

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

NO. 133 MM 2020

**PENNSYLVANIA DEMOCRATIC PARTY, NILOFER NINA AHMAD,
DANILO BURGOS, AUSTIN DAVIS, DWIGHT EVANS, ISABELLA
FITZGERALD, EDWARD GAINNEY, MANUEL M. GUZMAN, JR.,
JORDAN A. HARRIS, ARTHUR HAYWOOD, MALCOLM KENYATTA,
PATTY H. KIM, STEPHEN KINSEY, PETER SCHWEYER, SHARIF
STREET, and ANTHONY H. WILLIAMS**

Petitioners

v.

**KATHY BOOCKVAR, in her capacity as Secretary of the Commonwealth of
Pennsylvania, and ALL 67 COUNTY BOARDS OF ELECTIONS,
Respondents**

**Brief of Pennsylvania Democratic Party, Nilofer Nina Ahmad, Danilo
Burgos, Austin Davis, Dwight Evans, Isabella Fitzgerald, Edward Gainey,
Manuel M. Guzman, Jordan Harris, Arthur Haywood, Malcolm Kenyatta,
Patty H. Kim, Stephen Kinsey, Peter Schweyer, Sharif Street, and Anthony
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I. INTRODUCTION

Elections shall be free and equal; and no power, civil or military, shall at anytime interfere to prevent the free exercise of the right of suffrage

This case tests the bedrock principle of suffrage that the right to vote for all citizens is sacrosanct. Pennsylvania courts have long breathed life into the Free and Equal Elections Clause by liberally construing administrative requirements to shield voters from disenfranchisement. The Commonwealth's new bipartisan and prescient no-excuse mail voting law, enacted to ease the voting process and expand the electoral franchise, is now under assault from the legal chicanery that various intervening parties and other litigants have deployed as part of a nationwide attack on voting rights during a time of enormous health and administrative challenges presented by the unimaginable global pandemic.

Petitioners here commenced this action to protect the right to vote for all Pennsylvanians and to stop the assured disenfranchisement of hundreds of thousands of Pennsylvania voters in the upcoming General Election. Petitioners ask this Court to direct a resolution that upholds the Commonwealth's core Constitutional principles of suffrage; ensures a transparent and fair election; and permits all qualified electors to vote safely and securely with assurance that their votes will count.

Act 77 of 2019 is the first major reform to the Election Code in over a decade and this case presents the Court with two different sets of issues.

First, the Petitioners ask the Court to resolve three questions that have arisen due to differing interpretations of the Act 77 revisions to the Election Code in the run up to and the aftermath of the June 2 Primary Election. These questions are presented under the Declaratory Judgment Act.

Second, the Petitioners ask the Court to resolve as-applied challenges to the Election Code's deadline for ballot receipt and the exponential increase in rejected ballots, and the constitutional questions of whether the challenges of the "imperfect storm" under which the General Election will occur implicate the Pennsylvania Constitution's Free and Fair Elections Clause.

The pandemic has precipitated an unanticipated demand for mail-in ballots—with more than 1.8 million requests for mail-in ballots in the Primary Election. That demand overwhelmed, and will again in November overwhelm, the resources and infrastructure in place to handle the demand, resulting in most of the county Boards missing deadlines to deliver ballots and, as a result, voters not having sufficient time to vote. Exacerbating these challenges, the United States Postal Service ("USPS") has recently warned the Commonwealth that delays in mail delivery pose a significant risk that certain voters, who timely request an absentee or mail-in ballot, "will not have sufficient time to complete and mail the completed ballot[s] back to

election officials in time for it to arrive by [Pennsylvania’s] return deadline.” Further, many government offices, including those that assist voters, remain closed to the public due to the pandemic, leaving many voters without reasonable access to these normal channels of assistance. Under these unusual circumstances, the Election Code’s ballot received-by deadline runs headlong into this toxic brew of election administration obstacles – none of which are the fault of the electors – and violates the Free and Fair Elections Clause. The Secretary of the Commonwealth (“Secretary”) acknowledges that the statutory scheme fails to meet this crisis. What remains unresolved is the necessary remedy.

Petitioners seek two principle¹ remedies:

(i) A 7-day extension of the “ballot received-by” deadline – until the existing federal deadline for overseas and military voters on November 10, 2020 – provided that the ballot is mailed by 8:00 p.m. on Election Day; and

(ii) A directive to the County Boards of Elections (“Boards”), requiring each Board to contact voters when the Board becomes aware of facial defects on the outer envelopes of an individual voter’s mail-in or absentee ballot to give the voter an opportunity to cure the deficiency before that deadline.²

¹ Although Petitioners continue to seek the injunctive relief as originally proposed, Petitioners are aware that some counties are making plans to alternatively address some of the issues raised. As discussed more fully below, Petitioners would welcome proposals from Respondents for alternative Court-ordered relief as a means of allowing counties to fairly and promptly administer the election in a manner that is reasonably uniform and still reflects the differing geographies, populations, and other factors across the Commonwealth’s 67 counties.

² Petitioners incorporate by reference the arguments raised in their Omnibus Memorandum of Law in Opposition to Preliminary Objections of Various County Boards of Elections and their Answers to New Matter Petitioners filed on August 27, 2020. **Exs. A and B.**

II. STATEMENT OF JURISDICTION

This Court has exercised extraordinary jurisdiction over this matter pursuant to its order of September 1, 2020.

III. STATEMENT OF QUESTIONS INVOLVED

A. Whether Section 1306-D of Act 77 (25 Pa. C.S. § 3150.16(a) and 25 Pa. C.S. § 3146.6(a)) requires Boards to clothe and count absentee and mail-in ballots that do not include a Privacy Envelope.

Suggested Answer: Yes.

B. Whether Section 1306-D of Act 77 (25 Pa. C.S. § 3150.16(a) and 25 Pa. C.S. § 3146.6(a)) permits each Board to evaluate the needs of its county to establish, if necessary, additional Board processes, locations, and facilities to facilitate the expedient return of absentee and mail-in ballots.

Suggested Answer: Yes.

C. Whether the Election Code's poll watcher residency requirement (25 P.S. § 2687(b)) is consistent with the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

Suggested Answer: Yes.

D. Whether the Commonwealth can comply with the timelines in Act 77 in the context of the pandemic and the challenges of the Postal Service in a manner that comports with a Free and Equal Elections Clause of the Pennsylvania Constitution.

Suggested Answer: No.

E. To ensure compliance with the Free and Equal Elections Clause in the Pennsylvania Constitution, whether Boards must be required to contact voters whose mail-in or absentee ballots contain facial defects on the outer envelopes to give those voters an opportunity to cure any facial defect before an Board may disenfranchise the elector.

Suggested Answer: Yes.

IV. STATEMENT OF THE CASE

A. Relevant Provisions of the Election Code, as Amended by Act 77

The General Assembly enacted Act 77 in October 2019 to permit no-excuse mail-in voting for all qualified electors. 25 Pa. C.S. §§ 3150.11-3150.17. Under the Election Code, as revised by Act 77, to vote by mail or absentee ballot, an elector begins the process by applying for a ballot. *See* 25 Pa. C.S. § 3150.12a(a). The mail-in ballot application requires electors to include, among other things, proof of identity, their phone number and email address. **Ex. C**, Application for Mail-In Ballot. The voter contact information is tracked in the SURE system, accessible to each Board, and can be automated for further responses by the Commonwealth and/or individual Boards.³ Boards must receive completed applications for mail-in ballots no later than seven days before an election. 25 Pa. C.S. § 3150.12a(a).

If a voter submits an application and the county Board determines that the voter meets the requirements for an absentee ballot or a mail-in ballot, the county Board sends to the voter a ballot, an envelope marked “Official Election Ballot” (a “Privacy Envelope”), and a second larger envelope. *See* 25 Pa. C.S. §§ 3146.2a(a.3)(3), 3150.15, 3150.16. If a county Board does not approve an application for an official mail-in ballot, it must notify the elector immediately with the Board’s statement of the reasons for disapproval. 25 Pa. C.S. § 3150.12b(c). For

³ *See* www.pavoterservices.pa.gov/pages/sureportal/home.aspx.

applicants who do not provide proof of identification or whose identification the Board cannot verify, the Board sends a notice with the mail-in ballot that directs the voter to provide “proof of identification with the mail-in ballot” and notifies the voter that if identification is not provided, “the ballot will not be counted.” *Id.*

Once a voter receives a ballot, the voter is then instructed to:

In secret, proceed to mark the ballot only in black lead pencil, indelible pencil or blue, black or blue-black ink, in fountain pen or ball point pen, and then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed “Official Election Ballot.” This envelop shall be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector’s county board and the local election of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 Pa. C.S. § 3150.16(a); *see also* 25 Pa. C.S. § 3146.6(a).

Act 77 expressly bars counting of an absentee or mail-in ballot that has “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference” on the inner secrecy envelope (the “Privacy Envelope”). 25 Pa. C.S. § 3146.8(g)(4)(i)-(iv).

Act 77 does not contain similar language to address so-called “naked ballots” –those instances where an elector has neglected to use the Privacy Envelope. Neither Act 77 nor any other provision of the Election Code includes any language that

would empower a Board to exclude a ballot if a voter has neglected to use a Privacy Envelope. 25 Pa. C.S. §§ 3150.16(a); 3146.6(a).

By contrast, the Election Code treats provisional ballots—paper ballots cast in-person when there are questions or concerns regarding a voter’s eligibility—differently than mail-in or absentee ballots. *See* 25 Pa. C.S. § 3050(a.4)(5)(ii)(C).

After completion of an absentee or mail-in ballot, Act 77 requires voters to return their ballots to their “county board of election” by 8 p.m. on Election Day. Act 77 § 1306-D(a); 25 Pa. C.S. § 3146.6(a), 3146.8(g)(1)(ii), 3150.16(a), (c). The language the General Assembly adopted in Section 1306-D allows each county board to collect ballots in whatever means, and at whatever location(s) that it controls, as the Board may choose. 25 Pa. C.S. § 3150.16(a). The Election Code does not specify use of a central office or headquarters. *Id.*

When Boards meet to canvass the mail-in ballots, the staff, among other things, examines the declaration on the exterior envelope and compare that information to the list of names registered to vote by mail. 25 Pa. C.S. § 3146.8(g)(3). If the voter’s right to vote is verified and the voter’s declaration is sufficient, the ballot may only be challenged if the voter is not qualified. 25 Pa. C.S. § 3146.8(g)(3). The county Board then opens the envelope of unchallenged mail-in ballots and checks to confirm that the Privacy Envelope does not have “any text, mark or symbol

which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference[.]” 25 Pa. C.S. § 3146.8(g)(4).

The legislative history of Act 77, which the General Assembly drafted in the Fall of 2019, contains no consideration or anticipation of how a once-in-a-century pandemic would impact the ballot-received deadline. The General Assembly considered and passed the law based on the apparent assumption that Boards would receive slightly more than the historic tens of thousands of mail-in and absentee ballots (roughly 84,000 absentee ballots during the 2016 primary election), not nearly 3 million as are expected this Fall. **Ex. D**, Declaration of Adam R. Roseman; **Ex. E**,⁴ Aug. 31, 2020 transcript of evidentiary hearing in *Crossey, et al v. Boockvar, et al*, 266 M.D. 2020 (“*Crossey Transcript*”), in this case the testimony of Secretary Boockvar, at 207:4-19. Thus, the General Assembly clearly established deadlines to apply for a mail-in and absentee ballot and for a voter to deliver their ballot to their county board consistent with the historical volume of absentee ballots voted in elections and established mail delivery deadlines. See *id.* at 40:7-24; **Ex. F**, Act 35 Report at 4.

⁴ Certain documents from discovery taken in *Donald J. Trump for President, Inc., et al v. Boockvar, et al.*, No. 20-966 (W.D. Pa.) (“Federal Court Action”), documents related to *Crossey, et al v. Boockvar, et al*, 266 M.D. 2020, and news articles are attached to **Ex. D**, Declaration of Adam R. Roseman, Esq. and are labeled as their own exhibits as attached.

B. The Department of State’s Pre-Primary Election Guidance and Additional August Guidance Regarding Act 77

1. *Mail-In and Absentee Ballot Collection Guidance*

In the process of implementing Act 77, on January 10, 2020, the Department of State issued Applications and Balloting Guidance: Mail-in and Absentee Ballots and Voter Registration Changes (“January Guidance”), which provide that “[i]n addition to [county election offices], counties may provide for other secure ballot collection locations that the county deems appropriate to accommodate in-person return of voted mail-in and absentee ballots.” **Ex. G**, January Guidance at 5.

The January Guidance provide that if Boards decide to provide “ballot collection locations,” Boards should consider, among other things, (1) “[e]nsure and document to the Department the security and chain of custody of mail-in and absentee ballots received from ballot collection locations”; (2) “[u]tilize a secure ballot collection receptacle that is designed for this specific purpose”; (3) “[o]fficially designate county election personnel who are sworn and authorized to remove mail-in and absentee ballots from ballot collection receptacles.” *Id.*

On August 19, the Department of State issued updated guidance for use in the General Election. **Ex. H**, Absentee and Mail-in Ballot Return Guidance (“August 2020 Drop Box Guidance”). The August 2020 Drop Box Guidance authorizes the use of ballot return locations or “drop boxes,” and reiterates that county Boards are authorized and should “establish a plan and adopt procedures for how voters in their

county may return their own voted absentee and mail-in ballots.” *Id.* at 3-8. The August 2020 Drop Box Guidance also provides detailed information for Election Boards regarding how to determine the appropriate location, hours of operation, accessibility, notice of sites, signage at ballot collection locations, how to properly secure the ballot collection locations, and how to establish ballot chain of custody procedures. *Id.*

2. *Naked Ballot Guidance*

In the days before the June 2 Primary Election, certain county Boards sought guidance from the Department of State as to whether the Boards should count naked ballots. **Ex. I**, May 28, 2020 email from Deputy Secretary of State Jonathan Marks (“Marks Guidance”). The Department of State responded to the Boards through an email from Deputy Secretary of State Jonathan Marks, and explained:

Though the Election Code requires county boards of elections to set aside absentee or mail-in ballots enclosed in official election ballot envelopes that contain “any text, mark or symbol which reveals the identity of the elector,” there is no statutory requirement, nor is there any statutory authority, for setting aside an absentee or mail-in ballot solely because the voter forgot to properly insert it into the official election ballot envelope. See 25 P.S. § 3146.8(g)(4)(ii).

To preserve the secrecy of such ballots, the board of elections in its discretion may develop a process by which the members of the pre-canvass or canvass boards insert these ballots into empty official election ballot envelopes or privacy sleeves until such time as they are ready to be tabulated.

Id.

On August 19, the Department of State formalized the guidance regarding naked ballots for all future elections. **Ex. J**, Guidance for Missing Official Election Ballot Envelopes (“Naked Ballot Guidance”). The Naked Ballot Guidance is generally consistent with the Marks Guidance and explains that “naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitutions. The failure to include the inner envelope (‘Secrecy Envelope’) does not undermine the integrity of the voting process.” *Id.*

C. For the Primary Election, Mail-In Ballot Demand Dramatically Exceeded Expectations, Delays Ensued, and Certain Boards Established Ballot Collection Locations to Attempt to Resolve

COVID-19 impacted the 2020 Primary Election and how citizens cast their ballots. **Ex. F**, Act 35 Report, at 4. On March 25, the General Assembly passed Act 12, which delayed the date of the Primary Election from April 28 to June 2; permitted counties to temporarily consolidate polling places without court approval; and eased other rules related to location and staffing of polling places, which resulted in dramatic consolidation of polling places. Act 12 of 2020, §§ 1801-B(a), 1804-B(a); (25 Pa. C.S. § 3582(b); 3584(a)).

More than 1.8 million electors applied to vote by mail in the Primary Election and more than 1.5 cast mailed votes. (**Ex. F** at 4), which was more than half of the

total number of votes actually cast during the Primary. *Id.* By comparison, the statewide total in the comparable 2016 primary election (when permissive mail-in ballots did not exist) was approximately 84,000 absentee ballots. *Id.*

The crush of absentee and mail-in ballot applications due to the pandemic created massive disparities in the distribution and return of mail-in ballots in the Primary Election. *Id.* at 38-39 (noting some counties experienced delays in fulfilling mail-in and absentee ballot requests). For example, one county mailed 6,000 absentee ballots to voters the day before the Primary Election. **Ex. K** at ¶ 11. In Delaware County, the Board mailed approximately 6,000 ballots on Election Day, after the County obtained a court order that allowed an extended receipt deadline based on the unavoidable delays. *Id.*; *See Ex. HH*, Declaration of Gerald Lawrence ¶ 6(d). Voters in Delaware County had to wait an average of 20 days to receive their ballots. *Id.*

The average wait time for voters to receive a mail-in or absentee ballot after requesting it was 7 days, with some counties, including Philadelphia, exceeding 10 days. **Ex. K** at ¶ 11.

In response to delays in voters' receipt of mail-in and absentee ballots, some county Boards took a variety of measures to facilitate ballot returns. Those efforts included establishing secure drop boxes at government offices, which county security controlled and monitored, using in some cases video surveillance. *See e.g.,*

Ex. L, Philadelphia Board Answer to Interrogatory No. 3; **Ex. M**, Bucks, Chester, and Montgomery Boards' Answer to Interrogatory No. 3.⁵ Several Boards established a variety of other ways for voters to expeditiously return their mail-in and absentee ballots consistent with the authority that the Election Code vested in the Boards to provide rules and regulations governing how voters return their ballots.

Exs. L, M. and P.

For example, the Philadelphia Board addressed the closure of its offices by creating drop boxes outside two buildings that are used for significant Board offices and the drop boxes were accessible at all times. *See Ex. O*, Petition; **Ex. P**, Bucks, Chester, Montgomery, and Philadelphia Response to Petition, at ¶ 86 (Aug 13, 2020). In the days immediately before the Primary Election, the Philadelphia Board also implemented temporary stations throughout the city, which Elections Board personnel staffed. *Id.*, *see also Ex. L*.

Montgomery County implemented similar measures, using ten drop-off locations at various township buildings, firehouses, and parks throughout the county where voters could return mail-in ballots. **Ex. M**.

Delaware County adopted an alternate solution, permitting voters to return their completed ballots to polling places on Election Day. **Ex. Q**.⁶ Because of the

⁵ Petitioners and Respondents all conducted discovery in the stayed Federal Court Action.

⁶ *Update on June the 2 Primary Election in Delaware County*, Press Release, Delaware County Pennsylvania, www.delcopa.gov/publicrelations/releases/2020/june2primaryupdate.html

delays in getting mail-in ballots to the voters, three Boards obtained court authorization to accept mail-in and absentee ballots for up to 7 days post-election so long as the ballots were mailed by the Primary Election. *See, e.g., In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary*, No. 2020-003416 (Del. Co. C. P. June 2, 2020); *see also* **Ex. R** and **Ex. S**.

In addition, on June 1, as part of his state of emergency response following the civil unrest that arose following the police murder of George Floyd, Governor Wolf issued an order that extended the deadline for county election officials in Allegheny, Dauphin, Delaware, Erie, Montgomery, and Philadelphia counties to receive ballots until 5:00 p.m. on June 9, so long as the ballots were postmarked no later than Election Day. **Ex. T**, Executive Order, Extension of Deadline for Receipt of Absentee and Mail-In Ballots in Certain Counties, 2020-02 (June 1, 2020).

D. Mail-In and Absentee Ballots Cast During the Primary Election Were Rejected Because They Contained Technical Errors or Were Untimely

In addition to the significant delays in the processing and distribution of mail-in and absentee ballots, the pandemic caused other election administration problems in the Primary Election, the first test of no-excuse mail-in voting. The mail-in and absentee ballots of hundreds of thousands of voters, who desired to participate in the electoral process and had requested ballots, were rejected or never received. *See e.g.,*

Ex. F. The Act 35 Report that the Department of State prepared in response to a legislative mandate indicates that more than 240,000 mail-in ballots and 69,000 absentee ballots went unvoted in the Primary. *Id.* at 12-14; 20-22. These were ballots which voters requested, Boards approved, and Boards eventually mailed to voters. *Id.*

Ballots of those who applied for and received a mail-in or absentee ballot were voided on the basis of a myriad mistakes or errors. Some voters cast ballots with incomplete Mailing Envelopes, lacking all required information or simply the declaration, date or signature. **Ex. HH** at ¶¶ 12-14. Many errors recurred, including failures to include required information on envelopes and naked ballots. *Id.*

Consistent with the Marks Guidance, the majority of county Boards accepted and counted naked ballots. However, because some Boards opted to follow their own procedures, a patchwork of standards resulted. In some counties, the ballots from voters who did not use the Privacy Envelopes were rejected. For example, in Lawrence and Mercer Counties, about 5% of mail-in and absentee ballots cast in the Primary Election were rejected because of a missing Privacy Envelope. **Ex. U**, Marc Levy, *Grey Area of Mail-in Voting Law Up to Pennsylvania Court*, TIMES LEADER (Aug. 25, 2020), www.timesleader.com/news/798226/gray-area-of-mail-in-voting-law-up-to-pennsylvania-court-3; compare **Ex. N**, July 15, 2020 email from Lawrence County with **Ex. F** at 13, 21.

The estimated 5% of ballots that were uncounted naked ballots in these counties provides a useful means of assessing the potential impacts on a statewide basis. The detailed data for those counties is available because several Boards, unlike the vast majority of county Boards, chose to disenfranchise electors who inadvertently submitted naked ballots, instead of implementing the administrative correction, which Department of State suggested. *See Exs. N, U.*

Boards also rejected many ballots because they received them after the applicable deadlines, even as adjusted. Approximately 98,000 ballots were received after 8:00 p.m. on the Primary Election. **Ex. V**, Chart of County Absentee or Mail-in Ballots. Counties where the “received-by” deadline was extended under the Governor’s emergency order received 9.7% of the ballots (88,991 of the 920,289 ballots distributed) *after* election day. Of the counties that counted some mail-in ballots received after the received-by deadline in the Election Code, about 18,000 ballots were received by Boards between June 6 and 9, after the third and by the seventh day after the election.

E. The COVID-19 Pandemic Will Continue This Fall

Unfortunately, COVID-19 continues to spread in Pennsylvania and, as of late August, the Commonwealth is still recording high numbers of new cases – 600-700 new cases per day, and 20-30 deaths per day. *COVID-19 Data for Pennsylvania*, Pennsylvania Department of Health, available at www.health.pa.gov/topics/disease/

coronavirus/Pages/Cases.aspx (last accessed Sept. 7, 2020). As of yesterday, over 135,000 confirmed cases of COVID-19 have been confirmed and over 7,700 deaths have occurred in Pennsylvania. *Id.*

A vaccine will not be ready or readily available to the public by the fall and public health experts expect the pandemic to extend well into the fall and potentially surge during that time.⁷ The General Election will thus occur in the midst of a continuing public health crisis and the safest way for voters in the Commonwealth to vote this year is by mail. *See id.* Under Act 77, early voting, described by the Act as in-person mail-in voting, begins on September 14. 25 Pa. C.S. § 3150.12a(a).

F. The Significant Risk of USPS’s Delivery Delays Resulting in the Disenfranchisement of Voters in the General Election

Under Pennsylvania law, a voter may request an absentee or mail-in ballot up until 7 days before an election. *See* 25 Pa. C.S. §§ 3146.2a(a.3)(3), 3150.12a(a), 3150.15. Once the voter receives a ballot, it is only counted if the voter’s county Board receives it by 8:00 p.m. on Election Day. Act 77 § 1306-D(a); 25 Pa. C.S. § 3146.6(a), 3146.8(g)(1)(ii), 3150.16(a), (c).

Two types of mail are generally involved in elections: first class mail and marketing mail. **Ex. K** at ¶ 18. The USPS service standard for one-way delivery of

⁷ **Ex. W**, Joel Achenbach and Rachel Weiner, *Experts project autumn surge in coronavirus cases, with a peak after Election Day*, WASHINGTON POST, Sept. 5, 2020, available at https://www.washingtonpost.com/health/coronavirus-fall-projections-second-wave/2020/09/04/6edb3392-ed61-11ea-99a1-71343d03bc29_story.html.

first class mail is 2 to 5 days, and marketing mail in 3 to 10 days. **Ex. E** at 40:7-24. Because the USPS is experiencing significant mail delivery delays, the Secretary has concluded that the risk of the disenfranchisement of a significant number of voters in the General Election, for reasons outside of their control, is very real. **Ex. X**, Secretary’s Aug. 13, 2020 Praeceptum to Withdraw Preliminary Objections in *Crossey*.

1. *Operational Changes Negatively Impact Mail Delivery and the Secretary Seeks an Extension of the Ballot Received Deadline*

Service disruption has slowed the USPS’s window for first class delivery even beyond the service delivery standard of 2 to 5 days. In July, however, the USPS delivery performance, for routes in Pennsylvania specifically, diminished so significantly that the Pennsylvania issues were a specific subject of Postmaster General Louis DeJoy’s testimony to Congress in late August.⁸

The USPS has suffered significant cuts and staffing shortages both over the last decade and since the new Postmaster General assumed control in June 2020. **Ex. K** at ¶ 21. In the last year, the USPS’s cost-cutting measures have included ending employee overtime and requiring trucks to leave plants on time regardless of whether all mail is loaded into the truck. *Id.* at ¶ 21. This transportation policy results in mail being left behind at distribution centers causing the mail to “pile[] up.” **Ex. E** at 48:13-49:13

⁸ Senate Hearing on U.S. Postal Service, C-SPAN (Aug. 21, 2020) (video), <https://www.cspan.org/video/?474940-1/senate-hearing-us-postal-service>.

The pandemic has further strained the USPS's operations because many employees have been forced to take leave, either as a precaution after potential exposure to COVID-19 or to care for family members, resulting in reduced staffing. **Ex. K** at ¶ 20. Because of reduced staffing, the USPS has had to prioritize the delivery of packages to ensure timely delivery of pharmaceuticals and personal protective equipment. *Id.*

The operational changes and the staff shortages have caused a decline in first class mail delivery times over recent months. *Id.* at ¶ 20; **Ex. Y**, Eastern AIM Service Update. Between April 1, 2020 through June 30, 2020, USPS's on-time delivery for First-Class Mail in the Central Pennsylvania District, Philadelphia Metro District, and Western Pennsylvania District regions were 94.1%, 92.7%, and 96% respectively. **Ex. K** at ¶ 21. During the week of July 19, however, those same regions reported on-time delivery scores of 72.1%, 85.7%, and 90% respectively. *Id.*; **Ex. E** at 63:16-64:2, 60:18-62-6.

Unless USPS makes efforts to retool its system and make up for past delays, processing standards will not recover. *Id.* at 56:6-57:5; 65:1-18. As a result, it is unlikely that a voter could request a mail-in ballot on the Tuesday before the election, could receive a ballot mailed from their county Board, and then return the ballot by mail to the Elections Board before the Election Day 8:00 p.m. deadline. *Id.* at 68:8-24; **Ex. K** at ¶ 22. Likewise, the Secretary is concerned that the ballot received by

deadline is incompatible with the USPS's delivery timeframes and that these delivery timeframes are applicable statewide. *See* Secretary's King's Bench Application at 27-29. Because of the pandemic and the delay in mail delivery, the Secretary reasonably believes that a three-day extension of the ballot received deadline (until Friday, November 6) would remedy the harm that the USPS could cause, without disrupting other election administration deadline. *Id.*

2. *The USPS Has Warned of Risk of Voter Disenfranchisement*

Issues with the USPS mail delivery delays are so extreme an issue that on July 29, the USPS took the unprecedented and unsolicited step of stating to the Secretary, in writing, that voters should return their ballot no later than October 27. **Ex. Z**, USPS Warning Letter for Pennsylvania. Unfortunately, as the USPS concedes, this creates a significant problem—under the Election Code, a voter is permitted to request a ballot as late as October 27—the same day the USPS recommends that it should be returned. *Id.* Before a voter could return the ballot, the county Elections Board, which has 48 hours under Act 77), would have to process the request, and mail it to the voter, which would take 2 to 5 days, at best. *Id.*; 25 Pa. C.S. § 3150.12a(a); 3150.15. The voter would then have to complete and return the ballot. 25 Pa. C.S. § 3150.16(c).

3. *A 7-Day Extension of the Ballot-Received-By Deadline Would Protect the Franchise of All Voters*

Even the USPS has warned that an extension of only 3 days to the received-by deadline would continue to risk disenfranchising many voters. Indeed,

[I]t appears that a voter may generally request a ballot as late as 7 days before the November general election, and that a requested ballot must be postmarked by Election Day and received by election officials no later than 3 days after the election,” which presents “a risk that the ballot will not reach the voter before Election Day” or that “a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state’s receipt deadline of November 6.

Ex. AA, USPS Warning Letter to North Carolina.

Approximately 98,000 ballots were received after the Primary Election, 80,000 of those ballots were received within the week following the Primary Election, at least 13,000 of the 80,000 ballots were received after the third and before the seventh day after the Primary Election (June 6-8), and some percentage of an additional 24,000 ballots were received by 5:00 p.m. on June 9. **Ex. V**.

G. Act 77 and The Poll Watcher Residency Requirement

When initially enacted, the poll watcher provisions of the Election Code restricted a poll watcher’s geographical territory to the election district in which the elector lived. 25 Pa. C.S. § 2687 (1947). In 2004, the Pennsylvania General Assembly amended the Election Code to allow poll watchers to work anywhere within their county. 25 Pa. C.S. § 2687(b).

Four years ago, on the eve of the last Presidential election, the Republican Party of Pennsylvania sued the Commonwealth seeking to enjoin enforcement of the geographical restrictions and to allow registered voters to poll watch anywhere in the Commonwealth. *See Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 402 (E.D. Pa. 2016) (Pappert, J.).

The District Court for the Eastern District of Pennsylvania, however, declined to enjoin the enforcement of the geographic restriction. In so doing, Judge Pappert found that the poll watcher residency requirement did not burden the plaintiffs' fundamental right to vote and the state need only provide a rational basis for the poll watcher residency requirement. *Id.*

The *Cortés* Court deferred to the General Assembly's decision to limit poll watchers to county residents because the choice was "rationally related to the state's interest in maintaining from their own county is rationally related to the state's interests in maintaining its county-run election system [under which] each county election official is tasked with managing credentials for a discrete part of the state's population." *Id.* at 410.

After losing the injunction hearing, the *Cortés* plaintiffs abandoned their position and did not raise the issue in any state or federal court for the next four years.

When the General Assembly drafted the bills that became Act 77 and Act 12, Republican leadership did not offer any changes to the poll watcher residency requirement in the Election Code. *See Id.* at ¶ 154; Act 77; Pennsylvania Bill History, 2004 Reg. Sess., S.B. 346. Thus, neither Act 77 nor Act 12 altered or amended the Election Code requirement that poll watchers may only watch polls at polling locations within county where the poll watcher is registered to vote. **Ex. BB**, Answer and New Matter of Secretary at ¶ 156; *compare* Act 77 with 25 Pa. C.S. § 2687(b).

H. The General Assembly and Further Election Code Changes

Two election-related bills, House Bill 2626 and Senate Bill 10, are pending before the General Assembly. Last week HB 2626 was amended to more closely track SB 10 and the bill was sent to the Senate. **Ex. CC**, H.B. 2626, P.N. 4335, 219th Leg. Reg. Sess. (Pa. 2020). However, neither HB 2626 nor SB 10 has yet become law and Governor Wolf has made clear that he will only sign a further election bill that makes the reforms which he believes to be essential, and which the legislative leadership has refused to adopt. *See Ex. DD*, Emily Previti, *Gov. Wolf Plans to Veto Election Code Bill in its Current Form*, available at www.witf.org/2020/09/02/gov-wolf-plans-to-veto-election-code-bill-in-its-current-form/ (visited Sept. 7, 2020).

V. FACTUAL SUMMARY; INTERPLAY WITH CROSSEY

This Court, in the parallel *Crossey* matter on original jurisdiction, has undertaken a fact-finding effort on the issues of postal delays, and has referred the matter to the Honorable Mary Hannah Leavitt, sitting as a special master. After holding an evidentiary hearing, Judge Leavitt issued her master's report of recommended findings of facts and conclusions of law on September 4. **Ex. EE.**

Special Master Leavitt heard extensive testimony from three key witnesses on the functioning of the postal service and the interplay with the election: Secretary Boockvar; former Deputy Postmaster General Ronald Stroman (retired June 2020); and Michael Plunkett, an advocate who previously was a business staffer at the USPS (retired 2012). The Special Master found all three to be credible. *Id.* at III.1 While Petitioners requested discovery and accelerated treatment below, based on the status of the various cases and the imminence of the election, Petitioners suggest that this Court may want to adopt some or all of the factual record and findings from the *Crossey* hearing into this matter rather than redeveloping similar findings of fact.⁹

⁹ A key element that the Court should find to be credible is that the testimony confirmed that significant mail delays are occurring due to COVID, with an almost doubling of late deliveries system wide in the second quarter of 2020 (Postal Q3). **Ex. K** at ¶ 21; *see also Ex. E* at 60:18-62-6, 63:16-64:13. Further, *Crossey* Petitioners submitted evidence and testimony of a dramatic decline in service in July 2020, a decline so severe that Congress scheduled hearings; the USPS submitted warning letters to approximately 46 states; and the USPS reworked a number of policies, although it remains unclear what corrections the USPS has, in fact, implemented. *See Ex. E* at 45:19-46:10, 48:13-49:13, 56:6-19; 57:6-20, 68:8-24.

VI. STANDARDS OF REVIEW

This case includes key issues of statutory construction and seeks both declaratory judgment and injunctive relief. Petitioners seek relief in the context of the traditional liberal construction of the Free and Equal Elections Clause and the Election Code that protect the rights of voters to cast their votes.

It is well-settled that courts are to liberally construe the Election Code “in favor of the right to vote.” *In re James Appeal*, 377 Pa. 405, 105 A.2d 64, 65-66 (1954) (citation omitted). To the extent possible, the Election Code should be construed to “include rather than exclude citizens in the electoral process.” *In re*

Special Master Leavitt found Boards received 61,333 ballots during the three days that followed the Primary Election and that 20% of those votes were not in counties with extended deadlines. *Id.* at III.19. The more than 60,000 ballots were approximately 4% of the mail ballots cast in the Primary, even before the USPS issues worsened. *Compare* with II.B.1.10.

The master also made an incorrect analysis of a fact not developed at the hearing, that “no evidence” existed to explain how the ballot delivery could be extended without mass confusion. *Id.* at III.26. That proposed finding misunderstands the underlying challenge—in fact, a remedy can be crafted through a single order from this Court, which the Prothonotary could communicate to all 67 Boards, each of whom are respondents before this Court. Voters need not receive any notice and are, in fact, already being encouraged to vote early, as the Secretary testified at length, which can continue after any remedy.

An extension order is more appropriate path than the alternative, a would-be patchwork of late-cycle emergency litigation before various Courts of Common Pleas. That solution, which could alter ballot received deadlines by-county at the last minute—which is what occurred during the Primary Election—is less desirable and results in more confusion than a state-wide uniform deadline set weeks in advance.

Recognizing that, as a matter of judicial economy and rather than authorizing a separate, second fact finding hearing, this matter may lean heavily on the factual record in *Crossey*, Petitioners present a factual summary relevant to this case, in addition to those findings this Court may make in *Crossey* which would be relevant. *See Addendum 1.*

Vodvarka, 636 Pa. 16, 140 A.3d 639, 641 (2016) (citation omitted). “In construing election laws, while we must strictly enforce all provisions to prevent fraud o[ur] overriding concern at all times must be to be flexible in order to favor the right to vote. Our goal must be to enfranchise and not disenfranchise.” *Weiskerger Appeal*, 447 Pa. 418, 290 A.2d 108, 109 (1972) (citation omitted).

1. *Constitutional Construction*

This case includes elements of Constitutional and statutory law. The fundamental rule of Constitutional construction is that “the Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Ieropoli v. AC & S Corp.*, 577 Pa. 138, 842 A.2d 919, 925 (2004). The Court is to interpret the Constitution’s words in their “popular, natural and ordinary meaning” in consideration of “the circumstances attending its formation and the construction probably placed upon it by the people.” *Scarnati v. Wolf*, 636 Pa. 474, 173 A.3d 1110, 1118 (2017) (internal quotations omitted).

2. *Statutory Construction*

Similarly, statutory interpretation is a question of law over which the Court’s standard of review is *de novo* guided by the Statutory Construction Act, which directs the Court to “ascertain and effectuate the intent of the General Assembly.” *Com. v. Kingston*, 636 Pa. 438, 143 A.3d 917, 921-22 (2016); 1 Pa.C.S. §§ 1501, *et seq.* Where the language of the statute clearly and unambiguously sets forth the

legislative intent, the statutory language alone determines its meaning. *See* 1 Pa.C.S. § 1921(b) (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”). “, the best indication of legislative intent is the plain language of a statute.” *Com. v. Gilmour Manufacturing Co.*, 573 Pa. 143, 822 A.2d 676, 679 (2003).

Only when the language of the statute is ambiguous does statutory interpretation construction become necessary. *Ramich v. WCAP (Schatz Electric Inc.)*, 564 Pa. 656, 770 A.2d 318, 322 (2001) (citing 1 Pa. C.S. § 1921(c)). Courts are “not permitted, under the guise of interpretation, to add words to a statute that the General Assembly omitted.” *Sadler v. W.C.A.B.*, 210 A.3d 372, 383 (Pa. Commw. Ct. 2019). Further, “courts may not insert a word not used by the legislature into a statute.” *In re Nomination Papers of Mann*, 944 A.2d 119, 124 (Pa. Commw. Ct. 2008) (citing *Girgis v. Board of Physical Therapy*, 859 A.2d 852, 854 (Pa. Commw. 2004)).

3. *Declaratory Judgment Act*

Under the Declaratory Judgment Act, this Court is empowered “to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” 42 Pa. C.S. § 7532. The declaratory judgment questions in this case are offered for initial resolution on extraordinary jurisdiction.

4. *Standard for Injunctive Relief*

A party seeking a permanent injunction must establish three elements: (1) a clear right to relief; (2) that an injunction is necessary to avoid an injury that cannot be compensated by damages; and (3) the greater injury will result from refusing the injunction. *Kuznik v. Westmoreland Cty. Bd. of Com'rs*, 588 Pa. 95, 902 A.3d 476, 489 (2006).

**VII. DECLARATORY JUDGMENT IS APPROPRIATE THAT NAKED
BALLOTS MUST BE CURED AND COUNTED**

Petitioners seek, and are entitled to declaratory judgment or, alternatively, injunctive relief to require the administrative cure and counting of naked ballots.¹⁰

It is undisputed that the Election Code directs mail-in and absentee voters to use a Privacy Envelope. What is disputed however, is what happens when a voter fails to do so. Petitioners agree with the Secretary and the vast majority of the counties that, pursuant to the strict language of the Election Code and the Commonwealth's preference for enfranchising voters, a simple administrative cure is mandatory. A few counties have opted to object to the authority of the Secretary to provide definitive guidance apparently preferring mass disenfranchisement of their electors. This Court should clearly require ballots to be clothed and counted for the reasons set forth below.

1. *This Court Has Consistently Interpreted the Election Code to Protect Enfranchisement*

This Court has consistently refused to reject noncompliant ballots merely because of technical errors and where such errors would not result or permit fraud. *Weiskerger Appeal*, 290 A.2d at 109 (declining to discard ballots marked in red ink

¹⁰ Petitioners acknowledge that every county that has answered has done so in a manner that states that they will follow a declaratory judgment and, as such, as to the issues also covered expressly by declaratory judgment issues, any injunctive relief would be duplicative, if the Court resolves the question of statutory construction. The as-applied injunctions will be addressed later in this brief.

rather than blue or black ink); *Shambach v. Bickhart*, 577 Pa. 384, 845 A.3d 793, 800, 803 (2004) (holding write-in votes must be counted even though candidate’s name was on ballot because Election Codes does not specifically authorize voiding such ballots and no evidence voters acted fraudulently in casting their votes).

No party has alleged here that the lack of a Privacy Envelope could credibly result in fraud. Thus, *Shambach* instructs a permissive approach to the validity of naked ballots. Because the Election Code does not expressly prohibit voters from casting ballots that lack a Privacy Envelope, the Election Code supports counting naked ballots.

2. *The Legislature Knew How to Order Ballots be Voided for Failure to Use a Secrecy Envelope—and Did Not Do So in Act 77*

When adopting the language at issue, the General Assembly evinced a clear choice to not disenfranchise voters who failed to use the Privacy Envelope – a remedy that the Legislature expressly requires elsewhere in the Election Code in a parallel, but distinct situation for provisional ballots. The Election Code’s rules for provisional ballots expressly specifies that: “a provisional ballot shall not be counted if a provisional ballot envelope does not contain a secrecy envelope.” 25 Pa. C.S. § 3050(a.4)(5)(ii)(C). Similar language is notably omitted from Section 1306-D.

If the Legislature had intended for counties to reject mail-in and absentee ballots lacking a Privacy Envelope, it could have readily included this language. *See*

In re Vencil, 638 Pa. 1, 152 A.3d 235, 244 (2017) (“[W]here a section of a statute contains a given provision, the omission of such a provision from a similar section is significant to show a different legislative intent.”) (internal citations omitted).

This legislative choice reflects a rational choice between activity in a polling place and activity taking place under the watch of a sworn, countywide-elected officials. Unlike mailed ballots, provisional ballots run a theoretical risk from the compromise of privacy because they are voted at a polling place, oftentimes in front of local precinct officials who are neighbors and friends. Thus, the General Assembly logically differentiates this potentially greater risk of pressure on the voters offset the risk of disenfranchisement from the failure to use a ballot envelope and chose to mandate rejection of a provisional ballot without a secrecy envelope. By contrast, mail-in ballots are packaged in the privacy of a voter’s home and are only removed from the envelope at all in a central process by sworn election officials under the scrutiny of authorized representatives and poll watchers. Based on this critical difference, and the lack of political pressure from a negligent failure to use a secrecy envelope, the General Assembly made the intentional choice not to require disenfranchisement in the situation of absentee and mail-in ballots.

3. *The Word “Shall” As Used Here is Directory, Not Mandatory*

To interpret the Election Code, courts are to ascertain the intent of the General Assembly. *In re Canvass of Absentee Ballots of Nov. 4*, 577 Pa. 231, 843 A.2d 1223, 1232 (2004) (citing 1 Pa.C.S. § 1921(a)). “A statute is ambiguous when there are at least two reasonable interpretations of the text.” *A.S. v. Pennsylvania State Police*, 636 Pa. 403, 143 A.3d 896, 905–06 (2016). Often, ambiguity emerges whether the Election Code’s instructions are directory or mandatory. *See Shambach*, 845 A.2d at 806 (Saylor, J., concurring) (“[I]t is widely accepted that most statutory provisions for the conduct of elections may be regarded as directory, and not mandatory . . .”). “[T]he difference between a mandatory and directory provision is the consequence for noncompliance: a failure to strictly adhere to the requirements of a directory statute will not nullify the validity of the action involved.” *JPay, Inc. v. Dep’t of Corr.*, 89 A.3d 756, 763 (Pa. Commw. Ct. 2014) (citing *Fishkin v. Hi-Acres, Inc.*, 462 Pa. 309, 341 A.2d 95, 98 n.5 (1975)).

As used in Section 1306-D the word “shall” is directory. Courts have repeatedly interpreted similar—and even more compulsory—provisions of the Election Code as directory. *See Gardner v. W.C.A.B.*, 585 Pa. 366, 888 A.2d 758, 764–65 (2005) (citations omitted) (“the word ‘shall’ also has been interpreted to mean ‘may’ or as being merely directory, as opposed to mandatory” and collecting instances of “shall” being read as directory); *Snyder Cty. Prison Bd. v. Pennsylvania*

Labor Relations Bd., 912 A.2d 356, 364–65 (Pa. Commw. Ct. 2006) (“Because the word ‘shall’ is overused, it is not examined critically before placed in a statute and, thus, can convey a diversity of meanings.”).

When Election Code provisions that are intended to protect voter secrecy are infringed, this Court has ordered that those ballots must be counted so long as the underlying purpose of the statute—the identification of a given voter’s preferences—has not actually been violated. *See, e.g., Weiskerger*, 290 A.2d at 109 (interpreting as directory the statutory “shall” that ballots be cast only in black or blue); *In re Primary Election of 1971*, 444 Pa. 392, 281 A.2d 642, 644 (1971) (who wrote the voter’s name); *In re Petitions to Open Ballot Boxes*, 410 Pa. 62, 188 A.2d 254, 256 (1963) (interpreting as directory the Code’s “shall” requirement that voters use only an “X” or check mark to indicate a vote); *Appeal of Norwood*, 382 Pa. 547, 116 A.2d 552, 554 (1955) (holding that ballots that technically fell afoul of secrecy requirements should be counted because the voters had not reasonably intended to violate those requirements); *Appeal of James*, 337 Pa. 405, 105 A.2d 64, 66-67 (1954) (accepting ballots that violated a statutory provision against double-listed write-in candidates because no suggestion of fraud and “it would be a stultification of the very principle of democracy behind the Election Code” to discard them); *Appeal of Gallagher*, 351 Pa. 451, 41 A.2d 630, 631-32 (1945) (ordering that a ballot

where a voter wrote “no good” after a candidate’s name should be counted because the voter’s “apparent idea was not to have his ballot bear an identifying phrase.”¹¹

4. *In re Canvass of Absentee Ballots Is Easily Distinguishable*

In various briefs, other parties have focused on a case from 2004 that is easily distinguishable here. *See In re Canvass of Absentee Ballots of Nov. 4, 2003*, 577 Pa. 231, 843 A.2d 1223 (2004). There, a county board of elections rejected 56 absentee ballots after third parties hand-delivered them to the county board of elections. *Id.* at 1226. This Court concluded that Section 3146.6(a)’s stipulation that absentee ballots “shall” be mailed or delivered personally, necessitated the rejection of this small set of ballots to close an easy avenue for fraudulent ballots. *Id.* at 1232-33. That is, the “in-person” delivery requirement was mandatory and not directory. *Id.* A concern about third-party delivery facilitating fraud was central to the holding in *In re Absentee Ballots* and pertained only to a handful of ballots. The conclusion in that case does not apply here.¹²

¹¹ By contrast, this Court has typically rejected ballots that create an obvious potential for fraud. *See, e.g., Appeal of Yerger*, 460 Pa. 537, 333 A.2d 902, 907 (1975) (rejecting ballots where no other ready method could prevent voters from casting two votes by using a machine ballot and paper write-in card simultaneously); *In re Election of Supervisor in Springfield Twp.*, 399 Pa. 37, 159 A.2d 901, 905 (1960) (throwing out contested votes where counting them would have produced more ballots than recorded voters).

¹² *Absentee Ballots* is also distinguishable from this case for two additional reasons: (1) it did not address whether Naked Ballots must be clothed and counted, it addressed only whether the “in-person” delivery requirement for absentee ballots was mandatory; and (2) when this Court decided *Absentee Ballots*, Section 1306-D(a) had not yet been enacted. *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 4920952, at *11 (W.D. Pa. Aug. 23, 2020).

The prohibition against third-party delivery of an absentee ballot provides a safeguard that the actual voter filled out the ballot and that “no other person has the opportunity to tamper it, or even destroy it.” *Id.* at 1232. These concerns are not present when a voter neglects to clothe their ballot in a Privacy Envelope. Even without a Privacy Envelope, the ballot is still sealed in an envelope that the voter mails or delivers to their county Board. The elector certifies the outer envelope and no third-party—with the potential exception of the Postal Service—is involved in the delivery of a Naked Ballot. Thus, a voter’s failure to clothe their ballot in a Privacy Envelope is a technicality that does not evidence or make the ballot susceptible to fraud.¹³

A voter’s failure to clothe a ballot in a Privacy Envelope is a mere technicality that causes no harm; no possibility that fraud exists. These otherwise-valid naked

¹³ Certain *amici* and intervenors have proposed an interpretation of the *Absentee Ballot* case that irrationally argues that a potential handful of unauthorized ballot deliveries, including by family members, should cause the Commonwealth to adopt standards that disenfranchise or imperil hundreds of thousands of voters. Where there is fraud, the criminal statutes will apply. But where a spouse delivers a ballot – whether walking it to the courthouse or to the mailbox – there is allegedly breathless cause for concern of a corrupt election of a federal equal protection concern. That argument fails because, as the Third Circuit has noted, federal claims must arise out of intentional conduct of the state to discriminate not innocent and insignificant inconsistencies in the administration of an election. *Hill v. Borough of Kutztown*, 455 F.3d 225, 239 (3d Cir. 2006). See, e.g., *Rickett v. Jones*, 901 F.2d 1058, 1060 (11th Cir. 1990) (“No human institution is perfect, including courts of law. Occasional or random errors in application of state law will occur: but such errors do not constitute state policy, and they do not offend the equal protection clause of the federal Constitution.”); *Powell v Power*, 438 F.2d 84 (2d Cir. 1970) (no cognizable equal protection claims unless state action seek to intentionally discriminate in elections). Petitioners do not believe that the *Absentee Ballot* case is as broad as contended by the intervenors and *amici*; but, if it is that broad, it would thus have been decided in a manner inconsistent with the more recent jurisprudence of this Court and should be overruled.

ballots reflect an individual voter's strong wish to participate in the electoral process: the voter applied for a mail-in or absentee ballot, completed it, and returned it. Accordingly, consistent with the its long-standing principles, this Court should prohibit the threatened wave of disenfranchisement of these bona fide voters.

VIII. DECLARATORY JUDGMENT IS REQUIRED THAT BOARDS CAN ESTABLISH OWN OFFICES, INCLUDING DROP BOXES AND TEMPORARY LOCATIONS

The Election Code requires that mailed ballots be returned “to the county board of election,” but intervenors and others contend that this requirement applies only to the physical place of a Board’s central office. Petitioners seek, and are entitled to declaratory judgment that Boards can, and in fact, must, establish a ballot return process that is appropriate for the applicable county, which could include temporary offices, drop boxes, and other locations as are appropriate.

1. *The County Board of Elections is Not Simply a Physical Place*

Intervenors maintain that Act 77’s requirement that voters are to return their ballots to the “county board of election” is a reference to a single central office. However, a county board of election is an agency, comprised of leaders (elected or appointed), staff, and whatever physical space and facilities it occupies.

The Election Code repeatedly makes clear that “county board of election” is not limited to a single physical place or location. It defines “county boards” as “the county board of elections of any county” and not a place. 25 Pa. C.S. § 2602(c). In fact, the Election Code contemplates that county boards of election will operate out of multiple locations. *Id.* at § 2645(b).

County boards have jurisdiction “over the conduct of primaries and elections in that county in accordance with the provisions of the Election Code.” *Hempfield*

School Dist. v. Election Bd., 574 A.2d 1190, 1190 (Pa. Cmmw. Ct. 1990). Each Board’s powers include the authority to designate the means used to receive ballots, including permitting the return of “ballot boxes” in either the office of the county board or “received in such other places as has been designated by the board.” 25 Pa. C.S. § 3151.

The intervenors’ efforts to limit Boards to a physical place is as absurd as it would be to assert that the Supreme Court is a merely a courtroom in the Capitol. Although the Capitol hearing room is beautiful, this Court includes its seven Justices, its staff, the virtual online filing office, three offices of the Prothonotary, its courtrooms in Harrisburg, Philadelphia and Pittsburgh, and any other locations where this Court decides to hold arguments or to conduct its other operations.

Boards are not single physical places but are statutorily created bodies. County Boards have the authority to establish offices to receive absentee or mail-in ballots, including, permanent offices, temporary offices, mobile or temporary locations, mail clearing houses, tabulation locations, or drop-boxes.¹⁴

¹⁴ Intervenors have also asserted that some specific physical requirements for county Board offices may exist, but they have not explained what or why. Although the General Assembly could reasonably require county personnel to staff offices during certain hours (as required on filing days and Election Day), or to have certain physical features, the Election Code does not contain any such requirements. 25 Pa. C.S. § 2602(c). As a result, until new legislation creates reasonable requirements, the county Boards must determine what physical means of security are reasonable and appropriate.

2. *The Plain Language of Act 77 Authorizes the Use of Ballot Drop-Boxes and Other Ballot Collection Methods*

The plain language of Act 77 permits voters to return absentee and mail-in ballots to any location that a county Board designates and controls, whether that location is the Board’s permanent office, a temporary office, or a secure ballot drop-boxes that the Board controls.

Here, the relevant clause in Section 1306-D(a) of Act 77 is unambiguous. Section 1306-D provides that absentee and mail-in ballots must be mailed “or deliver[ed] . . . in person to [the elector’s] county board of election.” 25 Pa. C.S. § 3146.6(a), 3150.16(a). Section 1306-D, however, does not state – as it theoretically could have – that a mail-in ballot must be delivered to the actual central, main, or primary office of the Board, as have been argued by Intervenors. Instead, the Election Code prescribes specifically, and solely, that the ballot be delivered to the voter’s “county board of election.” 25 P.S. § 3146.6(a), 3150.16(a).

Nothing in Sections 3146.6(a) or 3150.16(a) prohibits Boards from establishing temporary offices or ballot drop-boxes throughout the county, where voters can deliver their absentee or mail-in ballots. Nothing in the Election Code limits “county board of election” to county boards’ courthouse central office. To mandate a limitation to a specific location would require the insertion of words into the statute—*e.g.*, inserting “headquarters” or “main office” before “county board of election” or “at the permanent office” after “county board of election.”

Finally, had the General Assembly intended to limit delivery of mail-in and absentee ballots to only the permanent office or headquarters of a county Board, it knew how to do so. The proposed changes to the Election Code in SB 10 prove this point. Recognizing that the phrase “county boards of election” is not limited to county Boards’ headquarters, SB 10, if adopted, would alter the Election Code’s mail-in and absentee ballot sections by, among other things, adding the following bold language to the sections: “Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election **at the permanent offices of the county board of elections, to a location at the county courthouse designed by the county board of elections or to the judge of elections at the elector’s polling place and to no other location.**” Ex. FF, S.B. 10, P.N 1898, 219th Leg. Reg. Sess. (Pa. 2020) (emphasis added). A year ago, the Legislature did not include that language in the bill presented to, and signed by, the Governor in Act 77.

3. *Secretary Boockvar’s Guidance Also Supports the Conclusion That Boards May Use Ballot Drop-Boxes*

To the extent that the phrase “county boards of election” in Section 1306-D(a) is ambiguous – which it is not – statutory construction principles also establish that Boards may use drop-boxes to collect mail-in and absentee ballots.¹⁵

Courts may grant deference to the agency charged with the administration of the statute. 1 Pa. C.S. § 1921(c)(8). An agency’s interpretation of a statute is entitled to deference unless the interpretation is erroneous or frustrates the legislative intent. *Packer v. Bureau of Professional Occupational Affairs Dept. of State, State Bd. of Nursing*, 99 A.3d 965 (Pa. Cmmw. Ct. 2014); *Kuznik*, 902 A.2d at 502.

The Department of State has published guidance for use of county Boards in the General Election. *See Ex. H; see also Ex. G.* The August 2020 Ballot Drop Box Guidance authorizes the use of ballot return drop boxes and temporary locations. *Id.* at 3-8. It also provides detailed information regarding, among other things, the location, hours of operation, accessibility, notice of sites, signage at ballot collection locations, how to properly secure the ballot collection locations, and ballot chain of

¹⁵ When statutory language is ambiguous, courts look to the following factors to decide the meaning of the statute: (1) the occasion and necessity for the statute; (2) the circumstances under which it was enacted; (3) the mischief to be remedied; (4) the object to be obtained; (5) the former law, if any, including other statutes upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous legislative history; and (8) legislative and administrative interpretations of such statute. 1 Pa. C.S. § 1921(c).

custody procedures. *Id.* The Department of State’s guidance is a reasonable and correct interpretation and implementation of the Election Code and this Court should give deference to Department of State’s interpretation.

Finally, a broad interpretation of “county board of election” is consistent with sound policy. Voters are, reasonably, permitted to submit their absentee and in mail-in ballots by depositing them with the postal service, which is to deliver those ballots to the Boards. Allowing voters to directly deposit their ballots in drop-boxes that the Boards control is reasonable and must be permitted.

“County boards of election” is not limited to a county board’s courthouse office and Boards may establish temporary offices and/or ballot drop-boxes to expedite delivery of mail-in and absentee ballots by the Election Code’s received-by deadline.¹⁶

¹⁶ *Amici* or proposed intervenors will likely argue that permitting Boards to establish drop boxes or other ballot collection locations based on their county’s history, population, and geography creates an equal protection violation. It does not and this argument is red herring. It is well-established that county boards of elections have the authority to tailor and establish election procedures consistent with the unique characteristics of their county and that such decisions do not create federal constitutional violations. *See* 25 Pa. C.S. § 2726(a) (“county board of elections shall select and fix the polling place within each new election district and may, at any time, for any reason that may seem proper to it . . . change the polling place within any election district”); *cf. PG Publ’g Co. v. Aichele*, 705 F.3d 91, 114-116 (3d Cir. 2013).

IX. THE POLL WATCHER RESIDENCY REQUIREMENT REMAINS UNCHANGED AND IS CONSTITUTIONAL

Since 2004, the Election Code has permitted poll watchers to work anywhere within their county. 25 P.S. § 2687(b) (2004). When the General Assembly revisited this issue in the drafting of Act 77, it did not alter the rules for poll watchers, instead the General Assembly chose to create a role of canvass observers for out-of-county residents. Under its plain language, the Election Code does not permit electors to serve as a poll watcher outside of their home county.

In enacting Acts 77 and 12, the General Assembly could easily have altered or amended the poll watcher residency requirement, but it chose not to. Instead, it specifically created “canvass authorized representatives” to observe canvass activities and such representatives need not be registered voters of the county or the Commonwealth. *See* Act 12 of 2020 § 1308(g) (1.1).

Nor is there any Constitutional infirmity. Four years ago, the Republican Party of Pennsylvania sued the Secretary of the Commonwealth seeking to enjoin the enforcement of the geographic restriction and to allow registered voters to poll watch anywhere in the Commonwealth. *See Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 402 (E.D. Pa. 2016) (Pappert, J.). The *Cortés* plaintiffs asserted two primary arguments (1) poll watchers uncover election law violations and that when an unqualified elector votes within a district, the legitimate votes of qualified electors in the district are diluted and their fundamental right to vote is violated; and

(2) the poll watcher geographic restrictions violated the Equal Protection and Due Process Clause by “arbitrarily and unreasonably distinguish[ing] between voters within same electoral district by allowing some, but not others, to serve as poll watchers.” *Id.* at 407.

The United States District Court for the Eastern District of Pennsylvania, however, refused to grant the injunction. In so doing, the court found that the plaintiffs’ dilution of the vote theory is based on pure speculation that fraudulent voters may be “casting ballots elsewhere in the Commonwealth and the unproven assumption that these alleged instances of voter fraud would be prevented by the affected poll watchers were they not precluded from serving at those locations.” *Id.* Applying the rational basis test, the court ruled that Pennsylvania’s poll watcher residency requirement did not burden plaintiffs’ fundamental right to vote. *Id.*

More to the point, the court found that the General Assembly’s decision to limit poll watchers to county residents was rationally related to the Commonwealth’s interest in “maintaining its county-run election system [under which] each county election official is tasked with managing credentials for a discrete part of the state’s population.” *Id.* at 409.

The poll watcher residency requirement does not dilute any elector’s vote, treat any voter differently than another, and continues to serve the “state’s interests in maintaining its county-run election system.”¹⁷

Nothing—including the plain text of the poll watcher residency requiring in the Election Code—suggests any change to relevant statutory or Constitutional standards since Judge Pappert’s unequivocal determination in 2016 that the poll watcher residency requirement was Constitutional.

¹⁷ Some *amici* or intervenors may argue that the poll watcher residency requirement implicates the right to vote or burdens rights protected by the First Amendment to the United States Constitution. This argument is also flatly wrong and was rejected by Judge Pappert. *Cortés*, 218 F. Supp. 3d at 414 (“[T]he Court has found no support” for the proposition that “poll watching” is a fundamental right under the First Amendment”) (collecting cases).

X. THE PANDEMIC AND USPS FAILURES REQUIRE BOARDS TO COUNT MAILED BALLOTS POSTED BY ELECTION DAY AND RECEIVED BY NOVEMBER 10

No one credibly disputes that, despite the best efforts of the Boards and the Secretary, the Commonwealth cannot comply with the ballot receipt deadlines in Act 77 in a manner that comports with the Free and Equal Elections Clause of the Pennsylvania Constitution. Due to the pandemic and the failures of the USPS, the Secretary has recognized that this Court’s intervention is necessary and has, in fact, herself requested such an order.

1. *Petitioners Have a Clear Right to Relief because the Commonwealth Cannot Meet the Ballot Distribution Deadlines in Act 77*

“Elections shall be free and equal” in Pennsylvania. Pa. Const. art. I, § 5. Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 244 Pa. 447, 91 A. 520, 523 (1914). The Free and Equal Elections Clause is “specifically intended to equalize the power of voters in our Commonwealth’s election process.” *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 812 (2018), and protects voting rights even if they are denied or impeded “by inadvertence.” *Id.* at 810 (citing *In re New Britain Borough Sch. Dist.*, 295 Pa. 478, 145 A. 597, 599 (1929)). “Court[s] possess broad

authority to craft meaningful remedies” when “regulations of law . . . impair the right of suffrage.” *League of Women Voters of Pa.*, 178 A.3d at 822.

The Election Code itself goes to great lengths to ensure the franchise of voters, even when their franchise otherwise rubs against a deadline in the Election Code. *See* 25 Pa. C.S. § 3060(e) (explaining that as long as the voter is in line at their polling place by the time polls close on election day, the polling place must stay open so the voter may cast their ballot). However, in times of crisis, like the current COVID-19 pandemic, this Court has the authority to provide injunctive relief to protect voters’ guaranteed constitutional rights. *See, e.g., In re General Election-1985*, 109 Pa. Commw. 604, 531 A.2d 836, 838-39 (Pa. Commw. Ct. 1987) (affirming two-week suspension of election in precinct affected by severe flooding and reasoning that adhering to the prescribed schedule under the prevailing circumstances, “where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws”).

Although Act 77 expands voters’ voting options, voting by mail or absentee still presents significant risks of disenfranchisement because of the dramatic expansion of mail voters and USPS delivery delays, both of which the pandemic either caused or exacerbated.

To vote by mail or absentee ballot, the process begins with a ballot application. 25 Pa. C.S. § 3150.12(a). Boards must receive applications for mail-in and absentee ballots no later than seven days before an election. *See id.* at § 3150.12a(a). When mail-in ballot applications are received, the Boards must verify the information submitted in the application against the voter’s record in the SURE system. *See* 25 P.S. § 3150.12b(a). The Boards then “shall commence to deliver or mail official mail-in ballots as soon as a ballot is certified and the ballots are available.” *Id.* at § 3150.15. At this point, the voter has until 8:00 p.m. on election day to return the ballot to the Board. *See* 25 P.S. §§ 3146.6(a), 3146.8(g)(1)(ii), 3150.16(a), (c).

The deadlines to apply for a mail-in or absentee ballot, for county boards to send ballots to voters, and for voters to mail ballots back to county Boards in Act 77 was consistent with the presumptions embedded in law and time in the not-too-distant past, that a recipient will receive a letter three-days after mailing it. *See Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406, 408 (1959); *see also* Pa. R.A.P. 121(e); Fed. R. Civ. P. 6(d). Historically, it was true that if voters received their mail-in or absentee ballots from county Boards more than three days before the election, the USPS was previously able to timely return their ballots to Boards.

The legislative history makes clear that when the General Assembly drafted Act 77 in the fall of 2019, nobody considered how a once in a generation pandemic

might impact the ballot received-by deadline. The law was considered and passed based on the assumption that Boards would receive between 80,000 to 100,000 mail-in and absentee ballots, not nearly the 1.5 million that voted by mail in the Primary nor the 3 million electors that the Secretary estimates will vote in the General Election. *See Ex. F* at 4. Thus, the General Assembly established deadlines to apply for a mail-in and absentee ballot and for a voter to deliver their ballot to their county board consistent with historical amounts of absentee ballots voted each election and established mail delivery deadlines.

The timelines set forth for voting by mail in the Election Code simply did not account for the wave of mail-in and absentee ballot applications and ballots that would be requested and the resulting delays that would ensue. The Commonwealth's most populous counties simply could not meet the deadlines in the Election Code because of the surge in mail-in ballot applications during the Primary Election, so Boards sprang into action. Some established ballot collection locations throughout the county consistent with their population and geography **Exs. L-M**. Others sought judicial approval to extend the ballot received by deadline to ensure the franchise of voters in the county. **Exs. R-S**.

The pandemic persists and more Pennsylvania citizens will vote during the General Election than in the Primary Election. **Ex. E** at 207:4-19. Approximately three million voters in the Commonwealth are likely to cast their votes by mail or

absentee ballot during the General Election. *Id.* The issues extant during the Primary Election will persist in the General Election and indeed will be worse.

Indeed, beyond the pandemic, issues are three-fold:

- USPS has warned the Secretary of the a “significant risk” that certain voters who timely request an absentee or mail-in ballot “will not have sufficient time to complete and mail the completed ballot[s] back to election officials in time for it to arrive by [Pennsylvania’s] return deadline.” **Ex. Z.**
- The USPS has suffered significant cuts and staffing shortages. Specifically, it has cut overtime pay for employees and now requires trucks to leave plants on time regardless of whether all mail is loaded into the truck. **Ex. K** at ¶ 20. This results in significant mail delays. *Id.* at ¶¶ 20-21.
- The USPS has suffered reduced employee staffing because of the pandemic. *Id.* at ¶ 21.

The operational changes and the staff shortages have caused a decline in first class mail delivery times over recent months. *See Ex. Y; Ex. K* at ¶¶ 20-21. Thus, it is unlikely that a voter who requests a mail-in ballot the Tuesday before the election could have that ballot mailed to the voter and then received by the county board of elections before the Election Day 8:00 p.m. deadline. *Id.* at ¶ 22; **Ex. E** at 68:8-24. Because of this, the Secretary has asked this Court to extend the received-by deadline to November 6, 2020 to avoid the “significant risk” of disenfranchising voters. **Ex. Z; Ex. X.**

The Petitioners have established a clear right to relief, the only issue open is the duration of the necessary relief. Petitioners contend and have demonstrated that

the proper extension is 7 days, not the mere 3 days that the Secretary would prefer. A 7-day extension of the ballot receipt deadline—until November 10, 2020—is required to avoid the significant risk of disenfranchisement (which even the USPS has recognized) and to protect the constitutional right to a free and equal protection.

Even presuming the voter could complete and return the ballot within a single day, with 2 days for a county to mail the ballot, and with a 2 to 5-day turn-around time each direction, ballots would be expected to arrive between 7 and 13 days after requested by the voter. Presuming delivery times all fall within the service standard, a ballot requested on the last day to do so would be returned as much as six days late, and 5 to 8 days later than the USPS recommends. *Id.*

A 7-day extension to the ballot receipt deadline is consistent with the USPS’s recommendation to the Secretary that voters should mail their ballots to county boards no later than October 27, 2020, 7 days before the statutory deadline, to ensure county boards timely receive a voter’s ballot. **Ex. Z**, USPS Warning Letter for Pennsylvania.¹⁸ A 7-day extension Petitioners propose all but guarantees that voters’ constitutional rights will be protected.

¹⁸ This comports with a similar letter the USPS sent to the Secretary of State of North Carolina which concedes that “a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state’s receipt deadline of November 6.” **Ex. AA**.

The following example from Ronald Stroman, until recently the Deputy Postmaster General, proves this point:¹⁹

A voter submit[s] a request for an absentee ballot on Tuesday, October 27, 2020, which is one week before election day. If an election official responds promptly and mails the ballot within a day, the ballot could be accepted by the USPS as early as Wednesday, October 28. Let's assume the Board of Elections is using First Class Mail and the ballot is delivered to the voter's residence on Friday, October 30. The voter promptly reviews the candidates and any ballot initiatives, fills out the ballot and mails it Saturday afternoon, after the Saturday USPS critical entry time. The mail carrier won't pick up that ballot until Monday, November 2. Even if the voter takes the ballot to a Post Office and has it postmarked on Saturday, the ballot would not be processed until Monday. With the USPS service standard of two to five days, the earliest that ballot would be delivered to the Board of Elections is Wednesday, November 4, the day after election day. This scenario assumes everything goes perfectly, and a voter is within two days reach of USPS.

Now, let's say it takes five days to get a ballot to a voter, a day for the voter to fill out a ballot, and five days for that ballot to be delivered back to the Board of Elections, all within the USPS service standards. These realistic changes add six more days without even attempting to account for expected delays. In each of these scenarios, mailing ballots back to election officials is futile, or, at best, risk proposal for a voter.

Ex. K at ¶ 19.

¹⁹ If a factual hearing is held in this matter, Petitioners intend to produce Mr. Stroman as an expert, but the process for expert reports and submissions has not been set in this matter.

A shorter time window would not advance any material governmental interest advanced by choosing a shorter time window. Under the Supremacy Clause and the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), county boards are required to continue to count certain mail-in and absentee ballots received up to 7 days after the election, in this case, November 10, 2020 (“UOCAVA Deadline”). 52 U.S.C. § 20301, *et seq.*

Extending the ballot received deadline to the UOCAVA Deadline also eliminates administrative burdens associated with having county Boards adhere to multiple deadlines for different types of mail-in and absentee ballots. While a 7-day extension may require an extension of other deadlines post-election deadlines, most notably the Secretary’s deadline to order a statewide re-canvass, this Court could also consistently move those deadlines.

Petitioners’ proposed extension of the ballot received deadline is analogous to a court extending the ballot received deadline in the Election Code because of a natural disaster. Factors outside of an elector’s control (*i.e.*, a natural disaster, a pandemic, or the USPS’s mail delivery delays) should not disenfranchise voters when they comply with the Election Code’s requirements. Courts are empowered, and under the Pennsylvania Constitution, are required to intercede under these circumstances—a pandemic, combined with the USPS’s failures—to protect the right to free and equal elections.

Petitioners have established a clear right to relief that the Commonwealth cannot comply with timelines in the mail-in and absentee ballot sections in the Election Code and that a 7-day extension of the ballot receipt deadline (25 Pa. C.S. § 3146.6(a), 3146.8(g)(1)(ii), 3150.16(a), (c)) is appropriate to ensure that the Commonwealth complies with the Free and Equal Elections Clause.

2. *An Injunction Is Necessary to Avoid an Injury that Cannot be Compensated by Damages*

Petitioners’ request to extend the ballot receipt deadline seeks to avoid disenfranchisement, an injury that cannot be adequately compensated by monetary damages. *See Bergdoll v. Kane*, 557 Pa. 72, 731 A.2d 1261, 1268-69 (1999) (the right to vote “is pervasive of other basic civil and political rights, and is the bedrock [sic] of our free political system”); *see also Perles v. Cty. Return Bd. Of Northumberland Cty.*, 415 Pa. 154, 202 A.2d 538, 540 (1964) (“The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter.”); *In re Canvass of Absentee Ballots of 1967 Gen. Election*, 431 Pa. 165, 245 A.2d 258, 262 (1968) (holding that the disenfranchisement of 5,506 citizens would be “unconscionable”). It is well-established that threats to a fundamental constitutional right like voting are immediate and cannot be compensated by damages. *See PA State Education Association v. Comm’n*, 981 A.2d 383 (Pa. Commw. Ct. 2009), *aff’d* 606 Pa. 638, 2 A3d 586 (2010). Here, Petitioners seek the protection of a Constitutional right—the

most fundamental “right to vote.” Quite obviously, money damages cannot compensate for the threatened injury.

3. *Greater Injury Will Result from Declining to Enjoin*

Without an injunction, severe injury could occur with disenfranchisement, decreased legitimacy of our elections, and future legal challenges to the outcome of the General Election. If this Court does not extend the ballot receipt deadline, tens of thousands, if not hundreds of thousands, of voters could be disenfranchised through no fault of their own. If past is prologue, during the Primary Election more than 98,000 ballots were received after election day, and 80,000 of those ballots were received within the week following election day. **Ex. V.** This scale of disenfranchisement is unacceptable and antithetical to Pennsylvania’s proud tradition of promoting enfranchisement. The voter disenfranchisement will likely be even worse during the General Election because of the increase in mail-in ballots and USPS’s admitted mail delivery delays.

Petitioners have established that this Court should issue a permanent injunction extending the deadline for county boards to receive mail-in and absentee ballots from 8:00 p.m. on November 3, 2020 to 8:00 p.m. on November 10, 2020, 7 days after election day, so long as the ballot is postmarked by 8:00 p.m. on November 3, 2020.

XI. THE PANDEMIC AND USPS FAILURES REQUIRE BOARDS TO PROVIDE VOTERS WITH NOTICE AND OPPORTUNITY TO CURE FACIAL DEFECTS ON THEIR BALLOTS

Petitioners are entitled to a permanent injunction requiring Boards to contact voters whose mail-in or absentee ballots contain facial defects to allow them the chance to cure them, a “notice and cure” requirement to comport with the Free and Equal Elections Clause. Pa. Const. art. I, § 5.

Elections are “free and equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston*, 91 A. at 523. Towards this end, “Court[s] possess broad authority to craft meaningful remedies” when “regulations of law . . . impair the right of suffrage.” *League of Women Voters of Pa.*, 178 A.3d at 822.

Here, Petitioners have a clear right to relief. The Free and Equal Elections Clause permits this Court to require Boards to take affirmative steps, such as notifying voters who have cast facially deficient ballots to avoid voter disenfranchisement. This need is particularly acute because of the newness of Act 77, the immediate impacts of the pandemic, and USPS delays.

During the Primary Election, either because of haste or confusion with the mail-in voting process, voters cast ballots with an incomplete Mailing Envelope,

including not completing the Mailing Envelope at all or forgetting to include certain basic information like a missing date or signature. **Ex. HH** at ¶¶ 12.

In these situations, the voter has expressed their desire to participate in the electoral process: the voter applied for a mail-in or absentee ballot, completed the ballot, and timely returned it to their county Board. The voter simply made a clerical error. The number of voters expected to use the new framework in the General Election is exponentially larger than the number that the General Assembly could have anticipated when it enacted Act 77. The Court can and is empowered to require county Boards to notify voters who cast mail-in and absentee ballots that are facially defective to ensure they are not disenfranchised when a voters' intent is to cast a valid ballot.

In the Secretary's King's Bench Application, she argued that this proposed relief is unworkable. Secretary's King's Bench Application at 29-31. Petitioners respectfully disagree. County boards routinely engage in similar voter outreach when a voter is at risk of being disenfranchised. *See* 25 Pa. C.S. §§ 3050(a.4)(4)(i) (“[N]otice shall be given where possible to all provisional electors thus challenged”); **Ex. GG**, Union County Board of Elections' Supplemental Responses to Plaintiffs' Interrogatories in Federal Court Action.²⁰

²⁰ SB 10, a proposed bill that would significantly amend the mail-in and absentee ballot provisions of the Election Code, proposes that when county boards meet to pre-canvass or canvass, if the

The biggest historic challenge—identifying contact information for the voter — has been resolved by the Secretary herself as all voters applying for mail-in ballots are now asked for an email address and phone number, which are added to SURE and can be utilized, individually, or through automation, for elector contact.

The pandemic and the significant mail delivery delays have created a very real risk that a voter who receives their ballot just days before a critical national election may forget or fail to complete all or part of the Mailing Envelope. These voters will have expressed a desire to cast a ballot and a facial defect should not preclude them from doing so. The Free and Equal Elections Clause grants this Court the authority to craft an appropriate remedy ensure that does not happen. The remedy here is simple and consistent with the Election Code.

Petitioners have satisfied the second and third prong of injunctive relief for the same reasons related to extending received-by deadline: the injury cannot be compensated by damages and disenfranchisement—despite the voter’s express desire to cast a ballot—is the alternative for declining to grant the relief Petitioners’ seek.

county board is not satisfied that the signature on a voter’s mail-in or absentee ballot matches the signature on file, the county Board “shall [n]otify the elector by mail, e-mail, telephone or text message that the signature on the elector’s ballot does not match the elector’s signature in the registration book.” **Ex. FF** at 14. The elector would then have 6 calendar days to address and rectify the issue, i.e., show the county board that the voter is indeed the person who remitted the absentee or mail-in ballot. *Id.* Based on this proposed bill, its advocates, including the Republican Senate Intervenors, clearly believe county Boards would have little trouble accomplishing what Petitioners seek for the November election.

To be clear, Petitioners would welcome alternative proposed relief from the Respondents, if a different solution can be adopted in the interest of a straightforward administration of the election that protects these voters from disenfranchisement. Petitioners thus seek the relief as originally proposed, but would welcome proposals from Respondents any alternative relief for the Court to direct as a means of allowing counties to fairly and promptly administer the election in a manner that is reasonably uniform and still reflects the differing geographies, populations, and other factors across the Commonwealth's 67 counties.

Petitioners have thus established that this Court should issue a permanent injunction requiring county boards to contact voters whose mail-in or absentee ballots contain facial defects to provide them a chance to cure the defects before the UOCAVA deadline.

XII. CONCLUSION

This Court can prevent the disenfranchisement of hundreds of thousands of Pennsylvania electors over voter mistakes that can be administratively and promptly cured. For the foregoing reasons, and to protect the free and equal elections in this Commonwealth, Petitioners ask this Court to grant the following relief:

(1) Declare that Section 1306-D of Act 77 requires Boards to administratively clothe and count absentee and mail-in ballots that otherwise comply with Section 1306-D but that do not include a Privacy Envelope;

(2) Declare that Section 1306-D of Act 77 permits Boards to evaluate their county's needs and establish, if necessary, to expedient return of absentee and mail-in ballots by permitting voters to return ballots to temporary offices and/or drop boxes;

(3) Declare that the Election Code's poll watcher residency requirement is valid and Constitutional;

(4) Order that mail-in and absentee ballots postmarked by 8:00 p.m. on Election Day and received by county Boards by the UOCAVA Deadline, November 10, 2020, be tabulated; and

(5) Order Boards, where feasible, to contact voters whose mail-in and absentee ballots contain facial defects to give the elector an opportunity to cure such

defect(s) before the UOCAVA Deadline and, if a cure is made, to count the elector's vote.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I hereby certify that this brief contains 13,942 words within the meaning of Pa. R. App. Proc. 2135. In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

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



Kevin M. Greenberg