	37	1527
Sullivan	2	84
Susquehanna	96	672
Tioga	16	495
Union	53	988
Venango	8	460
Warren	3	325
Washington	138	3823
Wayne	117	884
Westmoreland	440	8275
Wyoming	33	419
York	924	12103

[View as a clickable county or zip code level map](#)

## Incidence by County

*Incidence is calculated by dividing the current number of confirmed and probable COVID-19 cases reported to the Department by the 2018 county population data available from the Bureau of Health Statistics. The counties are divided into 6 relatively equally-sized groups based on their incidence rate (i.e. sestiles). Cases are determined using a national COVID-19 case definition. There currently is no way to estimate the true number of infected persons. Incidence rates are based on the number of known cases, not the number of true infected persons.*

## Case Counts by Sex to Date

<b>Sex</b>	<b>Positive Cases</b>	<b>Percent of Cases</b>
Female	37,216	55%

Male	29,809	44%
Neither	3	0%
Not reported	685	1%

\* Percentages may not total 100% due to rounding

## Case Counts by Race to Date\*

Race	Positive Cases	Percent of Cases
African American/Black	8136	12%
Asian	914	1%
White	18,069	27%
Other	380	1%
Not reported	40,214	59%

\* 59% of race is not reported. Little data is available on ethnicity.

\*\* Percentages may not total 100% due to rounding

## Case Counts by Region to Date

Region	Positive	Negative	Inconclusive
Northcentral	1007	13402	17
Northeast	12660	50637	140
Northwest	434	11125	19
Southcentral	4835	42840	78
Southeast	43696	154500	906

Southwest	3274	55878	44
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## EpiCurve by Region

*Case counts are displayed by the date that the cases were first reported to the PA-NEDSS surveillance system. Case counts by date of report can vary significantly from day to day for a variety of reasons. In addition to changes due to actual changes in disease incidence, trends are strongly influenced by testing patterns (who gets tested and why), testing availability, lab analysis backlogs, lab reporting delays, new labs joining our electronic laboratory reporting system, mass screenings, etc. Trends need to be sustained for at least 2-3 weeks before any conclusions can be made regarding the progress of the pandemic.*

## COVID-19 Cases Associated with Nursing Homes and Personal Care Homes to Date

This data represents long-term care facilities in Pennsylvania, including Department of Health and Department of Human Services regulated facilities.

[COVID-19 Long-Term Care Facilities Data](#)(updated 5/22/2020 at 3:00 p.m.)

*The LTCF data will be updated on Tuesday, May 26, 2020.*

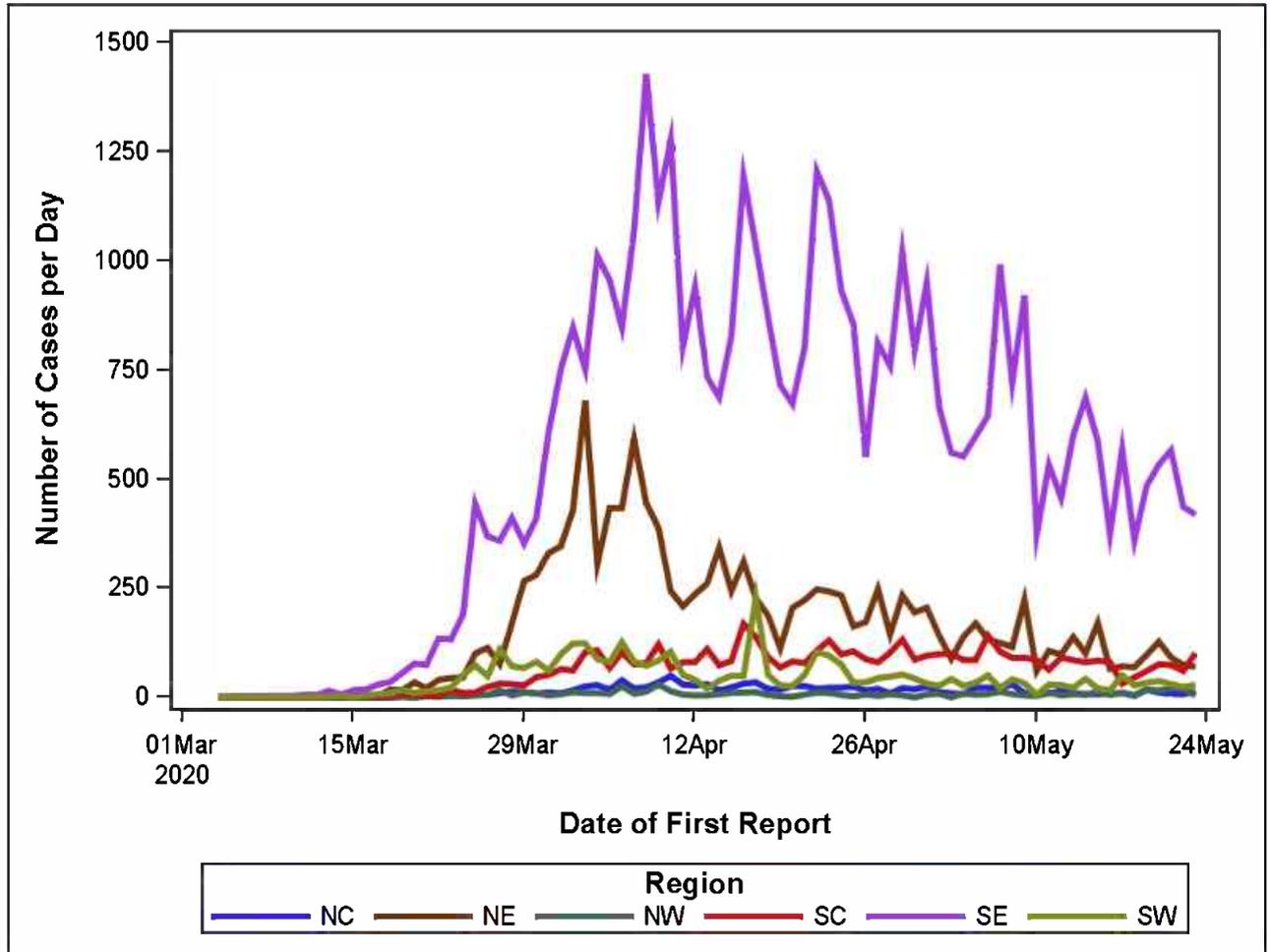
## INCIDENCE BY COUNTY



Cases per 100,000 population

7.6 - 42.5	42.8 - 85.9	87.8 - 122.0
123.3 - 234.1	274.1 - 522.5	636.9 - 1086.3

## EPICURVE BY REGION AND DATE OF FIRST REPORT



# **EXHIBIT D**



# Coronavirus Disease 2019 (COVID-19)

## Recommendations for Election Polling Locations

Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)

Updated March 27, 2020

### Summary of changes:

- Encourage moving election polling locations away from long term care facilities and facilities housing older persons to minimize COVID-19 exposure among older individuals and those with chronic medical conditions.
- Updated EPA COVID Disinfectant link.

## Background

There is much to learn about the novel coronavirus (SARS-CoV-2) that causes [coronavirus disease 2019 \(COVID-19\)](#). Based on what is currently known about SARS-CoV-2 and about similar coronaviruses, spread from person-to-person happens most frequently among close contacts (within about 6 feet). This type of transmission occurs via respiratory droplets. Transmission of SARS-CoV-2 to persons from surfaces contaminated with the virus has not been documented. Transmission of coronavirus in general occurs much more commonly through respiratory droplets than through contact with contaminated surfaces. Current evidence suggests that SARS-CoV-2 may remain viable for hours to days on surfaces made from a variety of materials. Cleaning of visibly dirty surfaces followed by disinfection is a best practice measure for prevention of COVID-19 and other viral respiratory illnesses in election polling locations.

## Purpose

This guidance provides recommendations on the routine cleaning and disinfection of polling location areas and associated voting equipment (e.g., pens, voting machines, computers). It suggests actions that polling station workers can take to reduce the risk of exposure to COVID-19 by limiting the survival of the virus in the environment. This guidance will be updated if additional information becomes available.

### Definitions:

- *Community settings* (e.g. polling locations, households, schools, daycares, businesses) encompass most non-healthcare settings and are visited by the general public.
- *Cleaning* refers to the removal of dirt and impurities including germs from surfaces. Cleaning alone does not kill germs. But by removing them, it decreases the number of germs and therefore any risk of spreading infection.
- *Disinfecting* kills germs on surfaces. Disinfecting works by using chemicals to kill germs on surfaces. This process does not necessarily clean dirty surfaces or remove germs. But killing germs remaining on a surface after cleaning further reduce any risk of spreading infection.

### Actions for elections officials in advance of election day

- **Encourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.**
  - Encourage mail-in methods of voting if allowed in the jurisdiction.
  - Encourage early voting, where voter crowds may be smaller throughout the day. This minimizes the number of individuals a voter may come in contact with.
  - Encourage drive-up voting for eligible voters if allowed in the jurisdiction.
  - Encourage voters planning to vote in-person on election day to arrive at off-peak times. For example, if voter crowds are lighter mid-morning, advertise that in advance to the community.

crowds are higher mid-morning, advertise that in advance to the community.

- Encourage relocating polling places from nursing homes, long-term care facilities, and senior living residences, to minimize COVID-19 exposure among older individuals and those with chronic medical conditions.
- Consider additional social distancing and other measures to protect these individuals during voting.

## Preventive actions polling workers can take

- **Stay at home if you have fever, respiratory symptoms, or believe you are sick**
- **Practice hand hygiene frequently:** wash hands often with soap and water for at least 20 seconds. If soap and water are not readily available, use an alcohol-based hand sanitizer that contains at least 60% alcohol.
- **Practice routine cleaning of frequently touched surfaces:** including tables, doorknobs, light switches, handles, desks, toilets, faucets, sinks, etc.
- **Disinfect surfaces that may be contaminated with germs after cleaning:** A list of products [with EPA-approved emerging viral pathogens claims](#)  is available. Products with EPA-approved emerging viral pathogens claims are expected to be effective against the virus that causes COVID-19 based on data for harder to kill viruses. Follow the manufacturer's instructions for all cleaning and disinfection products (e.g., concentration, application method and contact time, use of personal protective equipment).
- **Clean and disinfect voting-associated equipment (e.g., voting machines, laptops, tablets, keyboards) routinely.** Follow the manufacturer's instructions for all cleaning and disinfection products.
  - Consult with the voting machine manufacturer for guidance on appropriate disinfection products for voting machines and associated electronics.
  - Consider use of wipeable covers for electronics.
  - If no manufacturer guidance is available, consider the use of alcohol-based wipes or spray containing at least 70% alcohol to clean voting machine buttons and touch screens. Dry surfaces thoroughly to avoid pooling of liquids.

## Preventive action polling stations workers can take for themselves and the general public

Based on available data, the most important measures to prevent transmission of viruses in crowded public areas include careful and consistent cleaning of one's hands. Therefore:

- **Ensure bathrooms at the polling station are supplied adequately with soap, water, and drying materials so visitors and staff can wash their hands..**
- **Provide an alcohol-based hand sanitizer with at least 60% alcohol** for use before or after using the voting machine or the final step in the voting process. Consider placing the alcohol-based hand sanitizer in visible, frequently used locations such as registration desks and exits.
- **Incorporate social distancing strategies, as feasible.** Social distancing strategies increase the space between individuals and decrease the frequency of contact among individuals to reduce the risk of spreading a disease. Keeping individuals at least 6 feet apart is ideal based on what is known about COVID-19. If this is not feasible, efforts should be made to keep individuals as far apart as is practical. Feasibility of strategies will depend on the space available in the polling station and the number of voters who arrive at one time. Polling station workers can:
  - Increase distance between voting booths.
  - Limit nonessential visitors. For example, poll workers should be encouraged not to bring children, grandchildren, etc. with them as they work the polls.
  - Remind voters upon arrival to try to leave space between themselves and others. Encourage voters to stay 6 feet apart if feasible. Polling places may provide signs to help voters and workers remember this.
  - Discourage voters and workers from greeting others with physical contact (e.g., handshakes). Include this reminder on signs about social distancing.

## Recommendations for processing mail-in ballots

- Workers handling mail in ballots should practice hand hygiene frequently

- No additional precautions are recommended for storage of ballots

## References

- [Community Mitigation Guidance for COVID-19 Response in the United States: Nonpharmaceutical Interventions for Community Preparedness and Outbreak Response](#)
- [Handwashing: Clean Hands Save Lives](#)
- [Protect Yourself & Your Family](#)

Page last reviewed: March 10, 2020

# **EXHIBIT E**



# April 7, 2020 Absentee Voting Report

May 15, 2020

*Wisconsin Elections Commissioners*

Dean Knudson, chair | Marge Bostelmann | Julie M. Glancey | Ann S. Jacobs | Robert Spindell | Mark L. Thomsen

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*Administrator*  
Meagan Wolfe

The figures above are largely consistent with the percentage of ballots rejected or not returned in recent April elections. Both the ballot rejection and unreturned ballot rates were consistent with or lower than the previous rates. This comparison does not seek to downplay the concerns and experiences reported by voters who had difficulty receiving or returning their ballot or voters who could not meet the witness requirement due to COVID-19 concerns. It does demonstrate the Wisconsin vote by mail system for the April 7, 2020 election performed consistently with its performance in previous comparable elections, but there are still several opportunities for improvements. The State is currently pursuing multiple initiatives that will improve the by mail absentee process prior to the fall 2020 elections.

Table 6.

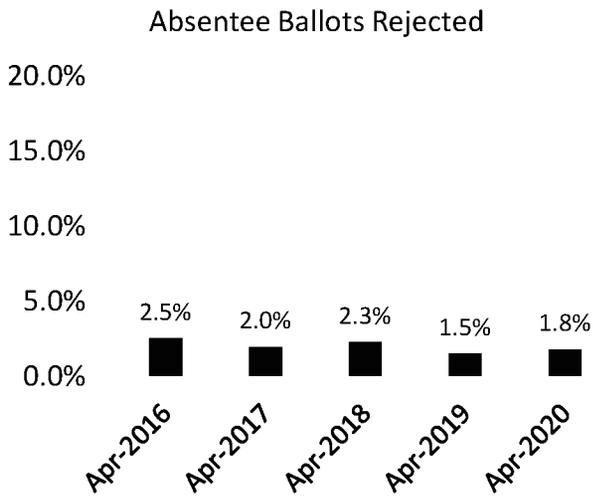
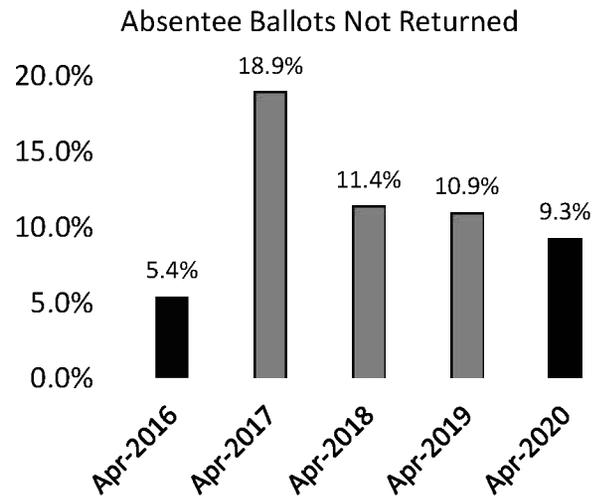


Table 7.



Likewise, most ballots were returned prior to Election Day, but nearly 7% arrived in the window between Election Day and the court ordered deadline of 4:00 p.m. on 4/13/2020. Over 1.1 million of the absentee ballots that were issued for this election were returned in accordance with current Wisconsin state law that requires ballots to be received by 8:00 PM on Election Day in order to be counted. Judge Conley’s extension of the ballot return deadline to 4:00 PM on April 13, 2020 resulted in an additional 79,054 ballots being counted for this election. Local election officials have also reported 2,659 ballots that were returned after the April 13 deadline that were not counted due to their late arrival.

Table 8.

April 2020 Absentee Ballot Return Dates	Absentee Ballot Count	% of Ballots
Total Absentee Ballots Returned	1,182,996	100.00%
Ballots returned before 4/8/2020	1,101,324	93.09%
Ballots returned between 4/8/2020 and 4/13/2020	79,054	6.68%
Ballots returned after 4/13/2020	2,659	0.22%

Additional historical data is attached to this report as Exhibit A - Absentee Voting Data.

# **EXHIBIT F**



1 303. The preliminary injunction issues have been fully briefed and the matter is now ripe  
2 for decision.

3 **I. The Ballot Interference Protection Act.**

4 Except for election officials or United States postal workers, the Ballot Interference  
5 Protection Act (BIPA) restricts who can collect a voter's voted or unvoted ballot. Mont.  
6 Code Ann. § 13-35-703. BIPA permits only caregivers, family members, household  
7 members, or acquaintances to collect ballots, but prohibits them from collecting and  
8 conveying more than six ballots. Mont. Code Ann. § 13-35-703(2) and (3). The BIPA also  
9 requires every caregiver, family member, household member, or acquaintance who  
10 delivers another person's ballot to sign a registry and provide: (1) the individual's name,  
11 address, and phone number; (2) the voter's name and address; and (3) the individual's  
12 relationship to the voter whose ballot is being delivered. Mont. Code Ann. § 13-35-704.  
13 The BIPA imposes a \$500.00 fine for each ballot unlawfully collected. Mont. Code Ann.  
14 § 13-35-705.

15 **II. The Absentee Ballot Election Day Receipt Deadline.**

16 The absentee ballot election day receipt deadline (Receipt Deadline) requires  
17 absentee ballots to be received at a designated election office, polling place, place of  
18 deposit, or by an authorized election official before 8:00 p.m. on election day. Mont. Code  
19 Ann. § 13-13-201(2)(e)(i)-(iv). Absentee ballots received after the 8:00 p.m. election day  
20 deadline are not counted. Mont. Code Ann. § 13-13-201(3); Mont. Code Ann. § 13-13-  
21 211(3); Mont. Code Ann. § 13-19-106(5)(b).  
22  
23  
24  
25  
26  
27

1 **III. Plaintiffs Alleged Constitutional Violations.**

2 Plaintiffs claim that, without furthering any legitimate state interests, the BIPA and  
3 Receipt Deadline significantly burden the right to vote and infringe upon the rights to free  
4 speech, association, and due process. The Plaintiffs argue that the BIPA and Receipt  
5 Deadline violate the fundamental constitutional rights of suffrage, assembly, speech, and  
6 due process under Montana's Constitution. Mont. Const. art. II, § 13, § 6, § 7, and § 17<sup>1</sup>.  
7 Unless enjoined, Plaintiffs assert that the BIPA and Receipt Deadline will make it  
8 significantly more difficult for many Montanans to vote or to have their votes counted.  
9

10 **IV. State's Justifications for the BIPA and Receipt Deadline.**

11 The State argues that the BIPA is necessary to prevent fraud when absentee  
12 ballots are collected and delivered. The State contends that the Receipt Deadline is  
13 necessary to treat absentee voters the same as in person voters and to provide timely,  
14 accurate election results. Because the BIPA and Receipt Deadline are alleged to serve  
15 legitimate and compelling state interests, the State argues that the laws are constitutional.  
16 The State further argues that Plaintiffs have failed to establish a *prima facie* case showing  
17 that a preliminary injunction is necessary.  
18

19 **V. Preliminary Injunction Requirements.**

20 Under Mont. Code Ann. § 27-19-201, a preliminary injunction may be granted:

- 21 (1) when it appears that the applicant is entitled to the relief demanded and  
22 the relief or any part of the relief consists in restraining the commission or  
23 continuance of the act complained of, either for a limited period or  
24 perpetually;  
25 (2) when it appears that the commission or continuance of some act during  
26 the litigation would produce a great or irreparable injury to the applicant;  
(3) when it appears during the litigation that the adverse party is doing or

27 <sup>1</sup> Because of time constraints, the Court will address the Plaintiffs' Article II, Section 13 claim and reserve ruling upon the other alleged constitutional violations at this time.

1 threatens or is about to do or is procuring or suffering to be done some act  
2 in violation of the applicant's rights, respecting the subject of the action, and  
tending to render the judgment ineffectual;

3 (4) when it appears that the adverse party, during the pendency of the  
4 action, threatens or is about to remove or to dispose of the adverse party's  
property with intent to defraud the applicant, an injunction order may be  
granted to restrain the removal or disposition;

5 (5) when it appears that the applicant has applied for an order under the  
6 provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

7 The above subsections are disjunctive, "meaning that findings that satisfy one subsection  
8 are sufficient." *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm'rs of Sweet Grass Cty.*,  
9 2000 MT 147, ¶ 27 (quoting *Stark v. Borner*, 226 Mont. 356, 359, 735 P.2d 314, 317  
10 (1987)). Consequently, only one subsection of Mont. Code Ann. 27-19-201 needs be met  
11 to support the issuance of a preliminary injunction. See *Stark*, 735 P.2d at 317.

12 Additionally, the "grant or denial of injunctive relief is a matter within the broad discretion  
13 of the district court based on applicable findings of fact and conclusions of law." *Weems v.*  
14 *State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276,  
15 ¶ 10).

16  
17 Further, the district court "does not determine the underlying merits of the case in  
18 resolving a request for preliminary injunction." *Weems*, ¶ 18. And "[i]n the context of a  
19 constitutional challenge, an applicant for preliminary injunction need not demonstrate that  
20 the statute is unconstitutional beyond a reasonable doubt, but 'must establish a *prima*  
21 *facie* case of a violation of its rights under' the Constitution." *Id.* (quoting *City of Billings v.*  
22 *City. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251  
23 (1997)). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to  
24 further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie*, *Black's Law*  
25 *Dictionary* (10th ed. 2014)). Because Plaintiffs have moved for a preliminary injunction  
26  
27

1 based on constitutional challenges, they must establish a *prima facie* case of a  
2 constitutional violation.

3 Section 13 of Montana's Constitution states: "All elections shall be free and open,  
4 and no power, civil or military, shall at any time interfere to prevent the free exercise of the  
5 right of suffrage." Mont. Const. art. II, § 13. The right of suffrage is a fundamental  
6 right. See e.g. *State v. Riggs*, 2005 MT 124, ¶ 47 (citations omitted) ("A right is  
7 'fundamental' under Montana's Constitution if the right ... is found in the Declaration of  
8 Rights.")  
9

10 Because voting rights are fundamental, statutes like the BIPA and the Receipt  
11 Deadline that allegedly infringe upon the right to vote "must be strictly scrutinized and can  
12 only survive scrutiny if the State establishes a compelling state interest and that its action  
13 is closely tailored to effectuate that interest and is the least onerous path that can be  
14 taken to achieve the State's objective." *Montana Env'tl. Info. Ctr. v. Dep't. of Env'tl. Quality*,  
15 1999 MT 248, ¶ 63; *Finke v. State ex. Rel. McGrath*, 2003 MT 48, ¶ 15. The State must  
16 "prove the compelling interest by competent evidence." *Wadsworth v. State*, 275 Mont.  
17 287, 911 P.2d 1165, 1174 (1996). Merely alleging that a compelling interest exists is not  
18 enough to justify interference with the exercise of a fundamental right. *Id.*  
19  
20

## 21 VI. Findings of Fact.

22 1. In support of their Motion for Preliminary Injunction, the Plaintiffs submitted  
23 the following Affidavits:

- 24 a. Affidavit of Kenneth Mayer, Ph.D.  
25 - expert opinions on voter suppression effects of BIPA and Receipt  
26 Deadline;  
27

- 1 b. Affidavit of Trent Bolger  
2 - Montana Democratic Party Get Out the Vote (GOTV), absentee  
3 ballot collection, Receipt Deadline;
- 4 c. Affidavit of Beth Brenneman  
5 - Disability Rights of Montana, absentee ballot collection, Receipt  
6 Deadline;
- 7 d. Affidavit of Shelbi Dantic  
8 - Montana Conservation Voters, absentee ballot collection,  
9 Receipt Deadline;
- 10 e. Affidavit of Robyn Driscoll  
11 - Chair, Montana Democratic Party, GOTV, absentee ballot collection;
- 12 f. Affidavit of Mary Glueckert  
13 - College student, MontPIRG, ASUM, student voting, absentee  
14 ballot collection;
- 15 g. Affidavit of Denver Henderson  
16 - Missoula County Election Advisory Committee, BIPA, absentee  
17 ballot collection, Receipt Deadline, COVID-19;
- 18 h. Affidavit of Sophie Moon  
19 - MontPIRG, student voting, Receipt Deadline, working class voters,  
20 minority voters;
- 21 i. Affidavit of Linda Stoll  
22 - Montana Association of County Clerk and Recorders; BIPA,  
23 absentee ballot collection, absentee ballot tracking, absentee  
24 ballot verification, proposed BIPA amendments, Native American  
25 voting;
- 26 j. Affidavit of Mary Hall  
27 - Chief election official for Thurston County, Washington; postmark  
deadline, counting postmarked ballots after Election Day;
- k. Affidavit of Marci McLean  
- Executive director of Montana Native Vote and Western Native  
Voice; GOTV for Indigenous voters on reservations in Montana  
BIPA.

1           2.       The Court finds that, without exception, all Affidavits were verified and that  
2 the material allegations in each Affidavit were made positively and not upon information  
3 and belief.

4           3.       The Court finds that, for the purposes of determining whether the Plaintiffs  
5 have presented a *prima facie* case for a preliminary injunction, the statements made by  
6 the Affiants are credible and based upon extensive personal experience. The Court further  
7 finds that the expert opinions expressed by Dr. Mayer are credible and persuasive. Dr.  
8 Mayer has extensive education, training, and experience in the field of election  
9 administration, the impact of direct and indirect costs<sup>2</sup> on voter turnout, and the  
10 relationship between socioeconomic and educational status on the ability to absorb voting  
11 costs<sup>3</sup>. The methodology Dr. Mayer used is widely recognized and accepted in his field.  
12 Dr. Mayer's expert testimony has been accepted by both state and federal courts<sup>4</sup>. His  
13 research has been published in many peer reviewed journals<sup>5</sup>. The Court finds that the  
14 State has not challenged Dr. Mayer's opinions.

15           4.       Based upon Plaintiffs' Affidavits, the Court finds that the BIPA and Receipt  
16 Deadline will significantly suppress voter turnout by disproportionately burdening voters  
17 who are Native American<sup>6</sup>, elderly<sup>7</sup>, disabled<sup>8</sup>, poor<sup>9</sup>, parents working low-wage jobs<sup>10</sup>,  
18 college students<sup>11</sup>, first-time voters<sup>12</sup>, and voters who have historically relied on GOTV and  
19  
20  
21  
22

23 <sup>2</sup> Includes administrative burdens and compliance costs.

24 <sup>3</sup> Affidavit of Dr. Kenneth Mayer at 2-3

25 <sup>4</sup> *Id.*

26 <sup>5</sup> *Id.*

27 <sup>6</sup> Affidavit of Linda Stoll

<sup>7</sup> Affidavit of Trent Badger and Affidavit of Robyn Driscoll

<sup>8</sup> Affidavit of Beth Brenneman

<sup>9</sup> Affidavit of Robyn Driscoll and Affidavit of Mary Glueckert

<sup>10</sup> Affidavit of Shelbi Dantic

<sup>11</sup> Affidavit of Mary Glueckert and Affidavit of Sophie Moon

<sup>12</sup> Affidavit of Mary Glueckert

1 ballot collection services like those provided by Western Native Voice<sup>13</sup>, MontPIRG<sup>14</sup>,  
2 Disability Rights Montana<sup>15</sup>, Forward Montana<sup>16</sup>, Montana Conservation Voters<sup>17</sup>,  
3 unionized labor<sup>18</sup>, and the Montana Democratic Party<sup>19</sup>.

4  
5 5. The Court further finds that, in opposing the Plaintiffs' Motion for Preliminary  
6 Injunction, the State failed to present any evidence to dispute the Plaintiffs' evidence (1)  
7 that the BIPA and Receipt Deadline statutes disproportionately burden the voters identified  
8 in paragraph 4 above or (2) that the statutes significantly suppress voter turnout by making  
9 voting more burdensome and costly for absentee voters.

10  
11 6. The Court finds that the BIPA and Receipt Deadline statutes will only  
12 exacerbate voter suppression because of the COVID-19 pandemic. Requiring absentee  
13 voters to line up, fill out a registry form, and be quizzed by an election official before  
14 delivering someone else's ballot violates the social distancing required to prevent the  
15 unnecessary spread of COVID-19. Because a significant percentage of absentee voters  
16 deliver their ballots shortly before or on election day, long lines and crowded election  
17 offices will be commonplace<sup>20</sup>. The BIPA's registry requirement eliminated the previous  
18 use of secure ballot drop boxes that election officials could place at various sites  
19 throughout a community or county to make absentee voting easy, convenient, and safe.  
20 The COVID-19 pandemic will only increase absentee voting, thereby amplifying the voter  
21 suppression effects of the BIPA and Receipt Deadline<sup>21</sup>.

22  
23  
24 <sup>13</sup> Affidavit of Dr. Kenneth Mayer  
25 <sup>14</sup> Affidavit of Mary Glueckert  
26 <sup>15</sup> Affidavit of Beth Brenneman  
27 <sup>16</sup> Affidavit of Dr. Kenneth Mayer  
<sup>17</sup> Declaration of Shelbi Dantic  
<sup>18</sup> Affidavit of Denver Henderson  
<sup>19</sup> Affidavit of Dr. Kenneth Mayer  
<sup>20</sup> Affidavit of Dr. Kenneth Mayer  
<sup>21</sup> *Id.*

1           7.       Based upon Dr. Mayer's Affidavit, the Court finds that there has never been  
2 a documented case of absentee ballot collection fraud in Montana.

3           8.       The Court finds that the Receipt Deadline disproportionately burdens voters  
4 who mail their absentee ballots when compared to voters who vote in person. The Receipt  
5 Deadline requires mailed absentee ballots to be received by 8:00 p.m. on election day. If a  
6 mailed absentee ballot is not received by 8:00 p.m. on election day, it is not counted. The  
7 Receipt Deadline deadline disenfranchises voters who vote before election day, but whose  
8 ballots are not delivered by the United States Postal Service until after election day.  
9 Delivery times can vary as much as two weeks in Montana depending upon a voter's  
10 location<sup>22</sup>. Even if living in the same city, delivery times can vary from one to seven days.

11           9.       The Court finds that the disparity and inconsistency of how long it takes to  
12 deliver a mailed absentee ballot significantly burdens absentee voters (1) because they  
13 must vote at least a week before the election to have a good chance of having their vote  
14 counted; (2) because they have less time and information to decide how to vote; and (3)  
15 because there is no guarantee that, even by voting a week early, their ballot will be  
16 delivered in time to be counted.

17           10.      The Court also finds that there is considerable confusion and  
18 misunderstanding among voters about when they must vote by mail. Many believe, based  
19 upon filing income tax returns and paying property taxes, that their vote will be counted if  
20 postmarked on or before election day. Others reasonably believe that their mailed ballot  
21 will be delivered expeditiously if mailed a day or two before election day, especially if  
22 mailed to their local election office.

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<sup>22</sup> *Id.*

1           11.     The Court finds that this misunderstanding and confusion disproportionately  
2 burdens first time voters, persons with less education, and persons who have historically  
3 relied on ballot collection services.

4           12.     The Court finds that, during the current 2020 election cycle, the combined  
5 effects of the BIPA and Receipt Deadline will cause thousands of Montanans to not vote or  
6 will result in their votes not being counted.

7           13.     Though the State alleges that the BIPA promotes the State's compelling  
8 interest in preventing voting fraud, the Court finds that the State has failed to present any  
9 evidence of absentee ballot collection fraud in Montana.

10           14.     The Court finds that the BIPA serves no legitimate purpose: it does not  
11 enhance the security or integrity of absentee voting; it does not reduce the costs or  
12 burdens of conducting elections; it does not make absentee voting easier or more efficient;  
13 it does not reduce confusion about absentee voting requirements; and it does not increase  
14 voter turnout.

15           15.     The Court finds that not a single election official in Montana supported the  
16 BIPA in legislative hearings; nor has the State presented any evidence from any election  
17 official that the BIPA: (1) will promote the integrity, security or efficiency of absentee voting;  
18 (2) will reduce election costs or burdens; and (3) will increase voter turnout. The evidence  
19 from election officials has been just the opposite. In fact, one election official from Cascade  
20 County who testified before the State Administration and Veteran Affairs Committee on  
21 February 27, 2020 characterized the BIPA as the "Voter Suppression Act of 2018."  
22 Plaintiffs' Ex.3 at p. 24.

1           16.     The Court finds that the State also failed to present any evidence that the  
2 Receipt Deadline promotes a compelling state interest.

3           17.     The Court finds that the Receipt Deadline fails to treat in person and  
4 absentee ballot voters uniformly. As long as in person voters are in line by 8:00 p.m. on  
5 election day, their ballots are counted no matter how many hours after the 8:00 p.m.  
6 deadline they actually vote. Not so with absentee voters, whose votes will not be counted if  
7 received after the 8:00 p.m. deadline even if they voted days before the deadline.

8           18.     While the State has a compelling interest in accurately tabulating and  
9 reporting election results in a timely fashion, the State failed to present any evidence that  
10 the Receipt Deadline furthers that interest. The State does not limit the time period for  
11 certifying election results; Montana counts federal write-in ballots for military and overseas  
12 votes until the Monday after election day and provisional ballots are not even counted until  
13 six days after election day. The State failed to present any evidence that using a postmark  
14 deadline, where all mailed ballots are counted if postmarked on or before election day and  
15 received by the same deadline for federal write-in ballots for military and overseas voters,  
16 would frustrate the State's ability to timely certify election results. The Court finds that, by  
17 using a postmark deadline, the State can accurately and timely certify election results  
18 without disenfranchising the thousands of eligible voters whose ballots are now ignored  
19 under the Receipt Deadline.

20  
21  
22  
23 **VII.    Conclusions of Law.**

24           1.     The Plaintiffs have satisfied their burden of presenting a *prima facie* case  
25 through credible and persuasive evidence that the BIPA and Receipt Deadline statutes  
26  
27

1 | burden and interfere with the fundamental right to vote guaranteed by article II, section 13  
2 | of Montana's Constitution.

3 |         2.       The State has failed to demonstrate through competent evidence that there  
4 | is any compelling state interest that warrants the burdens and interference on the right to  
5 | vote imposed by the BIPA and Receipt Deadline statutes.  
6 |

7 |         3.       If a preliminary injunction is not granted, the BIPA and Receipt Deadline  
8 | statutes will cause irreparable harm to thousands of Montana voters by preventing  
9 | absentee ballot voters from voting or by disenfranchising those whose absentee ballots  
10 | are received after election day.

11 |         4.       This Court concludes that the BIPA and Receipt Deadline statutes are  
12 | subject to strict scrutiny and that the State must demonstrate through competent evidence  
13 | that the statutes further compelling state interests. This Court's decision to grant a  
14 | preliminary injunction, however, would not change even under the balancing test  
15 | advocated by the State, i.e. balancing the burdens the statutes impose against the  
16 | interests the state advances for burdening voting rights. The Court has found that the BIPA  
17 | and Receipt Deadline statutes advance no legitimate state interests, yet place significant  
18 | burdens on the fundamental right to vote. The State would not prevail even under the  
19 | balancing test it advocates.  
20 |

21 |         5.       Based upon the evidence submitted thus far, the Court concludes that the  
22 | Plaintiffs are likely to prevail on the merits and would be entitled to a permanent injunction  
23 | to enjoin the enforcement of the BIPA and Receipt Deadlines statutes.  
24 |

25 |         6.       The Court concludes that, pursuant to Mont. Code Ann. § 27-19-201(1) and  
26 | (2), a preliminary injunction should issue enjoining the enforcement of the BIPA and  
27 |

1 Receipt Deadline statutes because the BIPA and Receipt Deadline statutes violate the  
2 right to vote. The Court reserves ruling upon whether these statutes also violate additional  
3 constitutional rights as Plaintiffs allege.

4 **VIII. Memorandum.**

5  
6 While not essential to the Court's Findings of Fact and Conclusions of Law, the  
7 Court will address the additional arguments asserted by the State.

8 **1. Plaintiffs' delay in seeking a preliminary injunction.**

9 The State argues that Plaintiffs' preliminary injunction motion should be denied  
10 because Plaintiffs' delay in seeking a preliminary injunction until just before the June 2  
11 primary election undermines their claim of irreparable harm. Def.'s Resp. 2. In Montana,  
12 the right to vote is a fundamental right guaranteed by Montana's Constitution. *State v.*  
13 *Riggs*, 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm  
14 for the purpose of determining whether a preliminary injunction should be issued." *Mont.*  
15 *Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15 (citing *Elrod v. Burns*, 427 U.S. 347,  
16 373 (1976)). As set forth above, the Plaintiffs have shown the BIPA and the Receipt  
17 Deadline violate Montanans' constitutional right to vote. The Plaintiffs have demonstrated  
18 irreparable harm for the purposes of determining whether a preliminary injunction should  
19 be issued.

20  
21  
22 The State also argues that Plaintiffs should be estopped from complaining about  
23 irreparable harm due to their delay in bringing the case. Def.'s Resp. 2. The cases the  
24 State cites to support its argument, however, are inapplicable here because those courts  
25 were faced with determining irreparable injury for copyright, trademark, and antitrust and  
26 trade violations, not constitutional violations. Def.'s Resp. 2-3 (citing *Oakland Tribune, Inc.*  
27

1 v. *Chronical Publ'g Co.*, 762 F.2d 1374, 1377 (9<sup>th</sup> Cir. 1985); *Garcia v. Google, Inc.* 768  
2 F.3d 733, 746 (9<sup>th</sup> Cir. 2015); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2<sup>nd</sup> Cir.  
3 1985)). The Plaintiffs have shown irreparable harm per se by presenting a *prima facie*  
4 case that the BIPA and Receipt Deadline statutes violate Montanans' constitutional right  
5 to vote.  
6

## 7 2. Timing of preliminary injunction.

8 The State also argues that the U.S. Supreme Court has "repeatedly emphasized"  
9 its disfavor of altering election rules by injunction on the eve of an election because such  
10 orders can result in "voter confusion and consequent incentive to remain away from the  
11 polls." Def.'s Resp. 3 (quoting *Rep. Nat'l Comm. V. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452,  
12 453-54 (2020) (*pur curiam*); *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). However, the U.S.  
13 Supreme Court explained:  
14

15 [I]mportantly, in their preliminary injunction motions, the plaintiffs did not ask  
16 the District Court allow ballots mailed and postmarked after election day . . .  
17 be counted . . . [t]hat is a critical point in the case . . . the District Court  
18 unilaterally ordered absentee ballots mailed and postmarked after election  
19 day . . . still be counted . . . [e]xtending the date by which ballots may be  
20 cast by voters—not just received by the municipal clerks but cast by  
21 voters—for an additional six days after the scheduled election day  
22 fundamentally alters the nature of the election.

23 *Rep. Nat'l Comm.* 206 L. Ed. 2d 452 at 1206-7.

24 *Rep. Nat'l Comm.* is not applicable here for several reasons. First, the relief sought  
25 by the Plaintiffs here is the relief granted by this Court. Second, this Court is not altering  
26 the "date by which ballots may be cast by voters," but rather whether absentee ballots  
27 postmarked on or before election day can be counted. The preliminary injunction does not  
"fundamentally alter the nature of the election". *Id.* Third, the injunction here will not result  
in voter confusion nor will it disenfranchise voters. Instead, the Court's preliminary

1 injunction will mitigate the voter suppression effects of the BIPA and Receipt Deadline  
2 statutes. Specifically, those absentee ballots received by the election office after the  
3 Receipt Deadline and those delivered by persons outside the statutory exceptions in  
4 BIPA will now be counted. Because the preliminary injunction granted here does not  
5 “fundamentally alter the nature of the election” or result in voter confusion or  
6 disenfranchisement, the State’s reliance on *Rep. Nat’l Comm* is misplaced. *Id.*

8 **3. BIPA’s passage by referendum.**

9 The State next argues that because the BIPA was passed by Montana voters by a  
10 wide majority, the referendum was a “demonstration of a compelling state interest.” Def.’s  
11 Resp. at 6 (citing *Montana Auto. Ass’n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303  
12 (1981)). In *Montana Auto. Ass’n*, the Montana Supreme Court stated that “the statewide  
13 vote on I-85 is a demonstration of a compelling state interest in the enactment of I-85.” *Id.*  
14 However, the Court also declared portions of the initiative unconstitutional. *Id.* While the  
15 Montana Supreme Court has recognized that a statewide initiative passed by Montana  
16 voters can indicate a compelling state interest, initiatives must still pass constitutional  
17 muster. Whether enacted by the legislature or by voter referendum, statutes cannot  
18 violate the Constitution. The State’s argument that the BIPA’s enactment by referendum  
19 shields the BIPA from constitutional scrutiny is mistaken.

22 **4. Voter fraud in other states.**

23 The State argues that voter fraud in other states constitutes a compelling state  
24 interest for adopting the BIPA. The State contends that Montana “need not wait for  
25 evidence of fraud [in Montana] to justify preventative measures.” Def.’s Resp. at 7. The  
26 State’s argument ignores the Plaintiffs’ evidence: (1) that the BIPA targets **non-fraudulent**  
27

1 absentee ballot collection in Montana; (2) that Montana already has a comprehensive set  
2 of statutes that prohibit and criminalize fraudulent voting activities, Mont. Code Ann. § 13-  
3 35-101 *et seq.*; and (3) that while the BIPA suppresses voting, it does nothing to advance  
4 the integrity or security of Montana elections. The State failed to present any evidence that  
5 Montana's pre-BIPA statutory scheme for preventing voter fraud would be insufficient to  
6 deter fraudulent absentee ballot collection practices. To put in perspective the success of  
7 Montana's pre-BIPA statutes prohibiting voter fraud, for the decade from 2006 through  
8 2016, there has not been a single case of ballot collection fraud even though voters cast  
9 7,079,953 absentee or mail ballots in Montana.<sup>23</sup>

11 For those reasons, the State's reliance on the Morley blog-posting entitled "Election  
12 Modifications to Avoid During the Covid-19 Pandemic," Lawfare (Apr. 17, 2020), is  
13 misplaced. Morley warns that elections officials should avoid adopting new election  
14 strategies in response to the Covid-19 epidemic that may create unforeseen problems with  
15 election administration and security. Morley identifies one such strategy as authorizing  
16 absentee ballot collection. Morley advises that "election officials should reject ... the use of  
17 third-party 'designated persons' – frequently referred to as 'ballot harvesters' – to collect  
18 absentee ballots from voters (except in jurisdictions where state law expressly authorizes  
19 their use)." Morley recommends that, "[e]lection officials should not expand the use of  
20 third-party ballot harvesting, particularly as a response to the pandemic." Morley's  
21 concerns do not support the BIPA. The BIPA was not enacted in response to COVID-19;  
22 the BIPA targets non-fraudulent absentee ballot collection; and Montana has permitted  
23  
24  
25  
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27

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<sup>23</sup> Affidavit of Dr. Kenneth Mayer

1 third-party absentee ballot collection for many years without a single case of fraud being  
2 reported.

3 Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

4 **IT IS HEREBY ORDERED:**

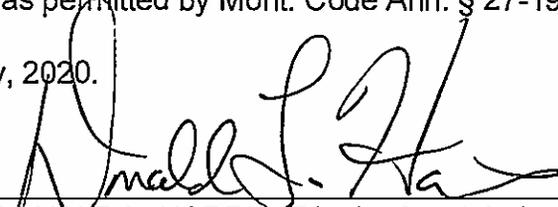
5 1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED**;

6 2. The Defendant and his agents, officers, employees, successors, and all  
7 persons acting in concert with each or any of them are **IMMEDIATELY** restrained and  
8 prohibited from enforcing the provisions of the Ballot Interference Prevention Act, Mont.  
9 Code Ann. § 13-35-701 *et seq.* and the election receipt deadline for absentee ballots set  
10 forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont.  
11 Code Ann. § 13-19-106(5)(b) pending resolution of the Plaintiffs' request that the  
12 Defendant be permanently enjoined from enforcing the statutes cited above;

13 3. All absentee ballots postmarked on or before election day shall be counted,  
14 if otherwise valid, provided such ballots are received by the deadline for federal write-in  
15 ballots for military and overseas voters; and

16 4. The Court waives the requirement that the Plaintiffs post a security bond for  
17 the payment of costs and damages as permitted by Mont. Code Ann. § 27-19-306(1)(b)(ii).

18 DATED this 22<sup>nd</sup> day of May, 2020.

19   
20 \_\_\_\_\_  
21 DONALD L. HARRIS, District Court Judge

22 cc: Peter M. (Mike) Meloy  
23 Matthew Gordon  
24 J. Stuart Segrest, Asst. A.G.  
25 Aislinn W. Brown, Asst. A.G.  
26 Hannah Tokerud, Asst. A.G.

# **EXHIBIT G**

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**IN THE SUPREME COURT OF PENNSYLVANIA**

---

DISABILITY RIGHTS PENNSYLVANIA;  
SENIORLAW CENTER; SOUTHEAST ASIAN  
MUTUAL ASSISTANCE ASSOCIATIONS  
COALITION, INC. (SEAMAAC); SUZANNE ERB;  
THE BARRISTERS' ASSOCIATION OF  
PHILADELPHIA,

Petitioners,

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.

No. 83 MM 2020

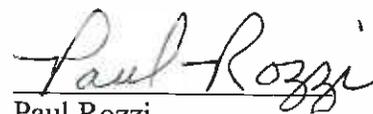
**DECLARATION OF PAUL ROZZI**

I, Paul Rozzi, hereby declare based on my personal knowledge the following:

1. I am the president of the Pennsylvania State Association of Letter Carriers, a position I have held since Sept. 23, 2016.
2. I served as a letter carrier with the U.S. Postal Service in Pennsylvania for over 32 years, until Dec. 31, 2016.
3. When a Pennsylvania voter puts his or her completed ballot in the mail, the ballot will go first to a U.S. Postal Service processing plant, where it will get processed, and then the ballot will be sent to its destination.

4. This process is an overnight process at minimum. If a ballot arrives at its destination by the day after Election Day, it necessarily was placed in the mail by the voter by 8 p.m. on Election Day.
5. All statements in this Declaration are true and correct to the best of my knowledge, information and belief. I understand that my statements are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Date: May 3, 2020



Paul Rozzi  
North Huntingdon, Pa.