

**IN THE SUPREME COURT OF PENNSYLVANIA**

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**No. 133 MM 2020**

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PENNSYLVANIA DEMOCRATIC PARTY *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, IN HER OFFICIAL CAPACITY AS ACTING  
SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA *et al.*,

Respondents.

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**REPUBLICAN PARTY OF PENNSYLVANIA'S SUPPLEMENTAL BRIEF**

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Intervenor-Respondent the Republican Party of Pennsylvania (“RPP”) supports and seeks to uphold free and fair elections on behalf of all Pennsylvanians.

For that reason, RPP seeks to uphold the plain terms of the Pennsylvania Election Code as enacted by the General Assembly and signed into law by the Governor. Unfortunately, despite acting primarily in a ministerial capacity, with no authority to intrude on the province of the General Assembly, the Secretary now has sided with the Democratic Party in seeking a judicial rewrite of the Election Code fewer than 60 days before election day and fewer than 10 days before voters may apply for an absentee or mail-in ballot. The Secretary and the Democratic Party ask the Court to impose their preferred new and wide-ranging election-administration regime on the Commonwealth, its citizens, and its voters. In the process, the Secretary and the Democratic Party invite the Court to undo the grand bipartisan compromise to promote free and fair elections that Pennsylvania’s political branches crafted in last year’s historic Act 77.

The Secretary’s and the Democratic Party’s proposed construction of the Election Code is irreconcilable with the plain statutory text, contravenes Pennsylvania and federal law, and, in fact, would trigger invalidation of Pennsylvania’s *entire no-excuse mail-in voting scheme* under Act 77’s non-severability clause. The Court should reject the Secretary’s and the Democratic

Party's construction, uphold Act 77 according to its plain terms, and declare the Election Code's poll watcher residency requirement unconstitutional.

## **BACKGROUND**

### **A. Act 77 & Pennsylvania Election Code**

Act 77 embodied a grand bipartisan compromise to modernize Pennsylvania's election system and to provide no-excuse mail-in voting. The Pennsylvania House of Representatives passed Act 77 with bipartisan support by a vote of 138-61. The Pennsylvania Senate passed Act 77 with bipartisan support by a vote of 35-14. Governor Wolf signed Act 77 into law on October 31, 2019. *See* Act 77, P.L. 552, S.B. 421, 203d Gen. Assemb., Reg. Sess. (Pa. 2019), [https://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?syear=2019&sind=0&body=S&type=B&bn=421](https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syear=2019&sind=0&body=S&type=B&bn=421).

As amended by Act 77, the Election Code permits all Pennsylvania voters to vote absentee as "qualified absentee electors," 25 P.S. § 3146.1, or by mail as "qualified mail-in electors," 25 P.S. § 3150.11. Voters can begin applying for an absentee or mail-in ballot 50 days before Election Day. 25 P.S. §§ 3146.2a(a), 3150.12a(a). This 50-day period is the longest in the country. *See* Press Release, Tom Wolf, Governor of Pennsylvania, *Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting* (Oct. 31, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/>.

Act 77 spells out several rules and requirements to vote by absentee or mail-in ballot. Four are principally relevant here.

*First*, Act 77 directs that absentee and mail-in ballots “must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” Act 77, sec. 6, § 1306, 2019 Pa. Laws 77 (codified as amended at 25 P.S. § 3146.6(c)); Act 77, sec. 8, § 1306-D, 2019 Pa. Laws 77 (codified as amended at 25 P.S. § 3150.16(c)) (hereinafter “Act 77”). This is the Election Day received-by deadline. Prior to Act 77, the received-by deadline for non-emergency absentee ballots was five o’clock P.M. on the Friday before the primary or general election. Act 77 § 1306.

*Second*, Act 77 mandates for both absentee and mail-in ballots that the “elector shall . . . fold the ballot” and “enclose and securely seal the same in the” secrecy envelope, which shields the identity of the voter from election officials. *Id.* As amended by Act 77 and Act 12 of 2020, the Election Code also directs that election officials “shall . . . set aside and declare[] void” any ballot whose secrecy envelope contains “any text, mark, or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” 25 P.S. § 3146.8(g)(4)(ii). Act 77’s secrecy envelope requirement and Act 12’s markings rule implement the Pennsylvania Constitution’s command “[t]hat secrecy in voting be preserved.” PA. CONST. art. VII, § 4. These provisions follow previous

provisions of the Election Code’s absentee voting law, which this Court construed in 2004. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d 1223, 1226 (Pa. 2004).

*Third*, Act 77 requires that voters “shall return” their absentee or mail-in ballots to the office of the county board of elections “by mail” or “in person.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16. This language follows the Election Code’s previous absentee voting law, which this Court held in 2004 prohibits third-party delivery of non-disabled voters’ ballots. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1226, 1231, 1234. Act 77 thus prohibits third-party delivery or “ballot harvesting” of absentee or mail-in ballots, as well as returning ballots to any location other than the office of the county board of elections.

*Fourth*, Act 77 requires that the voter must “fill out” the declaration on the absentee or mail-in ballot outer envelope and return the ballot so that it is “received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16. Act 77 therefore does not permit voters to cure noncompliant ballots after Election Day.

Act 77’s non-severability provision, Section 11, provides: “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining

provisions or applications of this act are void.” Act 77, sec. 11. The four provisions outlined above are all covered by the non-severability clause: they appear in section 6 of Act 77 for absentee ballots and in section 8 of Act 77 for mail-in ballots. *See* Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16. In addition, Pennsylvania’s entire new no-excuse mail-in voting scheme is contained in section 8 of Act 77. *See* Act 77, sec. 8. Accordingly, invalidation of any provision of Act 77 covered by the non-severability clause triggers invalidation of the entire no-excuse mail-in voting scheme. *See id.*, sec. 11.

Act 77 did not amend every provision of the Election Code. Among the provisions that Act 77 left intact is 25 P.S. § 2687(b), which requires that a poll watcher “must be a qualified registered elector of the county in which the election district for which the watcher was appointed is located.” This is the poll watcher residency requirement.

### **B. Act 77: A Grand Bipartisan Compromise**

Act 77 began as a one-subject bill introduced by Senator Boscola to target straight-ticket voting. *See* Paul Muschick, *How Pennsylvania’s biggest elections reforms in 80 years started in the Lehigh Valley*, The Morning Call (Dec. 6, 2019), <https://www.mcall.com/opinion/mc-opi-pa-elections-reform-legislation-compromise-muschick-20191206-euuesozlw5dnpcuunu3lh12tga-story.html>. Over time, Senator Boscola’s bill was amended to authorize payments to

counties for voting machines, extend deadlines, and so on. *Id.* And after the Governor vetoed an earlier iteration of the bill, the General Assembly and the Governor went back to the drawing board and, through difficult and prolonged negotiations, ultimately reached a middle ground. *Id.*

It is no secret that Act 77 was the result of a tough compromise. On the House floor, Senator Boscola (a Democrat), who introduced the bill, expressed “disappoint[ment] that the bill would not go as far as I would like” and did “not include every reform I would like to see.” *Legislative Journal–Senate: Consideration of and Concurrence in House Amendments to S.B. 421*, 203d Gen. Assemb. Sess. 46 1000 (Pa. 2019), <https://www.legis.state.pa.us/WU01/LI/SJ/2019/0/Sj20191029.pdf>. But she pushed forward nonetheless because “modernizing our elections and providing greater voter access are key.” *Id.* On the Senate floor, Republican Senate Majority Leader Corman described a similar experience:

All negotiations add some things and, unfortunately, lose some things. But to get to a point where there is bipartisan support to get agreement—we have a divided government in Pennsylvania, we have a Democratic Governor and a Republican legislature—there is always give and take. You have to be able to give to get. I think this bill is a product of that. The Governor led a difficult negotiation. It received 130 votes in the House, it was bipartisan, almost two-thirds of the Chamber, and we come here today. Again, every bill we can pick some pieces that we do not like about it, but I think, ultimately, this is the most significant modernization of our Election Code in decades.

*Id.* at 1002. The Governor likewise described Act 77 as “bipartisan compromise legislation.” Press Release, Tom Wolf, *supra* 2.



It is also no secret that Act 77's non-severability provision was a key part of that compromise. This precise issue arose on the House floor in a colloquy involving State Government Committee Chair Garth Everett:

Mrs. DAVIDSON. Thank you.

My second question has to do with the severability clause. It is my understanding that the bill says that the Supreme Court will have exclusive jurisdiction over challenges to elimination of straight-party voting, absentee voting, and mail-in voting. Then I also understand it also reads that the provisions of the bill will be nonseverable. So is that to mean that if somebody wants to challenge whether or not they were discriminated against because they did not have a ballot in braille, would they be able to – would that be a suit that they could bring to the Supreme Court under the severability clause?

Mr. EVERETT. Thank you, Mr. Speaker.

There is a nonseverability clause, and there is also the section that you mentioned that gives the Supreme Court of Pennsylvania jurisdiction, because the intent of this is that this bill works together, that it not be divided up into parts, and there is also a provision that the desire is, and of course, that could be probably gotten around legally, but that suits be brought within 180 days so that we can settle everything before this would take effect. So those are the provisions that have to do with nonseverability.

Mrs. DAVIDSON. So in effect, if a suit was brought to the Supreme Court of Pennsylvania and they found it to be unconstitutional, it would eliminate the entire bill because it cannot be severed.

Mr. EVERETT. Yes; that would be just in those sections that have been designated as nonseverable.

Mrs. DAVIDSON. All right. Thank you.

*Legislative Journal—House: Third Consideration of S.B. 421*, 203d Gen. Assemb. Sess. 64 1740–41 (Pa. 2019), <https://www.legis.state.pa.us/WU01/LI/HJ/2019/0/20191029.pdf>.

**C. *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. 2020) and *NAACP v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct. Aug. 28, 2020)**

The petitioners in *Crossey v. Boockvar*, No. 108 MM 2020, which is currently pending within this Court’s original jurisdiction, have challenged the Election Day received-by deadline and Act 77’s prohibition on ballot harvesting. This Court appointed “Commonwealth Court Presiding Judge Mary Hannah Leavitt as Special Master to conduct all necessary proceedings so as to create an evidentiary record on claims raised in this case including the ability of the United States Postal Service to comply with deadlines for the November 3, 2020 general election.” Order, *Crossey v. Boockvar*, No. 108 MM 2020 (Pa. Aug. 26, 2020). In compliance with that order, Judge Leavitt filed “her proposed findings of facts and conclusions of law and recommended disposition” on September 4, 2020. *See id.*

Reviewing the record evidence and allegations regarding mail-delivery delays, Judge Leavitt found that the “performance” of the U.S. Postal Service (“USPS”) in Pennsylvania “exceeds the national average.” Proposed Finding of Fact at 26 ¶ 12, *Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. Sept. 4, 2020) (Ex. A). “The USPS delivery standards are set in ranges,” and the delivery standard for Pennsylvania is “2 to 3 days.” *Id.* at 26 ¶ 11. “There is no evidence that USPS

performance in Pennsylvania extends beyond that range.” *Id.* To the contrary, “the USPS performance in Pennsylvania falls within that range over 98% of the time.” *Id.*

In fact, “[i]n the first quarter of 2020 for Pennsylvania, 99.5% of outbound Presort First-Class Mail was delivered within 3 days,” and “[m]ore than 98% was delivered within 1 day.” *Id.* at 26 ¶ 12. Even during the second quarter of 2020—when the COVID-19 pandemic was sweeping across the Commonwealth—“99.4% of USPS outbound Presort First-Class Mail was delivered within 3 days” in Pennsylvania and “[m]ore than 98% was delivered within 1 day.” *Id.*

Moreover, even a massive surge in absentee and mail-in voting in the 2020 general election will not lead to postal delays. To the contrary, “[i]f all 8.5 million registered voters in Pennsylvania elect to vote by absentee or mail-in ballot, the quantity of mail generated will represent only 1.2% of USPS’ capacity in the Eastern service area and will not overwhelm the system.” *Id.* at 26–27 ¶ 13.

Judge Leavitt’s findings comport with the USPS’ own statements and the evidence it provided in *NAACP v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct.). The *NAACP* petitioners have brought a range of challenges to Act 77 and the Election Code that implicate the received-by deadline, but they do not seek invalidation of it. As part of their case, the *NAACP* petitioners requested a *Touhy* deposition of a USPS official. USPS produced a declaration in response to that

request. *See* Decl. of Angela Curtis, *NAACP v. Boockvar*, No. 364 MD 2020 (Pa. Commw. Ct. Aug. 28, 2020) (“Curtis Decl.”) (Ex. B).

That declaration demonstrates that, as the Postmaster General told Congress, “the Postal Service is ready to take on and handle whatever volume of election mail it receives this fall.” *Examining the Finances and Operations of the United States Postal Service During COVID-19 and Upcoming Elections: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 116th Cong. 13 (2020) (statement of Louis DeJoy, Postmaster General and Chief Executive Officer of the United States Postal Service) (Curtis Decl. at Ex. A.). “Even with the challenges of keeping our employees and customers safe and healthy as they operate in a pandemic, the American public should know that this is our number one priority between now and Election Day.” *Id.* USPS has not “changed [its] delivery standards, [its] processing, [its] rules, or [its] prices for Election Mail.” *Id.* at 15. USPS “can, and will, handle the volume of Election Mail [it] receive[s].” *Id.*

The declaration further explains that USPS not only has prioritized delivery of election mail, but also has implemented measures to facilitate prompt delivery of absentee and mail-in ballots in the 2020 general election. USPS local officials routinely undertake review and removal of collection boxes and machines that are underutilized, outdated, or no longer necessary for efficient and effective processing of the mail. *See* Curtis Decl. ¶¶ 5–19. In order to allay any concerns regarding the

effect of such removals on delivery of election mail and ballots, the Postmaster General has instructed local post officials to “cease [such] removals . . . until after the election.” *Id.* ¶¶ 12, 19; *see also* DeJoy Senate Statement at 10–12, 14. Similarly, USPS routinely reviews retail hours at Post Offices and overtime hours worked by employees, but the Postmaster General has determined that such hours “will not be changed prior to the election.” Curtis Decl. ¶ 30; DeJoy Senate Statement at 14. The Postmaster General also has announced that, starting on October 1, 2020, USPS will “engage standby resources in all areas of [its] operations, including transportation,” in order “to satisfy any unforeseen demand” regarding election mail. DeJoy Senate Statement at 14.

**D. *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al., No. 2:20-cv-966-NR (W.D. Pa. 2020) and Pa. Democratic Party v. Boockvar, 133 MM 2020 (Pa. 2020)***

On June 29, 2020, Donald J. Trump for President, Inc. (the “Trump Campaign”) and the Republican National Committee (“RNC”), together with Congressmen Glenn Thompson, Mike Kelly, John Joyce, and Guy Reschenthaler, and registered voters Melanie Stringhill Patterson and Clayton David Show (collectively, the “Republican Plaintiffs”) commenced an action in the U.S. District Court for the Western District of Pennsylvania, under the caption *Donald J. Trump for President, Inc., et al. v. Kathy Boockvar, et al.*, No. 2:20-cv-966-NR (the

“Federal Action”). The Republican Plaintiffs joined the Secretary and all 67 Boards of Elections as defendants.

The Republican Plaintiffs have asked the federal court for a faithful and constitutional construction of the Election Code. The Republican Plaintiffs therefore seek, *inter alia*, declarations that:

- a. the return of absentee and mail-in ballots to drop-boxes or locations other than the offices of the county election boards, or via third-party delivery for non-disabled voters, violates Act 77;
- b. the counting of absentee or mail-in ballots that lack the secrecy envelope, contain any other text, mark, or symbol which reveals the electors’ identity, or lacks a completed or signed declaration violates Act 77; and
- c. the Election Code’s residency requirement for poll watchers is unconstitutional.

*See* Federal Action Am. Compl. (Doc. 234) at 70–73 (Ex. C).

In light of the imminent 2020 general election, the Republican Plaintiffs sought expedited consideration of their claims, which the federal court granted. Petitioners in this action (collectively, “the Democratic Party”) moved to intervene in the Federal Action. *See* Federal Action Doc. 83 (Ex. D). The federal court granted that motion. *See* Federal Action Doc. 309 (Ex. E).

The Democratic Party filed this suit on July 10, eleven days after the Republican Plaintiffs filed the Federal Action. The Democratic Party named as Respondents the same sixty-eight parties (the Secretary of State and every Board of Elections) whom the Republican Plaintiffs named as defendants in the Federal

Action. *See* Pet. Among other relief, the Democratic Party seeks mirror-image declarations that run directly opposite of the relief that the Republican Plaintiffs seek in the Federal Action. For example, the Democratic Party seeks declarations permitting voters to return ballots to locations other than the offices of county boards of elections; permitting election officials to count ballots that lack a secrecy envelope or completed declaration; and upholding the poll watcher residency requirement. *See id.* The Democratic Party also seeks judicial declarations extending Act 77's received-by deadline and requiring Commonwealth election officials to extend certain voters an opportunity to cure noncompliance with absentee and mail-in ballot requirements. *See id.*

Although the Federal Action was already proceeding on an expedited schedule, the Democratic Party sought an expedited schedule in this case. *See* App. For Extraordinary Relief. The Commonwealth Court granted that application in part and denied it in part. *See* Order (July 30, 2020). The Commonwealth Court set an accelerated schedule to brief preliminary objections to the Petition. *See id.*

The Secretary then petitioned this Court for an exercise of extraordinary jurisdiction in this case. *See* App. For Court To Exercise Extraordinary Jurisdiction (Aug. 16, 2020). In her Application, the Secretary revealed that she now agrees with the Democratic Party's position with respect to returning ballots to locations other than the office of county boards of elections, counting ballots without secrecy

envelopes, and the poll watcher residency requirement. *See* App. 23–26, 31–39. The Secretary also asks the Court to set aside the Election Day received-by deadline, although she seeks a shorter extension of that deadline than the Democratic Party. *See id.* at 27–29. To her credit, the Secretary still opposes the Democratic Party’s request to create an extra-statutory notice-and-cure procedure for certain voters. *See id.* at 29–31.

RPP and the other Republican Committees who sought to intervene in this case—the Trump Campaign and RNC—opposed the Secretary’s request for extraordinary jurisdiction. *See* Answer To App. (Aug. 23, 2020). One week after the Secretary filed her petition, the federal court stayed the Federal Action. *See* Federal Action Doc. 410 (Ex. F). The Republican Plaintiffs in the Federal Action later moved to modify the federal court’s stay order and for limited preliminary injunctive relief to preserve their right to pursue their challenges to the Secretary’s unconstitutional implementation of Act 77 and the Election Code. *See* Federal Action Doc. 414 (Ex. G).

This Court granted extraordinary jurisdiction two business days after the Republican Plaintiffs filed their motion in the Federal Action. *See* Order (Sept. 1, 2020). The Court’s order directed that “[t]he parties and intervenors in this matter are permitted to file supplemental briefing and/or affidavits to support their respective positions on the claims raised in this case on or before Tuesday,



September 8, 2020 at 5:00 pm.” *Id.* The Court granted RPP intervention on September 3. RPP now files this supplemental brief.

## **ARGUMENT**

The Court should deny the Secretary’s and the Democratic Party’s request to substitute by judicial fiat their preferred election-administration regime for the regime enacted by the General Assembly in the Election Code and Act 77. The Secretary and the Democratic Party jointly ask the Court to rewrite three provisions of Act 77; the Democratic Party asks the Court to rewrite a fourth; and the Secretary and the Democratic Party ask the Court to uphold the Election Code’s poll watcher residency requirement. All of this requested relief exceeds this Court’s authority under Pennsylvania and federal law. The requested changes to Act 77, moreover, run afoul of the Act 77’s non-severability clause and would trigger invalidation of all of the covered provisions of Act 77, *including Pennsylvania’s entire no-excuse mail-in voting scheme*. The Court should deny the requested declaratory relief, uphold Act 77 according to its plain terms, and declare the poll watcher residency requirement unconstitutional.

### **I. STATE AND FEDERAL LAW REQUIRE THIS COURT TO UPHOLD ACT 77’S PLAIN STATUTORY TEXT**

State and federal law delineate the Court’s task: to construe Act 77 and the Election Code in accordance with their plain terms and the mandates of the Pennsylvania and U.S. Constitutions.

1. This Court’s obligation in construing statutes is clear: to “ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). “The best indication of legislative intent is the language used in the statute.” *Office of Admin. v. Pa. Labor Relations Bd.*, 916 A.2d 541, 547–48 (Pa. 2007). Accordingly, “[w]hen 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 the spirit.” 1 Pa. C.S. § 1921(b).

Moreover, this Court lacks the authority to rewrite the General Assembly’s enactments because the General Assembly—not the judiciary—holds the sole power to write the laws for the Commonwealth. As this Court recently reaffirmed, the judiciary “may not usurp the province of the legislature by rewriting [statutes] ... as that is not [the court’s] proper role under our constitutionally established tripartite form of governance.” *See In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 722 (Pa. 2018); *accord Heller v. Frankston*, 475 A.2d 1291, 1296 (Pa. 1984) (“Where a legislative scheme is determined to have run afoul of constitutional mandate, it is not the role of this Court to design an alternative scheme which may pass constitutional muster.”). Thus, the Court cannot take unilateral action to rewrite the law. *Robinson Twp. v. Commonwealth*, 147 A.3d 536, 583 (Pa. 2016); *Cali v. Phila.*, 177 A.2d 824, 835 (Pa. 1962). “[E]diting of [a statute]” by the Court “would amount to judicial legislation.” *State Bd. of Chiropractic Exam’rs v. Life Fellowship of Pa.*, 272 A.2d 478, 482 (Pa. 1971).

The foundational rules of statutory construction and fundamental limitations on the Court’s authority apply with even greater force when the Election Code is at issue. “The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government.” *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54 (1869)); *see also Agre v. Wolf*, 284 F. Supp. 3d 591, 620 (E.D. Pa. 2018) (Smith, C.J.) (“The process for crafting procedural regulations is textually committed to state legislatures and to Congress.”).

The Pennsylvania Constitution is explicit regarding the separation of powers in the context of absentee voting. It provides:

The ***Legislature*** shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a) (emphasis added).

2. The requirements of deference to the General Assembly’s enactments—not the Secretary’s purported “interpretations” of them—and faithful adherence to the statutory text take on particular importance under Act 77. Act 77

contains a non-severability clause that covers the entirety of Pennsylvania’s no-excuse mail-in voting scheme and every statutory provision implicated in this case other than the poll watcher residency requirement. *See* Act 77, sec. 11.

The Court has “assume[d] that, as a general matter, nonseverability provisions are constitutionally proper.” *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006). And that is particularly true here for two reasons.

*First*, as this Court has recognized, non-severability provisions should be upheld when they legitimately arise from “the concerns and compromises which animate the legislative process.” *Id.* “In an instance involving such compromise, the General Assembly may determine, the court’s application of [ordinary severability principles] might undo the compromise; a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.* That is the case here, since the non-severability clause was part and parcel of the grand bipartisan compromise embodied in Act 77. *See* Background *supra* Section B.

*Second*, Act 77’s non-severability provision avoids the defect that the Court identified in *Stilp*. The defect in the provision the Court declined to enforce in *Stilp* was that it had been “employed as a sword against the Judiciary” and appeared “to be aimed at securing a coercive effect upon the Judiciary” (by threatening decreased judicial compensation) in violation of the separation of powers. 905 A.2d at 978–

80. Such provisions are “ineffective and cannot be permitted to dictate [the Court’s] analysis.” *Id.* at 980.

Act 77’s non-severability provision is nothing of the sort. It was permissibly employed by the Legislature “as a shield to ensure preservation of a legislative scheme or compromise,” *id.* at 978, in an area “regarded as peculiarly within the province of the legislative branch of government,” *Winston*, 91 A. at 522. Not only is there no evidence or basis to believe that the non-severability provision in a law concerning election administration was intended to coerce the courts, but it is also clear that the provision was intended to preserve the compromise struck in Act 77.

Act 77’s non-severability clause therefore is valid, enforceable, and binding on this Court. Accordingly, invalidation of any of the provisions of Act 77 covered by the non-severability clause—including any of the Act 77 provisions implicated in this case—triggers invalidation of *all* covered provisions, including the entire no-excuse mail-in voting scheme contained in section 8 of Act 77. *See* Act 77, sec. 11.

3. Finally, the U.S. Constitution also places crucial and inviolate prohibitions on judicial rewriting of the Election Code. The Constitution’s Elections Clause directs that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed by *the Legislature thereof*,” subject to directives of Congress. U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Likewise, the Constitution’s Electors Clause directs that “[e]ach State shall appoint,

in such Manner as *the Legislature thereof* may direct,” electors for President and Vice President. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

The Electors Clause in particular “convey[s] the broadest power of determination” and “leaves it to the legislature exclusively to define the method” of appointment of electors. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). “Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.” *Bush v. Gore*, 531 U.S. 98, 112–13 (2000) (Rehnquist, J., concurring). “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question,” including when such departure is carried out by the state judiciary. *Id.* at 113. “[W]ith respect to a Presidential election,” state courts must be “mindful of the legislature’s role under Article II in choosing the manner of appointing electors.” *Id.* at 114. For this reason as well, the Court may not deviate from Act 77’s plain text or rewrite the Election Code.

## **II. THE PLAIN STATUTORY TEXT FORECLOSES THE DEMOCRATIC PARTY’S REQUESTED CONSTRUCTION OF ACT 77**

The Secretary and the Democratic Party ask the Court to rewrite Act 77’s received-by deadline, secrecy envelope requirement, and requirement to return a ballot to the office of the county board of elections. The Democratic Party also asks the Court to graft an extra-statutory notice-and-cure requirement onto Act 77. All of this requested relief contravenes Act 77’s plain terms and non-severability

provision. Moreover, the requested extension of the received-by deadline contravenes the federal laws establishing a uniform nationwide federal Election Day, and the requested elimination of the secrecy envelope requirement violates the Pennsylvania Constitution’s command “[t]hat secrecy in voting be preserved.” PA. CONST. art. VII, § 4.

The Secretary has attempted to buttress her preferred construction of Act 77 by issuing “Guidances” regarding the secrecy envelope requirement and requirement to return ballots to the office of the county board of elections. *See Guidance for Missing Official Election Ballot Envelopes* (Aug. 19, 2020), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_NakedBallot\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf); *Absentee and Mail-in Ballot Return Guidance* (Aug. 19, 2020), [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf). The Secretary, however, acts in a ministerial capacity under the Election Code and has no power or authority to intrude upon the province of the General Assembly. *See* 25 P.S. § 2621; *Perzel v. Cortes*, 870 A.2d 759, 764 (Pa. 2005); *Hamilton v. Johnson*, 141 A. 846, 847 (Pa. 1928). She therefore has no authority to construe—and is entitled to no deference in her “interpretation” of—the Election Code. *See* 25 P.S. § 2621; *Perzel*, 870 A.2d at 764; *Hamilton*, 141 A. at 847. Thus, her guidance documents are of no moment, and they cannot override the plain terms of Act 77 and

the Election Code in any event. *See, e.g., Nw. Youth Servs., Inc. v. Com., Dep't of Public Welfare*, 66 A.3d 301, 312 (Pa. 2013) (“[I]nterpretive rules outside the realm of an agency’s delegated lawmaking authority may be disregarded,” as may such rules that are “unwise or violative of legislative intent.”).

Accordingly, and as explained more fully below, the Court should deny the Democratic Party’s requested relief and uphold Act 77 according to its plain statutory text. *See A.S. v. Pa. State Police*, 143 A.3d 896, 903 (Pa. 2016) (when interpreting statutes, the Statutory Construction Act directs that legislative intent is to be ascertained from the statute’s plain language); *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 82 (Pa. 2006) (“[T]he plain language of a statute ‘cannot be ignored in pursuit of the statute’s alleged contrary spirit or purpose.’”).

**A. Act 77 Creates The Valid And Binding Election Day Received-By Deadline**

Act 77 directs that absentee and mail-in ballots “must be received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16. For at least three reasons, this Court lacks authority to depart from this express requirement and to extend the received-by deadline as requested by the Secretary and the Democratic Party. *First*, any such order would trigger Act 77’s non-severability clause and invalidation of Pennsylvania’s entire no-excuse mail-in voting scheme. *Second*, the received-by deadline is an evenhanded and constitutional rule of election



administration. *Third*, federal law strictly limits any extension of the received-by deadline in any event. The Court should reject the Secretary's and the Democratic Party's invitation to override the Legislature's received-by deadline in Act 77.

**1. Act 77's Non-Severability Clause Forecloses Extension Of The Received-By Deadline**

The Secretary acknowledges that the Election Day received-by deadline is an express requirement of Act 77. *See App. 27.* The Secretary and the Democratic Party nonetheless both seek a judicial order invalidating the deadline, crafting a new Election Day postmark requirement, and creating an extended received-by deadline, although they seek different extensions. *See id.* But neither the Secretary nor the Democratic Party even mentions Act 77's non-severability clause, let alone explains how the relief they seek would not trigger that clause and invalidation of Pennsylvania's no-excuse mail-in voting scheme. *See id.; see also Pet.*

The reason is plain: Act 77's non-severability clause forecloses the requested relief. The received-by deadline is covered by Act 77's non-severability clause. *See Act 77, secs. 6, 8, 11.* Accordingly, any invalidation of the received-by deadline—including a replacement of that deadline with either of the extensions that the Secretary or the Democratic Party requests—would trigger invalidation of the other covered provisions, including the entire mail-in voting scheme. *See id., sec. 11; see also Stilp, 905 A.2d at 978–80; supra Part I.2.*

## 2. Act 77's Received-By Deadline Is Constitutional, Including During The COVID-19 Pandemic

The U.S. Supreme Court and other courts have recognized that election-related deadlines, including deadlines on the exercise of the franchise, are constitutional. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973); *Mays v. LaRose*, 951 F.3d 775, 787 (6th Cir. 2020). Consistent with this authority, courts across the country—including this Court on two separate occasions—have upheld Election Day received-by deadlines as constitutional even during the COVID-19 pandemic. *See Disability Rights Pa. v. Boockvar*, No. 83 MM 2020, 2020 WL 2507661 (Pa. May 15, 2020); *Delisle v. Boockvar*, No. 95 MM 2020, 2020 WL 3053629 (Pa. May 29, 2020); *see also Stapleton v. Thirteenth Judicial Dist. Ct.*, No. OP 20-0293 (Mont. May 27, 2020) (Ex. H); *Nielsen v. DeSantis*, No. 4:20-cv-236-RH-MJF (N.D. Fla. June 24, 2020) (Ex. I); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020). As these courts have recognized, Election Day received-by deadlines “ensur[e] a smooth process for [voters] to cast ballots and officials to count those ballots.” *Thomas*, 2020 WL 2617329, at \*26 (citation omitted). The Northern District of Florida recently explained:

A state could reasonably so provide [a postmark deadline]; some do. But . . . a state could also reasonably decide, as Florida has, to require receipt on or before election day. This eliminates the problem of missing, unclear, or even altered postmarks, eliminates delay that can have adverse consequences, and eliminates the remote possibility that

in an extremely close election—Florida has had some—a person who did not vote on or before election day can fill out and submit a ballot later.

*Nielsen*, No. 4:20-cv-236-RH-MJF at 3 (Ex. I).

The Secretary previously told the Court that the received-by deadline is constitutional under the Free and Equal Elections Clause. *See* Resps.’ Opp. To App. For Prelim. Inj. at 34–37, *Disability Rights Pa.*, 2020 WL 2507661. The Secretary nonetheless now suggests that enforcement of the received-by deadline violates that Clause. *See* App. 27. The Secretary was right the first time, as the Court recognized. *See* *Disability Rights Pa.*, 2020 WL 2507661; *Delisle*, 2020 WL 3053629. After all, the received-by deadline is a neutral, evenhanded rule that applies to all Pennsylvania voters equally. It therefore is constitutional. *See, e.g., League of Women Voters v. Commonwealth*, 178 A.3d 737, 804 (Pa. 2018). Indeed, neither the Secretary nor the Democratic Party has shown—or can show—that the Election Day received-by deadline is a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors.” *Patterson*, 60 Pa. at 75 (1869).

The Secretary’s related contention that an extension of the received-by deadline is appropriate to address “the threat of mail-delivery delays during an ongoing pandemic,” App. 28, fails as a matter of fact and law. *First*, the alleged “threat of mail-delivery delays” affecting the general election is speculative at best, *e.g., Disability Rights Pa.*, 2020 WL 2507661; *Delisle*, 2020 WL 3053629, and, in

fact, is contradicted by Judge Leavitt’s findings in *Crossey* and USPS’ own evidence in *NAACP*. See Background *supra* Section C.

*Second*, even if a “threat of mail-delivery delays during [the] ongoing pandemic” existed, App. 28, it would not be unique to Pennsylvania. Such alleged delays, however, have not been sufficient to persuade other courts to invalidate election day receipt deadlines—including in states with shorter absentee and mail-in voting periods than the Commonwealth’s longest-in-the-nation 50-day period. See *Thomas*, 2020 WL 2617329, at \*24–27 (South Carolina: 30 days); *Nielsen*, No. 4:20-cv-236-RH-MJF (Florida: up to 40 days). Yet the Secretary has not even cited, much less attempted to distinguish, this weight of authority.

Moreover, the Election Day received-by deadline affects only voters who wait until late in the absentee or mail-in voting period to submit their ballots. But any “interest . . . in making a late rather than an early decision” to request or complete a ballot is slight at best, and is outweighed by the Commonwealth’s interests advanced by the deadline. *Storer v. Brown*, 415 U.S. 724, 736 (1974); see also *Rep. Nat’l Comm. v. Dem. Nat’l Comm.*, 140 S. Ct. 1205, 1207 (Apr. 6, 2020). And given Pennsylvania’s unparalleled and generous absentee and mail-in voting period, any voter’s inability to cast a timely ballot is “not caused by” the Election Day received-by deadline but instead “by their own failure to take timely steps to effect”

completion and return of their ballot. *Rosario*, 410 U.S. at 758; *see also Mays*, 951 F.3d at 786–87; *Thomas*, 2020 WL 2617329, at \*26.

Act 77’s received-by deadline is constitutional, including during the COVID-19 pandemic.

### **3. Federal Law Strictly Limits Any Extension Of The Received-By Deadline**

Finally, in all events, federal law strictly limits any extension of the received-by deadline. Federal law creates a uniform nationwide federal Election Day that preempts any counting in federal elections of ballots that were not cast or mailed by Election Day, including ballots that lack a postmark and are received after Election Day.

“[I]t is well settled that the Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.” *Foster v. Love*, 522 U.S. 67, 69 (1997) (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832–33 (1995)). “[T]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.” *Ex parte Siebold*, 100 U.S. 371, 384 (1879); *see also Foster*, 522 U.S. at 69.

Congress has prescribed a single nationwide federal Election Day in three federal statutes. The first, 3 U.S.C. § 1, provides that “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first

Monday in November, every fourth year succeeding every election of a President and Vice President.” The second, 2 U.S.C. § 7, directs that “[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.” And the third, 2 U.S.C. § 1, mandates that “[a]t the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for a term commencing on the 3d day of January next thereafter.”

This trio of statutes “mandates holding all elections for Congress and the Presidency on a single day throughout the Union.” *Foster*, 522 U.S. at 70. The term “election” within these statutes means the “combined actions of voters and officials meant to make a final selection of an officeholder.” *Id.* at 71. In other words, “election” is the consummation of a process to elect an official. *See id.* Thus, these three federal statutes require the 2020 general election to be consummated on Election Day (November 3, 2020). *See id.*; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 2, 7.

Consistent with these federal statutes, “the Voting Rights Act Amendments of 1970 require that citizens be allowed to vote by absentee ballot in Presidential elections *on or before* the day of the election.” *Voting Integrity Project, Inc. v.*

*Bomer*, 199 F.3d 773, 778 (5th Cir. 2000) (emphasis added); *see also* 52 U.S.C. § 10502(d). But whatever latitude states retain under federal law to define the process of casting mail ballots through the USPS, they cannot create a process under which ballots cast or mailed *after* Election Day can be considered timely. After all, such a process would permit a voter to take “actions . . . meant to make a final selection of an officeholder” after Election Day, in contravention of federal law. *Foster*, 522 U.S. at 70; 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7.

An extension of the received-by deadline, however, threatens to do precisely that. Such an extension could lead to election officials receiving ballots that were cast or mailed after Election Day. It also could lead to election officials receiving ballots after Election Day that bear no proof, such as a postmark, establishing that they were cast and mailed on or before Election Day. Counting such ballots in federal elections would violate the federal laws establishing a nationwide federal Election Day. *Foster*, 522 U.S. at 70–71; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 2, 7. Any extension of the received-by deadline, therefore, “ceases to be operative” to the extent that it purports to permit the counting of such ballots in federal elections. *Foster*, 522 U.S. at 69; *see also* 3 U.S.C. § 1; 2 U.S.C. §§ 1, 7.

For all of these reasons, the Court should deny the Secretary’s and the Democratic Party’s requests to extend Act 77’s received-by deadline.

**B. Act 77 And The Election Code Invalidate Absentee And Mail-In Ballots That Lack A Secrecy Envelope**

**1. Act 77 Implements A Constitutional Command And Mandates That Voters Use Secrecy Envelopes**

The Pennsylvania Constitution directs that “[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.” PA. CONST. art. VII, § 4. This Constitutional command is a “keystone of our democracy” that “must be preserved.” *Appeal of Orsatti*, 598 A.2d 1341, 1344 (Pa. Commw. Ct. 1991) (internal quotation omitted). It prohibits methods of voting “which may allow officials to ascertain a voter’s identity.” *Banfield v. Cortes*, 110 A.3d 155, 168 n.10 (Pa. 2015). Thus, an individual cannot waive, voluntarily or by compulsion, the secrecy of her ballot, except in cases where an individual has cast an illegal vote (for example, because she was ineligible to vote) or an individual’s vote has been altered by a third party. *See, e.g., In re Gen. Election for Dist. Justice*, 670 A.2d 629, 635, 639–40 (Pa. 1996); *Appeal of Orsatti*, 598 A.2d at 1343–44; *In re Gen. Election of Nov. 4, 1975*, 71 Pa. D. & C. 2d 83, 91–92 (Pa. Ct. Com. Pl. Pike 1975).

Consistent with longstanding practice in Pennsylvania, Act 77 implements this Constitutional requirement by mandating that the “elector shall . . . fold the ballot” and “enclose and securely seal the same in the” secrecy envelope, which, as officially prepared, does not disclose the voter’s identity. Act 77 §§ 1306, 1306-D;



25 P.S. §§ 3146.6, 3150.16. Act 77’s use of the word “shall” carries “an imperative or mandatory meaning.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231. Accordingly, its “clear mandate[.]” requires exclusion of any ballot that the voter fails to secure in a secrecy envelope. *Id.*

Act 12’s markings rule confirms this result. That rule directs that election officials “shall . . . set aside and declare[.] void” any ballot whose secrecy envelope contains “any text, mark, or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” 25 P.S. § 3146.8(g)(4)(ii). The purpose of Act 77’s secrecy envelope requirement and Act 12’s markings rule is to protect the secret ballot and “to prevent ballots from being identifiable” to election officials or other persons. *Appeal of Weiskerger*, 290 A.2d 108, 109 (Pa. 1972); *see also Banfield*, 110 A.3d at 168 n.10. “The[se] provision[s], thus, [are] consistent with the spirit and intent of our election law, which requires that a voter cast his ballot alone, and that it remain secret and inviolate.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1232.

Act 77 and Act 12 therefore mandate that an absentee or mail-in ballot is “invalid” whenever the envelope that contains it “reveals the identity of the elector.” 25 P.S. § 3146.8(g)(4)(ii). This occurs when a marking on the secrecy envelope reveals the voter’s identity in contravention of Act 12. *Id.* It also occurs when a voter omits the secrecy envelope in contravention of Act 77. In that scenario, the

voter places the ballot in an outer envelope that contains identifying information—in particular, the completed declaration by which election officials confirm the voter’s identity and eligibility to vote. *See id.* § 3146.8(g)(3). Accordingly, absentee and mail-in ballots without a secrecy envelope also are “identifiable” and invalid. *Appeal of Weiskerger*, 290 A.2d at 109. In other words, *any* ballot contained in an envelope with markings that reveal the identity of the voter cannot be counted. *See* 25 P.S. § 3146.8(g); *Appeal of Weiskerger*, 290 A.2d at 109.

The plain Constitutional and statutory text thus foreclose the Secretary’s and the Democratic Party’s request to order election officials to count absentee and mail-in ballots submitted without a secrecy envelope. Moreover, because the secrecy envelope requirement is covered by Act 77’s non-severability provision, any such order would trigger invalidation of *all* covered provisions of Act 77, including the entire no-excuse mail-in voting scheme. *See* Act 77, secs. 6, 8, 11; *see also Stilp*, 905 A.2d at 978–80; *supra* Part I.2.

**2. The Secretary’s Contrary Construction Ignores The Constitution, The Plain Statutory Text, And This Court’s Precedents**

The Secretary acknowledges that ballots submitted in secrecy envelopes with marks that reveal the identity of the voter are invalid and cannot be counted. *See* App. 32–33. She nonetheless argues that ballots submitted without a secrecy envelope in contravention of Act 77 should be counted. *See id.* The Secretary,

however, never mentions the Pennsylvania Constitution’s command “[t]hat secrecy in voting be preserved.” PA. CONST. art. VII, § 4. Nor does she offer any explanation as to why the General Assembly would have invalidated one category of ballots that reveal the identity of the voter but not the other. *See* App. 32–33. Instead, the Secretary makes four attempts to parse the statutory language toward her preferred construction, all of which fail.

*First*, the Secretary suggests that noncompliance with Act 77’s secrecy envelope requirement does not “permit fraud.” App. 34. But even if that unsubstantiated assertion were true (and it is not), it does not affect the outcome here. After all, Act 77’s secrecy envelope requirement does at least as much to prevent fraud as Act 12’s markings rule. Moreover, as the Secretary acknowledges, this Court has recognized that the Commonwealth has a strong interest in preventing ballots from “being identifiable” to election officials or anyone else. *Id.*; *see also Banfield*, 110 A.3d at 168 n.10; *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1232; *Appeal of Weiskerger*, 290 A.2d at 109. Indeed, advancing that interest promotes the integrity of, and public confidence in, the Commonwealth’s elections. The Secretary, however, never addresses this interest, much less explains why the Court should undermine it by invalidating the secrecy envelope requirement. *See* App. 34.

*Second*, the Secretary suggests that the use of the word “shall” in Act 77’s secrecy envelope provision is “merely directory,” like a direction to use a particular color of ink or not to write in the name of a candidate who appears on the ballot. App. 32. But as this Court already has explained, the case the Secretary cites in support of this suggestion, *Appeal of Weiskerger*, “was decided before the enactment of the Statutory Construction Act, which dictates that legislative intent is to be considered only when a statute is ambiguous.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231. Since that enactment, this Court “has repeatedly recognized the unambiguous meaning of the word” “shall” to be “imperative or mandatory.” *Id.* at 1231–32. More importantly, “[t]he legislature is presumed to know about this body of case law, as it is well-settled that if the legislature in a later statute uses the same language used in a prior statute which has been construed by the courts, there is a presumption that the repeated language is to be interpreted in the same manner as such language had previously interpreted when the court construed the earlier statute.” *Pa. State Educ. Ass’n v. Commonwealth, Dep’t. of Cmty. & Econ. Dev.*, 148 A.3d 142, 157 (Pa. 2016). *See also Verizon Pa., Inc. v. Commonwealth*, 127 A.3d 745, 757 (Pa. 2015), and the cases cited therein.

The plain statutory text provides no basis to depart from the unambiguous and mandatory construction of the word “shall” here. “[T]here is nothing” in Act 77 “to suggest that a voter has a choice between” whether or not she uses a secrecy

envelope. *Id.* at 1231. To construe Act 77’s secrecy envelope requirement “as merely directory would render [it] meaningless and, ultimately, absurd.” *Id.*

After all, even “so-called technicalities of the Election Code are necessary *for the preservation of secrecy* and the sanctity of the ballot and must be observed—particularly where, as here, they are designed” to implement a Constitutional mandate. *Id.* at 1234 (emphasis added). Thus, noncompliance with a procedure to safeguard the secret ballot—which implements a command of Constitutional magnitude, *see* PA. CONST. art. VII, § 4—is a far cry from “minor irregularities” like using the wrong color of ink or writing in a candidate whose name appears on the ballot. *See Appeal of Weiskerger*, 290 A.2d at 109; *Shambach v. Bickhart*, 845 A.2d 793, 798 (Pa. 2004); *see also* App. 31–35; *Canvass of Absentee Ballots of Apr. 28, 1964, Primary Election*, 34 Pa. D. & C. 2d 419, 423, 425 (Pa. Ct. Com. Pl. Phila. 1964) (“[a] voter, by failing to observe the statutory requirements, has disenfranchised himself,” and such disenfranchisement includes when the voter fails to sign the outer envelope declaration). The Secretary recognizes as much because she concedes that ballots that violate Act 12’s markings rule are invalid. *See* App. 32–33. So too, are ballots submitted without complying with Act 77’s “mandatory” secrecy envelope requirement. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231–34.

*Third*, the Secretary points out that Act 12 expressly requires exclusion of ballots submitted in secrecy envelopes with marks that reveal the voter's identity, but that Act 77 does not "provide that naked ballots or mail-in ballots without interior envelopes should not be counted." App. 33. But there was no reason for the General Assembly to specify that consequence under Act 77: that consequence already flows from the "imperative and mandatory" requirement that the voter "shall" secure her ballot in a secrecy envelope. *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231. Indeed, the version of 25 P.S. § 3146.6(a) that this Court construed in *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election* likewise did not provide that ballots hand-delivered by third persons should not be counted. *See id.* at 1226. The Court, however, concluded that such third-party delivery required invalidation of the ballot because the voter had failed to comply with the statutory mandate that she "shall" send her ballot "by mail" or deliver it "in person." *Id.*; *see also id.* at 1231–35.

The Secretary thus ignores the crucial difference in Act 77's and Act 12's plain statutory text. Act 77 directs what the *voter* "shall" do with the ballot, Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16, so the voter's noncompliance with the "mandatory" secrecy envelope requirement requires invalidation of the ballot, *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231–35. But Act 12's markings rule does not direct the voter to do anything. Rather, it directs

what *election officials* “shall” do when they receive a ballot in a secrecy envelope with markings that reveal the identity of the voter. 25 P.S. § 3146.8(g)(4)(ii).

Thus, there was no reason for the General Assembly to specify the consequence for noncompliance with Act 77’s secrecy envelope requirement: under the Pennsylvania Constitution and this Court’s precedents, such noncompliance already required invalidation of the ballot. PA. CONST. art. VII, § 4; *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231–35. In Act 12, by contrast, the General Assembly gave instructions to election officials encountering a scenario where the voter had complied Act 77’s secrecy envelope requirement but the envelope still revealed the voter’s identity or vote. 25 P.S. § 3146.8(g)(4)(ii).

Thus, in all events, the General Assembly’s clarification in Act 12 that absentee or mail-in ballots in *secrecy* envelopes that reveal the voter’s identity are invalid does not imply that absentee or mail-in ballots in *outer* envelopes that reveal the voter’s identity in contravention of Act 77 are somehow valid. Rather, the statutory language makes clear that the General Assembly invalidated *any* ballot contained in an envelope that reveals the identity of the voter, regardless of whether that envelope is a secrecy envelope or an outer envelope. The Secretary’s cramped contrary reading would frustrate the Constitution’s and the General Assembly’s directive to protect the secret ballot. *See, e.g.*, PA. CONST. art. VII, § 4; *Banfield*,

110 A.3d at 168 n.10; *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231–35; *Appeal of Weiskerger*, 290 A.2d at 109.

*Fourth*, the Secretary suggests that invalidating naked ballots would violate the constitutional mandate of “free and equal elections.” App. 34. But, of course, the mandate that “secrecy in voting be preserved” is *also* a constitutional mandate. PA. CONST. art. VII, § 4. As a specific mandate requiring secrecy in voting, it trumps the more general mandate of free and equal elections. *See, e.g., Zauflik v. Pennsbury School Dist.*, 104 A.3d 1096, 1126–27 (Pa. 2014).

In all events, the secrecy envelope requirement is a neutral and evenhanded rule that applies to all Pennsylvania voters on equal terms. It therefore does not violate the Free and Equal Elections Clause. *See, e.g., League of Women Voters*, 178 A.3d at 804. And once again, neither the Secretary nor the Democratic Party can show a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors,” *Patterson*, 60 Pa. at 75, in the Legislature’s faithful implementation of the Constitutional mandate that “secrecy in voting be preserved,” PA. CONST. art. VII, § 4. The Court should reject the Secretary’s and the Democratic Party’s proposed evisceration of the secrecy envelope requirement and uphold Act 77 in its entirety.



**C. Act 77 Prohibits County Boards From Designating Locations Other Than Their Offices For Delivery Of Ballots**

Act 77 mandates that voters “shall” return their absentee or mail-in ballots to the office of the county board of elections “by mail” or “in person.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16. This requirement of return by mail or in person “is mandatory.” *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 843 A.2d at 1231–35.

Act 77 makes clear, moreover, that the absentee or mail-in ballots must be returned to the *office* of the county board of elections, not to the board as a *body*. Indeed, Act 77 mandates that “a completed [absentee or mail-in] ballot must be received *in the office of the county board of elections* no later than eight o’clock P.M. on the day of the primary or election.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6(c), 3150.16(c) (emphasis added). Act 77 also requires that the declaration envelope for absentee and mail-in ballots must have printed upon it “the address of the elector’s county board of election,” so that “the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6(a) and 3150.16(a). Thus, Act 77 contemplates that absentee and mail-in ballots be mailed or delivered to the office of the county election board that appears on the declaration envelope. Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6(a), (c) and 3150.16(a), (c).

The Secretary makes no argument that the terms “drop-boxes” or “satellite locations” appear anywhere in the Election Code. The Secretary also offers no explanation as to how election officials would monitor drop-boxes and guarantee that Act 77’s prohibition on third-party delivery and ballot harvesting is upheld and enforced at drop-boxes. The Secretary and the Democratic Party nonetheless ask the Court to authorize voters to return their ballots to locations other than the office of the county board of elections, including unmanned and unmonitored drop-boxes. *See* App. 23–26; *see also* Pet. By invalidating a plain requirement of Act 77, however, this relief would trigger Act 77’s non-severability clause and invalidation of Pennsylvania’s entire no-excuse mail-in voting scheme. *See* Act 77, sec. 11.

Moreover, the Secretary’s and the Democratic Party’s preferred scheme would permit individual counties to implement vastly different ballot-return regimes. *See, e.g.*, App. 23 (discussing ballot-return regimes in Delaware County, Montgomery County, and Philadelphia County). In fact, the Secretary’s and the Democratic Party’s requested remedy would permit *each* of Pennsylvania’s 67 counties to adopt its *own* ballot-return regime. An outcome permitting variation across counties would create disparities and potential confusion for voters and candidates participating in statewide elections or in elections in districts covering more than one county. It also would violate the Equal Protection Clause of the U.S. Constitution: “[h]aving once granted the right to vote on equal terms, the State may

not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05 (holding that standardless manual recount across counties violated Equal Protection); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right to suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). Indeed, “[a] state must impose uniform statewide standards in each county in order to protect the legality of a citizen’s vote. Anything less implicates constitutional problems under the equal protection clause of the Fourteenth Amendment.” *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F. Supp. 2d 684, 697 (W.D. Pa. 2003). The Secretary’s and the Democratic Party’s requested relief would run headlong into these precise constitutional problems and thus fails.

**D. The Democratic Party Provides No Basis For Requiring The Commonwealth To Provide A Cure Opportunity To Certain Voters**

The Secretary is entirely correct that “[t]he Democratic Party provides no statutory or constitutional basis for requiring County Boards to contact voters whose ballots contain ‘minor errors’ and afford them an opportunity to cure.” App. 29. The only authority the Democratic Party cites for this novel claim is Pennsylvania’s Free and Equal Elections Clause. Pet. ¶ 185. But as this Court has long made clear, that provision does not imbue courts with freestanding authority to rewrite the Election Code to comport with a litigant’s notion of good election policy. Rather,

“ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government.” *Winston*, 91 A. at 522. If some restrictions are “onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to amend.” *Id.*

The legislative nature of the request at issue is readily apparent here. Notifying voters of defective ballots and providing them with an opportunity to cure would be a monumental undertaking—particularly on the eve of an election. Outlining and implementing that requested relief statewide would require the expenditure of significant resources. As the Secretary again correctly notes, “[s]uch logistical policy decisions are more properly addressed by the legislature.” App. 30. That body, not this Court, is the entity best suited to balance the Commonwealth’s interests and the likely fiscal and administrative burdens resulting from a policy such as that proposed by the Democratic Party.

The tardiness of the Democratic Party’s request, made in the “weeks” leading up to the imminent general election, alone is a sufficient basis to deny it. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). In all events, the Democratic Party cannot show a “plain, palpable and clear abuse of the [legislative] power which actually infringes the rights of the electors.” *Patterson*, 60 Pa. at 75. To the contrary, the requirement that voters follow the appropriate procedures when filling out their ballots easily passes muster. Those procedures treat all voters alike. *Winston*, 91 A. at 523. They

deny no qualified electors the right to vote. *Id.* Each voter “has the right to cast his ballot and have it honestly counted” under the same standard. *Id.* And “the inconveniences if any bear upon all in the same way under similar circumstances.” *Id.*

In all events, the Democratic Party’s requested relief would trigger Act 77’s non-severability clause. *See* Act 77, sec. 11. Requiring county officials to offer voters a chance to “cure,” through the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) period, defective ballots discovered “on, or after Election Day,” Pet. ¶ 187, would necessitate invalidation of the requirement in section 8 of Act 77 that the voter “fill out” the declaration on the outer envelope and submit the ballot in time for it to be “received in the office of the county board of elections no later than eight o’clock P.M. on the day of the primary or election,” Act 77 §§ 1306, 1306-D; 25 P.S. §§ 3146.6, 3150.16 (emphasis added). Because that requirement is covered by Act 77’s non-severability clause, any such invalidation would trigger invalidation of the entire no-excuse mail-in voting scheme. *See* Act 77, secs. 8, 11.

Finally, under the Democratic Party’s requested approach, a ballot cured during the UOCAVA period would not be cast until after Election Day. Accordingly, counting any such ballots in a federal election is preempted by the federal statutes creating a uniform nationwide federal Election Day. *See supra* Part II.A. The Court should reject the Democratic Party’s claim.

### III. THE POLL WATCHER RESIDENCY REQUIREMENT IS UNCONSTITUTIONAL

The Court may not grant the Secretary's and the Democratic Party's request to uphold the poll watcher residency requirement, *see* App. 36, because that requirement is unconstitutional. The Secretary relies primarily on the U.S. District Court for the Eastern District of Pennsylvania's decision in *Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396 (E.D. Pa. 2016). *See* App. 38-39. That decision, however, is distinguishable, and the Secretary improperly dismisses the vital role of poll watchers in safeguarding all Pennsylvanians from election fraud or ballot tampering.

As an initial matter, *Cortes* was decided on a very different procedural posture and a limited record. In that case, the plaintiffs sought a preliminary injunction just eighteen days before the general election, and the requested relief, if granted, "would [have] alter[ed] Pennsylvania's laws just five days before the election." *Cortes*, 218 F. Supp. 3d at 405. Accordingly, "avoid[ing] last-minute intervention in a state's election process" served as the primary reason for why the court denied the requested relief, because the court found that "[a]ny intervention ... risks practical concerns including disruption, confusion or other unforeseen deleterious effects." *Id.* at 404-405. Thus, having found that the requested injunctive relief was untimely, any further ruling by the court in that case was dicta. *See, e.g., Kool v. Coffey*, 300 F.3d 340, 355 (3d Cir. 2002) (having concluded notice was inadequate, the

court’s “comments about the merits of the case [were] simply precatory and [were] not necessary to the actual holding of the case”).

More fundamentally, the *Cortes* decision, like the Secretary here, gives short shrift to the Commonwealth’s obligation to safeguard the electorate from voter fraud. “Every voter in a federal ... election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974). This “right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.” *Id.* at 226 (quoting *Prichard v. United States*, 181 F.2d 326, 331 (6th Cir.), *aff’d due to absence of quorum*, 339 U.S. 974 (1950)). Ultimately, “the deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial.” *Id.*; *see also Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). *See also Patterson Aff.* (Ex. J).

Poll watchers help prevent such injury. Their “statutory role” in “[p]rotecting the purity of the electoral process” “promotes a free and fair election” and “serve[s] to guard the integrity of the vote.” *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979). In the absence of poll watchers, fraud can flourish—a fact demonstrated just months ago when a former election judge pled guilty to ringing up fraudulent votes in South Philadelphia. He was able to commit this crime, in part, because there were no poll watchers at his precinct. *See Information and Counts, United States v. DeMuro*, No. 2:20cr112 (E.D. Pa. Mar. 03, 2020), ECF No. 1. And with Pennsylvania moving to an entirely new election regime under Act 77—with increased opportunities for ballot fraud and tampering—the need for poll watchers has never been more apparent.

Nevertheless, due to the distribution of voters throughout the Commonwealth, the county-residence requirement makes it difficult for both political parties to identify qualified poll watchers in all precincts. *See Vonne Aff.* (Ex. K). For example, in Philadelphia County, there exist 66 voting wards which are divided into 1,686 divisions. *See Political Maps*, Office of the Phila. City Commissioners, <https://www.philadelphiavotes.com/en/resources-a-data/political-maps> (last visited Sept. 7, 2020). Republicans are not a majority of registered voters in any ward in Philadelphia County. *See Department Reports and Data, Historical Citywide Voter Registration Data (1940-2019)*, Office of the Phila. City



Commissioners, <https://www.philadelphiavotes.com/en/home/item/101-historical-citywide-voter-registration-data-now-available> (last visited Sept. 7, 2020). Conversely, in some contiguous geographic areas of the Commonwealth, such as in Fulton, Franklin, Bedford, Huntingdon and Perry counties, Republicans account for almost 70% of the voters. *See* 2019 Voter Registration Statistics – Official (Nov. 5, 2019), <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Documents/2019%20Election%20VR%20Stats%20%20final.pdf>.

Given these disparities, there is no rational basis for the Commonwealth to adhere to its county-residence rule. While the *Cortes* court claimed that rule was rationally related to Pennsylvania’s “county-by-county system of elections,” *Cortes*, 218 F. Supp. 3d at 409, the fact remains that the Election Code sets forth the uniform standards that *all sixty-seven Pennsylvania counties* must follow in order to conduct any election in this Commonwealth. Indeed, the Equal Protection Clause requires such uniformity. *See, e.g., Pierce*, 324 F. Supp. 2d at 697 (“A state must impose uniform statewide standards in each county to protect the legality of a citizen’s vote.”). Accordingly, the Commonwealth lacks a constitutionally recognized basis for imposing a county-residence restriction that effectively denies political parties, their candidates, and the voters an essential safeguard against voter fraud. The poll watcher residency requirement is unconstitutional.

## CONCLUSION

The Court should uphold Act 77 according to its plain text and declare the poll watcher residency requirement unconstitutional.

Dated: September 8, 2020

Respectfully submitted,

/s/ Kathleen A. Gallagher

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**CERTIFICATION OF WORD COUNT**

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure,  
I certify that this Brief contains 11,538 words, exclusive of the supplementary matter  
as defined by Pa.R.A.P. 2135(b).

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
*Counsel for Intervenor-Respondent  
the Republican Party of Pennsylvania*

## **CERTIFICATE OF COMPLIANCE**

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

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2020, I caused a true and correct copy of this document to be served on all counsel of record via PACFile.

*/s/ Kathleen A. Gallagher*  
\_\_\_\_\_  
Kathleen A. Gallagher  
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the Republican Party of Pennsylvania,*

# **EXHIBIT A**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas,	:	
Irvin Weinreich, Brenda Weinreich,	:	
and the Pennsylvania Alliance	:	
for Retired Americans,	:	
Petitioners	:	
	:	
v.	:	266 M.D. 2020
	:	
Kathy Boockvar, Secretary of the	:	
Commonwealth, and Jessica Mathis	:	
Director of the Bureau of Election	:	
Services and Notaries,	:	
Respondents	:	

**RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**I. Introduction**

On April 22, 2020, the Pennsylvania Alliance for Retired Americans and four individuals, two of whom are members of the Alliance (collectively, Petitioners), filed a Petition for Declaratory and Injunctive Relief (Petition) against the Secretary of the Commonwealth, Kathy Boockvar, and the Director of the Bureau of Election Services and Notaries, Jessica Mathis (collectively, Secretary) in this Court. Anticipating disruptions to the June 2, 2020, primary election from the COVID-19 pandemic, the Petition raised, *inter alia*, constitutional claims about provisions of the Pennsylvania Election Code (Election Code)<sup>1</sup> related to mail-in ballots, which is a method of voting that the General Assembly added to the Election Code by the Act of October 31, 2019, P.L. 552, No. 77 (Act 77). Petitioners filed a May 8, 2020, Emergency Application for Special Relief in the Nature of a

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

Preliminary Injunction and for Expedited Review (Preliminary Injunction Application).

This Court held a pre-hearing telephone conference call on the Preliminary Injunction Application, during which the Secretary confirmed her intention to challenge this Court's jurisdiction over the Petition in her preliminary objections. The parties agreed to bifurcate the issue of jurisdiction over the Preliminary Injunction Application from the merits. After briefing by the parties and intervenors,<sup>2</sup> this Court denied the Preliminary Injunction Application on May 28, 2020, on the basis that Petitioners were not likely to prevail on the issue of this Court's jurisdiction.

On June 17, 2020, this Court issued an opinion and order transferring the matter to the Supreme Court of Pennsylvania. This Court agreed with the Secretary that the Petition's claims fell within the Supreme Court's exclusive jurisdiction over constitutional challenges to Act 77 under Section 13(b) of Act 77.<sup>3</sup> *Crossey v. Boockvar* (Pa. Cmwlth., No. 266 M.D. 2020, filed June 17, 2020).

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<sup>2</sup> After this Court transferred the matter to the Supreme Court, the Supreme Court granted the applications for leave to intervene filed on behalf of President Pro Tempore Joseph B. Scarnati, III, and Majority Leader of the Senate Jake Corman (collectively, Senate Intervenors) and on behalf of the Speaker of the House of Representatives Bryan Cutler and House Majority Leader Kerry Benninghoff (House Intervenors). See *Crossey v. Boockvar* (Pa., No. 108 MM 2020, filed August 21, 2020).

The Supreme Court denied the application for leave to intervene filed by the Republican Party of Pennsylvania, the Republican National Committee, and the National Republican Congressional Committee. *Id.*

<sup>3</sup> Specifically, this Court concluded that the Petition challenged Sections 1306 and 1306-D of the Election Code. These sections relate to the date, time, and manner by which absentee or mail-in ballots must be returned to the county boards of elections. They are listed in Section 13(b) of Act 77 as sections over which the Supreme Court had exclusive jurisdiction if a challenge was brought within 180 days of Act 77's effective date.



The Supreme Court accepted the transfer at 108 MM 2020 and granted Petitioners' Application for Leave to File an Amended Petition by July 13, 2020. The Amended Petition for Review (Amended Petition) sets forth constitutional claims arising from the Secretary's failure (1) to allow the return of absentee and mail-in ballots after the 8:00 p.m. Election Day deadline, because of alleged backlogs in the application process and delays by the United States Postal Service (USPS) in mail delivery; (2) to provide prepaid postage on mail-in ballots; and (3) to allow voters to obtain third-party assistance in the return of mail-in ballots. The Amended Petition alleges that the Secretary's failure to implement such procedures violates Article I, Sections 1,<sup>4</sup> 5,<sup>5</sup> and 26<sup>6</sup> of the Pennsylvania Constitution. Petitioners request the Supreme Court to declare that the above-listed barriers to voting by mail violate their constitutionally protected right to free access to a free and equal election during the pandemic. Petitioners request the Supreme Court to order the Secretary to implement additional safeguards for the November 3, 2020, general election and any other election held during the pandemic. These proposed safeguards include providing prepaid postage on all absentee and mail-in ballots; counting ballots delivered after the statutory deadline of 8:00 p.m. Election Day; and authorizing third-party assistance in the collection and submission of absentee and

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<sup>4</sup> Article I, Section 5 of the Pennsylvania Constitution provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, §1.

<sup>5</sup> Article I, Section 5 of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, §5.

<sup>6</sup> Article I, Section 26 of the Pennsylvania Constitution provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art. I, §26.

mail-in ballots to the extent the latter two measures do not trigger Act 77's non-severability provisions.

The Secretary and Intervenors filed preliminary objections to the Amended Petition.<sup>7</sup> Prior to disposition thereof, the Supreme Court issued an August 26, 2020, order appointing the undersigned as Special Master and directing the Court “to create an evidentiary record on claims raised in this case including the ability of the United States Postal Service to comply with deadlines for the November 3, 2020 general election.” *Crossey v. Boockvar* (Pa., No. 108 MM 2020, filed August 26, 2020). The Supreme Court directed this Court to file with the Prothonotary of the Supreme Court its proposed findings of fact and conclusions of law and recommended disposition no later than Friday, September 4, 2020. *Id.*

On August 27, 2020, this Court issued a case management order that directed the parties and intervenors to file pre-hearing statements by Friday, August 28, 2020. It scheduled a pre-hearing telephone conference for Saturday, August 29, 2020, and an evidentiary hearing for August 31, 2020. It also ordered that the parties

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<sup>7</sup> The Secretary objected on the basis that the Amended Petition (1) fails to state a constitutional claim because its allegations are hypothetical; (2) the Alliance lacks standing as an organization and asserts claims not ripe for review; and (3) fails to join indispensable parties, *i.e.*, the county boards of elections. The Secretary also objected on the basis that the Commonwealth enjoys sovereign immunity that bars mandatory injunctive relief.

On August 13, 2020, the Secretary withdrew her preliminary objections that the Amended Petition did not state a constitutional violation and was not ripe for review.

Senate Intervenors objected on the basis of (1) lack of jurisdiction and ripeness; (2) failure to join the county boards of elections as indispensable parties; (3) the claims raise non-justiciable political questions; (4) failure to conform to law; (5) insufficient specificity of the pleadings; and (6) lack of capacity to sue.

House Intervenors objected on the basis of (1) lack of standing of the Alliance because it does not vote; (2) failure to state a constitutional violation; (3) failure to present a justiciable claim; and (4) failure to join indispensable parties.

and intervenors file and serve proposed findings of fact and conclusions of law by September 2, 2020, 9:00 a.m.

## **II. Evidentiary Hearing of August 31, 2020**

The Court summarizes the hearing testimony and documentary evidence as follows.

### **A. Petitioners' Witnesses<sup>8</sup>**

#### **1. Ronald Stroman**

1. Ronald Stroman served as Deputy Postmaster General from 2011 to June 2020. Notes of Testimony, [Aug. 31, 2020,] 13-15 (N.T. \_\_\_\_).
2. He holds a B.A. in government from Manhattan College and a J.D. from Rutgers University. N.T. 13.
3. Mr. Stroman was a member of the USPS Board of Governors, which oversees the strategic direction of the USPS. He served on the Postmaster General's Executive Leadership Team, which implements the directions of the Board of Governors. N.T. 15.
4. Mr. Stroman had responsibility to improve the communications between the USPS, election officials and the election mail community; to improve the internal training for USPS employees on election mail; and to develop a system for rapid response to election mail issues. N.T. 17; Petitioners' Ex. 32.

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<sup>8</sup> The Court took witnesses out of order so that the testimony relevant to each issue was addressed at the same time. The Court further notes that the transcript of the evidentiary hearing is incomplete. Paragraphs 16, 39, and 40 of the summary of Mr. Stroman's testimony is based upon the notes of the court and staff, not the transcript. On September 4, 2020, a corrected transcript was filed with the Court. The citations herein refer to the transcript filed with the Court on September 1, 2020.

5. The Court accepted Mr. Stroman as an expert in the USPS' operations and delivery standards, and the application of those delivery standards to voting by mail. N.T. 19, 25.
6. Mr. Stroman testified that there are three aspects to the USPS mail process: retail (local post office), processing and delivery. N.T. 26.
7. Mail is collected by carriers or at a local post office. All mail is collected and placed with similar types of mail (*e.g.*, First-Class Mail, Marketing Mail) and transported to the processing center. At the processing center, mail is placed in sorting machines to find the correct zip code. If the mail remains in the same zip code, it is taken to a truck for transportation to a delivery unit. Carriers and clerks sort the mail by routes, and then the mail is placed on trucks for delivery to the addressees. N.T. 26-27.
8. If mail is designated for a location outside the boundaries of the processing center, it is transported to the appropriate processing center. Upon receipt there, the same process is used to deliver the mail. *Id.*
9. Mr. Stroman was Deputy Postmaster General during the April 2020 Wisconsin primary, and he testified about the investigation the USPS conducted into its performance during that primary. N.T. 28; Petitioners' Ex. 4.
10. Mr. Stroman attributed the delay in the receipt of absentee ballots during the Wisconsin primary election to: (1) the different service standards depending on the class of mail; and (2) the date upon which a voter requested a ballot. N.T. 28, 29.
11. Mr. Stroman testified about the July 29, 2020, letter that General Counsel and Executive Vice President of the USPS, Thomas J. Marshall, sent to

- Secretary Boockvar. That letter advised the Secretary that the Commonwealth's election law deadlines for requesting and casting mail-in ballots are incongruous with the USPS' delivery standards, and that this mismatch creates a risk that ballots requested near the deadline would not be returned in time to be counted under the law. N.T. 34; Petitioners' Ex. 6.
12. The July 29, 2020, letter further advised that there are two main classes of mail used for ballots: First-Class Mail and Marketing Mail, the latter of which uses a nonprofit postage rate. Petitioners' Ex. 6.
  13. Mr. Stroman agreed with Mr. Marshall's statement that voters must use First-Class Mail (or an expedited service) to mail their ballots and ballot requests, while election officials may generally use First-Class Mail or Marketing Mail to mail ballots to voters. N.T. 37.
  14. Domestic First-Class Mail has a nationwide delivery standard of 2 to 5 days upon receipt at the post office. N.T. 38, 75; Petitioners' Ex. 6, 32, ¶18.
  15. Marketing Mail has a nationwide delivery standard of 3 to 10 days upon receipt at the post office. N.T. 38, 75; Petitioners' Exs. 6, 32, ¶18.
  16. Mr. Stroman agreed that the July 29, 2020, letter does not advocate for changes in Pennsylvania's election law to accommodate the USPS's delivery standards and was intended to be educational.
  17. According to Mr. Stroman, mail delivered within the above-listed standards is considered timely under normal circumstances. N.T. 38, 39.
  18. Mr. Stroman identified three circumstances that he does not consider normal at this time: the COVID-19 pandemic, new initiatives by the new Postmaster General and the increase in the volume of mail-in ballots. N.T. 39, 45.

19. The pandemic has caused issues with USPS employee availability, which in turn affects the processing and delivery of mail in both the primary location and secondary location to which the mail is directed. N.T. 39, 40.
20. In the Pennsylvania June 2, 2020, primary, the pandemic affected the delivery of mail not only in the Philadelphia region but also in the entire mail-processing network. N.T. 43, 44.
21. Mr. Stroman testified that the new Postmaster General, Louis DeJoy, issued a new directive that mail transportation trucks leave at the designated time. If the mail has not been processed before the scheduled departure, the truck leaves without all the mail. In a cumulative fashion, this causes delays and backups on the delivery side of the process. N.T. 45-47, 55.
22. The third factor affecting the delivery standards is the volume of ballots. States are amending their election laws, which requires the USPS to train its employees to process election mail. N.T. 47.
23. The above factors will delay the USPS' ability to meet its delivery standards, according to Mr. Stroman. N.T. 49.
24. Mr. Stroman testified about Petitioners' Exhibit 9, which is a Score Break-down of Presort First-Class Mail on a nationwide basis and shows a decline in delivery times for three weeks in July 2020. He testified that Petitioners' Exhibit 9 was consistent with his knowledge of the Postmaster General's testimony in recent U.S. House and Senate Hearings. N.T. 49-51; Petitioners' Ex. 9.
25. Exhibit 9 purports to show how close the USPS came to meeting its performance standards. The decline in the score indicates that the USPS did not meet its service performance targets. N.T. 52-54.

26. Mr. Stroman opined that the USPS' failure to hit its performance targets has a compounding effect and that delays in delivery will get worse as time runs. N.T. 54, 55.
27. Mr. Stroman testified that all ballots returned to the county boards of elections will be single-piece mailings, which requires them to go through the sorting process. This may cause delays. N.T. 56, 85, 88.
28. Mr. Stroman testified regarding Petitioners' Exhibit 28, which is an Areas Inspiring Mail Chart. The Chart uses a baseline performance standard of 96%, meaning that percentage of time the USPS meets its delivery standard of 2 to 5 days for First-Class Mail or 3 to 10 days for Mass Marketing Mail. N.T. 58-63; Petitioners' Ex. 28.
29. The Chart provides that in the 43rd week, the USPS' performance rates, when compared to its intended performance standard of 96%, was 72.86% for Central Pennsylvania; 85.68% for the Philadelphia Metropolitan area; and 90.01% for Western Pennsylvania. N.T. 61; Petitioners' Ex. 28.
30. Mr. Stroman attributed the drop in the performance to the Postmaster General's changes in operations. N.T. 60.
31. These numbers mean that the USPS is not meeting its service target rates by a large margin, according to Mr. Stroman. N.T. 61, 62.
32. Mr. Stroman has a high degree of confidence in the data used in Petitioners' Exhibit 28 based on his personal knowledge of how the USPS operates and how such data is retrieved and compiled. N.T. 101-02.
33. Mr. Stroman opined that the USPS cannot improve its performance before the November 2020 general election. It takes time to fix the problems due

to the integrated nature of the USPS' network and to clear backlogs. N.T. 62, 63.

34. Mr. Stroman opined that there is a significant risk that the USPS will not meet its First-Class Mail service delivery standards of 2 to 5 days during the November 2020 election. N.T. 66, 70.
35. Mr. Stroman further observed that not all absentee ballots will be deposited in the mail from within the Commonwealth. N.T. 71.
36. Mr. Stroman testified that the USPS' delivery standard is 2 to 5 days within the Commonwealth, which includes mail deposited in the mail outside of the Commonwealth. N.T. 76, 77.
37. Mr. Stroman did not know which class of mail Pennsylvania election officials will use to mail the ballots to voters or the class by which the ballots will be returned to election officials. He believed that Pennsylvania's boards of elections are not using uniform mailing. N.T. 78.
38. Election mail is not separated from the general mail but the USPS attempts to prioritize it by tagging or coding election mail. N.T. 83, 85.
39. Mr. Stroman agreed that the county boards of elections play a very important role in getting the ballots to voters on time and are ultimately responsible for mailing ballots. N.T. 107. The county boards of elections should ensure that the envelopes used are automation compatible, the proper weight and properly addressed.
40. Mr. Stroman recommended that voters mail their completed ballots to the county election board at least 10 days prior to the election.
41. Mr. Stroman testified that it was possible but highly unlikely that a voter who requested 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. N.T. 120-22; Petitioners' Ex. 32, ¶19.

## **2. Devon Laudenslager**

1. Devon Laudenslager is a resident of the City of Philadelphia and has been registered to vote for four years. N.T. 282.
2. Due to the COVID-19 pandemic, Ms. Laudenslager applied for a mail-in ballot from her county board of elections on May 5, 2020, and received a confirmation email the next day that her application had been received. N.T. 282.
3. On May 15, 2020, Ms. Laudenslager received a second email indicating that her ballot had been mailed on May 15, 2020, and if she did not receive the ballot by May 22, 2020, she should contact her board of elections. N.T. 283.
4. When Ms. Laudenslager did not receive her mail-in ballot by May 22, 2020, she attempted to contact her board of elections. N.T. 283. Initially, she received a busy signal and, when the line was not busy, no one answered the phone and there was no ability to leave a message. N.T. 283-84.
5. She attempted to locate an alternate phone number to contact the board from its website, but her attempts to reach the board through alternate phone numbers were unsuccessful. N.T. 284.
6. As of May 26, 2020, the deadline to apply for a mail-in ballot, Ms. Laudenslager had not received her ballot. N.T. 283.
7. Ms. Laudenslager contacted her state representative's office, which told her that it had been in touch with the City of Philadelphia Commissioners

Office, and had a list of voters that needed replacement ballots. N.T. 285-86.

8. On June 2, 2020, Ms. Laudenslager went to her polling place to vote because she had not received her mail-in ballot. N.T. 286.
9. Her vote was counted. N.T. 286.
10. Ms. Laudenslager received a ballot by mail on June 4, 2020. N.T. 286.
11. Ms. Laudenslager intends to vote in the November 3, 2020, general election but doubts she will attempt to use a mail-in ballot due to her experience in the June 2020 primary and her fears that she cannot be assured that her county board of elections will receive her ballot in time to be counted even if she receives her ballot timely. N.T. 287-89.
12. Ms. Laudenslager gave two other examples of issues she had with her mail. She expected a follow-up letter from a graduate school and she received a letter from the Department of Transportation indicating her license would be renewed but that she should expect a follow-up letter. She never received either follow-up letter. N.T. 287.

### **3. Dr. Joseph Eisenberg**

1. Joseph N.S. Eisenberg, PhD, MPH, is the John G. Searle endowed Chair and Professor of Epidemiology in the School of Public Health at the University of Michigan. He also has an adjunct appointment at the Universidad San Francisco de Quito in Ecuador. He received his PhD in Bioengineering in the joint University of California, Berkeley/University of California, San Francisco program, and an MPH from the School of Public Health at the University of California, Berkeley (focusing on the science of infectious disease transmission). Petitioners' Ex. 30 at ¶2.

2. Dr. Eisenberg is an infectious disease epidemiologist who researches how pathogens move through the environment and society to cause infectious diseases. Petitioners' Ex. 30 at ¶¶3, 5.
3. Since February 2020, Dr. Eisenberg has provided expert advice on COVID-19 by serving on advisory panels (Bipartisan Policy Center, Washington D.C.); presenting Webinars (Alliance for Health Policy, Barsan Research Forum, The University of Michigan Club of Washington, D.C.); and participating in media interviews (Detroit Fox News, MSNBC, WXYX Detroit, New York Times, Washington Post). During the initial phase of the pandemic, Dr. Eisenberg was a member of a subcommittee informing the Governor of Michigan's task force on opening the economy. Dr. Eisenberg has consulted with companies such as Ford Motor Company and Gemline on best practices during the COVID-19 pandemic. Petitioners' Ex. 30 at ¶6.
4. The Court admitted Dr. Eisenberg as an expert in the field of epidemiology. N.T. 295.
5. Dr. Eisenberg observed that COVID-19 cases in Pennsylvania have plateaued, but he expects significant transmission to continue in the fall. N.T. 297.
6. The novel coronavirus that causes COVID-19 is spread from person to person through the air and on environmental surfaces. The higher the concentration of virus to which one is exposed, the greater the chances of being infected. Additionally, being close to people who are coughing, speaking with force, or sneezing is riskier than those who are just speaking normally. Transmissibility increases when people are in enclosed, poorly ventilated spaces, in crowded spaces and in close proximity to other people.

Public gatherings at polling places and ballot return locations in municipal buildings may contribute to the spread of the virus. Petitioners’ Ex. 30 at ¶¶2, 14.

7. Dr. Eisenberg acknowledged the [Centers for Disease Control and Prevention] has adopted “interim guidance for ensuring various voting options, encouraging physical distancing, personal prevention practices, and employing environmental cleaning and disinfection to lower COVID-19 transmission during elections.” N.T. 307 (quoting Senate Intervenors Ex.17 at 2).
8. Allowing voters to vote by mail is consistent with current public health guidelines to minimize the spread of the virus and prevent COVID-19 illness because it (1) decreases the number of people who need to vote in person; (2) allows high-risk individuals to avoid in-person voting; and (3) minimizes the chances that indoor ballot return locations, such as polling stations or county board of elections’ offices, will contribute to the spread of the virus. Petitioners’ Ex. 30 at ¶¶2, 36.

## **B. Respondents’ Witness**

### **1. Kathy Boockvar, Secretary of the Commonwealth**

1. Kathy Boockvar was appointed as Secretary of the Commonwealth in January 2019 and confirmed by the Pennsylvania Senate in November 2019.
2. Secretary Boockvar is the chief elections official for the Commonwealth of Pennsylvania with responsibility for assessing risks to the voting process, including obstacles to the accessibility, security and integrity of elections. She and the Department of State engage in a “constant assessment and evaluation” to ensure “the highest level of accessibility, security, and safety

to the voters of Pennsylvania to make sure that they can exercise their right to vote.” N.T. 144.

3. At the inception of this litigation in April 2020, Secretary Boockvar opposed a statewide extension of the received-by deadline for mail-in ballots, preferring instead to deal with issues that would arise during the 2020 primary election on a county-by-county basis. N.T. 132.
4. The courts of common pleas in three counties extended the received-by deadline in the 2020 primary election. N.T. 133. An executive order by Governor Tom Wolf extended the received-by deadline by seven days in six counties due to civil unrest. *Id.* at 169.
5. On July 29, 2020, Secretary Boockvar received a letter from Thomas J. Marshall, General Counsel and Executive Vice President of the USPS. Respondents’ Ex. 1.
6. In his letter, Mr. Marshall advised Secretary Boockvar that “most domestic First-Class Mail is delivered 2 to 5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3 to 10 days after it is received.” Respondents’ Ex. 1 at 1. Based on these guidelines, Mr. Marshall recommended that (a) where voters will both receive and send a ballot by mail, they should request a ballot from their election officials at least 15 days before Election Day; (b) election officials should use First-Class Mail to transmit blank ballots and allow one week for delivery to voters; and (c) domestic voters should mail their completed ballots at least one week before the state’s due date. *Id.* at 1-2.
7. Observing that Pennsylvania’s election laws require a ballot to be returned by Election Day and that voters may request a mail-in ballot as late as 7 days

before Election Day, Mr. Marshall opined that “to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.” Respondents’ Ex. 1 at 2.

8. Mr. Marshall sent the same letter to the Secretary of State of North Carolina on July 30, 2020, noting that in North Carolina “a voter may generally request a ballot as late as 7 days before the November general election, and that a completed ballot must be postmarked by Election Day and received by election officials no later than 3 days after the election.” Petitioners’ Ex. 7. Mr. Marshall’s letter to North Carolina also described North Carolina’s election law deadline for receipt of absentee and mail-in ballots “incongruous” and “incompatible” with the USPS nationwide delivery standards for First-Class Mail and Marketing Mail. *Id.* The letter went to 46 states. N.T. 135.
9. Secretary Boockvar testified that Mr. Marshall’s estimate that most domestic First-Class Mail is delivered 2 to 5 days after it is received by the USPS differed from her understanding that such mail typically has a 1 to 3 business day turnaround time, which is what voters would have expected in previous elections. N.T. 138.
10. A total of 1,462,254 ballots were cast by mail in the 2020 primary election. Respondents’ Ex. 2. According to the Department of State’s records, the mailed ballots were received by the county boards of elections in the following timeframes:

2/24/2020 – 3/31/2020:	278
4/1/2020 – 4/30/2020:	51,743

5/1/2020 – 5/19/2020:	292,412
5/20/2020 – 5/26/2020:	320,032
5/27/2020 – 5/31/2020:	436,701
6/1/2020:	173,869
6/2/2020 (Election Day):	89,018
6/3/2020:	31,183
6/4/2020:	14,177
6/5/2020:	15,973
6/6/2020:	3,966
6/7/2020:	84
6/8/2020:	10,240
6/9/2020 – 6/24/2020:	22,578

*Id.*

11. The State of Washington conducts its elections solely by mail and experienced “significant mail delays and a huge increase in the number of ballots received after election day” in the 2020 primary election. N.T. 141.
12. The Pennsylvania Department of State predicts that approximately 3 million voters will cast their votes by mail-in or absentee ballot in the November 2020 general election. N.T. 181. Based on voting patterns in the 2020 primary election, the Department expects that approximately half of the mail-in and absentee ballots will arrive in the last week of voting. *Id.* at 150-51.
13. Based primarily upon Mr. Marshall’s letter, Secretary Boockvar changed her position on a statewide change to the received-by deadline. In addition, she has had discussions with other state election officials. Secretary Boockvar is concerned that Pennsylvania’s deadlines for mail-in ballots are incompatible with the USPS’ current delivery timeframes, which are applicable statewide. She recommends that mail-in ballots should be counted if they are postmarked by Election Day, November 3, 2020, and received by the county

boards of elections no later than 3 days after the election, or by Friday, November 6, 2020. N.T. 134-136.

14. Secretary Boockvar opined that, in weighing the contours of an extension, she considered the balance between ensuring citizens can exercise their right to vote and conducting efficient election administration. Based on voting patterns in the 2020 primary election, the majority of late mail-in ballots arrived within 3 days after the election. N.T. 154; Respondents' Ex. 2.
15. Secretary Boockvar opined that Petitioners' requested 7-day extension of the received-by deadline will adversely impact other deadlines. N.T. 153. These deadlines include the deadline by which certain voters using mail-in or absentee ballots must provide identification, which is on the sixth day after the election;<sup>9</sup> the deadline for defeated candidates to give up any right to a recount or recanvass, which is on the eighth day after the election;<sup>10</sup> and the deadline for the Secretary to order a recount or recanvass, which is on the ninth day after the election.<sup>11</sup>
16. County boards of elections are increasing their staffing in advance of the November 3, 2020, election and will mail out ballots beginning in September. Federal funds are available to the boards for purchasing additional processing equipment. N.T. 145.
17. The Department of State will reimburse county boards of elections for the return postage they affix to the mail-in ballot envelopes, which will be done in different ways depending on the county, *i.e.*, business return mail, a stamp

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<sup>9</sup> Section 1308(h) of the Election Code, added by the Act of March 6, 1951, P.L. 3, *as amended*, 25 P.S. §3146.8(h).

<sup>10</sup> Section 1404(h) of the Election Code, 25 P.S. §3154(h).

<sup>11</sup> Section 1404(g)(2) of the Election Code, 25 P.S. §3154(g)(2).



or a meter marking. N.T. 158-59. “[A]n overwhelming majority of times there’s going to be a postmark.” *Id.* at 159.

18. The Department of State is conducting major efforts to educate voters about the process of voting by mail and the importance of doing so promptly. N.T. 146-47.
19. When impediments to voting arise in individual counties, such as local emergencies or delays in issuing ballots, a county may seek relief from its own court of common pleas. N.T. 132, 155-56.

### **C. Senate Intervenors’ Witness**

#### **1. Michael Plunkett**

1. Michael Plunkett is a retired 25-year employee of the USPS. He holds a B.A. in Economics from the Pennsylvania State University, an M.B.A. from the Wharton School, University of Pennsylvania, and a second M.B.A. from the Massachusetts Institute of Technology. N.T. 205.
2. Mr. Plunkett worked for the USPS in various staff and management positions, including letter carrier and Associate Vice President of Business Development. N.T. 193; Senate Intervenors (SI) Ex. 1, ¶¶1-3. He retired from the USPS in 2011 and since 2016 has served as President and CEO of the Association for Postal Commerce, which is a trade association for companies that use the USPS in their business. SI Ex. 1, ¶3.
3. Mr. Plunkett was admitted as an expert witness in USPS delivery performance standards and practices on postmarks. N.T. 202, 211.
4. Mr. Plunkett used the quarterly reports filed by the USPS with the Postal Regulatory Commission, the regulator for the USPS, as the source of data

for his expert testimony about USPS operational performance in Pennsylvania and in the Eastern Area. SI Ex. 1, ¶7.

5. Pennsylvania has 8.5 million registered voters. For purposes of his opinion, Mr. Plunkett assumed that all voters would vote by absentee or mail-in ballots in the November 2020 general election over the 50-day period permitted under the Election Code. SI Ex. 1, ¶¶13, 15.
6. Most outbound First-Class Mail is sent in batches known as “Presort First-Class Mail,” which will be used to send ballots to voters by county boards of elections. SI Ex.1, ¶¶8, 10.
7. Election mail is treated differently than other First-Class Mail because it is prioritized for faster delivery. N.T. 267-268.
8. Mr. Plunkett testified that USPS delivery standards are zip code specific. The service performance standard for First-Class Mail within the 48 contiguous states is 2 to 3 days, and 2 to 5 days for those states plus Alaska, Hawaii and Puerto Rico. It is 6 days for Guam. For mail within Pennsylvania, the service performance standard is 2 days, although it is 3 days for mail between Erie and Philadelphia. For intra-county mail in Pennsylvania, the service performance standard is 2 days but up to 3 days for some counties. N.T. 213, 244.
9. Mr. Plunkett testified about the USPS report for the first quarter of 2020 covering the Eastern Area, made up of four districts that cover Pennsylvania identified as “Appalachian,” “Central Pennsylvania,” “Philadelphia Metro” and “Western Pennsylvania.” N.T. 217. The report showed that 99.5% of outbound Presort First-Class Mail was delivered within 3 days. This included mail originating within and outside Pennsylvania. Of that total,

98.3% was delivered within 1 day. SI Ex. 1, ¶¶8, 10. The service standard is 2 days for mail originating and ending in Pennsylvania. N.T. 219.

10. The USPS report for the first quarter of 2020 showed that in the Eastern Area, 97.0% of First-Class Mail was delivered within 3 days. Of that number, 92.5% of all First-Class Mail was delivered within 1 day. SI Ex. 1, Attachment A.
11. The USPS report for the second quarter of 2020 in the Eastern Area showed that approximately 99% of Presort First-Class Mail in Pennsylvania was delivered within 3 days, with 97.4% being delivered within 1 day. SI Ex. 4 at 2; N.T. 217.
12. The second quarter of 2020 included the period of time the USPS experienced a reduction in employee availability caused by the COVID-19 pandemic. N.T. 225.
13. The volume of First-Class Mail declined approximately 9% between 2019 and 2020, which suggests that the USPS has capacity to handle an increase in mail volume. SI Ex.1, ¶18.
14. During the first quarter of 2020, the USPS processed approximately 700 million Presort First-Class Mail letters and postcards in the Eastern Area. SI Ex.1 ¶11. If all 8.5 million registered voters in Pennsylvania request an absentee or mail-in ballot for the November 2020 election, that would represent 1.2% of USPS capacity in the Eastern service area. N.T. 144. The Secretary anticipates that 3 million Pennsylvanians will vote by mail in 2020, which represents 0.4% of USPS capacity in the Eastern service area. N.T. 181.

15. Given the volume of First-Class Mail handled by the USPS in the Eastern Area, Mr. Plunkett testified that the addition of 8.5 million ballots would not create an operational issue for the USPS. N.T. 181; SI Ex. 1, ¶15. Mr. Plunkett opined that “adding outbound and inbound election related mail in Pennsylvania would not impact the USPS’ ability to provide reliable and timely mail service.” SI Ex. 1, ¶24.
16. Mr. Plunkett is “unaware of any significant disruptions to First-Class Mail service.” SI Ex. 1, ¶19. Such disruptions would be known to him given his 25-year employment with the USPS and current employment with the Association for Postal Commerce, which continually monitors USPS performance. N.T. 205.
17. Upon being shown Petitioners’ Exhibit 28, Mr. Plunkett testified that the Postmaster General acknowledged that policy changes caused a temporary decline in service. Because the Postmaster General has ended the practice of trucks leaving a processing center before all mail has been sorted, USPS service should return to pre-decision levels. N.T. 252-53.
18. “Postmarks” are applied to stamped mail to prevent reuse of the stamp. N.T. 236; SI Ex. 1. Commercial mail generally bears evidence of payment, such as permit imprints, that are linked numerically to postage accounts. This mail does not bear traditional “postmarks” readable by the human eye. SI Ex. 1, ¶29.
19. The USPS has created specific service type identification (STID) codes, which are encoded in an intelligent mail barcode, for use on election mail that will allow it to identify and track ballots as they move through the USPS network. SI Ex. 1, ¶35.

20. The marks imprinted by the USPS on this type of mail are not readable by the human eye and would require scanners and software to decode. SI Ex. 1, ¶36. Mr. Plunkett testified that the USPS “plans to isolate election mail and to postmark even where postmarks are not necessary.” N.T. 246, 261.
21. Mr. Plunkett testified that a voter who requests a ballot on the last day in the general election cycle, Tuesday, October 27, 2020, would likely receive a ballot on Thursday or Friday. If the voter mails her ballot on Saturday, it would likely be received on Monday or Tuesday, Election Day. N.T. 271, 272.
22. Mr. Plunkett testified that a 1-day delay in service would not mean that ballots would not be received on time. N.T. 267.

#### **D. House Intervenors’ Witness**

##### **1. Torren Ecker**

1. Mr. Ecker is a member of the House of Representatives and represents the 193rd District. N.T. 331.
2. He ran in the May 15, 2018, primary as one of four candidates for the office. N.T. 331.
3. At 9:30 p.m. that day, the election results were posted and it appeared that Mr. Ecker lost by one vote. N.T. 332.
4. Election officials learned that one precinct had not counted its absentee ballots. When those ballots were counted, Mr. Ecker gained an additional vote. At that point, the election was tied. N.T. 332-33.
5. When the county board of elections recanvassed its ballots, it found two provisional ballots. An unqualified voter submitted one ballot, and the other voter cast a ballot in favor of Mr. Ecker. N.T. 334.

6. The losing candidate petitioned the court of common pleas for a recount, but after the recount Mr. Ecker remained the winner of the primary election. N.T. 335.
7. Starting on May 15, 2018, the entire process took approximately one month. N.T. 335.
8. As a candidate, Mr. Ecker agreed that he wanted constituents of the 193rd District to vote. N.T. 338.

### **III. Findings of Fact**

1. All witnesses testified credibly. To the extent that the opinions of Mr. Stroman and the Secretary differ from the opinions of Mr. Plunkett, the Court finds Mr. Plunkett's opinions more credible and persuasive than those of Mr. Stroman and the Secretary, in light of his experience in statistical and financial analysis of USPS data both as a 25-year employee of the USPS and as current president of the Association for Postal Commerce.
2. The USPS has a standard delivery performance of 2 to 3 days for First-Class Mail in the contiguous United States; 5 days for First-Class Mail sent to Alaska, Hawaii, and Puerto Rico; and 6 days for mail sent to Guam.
3. Marketing mail has a nationwide standard delivery performance of 3 to 10 days.
4. For First-Class Mail within Pennsylvania, the standard delivery performance is 2 to 3 days after collection by the USPS. However, mail may take 3 days to be delivered from one end of the Commonwealth to the other (for example, from Philadelphia to Erie).
5. These above-described standards for delivery performance have been in place for a long time and not been adjusted since the enactment of Act 77.

6. For intra-county mail, the standard delivery performance is 2 days after collection by the USPS and, with limited exceptions, may take 3 days within some counties.
7. Petitioners' Exhibit 9, entitled "USPS Service Performance Measurement, PMG Briefing, August 12, 2020," shows the percentage of time that the USPS met its performance target of 96% nationwide for the period of March 14, 2020, through August 1, 2020, for various classes of mail. Relevantly, the graph shows a downturn in the USPS' performance for the period of July 4, 2020, through July 18, 2020, for Presort First-Class Mail. The Court declines to draw an inference from this exhibit that there is a general decline in standard delivery performance because the graph is based upon a snapshot of three weeks of experience. Mr. Stroman attributed the downturn to the Postmaster General's new policy directive on transportation, and this policy directive has been terminated.
8. Petitioners' Exhibit 28, which is a graph produced by Areas Inspiring Mail, shows that for the 41st through 43rd weeks there was a drop in the USPS's performance against the target of 96%. The graph shows that during those three weeks the USPS met its standard delivery target 72.86% of the time for Central Pennsylvania; 85.68% of the time for the Philadelphia Metro Area; 84.96% of the time for the Appalachian region; and 90.01% of the time for Western Pennsylvania. The Court declines to assign Exhibit 28 any weight. First, the document appears undated or the date is obscured. It does not show the year and month of the activity depicted. Second, Mr. Stroman testified that Exhibit 28 compares the USPS' performance for 2019 to that of 2020 and that the graph shows a sharp decline in the USPS' performance

targets between the 41st and 43rd weeks. N.T. 59. However, it is not clear that the weeks identified in the graph correspond directly to weeks of the calendar year. We have not reached the 41st through 43rd weeks of calendar year 2020. Third, the graph depicts a snapshot of three weeks and does not predict what the data will show for the 12-week period from June 1, 2020, to September 30, 2020.

9. Mail for deposit with the USPS may be handed directly to a postal carrier or collected by a carrier from a voter's residential mail receptacle.
10. There is no separate delivery performance standard for election-related First-Class Mail. The USPS prioritizes First-Class Mail identified as election-related.
11. Although there was testimony and argument regarding USPS "delivery delays," there was no evidence to define a delay. The USPS delivery standards are set in ranges, *i.e.*, 2 to 3 days in Pennsylvania. There is no evidence that USPS performance in Pennsylvania extends beyond that range. To the contrary, the USPS performance in Pennsylvania falls within the range over 98% of the time.
12. Pennsylvania's USPS performance exceeds the national average. In the first quarter of 2020 for Pennsylvania, 99.5% of USPS outbound Presort First-Class Mail was delivered within 3 days. More than 98% was delivered within 1 day. In the second quarter of 2020 for Pennsylvania, 99.4% of USPS outbound Presort First-Class Mail was delivered within 3 days. More than 98% was delivered within 1 day.
13. If all 8.5 million registered voters in Pennsylvania elect to vote by absentee or mail-in ballot, the quantity of mail generated will represent only 1.2% of



USPS' capacity in the Eastern service area and will not overwhelm the system.

14. A voter may cast a ballot in person at a polling location any time between 7:00 a.m. and before 8:00 p.m. on Election Day. If the voter has applied for an absentee or mail-in ballot, she may personally return the ballot to the county board of elections by 8:00 p.m. on Election Day or mail the ballot to the county board in such time that the board receives the ballot no later than 8:00 p.m., Election Day (the "received-by deadline").
15. A voter may elect to return the ballot by using a prepaid postage envelope if one is provided by the county board of elections, by placing a First-Class stamp on the return envelope or by purchasing expedited delivery from the USPS or other private delivery service.
16. If a voter applies for an absentee or mail-in ballot but cannot return it to the county board of elections before the received-by deadline, the voter may cast a provisional ballot in person at her polling place, as Ms. Laudenslager did.
17. There was no evidence that the county boards of elections anticipate consolidating polling places as they did in the primary election, that the county boards anticipate insufficient staffing or that the health and safety procedures used by the county boards during the June 2020 primary were ineffective.
18. Section 1206 of the Election Code, 25 P.S. §3046, provides a remedy for emergencies arising on election day; that is, an individual or county may bring a controversy before the court of common pleas and have the matter decided expeditiously. This was done in three counties during the 2020 primary election. Where an individual is seeking a judicial order to vote,

the court must inform the individual of the provisional ballot process set forth in Section 1206 of the Election Code, 25 P.S. §3046.

19. Secretary's Exhibit 2, a chart identifying the number of mail-in ballots received by each county and the date of receipt, does not support a finding that the received-by deadline should be extended by three days, to Friday, November 6, 2020. The exhibit does not explain when the voters applied for their absentee or mail-in ballots, when the county boards of elections mailed the ballots to the voters or when the voters deposited the ballots in the return mail.

Secretary's Exhibit 2 showed that 61,333 votes were received by county boards of elections during the three days that followed the primary election day. Of that total, 52,761 were received in counties where the Governor had extended the received-by deadline because of civil unrest or where the court of common pleas had extended the received-by deadline for receipt of absentee and mail-in ballots. Accordingly, all 52,761 were counted. Secretary's Exhibit 2 does not predict how many mail-in ballots will be received after 8:00 p.m. on Election Day because it is not known whether the mailing of ballots in the primary election was affected by the announced extension of the received-by deadline.

20. The Secretary is working with the county boards of elections and the USPS to design election-related mail envelopes. The Secretary is undertaking a public education campaign to inform voters of the need to apply for and return all mail ballots as early as possible.
21. Ms. Laudenslager was not disenfranchised because she voted at a polling place and her vote was counted.

22. Petitioners presented no evidence to support their request for third-party assistance in the delivery of ballots to either the USPS or the county boards of election or for their request for prepaid postage on all absentee and mail-in ballots.
23. Petitioners' claim for prepaid postage is moot in light of the Secretary's announcement that the Department of State will provide funding to the county boards of elections for postage.
24. There was no clear evidence presented on whether prepaid postage envelopes, which may be provided by the county boards of elections to voters for mailing their completed ballots, will be postmarked. A postmark would evidence the date the voter placed the ballot in the mail.
25. There was no evidence showing that COVID-19 was transmitted to an individual who appeared at a polling place in Pennsylvania during the primary election on June 2, 2020.
26. There was no evidence presented to address how an extension of the statutory deadline could be implemented without causing confusion among the 67 county boards of elections that are preparing to conduct the general election in accordance with the received-by deadline which has been in effect for all elections in Pennsylvania since 1964, and among the voting public.

#### **IV. Conclusions of Law**

1. The deadline for receipt of absentee and mail-in ballots by 8:00 p.m. on Election Day represents a policy choice made by the legislative and executive branches in the enactment of Act 77. This deadline was first adopted for absentee ballots. *See* Section 22 of the Act of August 13, 1963,

P.L. 707 (effective January 1, 1964). The same deadline was adopted in Act 77 for mail-in ballots. *See* Section 1306-D(c) of the Election Code, 25 P.S. §3150.16(c).

2. Petitioners’ evidence did not prove that disruptions to USPS operations are likely to occur in November 2020 that will cause timely mailed ballots to go uncounted in the general election. Petitioners offered no evidence that a single mail-in ballot in the primary election was received by a county board of elections after the June 2, 2020, deadline because of a delay in delivery by the USPS. Petitioners offered no evidence upon which the Court can find, as fact, that the USPS will not be able to deliver absentee and mail-in ballots within 2 to 3 days of their being posted. The credible evidence shows just the opposite, *i.e.*, the USPS is unlikely to be overwhelmed in November.
3. If the current deadlines remain in place for the November general election and significant delays develop in certain counties with the processing of ballot applications or in the USPS delivery of mail, the county courts of common pleas are empowered to provide targeted relief. Petitioners have not demonstrated that such county-specific relief will be inadequate and that an immediate statewide remedy is necessary.
4. As Justice Wecht wrote in support of the Pennsylvania Supreme Court’s recent decision dismissing a similar COVID-19-related challenge to the Commonwealth’s administration of the 2020 primary election, “the instant request ... is predicated upon mere speculation about what may or may not occur with delivery operations within the Commonwealth in several weeks’ time. While circumstances may change, the possibility that votes may be suppressed due to late ballot delivery, as presently alleged, is too remote at

this time to constitute a cognizable injury.” *Disability Rights Pennsylvania v. Boockvar*, (Pa., No. 83 MM 2020, filed May 15, 2020) (Wecht, J., Concurring Statement at 1-2).

5. Petitioners’ evidentiary case did not address the alleged injury occasioned by the prohibition against third-party assistance in casting and delivering absentee and mail-in ballots or the need for prepaid postage on all absentee and mail-in ballots.
6. The Court concludes that it is not necessary to address the outstanding legal objections raised by Respondents, by Senate Intervenors or by House Intervenors.
7. Petitioners have not made a “clear, palpable and plain demonstration” that the received-by deadline for absentee and mail-in ballots in Act 77 is unconstitutional for any election during the COVID-19 pandemic. *Yocum v. Commonwealth of Pennsylvania Gaming Control Board*, 161 A.3d 228, 238 (Pa. 2017). The received-by deadline for mail-in ballots is a valid election administration regulation, and the opportunity to vote by mail-in ballot accommodates those voters who do not wish to vote in person during the COVID-19 pandemic.

## **V. Discussion**

Constitutional challenges to any legislation, including election laws, are cognizable only where the injury is concrete. “There is a presumption that lawfully enacted legislation is constitutional. Should the constitutionality of legislation be challenged, the challenger must meet the burden of rebutting the presumption of constitutionality by a *clear, palpable and plain demonstration* that the statute violates a constitutional provision.” *Yocum*, 161 A.3d at 238 (emphasis added).

Where a court determines that a law is unconstitutional, it is not the court's role to design an alternative scheme that passes constitutional muster; rather, the court must grant the legislature sufficient time to consider and enact remedial legislation. *See generally In re Fortieth Statewide Investigation Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (courts may not usurp the province of the legislature by rewriting legislation and adding hearing and evidentiary requirements that the participants must follow in grand jury proceedings); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018) (providing timeframe for legislative and executive branches to enact remedial redistricting plan).

Moreover, “[i]t is a mistake to suppose[] that a court of equity is amenable to no law, either common or statute, and assumes the rule of an arbitrary legislator in every particular case.’ When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle those rights. Equity follows the law.” *Piper v. Tax Claim Bureau of Westmoreland County*, 910 A.2d 162, 165 (Pa. Cmwlth. 2006) (quoting *First Federal Savings and Loan Association v. Swift*, 321 A.2d 895, 897 (Pa. 1974)).

The United States Constitution provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” U.S. CONST. art. I, §4, cl.1. Article I, Section 5 of the Pennsylvania Constitution further states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST. art. I, §5.

Each state's election code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- to least some degree -- the individual's right to vote ...." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and the Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Although Petitioners seek to add new provisions to the existing Election Code, rather than expressly challenging the validity of a particular provision, the premise of *Yocum* applies with equal force. This Court has explained that "[a] statute is cloaked with a strong presumption of constitutionality and one who attacks it bears the burden of demonstrating that the legislation 'clearly, palpably and plainly violates the constitution.'" *Ketterer v. Department of Transportation*, 574 A.2d 735, 736 (Pa. Cmwlth. 1990) (quotation omitted).

Petitioners premise their claims on different provisions of the Pennsylvania Constitution, but the alleged injury in each instance is at bottom the same: if the legislative and executive branches do not implement the responsive measures to the ongoing COVID-19 pandemic favored by Petitioners, some voters will be burdened in the exercise of their vote. They believe this warrants declaratory and injunctive relief.

Petitioners allege that counties could (1) face shortages of poll workers and may have to contend with social-distancing guidelines in processing ballots, *see* Amended Petition ¶6; (2) fall behind on processing mail-in and absentee ballots applications, *id.*, *see also* ¶53; and (3) the USPS may not be able to deliver election ballots in a timely manner, *id.* ¶54. Petitioners allege that it is “anyone’s guess whether voters who timely request mail ballots will receive them in time to complete the [ballots] and mail them back to county officials such that they arrive by 8:00 p.m. on Election Day.” *Id.* ¶55.

Petitioners allege that without third-party assistance with delivery of mail-in and absentee ballots, “[v]oters ... who have struggled with delayed mail delivery will be forced to deliver their ballots for the general election in-person this year to ensure their votes are counted[.]” *Id.* ¶63. Similarly, Petitioners assert that without prepaid postage on absentee and mail-in ballots, voters will have to shoulder the “unnecessary expense” of stamps, which “could be cost prohibitive,” and will also risk a “trip to the post office or any other establishment that sells stamps, at a time when individuals have been instructed to maintain social distancing guidelines to stem the spread of COVID-19[.]” *Id.* ¶¶66-67. Some of the reforms for which Petitioners advocate are under consideration by the General Assembly. If they are not enacted, Petitioners believe these reforms must be ordered by the Supreme Court of Pennsylvania.

The Amended Petition states that in the days before the June primary election, some counties took targeted measures to address COVID-19-specific challenges. *See* Amended Petition ¶25 n.4, ¶57 (citing *In re Extension of Time for Absentee and Mail-In Ballots to be Received by Mail and Counted in the 2020 Primary Election*, (C.C.P. Del. Cty. No. 2020-003416)). However, Petitioners



believe these county-specific judicial orders (and executive orders) will not suffice in November 2020.

In her preliminary objections filed with the Supreme Court, the Secretary stated that “nothing in the Amended Petition gives any specifics on what exactly will go wrong, where it will go wrong, or, -- just as importantly -- why the statewide remedy Petitioners seek will be necessary to correct the problem. Nor could the Amended Petition supply these specifics; in a fast-changing situation, and with the November general election months away, such predications are necessarily conjectural at best.” Secretary Preliminary Objections, at 16 ¶21.

Considering the above, Petitioners did not carry their burden of showing that the Election Code’s deadline for returning absentee and mail-in ballots is plainly and palpably unconstitutional. One year ago, the former Election Code required that all mail-in ballots, which were limited to absentee ballots, had to be returned to the county boards of elections by 5:00 p.m. on the Friday *before* Election Day in order to be counted. *Former* Section 1306(a) of the Election Code, 25 P.S. §3146.69(a). The General Assembly, which determines the time, place and manner of Pennsylvania’s elections, extended the former received-by deadline by four days in Act 77. It is for the General Assembly to decide what further changes should be made to all the statutory deadlines, which may include advancing the deadline for requesting an absentee or mail-in ballot.

Presently, voters in Pennsylvania have 50 days to request and cast a mail-in ballot. Section 1302.1 – D of the Election Code, 25 P.S. §3150.12a. Voters have the option to request a ballot early in the process and to return it early in the process. They also have the option to wait until one week before the election to request a ballot from the county board of elections, which has 48 hours to respond.

If the voter receives the ballot one day before Election Day, she can purchase overnight mailing from the USPS to ensure its timely receipt. If the voter receives the ballot on Election Day, she can personally deliver the ballot to the county board of elections. If the requested ballot is not received by Election Day, the voter can vote in person at her designated polling place, as did Ms. Laudenslager. And, of course, voters have the option to appear at their polling place and vote in person before 8:00 p.m. on Election Day.

Section 1206 of the Election Code provides that where significant problems develop in a precinct or county, our courts of court of common pleas can order relief. 25 P.S. §3046. This was done in several counties in the 2020 primary election, which extended the deadline for receipt of absentee and mail-in ballots.

As the Secretary noted, there must be deadlines in order for a free and equal election to take place. And every deadline will mean that some voters will not be able to participate in an election. A voter may arrive at the polling place at 8:05 p.m. on Election Day, or a voter's mail-in ballot may arrive at the county board of elections at 8:05 p.m. on Election Day. Neither vote will be counted.

In her original preliminary objections, the Secretary argued that Petitioners' pleading did not present a controversy ripe for judicial review. Nor did Petitioners' evidence. Whatever delays may be occasioned in the November 2020 general election with respect to the receipt of mail-in ballots by county boards of elections, they are not likely to be caused by the USPS. The evidence demonstrated that USPS performance in Pennsylvania exceeds the national average.

There are an infinite number of considerations that go into setting the rules for a free and equal election. It is the job of the legislature, not the judiciary, to make these policy choices.

The 8:00 p.m. Election Day deadline for returning absentee and mail-in ballots has been in existence since 1964.<sup>12</sup> For a court to order a new statewide deadline may create widespread confusion among voters and the county boards of elections, the parties that actually conduct the election. This militates against intervention by a court sitting in equity, assuming grounds for relief were demonstrated, and here they were not.

Even if that hurdle were crossed, an order enjoining enforcement of the received-by deadline would have to be issued to the county boards of elections. They are the persons that process and qualify ballots. Because they are not parties to this case, they cannot be enjoined from enforcing the received-by deadline in the Election Code.

In sum, the Election Code provides meaningful responses for conducting an election during the COVID-19 pandemic. Voters may cast their vote by mail if they conclude their polling place will not meet their standards of safety. That voters have the responsibility to obtain a ballot and return it by 8:00 p.m. Election Day does not impose an unlawful burden on the free exercise of the right to vote. At the next level, county boards of elections may seek relief from their courts of common pleas should the circumstances require that step appropriate. Finally, the General Assembly can enact appropriate measures should it determine that the COVID-19 pandemic requires a statewide response.

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<sup>12</sup> Pennsylvania's received-by deadline is consistent with other state election laws. *See* ARIZ. REV. STAT. ANN. §16-558.01 (West 2015) (requiring the return of a mail-in ballot by 7:00 p.m. on the day of the election); GA. CODE ANN. §21-2-386(a)(1)(f) (West 2019) (requiring the destruction of absentee ballots received after the polls close); ME. REV. STAT. ANN. tit. 21-a, §755 (1991) (requiring the return of an absentee ballot before the close of the polls on election day); MICH. COMP. LAWS ANN. §168.764a (West 2012) (requiring receipt of absentee ballot before the close of polls on election day); WIS. STAT. ANN. §7.52(1)(a) (West 2018) (requiring the canvas of all absentee ballots received by 8:00 p.m. on election day).

## **VI. Conclusion**

For these reasons, the Court recommends that the Supreme Court deny Petitioners' Prayer for Relief.

Respectfully submitted,

s/Mary Hannah Leavitt  
MARY HANNAH LEAVITT, President Judge

Filed: September 4, 2020

**Exhibits Admitted into Evidence at Evidentiary Hearing**

<b>Exhibit No.</b>	<b>Description</b>
<b>Petitioners</b>	
Petitioners' Ex. 4	USPS Office of Inspector General Management Alert (July 7, 2020)
Petitioners' Ex. 6	USPS General Counsel Thomas J. Marshall Letter to the Hon. Kathy Boockvar (July 29, 2020)
Petitioners' Ex. 7	USPS General Counsel Thomas J. Marshall Letter to the Hon. Elaine Marshall (July 30, 2020)
Petitioners' Ex. 9	USPS PMG Briefing, Service Performance Measurement (Aug. 12, 2020)
Petitioners' Ex. 28	Eastern Areas Inspiring Mail Service Update
Petitioners' Ex. 30	Preliminary Report of Joseph Eisenberg
Petitioners' Ex. 32	Preliminary Report of Ronald Strohman
<b>Respondents</b>	
Respondents' Ex. 1	Letter dated July 29, 2020, from Thomas J. Marshall, General Counsel and Executive Vice President of the United States Postal Service, to Kathy Boockvar, Secretary of the Commonwealth of Pennsylvania
Respondents' Ex. 2	Chart of County Absentee or Mail-in Ballots
Respondents' Ex. 4	Postal Bulletin: Your 2020 Election and Political Mail Guide (Feb. 13, 2020)
<b>Senate Intervenor</b>	
Senate Intervenor's Ex. 1	Mr. Plunkett's Declaration that as filed on May 18, 2020 as Ex. A to Legislative Intervenor's Opposition to the Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction
Senate Intervenor's Ex. 2	Attachment A from Plunkett's Report, <i>Quarterly Performance for First-Class Flats: Service Variance</i>
Senate Intervenor's Ex. 3	Attachment B from Plunkett's Report, <i>Quarterly Performance Aggregation for First-Class Flats: Service Variance</i>
Senate Intervenor's Ex. 4	Quarterly Performance for Presort First-Class Mail® Service Variance, USPS, FY 2020 Quarter III
Senate Intervenor's Ex. 6	In the Matter of: Investigation of Election Irregularities Affecting Counties Within the 9 <sup>th</sup> Congressional District
Senate Intervenor's Ex. 7	Final Report of the Miami-Dade County Grand Jury, Spring Term A.D. 2012, available

Senate Intervenors' Ex. 10	USPS Service Alert, Aug. 28, 2020
Senate Intervenors' Ex. 11	Postmaster General Louis DeJoy Statement, USPS, Aug. 18, 2020
Senate Intervenors' Ex. 16	Dhaval M. Dave, <i>et al. Black Lives Matter Protests, Social Distancing, and COVID-19</i>
Senate Intervenors' Ex. 17	U.S. Department of Health and Human Services and Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, <i>Notes from the Field</i> , July 31, 2020
<b>House Intervenors</b>	
House Intervenors' Ex. 1	Statement of Postmaster General and Chief Executive Office Louis DeJoy (Aug. 21, 2020)

# **EXHIBIT B**

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE  
CONFERENCE,

Petitioner,

v.

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

Respondents.

NO. 364 MD 2020

I, ANGELA H. CURTIS, under penalty of perjury and in lieu of affidavit as permitted by 28 U.S.C. § 1746, declare as follows: I am currently employed by the United States Postal Service as Vice President, Retail and Post Office Operations, Headquarters at 475 L'Enfant Plaza, SW, Washington, DC 20260-1135, and have occupied that position since August 2020. In this position, I am responsible for internal post office and retail operations nationwide. Prior to assuming my current position, I was most recently the Acting Eastern Area Vice President, a position I held from August 2019 until August 2020. My duties as Acting Eastern Area Vice President included responsibility for execution of all Postal Service operations within the ten (10) Districts within the Eastern Area, including but not limited to, mail processing and distribution, transportation, delivery, and retail operations.



My duties and responsibilities as Acting Eastern Area Vice President included responsibility for the Philadelphia District operations. In both my current capacity as Vice President, Retail and Post Office Operations and my prior capacity as Acting Eastern Area Vice President, I regularly review data and information concerning Postal Service operational performance, including, but not limited to, mail processing and transportation, and retail and delivery operations in order to execute my duties and responsibilities.

I am familiar with the above-captioned action and am submitting this declaration in response to Plaintiffs' request for testimony, dated August 17, 2020.

The request for testimony dated August 17, 2020, made the following requests for information and testimony:

- “1. USPS policy changes implemented by Postmaster General Louis DeJoy, including the direction to USPS employees to leave mail undelivered;
2. Current mail volume and current backlog of undelivered mail in Philadelphia;
3. Recent changes to—and reductions in—USPS office operating hours;
4. The ban on overtime work for USPS employees;
5. USPS staffing shortages due to the COVID-19 pandemic, including the cause of such staffing shortages and the impact of those staffing shortages on mail delivery services.”

*See* August 17, 2020 Letter at 3. This declaration answers those requests for information and testimony.

**I. USPS policy changes implemented by Postmaster General Louis DeJoy, including the direction to USPS employees to leave mail undelivered.**

1. Postmaster General DeJoy testified in his prepared remarks before Congress that he had made only two changes since becoming Postmaster General: (1) modifying “the organizational structure [to] align[] functions based on core business operations and [] provide more clarity and focus on what the Postal Service does best: collect, process, move, and deliver mail and packages;” and (2) “directing that we be more disciplined by ensuring that our trucks should run on time and on schedule, and that we should eliminate unnecessary extra trips.” See Written Statement of PMG before Senate Committee on Homeland Security and Governmental Affairs Hearing on 8/21/2020, and Written Statement of PMG before the House Committee on Oversight and Reform on 8/24/2020, attached hereto as Exs. A and B.

2. This second initiative was developed in response to a report from the Postal Service Inspector General regarding “schedule delays in Postal Service transportation and the substantial cost associated with our weakness in this fundamental operating principle.” Oral Statement of Postmaster General Louis DeJoy before the House Committee on Oversight and Reform on 8/24/2020, attached as Ex. C.

3. Postmaster General DeJoy, in both his Senate and House testimony, explained that his initiative to run postal trucks run on time is an effort to mitigate, but not eliminate extra truck trips, in an effort to ensure that mail is delivered in a timely and cost efficient manner.

4. On August 18, 2020, the Postmaster General announced a commitment to “engage standby resources in all areas of our operations, including transportation, to satisfy any unforeseen demand” regarding election mail, starting October 1, 2020. See PMG Statement dated 8/18/2020, page 1-2, attached hereto as Ex. D.

5. There have been media reports of other changes or directives allegedly made by Postmaster General DeJoy, including the removal of collection boxes and the removal of mail processing machines from mail processing facilities, which he did not, in fact, make.

6. Postmaster General DeJoy did not direct the removal of collection boxes.

7. The Postal Service annually reviews whether its blue collection boxes (currently approximately 140,000 boxes) are to be left where they are, moved elsewhere, or removed from service.

8. The Postal Service regulations found in the Post Office Operations Manual (“POM”) 315 dictate that where a collection box has a density of 25 letters or fewer on a daily basis over a period of two weeks, removal or relocation of the box is considered.

9. Prior to removal of a collection box, a notice is placed on the box informing users of the planned removal of the box in thirty (30) days.

10. This process is handled by managers in field district and area offices. Managers at postal headquarters rarely become involved.

11. Over the past seven years, approximately 3,100 boxes have been removed on average each year; the number of boxes removed this year is approximately 1,500. However, no collection boxes were removed in the city of Philadelphia during FY2020.

12. Other than a small number of boxes in airports and a recent instruction from postal headquarters to cease removals until after the election, there have been no changes to postal practices regarding collection boxes for many years.

13. Furthermore, Postmaster General DeJoy testified before Congress on August 21, 2020 and on August 24, 2020, and stated that he has directed the suspension of this process temporarily, and no collection boxes will be removed prior to the election.

14. Postmaster DeJoy did not direct the removal of mail processing equipment from Postal Service facilities.

15. The Postal Service removes mail processing equipment primarily when the volume of mail declines to the point where some of the machines are redundant, i.e., there is more mail processing capacity to handle the volume of mail than is needed.

16. Mail volumes have been declining for several years, and that decline has been exacerbated by the COVID pandemic.

17. Over the past five years, mail processing machines have been removed each year nationwide as a result of declining mail volume; by “removed” the Postal Service also means disconnecting from the network, temporarily tarping or physically removing from the facility. More machines were removed this year due to implementation of a reduction initiative that began in 2017 and resulted in the May 2020 reduction plan.

18. The following represents data from 2015 to the present on Postal Service machine inventory for machines that process letters and flats:

Without Package Sorters	Inventory at the beginning of						AUG FY20
	FY15	FY16	FY17	FY18	FY19	FY20	
Letters Sorters	6,242	5,145	4,946	4,625	4,533	4,376	3,722
Flats Sorters	521	498	500	468	459	448	391
<b>Total</b>	<b>6,763</b>	<b>5,643</b>	<b>5,446</b>	<b>5,093</b>	<b>4,992</b>	<b>4,824</b>	<b>4,113</b>
Change		<b>1,120</b>	<b>197</b>	<b>353</b>	<b>101</b>	<b>168</b>	<b>711</b>
	<b>Total</b>	<b>1,939</b>					
	<b>Average</b>	<b>388</b>					

19. Postmaster General DeJoy testified before Congress on August 21 and 24, 2020, and stated that while he will not replace any machines recently removed from Postal Service facilities, he has directed that no additional mail processing machines are to be removed from any Postal Service facility prior to the election.

**II. Current mail volume and current backlog of undelivered mail in Philadelphia**

20. The following data represent the delayed inventory volume for the City of Philadelphia Processing and Distribution Center (P&DC) for First Class mail and flats, in three date ranges:

Date Range	Letters	Flats	Total
3/1/20 - 4/3/20	10,752,570	1,564,033	12,316,603
4/4/20 - 7/10/20	25,013,762	3,646,562	28,660,324
7/11/20 - 8/21/20	17,879,233	4,154,437	22,033,670

21. The following data represent non-delivery, missed address, and delayed mail information for the city of Philadelphia between March 1 and August 21, 2020, separated into three date ranges and three categories, out of a total possible number of deliveries of 710,692.

	3/1 - 4/3	4/4 - 7/10	7/11 - 8/21
Non-Delivery %	0.26%	2.53%	8.49%
Average Daily Missed Addresses	1,882	17,965	60,347
Delayed Mail (Total)	19,007	2,679,675	6,073,613
Delayed Mail (Weekly Average)	3,801	191,405	1,012,269

22. The following data represent delivered mail volume for the city of Philadelphia between March 1 and August 21, 2020, separated into three date ranges and three categories, out of a total possible number of deliveries of 710,692.

	3/1 - 4/3	4/4 - 7/10	7/11 - 8/21
Delivered Mail (Total)	51,906,668	115,976,506	54,700,324
Delivered Mail (Weekly Average)	10,381,334	8,284,036	9,116,721

23. In order to address and correct missed deliveries of letters and flats in Philadelphia, the Postal Service routinely deploys carriers on Sundays to make deliveries of those undelivered letters and flats.

### **III. Recent changes to—and reductions in—USPS office operating hours**

24. Postmaster General DeJoy did not direct a reduction in Post Office operating hours.

25. Further, Postmaster DeJoy testified before Congress on August 21 and 24, 2020, during which he reaffirmed that he issued no such directive.

26. The Postal Service routinely reviews window hours in post offices, examining retail units' volume of transactions, customer visits, and revenue to assess whether locations are operating efficiently and adequately providing service to customers, generally on an annual basis in preparation for plans for the next fiscal year.

27. Local managers are not permitted to close or consolidate facilities or significantly reduce hours without review and approval by the area and headquarters managers.

28. There were proposed changes to Philadelphia city finance and retail unit hours for Fiscal Year 2020, but those changes were never approved and, thus, never implemented.

29. When area or headquarters managers have learned about occasional isolated incidents of local facilities posting reductions in summer 2020 hours, the facility has been instructed not to proceed with any changes.

30. Moreover, Postmaster DeJoy further testified that retail hours at Post Offices will not be changed prior to the election.

31. During the COVID pandemic, some Philadelphia finance and retail units were closed temporarily because the facility inside which they are located was closed due to the COVID pandemic quarantine.

32. Likewise, some Philadelphia finance and retail units with very small staffs were closed temporarily and sporadically where there was no staff available to work as a result of COVID.

33. There are some retail locations in the city of Philadelphia that open late and close early, as well as units that occasionally cannot open at all, due to employee unavailability as a result of COVID.

34. Finally, during the brief period of civil unrest in June 2020 in Philadelphia, some finance and retail units located close to the areas of unrest were closed temporarily for safety reasons.

#### **IV. The ban on overtime work for USPS employees**

35. Postmaster General DeJoy did not ban overtime work for Postal Service employees, nor did he direct a cutback in overtime hours for Postal Service employees.



36. Postmaster General DeJoy confirmed this during his Congressional testimony on August 21 and 24, 2020, and further explained that he never placed a limitation on overtime and specifically instructed that there be no cutback on overtime hours in retail centers until after the election.

37. Overtime is scheduled and assigned based on operational requirements, and management has always sought to ensure that overtime used is necessary based on workload and other factors, and is authorized in accordance with Postal Service policies.

38. Overtime has not been reduced since Mr. DeJoy became Postmaster General.

39. The Postal Service incurred overtime, nationally, at a rate of approximately 13 percent prior to Mr. DeJoy's arrival; and in June, July, and August of 2020, overtime continues to be utilized at a rate of approximately 13 percent.

40. Usage of overtime in the city of Philadelphia has been impacted by employee unavailability due to the COVID-19 pandemic.

41. From March 1 through April 3, 2020, employees in the mail handler craft in the city of Philadelphia used 24,542.09 hours of overtime, employees in the clerk craft used 43,984.23 hours of overtime, and city carrier employees used 61,077.35 hours of overtime.

42. From April 4 through July 10, 2020, employees in the mail handler craft in the city of Philadelphia used 83,253.5 hours of overtime, employees in the clerk craft used 151,725.8 hours of overtime, and city carrier employees used 296,313.09 hours of overtime.

43. From July 11 through August 21, 2020, employees in the mail handler craft in the city of Philadelphia used 35,731.63 hours of overtime, employees in the clerk craft used 61,532.94 hours of overtime, and city carrier employees used 148,971.59 hours of overtime.

**V. USPS staffing shortages due to the COVID-19 pandemic, including the cause of such staffing shortages and the impact of those staffing shortages on mail delivery services.**

44. Staffing shortages during the pandemic led to significant difficulties in the Postal Service's ability to process and deliver mail on time.

45. When Philadelphia was hard hit by the pandemic, there were occasions in which insufficient staff was available to deliver mail every day, but we ensured that would not go over two days without route delivery.

46. The pandemic's challenges have required that local offices at times make difficult day-to-day decisions regarding how best to manage transportation, processing, and delivery schedules.

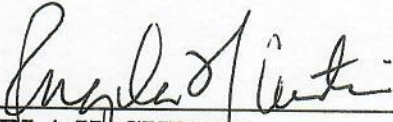
47. The following are employee availability data for the City of Philadelphia, broken down by craft, in three date ranges:

Craft	3/1 - 4/3	4/4 - 7/10	7/11 - 8/21
Clerk	78.48%	74.66%	73.31%
Carrier	76.85%	73.31%	70.29%
Mail Handler	73.08%	69.26%	68.20%

48. The Postal Service reached an agreement with the postal workers' unions to allow us to hire additional non-career employees above the historical contractual non-career employee limits to address the employee unavailability issues resulting directly from the COVID pandemic.

49. In order to address staff shortages in Philadelphia, the Postal Service hired approximately 1, 141 new employees during the period from June 27, 2020, to August 18, 2020.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

  
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ANGELA H. CURTIS  
VICE PRESIDENT, RETAIL AND  
POST OFFICE OPERATIONS, HEADQUARTERS

Executed at Washington, DC on this 28th day of August, 2020.



**STATEMENT OF  
POSTMASTER GENERAL AND CHIEF EXECUTIVE OFFICER  
LOUIS DEJOY  
before the  
Senate Committee on Homeland Security  
and Governmental Affairs Hearing  
“Examining the Finances and Operations of the United States Postal  
Service During COVID-19 and Upcoming Elections”  
UNITED STATES SENATE  
August 21, 2020**

Good Morning Chairman Johnson, Ranking Member Peters, and Members of the Committee. Thank you for calling this hearing to discuss the important work of the United States Postal Service.

I am proud to represent the more than 630,000 hard-working and dedicated men and women of the Postal Service, who have proven, now more than ever, the importance of the Postal Service in the daily lives of all Americans. It is an incredible honor to serve the public and this organization as Postmaster General.

## **INTRODUCTION**

I assumed the role of Postmaster General just over 60 days ago with the goal of preserving and strengthening this great American institution. The Postal Service was established by Congress to fulfill a public service mission of providing prompt, reliable, and universal postal services to the American people, in an efficient and financially self-sustaining fashion. The Postal Service's ability to fulfill that mission in the coming years is fundamentally at risk, and changes must be made to ensure our long-term sustainability for the years and decades ahead. The business model of the Postal Service—as established by law—requires us to cover our costs through our own efforts, and I view it as my personal obligation to put the organization in a position to fulfill that mandate. I am absolutely convinced that with some help from Congress and our regulator, we can do it, and that there is a bright future ahead for the Postal Service. But it does require significant effort by the Postal Service to change.

Since the Governors announced my selection as Postmaster General in May, I have been fully immersed in understanding and evaluating all aspects of the postal organization and business model, to understand the Postal Service and the reasons for our current financial condition. I have been working closely with postal leaders to learn every core area of our business. We have assessed previous plans, as well as research and analysis about our products and services and the competitive marketplace. We have evaluated our operational practices and the many ways we deliver value for our customers, as well as the drivers of our troubling financial condition. We have looked to find the good in the organization, which we will preserve and strengthen, and we have also tried to identify the items that are obstacles to our success, and to chart a course to surmount those obstacles.

I am an optimist by nature. For that reason, I am enthusiastic and energized about the prospects for the future of the Postal Service and our untapped promise. I have been extremely impressed by the dedication of the Postal Service workforce and their commitment to the public service that we provide the American people, and I am excited about the fantastic competencies of this organization. I believe that there are tremendous opportunities available to us if we are willing to grasp those opportunities, and to take the transformative steps necessary to turn our business around and become financially healthy, while remaining a vital part of the nation's critical infrastructure.

Some may ask, why does the Postal Service need to transform? To that question, I say that while I am optimistic about the future of the Postal Service, I am also a realist, and am keenly aware of the magnitude of the financial challenges we face. Our financial position is dire, stemming from substantial declines in mail volume, a statutorily-imposed business model that is broken, huge legacy retiree healthcare and pension liabilities, and a management strategy that has not adequately addressed these issues. As a result, the Postal Service has experienced over a decade of financial losses, with substantial net losses every year since 2007. In FY 2019, net losses approached \$9 billion and we are closing in on \$11 billion in losses for 2020. Currently, our liabilities exceed our assets by approximately \$135 billion. Without dramatic change, there is simply no end in sight, and we face an impending liquidity crisis that threatens our ability to deliver on our mission to the American public.

At the same time, there is a critical need to make capital investments to ensure effective and efficient operations, and meet the needs of the American people. Our financial situation has forced us to defer capital investments over the past decade to preserve liquidity, which is not a sustainable strategy for success. Most vitally, we need to invest in new delivery vehicles so that our letter carriers can safely serve the American people and we can participate in the growth of the new economy.

Changing this state of affairs and positioning the Postal Service for long-term success and sustainability requires fundamental changes. It requires that we stop simply talking about the ways to address the Postal Service's financial condition, and instead start actually addressing them. It requires that the Postal Service not be prevented from taking the steps necessary to transform our organization to meet the challenges that we face. It requires a recognition that in order to achieve the mission laid out by our statute —to provide high-quality universal postal

services in an efficient and self-sustaining fashion—the Postal Service must continually adapt and adjust our operations to a constantly changing world. We simply cannot be successful if we are subject to political or regulatory requirements that force us to remain static in a world that is incredibly dynamic.

I am not kidding myself, so I fully understand that these steps will not be easy, which is likely one reason why they have not been taken before. But they are necessary, and I am committed to doing the hard work. I certainly recognize that not everyone will agree with the ideas I have concerning how to return the Postal Service to a financially sustainable path. These solutions are based upon my 30 years of commercial experience in the logistics business and the listening, collaboration, and intensive reviews I've conducted with members of our Postal Service team across the organization. My vision is of a Postal Service that provides our essential public service in an efficient and effective manner and that can adapt to the evolving needs of the American public in a self-sustaining way, which is consistent with our statutory mandate as established by Congress.

I also want to make certain things clear. One criticism that I have heard is that some believe that I treat the Postal Service as a private sector business, rather than a government service. I accepted the job of Postmaster General fully committed to the role of the Postal Service as an integral part of the United States Government, providing all Americans with universal and open access to our unrivalled processing and delivery network, as reflected in the Mission Statement that the Board adopted on April 1, 2020. I fully embrace six-day delivery of mail and packages as one of this organization's greatest strengths. I also plan to invest in tools and equipment for our letter carriers, and to enhance the stability of our non-career workforce, to continue to provide the nation's most trusted service. At the same time, I recognize that in 1970, Congress created an independent Postal Service designed to operate more like a business, with substantial autonomy over its operations and the freedom to make postal decisions outside of the direct political control of Congress or the President. Congress has therefore recognized that achieving our public service mission and acting in a business-like manner are not mutually exclusive. Rather, making decisions based on the exercise of business judgment regarding the best way to provide service to the American people is fundamentally necessary if there is any hope for us to fulfill the Postal Service's statutory mission.

I am also fully committed to preserving and protecting the Postal Service's proud tradition of serving the American public in a nonpartisan fashion, and I embrace the concept of public service as a public trust. I intend to uphold the trust that has been placed in me by the Governors, and in that regard, I have and will continue to abide fully with all of my ethical obligations, despite assertions to the contrary. I have worked closely with ethics officials and have followed their guidance, and will continue to do so. I took this job to give back to my country and to hopefully do some good by putting the Postal Service back on a financially sustainable path.

I recognize that our service performance has come into question recently. We take these concerns seriously and are focused on stabilizing service to ensure we meet our commitment to the American public. We deliver to 160 million residences and businesses 6 days per week, and on a normal day the Postal Service shows up and delivers 99.94 percent of the time. Unprecedented conditions over the last six months, however, have contributed to service instability in certain areas of the country that have escalated.

Since March 2020, the Postal Service has experienced mail delivery challenges due to the COVID-19 global pandemic. The impacts of the pandemic have had broad reaching impacts on all aspect our operations, with a limited supply of commercial air trips to carry our volume, decreased employee availability as employees deal will health, home and community impacts, and significant changes in mail and package volumes. However, our overall ability to service our required deliveries during these difficult times still remains above 99.88 percent. In addition, improvements we have made in our transportation network have also revealed the need to realign some of our other processes, which have temporarily impacted mail and package service performance. We are acting to address those issues, and have seen immediate improvements, and we will continue to make necessary corrections. Despite these shortfalls, the American public's support of our employees has been overwhelmingly positive and we continue to work diligently with hiring and reallocating resources to ensure we deliver at expected levels.

Service, like many things, is local. And there are several cities and communities that have been hard hit by the pandemic. These same cities and regions are also some of the most complex delivery operations we manage. All of that, combined with employee availability issues and difficulties in hiring additional resources, have resulted in more significant delivery service disruptions than reflected in the national average. The entire organization is working collectively



to restore consistent delivery service. We are mobilizing all available resources and managing these offices at a national level.

Overcoming difficult times and providing a sense of normalcy for the American public is just one critical attribute of this organization's resiliency that has contributed to our legacy for the past 240 years. While our resiliency has been tested, it has not been broken. You have my commitment, and that of the entire organization, that we will stabilize operations and restore the nation's confidence and trust in the Postal Service.

### **THE PUSH FOR PROGRESS AND FINANCIAL SUSTAINABILITY**

The causes of the Postal Service's dire financial condition are well-understood, and the only way that they can be solved is through significant and fundamental reforms to our current business model. This requires action from Congress, the Postal Regulatory Commission (Commission), and the Postal Service.

As the Postal Service has said for years, Congress and the Commission have long delayed much needed legislative and regulatory reforms which would have helped to address the situation. Congress must enact reform legislation that addresses our unaffordable retirement payments. Most importantly, Congress must allow the Postal Service to integrate our retiree health benefits program with Medicare, which is a common-sense best practice followed by all businesses who still offer retiree health care. It must also rationalize our pension funding payments.

Legislative reforms have been discussed and debated for years, but no action has been taken. I urge Congress to expeditiously enact these reforms. I also urge Congress to enact legislation that would provide the Postal Service with financial relief to account for the impacts of the COVID-19 pandemic on our financial condition.

The Commission, meanwhile, must expeditiously resolve the 10-year review, and design a more rational regulatory system for our mail products. The 10-year review has been ongoing for nearly 4 years, and it has been nearly 3 years since the Commission concluded that the current

system is not working, yet it has still not finalized a replacement system. We continue to wait for the required relief.

Had Congress and the Commission fulfilled their obligations to the American people concerning the Postal Service, I am certain that much of our cumulative losses that we have experienced since 2007 could have been avoided, and that the Postal Service's operational and financial performance would not be in such jeopardy.

At the same time, the Postal Service has failed to engage a sufficient operating strategy that adequately mitigated these predicted annual financial losses. We should not wait for the legislative and regulatory process to save us. The Postal Service must do our part, by pursuing every strategy within our control to ensure our success, and in that regard, I know we can do more. If we want to be viable for the long term, it is absolutely imperative for the Postal Service to operate efficiently and effectively, while continuing to provide service that fulfills our universal service mandate and meets the needs of our customers.

Efficiency and effectiveness are also necessary given the realities of the marketplace in which we operate. There are competitive alternatives to every product that we offer, and the way in which the American people use the mail has evolved. For that reason, high-quality, reasonably-priced service is an absolute necessity, but it is equally important for us to embrace the reality that high-quality service and efficient service are not mutually exclusive, but instead must go hand-in hand if we are going to keep pace with our competition and be self-sustaining, as our mandate requires.

The Postal Service is a great American institution with tremendous capabilities and prospects, and I know there is incredible additional value within the Postal Service that needs to be unlocked. To reach our full potential we need to be even better at everything we do well now, and we need to recognize our issues and urgently embrace the changes required to unleash the full range of possibilities. To transform and remain a self-sustaining, mission-focused organization that continues to serve the American people, the Postal Service must have a management structure and an operating strategy that ensure we operate efficiently and effectively. We must focus on our strengths to maximize our prospects for long-term success, by improving the products and services we provide, pursuing new revenue streams, and continuing to operate more efficiently.

Let me tell you about the two things that I have done so far to pursue these goals during my 60-plus days in office.

First, I took a fresh look at our operations and considered any necessary organizational and structural adjustments that would best position the Postal Service to maximize our core competencies and key strengths. I worked diligently with Postal Service leadership throughout the country to find good practices in the organization. I met very smart and dedicated people who were anxious to engage in improvement, but were locked in an organization that was too bureaucratic. I worked with them in groups and individually for hundreds of hours to identify an organizational strategy more equipped to deal with our operating model and the future initiatives we are developing together to ensure the long-term success of the organization. I worked with each individual in the leadership ranks and assessed their specific talents and interest, and together we designed an organizational structure with leadership that is ready to embark upon the very substantial initiatives we have ahead of us. Twenty-four people were given roles they were excited about with many getting promotions. This was a liberation of talented people now placed in roles that will enable the organization to improve service, expand revenue, and do so in a cost-effective manner—which is the mission assigned to me by the Governors.

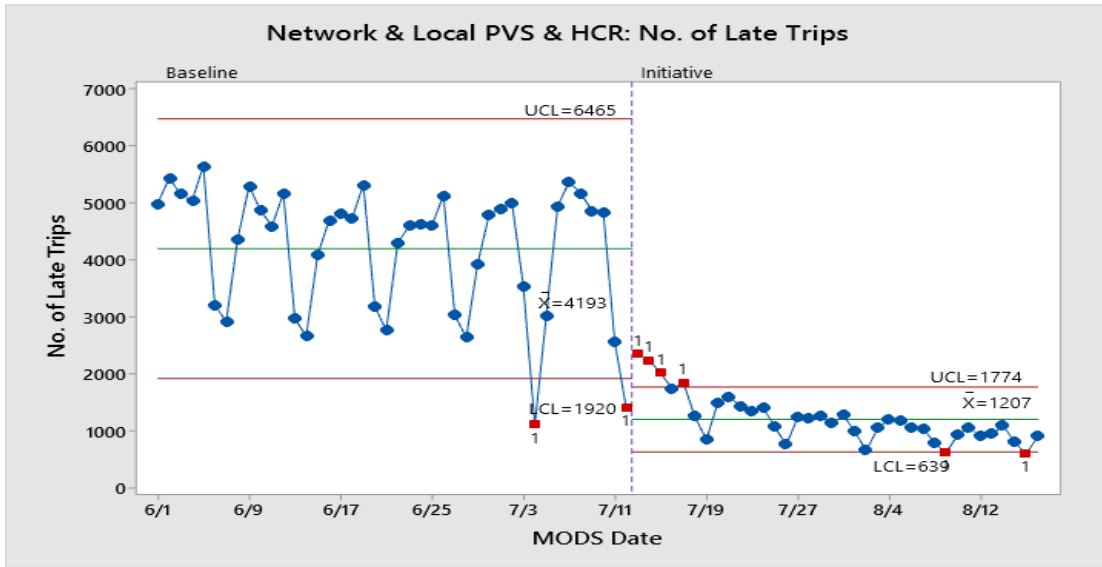
To be more specific, the modified organizational structure aligns functions based on core business operations and will provide more clarity and focus on what the Postal Service does best: collect, process, move, and deliver mail and packages. We needed to provide greater focus on the core aspects of our business, and the new structure allows that with clearer lines of authority and accountability. The modified organizational structure will also strengthen the Postal Service by enabling us to identify new opportunities to generate revenue, so that we will have additional financial resources to be able to continue to fulfill our universal service obligation to all of America. We are confident that the new organizational structure is the right alignment, and it was a change that needed to be made.

Second, I have ensured that the organization refocuses on the need for operational discipline. Every operational services organization, public or private, must solve the problem of designing an efficient operating plan and then meeting that plan to be successful. The Postal Service is no different. It is frankly the only path to consistent, affordable service, and is foundational to our future aspirations and objectives. For that reason, I started with one simple step: directing

that we be more disciplined by ensuring that our trucks should run on time and on schedule, and that we should eliminate unnecessary extra trips. Running on time and on schedule is the only way that our network can work in the manner that is intended, because each step that is used to accept, process, transport, and deliver a piece of mail or package throughout our network must work seamlessly to meet our service standards.

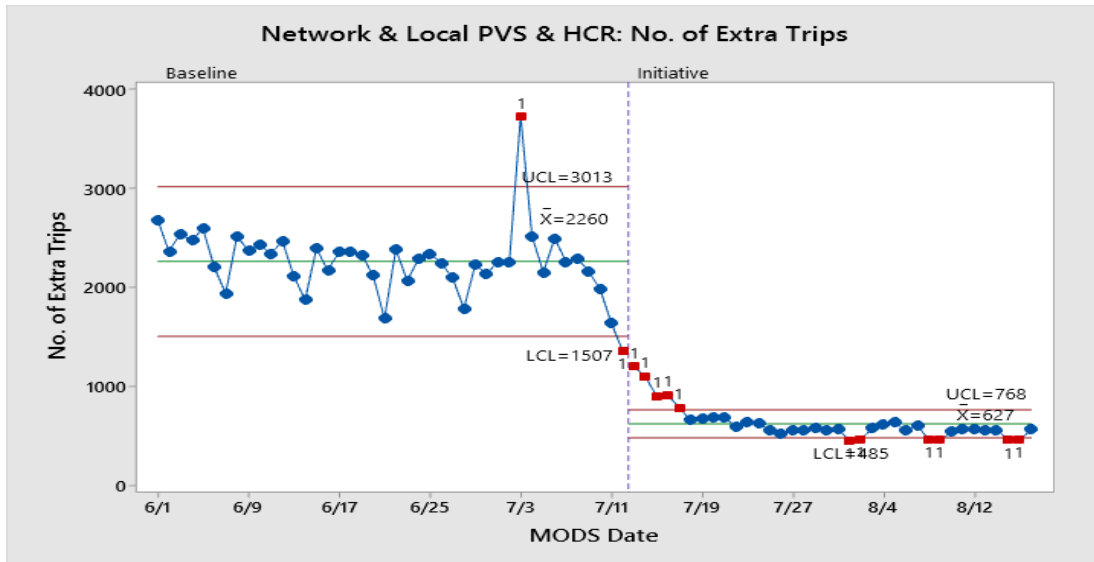
In just a few weeks, we have substantially improved our on-time dispatch schedule from 89.4 percent to 97.0 percent on time. We have also focused on decreasing the number of extra trips we operate. We have reduced this costly expense by over 70 percent in the last four weeks. To put this in perspective, our trips on time have increased from 35,000 daily trips to more than 39,000 daily trips. Late trips decreased by over 2,900 trips per day and extra trips decreased by over 1,600 trips per day. While the improvements are dramatic, this effort did expose a need to realign some of our processing and scheduling that caused mail to miss the scheduled transportation, and has temporarily impacted mail and package service performance. Once the need to realign was identified, we have acted quickly to correct these issues and have seen immediate improvements, but we acknowledge that more work needs to be done to ensure we are service responsive. We will continue to bring disciplined focus to stabilize operations across processing, transportation, and delivery within our network to fulfill our obligation and commitment to provide consistent and reliable service that meets the expectations of the American public.

### Late Trips from June 1-August 17



Source: SV - Surface Visibility

### Extra Trips from June 1-August 17



Source: SV - Surface Visibility

This effort does not mean leaving mail behind; rather, it means adhering to our existing operating plan so that we can achieve our mission in a sustainable fashion. To be clear, the trucks need to leave on time with the mail that is supposed to be on those trucks based upon our operating plans. As with any operational initiative, it exposed additional inefficiencies in our processes and systems that we quickly began to correct. We continue to keep a sharp focus on how the two changes we have implemented impact our service performance, and we will take

swift action to make adjustments in real-time as needed to ensure that any service issues that arise are corrected as quickly as possible. You have my personal commitment, and that of the entire organization, that we will stabilize operations and restore your confidence and trust in the Postal Service.

The decision to focus on our transportation discipline was not made in a vacuum. On the day that I was sworn in as Postmaster General by our Board of Governors, the Postal Service Inspector General issued a report entitled “U.S. Postal Service’s Processing Network Optimization and Service Impacts.” In that report, our Inspector General indicated that the Postal Service spent \$1.1 billion in mail processing overtime and penalty overtime, \$280 million in late and extra transportation, and \$2.9 billion in delivery overtime and penalty overtime costs in FY 2019. Yet, even after incurring these additional costs, the Postal Service has not seen material improvement in our service performance scores. While we did not fully agree with all aspects of OIG’s report, we did not dispute the fundamental conclusion that we need to redouble our efforts to focus on our plans to improve operational efficiency and to further control overtime expenditures.

Finally, three other issues have received considerable attention, so I wanted to clear up misconceptions about them.

Overtime has also been a source of substantial cost, and it is to a certain extent reflective of inefficiency in our operations. A new OIG report coming out shortly identifies that between FY2014 and FY2019, the number of Postal Service employees who received more in overtime pay than they made in base salary increased from 758 to more than 4,000. Overtime is scheduled and assigned based on operational requirements, and management has focused on ensuring that overtime used is necessary based on workload or other factors and is authorized in accordance with our policies. However, I did not direct the elimination of overtime, and in fact overtime has not been reduced since I became the Postmaster General. We were incurring overtime at a rate of approximately 13 percent prior to my arrival, and in June, July, and August, overtime is still at approximately 13 percent. In fact, since my first week on the job, the Postal Service has spent well over \$750 million in overtime.

Regarding collection boxes, the Postal Service has over 140,000 blue collection boxes, and we have reviewed collection box density annually on a routine basis in accordance with Postal

policy. Over the past 10 years, over 30,000 collection boxes have been removed from around the country, averaging 3,500 boxes per year. This has been done because of the low volume of mail that those boxes were receiving, meaning it was inefficient to keep them in place. This is a long-standing policy and process that I did not initiate or direct, but I have paused it until after the election given recent customer concerns.

**Blue Collection Box Removal Data 2013 – Present**

	Fiscal Year 2013	Fiscal Year 2014	Fiscal Year 2015	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018	Fiscal Year 2019	Fiscal Year 2020 to date	Total Remaining to Date
Count of Boxes	164,099	159,729	156,349	154,006	152,539	146,252	143,977	142,300	140,837
Boxes Removed	-4,370	-3,380	-2,343	-1,467	-6,287	-2,275	-1,677	-1,463	

Source: CPMS - Collection Point Management System

Finally, regarding mail sorting machines, the Postal Service has always evaluated equipment sets and other operational factors to balance available resources with changes in volumes. For the evaluation of processing equipment, we utilize an iterative process in which volume trends by product type are compared to the fleet of equipment needed to process the mail. Since 2016, overall letter mail volume has dropped by 29 percent and overall flat mail volume has dropped by 32 percent. Accordingly, letter sorting equipment during the same period was reduced by 27 percent and flat sorting equipment was reduced by 25 percent. This includes the removal of over 1000 machines. While letter and flat machines have been reduced to account for the reduction in letter and flat volume, we have increased package sorting equipment to process the increases in package volume.

In April 2020, an evaluation of letter and flat sorting equipment utilization showed that even with the ongoing reductions in equipment, the letter sorting machines are only being used for 32 percent of the available machine hours. The flat sorting machines are only being used for 38 percent of the available machine hours. Even if letter and flat volumes increase substantially, there is more than enough capacity on the machines to handle the volume. For context, we anticipate that Election Mail will account for less than two percent of all mail volume from mid-September until Election Day. Nonetheless, while I did not initiate the evaluation or removal of this equipment, I have given the directive to stop the removal of additional mail processing machines through the election.

## **ELECTION MAIL**

As I stated earlier this week, the Postal Service is ready today to handle whatever volume of election mail it receives this fall. Even with the challenges of keeping our employees and customers safe and healthy as they operate amid a pandemic, the American public should know that this is our number one priority between now and Election Day. All of us in the Postal Service are justifiably proud of our role in the democratic process, and I intend to keep it that way.

I recognize that it has become impossible to separate the necessary long-term reform efforts we will need to undertake from the broader political environment surrounding the election, and I do not want to pursue any immediate efforts that might be utilized to tarnish the Postal Service brand, particularly as it relates to our role in the democratic process.

To reiterate, a false narrative has developed that the two steps we have taken to improve efficiency—running on time and on schedule and realigning our organizational structure—are somehow designed to harm the ability of voters to use the mail to vote. Further, this false narrative has turned matters that have either been long planned or are part of long-standing processes in place for years—well before my arrival 67 days ago—such as the routine equipment reductions and the regular removal of low-volume collection boxes, into attacks on the election. Even the recommendations that we have been making for years, like asking election officials to use First-Class Mail when sending blank ballots to voters or urging voters to return their ballots one week before the election, have been turned into accusations that we are degrading the service provided to Election Mail.

While this narrative is fundamentally false and unfair, there is also no doubt that it is hurting the Postal Service's valued reputation as a source of reliability and strength for the American people. And, it could serve to undermine public confidence in the electoral process. Managing the Postal Service in an efficient and effective manner cannot succeed if everything is politicized; this was a key insight that led to the creation of an independent Postal Service in the first place. In such an atmosphere, it becomes impossible for the Postal Service to do the job that Congress has tasked us to do, and that it is my solemn duty to uphold.



Therefore, and as I announced earlier this week, I have decided to pause the implementation of our future transformative efforts until after the election.

While the Governors and I believe significant reforms are essential, as discussed above, even longstanding efficiency efforts have become a distraction from our mission of service to the public as the nation prepares to hold a presidential election in the midst of a devastating pandemic. Because those longstanding operational initiatives and other efforts that are under consideration have been raised as areas of concern, and to avoid even the appearance of any impact on election mail, I am suspending those longstanding initiatives until after the election is concluded.

Therefore, retail hours at Post Offices won't be changed, and mail processing equipment and blue collection boxes won't be removed during this period. No mail processing facilities will be closed and we have terminated the pilot program that began in July that expedited carrier departures to their delivery routes, without plans to extend or expand it. To clear up any confusion, overtime has, and will continue to be, approved as needed. Finally, effective October 1, 2020, we will engage standby resources in all areas of our operations, including transportation, to satisfy any unforeseen demand for the election.

In addition to the above commitments, I also announced the expansion of our current leadership taskforce on election mail to enhance our ongoing work and partnership with state and local election officials in jurisdictions throughout the country. Leaders of our postal unions and management associations have committed to joining this taskforce to ensure strong coordination throughout the Postal Service, with state and local partners, and to make sure any concerns can be raised and resolved at the highest levels of the organization. Because of the unprecedented demands of the 2020 election, this taskforce will help ensure that election officials and voters are well informed and fully supported by the Postal Service.

These efforts will further enhance our already robust outreach efforts with state and local election officials. During this outreach, the Postal Service explains our services and delivery processes, and provides guidance on how election officials can design and send their mailings in a manner that is consistent with postal regulations, that improves mailpiece visibility, and that ensures timely and efficient processing and delivery.

Our outreach also includes educating election officials and voters to be mindful of how the mail works, since state election deadlines often do not consider our delivery standards. This is particularly important given the anticipated increase in mail-in voting during the COVID-19 pandemic, especially in those jurisdictions that are less experienced with handling high volumes of mail-in votes and that are trying to implement new election rules and requirements.

Our key recommendation is that voters should request their ballot at least 15 days before the election, to ensure that they have enough time to receive the ballot, complete it, and then mail it back to the elections office. The return ballot should be placed in the mail at least 7 days prior to the election. Despite some assertions to the contrary, this is the same message that we have made in previous years and have been reiterating all year, and has nothing to do with recent operational initiatives or concerns about delayed mail. To be clear, these recommendations are designed to help ensure that ballots will be delivered and counted, and should in no way be misconstrued to imply that we lack confidence in our ability to deliver those ballots. We can, and will, handle the volume of Election Mail we receive.

In that regard, we have not changed our delivery standards, our processing, our rules, or our prices for Election Mail. To the contrary, we have intensified our efforts to fulfill our role in the electoral process. We will do everything we can to handle and deliver Election Mail in a manner consistent with the proven processes and procedures that we have relied on for years.

In sum, the goal of our education efforts is simple: to ensure that voters who choose to use the mail will have their votes counted. This goal is advanced by being transparent, and educating voters about how the mail works and what they can do to ensure that their vote is counted. It is not advanced by remaining silent and letting voters believe that all they need to consider is whether they have requested and mailed a ballot in accordance with state law deadlines. While we will do whatever we can to deliver ballots even when they are mailed at the last second, it should also be obvious to fair-minded election officials that urging voters to mail back their ballot at least a week before the deadline is a simple and straightforward step to ensure that ballots are delivered on time and, most importantly, counted under state law. Because this goal is so important, we intend to continue our efforts, and also to work with the leaders of our unions and management associations, to help spread the word that voters who choose to use the mail to vote should request their ballots early and vote early.

## **COVID-19 RESPONSE**

Just as all of us in the Postal Service are justifiably proud of our role in the democratic process, we are also proud to do our part as an essential government service, critical to the nation's infrastructure, during the COVID-19 pandemic. I have been struck by the commitment and dedication of postal employees, who have truly gone above and beyond during this national emergency.

The Postal Service has been a source of constancy and reliability in every community. Our more than 630,000 employees are working to make sure our customers can depend on us. We're on the front lines — delivering needed medications, supplies, benefit checks, financial statements and the important correspondence every family counts on receiving. The public support for the organization is extremely high because postal employees are so committed to serving their communities and their customers. We aim to continually earn the trust and support of the public.

We will continue to take the necessary steps to protect the safety and wellness of our employees, and to reinforce workplace behaviors to ensure that contact with our customers reflects the best guidance regarding healthy interactions, social distancing and risk minimization.

Like the rest of the country, the pandemic has impacted us financially, including increased costs associated with the measures necessary to protect our employees and customers, such as the purchase of personal protective equipment and installation of transparent dividers at retail locations. We have also seen a remarkable impact on our mail volume, which has decreased 24 percent. Given these numbers, and as I noted earlier, I also call on Congress to enact legislation that addresses the impact of the pandemic on our financial condition.

## **CONCLUSION**

Since I became Postmaster General just over 60 days ago, I made the deliberate decision to focus my energy on learning the organization so I could make informed decisions as a leader and CEO from the start. This time was well spent, but I recognize that in these first two months or so, I have not been as available to non-postal stakeholders for meetings and discussions. While my efforts to study and improve the organization will be ongoing throughout my tenure as Postmaster General, I recognize the importance of now being more available to Congress and other external stakeholders. I hope my testimony today demonstrates as much.

I accept the responsibility that the Governors gave me to maintain and enhance our reputation and role as a trusted face of the federal government in every community, and I intend to work with postal executives, management associations, managers, union leadership, and our craft employees to do everything I can to put us back on a financially stable path. I am confident that we can chart a path forward that allows the Postal Service to fulfill our vital public service mission in a sustainable manner. I look forward to the challenge, and know we are up to it.

In this regard, I want to be transparent with you in saying that it remains critically important for the Postal Service to reform. It is imperative that the Postal Service undertake a number of transformative steps in order to create a financially viable organization, capable of fulfilling our public service mission to the American people in a self-sustaining fashion over the long term. These steps will not be easy, but are necessary, and we simply must pursue them. While we will not implement any changes before the election, we will continue to move forward with analyzing those changes that are necessary, so that we are prepared to move forward once the election ends. We need the support of Congress to achieve these goals, rather than to be hamstrung. I would appreciate your support in working together to ensure a bright future for the Postal Service.

Thank you, Mr. Chairman, Ranking Member Peters, and Members of the Committee, for the opportunity to submit this testimony. I welcome any questions that you and the committee may have.

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**STATEMENT OF  
POSTMASTER GENERAL AND CHIEF EXECUTIVE OFFICER  
LOUIS DEJOY  
before the  
House Committee on Oversight and Reform  
“Protecting the Timely Delivery of Mail, Medicine, and Mail-in Ballots”  
UNITED STATES HOUSE  
August 24, 2020**

Good Morning Chairwoman Maloney, Ranking Member Comer, and Members of the Committee. Thank you for calling this hearing to discuss the important work of the United States Postal Service.

I am proud to represent the more than 630,000 hard-working and dedicated men and women of the Postal Service, who have proven, now more than ever, the importance of the Postal Service in the daily lives of all Americans. It is an incredible honor to serve the public and this organization as Postmaster General.

## **INTRODUCTION**

I assumed the role of Postmaster General just over 60 days ago with the goal of preserving and strengthening this great American institution. The Postal Service was established by Congress to fulfill a public service mission of providing prompt, reliable, and universal postal services to the American people, in an efficient and financially self-sustaining fashion. The Postal Service's ability to fulfill that mission in the coming years is fundamentally at risk, and changes must be made to ensure our long-term sustainability for the years and decades ahead. The business model of the Postal Service—as established by law—requires us to cover our costs through our own efforts, and I view it as my personal obligation to put the organization in a position to fulfill that mandate. I am absolutely convinced that with some help from Congress and our regulator, we can do it, and that there is a bright future ahead for the Postal Service. But it does require significant effort by the Postal Service to change.

Since the Governors announced my selection as Postmaster General in May, I have been fully immersed in understanding and evaluating all aspects of the postal organization and business model, to understand the Postal Service and the reasons for our current financial condition. I have been working closely with postal leaders to learn every core area of our business. We have assessed previous plans, as well as research and analysis about our products and services and the competitive marketplace. We have evaluated our operational practices and the many ways we deliver value for our customers, as well as the drivers of our troubling financial condition. We have looked to find the good in the organization, which we will preserve and strengthen, and we have also tried to identify the items that are obstacles to our success, and to chart a course to surmount those obstacles.

I am an optimist by nature. For that reason, I am enthusiastic and energized about the prospects for the future of the Postal Service and our untapped promise. I have been extremely impressed by the dedication of the Postal Service workforce and their commitment to the public service that we provide the American people, and I am excited about the fantastic competencies of this organization. I believe that there are tremendous opportunities available to us if we are willing to grasp those opportunities, and to take the transformative steps necessary to turn our business around and become financially healthy, while remaining a vital part of the nation's critical infrastructure.

Some may ask, why does the Postal Service need to transform? To that question, I say that while I am optimistic about the future of the Postal Service, I am also a realist, and am keenly aware of the magnitude of the financial challenges we face. Our financial position is dire, stemming from substantial declines in mail volume, a statutorily-imposed business model that is broken, huge legacy retiree healthcare and pension liabilities, and a management strategy that has not adequately addressed these issues. As a result, the Postal Service has experienced over a decade of financial losses, with substantial net losses every year since 2007. In FY 2019, net losses approached \$9 billion and we are closing in on \$11 billion in losses for 2020. Currently, our liabilities exceed our assets by approximately \$135 billion. Without dramatic change, there is simply no end in sight, and we face an impending liquidity crisis that threatens our ability to deliver on our mission to the American public.

At the same time, there is a critical need to make capital investments to ensure effective and efficient operations, and meet the needs of the American people. Our financial situation has forced us to defer capital investments over the past decade to preserve liquidity, which is not a sustainable strategy for success. Most vitally, we need to invest in new delivery vehicles so that our letter carriers can safely serve the American people and we can participate in the growth of the new economy.

Changing this state of affairs and positioning the Postal Service for long-term success and sustainability requires fundamental changes. It requires that we stop simply talking about the ways to address the Postal Service's financial condition, and instead start actually addressing them. It requires that the Postal Service not be prevented from taking the steps necessary to transform our organization to meet the challenges that we face. It requires a recognition that in order to achieve the mission laid out by our statute—to provide high-quality universal postal

services in an efficient and self-sustaining fashion—the Postal Service must continually adapt and adjust our operations to a constantly changing world. We simply cannot be successful if we are subject to political or regulatory requirements that force us to remain static in a world that is incredibly dynamic.

I am not kidding myself, so I fully understand that these steps will not be easy, which is likely one reason why they have not been taken before. But they are necessary, and I am committed to doing the hard work. I certainly recognize that not everyone will agree with the ideas I have concerning how to return the Postal Service to a financially sustainable path. These solutions are based upon my 30 years of commercial experience in the logistics business and the listening, collaboration, and intensive reviews I've conducted with members of our Postal Service team across the organization. My vision is of a Postal Service that provides our essential public service in an efficient and effective manner and that can adapt to the evolving needs of the American public in a self-sustaining way, which is consistent with our statutory mandate as established by Congress.

I also want to make certain things clear. One criticism that I have heard is that some believe that I treat the Postal Service as a private sector business, rather than a government service. I accepted the job of Postmaster General fully committed to the role of the Postal Service as an integral part of the United States Government, providing all Americans with universal and open access to our unrivalled processing and delivery network, as reflected in the Mission Statement that the Board adopted on April 1, 2020. I fully embrace six-day delivery of mail and packages as one of this organization's greatest strengths. I also plan to invest in tools and equipment for our letter carriers, and to enhance the stability of our non-career workforce, to continue to provide the nation's most trusted service. At the same time, I recognize that in 1970, Congress created an independent Postal Service designed to operate more like a business, with substantial autonomy over its operations and the freedom to make postal decisions outside of the direct political control of Congress or the President. Congress has therefore recognized that achieving our public service mission and acting in a business-like manner are not mutually exclusive. Rather, making decisions based on the exercise of business judgment regarding the best way to provide service to the American people is fundamentally necessary if there is any hope for us to fulfill the Postal Service's statutory mission.



I am also fully committed to preserving and protecting the Postal Service's proud tradition of serving the American public in a nonpartisan fashion, and I embrace the concept of public service as a public trust. I intend to uphold the trust that has been placed in me by the Governors, and in that regard, I have and will continue to abide fully with all of my ethical obligations, despite assertions to the contrary. I have worked closely with ethics officials and have followed their guidance, and will continue to do so. I took this job to give back to my country and to hopefully do some good by putting the Postal Service back on a financially sustainable path.

I recognize that our service performance has come into question recently. We take these concerns seriously and are focused on stabilizing service to ensure we meet our commitment to the American public. We deliver to 160 million residences and businesses 6 days per week, and on a normal day the Postal Service shows up and delivers 99.94 percent of the time. Unprecedented conditions over the last six months, however, have contributed to service instability in certain areas of the country that have escalated.

Since March 2020, the Postal Service has experienced mail delivery challenges due to the COVID-19 global pandemic. The impacts of the pandemic have had broad reaching impacts on all aspect our operations, with a limited supply of commercial air trips to carry our volume, decreased employee availability as employees deal will health, home and community impacts, and significant changes in mail and package volumes. However, our overall ability to service our required deliveries during these difficult times still remains above 99.88 percent. In addition, improvements we have made in our transportation network have also revealed the need to realign some of our other processes, which have temporarily impacted mail and package service performance. We are acting to address those issues, and have seen immediate improvements, and we will continue to make necessary corrections. Despite these shortfalls, the American public's support of our employees has been overwhelmingly positive and we continue to work diligently with hiring and reallocating resources to ensure we deliver at expected levels.

Service, like many things, is local. And there are several cities and communities that have been hard hit by the pandemic. These same cities and regions are also some of the most complex delivery operations we manage. All of that, combined with employee availability issues and difficulties in hiring additional resources, have resulted in more significant delivery service disruptions than reflected in the national average. The entire organization is working collectively

to restore consistent delivery service. We are mobilizing all available resources and managing these offices at a national level.

Overcoming difficult times and providing a sense of normalcy for the American public is just one critical attribute of this organization's resiliency that has contributed to our legacy for the past 240 years. While our resiliency has been tested, it has not been broken. You have my commitment, and that of the entire organization, that we will stabilize operations and restore the nation's confidence and trust in the Postal Service.

### **THE PUSH FOR PROGRESS AND FINANCIAL SUSTAINABILITY**

The causes of the Postal Service's dire financial condition are well-understood, and the only way that they can be solved is through significant and fundamental reforms to our current business model. This requires action from Congress, the Postal Regulatory Commission (Commission), and the Postal Service.

As the Postal Service has said for years, Congress and the Commission have long delayed much needed legislative and regulatory reforms which would have helped to address the situation. Congress must enact reform legislation that addresses our unaffordable retirement payments. Most importantly, Congress must allow the Postal Service to integrate our retiree health benefits program with Medicare, which is a common-sense best practice followed by all businesses who still offer retiree health care. It must also rationalize our pension funding payments.

Legislative reforms have been discussed and debated for years, but no action has been taken. I urge Congress to expeditiously enact these reforms. I also urge Congress to enact legislation that would provide the Postal Service with financial relief to account for the impacts of the COVID-19 pandemic on our financial condition.

The Commission, meanwhile, must expeditiously resolve the 10-year review, and design a more rational regulatory system for our mail products. The 10-year review has been ongoing for nearly 4 years, and it has been nearly 3 years since the Commission concluded that the current

system is not working, yet it has still not finalized a replacement system. We continue to wait for the required relief.

Had Congress and the Commission fulfilled their obligations to the American people concerning the Postal Service, I am certain that much of our cumulative losses that we have experienced since 2007 could have been avoided, and that the Postal Service's operational and financial performance would not be in such jeopardy.

At the same time, the Postal Service has failed to engage a sufficient operating strategy that adequately mitigated these predicted annual financial losses. We should not wait for the legislative and regulatory process to save us. The Postal Service must do our part, by pursuing every strategy within our control to ensure our success, and in that regard, I know we can do more. If we want to be viable for the long term, it is absolutely imperative for the Postal Service to operate efficiently and effectively, while continuing to provide service that fulfills our universal service mandate and meets the needs of our customers.

Efficiency and effectiveness are also necessary given the realities of the marketplace in which we operate. There are competitive alternatives to every product that we offer, and the way in which the American people use the mail has evolved. For that reason, high-quality, reasonably-priced service is an absolute necessity, but it is equally important for us to embrace the reality that high-quality service and efficient service are not mutually exclusive, but instead must go hand-in hand if we are going to keep pace with our competition and be self-sustaining, as our mandate requires.

The Postal Service is a great American institution with tremendous capabilities and prospects, and I know there is incredible additional value within the Postal Service that needs to be unlocked. To reach our full potential we need to be even better at everything we do well now, and we need to recognize our issues and urgently embrace the changes required to unleash the full range of possibilities. To transform and remain a self-sustaining, mission-focused organization that continues to serve the American people, the Postal Service must have a management structure and an operating strategy that ensure we operate efficiently and effectively. We must focus on our strengths to maximize our prospects for long-term success, by improving the products and services we provide, pursuing new revenue streams, and continuing to operate more efficiently.

Let me tell you about the two things that I have done so far to pursue these goals during my 60-plus days in office.

First, I took a fresh look at our operations and considered any necessary organizational and structural adjustments that would best position the Postal Service to maximize our core competencies and key strengths. I worked diligently with Postal Service leadership throughout the country to find good practices in the organization. I met very smart and dedicated people who were anxious to engage in improvement, but were locked in an organization that was too bureaucratic. I worked with them in groups and individually for hundreds of hours to identify an organizational strategy more equipped to deal with our operating model and the future initiatives we are developing together to ensure the long-term success of the organization. I worked with each individual in the leadership ranks and assessed their specific talents and interest, and together we designed an organizational structure with leadership that is ready to embark upon the very substantial initiatives we have ahead of us. Twenty-four people were given roles they were excited about with many getting promotions. This was a liberation of talented people now placed in roles that will enable the organization to improve service, expand revenue, and do so in a cost-effective manner—which is the mission assigned to me by the Governors.

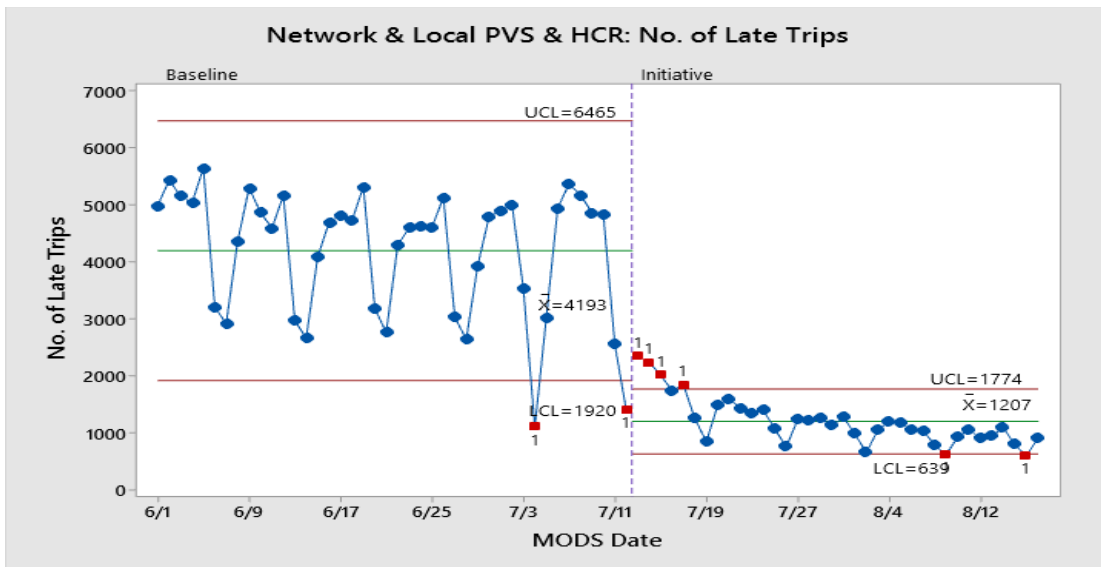
To be more specific, the modified organizational structure aligns functions based on core business operations and will provide more clarity and focus on what the Postal Service does best: collect, process, move, and deliver mail and packages. We needed to provide greater focus on the core aspects of our business, and the new structure allows that with clearer lines of authority and accountability. The modified organizational structure will also strengthen the Postal Service by enabling us to identify new opportunities to generate revenue, so that we will have additional financial resources to be able to continue to fulfill our universal service obligation to all of America. We are confident that the new organizational structure is the right alignment, and it was a change that needed to be made.

Second, I have ensured that the organization refocuses on the need for operational discipline. Every operational services organization, public or private, must solve the problem of designing an efficient operating plan and then meeting that plan to be successful. The Postal Service is no different. It is frankly the only path to consistent, affordable service, and is foundational to our future aspirations and objectives. For that reason, I started with one simple step: directing

that we be more disciplined by ensuring that our trucks should run on time and on schedule, and that we should eliminate unnecessary extra trips. Running on time and on schedule is the only way that our network can work in the manner that is intended, because each step that is used to accept, process, transport, and deliver a piece of mail or package throughout our network must work seamlessly to meet our service standards.

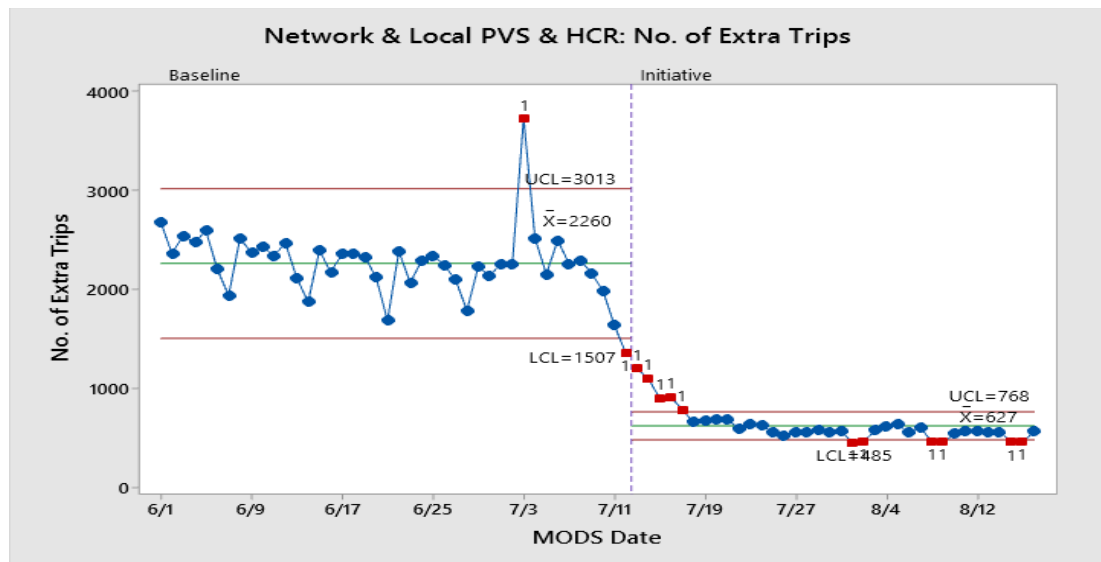
In just a few weeks, we have substantially improved our on-time dispatch schedule from 89.4 percent to 97.0 percent on time. We have also focused on decreasing the number of extra trips we operate. We have reduced this costly expense by over 70 percent in the last four weeks. To put this in perspective, our trips on time have increased from 35,000 daily trips to more than 39,000 daily trips. Late trips decreased by over 2,900 trips per day and extra trips decreased by over 1,600 trips per day. While the improvements are dramatic, this effort did expose a need to realign some of our processing and scheduling that caused mail to miss the scheduled transportation, and has temporarily impacted mail and package service performance. Once the need to realign was identified, we have acted quickly to correct these issues and have seen immediate improvements, but we acknowledge that more work needs to be done to ensure we are service responsive. We will continue to bring disciplined focus to stabilize operations across processing, transportation, and delivery within our network to fulfill our obligation and commitment to provide consistent and reliable service that meets the expectations of the American public.

## Late Trips from June 1-August 17



Source: SV - Surface Visibility

## Extra Trips from June 1-August 17



Source: SV - Surface Visibility

This effort does not mean leaving mail behind; rather, it means adhering to our existing operating plan so that we can achieve our mission in a sustainable fashion. To be clear, the trucks need to leave on time with the mail that is supposed to be on those trucks based upon our operating plans. As with any operational initiative, it exposed additional inefficiencies in our processes and systems that we quickly began to correct. We continue to keep a sharp focus on how the two changes we have implemented impact our service performance, and we will take

swift action to make adjustments in real-time as needed to ensure that any service issues that arise are corrected as quickly as possible. You have my personal commitment, and that of the entire organization, that we will stabilize operations and restore your confidence and trust in the Postal Service.

The decision to focus on our transportation discipline was not made in a vacuum. On the day that I was sworn in as Postmaster General by our Board of Governors, the Postal Service Inspector General issued a report entitled “U.S. Postal Service’s Processing Network Optimization and Service Impacts.” In that report, our Inspector General indicated that the Postal Service spent \$1.1 billion in mail processing overtime and penalty overtime, \$280 million in late and extra transportation, and \$2.9 billion in delivery overtime and penalty overtime costs in FY 2019. Yet, even after incurring these additional costs, the Postal Service has not seen material improvement in our service performance scores. While we did not fully agree with all aspects of OIG’s report, we did not dispute the fundamental conclusion that we need to redouble our efforts to focus on our plans to improve operational efficiency and to further control overtime expenditures.

Finally, three other issues have received considerable attention, so I wanted to clear up misconceptions about them.

Overtime has also been a source of substantial cost, and it is to a certain extent reflective of inefficiency in our operations. A new OIG report coming out shortly identifies that between FY2014 and FY2019, the number of Postal Service employees who received more in overtime pay than they made in base salary increased from 758 to more than 4,000. Overtime is scheduled and assigned based on operational requirements, and management has focused on ensuring that overtime used is necessary based on workload or other factors and is authorized in accordance with our policies. However, I did not direct the elimination of overtime, and in fact overtime has not been reduced since I became the Postmaster General. We were incurring overtime at a rate of approximately 13 percent prior to my arrival, and in June, July, and August, overtime is still at approximately 13 percent. In fact, since my first week on the job, the Postal Service has spent well over \$750 million in overtime.

Regarding collection boxes, the Postal Service has over 140,000 blue collection boxes, and we have reviewed collection box density annually on a routine basis in accordance with Postal

policy. Over the past 10 years, more than 30,000 collection boxes have been removed from around the country, averaging about 3,500 boxes per year over the last 3 years. This has been done because of the low volume of mail that those boxes were receiving, meaning it was inefficient to keep them in place. This is a long-standing policy and process that I did not initiate or direct, but I have paused it until after the election given recent customer concerns.

**Blue Collection Box Removal Data 2013 – Present**

	Fiscal Year 2013	Fiscal Year 2014	Fiscal Year 2015	Fiscal Year 2016	Fiscal Year 2017	Fiscal Year 2018	Fiscal Year 2019	Fiscal Year 2020 to date	Total Remaining to Date
Count of Boxes	164,099	159,729	156,349	154,006	152,539	146,252	143,977	142,300	140,837
Boxes Removed	-4,370	-3,380	-2,343	-1,467	-6,287	-2,275	-1,677	-1,463	

Source: CPMS - Collection Point Management System

Finally, regarding mail sorting machines, the Postal Service has always evaluated equipment sets and other operational factors to balance available resources with changes in volumes. For the evaluation of processing equipment, we utilize an iterative process in which volume trends by product type are compared to the fleet of equipment needed to process the mail. Since 2016, overall letter mail volume has dropped by 29 percent and overall flat mail volume has dropped by 32 percent. Accordingly, letter sorting equipment during the same period was reduced by 27 percent and flat sorting equipment was reduced by 25 percent. This includes the removal of over 1000 machines. While letter and flat machines have been reduced to account for the reduction in letter and flat volume, we have increased package sorting equipment to process the increases in package volume.

In April 2020, an evaluation of letter and flat sorting equipment utilization showed that even with the ongoing reductions in equipment, the letter sorting machines are only being used for 32 percent of the available machine hours. The flat sorting machines are only being used for 38 percent of the available machine hours. Even if letter and flat volumes increase substantially, there is more than enough capacity on the machines to handle the volume. For context, we anticipate that Election Mail will account for less than two percent of all mail volume from mid-September until Election Day. Nonetheless, while I did not initiate the evaluation or removal of this equipment, I have given the directive to stop the removal of additional mail processing machines through the election.



## **ELECTION MAIL**

As I stated earlier this week, the Postal Service is ready today to handle whatever volume of election mail it receives this fall. Even with the challenges of keeping our employees and customers safe and healthy as they operate amid a pandemic, the American public should know that this is our number one priority between now and Election Day. All of us in the Postal Service are justifiably proud of our role in the democratic process, and I intend to keep it that way.

I recognize that it has become impossible to separate the necessary long-term reform efforts we will need to undertake from the broader political environment surrounding the election, and I do not want to pursue any immediate efforts that might be utilized to tarnish the Postal Service brand, particularly as it relates to our role in the democratic process.

To reiterate, a false narrative has developed that the two steps we have taken to improve efficiency—running on time and on schedule and realigning our organizational structure—are somehow designed to harm the ability of voters to use the mail to vote. Further, this false narrative has turned matters that have either been long planned or are part of long-standing processes in place for years—well before my arrival 67 days ago—such as the routine equipment reductions and the regular removal of low-volume collection boxes, into attacks on the election. Even the recommendations that we have been making for years, like asking election officials to use First-Class Mail when sending blank ballots to voters or urging voters to return their ballots one week before the election, have been turned into accusations that we are degrading the service provided to Election Mail.

While this narrative is fundamentally false and unfair, there is also no doubt that it is hurting the Postal Service's valued reputation as a source of reliability and strength for the American people. And, it could serve to undermine public confidence in the electoral process. Managing the Postal Service in an efficient and effective manner cannot succeed if everything is politicized; this was a key insight that led to the creation of an independent Postal Service in the first place. In such an atmosphere, it becomes impossible for the Postal Service to do the job that Congress has tasked us to do, and that it is my solemn duty to uphold.

Therefore, and as I announced earlier this week, I have decided to pause the implementation of our future transformative efforts until after the election.

While the Governors and I believe significant reforms are essential, as discussed above, even longstanding efficiency efforts have become a distraction from our mission of service to the public as the nation prepares to hold a presidential election in the midst of a devastating pandemic. Because those longstanding operational initiatives and other efforts that are under consideration have been raised as areas of concern, and to avoid even the appearance of any impact on election mail, I am suspending those longstanding initiatives until after the election is concluded.

Therefore, retail hours at Post Offices won't be changed, and mail processing equipment and blue collection boxes won't be removed during this period. No mail processing facilities will be closed and we have terminated the pilot program that began in July that expedited carrier departures to their delivery routes, without plans to extend or expand it. To clear up any confusion, overtime has, and will continue to be, approved as needed. Finally, effective October 1, 2020, we will engage standby resources in all areas of our operations, including transportation, to satisfy any unforeseen demand for the election.

In addition to the above commitments, I also announced the expansion of our current leadership taskforce on election mail to enhance our ongoing work and partnership with state and local election officials in jurisdictions throughout the country. Leaders of our postal unions and management associations have committed to joining this taskforce to ensure strong coordination throughout the Postal Service, with state and local partners, and to make sure any concerns can be raised and resolved at the highest levels of the organization. Because of the unprecedented demands of the 2020 election, this taskforce will help ensure that election officials and voters are well informed and fully supported by the Postal Service.

These efforts will further enhance our already robust outreach efforts with state and local election officials. During this outreach, the Postal Service explains our services and delivery processes, and provides guidance on how election officials can design and send their mailings in a manner that is consistent with postal regulations, that improves mailpiece visibility, and that ensures timely and efficient processing and delivery.

Our outreach also includes educating election officials and voters to be mindful of how the mail works, since state election deadlines often do not consider our delivery standards. This is particularly important given the anticipated increase in mail-in voting during the COVID-19 pandemic, especially in those jurisdictions that are less experienced with handling high volumes of mail-in votes and that are trying to implement new election rules and requirements.

Our key recommendation is that voters should request their ballot at least 15 days before the election, to ensure that they have enough time to receive the ballot, complete it, and then mail it back to the elections office. The return ballot should be placed in the mail at least 7 days prior to the election. Despite some assertions to the contrary, this is the same message that we have made in previous years and have been reiterating all year, and has nothing to do with recent operational initiatives or concerns about delayed mail. To be clear, these recommendations are designed to help ensure that ballots will be delivered and counted, and should in no way be misconstrued to imply that we lack confidence in our ability to deliver those ballots. We can, and will, handle the volume of Election Mail we receive.

In that regard, we have not changed our delivery standards, our processing, our rules, or our prices for Election Mail. To the contrary, we have intensified our efforts to fulfill our role in the electoral process. We will do everything we can to handle and deliver Election Mail in a manner consistent with the proven processes and procedures that we have relied on for years.

In sum, the goal of our education efforts is simple: to ensure that voters who choose to use the mail will have their votes counted. This goal is advanced by being transparent, and educating voters about how the mail works and what they can do to ensure that their vote is counted. It is not advanced by remaining silent and letting voters believe that all they need to consider is whether they have requested and mailed a ballot in accordance with state law deadlines. While we will do whatever we can to deliver ballots even when they are mailed at the last second, it should also be obvious to fair-minded election officials that urging voters to mail back their ballot at least a week before the deadline is a simple and straightforward step to ensure that ballots are delivered on time and, most importantly, counted under state law. Because this goal is so important, we intend to continue our efforts, and also to work with the leaders of our unions and management associations, to help spread the word that voters who choose to use the mail to vote should request their ballots early and vote early.

## **COVID-19 RESPONSE**

Just as all of us in the Postal Service are justifiably proud of our role in the democratic process, we are also proud to do our part as an essential government service, critical to the nation's infrastructure, during the COVID-19 pandemic. I have been struck by the commitment and dedication of postal employees, who have truly gone above and beyond during this national emergency.

The Postal Service has been a source of constancy and reliability in every community. Our more than 630,000 employees are working to make sure our customers can depend on us. We're on the front lines — delivering needed medications, supplies, benefit checks, financial statements and the important correspondence every family counts on receiving. The public support for the organization is extremely high because postal employees are so committed to serving their communities and their customers. We aim to continually earn the trust and support of the public.

We will continue to take the necessary steps to protect the safety and wellness of our employees, and to reinforce workplace behaviors to ensure that contact with our customers reflects the best guidance regarding healthy interactions, social distancing and risk minimization.

Like the rest of the country, the pandemic has impacted us financially, including increased costs associated with the measures necessary to protect our employees and customers, such as the purchase of personal protective equipment and installation of transparent dividers at retail locations. We have also seen a remarkable impact on our mail volume, which has decreased 24 percent. Given these numbers, and as I noted earlier, I also call on Congress to enact legislation that addresses the impact of the pandemic on our financial condition.

## **CONCLUSION**

Since I became Postmaster General just over 60 days ago, I made the deliberate decision to focus my energy on learning the organization so I could make informed decisions as a leader and CEO from the start. This time was well spent, but I recognize that in these first two months or so, I have not been as available to non-postal stakeholders for meetings and discussions. While my efforts to study and improve the organization will be ongoing throughout my tenure as Postmaster General, I recognize the importance of now being more available to Congress and other external stakeholders. I hope my testimony today demonstrates as much.

I accept the responsibility that the Governors gave me to maintain and enhance our reputation and role as a trusted face of the federal government in every community, and I intend to work with postal executives, management associations, managers, union leadership, and our craft employees to do everything I can to put us back on a financially stable path. I am confident that we can chart a path forward that allows the Postal Service to fulfill our vital public service mission in a sustainable manner. I look forward to the challenge, and know we are up to it.

In this regard, I want to be transparent with you in saying that it remains critically important for the Postal Service to reform. It is imperative that the Postal Service undertake a number of transformative steps in order to create a financially viable organization, cap able of fulfilling our public service mission to the American people in a self-sustaining fashion over the long term. These steps will not be easy, but are necessary, and we simply must pursue them. While we will not implement any changes before the election, we will continue to move forward with analyzing those changes that are necessary, so that we are prepared to move forward once the election ends. We need the support of Congress to achieve these goals, rather than to be hamstrung. I would appreciate your support in working together to ensure a bright future for the Postal Service.

Thank you, Chairwoman Maloney, Ranking Member Comer, and Members of the Committee, for the opportunity to submit this testimony. I welcome any questions that you and the committee may have.

# # #



**POSTAL NEWS**

FOR IMMEDIATE RELEASE  
Aug. 24, 2020

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## **Oral Statement of Postmaster General Louis DeJoy Before the House Committee on Oversight and Reform**

WASHINGTON, DC — *Below is the oral statement prepared for delivery by Postmaster General Louis DeJoy before today's hearing by the House Committee on Oversight and Reform.*

"Good morning, Chairwoman Maloney, Ranking Member Comer, and members of the Committee.

I'm proud to be with you today on behalf of the 630,000 dedicated women and men of the United States Postal Service.

On June 15<sup>th</sup>, I became America's 75<sup>th</sup> Postmaster General. Since that time, for a variety of reasons, there has been a great deal of attention to the Postal Service by our elected officials, the media and the American people.

I want to begin by assuring this committee and the American public that the Postal Service is fully capable and committed to delivering the nation's ballots securely and on-time.

This sacred duty is my number one priority between now and election day.

To be clear, we will do everything we can to handle and deliver Election Mail in a manner consistent with the proven processes and procedures that we have relied on for years. Nevertheless, I encourage all Americans who choose to vote by mail to request their ballots early and to vote early, as a common sense best practice.

As part of this conversation, there are many inaccuracies about my actions that I wish to again correct.

First, I did not direct the removal of blue collection boxes or the removal of mail processing equipment.

Second, I did not direct the cut back on hours at any of our post offices.

Finally, I did not direct the elimination or any cutback in overtime.

I did however suspend these practices, to remove any misperceptions about our commitment to delivering the nation's election mail.

Any further assertions by the media or elected officials is furthering a false narrative to the American People.

Now let me describe the two actions I have taken in the 70 days since my appointment.

I came to the Postal Service with decades of experience in solving large and complex logistical problems.

I planned to use this experience to help lead the operating change required for the Postal Service to grow and embark on a path of sustainability.

On the day of my swearing in-the Postal Service Inspector General issued an astonishing report about the schedule delays in Postal Service transportation and the substantial cost associated with our weakness in this fundamental operating principle.

Upon review, I directed the Postal Service operations team to develop and execute on a plan to improve our adherence to the transportation schedules of our over 40,000 trips a day.

We have accomplished this goal-as our on-time departures are approaching 98% and wasteful extra trips are down by over 70%.

While we have had a temporary service decline which should not have happened, we are fixing this.

In fact, as of last week, service improved across all major mail and package categories, and I am laser-focused on improving service for the American public.

The second of two changes I've made while Postmaster General is installing a new organizational reporting structure to better align talent and resources, to instill greater accountability for performance and to focus the organization on service and growth.

These two changes, creating our new on-time transportation network and designing an engaged functional organizational structure, will be the catalyst for the significant improvements in cost, performance and growth that I plan for this vital American Institution.

Madam Chairwoman, the women and men of the Postal Service have demonstrated extraordinary commitment to our mission of service throughout the COVID-19 pandemic.

In every community in America, we continue to work to keep our employees and customers safe as we fulfill our essential role in delivering the medications, benefit checks and financial statements the public depends upon.

Since the beginning of the pandemic, there has been a public outpouring of support for our postal employees as they performed their essential service throughout the nation. This is a well-deserved testament to their dedication.

Chairwoman Maloney; Ranking Member Comer; I hope we can agree that the financial state of the Postal Service is unacceptable and needs to be fixed.

I look forward to working with you and this committee and our stakeholders to restore the financial health of the United States Postal Service and to improve the way we serve the American public.

This concludes my remarks. I welcome any questions that you and the committee may have.”

*Note: The Postmaster General's written statement is available [here](#).*

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**POSTAL NEWS**

FOR IMMEDIATE RELEASE  
Aug. 18, 2020

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## Postmaster General Louis DeJoy Statement

WASHINGTON, DC — Postmaster General Louis DeJoy issued the following statement today:

“The United States Postal Service will play a critical role this year in delivering election mail for millions of voters across the country. There has been a lot of discussion recently about whether the Postal Service is ready, willing and able to meet this challenge.

I want to make a few things clear:

The Postal Service is ready today to handle whatever volume of election mail it receives this fall. Even with the challenges of keeping our employees and customers safe and healthy as they operate amid a pandemic, we will deliver the nation’s election mail on time and within our well-established service standards. The American public should know that this is our number one priority between now and election day. The 630,000 dedicated women and men of the Postal Service are committed, ready and proud to meet this sacred duty.

I am announcing today the expansion of our current leadership taskforce on election mail to enhance our ongoing work and partnership with state and local election officials in jurisdictions throughout the country. Leaders of our postal unions and management associations have committed to joining this taskforce to ensure strong coordination throughout our organization. Because of the unprecedented demands of the 2020 election, this taskforce will help ensure that election officials and voters are well informed and fully supported by the Postal Service.

I came to the Postal Service to make changes to secure the success of this organization and its long-term sustainability. I believe significant reforms are essential to that objective, and work toward those reforms will commence after the election. In the meantime, there are some longstanding operational initiatives — efforts that predate my arrival at the Postal Service — that have been raised as areas of concern as the nation prepares to hold an election in the midst of a devastating pandemic. To avoid even the appearance of any impact on election mail, I am suspending these initiatives until after the election is concluded.

I want to assure all Americans of the following:

- Retail hours at Post Offices will not change.
- Mail processing equipment and blue collection boxes will remain where they are.
- No mail processing facilities will be closed.
- And we reassert that overtime has, and will continue to be, approved as needed.

In addition, effective Oct. 1, we will engage standby resources in all areas of our operations,



including transportation, to satisfy any unforeseen demand.

I am grateful for the commitment and dedication of all the men and women of the Postal Service, and the trust they earn from the American public every day, especially as we continue to contend with the impacts of COVID-19. As we move forward, they will have the full support of our organization throughout the election.”

###

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# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DONALD J. TRUMP FOR PRESIDENT, ) CIVIL ACTION  
INC.; GLENN THOMPSON; MIKE KELLY; )  
JOHN JOYCE; GUY RESCHENTHALER; )  
REPUBLICAN NATIONAL COMMITTEE; )  
MELANIE STRINGHILL PATTERSON; and )  
CLAYTON DAVID SHOW, )

Plaintiffs, )

v. ) No. 2:20-CV-966

KATHY BOOCKVAR, in her capacity as )  
Secretary of the Commonwealth of )  
Pennsylvania; ADAMS COUNTY BOARD )  
OF ELECTIONS; ALLEGHENY COUNTY )  
BOARD OF ELECTIONS; ARMSTRONG )  
COUNTY BOARD OF ELECTIONS; )  
BEAVER COUNTY BOARD OF )  
ELECTIONS; BEDFORD COUNTY BOARD )  
OF ELECTIONS; BERKS COUNTY BOARD )  
OF ELECTIONS; BLAIR COUNTY BOARD )  
OF ELECTIONS; BRADFORD COUNTY )  
BOARD OF ELECTIONS; BUCKS COUNTY )  
BOARD OF ELECTIONS; BUTLER )  
COUNTY BOARD OF ELECTIONS; )  
CAMBRIA COUNTY BOARD OF )  
ELECTIONS; CAMERON COUNTY )  
BOARD OF ELECTIONS; CARBON )  
COUNTY BOARD OF ELECTIONS; )  
CENTRE COUNTY BOARD OF )  
ELECTIONS; CHESTER COUNTY BOARD )  
OF ELECTIONS; CLARION COUNTY )  
BOARD OF ELECTIONS; CLEARFIELD )  
COUNTY BOARD OF ELECTIONS; )  
CLINTON COUNTY BOARD OF )  
ELECTIONS; COLUMBIA COUNTY )  
BOARD OF ELECTIONS; CRAWFORD )  
COUNTY BOARD OF ELECTIONS; )  
CUMBERLAND COUNTY BOARD OF )  
ELECTIONS; DAUPHIN COUNTY BOARD )  
OF ELECTIONS; DELAWARE COUNTY )  
BOARD OF ELECTIONS; ELK COUNTY )  
BOARD OF ELECTIONS; ERIE COUNTY )

BOARD OF ELECTIONS; FAYETTE )  
COUNTY BOARD OF ELECTIONS; )  
FOREST COUNTY BOARD OF )  
ELECTIONS; FRANKLIN COUNTY )  
BOARD OF ELECTIONS; FULTON )  
COUNTY BOARD OF ELECTIONS; )  
GREENE COUNTY BOARD OF )  
ELECTIONS; HUNTINGDON COUNTY )  
BOARD OF ELECTIONS; INDIANA )  
COUNTY BOARD OF ELECTIONS; )  
JEFFERSON COUNTY BOARD OF )  
ELECTIONS; JUNIATA COUNTY BOARD )  
OF ELECTIONS; LACKAWANNA )  
COUNTY BOARD OF ELECTIONS; )  
LANCASTER COUNTY BOARD OF )  
ELECTIONS; LAWRENCE COUNTY )  
BOARD OF ELECTIONS; LEBANON )  
COUNTY BOARD OF ELECTIONS; )  
LEHIGH COUNTY BOARD OF )  
ELECTIONS; LUZERNE COUNTY BOARD )  
OF ELECTIONS; LYCOMING COUNTY )  
BOARD OF ELECTIONS; MCKEAN )  
COUNTY BOARD OF ELECTIONS; )  
MERCER COUNTY BOARD OF )  
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OF ELECTIONS; MONROE COUNTY )  
BOARD OF ELECTIONS; MONTGOMERY )  
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ELECTIONS; NORTHAMPTON COUNTY )  
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NORTHUMBERLAND COUNTY BOARD )  
OF ELECTIONS; PERRY COUNTY BOARD )  
OF ELECTIONS; PHILADELPHIA )  
COUNTY BOARD OF ELECTIONS; PIKE )  
COUNTY BOARD OF ELECTIONS; )  
POTTER COUNTY BOARD OF )  
ELECTIONS; SCHUYLKILL COUNTY )  
BOARD OF ELECTIONS; SNYDER )  
COUNTY BOARD OF ELECTIONS; )  
SOMERSET COUNTY BOARD OF )  
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BOARD OF ELECTIONS; SUSQUEHANNA )  
COUNTY BOARD OF ELECTIONS; TIOGA )  
COUNTY BOARD OF ELECTIONS; UNION )  
COUNTY BOARD OF ELECTIONS; )

VENANGO COUNTY BOARD OF )  
 ELECTIONS; WARREN COUNTY BOARD )  
 OF ELECTIONS; WASHINGTON COUNTY )  
 BOARD OF ELECTIONS; WAYNE )  
 COUNTY BOARD OF ELECTIONS; )  
 WESTMORELAND COUNTY BOARD OF )  
 ELECTIONS; WYOMING COUNTY )  
 BOARD OF ELECTIONS; and YORK )  
 COUNTY BOARD OF ELECTIONS, )  
 )  
 Defendants. )

**VERIFIED AMENDED COMPLAINT  
 FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs, by their undersigned counsel, hereby complain of Defendants as follows:

**INTRODUCTION**

1. Free and fair elections are essential to the right of Americans to choose through their vote whom they elect to represent them. Upending our entire election process and undermining ballot security through inconsistently-enforced regulations of by-mail voting, including through the use of unauthorized, unmonitored, and/or unsecured drop-boxes, is the single greatest threat to free and fair elections. To be free and fair, elections must be transparent, verifiable, and conducted uniformly in compliance with the rules and requirements set out by the legislature. Yet, Defendants have inexplicably chosen a path that jeopardizes election security and will lead - and has already led - to the disenfranchisement of voters, questions about the accuracy of election results, and ultimately chaos heading into the upcoming November 3, 2020 General Election. This is all a direct result of Defendants' hazardous, hurried, and illegal implementation of unmonitored mail-in voting which provides fraudsters an easy opportunity to engage in ballot harvesting, manipulate or destroy ballots, manufacture duplicitous votes, and sow chaos. Contrary to the direction of Pennsylvania's General Assembly which has authorized only monitored and secured mail-in voting, Defendants have sacrificed the sanctity of in-person voting at the altar of

unmonitored and unsecured mail-in voting and have exponentially enhanced the threat that fraudulent or otherwise ineligible ballots will be cast and counted in the upcoming General Election.

2. All of this was on full display in Pennsylvania's June 2, 2020 Primary Election. That election proved that Defendants are unwilling to properly administer the Pennsylvania General Assembly's new mail-in voting law, Act 77, that made significant changes to Pennsylvania's elections, and instead have opted to promote unlimited use of unmonitored mail-in voting. Defendants' failure is the direct result of their election administration decisions, many of which exceed the legal power or authority of the decision makers. For example, despite the Pennsylvania General Assembly's clear and unambiguous mandate that absentee and mail-in<sup>1</sup> ballots by non-disabled electors are to be mailed or personally delivered to the county boards of elections, approximately twenty (20) counties in this Commonwealth, with the knowledge, consent and/or approval of the Secretary of the Commonwealth, allowed absentee and mail-in ballots to be returned to polling places and other locations, such as shopping centers, parking lots, fairgrounds, parks, retirement homes, college campuses, fire halls, municipal government buildings, and elected officials' offices. Also, the Governor of the Commonwealth issued an Executive Order

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<sup>1</sup> Article VII, Section 14 of the Constitution of the Commonwealth of Pennsylvania provides that absentee voting shall be permitted for those "qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee[.]" [Pa. Const. art. VII, § 14](#). Act 77 (as hereinafter defined, and codified, in part, at [25 P.S. § 2602](#)) makes a distinction between a "qualified mail-in elector" and a "qualified absentee elector." See [25 P.S. § 2602\(w\) & \(z.6\)](#). In general use, however, the terms "mail-in" and "absentee" are used interchangeably to discuss the use of the United States Postal Service to deliver ballots to and from electors. For the purposes of this complaint, the terms "mail-in" and "absentee" refer to the general usage unless the specific is indicated.

the *day before* the June 2, 2020 Primary Election changing the rules of mail-in balloting, but only for some counties and not all. Further, Allegheny County not only issued duplicate mail-in and absentee ballots to voters because of a glitch in the state’s Statewide Uniform Registry of Electors (SURE) system, but also instituted severe polling place consolidations that caused long lines and confusion among voters, candidates, and political parties. Moreover, Philadelphia County could not sustain its vote counting process and, without warning, stopped counting ballots on June 4, 2020, and then, without formal notice, started counting again on June 9, 2020.

3. Defendants, through their haphazard administration of Act 77, have burdened voters, candidates, and political committees with the arbitrary and illegal preclusion of poll watchers from being present in all locations where votes are being cast because (a) the locations where mail-in or absentee ballots are being returned do not constitute a “polling place” within the meaning of Sections 102(q) and 417(b) of the Pennsylvania Election Code, Act of June 3, 1937, P.L. 1333, as amended (“Election Code”), [25 P.S. §§ 2602\(q\)](#) and [2687\(b\)](#); and (b) the poll watchers may only serve in the county of their residence under Election Code Section 417(b), [25 P.S. § 2687\(b\)](#). The result is that a significant portion of votes for elections in Pennsylvania are being cast in a fashion that denies any procedural visibility to candidates, political parties, and the public in general, thereby jeopardizing the free and fair public elections guaranteed by the United States and Pennsylvania Constitutions. The most recent election conducted in this Commonwealth and the public reaction to it demonstrate the harm caused by Defendants’ unconstitutional infringements of Plaintiffs’ rights. The continued enforcement of arbitrary and disparate policies and procedures regarding poll watcher access and ballot return and counting poses a severe threat to the credibility and integrity of, and public confidence in, Pennsylvania’s elections.

4. The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast. An individual's right to vote is infringed if his or her vote is cancelled or diluted by a fraudulent or illegal vote, including without limitation when a single person votes multiple times. The United States Supreme Court has made this clear in case after case. *See, e.g., Gray v. Sanders, 372 U.S. 368, 380 (1963)* (every vote must be "protected from the diluting effect of illegal ballots."); *Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008)* (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); accord *Reynolds v. Sims, 377 U.S. 533, 554-55 & n.29 (1964)*.

5. Accordingly, along with equitable and other relief, Plaintiffs seek an order, declaration, and/or injunction that prohibits Defendants from permitting the return of absentee and mail-in ballots to locations other than to the respective offices of the county boards of elections as prescribed by the Pennsylvania Election Code, particularly with regard to mobile ballot collection centers and other inadequately noticed and unmonitored ad hoc drop boxes. Further, Plaintiffs seek an order, declaration, and/or injunction that bars county election boards from counting absentee and mail-in ballots that lack a secrecy envelope, contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters. Additionally, Plaintiffs seek an order, declaration, and/or injunction that requires county election boards to verify the identification and qualification for each applicant of an absentee or mail-in ballot, and to properly enforce which voters can and cannot vote on Election Day at the polling place after having applied for and either voted or not voted their absentee or mail-in ballots. Finally, Plaintiffs seek an order,



declaration, and/or injunction that permits poll watchers, regardless of their county of residence, to be present in all locations where votes are cast or counted, including without limitation all locations where absentee or mail-in ballots are being returned.

### **JURISDICTION AND VENUE**

6. Under [28 U.S.C. §§ 1331 & 1343](#), this Court has subject matter jurisdiction because this action arises under the Constitution and laws of the United States and involves a federal election. Also, this Court has supplemental jurisdiction over any state law claims under [28 U.S.C. § 1367](#).

7. Venue is proper because a substantial part of the events giving rise to the claims occurred in this District, and several of the Defendants reside in this District and all of the Defendants are residents of the Commonwealth of Pennsylvania in which this District is located. [28 U.S.C. § 1391](#).

### **PARTIES**

8. Plaintiff Donald J. Trump for President, Inc. (hereinafter, the “Trump Campaign”), is the principal committee for the reelection campaign of Donald J. Trump, the 45th President of the United States of America (hereinafter, “President Trump”). President Trump is the presumptive Republican nominee for the office of the President of the United States of America in the upcoming November 3, 2020 General Election. The Trump Campaign brings this action for itself and on behalf of its candidate, President Trump. President Trump is a “candidate” as that term is defined in Election Code Section 102(a), [25 P.S. §§ 2602\(a\)](#). See [Rowland v. Smith, 83 Pa. D. & C. 99, 101-2 \(Pa. Ct. Com. Pl. Dauphin 1952\)](#) (“candidate” under the Election Code includes one who is a candidate for nomination for President of the United States). As a political committee for a federal candidate, the Trump Campaign has Article III standing to bring this action. See, e.g.,

Orloski v. Davis, 564 F. Supp. 526, 530-31 (M.D. Pa. 1983). See also Tex. Democratic Party v. Benkiser, 459 F.3d 582, 587-588 (5<sup>th</sup> Cir. 2006) (“after the primary election, a candidate steps into the shoes of his party, and their interests are identical.”).

9. Plaintiff Glenn Thompson (hereinafter, “Representative Thompson”) is an adult individual who is a qualified registered elector residing in Centre County, a member of the Republican Party, and the United States Representative for the 15th Congressional District of Pennsylvania. Representative Thompson is currently running for reelection in the 15th Congressional District which includes all of Warren, McKean, Forest, Venango, Elk, Cameron, Clarion, Jefferson, Armstrong, Clearfield, and Indiana counties, most of Cambria and Centre counties, and part of Butler County. Representative Thompson constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Thompson brings this suit in his capacity as a candidate for federal office and a private citizen. As a candidate and voter, Representative Thompson has Article III standing to bring this action. See Orloski, 564 F. Supp. at 530; Pierce v. Allegheny County Bd. of Elections, 324 F. Supp. 2d 684, 692-93 (W.D. Pa. 2003).

10. Plaintiff Mike Kelly (hereinafter, “Representative Kelly”) is an adult individual who is a qualified registered elector residing in Butler County, a member of the Republican Party, and the United States Representative for the 16th Congressional District of Pennsylvania. Representative Kelly is currently running for reelection in the 16th Congressional District which includes all of Erie, Crawford, Mercer, and Lawrence counties, as well as part of Butler County. Representative Kelly constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), 25 P.S. § 2602(a) & (t). Representative Kelly brings this suit in his capacity as a candidate for federal office and a private citizen. As a candidate

and voter, Representative Kelly has Article III standing to bring this action. See [Orloski, 564 F. Supp. at 530](#); [Pierce, 324 F. Supp. 2d at 692-93](#).

11. Plaintiff John Joyce (hereinafter, “Representative Joyce”) is an adult individual who is a qualified registered elector residing in Blair County, a member of the Republican Party, and the United States Representative for the 13th Congressional District of Pennsylvania. Representative Joyce is currently running for reelection in the 13th Congressional District which includes all of Blair, Huntingdon, Bedford, Fulton, Franklin, and Adams counties, most of Somerset County, and parts of Westmoreland, Cambria, and Cumberland counties. Representative Joyce constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), [25 P.S. § 2602\(a\) & \(t\)](#). Representative Joyce brings this suit in his capacity as a candidate for federal office and a private citizen. As a candidate and voter, Representative Joyce has Article III standing to bring this action. See [Orloski, 564 F. Supp. at 530](#); [Pierce, 324 F. Supp. 2d at 692-93](#).

12. Plaintiff Guy Reschenthaler (hereinafter, “Representative Reschenthaler”) is an adult individual who is a qualified registered elector residing in Washington County, a member of the Republican Party, and the United States Representative for the 14th Congressional District of Pennsylvania. Representative Reschenthaler is currently running for reelection in the 14th Congressional District which includes all of Fayette, Greene, and Washington counties, as well as the western part of Westmoreland County. Representative Reschenthaler constitutes both a “candidate” and a “qualified elector” as those terms are defined in Election Code Section 102(a) and (t), [25 P.S. § 2602\(a\) & \(t\)](#). Representative Reschenthaler brings this suit in his capacity as a candidate for federal office and a private citizen. As a candidate and voter, Representative

Reschenthaler has Article III standing to bring this action. See [Orloski, 564 F. Supp. at 530; Pierce, 324 F. Supp. 2d at 692-93.](#)

13. Plaintiff Republican National Committee (hereinafter, the “RNC”) is a national political committee that leads the Republican Party of the United States (hereinafter, the “Republican Party”). The RNC works to elect Republican candidates to state and federal offices throughout the United States, including in the Commonwealth of Pennsylvania, and it organizes and operates the Republican National Convention through which its members nominate their candidates for President and Vice President of the United States. The Republican Party includes over thirty million (30,000,000) registered Republicans in all fifty (50) states, the District of Columbia, and the U.S. territories, and constitutes a “political party” as that term is defined in Election Code Section 801, [25 P.S. § 2831](#). The RNC brings this action for itself, the Republican Party, all of its members, all registered Republican voters, and all nominated Republican candidates in the November 3, 2020 General Election in the Commonwealth of Pennsylvania. As a political committee, the RNC has Article III standing to bring this action. See, e.g., [Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 573-74 \(6<sup>th</sup> Cir. 2004\); Pa. Democratic Party v. Republican Party of Pa., 2016 U.S. Dist. LEXIS 153944, at \\*8-9 \(E.D. Pa. Nov. 7, 2016\); Democratic Exec. Comm. v. Detzner, 347 F. Supp. 3d 1017, 1025 \(N.D. Fl. 2018\); Orloski, 564 F. Supp. at 530-31.](#)

14. Plaintiff Melanie Stringhill Patterson (hereinafter, “Ms. Patterson”) is an adult individual who is a qualified registered elector residing in Belle Vernon, Fayette County, Pennsylvania. Ms. Patterson resides in the 14<sup>th</sup> Congressional District and desires to engage in poll watching for the re-election campaigns of both President Trump and Representative Reschenthaler in counties other than Fayette County. Ms. Patterson constitutes a “qualified

elector” as that term is defined in Election Code Section 102(t), [25 P.S. § 2602\(t\)](#). Ms. Patterson brings this suit in her capacity as a private citizen. As a qualified elector and registered voter, Ms. Patterson has Article III standing to bring this action. See [Orloski, 564 F. Supp. at 530](#); [Pierce, 324 F. Supp. 2d at 692-93](#).

15. Plaintiff Clayton David Show (hereinafter, “Mr. Show”) is an adult individual who is a qualified registered elector residing in Hopwood, Fayette County, Pennsylvania. Mr. Show resides in the 14<sup>th</sup> Congressional District and desires to engage in poll watching for the re-election campaigns of both President Trump and Representative Reschenthaler in counties other than Fayette County. Mr. Show constitutes a “qualified elector” as that term is defined in Election Code Section 102(t), [25 P.S. § 2602\(t\)](#). Mr. Show brings this suit in his capacity as a private citizen. As a qualified elector and registered voter, Mr. Show has Article III standing to bring this action. See [Orloski, 564 F. Supp. at 530](#); [Pierce, 324 F. Supp. 2d at 692-93](#).

16. Defendant Kathy Boockvar (hereinafter, “Secretary Boockvar”) is the Secretary of the Commonwealth. In this role, Secretary Boockvar leads the Pennsylvania Department of State. As Secretary, she is Pennsylvania’s Chief Elections Officer and a member of the Governor’s Executive Board. The Pennsylvania Constitution vests no powers or duties in Secretary Boockvar. [Perzel v. Cortes, 870 A.2d 759, 764 \(Pa. 2005\)](#). Instead, her general powers and duties concerning elections are set forth in Election Code Section 201, [25 P.S. § 2621](#). Under the Election Code, Secretary Boockvar acts primarily in a ministerial capacity and has no power or authority to intrude upon the province of the Pennsylvania General Assembly. [Perzel, 870 A.2d at 764](#); [Hamilton v. Johnson, 141 A. 846, 847 \(Pa. 1928\)](#). Secretary Boockvar is sued in her official capacity.

17. Defendants Adams County Board of Elections, Allegheny County Board of Elections, Armstrong County Board of Elections, Beaver County Board of Elections, Bedford

County Board of Elections, Berks County Board of Elections, Blair County Board of Elections, Bradford County Board of Elections, Bucks County Board of Elections, Butler County Board of Elections, Cambria County Board of Elections, Cameron County Board of Elections, Carbon County Board of Elections, Centre County Board of Elections, Chester County Board of Elections, Clarion County Board of Elections, Clearfield County Board of Elections, Clinton County Board of Elections, Columbia County Board of Elections, Crawford County Board of Elections, Cumberland County Board of Elections, Dauphin County Board of Elections, Delaware County Board of Elections, Elk County Board of Elections, Erie County Board of Elections, Fayette County Board of Elections, Forest County Board of Elections, Franklin County Board of Elections, Fulton County Board of Elections, Greene County Board of Elections, Huntingdon County Board of Elections, Indiana County Board of Elections, Jefferson County Board of Elections, Juniata County Board of Elections, Lackawanna County Board of Elections, Lancaster County Board of Elections, Lawrence County Board of Elections, Lebanon County Board of Elections, Lehigh County Board of Elections, Luzerne County Board of Elections, Lycoming County Board of Elections, McKean County Board of Elections, Mercer County Board of Elections, Mifflin County Board of Elections, Monroe County Board of Elections, Montgomery County Board of Elections, Montour County Board of Elections, Northampton County Board of Elections, Northumberland County Board of Elections, Perry County Board of Elections, Philadelphia County Board of Elections, Pike County Board of Elections, Potter County Board of Elections, Schuylkill County Board of Elections, Snyder County Board of Elections, Somerset County Board of Elections, Sullivan County Board of Elections, Susquehanna County Board of Elections, Tioga County Board of Elections, Union County Board of Elections, Venango County Board of Elections, Warren County Board of Elections, Washington County Board of Elections, Wayne County Board of

Elections, Westmoreland County Board of Elections, Wyoming County Board of Elections, and York County Board of Elections (collectively hereinafter, the “County Election Boards”), are the county boards of elections in and for each county of the Commonwealth of Pennsylvania as provided by Election Code Section 301, [25 P.S. § 2641](#). The County Election Boards “have jurisdiction over the conduct of primaries and elections in such count[ies], in accordance with the provision of [the Election Code.]” [Id. at § 2641\(a\)](#). The County Election Boards’ general powers and duties are set forth in Election Code Section 302, [25 P.S. § 2642](#). The County Election Boards are executive agencies that carry out legislative mandates, and their duties concerning the conduct of elections are purely ministerial with no exercise of discretion. [Shroyer v. Thomas, 81 A.2d 435, 437 \(Pa. 1951\)](#); [Perles v. Hoffman, 213 A.2d 781, 786 \(Pa. 1965\)](#) (Cohen, J., concurring). *See also Deer Creek Drainage Basin Authority v. County Bd. of Elections, 381 A.2d 103, 109 (Pa. 1977)* (Pomeroy, J., dissenting) (“A board of elections, it has been well said, “does not sit as a quasi-judicial body adjudicating contending forces as it wishes, but rather as an executive agency to carry out legislative mandates. Its duties are ministerial only.”); [In re Municipal Reapportionment of Township of Haverford, 873 A.2d 821, 833, n.18 \(Pa. Commw. Ct. 2005\)](#) (“The duties of a board of elections under the Election Code are ministerial and allow for no exercise of discretion.”), *appeal denied 897 A.2d 462 (Pa. 2006)*.

## **FACTUAL ALLEGATIONS**

### **I. Federal Constitutional Protections for Free and Fair Public Elections.**

18. Free, fair, and transparent public elections are crucial to democracy – a government of the people, by the people, and for the people.

19. The most fundamental principle defining credible elections in a democracy is that they must reflect the free expression of the will of the people.

**A. *The Right to Vote in Federal Elections.***

20. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. [\*Harper v. Virginia State Board of Elections\*, 383 U.S. 663, 665 \(1966\)](#). See also [\*Reynolds\*, 377 U.S. at 554](#) (The Fourteenth Amendment protects the “the right of all qualified citizens to vote, in state as well as in federal elections.”). Indeed, ever since the [\*Slaughter-House Cases\*, 83 U.S. 36 \(1873\)](#), the United States Supreme Court has held that the Privileges and Immunities Clause of the Fourteenth Amendment protects certain rights of federal citizenship from state interference, including the right of citizens to directly elect members of Congress. See [\*Twining v. New Jersey\*, 211 U.S. 78, 97 \(1908\)](#) (citing [\*Ex parte Yarbrough\*, 110 U.S. 651, 663-64 \(1884\)](#)). See also [\*Oregon v. Mitchell\*, 400 U.S. 112, 148-49 \(1970\)](#) (Douglas, J., concurring) (collecting cases).

21. The fundamental right to vote protected by the Fourteenth Amendment is cherished in our nation because it “is preservative of other basic civil and political rights.” [\*Reynolds\*, 377 U.S. at 562](#).

22. “Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted” if they are validly cast. [\*United States v. Classic\*, 313 U.S. 299, 315 \(1941\)](#). “[T]he right to have the vote counted” means counted “at full value without dilution or discount.” [\*Reynolds\*, 377 U.S. at 555, n.29](#) (quoting [\*South v. Peters\*, 339 U.S. 276, 279 \(1950\)](#) (Douglas, J., dissenting)).

23. “Every voter in a federal ... election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have



his vote fairly counted, without its being distorted by fraudulently cast votes.” [\*Anderson v. United States\*, 417 U.S. 211, 227 \(1974\)](#); see also [\*Baker v. Carr\*, 369 U.S. 186, 208 \(1962\)](#).

24. Invalid or fraudulent votes “debase[.]” and “dilute” the weight of each validly cast vote. See [\*Anderson\*, 417 U.S. at 227](#).

25. “The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.” [\*Anderson\*, 417 U.S. at 226](#) (quoting [\*Prichard v. United States\*, 181 F.2d 326, 331 \(6th Cir.\)](#), *aff’d due to absence of quorum*, [\*339 U.S. 974 \(1950\)\*](#)).

26. Practices that promote fraud or the casting of illegal or unreliable ballots, or fail to contain basic minimum guarantees against such conduct, can violate the Fourteenth Amendment by leading to the dilution of validly cast ballots. See [\*Reynolds\*, 377 U.S. at 555](#) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

**B. *The Equal Protection Clause of the Fourteenth Amendment.***

27. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” [\*Bush v. Gore\*, 531 U.S. 98, 104-5 \(2000\)](#). See also [\*Harper\*, 383 U.S. at 665](#) (“Once the franchise is granted, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).

28. The Equal Protection Clause of the Fourteenth Amendment proscribes that “one person’s vote must be counted equally with those of all other voters in a State.” [Reynolds, 377 U.S. at 560](#). In other words, “whenever a state or local government decides to select persons by popular election to perform governmental functions, [equal protection] requires that each qualified voter must be given an equal opportunity to participate in that election ... .” [Hadley, v. Junior College District, 397 U.S. 50, 56 \(1968\)](#).

29. Accordingly, the Equal Protection Clause requires states to “avoid arbitrary and disparate treatment of the members of its electorate.” [Charfauros v. Bd. of Elections, 249 F.3d 941, 951 \(9th Cir. 2001\)](#) (quoting [Bush, 531 U.S. at 105](#)); see also [Dunn v. Blumstein, 405 U.S. 330, 336 \(1972\)](#) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); [Gray, 372 U.S. at 380](#) (“The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court’s] decisions.”).

30. “[T]reating voters differently” thus “violate[s] the Equal Protection Clause” when the disparate treatment is the result of arbitrary, ad hoc processes. [Charfauros, 249 F.3d at 954](#). Indeed, a “minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote].” [Bush, 531 U.S. at 105](#).

31. The use of “standardless” procedures can violate the Equal Protection Clause. [Bush, 531 U.S. at 103](#). “The problem inheres in the absence of specific standards to ensure ... equal application” of even otherwise unobjectionable principles. [Id. at 106](#). Any voting system that involves discretion by decision makers about how or where voters will vote must be “confined by specific rules designed to ensure uniform treatment.” [Id.](#)

32. Allowing a patchwork of different rules from county to county in a statewide election involving federal and state candidates implicates equal protection concerns. [Pierce, 324 F. Supp. 2d at 698-699](#). See also [Gray, 372 U.S. at 379-381](#) (a county unit system which weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties violates the Equal Protection Clause and its one person, one vote jurisprudence).

**C. *Constitutional Commitment of Federal Election Regulation to the State Legislature.***

33. In statewide elections involving federal candidates, “a State’s regulatory authority springs directly from the United States Constitution.” [Project Vote v. Kelly, 805 F. Supp. 2d 152, 174 \(W.D. Pa. 2011\)](#) (citing [Cook v. Gralike, 531 U.S. 510, 522-523 \(2001\)](#); [U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 \(1995\)](#)).

34. The Elections Clause of the United States Constitution states that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof.” [U.S. Const. Art. I, § 4, cl. 1](#) (emphasis added). Likewise, the Electors Clause of the United States Constitution states that “[e]ach State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors” for President. [U.S. Const. Art. II, § 1, cl. 2](#) (emphasis added).

35. The Legislature is “the representative body which ma[kes] the laws of the people.” [Smiley v. Holm, 285 U.S. 355, 365 \(1932\)](#). Regulations of congressional and presidential elections, thus, “must be in accordance with the method which the state has prescribed for legislative enactments.” [Id. at 367](#); see also [Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 576 U.S. 787, 135 S. Ct. 2652, 2668 \(U.S. 2015\)](#).

36. In Pennsylvania, the “legislature” is the General Assembly. [Pa. Const. Art. II, § 1](#). See also [Winston v. Moore, 91 A. 520, 522 \(Pa. 1914\)](#) (“The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government.”); [Patterson v. Barlow, 60 Pa. 54, 75 \(1869\)](#) (“It is admitted that the Constitution cannot execute itself, and that the power to regulate elections is a legislative one, which has always been exercised by the General Assembly since the foundation of the government.”)

37. Because the United States Constitution reserves for state legislatures the power to set the time, place, and manner of holding elections for Congress and the President, state executive officers have no authority to unilaterally exercise that power, much less flout existing legislation.

38. Nor can the authority to ignore existing legislation be delegated to an executive officer. While the Elections Clause “was not adopted to diminish a State’s authority to determine its own lawmaking processes,” [Ariz. State Legislature, 135 S. Ct. at 2677](#), it does hold states accountable to their chosen processes when it comes to regulating federal elections. [Id. at 2668](#).

39. “A significant departure from the legislative scheme for appointing Presidential electors presents a federal constitutional question.” [Bush, 531 U.S. at 113](#) (Rehnquist, J., concurring); [Smiley, 285 U.S. at 365](#).

## **II. Pennsylvania Constitutional Protections for Free and Fair Public Elections.**

40. The Pennsylvania Constitution also bestows the right to vote upon qualified citizens and guarantees them equal protection in the enjoyment of that right. See [Pa. Const. art. VII, § 1§](#) & [art. I, § 28](#).

41. Further, Article I, Section 5 of the Pennsylvania Constitution, entitled “Elections” and commonly referred to as the “Free and Equal Elections Clause,” provides:

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

[Pa. Const. art. I, § 5.](#)

42. The Free and Equal Elections Clause “is contained within the Pennsylvania Constitution’s ‘Declaration of Rights,’ which ... is an enumeration of the fundamental individual human rights possessed by the people of the Commonwealth that are specifically exempted from the powers of the Commonwealth government to diminish.” [League of Women Voters v. Commonwealth, 178 A.3d 737, 803 \(Pa. 2018\).](#)

43. “[E]lections are free and equal within the meaning of the [Pennsylvania] Constitution when they are public and open to all qualified electors alike; when every voter has the same right as every other voter; **when each voter under the law has the right to cast his ballot and have it honestly counted**; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” [Winston, 91 A. at 523](#) (emphasis added).

44. *Winston*’s mandate set forth in the preceding paragraph represents “the minimum requirements for ‘free and fair’ elections” in this Commonwealth. [League of Women Voters, 178 A.3d at 810.](#)

45. The rights protected by the Free and Equal Elections Clause of the Pennsylvania Constitution, including without limitation the right to free and fair public elections, may not be taken away by an act of the Commonwealth’s legislative or executive branches, and both branches are prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence. [League of Women Voters, 178 A.3d at 810.](#)

46. The rights protected by the Free and Equal Elections Clause of the Pennsylvania Constitution, including without limitation the right to free and fair public elections, apply to the election of both federal and state candidates. [League of Women Voters, 178 A.3d at 811.](#)

**III. Poll Watching Ensures Free and Fair Public Elections.**

47. The Pennsylvania Constitution gives the Commonwealth's General Assembly the authority to enact legislation governing the conduct of elections. See [Pa. Const. art. VII, § 6; Winston, 91 A. at 522.](#)

48. “Pennsylvania’s election laws apply equally to federal and state elections.” [Project Vote, 805 F. Supp. 2d at 174](#) (citing [Kuznik v. Westmoreland County Board of Elections, 902 A.2d 476, 490-493 \(Pa. 2006\)](#)).

49. Elections in Pennsylvania are governed and regulated by the Election Code.

50. “Although the [Commonwealth] is ultimately responsible for the conduct and organization of elections, the statutory scheme [promulgated by the Election Code] delegates aspects of that responsibility to the political parties. This delegation is a legislative recognition of ‘the critical role played by political parties in the process of selecting and electing candidates for state and national office.’” [Tiryak v. Jordan, 472 F. Supp. 822, 823-24 \(E.D. Pa. 1979\)](#) (quoting [Marchioro v. Chaney, 442 U.S. 191, 195 \(1979\)](#)).

51. Election Code Section 417, [25 P.S. § 2687](#), creates the position of poll watcher and entrusts to each candidate for nomination or election at any election, and each political party and each political body which has nominated candidates for such elections, the power to appoint poll watchers to serve in each election district in the Commonwealth. See [25 P.S. § 2687\(a\)](#).

52. Under the Election Code, “poll watcher[s] perform[] a dual function on Election Day. On the one hand, because [poll watchers] are designated and paid by [candidates, political parties, and/or political bodies], [their] job is to guard the interests of [their] candidates [or political parties or bodies]. On the other hand, because the exercise of [their] authority promotes a free and fair election, poll watcher[s] serve to guard the integrity of the vote. Protecting the purity of the electoral process is a state responsibility and [poll watchers’] statutory role in providing that

protection involves [them] in a public activity, regardless of [their] private political motives.”  
[Tiryak](#), 472 F. Supp. at 824.

53. Election Code Section 417 dictates the number of poll watchers allowed, the qualifications and manner of their appointment, their provision of watchers’ certificates from the County Election Boards, their location within the polling place<sup>2</sup>, the activities permitted by poll watchers, and the maximum amount of compensation to be paid to poll watchers. [25 P.S. § 2687\(a\)-\(c\)](#).

54. Under Election Code Section 417(b), poll watchers may observe the election process from the time the first polling place official appears in the morning to open the polling place until the time the polls are closed and the election returns are counted and posted at the polling place entrance. [25 P.S. § 2687\(b\)](#). However, until the polls close, only one poll watcher representing each political party and its candidates at a general, municipal, or special election can be present in the polling place outside the enclosed space from the time that the election officers meet to open the polls and until the counting of the votes is complete. *Id.* See also Election Code Section 1220, [25 P.S. § 3060\(a\) & \(d\)](#). Once the polls close and while the ballots are being counted, then all the poll watchers for candidates and political parties or bodies are permitted to be in the polling place outside the enclosed space. [25 P.S. § 2687\(b\)](#).

55. Under Election Code Section 417(b), poll watchers are permitted to keep a list of voters, and during times when voters are not present or voting, watchers can ask the Judge of Elections to inspect the voting check list and either of the two numbered lists of voters, but cannot mark or alter those lists. [25 P.S. § 2687\(b\)](#).

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<sup>2</sup> “Polling place” is a defined term under the Election Code which means “the room provided in each election district for voting at a primary or election.” Election Code Section 102(q), [25 P.S. § 2602\(q\)](#).

56. In addition to the activities authorized by Election Code Section 417(b), poll watchers are among those who are authorized under Election Code Section 1210(d), [25 P.S. § 3050\(d\)](#), to challenge any person who presents himself or herself to vote at a polling place on Election Day concerning the voter's identity, continued residence in the election district, or registration status. See [25 P.S. § 3050\(d\)](#) (“any person, although personally registered as an elector, may be challenged by any qualified elector, election officer, overseer, or *watcher* at any primary or election as to his identity, as to his continued residence in the election district or as to any alleged violation of the provisions of section 1210 of this act, ...”) (emphasis added).

57. Also, prior to October 31, 2019, poll watchers were authorized under Election Code Section 1308(e), 25 P.S. § 3146.8(e) (repealed), to be present at the polling place on Election Day when absentee ballots, which were required to be delivered to the polling places, were examined by local election boards and to assert challenges to the mail-in ballots' validity.

58. Moreover, poll watchers' functions go beyond the activities authorized under Election Code Sections 417(b) and 1210(d) on Election Day.

59. For example, under Election Code Section 310, [25 P.S. § 2650](#), poll watchers appointed by parties, political bodies, or bodies of citizens may appear at any public session of the county board of elections, and at any computation and canvassing of returns of any primary or election and recount of ballots or recanvass of voting machines, in which case such poll watchers may exercise the same rights as watchers at polling places and may raise objections to any ballots or machines for subsequent resolution by the county board of elections and appeal to the courts. [25 P.S. § 2650\(a\) & \(c\)](#).



60. Without poll watchers, the integrity of the vote in elections is threatened and the constitutional right to free and fair public elections under the United States and Pennsylvania Constitutions is denied.

61. Poll watchers serve as an important check to ensure transparency and guard against inconsistencies and other wrongdoing by election officials. The need for poll watchers was demonstrated by the case of *United States v. DeMuro*, Criminal No. 20-112 (E.D. Pa. unsealed May 21, 2020). In that case, a former Judge of Elections in South Philadelphia pled guilty to adding fraudulent votes to the voting machines during Election Day -- also known as “ringing up” votes -- and then falsely certifying that the voting machine results were accurate for specific federal, state, and local Democratic candidates in the 2014, 2015, and 2016 primary elections. The scheme involved a political consultant who purportedly solicited monetary payments from the candidates as “consulting fees,” and then used portions of those funds to pay election board officials, including DeMuro, in return for ringing up votes. DeMuro was able to commit the fraud because there were no poll watchers at his precinct. *See United States v. DeMuro*, Criminal No. 20-112, Information (Doc. #1) (E.D. Pa Mar. 03, 2020); M. Cavacini, “U.S. Attorney William M. McSwain Announces Charges and Guilty Plea of Former Philadelphia Judge of Elections Who Committed Election Fraud,” U.S. Attys. Office – Pa., Eastern (May 21, 2020) (available at <https://www.justice.gov/usao-edpa/pr/us-attorney-william-m-mcswain-announces-charges-and-guilty-plea-former-philadelphia>).

62. Poll watchers also serve a “get out the vote” function. Traditionally, poll watchers have a list of all registered voters and keep track of those who voted to aid their respective candidates, campaign committees, and political parties in encouraging reliable supporters to vote on election day. If polling locations fail to open or are relocated and changed, then poll watchers

serve to help redirect voters to proper locations in the absence of state guidance. Poll watchers also aid candidates, parties, and the state by quickly identifying issues with polling locations or rogue election officials, thus facilitating the rapid resolution of those issues before voters are disenfranchised.

**IV. The Perils of Hastily Moving to an Unmonitored Mail-In Voting System.**

63. “States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.” [\*Lassiter v. Northampton County Board of Elections\*, 360 U.S. 45, 50 \(1959\)](#).

64. However, failing to enact even basic transparency measures or safeguards against the casting of illegal or unreliable ballots creates an obvious opportunity for ineligible voters to cast ballots, invites fraud, and undermines the public’s confidence in the integrity of elections — all of which violate the fundamental right to vote, the guarantee of equal protection, and the right to participate in free, fair, and transparent elections as guaranteed by the United States and Pennsylvania Constitutions.

65. If a state fails to enact even basic integrity and transparency measures it violates the right to free, fair, and transparent public elections because its elections are no longer meaningfully public and the state has functionally denied its voters a fair election.

66. “[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.” [\*Crawford\*, 553 U.S. at 195-96](#) (plurality op. of Stevens, J.). As the Commission on Federal Election Reform - a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, and cited extensively by the United States Supreme Court - observed, “the ‘electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.’” *Building Confidence in U.S. Election*, Report of the

Commission on Federal Election Reform, p. 46 (Sept. 2005) (available at <https://bit.ly/3dXH7rU>, and referred to and incorporated herein by reference) (hereinafter, the “Carter-Baker Report”).

67. According to the Carter-Baker Report, mail-in voting is “the largest source of potential voter fraud.” Carter-Baker Report, p. 46. Many well-regarded commissions and groups of diverse political affiliation agree that “when election fraud occurs, it usually arises from absentee ballots.” Michael T. Morley, *Election Emergency Redlines*, p. 2 (Mar. 31, 2020) (available at <https://ssrn.com/abstract=3564829> or <http://dx.doi.org/10.2139/ssrn.3564829>, and referred to and incorporated herein by reference) (hereinafter, “Morley, Redlines”). Such fraud is easier to commit and harder to detect. As one federal court put it, “absentee voting is to voting in person as a take-home exam is to a proctored one.” [\*Griffin v. Roupas\*, 385 F.3d 1128, 1131 \(7th Cir. 2004\)](#). See also [\*id.\* at 1130-31](#) (voting fraud is a “serious problem” and is “facilitated by absentee voting.”).

68. Courts have repeatedly found that mail-in ballots are particularly susceptible to fraud. As Justice Stevens has noted, “flagrant examples of [voter] fraud ... have been documented throughout this Nation’s history by respected historians and journalists,” and “the risk of voter fraud” is “real” and “could affect the outcome of a close election.” [\*Crawford\*, 553 U.S. at 195-196](#) (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-in voting is “less reliable” than in-person voting. [\*Crawford\*, 553 U.S. at 212, n.4](#) (Souter, J., dissenting) (“election officials routinely reject absentee ballots on suspicion of forgery”); [\*id.\* at 225](#) (“absentee-ballot fraud ... is a documented problem in Indiana”). See also [\*Veasey v. Abbott\*, 830 F.3d 216, 239, 256 \(5th Cir. 2016\)](#) (en banc) (“mail-in ballot fraud is a significant threat” — so much so that “the potential and reality of fraud is much greater in the mail-in ballot context than

with in-person voting.”). *See also id. at 263* (“[M]ail-in voting ... is far more vulnerable to fraud.”); *id.* (recognizing “the far more prevalent issue of fraudulent absentee ballots”).

69. Pennsylvania is not immune from mail-in ballot fraud. For example, in 1999, former Representative Austin J. Murphy was indicted by a Fayette County grand jury and then convicted of absentee ballot fraud for forging absentee ballots for residents of a nursing home and adding his wife as a write-in candidate for township election judge. *See* B. Heltzel, “Six of seven charges against Austin Murphy dismissed,” Pittsburgh Post-Gazette (June 22, 1999) (available at <http://old.post-gazette.com/regionstate/19990622murphy6.asp>, and referred to and incorporated herein by reference). Similarly, in 2014, Richard Allen Toney, the former police chief of Harmar Township in Allegheny County pleaded guilty to illegally soliciting absentee ballots to benefit his wife and her running mate in the 2009 Democratic primary for town council. *See* T. Ove, “Ex-Harmar police chief pleads guilty to ballot tampering,” Pittsburgh Post-Gazette (Sept. 26, 2014) (available at <https://www.post-gazette.com/local/north/2014/09/26/Ex-Harmar-police-chief-pleads-guilty-to-ballot-tampering-Toney/stories/201409260172>, and referred to and incorporated herein by reference). Further, in 2015, Eugene Gallagher pled guilty to unlawfully persuading residents and non-residents of Taylor in Lackawanna County to register for absentee ballots and cast them for him during his councilman candidacy in the November 2013 election. *See* J. Kohut, “Gallagher resigns from Taylor council, pleads guilty to three charges,” The Times-Tribune (Apr. 3, 2015) (available at [https://www.thetimes-tribune.com/news/gallagher-resigns-from-taylor-council-pleads-guilty-to-three-charges/article\\_e3d45edb-fe99-525c-b3f9-a0fc2d86c92f.html](https://www.thetimes-tribune.com/news/gallagher-resigns-from-taylor-council-pleads-guilty-to-three-charges/article_e3d45edb-fe99-525c-b3f9-a0fc2d86c92f.html), and referred to and incorporated herein by reference). *See also Commonwealth v. Bailey*, 775 A.2d 881, 886 (Pa. Commw. Ct. 2001) (upholding defendant’s conviction for absentee ballot violations, holding that a county district attorney has jurisdiction to prosecute such claims even in the absence

of an investigation and referral by the Bucks County elections board); *In re Center Township Democratic Party Supervisor Primary Election*, 4 Pa . D. & C.4th 555, 557-563 (Pa. Ct. Com. Pl. Beaver 1989) (court ordered a run-off election after evidence proved that fifteen absentee ballots were applied for and cast by non-existent individuals whose applications and ballots were handled by a political ally of the purported winner).

70. Mail-in voting is vulnerable to abuse in several ways. For one, mail-in ballots are sometimes “mailed to the wrong address or to large residential buildings” and “might get intercepted.” Carter-Baker Report, p. 46. For another, absentee or mail-in voters “who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” *Id.* And “[v]ote buying schemes are far more difficult to detect when citizens vote by mail.” *Id.* For example, “[i]ndividuals can sign and sell their absentee ballot,” or “[o]ne spouse can coerce the other to sign the ballot and hand it over to them to vote fraudulently.” *Id.*

71. This risk of abuse by absentee or mail-in voting is magnified by the fact that “many states’ voter registration databases are outdated or inaccurate.” Morley, Redlines, p. 2. A 2012 study from the Pew Center on the States - which the U.S. Supreme Court cited in a recent case - found that “[a]pproximately 24 million - one of every eight - voter registrations in the United States are no longer valid or are significantly inaccurate”; “[m]ore than 1.8 million deceased individuals are listed as voters”; and “[a]pproximately 2.75 million people have registrations in more than one state.” See Pew Center on the States, *Election Initiatives Issue Brief*, “Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade,” (Feb. 2012) (available at <https://www.issuelab.org/resources/13005/13005.pdf>, and referred to and

incorporated herein by reference) (cited in [Husted v. A. Philip Randolph Inst.](#), 138 S. Ct. 1833, 1838 (U.S. 2018)).

72. Similarly, a 2010 study by the Caltech/MIT Voting Technology Project found that roughly 9% of “listed registration records in the United States ... are estimated to be invalid.” See Ansolabehere, S., Hersh, E., Report, Caltech/MIT Voting Technology Project, *The quality of voter registration records: A state-by-state analysis*, “Summary,” (Jul 14, 2010) (available at [https://elections.wi.gov/sites/default/files/publication/65/the\\_quality\\_of\\_voter\\_registration\\_records\\_harvard\\_10685.pdf](https://elections.wi.gov/sites/default/files/publication/65/the_quality_of_voter_registration_records_harvard_10685.pdf), and referred to and incorporated herein by reference). On top of those invalid records, “in the typical state 1 in 65 records is duplicative, meaning that the same registrant is listed multiple times.” *Id.* The same study found that “[i]n the typical state, 1 in 40 counted votes in the 2008 general election cannot be matched to a registrant listed as having voted” and that “1 in 100 listed registrants is likely to be deceased.” *Id.*

73. The risks of abuse by mail-in voting are compounded by the practice of ballot harvesting: *i.e.*, coordinated efforts to have third parties collect mail-in ballots from voters and drop them off at polling places or elections centers.

74. Ballot harvesters are usually third parties (*i.e.*, campaign workers, union members, political activists, paid personnel, volunteers, or others). They go door-to-door and offer to collect and turn in ballots for voters. “In some documented cases, the workers collecting the ballots have entered into voters’ homes to help them retrieve and fill out their ballots.” S. Crabtree, “Amid Covid Mail-In Push, CA Officials Mum on Ballot Harvesting,” RealClear Politics (Apr. 24, 2020) (available at [https://www.realclearpolitics.com/articles/2020/04/24/amid\\_covid\\_mail-in\\_push\\_ca\\_officials\\_mum\\_on\\_ballot\\_harvesting\\_143036.html](https://www.realclearpolitics.com/articles/2020/04/24/amid_covid_mail-in_push_ca_officials_mum_on_ballot_harvesting_143036.html), and referred to and incorporated herein by reference).

75. “Ballot harvesting gives third parties who may be completely unknown to both the voter and election officials the opportunity to potentially tamper with absentee ballots” in a number of ways. Morley, Redlines, p. 5. For instance, “[h]arvesters may pressure voters into giving them blank ballots or casting their votes a certain way,” or, “[w]hen a voter has voted for the ‘wrong’ candidate, the harvester may surreptitiously change the vote, include additional votes to void the ballot, or simply dispose of the ballot rather than returning it.” *Id.*

76. These forms of misconduct are incredibly difficult to detect. The practice is “especially concerning when third parties who are not related to the voter -- and who may not even be known to the voter -- are permitted to harvest unlimited numbers of ballots, frequently without having to identify themselves to election officials or note their identity on the ballots’ envelopes.” Morley, Redlines, p. 4.

77. Ballot harvesting can have a substantial negative impact on elections. For example, in 1993, the Honorable Clarence C. Newcomer of the United States District Court for the Eastern District of Pennsylvania enjoined the Philadelphia County Board of Elections from counting over a thousand voted absentee ballots that had been delivered by Democratic committee members and several campaign workers of William Stinson who was the Democratic candidate for the 2nd senatorial district for the Pennsylvania Senate. See [Marks v. Stinson, C.A. No. 93-6157, 1994 WL 1461135, 1994 U.S. Dist. LEXIS 5273, at \\*83 & \\*96-99 \(E.D. Pa. April 26, 1994\)](#). Judge Newcomer found that approximately six hundred (600) of the illegally delivered ballots involved unregistered voters who could not have voted in person at the polls. [Id., 1994 U.S. Dist. LEXIS 5273, at \\*44-45](#). Accordingly, because the ballot harvesting violated the Pennsylvania Election Code and the fundamental right to vote protected by the Fourteenth Amendment, Judge Newcomer declared Bruce Marks, the Republican candidate, the winner of that election. [Id. at \\*77-92](#).

78. To be sure, absentee or mail-in voting can be a legitimate feature of a state's election process when coupled with adequate procedural safeguards to deter fraud. But given the many risks discussed above, in most states, it is an *alternative* implemented carefully and slowly and *only with* such safeguards in place.

79. One procedural safeguard is prohibiting a third party's ability to collect and return another person's absentee or mail-in ballot. As the Carter-Baker Report explains: "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." Carter-Baker Report, p. 46.

80. Another procedural safeguard is specifying the location where absentee or mail-in ballots can be returned and providing for state officials or poll watchers to monitor the return or delivery of ballots to those location.

81. Federal law also recognizes the risks of unmonitored absentee or mail-in voting and thus requires certain first-time voters to present identification. *See* [52 U.S.C. § 21083\(b\)](#).

#### **V. Pennsylvania Enacts All-Voter Mail-in Voting.**

82. The Pennsylvania General Assembly may enact laws governing the conduct of elections. [Winston, 91 A. at 522](#). However, "no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions." [Shankey v. Staisey, 257 A. 2d 897, 898 \(Pa.\), cert. denied 396 U.S. 1038 \(1970\)](#).

83. "Prior to the year 1957, the Pennsylvania Constitution permitted absentee voting only by individuals engaged in actual military service (Art. 8, § 6 of the Pennsylvania Constitution (1874)), and by bedridden or hospitalized veterans (Art. 8, § 18 added to the Pennsylvania Constitution (1949))." [Absentee Ballots Case, 224 A.2d 197, 199 \(Pa. 1966\)](#).



84. In 1957, the Pennsylvania Constitution was further amended to permit absentee voting for those “qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee[.]” [Pa. Const. art. VII, § 14](#).

85. In 1960, the Election Code was amended to implement the 1957 amendment to the Pennsylvania Constitution. [Absentee Ballots Case, 224 A.2d at 200](#). See also The Act of January 8, 1960, entitled “An Act amending the Act of June 3, 1937,” P.L. 2135, [25 P.S. §§ 3149.1-3149.9](#) (Supp. 1960).

86. “Absentee voting has consistently been regarded by the Pennsylvania courts as an extraordinary procedure in which the safeguards of the ordinary election process are absent.” [Canvass of Absentee Ballots of April 28, 1964, Primary Election, 34 Pa. D. & C.2d 419, 420 \(Pa. Ct. Com. Pl. Phila. 1964\)](#).

87. Specifically, “in the casting of an absentee ballot, the ordinary safeguards of a confrontation of the voter by the election officials and watchers for the respective parties and candidates at the polling place are absent.” [Canvass of Absentee Ballots of April 28, 1964, Primary Election, 34 Pa. D. & C.2d at 420](#).

88. Because “it is fraught with evils and frequently results in void votes,” Pennsylvania’s laws regarding absentee voting are “strictly construed and the rights created thereunder not extended beyond the plain and obvious intention of the act.” [Canvass of Absentee Ballots of April 28, 1964, Primary Election, 34 Pa. D. & C.2d at 420-21](#) (citing

[Board of Elections, 29 D.&C.2d 499, 506-7 \(Pa. Ct. Com. Pl. 1962\)](#)). See also [Marks, 1994 U.S. Dist. LEXIS 5273, at \\*78](#).

89. Moreover, consistent with Pennsylvania’s Statutory Construction Act, the Election Code’s use of the word “shall” to identify the manner and other “technicalities” that an elector must follow to cast an absentee ballot are “substantive provisions” that are necessary to “safeguard against fraud” and preserve the “secrecy and the sanctity of the ballot and must therefore be observed,” and ballots cast “in contravention of [such] mandatory provision[s] are void.” See [In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1231-34 \(Pa. 2004\)](#).

90. On October 31, 2019, the Pennsylvania General Assembly enacted Act 77. See Act 2019-77 (S.B. 421), § 8, approved October 31, 2019, eff. October 31, 2019.

91. Act 77 made significant changes to Pennsylvania’s elections, including the adoption of no excuse mail-in voting for all qualified electors. See, e.g., [25 P.S. §§ 3150.11-3150.17](#). However, presumably knowing of all the risks associated with mail-in voting, the General Assembly enacted no excuse mail-in voting with certain restrictions designed to ensure the ballot’s secrecy and to prevent fraud.

92. For example, for both absentee and mail-in voting, Act 77 retains the requirement that “the [non-disabled] elector shall send [his or her absentee or mail-in ballot] by mail, postage, except where franked, or deliver it in person to [the] county board of elections,” in order for the ballot to be properly cast under Act 77. See [25 P.S. §§ 3146.6\(a\) & 3150.16\(a\)](#). Accordingly, as it did prior to the enactment of Act 77, the Election Code bars ballot harvesting of absentee and mail-in ballots cast by non-disabled voters. See [Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d at 1234](#) (“we hold that Section 3146.6(a)'s "in person" delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered

in contravention of this mandatory provision are void.”); [Marks, 1994 U.S. Dist. LEXIS 5273](#), at [\\*83](#).

93. Also, for both absentee and mail-in voting, Act 77 retains the requirement that an elector must comply with the following mandatory requirements in order for such ballot to be properly cast:

[T]he [non-disabled] elector shall, 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 envelope shall then 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 of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope.

See [25 P.S. §§ 3146.6\(a\) & 3150.16\(a\)](#).

94. Moreover, as it did prior to the enactment of Act 77, the Election Code bars the counting of an absentee or mail-in ballot that either lacks an “Official Election Ballot” or contains on that envelope “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference.” See Election Code Sections 1306.6(a) and 1308(g)(i)-(iv), [25 P.S. §§ 3146.6\(a\) & 3146.8\(g\)\(4\)\(i\)-\(iv\)](#).

95. These provisions in the Election Code, as amended by Act 77, that identify exactly what an elector “shall” do to properly cast and vote an absentee or mail-in ballot serve to ensure the secrecy of such ballots and to prevent fraud. See [Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d at 1232](#). See also [id. at 1234](#) (the Election Code’s provisions of how to cast an absentee ballot are “substantive matters—how to cast a reliable vote—and not [] a mere procedural matter” that can be disregarded by a county board of elections); [Appeal of Yerger, 333 A.2d 902, 907 \(Pa. 1975\)](#) (the validity of a ballot must first be ascertained before any factual inquiry into the

intention of the voter); [Appeal of James, 105 A.2d 64, 66 \(Pa. 1954\)](#) (“violations of substantive provisions of the [Election] Code cannot be overlooked on the pretext of pursuing a liberal construction.”).

96. However, in contrast to prior provisions of the Election Code, all absentee and mail-in ballots are no longer sent to polling places on Election Day and are no longer inspected by the local election boards or subject to challenge by poll watchers at the polling places. Instead, Act 77 mandates that all properly cast absentee and mail-in ballots are to remain with the County Election Boards until they are to be canvassed by them. *See* Election Code Section 1308(a), [25 P.S. § 3146.8\(a\)](#).

97. Additionally, contrary to the prior provisions of the Election Code, Act 77 requires the County Election Boards to conduct a pre-canvass of all absentee and mail-in ballots received to that point before 7:00 a.m. on Election Day. Poll watchers are not permitted to attend this pre-canvass meeting; rather, only one “representative” for each candidate and political party can be present. *See* Election Code Section 1308(g)(2), [25 P.S. § 3146.8\(g\)\(2\)](#).

98. Further, contrary to prior provisions of the Election Code, Act 77 mandates that the County Election Boards are to meet no earlier than the close of polls on Election Day and no later than the third day following the election to begin canvassing absentee and mail-in ballots. But, like prior provisions of the Election Code, poll watchers are permitted to be present when the envelopes containing official absentee and mail-in ballots are opened and when such ballots are counted and recorded. *See* Election Code Section 1308(g)(2) & (b), [25 P.S. § 3146.8\(g\)\(2\) & \(b\)](#).

99. Similar to prior provisions of the Election Code, Act 77 specifies the County Election Boards as the location for where voters must mail or personally deliver all cast absentee and mail-in ballots. *See* Election Code Section 1306(a), [25 P.S. §§ 3146.6\(a\) & 3150.16](#)

Accordingly, other locations, including without limitation mobile locations and polling places, are not authorized for the return or delivery of absentee or mail-in ballots under Act 77. *Id.*

100. Act 77 prohibits an elector from casting both a mail-in ballot and in-person ballot.

Specifically, Act 77 provides:

Any elector who receives and votes a mail-in ballot under section 1301-D shall not be eligible to vote at a polling place on election day. The district register at each polling place shall clearly identify electors who have received and voted mail-in ballots as ineligible to vote at the polling place, and district election officers shall not permit electors who voted a mail-in ballot to vote at the polling place.

[25 P.S. § 3150.16\(b\)\(1\)](#).

101. Further, Act 77 provides that an elector who requests a mail-in or absentee ballot and who is not shown on the district register as having voted may vote only by provisional ballot at the polling place on Election Day, unless the elector remits the unvoted mail-in or absentee ballot and the envelope containing the declaration of the elector to the judge of elections to be spoiled and the elector signs a statement under penalties of perjury that he or she has not voted the absentee or mail-in ballot. [25 P.S. § 3150.16\(b\)\(2\) & \(3\)](#).

102. These restrictions and requirements under Act 77 were put in place to reduce the possibility that illegally cast and/or fraudulent ballots would be counted.

**VI. Defendants' Administration of Pennsylvania's 2020 Primary Election Resulted in Violations of the Election Code and Infringement of Constitutional Rights to Free, Fair and Transparent Public Elections.**

103. Although the Secretary of the Commonwealth is considered the “chief election officer,” the Pennsylvania Constitution vests no powers or duties in Secretary Boockvar. [Perzel, 870 A.2d at 764](#). Instead, her general powers and duties concerning the administration of elections are set forth in Election Code Section 201, [25 P.S. § 2621](#).

104. Under Election Code Section 201, Secretary Boockvar has no ruling-making power or authority. See [25 P.S. § 2621\(a\)-\(g\)](#). Instead, Secretary Boockvar acts primarily in a ministerial capacity and has no power or authority to intrude upon the province of the Pennsylvania General Assembly. [Perzel, 870 A.2d at 764](#); [Hamilton, 141 A. at 847](#).

105. Under Election Code Section 301, [25 P.S. § 2641](#), the election procedures and processes are managed by each of the Commonwealth's sixty-seven counties. In particular, Election Code Section 301 provides that each county “shall” have “a county board of elections” which “shall have jurisdiction over the conduct of primaries and elections in such county, in accordance with the provisions of [the Election Code].” [25 P.S. § 2641\(a\)](#).

106. The general powers of the County Election Boards are set forth in Election Code Section 302, [25 P.S. § 2642](#). Under that section, the County Election Boards are empowered to “make and issue such rules, regulations and instructions, *not inconsistent with law*, as they may deem necessary *for the guidance of voting machine custodians, election officers and electors.*” [25 P.S. § 2642\(f\)](#) (emphasis added).

107. However, because they are executive agencies that carry out legislative mandates, see [Shroyer, 81 A.2d at 437](#); [Perles, 213 A.2d at 786](#)

108. , the County Election Boards have no power to enact or adopt rules, policies, practices, and/or procedures that violate explicit directives of the Election Code, including those involving absentee and mail-in voting, on the pretext of pursuing a liberal construction. See [In re Canvass of Absentee Ballots of November 4, 2003, 839 A.2d 451, 461 \(Pa. Commw. Ct. 2003\)](#) (J. Leadbetter, dissenting), *rev'd in part*, [843 A.2d 1223 \(Pa. 2004\)](#). See also [In re April 10, 1984 Election of East Whiteland Township, Chester County, 483 A.2d 1033, 1036 \(Pa. Commw. Ct. 1984\)](#) (“While it is true that a defect which is minor or technical in nature will not void an otherwise

valid ballot, violations of substantive provisions of the Code cannot be overlooked on the pretext of pursuing a liberal construction.”).

109. When County Election Boards, individually or collectively, exceed their limited rule-making powers, they “generate a far greater inequity: the uneven treatment of absentee votes throughout the Commonwealth.” [In re Canvass of Absentee Ballots](#), 843 A.2d at 1234. See also [Pierce](#), 324 F. Supp. 2d at 698-699 (allowing a patchwork of different rules from county to county in a statewide election involving federal and state candidates implicates equal protection concerns).

110. Under the Election Code, the Secretary of the Commonwealth has no role that allows her to oversee the County Election Boards’ conduct of primaries and general elections, except the limited authority to order a recount or recanvass under Election Section 1404, [25 P.S. § 3154](#). See [25 P.S. § 2621\(f.2\)](#).

111. Accordingly, under the Election Code Section 302, the County Election Boards, rather than the Secretary of the Commonwealth, are responsible to mail out, receive, count, and verify absentee and mail-in ballots. See, e.g., 25 P.S. §§ [3146.5](#), [3146.6\(a\) & \(c\)](#), [3146.8\(g\)\(3\)](#), [3150.15](#), [3150.16\(a\) & \(c\)](#). Also, the County Election Boards are the entities to issue “certificates of appointment to watchers at primaries and elections.” [25 P.S. § 2642\(e\)](#). Additionally, the County Election Boards are responsible for “instruct[ing] election officers in their duties . . . to the end that primaries and elections may be honestly, efficiently, and *uniformly* conducted.” [25 P.S. § 2642\(g\)](#) (emphasis added).

112. On June 2, 2020, Pennsylvania held its Primary Election which was the first election that followed the enactment of Act 77 and its unmonitored all voter mail-in voting alternative.

113. Prior to the Primary Election, Pennsylvania election officials estimated that as many as two million (2,000,000) voters would apply to vote by mail. *See Crossey v. Boockvar*, No. 266 MD 2020 (Pa. Commw. Ct. May 18, 2020), “Decl. of Jonathan Marks, the Deputy Secretary for Elections and Commissions for Pennsylvania,” ¶ 32 (hereinafter, “Marks Decl.” and referred to and incorporated herein by reference). “Ultimately, more than 1.8 million voters applied for a mail-in or absentee ballot.” *See* “Trump, Biden win Pennsylvania primary contests amid unrest, pandemic,” TRIBLive–Associated Press (June 2, 2020) (available at <https://triblive.com/news/pennsylvania/pennsylvania-primary-begins-amid-unrest-pandemic/>, and referred to and incorporated herein by reference).

114. According to Secretary Boockvar, “nearly 1.5 million voters cast their vote by mail-in or absentee ballot [in the June 2, 2020 Primary Election.]” *See* K. Boockvar, “FixGov: Historic primary paves way for successful general election in Pennsylvania,” The Brookings Institution (June 22, 2020) (available at <https://www.brookings.edu/blog/fixgov/2020/06/22/historic-primary-paves-way-for-successful-general-election-in-pennsylvania/>, and referred to and incorporated herein by reference).

115. Despite the record number of requested and voted absentee or mail-in ballots, Defendants failed to take adequate measures to ensure that the provisions of the Election Code concerning absentee or mail-in ballots, including without limitation the newly enacted Act 77, were followed.

**A. *Failure to Perform Proper Verification of Applicant’s Qualifications and Identity.***

116. On or about January 10, 2020, the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, published and disseminated to all the County Election Boards a set of “guidelines” titled “Pennsylvania Applications and Balloting



Guidance: Mail-in and Absentee Ballots and Voter Registration Changes.” A true and correct copy of the January 10, 2020 Guidelines are available at the Pennsylvania Department of State’s web site at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_Act%2077\\_Absentee%20and%20Mail-in%20Guidance.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_Act%2077_Absentee%20and%20Mail-in%20Guidance.pdf).

117. The January 10, 2020 Guidelines purportedly “define both what is required by Act 77 and what is permissible under Act 77 or some other portion of the Election Code.” *See* January 10, 2020 Guidelines, p. 2.

118. According to the January 10, 2020 Guidelines, “[a] county board of elections **cannot decline** the voter’s application for a mail-in or absentee ballot, unless there is a bona fide objection to the mail-in or absentee ballot application.” *See* January 10, 2020 Guidelines, p. 4 (emphasis original).

119. Yet, Act 77 states that a county election board, “upon receipt of any application of a qualified elector under section 1301-D, shall determine the qualifications of the applicant by verifying the proof of identification and comparing the information provided on the application with the information contained on the applicant’s permanent registration card,” and determine for itself whether it is “satisfied that the applicant is qualified to receive an official mail-in ballot,” at which point “the application shall be marked ‘approved,’” which decision “shall be final and binding, except that challenges may be made only on the grounds that the applicant [i]s not a qualified elector.” [25 P.S. § 3150.12b\(a\)\(1\)-\(2\)](#). *See also* [25 P.S. § 3146.2b\(a\) – \(c\)](#).

120. The January 10, 2020 Guidelines make no mention of the County Election Boards’ duty to verify an applicant’s qualifications or identification by comparison to the applicant’s permanent registration card. Instead, the January 10, 2020 Guidelines suggest the County Election Boards should just approve all submitted applications unless someone raises a “bona fide

objection,” without any further explanation as to what constitutes a “bona fide objection.” *See* January 10, 2020 Guidelines, p. 4.

121. Upon information and belief, several counties followed the “guidance” provided in the January 10, 2020 Guidelines and approved all applications for absentee or mail-in ballots without performing the requisite verification of the applicant’s qualifications or identification by comparison to the applicant’s permanent registration card.

**B. *Use of Unmonitored Drop-Boxes and Other Ballot Collection Locations.***

122. Under the headings “Optional County Services” and “Collection of Mail-In and Absentee Ballots,” the January 10, 2020 Guidelines state that “[a]s allowed under existing law, county election boards may provide for mail-in and absentee application processing and balloting at more than one [county elections office (CEO)] located within county borders,” and advises that “[w]hen choosing a location for the CEO, counties should consider, at a minimum, ... choos[ing] locations that serve heavily populated urban/suburban areas, as well as rural areas, [including] near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes.” *See* January 10, 2020 Guidelines, pp. 4-6.

123. Nowhere in the January 10, 2020 Guidelines does Secretary Boockvar disclose what “existing law” permits the creation of additional county election offices, *id.*, and indeed, no such existing law exists.

124. Moreover, although the January 10, 2020 Guidelines note the importance of the County Election Boards to follow certain “best practices” concerning the use of drop boxes and other “ballot collection locations,” the January 10, 2020 Guidelines themselves instruct the County Election Boards to “contact the Department [of State] for [further] guidance” on these issues. *Id.* at p. 6.

125. Upon information and belief, the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, disseminated such further “guidance” to some but not all the County Election Boards.

126. Despite the Election Code’s clear and unambiguous mandate that absentee and mail-in ballots by non-disabled electors were to be mailed or personally delivered to only the county boards of elections, approximately twenty (20) County Election Boards (namely, Allegheny, Bedford, Bucks, Chester, Cameron, Carbon, Centre, Chester, Clinton, Crawford, Dauphin, Delaware, Elk, Erie, Luzerne, Montgomery, Philadelphia, Venango, and York) followed the January 10, 2020 Guidelines and other “guidance” provided by Secretary Boockvar and/or the Pennsylvania Department of State, and allowed absentee and mail-in ballots to be returned to other locations, such as shopping centers, parking lots, fairgrounds, parks, retirement homes, college campuses, fire halls, municipal government buildings, and elected officials’ offices. *See* “Voting by Absentee or Mail-In Ballot: County drop boxes and drop-off locations,” Pa. Dept. of State (2020) (previously available at <https://www.votespa.com/Voting-in-PA/Documents/2020Primary-County-DropLocations.pdf>, and referred to and incorporated herein by reference). *See also* Joe Brandt and Deanna Durante, “Can You Drop Off a Pa. Mail-In Ballot? It Depends Where You Live,” Channel 10 Philadelphia (May 26, 2020) (available at <https://www.nbcphiladelphia.com/news/local/can-you-drop-off-a-pa-mail-in-ballot-it-depends-where-you-live/2408168/>, and referred to and incorporated herein by reference); Shaunice Ajiwe, “Here Are All the Places You Can Drop Off Your Mail-In Ballot,” Philadelphia Magazine (May 29, 2020) (available at <https://www.phillymag.com/news/2020/05/29/drop-off-mail-in-ballot/>, and referred to and incorporated herein by reference).

127. Additionally, the Philadelphia County Board of Elections partnered with the Committee of Seventy, a Philadelphia based, self-proclaimed non-partisan group, to implement a mobile mail-in ballot drop-off initiative to collect voted absentee and mail-in ballots from non-disabled voters. The mobile collection occurred between May 30, 2020 and June 1, 2020 at certain schools and shopping centers within Philadelphia County, and was in addition to the Commissioner's "24/7 mail-in ballot drop-off locations" at "[Philadelphia] City Hall (south portal) and [the Philadelphia County] Board of Elections Office at 520 N. Columbus Blvd (Spring Garden entrance)." See Office of the Philadelphia City Commissioners, "Mobile Drop Off Location for Mail-In-Ballot" (available at <https://www.philadelphiavotes.com/en/home/item/1814-mobile-drop-off-location-for-mail-in-ballot>, and referred to and incorporated herein by reference).

128. Moreover, the Delaware County Board of Elections announced the day before the June 2, 2020 Primary Election that it was permitting third-party delivery of absentee and mail-in ballots for non-disabled voters and that absentee and mail-in ballots could be returned to "ANY polling location on Election Day" via unmonitored drop boxes in which voters were "not be required to check in with the [poll] workers." Further, the Delaware County Board of Elections allowed those who received and completed absentee or mail-in ballots but did not want to return them to the election board to appear at their respective polling location on Election Day and cast provisional ballots which will "likely be included in the initial results." See, e.g., Delaware County Press Release, June 1, 2020 (last accessed July 15, 2020) [https://www.delcopa.gov/publicrelations/releases/2020/primaryupdate\\_june1.html](https://www.delcopa.gov/publicrelations/releases/2020/primaryupdate_june1.html). All of these actions were inconsistent and/or contrary to the clear and unambiguous mandates of the Election Code and Act 77. See [25 P.S. §§ 3146.6\(a\) & \(b\)\(1\)-\(3\), 3150.16\(a\) & \(b\)\(1\)-\(3\), and 3050\(a.4\)](#).

129. Most of the other locations that were used to collect mail-in or absentee ballots for the Primary Election involved the use of unmonitored and/or unsecured “drop-off boxes” and/or other similar means.

130. Moreover, the amount of notice and the fashion in which notice was given concerning the existence, use, and location of the drop boxes and the mobile voting sites varied among the twenty counties that implemented such measures, and many of the notices failed to comply with the Election Code’s notice publication requirements. *See, e.g.*, Election Code Sections 106 and 526(c), 25 P.S. §§ [2606](#) & [2726\(c\)](#).

131. Under Act 77, the other locations that were used to collect mail-in or absentee ballots for the Primary Election do not constitute a “polling place” as defined in Election Code Section 102(q), [25 P.S. § 2602\(q\)](#).

132. Moreover, Election Code Sections 526 through 530, 25 P.S. §§ [2726-2729.1](#), set forth the requirements that must be met for a location to be selected and used as a “polling place.” Notably, Election Code Section 529.1, [25 P.S. § 2729.1](#), mandates that “[n]o election shall be held in any of the following: ... (5) A vacant lot[; or] ... (7) An office, building or private residence of an elected official. ... .” Accordingly, many of the other locations that were used to collect mail-in or absentee ballots for the Primary Election violated Election Code Section 529.1, [25 P.S. § 2729.1](#).

133. The other locations that were used to collect mail-in or absentee ballots for the Primary Election were used in violation of the Election Code’s mandatory provisions, including without limitation the clear and unambiguous mandate that absentee and mail-in ballots were to be mailed or personally delivered by the electors to only the County Boards of Elections, *see* Election Code Section 1306(a), [25 P.S. §§ 3146.6\(a\)](#) & [3150.16](#), and that no election shall be held

in a vacant lot or an office or building of an elected official, *see* Election Code Section 529.1, [25 P.S. § 2729.1](#).

134. The use of illegal and inadequately noticed drop boxes or mobile drop-off facilities eviscerates the procedural protections that currently accompany Pennsylvania’s mail-in voting procedures by creating a gap in the ability of both the Commonwealth and political parties to observe the delivery process and ensure that Pennsylvania’s election laws are being followed.

**C. *Issues Involving Duplicate or Unmailed Absentee and Mail-In Ballots.***

135. On May 14, 2020, Allegheny County reported that an issue with the State’s SURE system was causing the printing and mailing of duplicate mail-in and absentee ballots to voters within its county. *See* A. Downs, “Elections Division Statement on State SURE System Issue Impacting County,” Allegheny County Dept. of Adm. Servs. – Div. of Elections (May 14, 2020) (available at [file:///H:/Downloads/Elections%20Division%20Statement%20on%20State%20SURE%20System%20Issue%20Impacting%20County%20\(2\).pdf](file:///H:/Downloads/Elections%20Division%20Statement%20on%20State%20SURE%20System%20Issue%20Impacting%20County%20(2).pdf), and referred to and incorporated herein by reference).

136. Further, several Allegheny County residents reported that they never received their mail-in or absentee ballots, and of the more than 280,000 mail-in ballots requested, only 75% of the ballots were received back, as of June 4, 2020. *See* “Allegheny County voters identify 5 issues to address before November presidential election,” PublicSource (Jun. 4, 2020) (available at <https://www.publicsource.org/allegheny-county-voters-identify-5-issues-to-address-before-november-presidential-election/>, and referred to and incorporated herein by reference).

137. The issue of duplicate ballots caused confusion with voters over which ballot to vote and whether their voted ballot was actually received.

**D. *Uneven Treatment of Electors Who Applied for But Did Not Vote an Absentee or Mail-in Ballot and Sought to Vote at their Polling Place on Election Day.***

138. On January 30, 2020, the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, published and disseminated to all the County Election Boards a set of “guidelines” titled “Pennsylvania Balloting and Envelope Guidance.” A true and correct copy of the January 30, 2020 Guidelines are available at the Pennsylvania Department of State’s web site at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotingandEnvelope\\_CountyGuidance\\_v1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotingandEnvelope_CountyGuidance_v1.0.pdf).

139. Like the January 10, 2020 Guidelines, the January 30, 2020 Guidelines purportedly “define both what is required by Act 77 and what is permissible under Act 77 or some other portion of the Election Code.” See January 30, 2020 Guidelines, p. 2. Further, the January 30, 2020 Guidelines state “[t]he Department of State (DOS) will continue to update this guidance leading up to the 2020 Primary Election.” *Id.*

140. According to the January 30, 2020 Guidelines, “[a]s soon as a voter requests a civilian absentee ballot or mail-in ballot, they are only entitled to vote by provisional ballot if they show up at their polling place, and the voter is not shown on the district register as having voted an absentee or mail-in ballot,” citing Election Code Section 1210, [25 P.S. § 3050\(a.4\)\(1\)](#). Also, the January 30, 2020 Guidelines state: “Act 77 of 2019 establishes provisional balloting as the only option for voters to cast their vote in the event their absentee or mail-in ballot is not returned to the county by 8:00 p.m. on election day.”

141. Yet, under Act 77, an elector who requests an absentee or mail-in ballot and who is not shown on the district register as having voted that ballot may vote a regular ballot in-person at the polling place if the elector remits his or her unvoted absentee or mail-in ballot and the envelope containing the elector’s declaration to the judge of elections to be spoiled and the elector signs the

requisite statement declaring that he or she has not voted the absentee or mail-in ballot and has requested it to be spoiled. *See* [25 P.S. §§ 3146.6\(b\)\(3\) & 3150.16\(b\)\(3\)](#).

142. The “guidance” provided in the January 30, 2020 Guidelines concerning whether an elector who has applied for but not voted an absentee or mail-in ballot is contrary to what Act 77 and the Election Code provides.

143. On March 5, 2020, the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, published and disseminated to all the County Election Boards a set of “guidelines” titled “Pennsylvania Provisional Voting Guidance.” A true and correct copy of the March 5, 2020 Guidelines are available at the Pennsylvania Department of State’s web site at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_ProvisionalBallots\\_guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_ProvisionalBallots_guidance_1.0.pdf).

144. Like the January 10, 2020 and January 30, 2020 Guidelines, the March 5, 2020 Guidelines purportedly “define both what is required by Act 77 and what is permissible under Act 77 or some other portion of the Election Code.” *See* March 5, 2020 Guidelines, p. 2. Further, the March 5, 2020 Guidelines state “[t]he Department of State (DOS) will continue to update this guidance leading up to the 2020 Primary Election.” *Id.*

145. According to the March 5, 2020 Guidelines, “[i]f a voter is issued an absentee or mail-in ballot for the upcoming election, they cannot vote a regular ballot.” *See* March 5, 2020 Guidelines, p. 4.

146. Nowhere in the March 5, 2020 Guidelines does Secretary Boockvar identify what provision of Act 77 supports this “guidance.” *Id.*

147. Yet, under Act 77, an elector who requests an absentee or mail-in ballot and who is not shown on the district register as having voted that ballot may vote a regular ballot in-person at



the polling place if the elector remits his or her unvoted absentee or mail-in ballot and the envelope containing the elector's declaration to the judge of elections to be spoiled and the elector signs the requisite statement declaring that he or she has not voted the absentee or mail-in ballot and has requested it to be spoiled. *See* [25 P.S. §§ 3146.6\(b\)\(3\) & 3150.16\(b\)\(3\)](#).

148. Much like the January 30, 2020 Guidelines, the “guidance” provided in the March 5, 2020 Guidelines concerning whether an elector who has applied for but not voted an absentee or mail-in ballot is contrary to what Act 77 and the Election Code provides.

149. Many County Election Boards followed the misinformation provided in the January 30, 2020 and March 5, 2020 Guidelines and denied electors who had applied for but not voted their absentee or mail-in ballots the right to vote a regular ballot in person at the polling locations, whereas other counties followed the dictates of the Election Code and Act 77 and allowed such electors to vote a regular ballot upon the spoliation of their ballots.

150. Equally concerning is that, according to a recent report from the Philadelphia County Board of Elections, double voting (*i.e.*, voting by mail and in-person by the same elector) occurred in the Primary Election. *See* Jonathan Lai, “Philly elections officials caught 40 cases of double voting. It’s not fraud, but it’s still a problem,” *The Philadelphia Inquirer* (June 16, 2020) (available at <https://www.inquirer.com/politics/election/pa-primary-election-mail-ballots-double-voting-20200616.html>, and referred to and incorporated herein by reference).

151. The double-voting occurred in Philadelphia despite Act 77’s clear and unambiguous mandate that an elector cannot vote both a mail-in or absentee ballot and an in-person or machine ballot. [25 P.S. § 3150.16\(b\)\(1\)-\(3\)](#).

152. The January 30, 2020 and March 5, 2020 Guidelines caused an uneven treatment of voters throughout the Commonwealth.

**E. *Uneven Treatment of Absentee and Mail-Ballots That Fail to Include a Secrecy Envelope as Mandated by the Election Code and Act 77.***

153. On pages 10 through 13 of the January 30, 2020 Guidelines, the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, provided “guidance” on the envelopes that an elector must use to vote an absentee or mail-in ballot, including without limitation the “secrecy envelope.” *See* January 30, 2020 Guidelines, pp. 10-12. Other than stating that “[t]he secrecy envelope shall contain no other marks other than the envelope title,” the January 30, 2020 Guidelines do not note that the Election Code’s mandatory requirement that the absentee and mail-in ballot be enclosed in a secrecy envelope in order for it to be counted.

154. Attached as Exhibit 1 is a directive issued by the Pennsylvania Department of State, with the knowledge, approval and/or consent of Secretary Boockvar, on May 28, 2020.

155. Titled “Important DOS Email re: Absentee/Mail-in Ballot Canvass,” the May 28, 2020 Directive states:

Thought the Election Code requires county boards of elections to set aside absentee or mail-in ballots enclosed in the official 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.

*See* May 28, 2020 Directive.

156. The May 28, 2020 Directive is contrary to the clear and unambiguous provisions of the Election Code and Act 77. *See* Election Code Sections 1306.6(a) and 1308(g)(i)-(iv), [25 P.S. §§ 3146.6\(a\) & 3146.8\(g\)\(4\)\(i\)-\(iv\)](#). *See also* [Absentee Ballots of Nov. 4, 2003 Gen. Election, 843](#)

[A.2d at 1234](#) (the Election Code’s provisions of how to cast an absentee ballot are “substantive matters—how to cast a reliable vote—and not [] a mere procedural matter” that can be disregarded by a county board of elections).

157. Upon information and belief, many of the County Election Boards followed the May 28, 2020 Directive and counted in the 2020 Primary Election absentee and mail-in ballots that failed to comply with the Election Code’s inner secrecy envelope mandate, but some County Election Boards did not.

158. Also, upon information and belief, some but not all County Election Boards followed in the 2020 Primary Election the Election Code’s mandate to not count absentee and mail-in ballots that contain on the inner secrecy envelope “any text, mark or symbol which reveals the identity of the elector, the elector’s political affiliation or the elector’s candidate preference,” or fail to include on the outside envelope a completed declaration that is dated and signed by the elector, but some County Election Boards did not. For example, upon information and belief, Philadelphia County Board of Elections’ practice is to count such absentee and mail-in ballots, whereas the practice in other counties is to not count them.

159. The statutory provisions in the Election Code and Act 77 involving absentee and mail-in ballots do not repose in either Secretary Boockvar or the County Election Boards the free-ranging power to attempt to ascertain voter intent or rule out fraud when a vote has been cast in violation of its explicit mandates. While voter intention may be paramount in the realm of the fundamental right to vote, ascertaining that intent necessarily assumes a properly cast ballot. Otherwise, a properly cast ballot will be diluted by one which has been improperly cast.

160. By enacting the inner secrecy envelope proscription and the other mandates for the casting of a “reliable vote” via an absentee or mail-in ballot, the General Assembly weighed the

factors bearing on that question, and it did not vest, and has not vested, any discretion or rule-making authority in Secretary Boockvar and/or the County Election Boards to reweigh those factors in determining whether or not to count a particular absentee or mail-in ballot should be counted.

161. The May 28, 2020 Directive caused an uneven treatment of absentee and mail-in voters throughout the Commonwealth.

**F. *Defendants' Inconsistent Administration and Uneven Treatment of Voters Represents an Unconstitutional Infringement of Plaintiffs' Fundamental Rights.***

162. The casting of votes in violation of the Election Code's mandatory provisions renders them void. [\*Absentee Ballots of Nov. 4, 2003 Gen. Election\*, 843 A.2d at 1234.](#)

163. Further, for statewide elections involving federal candidates, Defendants' allowance, by act or omission, of the collection and counting of in-person, provisional, and absentee and mail-in ballots in a manner and at locations that are contrary to the Election Code's mandatory provisions constitutes legislative action by the Executive Branch in violation of the Elections and Electors Clauses of the United States Constitution.

164. Finally, the lack of statewide standards governing the location of drop boxes and the subsequent use of a patchwork of ad-hoc rules that vary from county to county in a statewide election involving federal and state-wide candidates violates the Equal Protection clause of the Fourteenth Amendment. [\*Pierce\*, 324 F. Supp. 2d at 698-699.](#)

**VII. Pennsylvania's Poll Watching is Unconstitutionally Restrictive.**

165. When initially enacted, Election Code Section 417 restricted a poll watcher's geographical territory to a single appointed election district within the county in which the person was a qualified registered elector. *See* 25 P.S. § 2687 (1947).

166. In 2004, Election Code Section 417 was amended to expand the poll watcher's geographical territory from a single election district to all election districts in the county in which the watcher is a qualified registered elector. [25 P.S. § 2687\(b\) \(2004\)](#).

167. In 2019, when Act 77 was enacted, no changes were made to Election Code Section 417 or the county residency requirement of poll watchers.

168. Consequently, as currently written, Election Code Section 417 does not permit a candidate or political party or any other body to appoint a poll watcher to serve in an election district in a county in which the watcher is not a qualified registered elector. *See* Election Code Section 417, [25 P.S. § 2687\(b\)](#).

169. In this upcoming November 3, 2020 General Election, there are statewide and federal candidates, including President Trump and Representatives Thompson, Kelly, Joyce, and Reschenthaler, whose election will be impacted by the manner in which the voting in all sixty-seven (67) counties of the Commonwealth is conducted.

170. Moreover, the Election Code sets forth the uniform standards that all sixty-seven (67) counties must follow in order to conduct any election in this Commonwealth and to cast and count votes, and the provisions of the Election Code do not create different standards for one or more classes of counties. Rather, the standards apply equally to all 67 counties.

171. The Equal Protection Clause mandates that the Commonwealth provide and use the same statewide uniform standards and regulations when conducting statewide or multi-county elections involving federal candidates, including without limitation the standards and regulations providing for the casting and counting of votes. [Pierce, 324 F. Supp. 2d at 698-699](#). In other words, the Equal Protection Clause requires every county in the Commonwealth to enforce and apply the same standards and procedures for an election, and it does not allow a select few counties

to either decline to enforce or employ those standards or develop their own contradicting standards that benefit their voters to the detriment of voters outside their counties. *Id.*

172. Accordingly, the manner in which the November 3, 2020 General Election is conducted and in which votes are cast and counted should be uniform across the counties of the Commonwealth.

173. Because the standards in the conduct of statewide elections involving federal and state candidates, including without limitation the casting and counting of votes, are to be uniform, Plaintiffs have a vested interest in ensuring that the electoral process is properly administered in every election district.

174. The Commonwealth has not, and cannot, articulate a constitutionally-recognized basis to restrict poll watchers from serving in counties other than their county of residence.

175. The Commonwealth's arbitrary rule against voters serving as poll watchers in counties other than their county of residence has real, demonstrable impacts on all Plaintiffs to this action.

176. In Pennsylvania, all Congressional electoral districts contain portions of multiple counties, and President Trump will appear on every ballot that will be cast in the November 3, 2020 General Election in all 67 counties of the Commonwealth. Consequently, all Plaintiffs have an interest in having their poll watchers monitor the polls in multiple counties to ensure the integrity of the vote on behalf of themselves and the other federal and state electoral candidates and to protect the integrity of the vote on behalf of its registered electors who are voting for federal and statewide Republican candidates.

177. According to statistics collected and disseminated by the Pennsylvania Department of State, there is a significant gap between the number of voters registered as Democrats and the

number of registered Republicans in some Pennsylvania counties. *See* “2019 Voter Registration Statistics – Official,” Pa. Dept. of State (Nov. 5, 2019) (available at <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Document/s/2019%20Election%20VR%20Stats%20%20final.pdf>, and referred to and incorporated herein by reference) (hereinafter, the “2019 Voter Registration Statistics”).

178. For example, in Philadelphia County, there exist 66 voting wards which are divided into 1,686 divisions (hereinafter, the “Philadelphia Divisions”). *See* Political Maps, Office of the Phila. City Commissioners (2020) (available at <http://www.philadelphiavotes.com/en/resources-a-data/political-maps>, and referred to and incorporated herein by reference). Republicans are not a majority of registered voters in any ward in Philadelphia County. *See* Department Reports and Data, “Historical Citywide Voter Registration Data,” Office of the Phila. City Commissioners (1940-2019) (available at [https://files7.philadelphiavotes.com/department-reports/Historical\\_Registration\\_1940-2019G.pdf#\\_ga=2.206750996.604579856.1592778750-1031414694.1591725640](https://files7.philadelphiavotes.com/department-reports/Historical_Registration_1940-2019G.pdf#_ga=2.206750996.604579856.1592778750-1031414694.1591725640), and referred to and incorporated herein by reference).

179. In some contiguous geographic areas of the Commonwealth, such as in Fulton, Franklin, Bedford, Huntingdon and Perry counties, Republicans account for almost 70% of the voters, thereby placing Democrats at a disadvantage in staffing polling places with Democratic poll watchers. *See* 2019 Voter Registration Statistics.

180. As a result of the Commonwealth’s arbitrary restriction on poll watchers, candidates, political parties, and political bodies are unjustifiably burdened in their attempts to locate available, qualified registered electors who can serve as poll watchers.

181. Additionally, Pennsylvania law does not speak to the ability of poll watchers to be present at the other locations that were used to collect mail-in and absentee ballots for the Primary

Election to ensure that no third-party delivery or other ballot-harvesting has occurred. *See* Election Code Sections 417 & 102(q), [25 P.S. §§ 2687\(b\)](#) & [2602\(q\)](#).

182. Nor are poll watchers permitted to be present during the pre-canvass meetings held on Election Day by the county boards of elections of the absentee and mail-in ballots. *See* Election Code Section 1308(g)(2), [25 P.S. § 3146.8\(g\)\(2\)](#).

183. In the June 2, 2020 Primary Election, approximately half of the cast votes were by absentee and mail-in ballots.

184. For the upcoming November 3, 2020 General Election, the predictions are that the same or greater percentage of absentee and mail-in ballots will be cast.

185. Plaintiffs have a substantial interest to ensure that the upcoming November 3, 2020 General Election is conducted in a free, open, and honest manner and that the votes cast are legitimate.

186. The Commonwealth has not articulated and cannot articulate a constitutionally-recognized basis to restrict poll watchers from being present at locations that are used to collect mail-in and absentee ballots prior to or on Election Day (to the extent such collections at locations beyond the County Election Boards' offices or through inadequately noticed and unmonitored ad hoc drop boxes are authorized by the Election Code, which Plaintiffs assert they are not), or the pre-canvass meeting of such voted absentee and mail-in ballots.

187. The Commonwealth's arbitrary exclusion of poll watchers from being present at locations that are used to collect mail-in and absentee ballots prior to Election Day (to the extent such collections at locations beyond the County Election Boards' offices or through inadequately noticed and unmonitored ad hoc drop boxes are authorized by the Election Code, which Plaintiffs



assert they are not), or the pre-canvass meeting of such ballots has real, demonstrable impacts on all Plaintiffs to this action.

188. Poll watchers serve the important purpose of assuring voters, candidates, political parties, and political bodies, who may question the fairness of the election process, that the same is conducted in compliance with the law, and is done in a correct manner which protects the integrity and validity of the vote and ensures that all elections are free, open, fair, and honest.

189. Arbitrarily restricting a registered voter from serving outside of the county of his or her residence and/or limiting his or her activities to only those which occur at a polling place on Election Day results in an unconstitutional infringement on the fundamental right to vote, the guarantee of equal protection, and the right to participate in free and fair public elections as guaranteed by the United States and Pennsylvania Constitutions.

#### **VIII. Need for Judicial Intervention.**

190. The current voting regime as employed by Defendants, including the January 10, 2020, January 30, 2020, and the March 5, 2020 Guidelines, and the May 28, 2020 Directive, remain in place and have needlessly resulted in the denial of free and fair elections and other fundamental rights during the Pennsylvania Primary Election. Absent judicial intervention, there is no reason to believe things will be different during the November 3, 2020 General Election.

191. This Court should act now to prevent a recurrence of the problems that manifested in the Pennsylvania Primary Election. Although the November General Election is still months away, presenting these issues to the Court now allows this Court and the parties sufficient time to develop a record and adequately consider the legal merits of Plaintiffs' claims.

192. Plaintiffs respectfully request that this Court prevent Defendants from making the same mistake twice. In addition to any other affirmative relief that the Court may deem necessary and proper, Plaintiffs seek an order, declaration, and/or injunction that prohibits Defendants from

permitting the return of absentee and mail-in ballots to locations other than the respective office of the county boards of elections as prescribed by the Pennsylvania Election Code. In the alternative, if the challenged conduct is not found to be illegal, Plaintiffs seek an order, declaration, and/or injunction instructing Defendants to publish uniform state-wide guidance on absentee ballot drop boxes explaining that the locations for absentee ballot drop boxes are subject to the same notice and determination requirements that Pennsylvania law currently provides for polling places. Further, Plaintiffs seek an order, declaration, and/or injunction that bars County Election Boards from counting absentee and mail-in ballots that lack an “Official Election Ballot” secrecy envelope, contain a text, mark, or symbol thereon, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters. Additionally, Plaintiffs seek an order, declaration, and/or injunction that requires county election boards to verify the identification and qualification for each applicant of an absentee or mail-in ballot, and to properly enforce which voters can and cannot vote on Election Day at the polling place after having applied for and either voted or not voted their absentee or mail-in ballots. Finally, Plaintiffs seek an order, declaration, and/or injunction that permits poll watchers, regardless of their county of residence, to be present in all locations where votes are cast, including without limitation where absentee or mail-in ballots are being returned before and on Election Day and at any pre-canvass meetings.

## **COUNT I**

### **First and Fourteenth Amendments**

### **[U.S. Const. Art. I § 4, cl. 1](#); [Art. II, § 1, cl. 2](#); Amend. [I](#) and [XIV](#), [42 U.S.C. § 1983](#) **Infringement of the Right to Vote Through Invalid Enactment of Regulations Affecting the Time, Place and Manner of Election by Pennsylvania’s Executive Branch****

193. Plaintiffs refer to and incorporate Paragraphs 1 through 192 of this Complaint as though the same were repeated at length herein.

194. Voting is a fundamental right protected by the Fourteenth Amendment to the United States Constitution.

195. The Fourteenth Amendment protects the right to vote from conduct by state officials which seriously undermines the fundamental fairness of the electoral process. [\*Marks v. Stinson\*, 19 F.3d 873, 889 \(3d Cir. 1994\)](#); [\*Griffin v. Burns\*, 570 F.2d 1065, 1077-78 \(1st Cir. 1978\)](#).

196. The United States Constitution entrusts state legislatures to set the time, place, and manner of congressional elections and to determine how the state chooses electors for the presidency. See [U.S. Const. Art. I, § 4, cl. 1](#) & [Art. II, § 1, cl. 2](#).

197. In Pennsylvania, “[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representative.” [Pa. Const. Art. II, § 1](#). See also [Winston](#), 91 A. at 522; [Patterson](#), 60 Pa. at 75.

198. Defendants, as a member of the Governor’s Executive Board and county executive agencies, are not part of the General Assembly and cannot exercise legislative power. Rather, Defendants’ power is limited to “tak[ing] care that the laws be faithfully executed.” [Pa. Const. Art. IV, § 2](#).

199. Although the Pennsylvania General Assembly may enact laws governing the conduct of elections, “no legislative enactment may contravene the requirements of the Pennsylvania or United States Constitutions.” [Shankey](#), 257 A. 2d at 898.

200. The Pennsylvania Election Code mandates that the County Election Boards shall determine the qualifications of all absentee and mail-ballot applicants by verifying their proof of identification and comparing the information provided on the applications with the information contained on the applicants’ permanent registration cards, and for all absentee and mail-in ballots by approved non-disabled electors, the elector “shall” “enclose and securely seal” the voted ballot

in the “Official Election Ballot” secrecy envelope with no text, mark, or symbol which reveals the elector’s identity, political affiliation or candidate preference, “shall” place the secrecy envelope in the second envelope and “shall ... fill-out, date and sign the declaration printed on such envelope,” and then “shall” mail or personally delivered the voted ballot to only the county boards of elections to ensure that the ballots are properly cast, kept secret, and not subject to fraud. *See* [25 P.S. §§ 3146.6\(a\)](#), [3150.16\(a\)](#) & [3146.8\(g\)\(4\)\(i\)-\(iv\)](#).

201. Rather than heeding these mandates, Defendants have knowingly authorized, allowed, and/or permitted some, but not all, of the County Election Boards to not verify the identification and/or qualifications of all absentee and mail ballot applicants, and/or to collect absentee and mail-in ballots at locations other than their offices, including without limitations mobile sites and locations that the Election Code has mandated shall not serve as polling places, and/or to utilize “drop boxes” and other unmonitored and/or unsecured means. Also, some, but not all, of the County Election Boards count absentee and mail-in ballots that lack the “Official Election Ballot” secrecy envelope, contain a text, mark, or symbol thereon, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters, despite the Election Code’s contrary mandate.

202. Permitting absentee and mail ballot applications to be approved without identification or confirmation of the applicant or his or her qualifications and/or permitting absentee and mail-in ballots of non-disabled electors to be collected at locations other than the offices of the county boards of elections and/or through “drop boxes” and other unmonitored and/or unsecured means and/or to be counted when not cast in the manner mandated by the

Election Code allows illegal absent and mail-in voting, ballot harvesting, and other fraud to occur and/or go undetected, and will result in dilution of validly cast ballots.

203. By permitting absentee and mail ballot applications to be approved without identification or confirmation of the applicant or his or her qualifications, by unilaterally establishing drop boxes and other locations for the return of absentee and mail-in ballots, and by counting improperly cast absentee and mail-in ballots, both in contradiction of Pennsylvania's statutory law, Defendants have increased the potential for ballot fraud or tampering, thus infringing the right to vote as secured to Plaintiffs and their members by the First and Fourteenth Amendments to the United States Constitution, without any authority to do so.

204. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

205. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

## **COUNT II**

### **Fourteenth Amendment**

### **U.S. Const. Amend. XIV, 42 U.S.C. § 1983**

### **Denial of Equal Protection**

### **Disparate Treatment of Nondisabled Absentee/Mail-In Voters Among Different Counties**

206. Plaintiffs refer to and incorporate Paragraphs 1 through 205 of this Complaint as though the same were repeated at length herein.

207. The equal enforcement of election laws is necessary to preserve our most basic and fundamental rights.

208. The Equal Protection Clause prevents the government from treating similarly situated voters differently without a compelling justification for doing so. [Bush, 531 U.S. at 104-05](#) (“[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”).

209. The requirement of equal treatment is particularly stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

210. The Pennsylvania Election Code mandates that all absentee and mail-in ballots by non-disabled electors “shall” be enclosed in the “Official Election Ballot” secrecy envelope with no text, mark, or symbol which reveals the elector’s identity, political affiliation or candidate preference, and then “shall” be mailed or personally delivered to only the county boards of elections to ensure that the ballots are properly cast, kept secret, and not subject to fraud. *See* [25 P.S. §§ 3146.6\(a\), 3150.16\(a\) & 3146.8\(g\)\(4\)\(i\)-\(iv\)](#).

211. Rather than heeding this mandate, Defendants have knowingly authorized, allowed, and/or permitted some, but not all, of the County Election Boards to collect absentee and mail-in ballots at locations other than their offices, including without limitations mobile sites and locations that the Election Code has mandated shall not serve as polling places, and/or to utilize drop boxes and other unmonitored and/or unsecured means. Also, some, but not all, of the County Election Boards count absentee and mail-in ballots that lack the “Official Election Ballot” secrecy envelope, contain a text, mark, or symbol thereon, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters despite the Election Code’s contrary mandate.

212. Permitting absentee and mail-in ballots of non-disabled electors to be collected at locations other than the offices of the county boards of elections and/or through “drop boxes” and

other unmonitored and/or unsecured means and to be counted when not cast in the manner mandated by the Election Code allows illegal absent and mail-in voting, ballot harvesting, and other fraud to occur and/or go undetected, and will result in dilution of validly cast ballots.

213. Defendants, through their intentional, negligent, or reckless acts or omissions, have violated the Elections and Electors Clauses of the United States Constitution and infringed upon the equal protection rights of Plaintiffs, their members, and all qualified Pennsylvania voters.

214. Defendants have acted and will continue to act under color of state law to violate the Equal Protection Clause of the United States Constitution.

215. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

### **COUNT III**

**Pennsylvania Equal Protection and Free and Equal Elections**  
**[Pa. Const. art. VII, § 1](#), [art. I, § 28](#), & [art. I, § 5](#)**  
**Infringement of the Right to Vote Through Invalid Enactment of Regulations**  
**Affecting the Time, Place and Manner of Election by Pennsylvania's Executive Branch**  
**and Denial of Equal Protection via Disparate Treatment of Absentee/Mail-In Voters**  
**Amongst Different Counties**

216. Plaintiffs refer to and incorporate Paragraphs 1 through 215 of this Complaint as though the same were repeated at length herein.

217. The Pennsylvania Constitution also bestows the right to vote upon qualified citizens and to equal protection in the enjoyment of that right. *See* [Pa. Const. art. VII, § 1](#) & [art. I, § 28](#).

218. Further, the Free and Equal Elections Clause of the Pennsylvania Constitution, provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” [Pa. Const. art. I, § 5](#).

219. A free and fair election requires ballot security.

220. For the same reasons Defendants have violated the United States Constitution's Elections and Electors Clauses and its First and Fourteenth Amendments and Equal Protection Clause by their intentional, negligent, or reckless failure or refusal to enforce the Election Code's mandated concerning the collection of absentee and mail-in ballots (as stated more fully in Paragraphs 193 through 215 of this Complaint), Defendants have violated the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and have infringed upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

221. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

222. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

#### **COUNT IV**

**First and Fourteenth Amendments**  
**U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983**  
**Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against**  
**Dilution of Vote by Fraud or Tampering: Poll Watcher Residency Restriction &**  
**Polling Place Restriction**

223. Plaintiffs refer to and incorporate Paragraphs 1 through 222 of this Complaint as though the same were repeated at length herein.

224. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Plaintiffs and all qualified voters in the Commonwealth of Pennsylvania, regardless of their location or residence, have a vested interest in ensuring that the electoral process is properly administered in every election district.



225. Defendants have a duty to establish basic minimum safeguards to guard against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering.

226. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Election Code Section 417, [25 P.S. § 2687](#), arbitrarily and unreasonably distinguishes between qualified voters within the Commonwealth of Pennsylvania by limiting their service as a poll watcher to only the county of their residence and by limiting their service as a poll watcher to monitoring only in-person voting at the polling place on Election Day.

227. The Commonwealth has no legitimate interest in arbitrarily restricting the right of any of its qualified voters from serving as a poll watcher to monitor the drop off of absentee and mail-in ballots before Election Day, regardless in what county those ballots may be cast.

228. By failing to allow Pennsylvania voters to serve as poll watchers in counties other than their county of residence or monitor the drop off of absentee and mail-in ballots, Election Code Section 417, [25 P.S. § 2687](#), makes it extremely difficult or functionally impracticable for candidates and parties to ensure that they have poll watchers at all locations where ballots are being cast in connection with the November 2020 General Election – including remote drop boxes (which Plaintiffs contend are not permitted under the Election Code) – thus fostering an environment that encourages ballot fraud or tampering, and preventing the Commonwealth, candidates, and political parties from ensuring that the General Election is free, fair, and transparent.

229. By failing to take basic precautions to protect against ballot fraud or tampering, Defendants have infringed upon the right to vote as secured to Plaintiffs and their members by the

First and Fourteenth Amendments to the United States Constitution without any compelling reason to do so.

230. On its face and as applied to the 2020 General Election, Election Code Section 417's residency requirement and its "polling place" requirement deny qualified voters in the Commonwealth of Pennsylvania of their fundamental right to a free, fair, and transparent public election process.

231. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

232. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

### **COUNT V**

#### **Pennsylvania Equal Protection and Free and Equal Elections**

#### **Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5**

#### **Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against Dilution of Vote by Fraud or Tampering: Poll Watcher Residency Restriction & Polling Place Restriction**

233. Plaintiffs refer to and incorporate Paragraphs 1 through 232 of this Complaint as though the same were repeated at length herein.

234. For the same reasons Election Code Section 417's county residency requirement and polling place restriction violate the United States Constitution's First and Fourteenth Amendments and its Equal Protection Clause (as stated more fully in Paragraphs 223 through 232 of this Complaint), Election Code Section 417's county residency requirement and polling place restriction violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania

Constitution and infringe upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

235. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

236. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

## COUNT VI

### **First and Fourteenth Amendments**

#### **U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983**

#### **Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against Dilution of Vote by Fraud or Tampering: Failure to Notice Drop Box Location**

237. Plaintiffs refer to and incorporate Paragraphs 1 through 236 of this Complaint as though the same were repeated at length herein.

238. In statewide and federal elections conducted in the Commonwealth of Pennsylvania, including without limitation the upcoming November 3, 2020 General Election, Plaintiffs and all qualified voters in the Commonwealth of Pennsylvania, regardless of their location or residence, have a vested interest in ensuring that the electoral process is properly administered in every election district.

239. In the June 2, 2020 Primary Election, some of the County Election Boards, with Secretary Boockvar's knowledge and consent, established drop box and mobile drop box drop off locations for absentee and mail-in ballots in contradiction of state law while providing insufficient public notice regarding the location of these drop boxes or mobile locations.

240. The Election Code requires the County Election Boards to provide not less than twenty (20) days' public notice of the location of all polling places where an election is to be held, and not less

than five (5) days' public notice before closing or opening a new polling place. *See* Election Code Section 526(a) & (c), [25 P.S. § 2726\(a\) & \(c\)](#); *see also* Election Code Section 106, [25 P.S. § 2606](#).

241. Moreover, the Election Code provides certain criteria that govern the selectin of sites for polling places. *See* Election Code Sections 527-529.1, 25 P.S. §§ [2727-2729.1](#).

242. Defendants failed to comply with either the Election Code's notice requirements or these site selection requirements when establishing drop boxes and mobile drop boxes for absentee and mail-in ballots in connection with the June 2, 2020 primary election.

243. In doing so, Defendants increased the likelihood that they would confuse voters and prevent candidates or political parties from notifying voters about the availability and location of the drop boxes or adequately monitoring the drop boxes, thus fostering an environment that encourages ballot fraud or tampering, and preventing the Commonwealth, candidates, and political parties from ensuring that the General Election is free, fair, and transparent.

244. On information and belief, Plaintiffs believe that Defendants intend to repeat this practice in the upcoming November 3, 2020 General Election.

245. Defendants have a duty to establish basic minimum safeguards to guard against deprivation of the right to vote through the dilution of validly cast ballots by ballot fraud or election tampering.

246. By failing to comply with Pennsylvania's statutory notice, Defendants have failed to enact minimal safeguards against dilution of the right to vote by fraudulent ballots or tampering and thus infringe the right of qualified voters in the Commonwealth of Pennsylvania to a free, fair, and transparent public election process.

247. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

248. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

### **COUNT VII**

#### **Pennsylvania Equal Protection and Free and Equal Elections Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5 Infringement of the Right to Vote Through Failure to Sufficiently Safeguard Against Dilution of Vote by Fraud or Tampering: Failure to Notice Drop Box Location**

249. Plaintiffs refer to and incorporate Paragraphs 1 through 248 of this Complaint as though the same were repeated at length herein.

250. For the same reasons Defendants' failure to provide the statutory or otherwise adequate notice of drop box locations violates the United States Constitution's First and Fourteenth Amendments and its Equal Protection Clause (as stated more fully in Paragraphs 237 through 248 of this Complaint), Defendants' failure to provide the statutory or otherwise adequate notice of drop box locations violates the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and infringes upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

251. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

252. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

**COUNT VIII**

**First and Fourteenth Amendments  
U.S. Const. Amend. I and XIV, 42 U.S.C. § 1983  
Infringement of the Right to Vote Through Improper Voting at Polling Places**

253. Plaintiffs refer to and incorporate Paragraphs 1 through 252 of this Complaint as though the same were repeated at length herein.

254. Under Act 77, an elector who requests an absentee or mail-in ballot and who is not shown on the district register as having voted that ballot may vote a regular ballot in-person at the polling place if the elector remits his or her unvoted absentee or mail-in ballot and the envelope containing the elector's declaration to the judge of elections to be spoiled and the elector signs the requisite statement declaring that he or she has not voted the absentee or mail-in ballot and has requested it to be spoiled. *See* [25 P.S. §§ 3146.6\(b\)\(3\) & 3150.16\(b\)\(3\)](#).

255. In the June 2, 2020 Primary Election, many of the County Election Boards, following the misinformation provided in the January 30, 2020 and March 5, 2020 Guidelines, denied electors who had applied for but not voted their absentee or mail-in ballots the right to vote a regular ballot in person at the polling locations, whereas other counties followed the dictates of the Election Code and Act 77 and allowed such electors to vote a regular ballot upon the spoliation of their ballots.

256. The result of the County Election Boards' refusal and/or failure to allow voters who sought to have their absentee and mail-in ballots spoiled at the polling place on Election Day and vote a regular ballot left these electors with their votes subject to the Election Code's provisional ballot challenges, in direct contravention of the Election Code's mandates.

257. Moreover, some counties failed to follow the dictates of the Act 77 and the Election Code which bar electors who had voted an absentee and mail-in ballot from voting any ballot at the polling place, including without limitation a provisional ballot.

258. The result of the County Election Boards' refusal and/or failure to bar voters who had already voted an absentee and mail-in ballot from voting at their polling places was the existence of double votes being casted and counted.

259. On information and belief, Plaintiffs believe that Defendants intend to repeat this practice in the upcoming November 3, 2020 General Election.

260. Defendants have a duty to follow basic minimum safeguards to guard against deprivation of the right to vote by allowing those who are entitled to vote cast regular ballots and by preventing the dilution of validly cast ballots by improperly cast and/or fraudulent ballots.

261. By failing to comply with the Election Code and Act 77, Defendants have failed to enact minimal safeguards against deprivation of the right to vote and thus infringe the right of qualified voters in the Commonwealth of Pennsylvania to a free, fair, and transparent public election process.

262. Defendants have acted and will continue to act under color of state law to violate the right to vote as secured by the First and Fourteenth Amendments to the United States Constitution.

263. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

**COUNT VIX**

**Pennsylvania Equal Protection and Free and Equal Elections  
Pa. Const. art. VII, § 1, art. I, § 28, & art. I, § 5  
Infringement of the Right to Vote Through Improper Voting at Polling Places**

264. Plaintiffs refer to and incorporate Paragraphs 1 through 263 of this Complaint as though the same were repeated at length herein

265. For the same reasons Defendants' failure to follow basic minimum safeguards to guard against deprivation of the right to vote by allowing those who are entitled to vote cast regular ballots and by preventing the dilution of validly cast ballots by improperly cast and/or fraudulent ballots violates the United States Constitution's First and Fourteenth Amendments and its Equal Protection Clause (as stated more fully in Paragraphs 253 through 263 of this Complaint), Defendants' failure to comply with the Election Code and Act 77's provisions concerning who is entitled to vote regular and provisional ballots at the polling place violates the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution and infringes upon the rights of Plaintiffs and all qualified Pennsylvania voters protected thereby.

266. Defendants have acted and will continue to act under color of state law to violate the Equal Protection and Free and Equal Elections Clauses of the Pennsylvania Constitution.

267. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

WHEREFORE, Plaintiffs ask this Court to enter judgment in their favor and provide the following relief:



A. An order or declaration that the return of absentee and mail-in ballots by non-disabled electors to locations other than the respective office of the County Election Boards violates the Pennsylvania Election Code and the United States and Pennsylvania Constitutions;

B. In the alternative to the relief requested in Subparagraph (A), an order or declaration that Defendants must comply with Pennsylvania laws governing notice of changes to polling locations and site criteria for polling locations when establishing locations other than their respective offices to which voters may return absentee and mail-in ballots, and ensure that all counties utilize that option;

C. An order or declaration that the counting of absentee and mail-in ballots that lack an “Official Election Ballot” secrecy envelope, contain on that envelope any text, mark, or symbol which reveals the elector’s identity, political affiliation, or candidate preference, does not include on the outside envelope a completed declaration that is dated and signed by the elector, , and/or are delivered in-person by third-parties for non-disabled voters violates the Pennsylvania Election Code and the United States and Pennsylvania Constitutions;

D. An order or declaration enjoining the enforcement of Election Code Section 417’s residency and “polling place” requirements for poll watchers as a violation of the rights secured by the United States and Pennsylvania Constitutions;

E. An order or declaration mandating that County Election Boards verify the identification and qualification for each applicant of an absentee or mail-in ballot by comparing the application information to the information contained on the applicant’s permanent registration card;

F. An order or declaration mandating that County Election Boards permit those electors who have applied but not voted their absentee and mail-in ballots to vote regular ballots

upon having the electors' non-voted absentee and mail-in ballots spoiled at their polling places, and that County Election Boards deny those electors who have voted their absentee and mail-in ballots from casting any ballot, regular or provisional.

G. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from collecting absentee and mail-in ballots (i) in locations other than in the office of each of the County Election Boards and/or (ii) through unsecured and unmonitored drop boxes and other similar means;

H. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from counting absentee and mail-in ballots that lack an "Official Election Ballot" secrecy envelope, contain on that envelope any text, mark, or symbol which reveals the elector's identity, political affiliation, or candidate preference, do not include on the outside envelope a completed declaration that is dated and signed by the elector, and/or are delivered in-person by third-parties for non-disabled voters;

I. A preliminary and permanent injunction prohibiting Defendants, and all other persons acting in concert with them, from restricting poll watchers, regardless of their county of residence, to be present in all locations where votes are cast, including without limitation where absentee or mail-in ballots are being returned before and on Election Day and at any pre-canvass meetings;

J. A preliminary and permanent injunction requiring the County Election Boards to verify the identification and qualification for each applicant of an absentee or mail-in ballot by comparing the application information to the information contained on the applicant's permanent registration card;

K. A preliminary and permanent injunction requiring the County Election Boards to permit those electors who have applied but not voted their absentee and mail-in ballots to vote regular ballots upon having the electors' non-voted absentee and mail-in ballots spoiled at their polling places, and that County Election Boards deny those electors who have voted their absentee and mail-in ballots from casting any ballot, regular or provisional.

L. Plaintiffs' reasonable costs and expenses, including attorneys' fees; and

M. All other relief that Plaintiffs are entitled to and that the Court deems just and proper.

Date: July 27, 2020

Respectfully submitted,

PORTER WRIGHT MORRIS & ARTHUR LLP

By: /s/ Ronald L. Hicks, Jr.

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*Counsel for Plaintiffs*

**VERIFICATION**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that I have reviewed the foregoing Complaint and that the factual allegations are true and correct.

Date: July 27, 2020

/s/ James J. Fitzpatrick  
James J. Fitzpatrick, PA EDO Director  
Donald J. Trump for President, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Amended Complaint to be filed this 27th day of July, 2020, via ECF, which system will serve notice of same on all parties registered to receive same via the ECF system. For any party who has yet to enter an appearance, the undersigned certifies that a copy of the foregoing filing will be served on that party via U.S. Mail and a copy sent to the County Solicitor, if known, via email or fax.

Respectfully submitted,

PORTER WRIGHT MORRIS & ARTHUR LLP

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*Counsel for Plaintiffs*

# **EXHIBIT 1**

**From:** Marks, Jonathan <[jmarks@pa.gov](mailto:jmarks@pa.gov)>  
**Sent:** Thursday, May 28, 2020 7:44 PM  
**To:** Marks, Jonathan <[jmarks@pa.gov](mailto:jmarks@pa.gov)>  
**Subject:** Important DOS Email re: Absentee/Mail-in Ballot Canvass  
**Importance:** High

To all county election officials.

I hope you are all safe and well.

The department has received some questions from county officials in recent days regarding the proper disposition of absentee or mail-in ballots cast by voters who did not enclose their voted ballots in the official election ballot envelope ("secrecy" or "inner" envelope).

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.

Please consult with your solicitor about your plans to deal with such instances should they occur during the pre-canvass or canvass.

Thank you for everything you are doing to administer the 2020 Primary while coping with the unique challenges presented by COVID-19.

Kind regards,

Jonathan M. Marks  
Deputy Secretary for Elections & Commissions  
Pennsylvania Department of State  
302 North Office Building | Harrisburg, PA 17120  
☎ 717.783.2035 📠 717.787.1734  
✉ [jmarks@pa.gov](mailto:jmarks@pa.gov)

# **EXHIBIT D**



**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR PRESIDENT, ) CIVIL ACTION  
INC.; GLENN THOMPSON; MIKE KELLY; )  
JOHN JOYCE; GUY RESCHENTHALER; )  
REPUBLICAN NATIONAL COMMITTEE; )  
MELANIE STRINGHILL PATTERSON; and )  
CLAYTON DAVID SHOW, )

Plaintiffs, )

v. )

No. 2-20-cv-966

KATHY BOOCKVAR, in her capacity as )  
Secretary of the Commonwealth of )  
Pennsylvania; ADAMS COUNTY BOARD )  
OF ELECTIONS; ALLEGHENY COUNTY )  
BOARD OF ELECTIONS; ARMSTRONG )  
COUNTY BOARD OF ELECTIONS; )  
BEAVER COUNTY BOARD OF )  
ELECTIONS; BEDFORD COUNTY BOARD )  
OF ELECTIONS; BERKS COUNTY BOARD )  
OF ELECTIONS; BLAIR COUNTY BOARD )  
OF ELECTIONS; BRADFORD COUNTY )  
BOARD OF ELECTIONS; BUCKS )  
COUNTY BOARD OF ELECTIONS; )  
BUTLER COUNTY BOARD OF )  
ELECTIONS; CAMBRIA COUNTY BOARD )  
OF ELECTIONS; CAMERON COUNTY )  
BOARD OF ELECTIONS; CARBON )  
COUNTY BOARD OF ELECTIONS; )  
CENTRE COUNTY BOARD OF )  
ELECTIONS; CHESTER COUNTY BOARD )  
OF ELECTIONS; CLARION COUNTY )  
BOARD OF ELECTIONS; CLEARFIELD )  
COUNTY BOARD OF ELECTIONS; )  
CLINTON COUNTY BOARD OF )  
ELECTIONS; COLUMBIA COUNTY )  
BOARD OF ELECTIONS; CRAWFORD )  
COUNTY BOARD OF ELECTIONS; )  
CUMBERLAND COUNTY BOARD OF )  
ELECTIONS; DAUPHIN COUNTY BOARD )  
OF ELECTIONS; DELAWARE COUNTY )  
BOARD OF ELECTIONS; ELK COUNTY )  
BOARD OF ELECTIONS; ERIE COUNTY )  
BOARD OF ELECTIONS; FAYETTE )  
COUNTY BOARD OF ELECTIONS; )

FOREST COUNTY BOARD OF )  
ELECTIONS; FRANKLIN COUNTY )  
BOARD OF ELECTIONS; FULTON )  
COUNTY BOARD OF ELECTIONS; )  
GREENE COUNTY BOARD OF )  
ELECTIONS; HUNTINGDON COUNTY )  
BOARD OF ELECTIONS; INDIANA )  
COUNTY BOARD OF ELECTIONS; )  
JEFFERSON COUNTY BOARD OF )  
ELECTIONS; JUNIATA COUNTY BOARD )  
OF ELECTIONS; LACKAWANNA )  
COUNTY BOARD OF ELECTIONS; )  
LANCASTER COUNTY BOARD OF )  
ELECTIONS; LAWRENCE COUNTY )  
BOARD OF ELECTIONS; LEBANON )  
COUNTY BOARD OF ELECTIONS; )  
LEHIGH COUNTY BOARD OF )  
ELECTIONS; LUZERNE COUNTY BOARD )  
OF ELECTIONS; LYCOMING COUNTY )  
BOARD OF ELECTIONS; MCKEAN )  
COUNTY BOARD OF ELECTIONS; )  
MERCER COUNTY BOARD OF )  
ELECTIONS; MIFFLIN COUNTY BOARD )  
OF ELECTIONS; MONROE COUNTY )  
BOARD OF ELECTIONS; MONTGOMERY )  
COUNTY BOARD OF ELECTIONS; )  
MONTOUR COUNTY BOARD OF )  
ELECTIONS; NORTHAMPTON COUNTY )  
BOARD OF ELECTIONS; )  
NORTHUMBERLAND COUNTY BOARD )  
OF ELECTIONS; PERRY COUNTY BOARD )  
OF ELECTIONS; PHILADELPHIA )  
COUNTY BOARD OF ELECTIONS; PIKE )  
COUNTY BOARD OF ELECTIONS; )  
POTTER COUNTY BOARD OF )  
ELECTIONS; SCHUYLKILL COUNTY )  
BOARD OF ELECTIONS; SNYDER )  
COUNTY BOARD OF ELECTIONS; )  
SOMERSET COUNTY BOARD OF )  
ELECTIONS; SULLIVAN COUNTY )  
BOARD OF ELECTIONS; SUSQUEHANNA )  
COUNTY BOARD OF ELECTIONS; TIOGA )  
COUNTY BOARD OF ELECTIONS; UNION )  
COUNTY BOARD OF ELECTIONS; )  
VENANGO COUNTY BOARD OF )  
ELECTIONS; WARREN COUNTY BOARD )

OF ELECTIONS; WASHINGTON COUNTY )  
 BOARD OF ELECTIONS; WAYNE )  
 COUNTY BOARD OF ELECTIONS; )  
 WESTMORELAND COUNTY BOARD OF )  
 ELECTIONS; WYOMING COUNTY )  
 BOARD OF ELECTIONS; and YORK )  
 COUNTY BOARD OF ELECTIONS, )  
 )  
 Defendants. )

**MOTION TO INTERVENE BY THE PENNSYLVANIA STATE DEMOCRATIC PARTY  
 AND INDIVIDUAL CANDIDATES AND VOTERS UNDER FEDERAL RULE OF CIVIL  
 PROCEDURE 24**

Pursuant to Fed. R. Civ. P. 24(a) and (b) of the Federal Rules of Civil Procedure, non-parties the Pennsylvania State Democratic Party, Congressman Dwight Evans, State Senators Sharif Street and Vincent Hughes, State Representatives Danillo Burgos, Morgan Cephas, Austin Davis, Isabella Fitzgerald, Edward Gainey, Jordan Harris, Mary Isaacson, Malcolm Kenyatta, Patty Kim, Stephen Kinsey, Peter Schweyer, and candidates for office Nina Ahmad, Anton Andrew, Janet Diaz, Manuel M. Guzman, Jr., Rick Krajewski, (“Candidates”), and State Senators Art Haywood and Anthony Williams (“Non-Candidate Legislators”) (collectively “Intervenors”) move for leave to intervene in this action to defend against claims of violations of the United States Constitution, Pennsylvania Constitution, and Pennsylvania Election Law asserted by Plaintiffs Donald J. Trump for President, Inc., Glenn Thompson, Mike Kelly, John Joyce, Guy Reschenthaler, the Republican National Committee, Melanie Stringhill Patterson, and Clayton David Show (collectively “Plaintiffs”) in the above-captioned matter. In support of this Motion, Intervenors incorporate by reference its Brief in Support of its Motion to Intervene.

Further, pursuant to Fed. R. Civ. P. 24(c), Intervenors request this Court deem its Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) filed.

Respectfully submitted,

/s/ A. Michael Pratt

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*Attorneys for Intervenors*

Dated: July 13, 2020

**CERTIFICATE OF SERVICE**

I, A. Michael Pratt, hereby certify that on July 13, 2020, I caused a true and correct copy of the foregoing Motion to Intervene, Brief in Support, Proposed Order, and Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Brief in Support, and Proposed Order to the Motion to Dismiss to be served on counsel of record for Plaintiffs and Defendants listed on the docket via the Court's ECF system.

*/s/ A. Michael Pratt* \_\_\_\_\_  
A. Michael Pratt

# **EXHIBIT E**



## **BACKGROUND**

On June 29, 2020, Plaintiffs, who are Republican candidates or electors in the upcoming November 2020 general election, filed this lawsuit seeking declaratory and injunctive relief in advance of the election. [ECF 4]. They subsequently amended their complaint on July 27, 2020. [ECF 234]. Defendants are the Secretary of the Commonwealth, as well as the boards of elections for all 67 counties in Pennsylvania.

Two weeks after the lawsuit was filed, on July 13, 2020, the Pennsylvania State Democratic Party and various Democratic candidates and non-candidate legislators filed a motion to intervene, arguing that they have a distinct interest in “protecting Democratic candidates in competing in a free and fair election and further protecting registered Democratic voters’ rights to an effective vote.” [ECF 85, p. 14].

On July 15, 2020, the NAACP Pennsylvania State Conference, Common Cause Pennsylvania, League of Women Voters of Pennsylvania, and several individual electors moved to intervene, arguing that they have a distinct interest in “protecting their own and their members’ rights to vote safely in the midst of a pandemic[.]” [ECF 104, p. 19].

On July 20, 2020, Citizens for Pennsylvania’s Future and the Sierra Club filed their motion to intervene, arguing that they have a distinct interest “in empowering traditionally underrepresented communities to participate in the electoral process” through mail-in voting. [ECF 138, p. 12].

Finally, on July 24, 2020, the Pennsylvania Alliance for Retired Americans and several retired voters moved to intervene, arguing that they have a distinct interest in “safely exercis[ing] their right to vote through the use of mail ballots” delivered to drop-boxes. [ECF 200, p. 15].



All proposed intervenors have argued that they are entitled to intervene as of right or permissively under Federal Rule of Civil Procedure 24.

Plaintiffs have opposed the final three motions to intervene [ECF 103; ECF 137; ECF 199], advancing essentially the same arguments in each brief. They argue that the proposed intervenors fail to meet Rule 24's requirements for intervention as a matter of right or by permission, since proposed intervenors "lack a discrete, substantial, legally protectable interest in the outcome of this suit, and they cannot overcome the presumption that Defendants and/or other intervening parties are adequately representing their interests." [ECF 177, p. 2; ECF 224, p. 2; ECF 304, p. 2]. They also argue that the proposed intervenors fail to identify the claims and defenses to which they are a proper party as required by Rule 24(c). [ECF 177, p. 1; ECF 224, p. 1; ECF 304, p. 1].

The motions are fully briefed and ready for disposition. After considering the papers, the Court finds, in its discretion, that all proposed intervenors should be granted leave to permissively intervene.

### **DISCUSSION & ANALYSIS**

Rule 24 provides two procedural avenues for an entity that was not named as a party to a lawsuit to seek to insert itself into the proceedings. Those are designated under the Rule as "intervention of right," Fed. R. Civ. P. 24(a), and "permissive intervention," Fed. R. Civ. P. 24(b).

To intervene as a matter of right under Rule 24(a)(2), the proposed intervenor must demonstrate: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the

litigation.” *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 315 (3d Cir. 2005) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

Permissive intervention under Rule 24(b), on the other hand, allows for intervention under more relaxed conditions. The Rule permits a party to intervene by demonstrating: (1) a timely application for intervention; and (2) that the party’s claim or defense shares a common question of law or fact with the underlying action. *See* Fed. R. Civ. P. 24(b)(1)(B). When reviewing a request for permissive intervention, the court must also consider whether permissive intervention would “unduly delay or prejudice the adjudication of the rights of the original parties.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779 n. 6 (3d Cir.1994) (quoting Fed. R. Civ. P. 24(b)(3)).

“Whether to allow a party to permissively intervene is left to the sound discretion of the Court.” *Worthington v. Bayer Healthcare, LLC*, Civ. No. 11–2793(ES)(CLW), 2011 WL 6303999, at \*8 (D.N.J. Dec. 15, 2011) (citation omitted); *Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1124 (3d Cir. 1992) (“[A]s the doctrine’s name suggests, [it] is within the discretion of the district court” whether to grant permissive intervention) (citation omitted). “The purpose of permissive intervention is to avoid a multiplicity of suits by settling related controversies in a single action.” *Wolf by Wolf v. Procter & Gamble Co.*, 555 F.Supp. 613, 627–28 (D.N.J. 1982) (citation omitted).

Here, the Court need not address intervention by right, since permissive intervention is appropriate—the proposed intervenors’ requests to intervene are timely, the grounds they present share a common question of law or fact with the underlying action, and there is no undue delay or prejudice involved.

First, the proposed intervenors meet the threshold inquiry of whether their motions are timely. *See NAACP v. New York*, 413 U.S. 345, 365 (1973).

“Rule 24 does not set forth a specific time limit governing the filing of a motion to intervene. Therefore, the determination of whether the motion has been timely filed is left to the discretion of the trial court.” *League of Women Voters of Haverford Twp. v. Bd. of Comm’rs. of Haverford Twp.*, No. CIV.A. 86-0546, 1986 WL 3868, at \*2 (E.D. Pa. Mar. 27, 1986). Here, it is apparent that all proposed intervenors moved in a timely way; indeed, they all moved in the few weeks between when Plaintiffs filed the initial complaint and when they amended. *See id.* (“There is no question that the applicants have made a timely motion to intervene having filed their motion within one month of the filing of plaintiff’s complaint. This is not a case where the applicants have sat on their rights or failed to protect their interests.”); *Ass’n for Fairness in Bus., Inc. v. New Jersey*, 193 F.R.D. 228, 232 (D.N.J. 2000) (permissive intervention granted where case was in preliminary stage of litigation).

Second, the proposed intervenors’ interests have a question of law or fact in common with this lawsuit. Namely, the proposed intervenors’ interest in the constitutionality of Pennsylvania’s voting procedures, mainly through the use of drop-boxes for mail-in voting, goes to the heart of Plaintiffs’ action. *See League of Women Voters*, 1986 WL 3868, at \*2 (residents of township who were registered to vote permissively allowed to intervene since “[t]heir claim concerning the Board of Commissioners’ failure to redistrict is identical to the claim raised by the original parties”); *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684, 688 (W.D. Pa. 2003) (Conti, J.) (noting intervention of the Pennsylvania Democratic State Committee to Republican political candidates’ challenge against county board of elections regarding third-party delivery of absentee ballots); *Stein v. Cortes*, 223 F. Supp. 3d 423, 429 (E.D. Pa. 2016) (noting the intervention of the Republican Party to a lawsuit demanding a recount for the 2016 general election).

Third, intervention at this time will not unduly delay or prejudice the adjudication of the rights of Plaintiffs, since the case has not progressed to a stage where intervention would be burdensome. Indeed, Plaintiffs only filed their amended complaint last week. *See League of Women Voters*, 1986 WL 3868, at \*2; *E.E.O.C. v. Northwestern Human Servs.*, No. Civ.A. 04-CV-4531, 2005 WL 2649324, at \*4 (E.D. Pa. Oct. 14, 2005) (“Defendant is unlikely to experience any undue delay or prejudice. Discovery is ongoing[.]”). While the hearing on Plaintiffs’ requests for declaratory relief is about two months away, the proposed intervenors will nonetheless be able to fully comply with this Court’s pre-hearing scheduling order, without delaying or prejudicing Plaintiffs’ rights, including preparation for the hearing.

Finally, the Court notes that Plaintiffs argue that some of the proposed intervenors violated Rule 24(c). Rule 24(c) provides that a proposed intervenor must set forth a “pleading that sets out the claim or defense for which intervention is sought.” However, the Court finds that the proposed intervenors’ failure to attach such a document is not fatal to their motions “because ‘the failure to comply with the Rule 24(c) requirement for a pleading is a purely technical defect which does not result in the disregard of any substantial right.’” *PPL Energyplus, LLC v. Solomon*, No. CV 11-745 (PGS), 2011 WL 13128622, at \*3 (D.N.J. July 19, 2011) (quoting *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009)). Noncompliance with Rule 24(c) is not fatal if the potential intervenor clearly states the grounds for intervention, which is what each proposed intervenor has done here. *See Pereira v. Foot Locker, Inc.*, No. 07-cv-2157, 2009 WL 4673865, at \*5 (E.D. Pa. Dec. 7, 2009) (“The interpretation of this rule is generally liberal, particularly when the actions of the movant have provided the basis and nature for their intervention.”) (citation omitted).

Under these circumstances, permissive intervention is appropriate.

**CONCLUSION**

AND NOW, this 3<sup>rd</sup> day of August, 2020, the Court hereby **ORDERS** that proposed intervenors' motions to intervene, [ECF 83; ECF 103; ECF 137; ECF 199], are **GRANTED**.

BY THE COURT:

/s/ J. Nicholas Ranjan

United States District Judge

# **EXHIBIT F**



**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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No. 2:20-cv-966

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DONALD J. TRUMP FOR PRESIDENT, INC., *et al.*,

Plaintiffs

v.

KATHY BOOCKVAR, in her capacity as Secretary of the  
Commonwealth of Pennsylvania, *et al.*,

Defendants.

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**ORDER**

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**AND NOW**, this **23<sup>rd</sup> day of August, 2020**, and as set forth more fully in the accompanying Opinion,

**IT IS HEREBY ORDERED** that the motions to dismiss filed by Defendants and the various Intervenors [ECF 246; ECF 260; ECF 261; ECF 263; ECF 272; ECF 274; ECF 278; ECF 280; ECF 282; ECF 283; ECF 287; ECF 288; ECF 289; ECF 294; ECF 296; ECF 298; ECF 321] are **GRANTED** in part. They are granted only to the extent the motions ask this Court to abstain from rendering a final decision on the merits under the doctrine set forth in *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). Because the Court is abstaining under *Pullman*, it has not reached a determination on any other arguments raised in

Defendants' and Intervenors' motions, and therefore holds the remaining aspects of those motions in abeyance.

**IT IS FURTHER ORDERED** that the Court's July 17, 2020, Scheduling Order [ECF 124] is **VACATED**, and all remaining requirements and deadlines set forth in that order, including the evidentiary hearing scheduled for September 22 and 23, 2020, are hereby **CANCELLED**.

**IT IS FURTHER ORDERED** that the case is **STAYED**. The Court's entry of a stay is without prejudice to any party moving to lift the stay after either: (i) resolution of the unsettled state-law issues identified in the Court's Opinion by the Pennsylvania Commonwealth Court or the Pennsylvania Supreme Court; or (ii) a prolonged delay by the state courts in resolving the unsettled state-law issues (*i.e.*, if no decision has been entered by the state courts by October 5, 2020). Under the latter scenario, any motion to lift the stay shall be limited to the claims that are not based on unsettled issues of state law. That is, the movant could only ask to proceed on the following claims from the Amended Complaint [ECF 234]: (i) Plaintiffs' third-party ballot-delivery claims that are set forth as parts of Counts I, II and III; (ii) Plaintiffs' facial challenge to Pennsylvania's poll-watching residency restriction set forth in Counts IV and V; and (iii) Plaintiffs' claims for improper provisional voting as set forth in Counts VIII and IX.

BY THE COURT:

*/s/ J. Nicholas Ranjan*  
United States District Judge



# **EXHIBIT G**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR	)	
PRESIDENT, INC.; <i>et al.</i> ,	)	<i>Electronically Filed</i>
	)	
Plaintiffs,	)	Civil Action
	)	
v.	)	No.: 2-20-CV-966
	)	
KATHY BOOCKVAR; <i>et al.</i> ,	)	
	)	Judge J. Nicholas Ranjan
Defendants.	)	

**PLAINTIFFS’ MOTION TO MODIFY STAY ORDER (ECF # 410)  
AND MOTION FOR LIMITED PRELIMINARY INJUNCTIVE RELIEF**

Recognizing that this is the only currently pending case in Pennsylvania in which they are all parties, and in light of the imminent onset of voting in Pennsylvania and recent significant developments involving both guidance from Defendant Kathy Boockvar, Secretary of the Commonwealth, and actions pending in the Commonwealth’s courts, Plaintiffs ask this Court to modify the stay entered by this Court on August 23, 2020, by:

- (a) Granting Plaintiffs limited, preliminary injunctive relief ordering Defendants to segregate and maintain intact all cast absentee and mail-in ballots that (i) are returned or collected through drop-boxes, (ii) lack an inner secrecy envelope or contain marks, text, or symbols thereon, or (iii) constitute non-disabled voters’ absentee and mail-in ballots that have been delivered in-person by someone other than the non-disabled voters;
- (b) Granting Plaintiffs limited, preliminary injunctive relief ordering Defendants to refrain from pre-canvassing or canvassing all cast absentee and mail-in ballots that (i) are returned or collected through drop-boxes, (ii) lack an inner secrecy envelope or contain marks, text, or symbols thereon, or (iii) constitute non-disabled voters’ absentee and mail-in ballots that have been delivered in-person by someone other than the non-disabled voters until further order of this Court;
- (c) Granting Plaintiffs limited, preliminary injunctive relief ordering Defendants to retain and make available for periodic review all digital images and video to the extent any video security surveillance system or internal camera is available and used to monitor drop-boxes or other sites and locations, including a county election office, used for the return and collection of cast absentee and mail-in ballots; and

- (d) Modifying the stay entered on August 23, 2020, to permit it to be lifted on September 14, 2020, rather than October 5, 2020, with respect to all settled state-law issues <sup>1</sup>

Without this relief, Defendants could begin irreversibly commingling potentially illegally cast ballots with other ballots from mid-to-late September 2020. Therefore, to prevent irreparable, constitutional harm to them and their fundamental rights, including without limitation their right to free, fair, and honest elections, and to preserve the ability to obtain an accurate count of the validly cast ballots in the November 3, 3030 General Election if this Court or any other court determines that any such ballots have been illegally cast, Plaintiffs ask this Court to modify the stay in its August 23, 2020 Order (ECF # [410](#)) to provide for limited, preliminary injunctive relief and to modify the stay lifting date from October 5, 2020 to September 14, 2020.

## **I. CASE STATEMENT.**

### **A. Plaintiffs And Their Claims.**

1. Plaintiffs<sup>2</sup> commenced this action on June 29, 2020. *See* Verified Complaint (ECF # [4](#)).
2. In their complaint, which was amended on July 27, 2020, Plaintiffs allege various federal and state constitutional violations stemming from Pennsylvania's recent implementation

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<sup>1</sup> In their Motion for a Speedy Declaratory Judgment Hearing and Expedited Discovery (ECF #[6](#)), Plaintiffs reserved the right to seek appropriate injunctive relief at such time as the November 3, 2020, General Election approached and irreparable harm existed. *See* Motion (ECF #[6](#)), ¶ 9, n. 3. As this Motion to Modify and/or Lift the Stay Order explains, that time has now arisen given the two sets of official guidance that were issued to the County Election Boards and provided to Plaintiffs via a supplemental discovery production on Friday, August 21, 2020, the pending delivering or mailing of ballots upon the General Election ballot's certification and availability, and the announced plans by some counties to install by October 1, 2020, drop-boxes for the return and collection of absentee and mail-in ballots. *See infra.*, pp. 4-18.

<sup>2</sup> Plaintiffs are the principal committee for the reelection campaign of President Donald J. Trump, the Republican National Committee, four members of the United States House of Representatives, representing the 13th, 14th, 15th, and 16th Congressional Districts of Pennsylvania and seeking reelection to another term in office, and two qualified registered electors residing in Pennsylvania who would like to poll watch in counties outside their residential counties. *See* Verified Amended Complaint (ECF # [234](#)), ¶¶ 8-15.

of its “no-excuse” mail-in voting scheme and three sets of formal guidance by Secretary Boockvar and the Pennsylvania Department of State, which implementation and guidance Plaintiffs assert led, and will continue to lead, to vote dilution (*i.e.*, the casting of unlawful ballots which, when counted, dilute the votes of lawfully cast ballots). *Id.* at ¶¶ 103-164, 193-205, 237-248, & 253-263. Further, Plaintiffs allege that the inconsistent implementation of the Election Code and Secretary Boockvar’s guidance across Pennsylvania’s 67 counties violate Plaintiffs’ federal and state equal protection and other constitutional rights. *Id.* at ¶¶ 206-222 & 237-267. Additionally, Plaintiffs allege that due to several county election boards’ intended use of drop-boxes in the upcoming November 3, 2020, General Election for the return and collection of absentee and mail-in ballots – which represented close to 40% of the cast ballots in the 2020 Primary Election – the Election Code’s restrictions on poll watcher residency and restrictions limiting poll watchers to watch only where in-person voting occurs are unconstitutional. *Id.* at ¶¶ 165-189 & 223-236.

3. In their complaint, Plaintiffs seek both declaratory and injunctive relief from the policies adopted by Secretary Boockvar and implemented by the Defendant County Election Boards which are contrary to the Pennsylvania Election Code and violate their federal and state constitutional rights. *Id.* at pp. 71-73.

**B. Some Defendants’ Rule 12 Motions And This Court’s August 23, 2020 Order.**

4. Defendants are Secretary Boockvar and all 67 of Pennsylvania’s county election boards. *See* Verified Amended Complaint (ECF # [234](#)), ¶¶ 16-17.

5. Secretary Boockvar accepted service of the summons and complaint on July 9, 2020. *See* Acceptances of Service (ECF ## [30](#) & [33](#)). After Plaintiffs incurred substantial expense and time, the remaining defendants were served between July 6, 2020, and July 17, 2020. *See* Returns of Service (ECF ## [119](#), [133](#), [140](#), [141](#), [164](#), [178](#), [223](#), [236](#), & [243](#)).

6. After this Court granted intervention to several non-parties, the Intervenors, Secretary Boockvar, and approximately 44 of the 67 County Election Boards moved to dismiss Plaintiffs' claims. See ECF ##[246](#); [260](#); [261](#); [263](#); [272](#); [274](#); [278](#); [280](#); [282](#); [283](#); [287](#); [288](#); [289](#); [294](#); [296](#); [298](#); & [321](#). As part of their motions, the Moving Defendants argued that this Court should abstain from rendering a decision on the merits under the doctrine set forth in [R.R. Comm'n of Tex. v. Pullman Co.](#), 312 U.S. 496 (1941). *Id.*

7. On August 23, 2020, this Court entered an Order granting the Moving Defendants' Rule 12 Motions but only to the extent that it would abstain from rendering a final decision under *Pullman*. See 08/23/2020 Order (ECF #[410](#)), p. 1.

8. Further, as part of its August 23, 2020 Order, this Court stayed this case "without prejudice" to any party moving to lift the stay as follows:

... The Court's entry of a stay is without prejudice to any party moving to lift the stay after either: (i) resolution of the unsettled state-law issues identified in the Court's Opinion by the Pennsylvania Commonwealth Court or the Pennsylvania Supreme Court; or (ii) a prolonged delay by the state courts in resolving the unsettled state-law issues (*i.e.*, if no decision has been entered by the state courts by October 5, 2020). Under the latter scenario, any motion to lift the stay shall be limited to the claims that are not based on unsettled issues of state law. That is, the movant could only ask to proceed on the following claims from the Amended Complaint [ECF 234]: (i) Plaintiffs' third-party ballot-delivery claims that are set forth as parts of Counts I, II and III; (ii) Plaintiffs' facial challenge to Pennsylvania's poll-watching residency restriction set forth in Counts IV and V; and (iii) Plaintiffs' claims for improper provisional voting as set forth in Counts VIII and IX.

See 08/23/2020 Order (ECF #[410](#)), p. 2.

**C. The Pennsylvania Department Of State's August 19, 2020 Guidance And Other Pertinent Facts Disclosed Through Discovery.**

9. Prior to the entry of this Court's August 23, 2020 Order, the parties were engaged in fact discovery which was scheduled to be completed by August 26, 2020, followed by expert

discovery to be completed by September 9, 2020. *See* Scheduling Order (ECF # [124](#)), “III. Discovery Deadlines,” pp. 3-6; Amended Scheduling Order (ECF # [334](#)), “II. Discovery Scope and Deadlines,” pp. 1-2.

10. As part of their written discovery responses served in this case after the amended complaint was filed, Secretary Boockvar and the County Election Boards have confirmed that they cannot answer questions about how many counted absentee and mail-in ballots were either delivered via drop-boxes or other collection methods or lacked an inner secrecy envelope or contained marks, text, or symbols on such envelope during the June 2, 2020 Primary Election, because the Secretary did not track that information as part of her Act 35 Report and the County Election Boards did not segregate such ballots but instead commingled and counted them during the pre-canvass and canvass<sup>3</sup> with all the other ballots that were cast during the June 2, 2020 Primary Election. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh. “C-1”), pp. 95:22 - 96:10; 97:15-25; 209:18 – 210:6; 08/19/2020 Dep. Tr. of J. Marks (App. Exh. “A-1”), pp. 229:19 – 230:1; 233:10-15; 241:2-22; 245:17 – 247:6.

11. Other pertinent facts disclosed during discovery indicate that Defendants plan to utilize drop boxes and to clothe, process, and count ballots lacking an inner secrecy envelope notwithstanding the requirements of Pennsylvania’s election laws and the pendency of this and other lawsuits concerning the legality of those practices.

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<sup>3</sup> As defined by the Election Code, following the enactment of Act 77, the term “pre-canvass” refers to “the inspection and opening of all envelopes containing official absentee ballots or mail-in ballots, the removal of such ballots from the envelopes and the counting, computing and tallying of the votes reflected on the ballots[,] ... [but] ... does not include the recording or publishing of the votes reflected on the ballots.” [25 P.S. § 2602\(q.1\)](#). In contrast, the term “canvass” means “the gathering of ballots after the final pre-canvass meeting and the counting, computing and tallying of the votes reflected on the ballots.” *Id.* at [§ 2602\(a.1\)](#).

12. Taken together, these facts suggest that Defendants intend to proceed with the irreversible commingling of potentially illegally cast ballots with validly cast ballots during the upcoming General Election unless enjoined from doing so by this Court.

13. During the August 19, 2020 deposition of Jonathan Marks, the Deputy Secretary for Elections and Commissions at the Pennsylvania Department of State,<sup>4</sup> Plaintiffs learned that Secretary Boockvar was reviewing certain “guidance” to the County Election Boards that had been drafted for the upcoming November 3, 2020 General Election. However, the Deputy Secretary testified that the “guidance” was not finalized as of the time of his deposition. *See* 08/19/2020 Dep. Tr. of J. Marks (App. Exh. “A-1”), pp. 188:22 - 189:11.

14. Two days later, approximately twenty minutes before her deposition was scheduled to start, Secretary Boockvar produced two written pieces of guidance, both dated August 19, 2020, as a supplement to her discovery responses. *See* Aug. 21, 2020 Email Message from K. Bokhan; Pa. Dept. of State, “Pennsylvania Absentee and Mail-In Ballot Return Guidance,” ver. 1 (Aug. 19, 2020) [bate-stamped as “PADOS000750.000001-8” and available at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_BallotReturn\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_BallotReturn_Guidance_1.0.pdf)]; Pa. Dept. of State, “Pennsylvania Guidance for Missing Official Ballot Envelopes (‘Naked Ballots’),” ver. 1 (Aug. 19, 2020) [bate-stamped as “PADOS000751.000001-2” and available at [https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS\\_NakedBallot\\_Guidance\\_1.0.pdf](https://www.dos.pa.gov/VotingElections/OtherServicesEvents/Documents/PADOS_NakedBallot_Guidance_1.0.pdf)] (all attached collectively as App. Exh. “B-1” through “B-3”).

15. The two documents produced on August 21, 2020 set forth the Pennsylvania Department of State’s official guidance on how a county election board can use drop-boxes for the

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<sup>4</sup> According to Secretary Boockvar, Deputy Secretary Jonathan Marks is “the person in charge of the elections in Pennsylvania under [her] watch.” *See* 08/21/2020 Dep. Tr. of K. Boockvar (attached to the Appendix in Support of this Motion as Exhibit (“App. Exh.”) “C-1”), pp. 52:22–53:6.

return and collection of absentee and mail-in ballots, and what a county election board should do if it receives an absentee or mail-in ballot that lacks an inner secrecy envelope. *See* App. Exh. B-2 & B-3. In essence, Secretary Boockvar and the Pennsylvania Department of State encourage the County Election Boards to use drop-boxes for the return and collection of absentee and mail-ballots and to clothe, process, and count all absentee and mail-in ballots that lack inner secrecy envelopes. *Id.*

16. The Naked Ballots Guidance represents a material change in the position taken by the Pennsylvania Department of State in the May 28, 2020, and the June 1, 2020, email messages in which Secretary Boockvar and the Department of State portrayed the preliminary decision to count such ballots as being based upon an inference that a voter “forgot” or “inadvertently fail[ed] to insert” his or her ballot into the secrecy envelope. *See* Verified Amended Complaint (ECF # [234](#)), ¶¶ 154-155, & Exh. 1. Now, under the August 19, 2020 guidance, the Secretary and the Department of State discard any requirement of evidence of voter intent and take “the ... position that naked ballots should be counted pursuant to the Pennsylvania Election Code, furthering the Right to Vote under the Pennsylvania and United States Constitutions[,]” regardless of the reason for that deficiency. Secretary Boockvar further opines that “[t]he failure to include the inner envelope (‘Secrecy Envelope’) does not undermine the integrity of the voting process[,]” and that “no voter should be disenfranchised for failing to place their ballot in the official election ballot envelope before returning it to the county board of election.” *See* 08/19/2020 Pennsylvania Guidance for Missing Official Election Ballot Envelopes (“Naked Ballots”) (App. Exh. “B-3”), p. 2. *See also* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 131:23 – 136:21.

17. Secretary Boockvar issued the Naked Ballots Guidance even though she concedes that when a ballot without an inner secrecy envelope is placed inside an outer envelope with an elector’s completed declaration, that ballot – and its related vote – can then be tied to an envelope



which has a text, mark, or symbol on it that identifies the elector. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 118:4 – 119:17. Further, Secretary Boockvar admits that neither she nor, to her knowledge, anyone from the Pennsylvania Department of State or Governor Wolfe’s administration had any discussions with the General Assembly about eliminating the inner secrecy envelope requirement as part of an elector’s mandatory requirements for casting an absentee or mail-in ballot. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 108:8-25 – 110:17 & 115:5-11. Further, in a June 30, 2020 email message that was produced for the first time on August 10, 2020, Secretary Boockvar stated that she doubts “highly unfortunately” that the General Assembly “would have the appetite to eliminate the secrecy envelopes” from Pennsylvania’s absentee and mail-in voting scheme. *See* 06/30/2020 Email Messages b/n K. Boockvar and N. Custodio (bate-stamped as PADOS000384.000001-2 and attached as App. Exh. “D”). Finally, both Secretary Boockvar and Deputy Secretary Marks acknowledged in their depositions taken last week that the language under Act 77 which sets forth the General Assembly’s requirements for what an elector must do to cast an absentee or mail-in ballot is the exact same language that was in place for absentee voting before the passage of Act 77. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 103:16 – 115:4; K. Boockvar Dep. Exhs. 6 (App. Exh. C-2), 7 (App. Exh. C-3), & 8 (App. Exh. C-4); 08/19/2020 Dep. Tr. of J. Marks (App. Exh. “A-1”), pp. 45:19 - 51:1 & 74:7 – 80:16; J. Marks Dep. Exhs. 5 (App. Exh. A-2), 6 (App. Exh. A-3), 10 (App. Exh. A-4), 11 (App. Exh. A-5), 12 (App. Exh. A-6), & 13 (App. Exh. A-7). *See also* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 148:21-150:16; K. Boockvar Dep. Exh. 13 (App. Exh. C-5) (in discussing her summary sent on November 25, 2019, Secretary Boockvar concedes that nothing in Act 77 changed the procedures for how a voter must cast their absentee or mail-in ballot in order for it to be counted, and that the first time the Department of State had ever taken the position that an

absentee or mail-in ballot without an inner secrecy envelope could be counted was in the May 28, 2020, email message and the August 19, 2020, Naked Ballots Guidance).

18. At her deposition, Secretary Boockvar acknowledged that before issuing the Naked Ballots Guidance, she had “never read” and “still had not read” the Pennsylvania Supreme Court’s 2004 decision of [\*In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election\*, 843 A.2d 1223 \(Pa. 2004\)](#). See 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 87:8 – 88:19. In that case, the Pennsylvania Supreme Court declared that “clear mandates of the Election Code” cannot be ignored under the guise of liberally construing the right to vote. [\*Canvass of Absentee Ballots\*, 843 A.2d at 1231](#). Moreover, in Election Code Section 3146.6(a) (which language is unchanged by Act 77), “[t]he word ‘shall’ carries an imperative or mandatory meaning.” *Id.* Further, “[u]nder the Statutory Construction Act, if the plain language of the statute is unambiguous, [a court] should not seek to avoid the clear command based upon a consideration of perceived intent or purpose.” *Id.* Accordingly, the Supreme Court held that (a) “the substantive provision of the Election Code” cannot be ignored, especially when they “are necessary for the preservation of secrecy and the sanctity of the ballot and must therefore be observed – particularly where ... they are designed to reduce fraud[,]” and (b) that ballots cast “in contravention of [a] mandatory provision are void.” [\*Id.\* at 1234](#).

19. Also, Secretary Boockvar has acknowledged that not all County Election Boards have agreed with her “guidance” that absentee and mail-in ballots which lack an inner secrecy envelope should be counted and not set aside as void. In fact, in the 2020 Primary Election, Lawrence County reported to the Pennsylvania Department of State that it did not count over 440 of the approximately 8,000 cast absentee and mail-in ballots that were returned without inner

secrecy envelopes.<sup>5</sup> According to Secretary Boockvar, she disagreed with that decision. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 141:18 – 142:6.

20. Concerning the Pennsylvania Department of State’s August 19, 2020 guidance involving drop-boxes, Secretary Boockvar has admitted that although counties are encouraged to submit their proposed plans to the Pennsylvania Department of State on or before the 45th day before an election, there is no requirement or repercussion if a county does not make any such submission. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh. “C-1”), pp. 199:10 – 200:10; 201:6-203:18; 211:18 – 212:9. Instead, it remains entirely up to each of the 67 counties to decide the time, manner, and place for their use, if any, of such drop-boxes. *Id.*

21. Moreover, although the August 19, 2020 guidance involving drop-boxes suggests that signs and video surveillance on unmonitored drop-boxes should be used to prevent third-party delivery of non-disabled voters absentee and mail-in ballots,<sup>6</sup> *see* 08/19/2020 Pennsylvania

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<sup>5</sup> The Act 35 Report issued by the Pennsylvania Department of State states that Lawrence County had “0” absentee and mail-in ballots marked as challenged and/or not counted in the 2020 Primary Election. *See* K. Boockvar Dep. Exh. 18 (App. Exh. C-7), pp. 16-18 & 24-26. However, in Lawrence County’s data submission that the Department of State utilized to create the Act 35 Report, Lawrence County reported the 440 absentee and mail-in ballots that it did not count because they lacked inner secrecy envelopes and noted that the Pennsylvania State Democratic party had withdrawn its objection to that decision. *See* 08/19/2020 Dep. Tr. of J. Marks (App. Exh. A-1), pp. 246:13 – 249:6; J. Marks Dep. Exh. 37 (App. Exh. A-17), p. 19.

<sup>6</sup> In her deposition, Secretary Boockvar repeatedly acknowledged that the Election Code prohibits third-party delivery of absentee and mail-in ballots voted by non-disabled electors and declares all such ballots as being void, and that nothing in Act 77 changed that. *See, e.g.*, 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh. “C-1”), pp. 88:20 – 91:22 & 150:17 – 151:10. As she testified: “It is long-time, well-established law in Pennsylvania” that such delivery is not permitted. *Id.* at pp. 88:20 – 89:15. Moreover, when Act 77 was passed, the General Assembly expressly discussed that an absentee or mail-in ballot that was not “returned in a way required by the legislation ... would not be counted” and that the “purpose of this legislation is make sure that the practice we have heard of ballot harvesting is illegal and cannot be done in Pennsylvania.” *See* 10/29/2020 Common. of Pa. Legis. Jour., No. 64, p. 1739 (cmts. of Rep. Everett) (attached as App. Exh. “H”). Nevertheless, both Secretary Boockvar and Deputy Secretary Marks acknowledged in their depositions that several counties have continued to allow third-party delivery of non-disabled voters’ ballots. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh “C-1”), pp. 91:23 – 99:6; 08/19/2020 Dep. Tr. of

Absentee and Mail-In Ballot Return Guidance (App. Exh. “B-2”), p. 5, § 2.3 & p. 6 § 2.5, Secretary Boockvar and Deputy Secretary Marks both have acknowledged in their depositions that such measures do not prevent the occurrence of illegal ballot harvesting. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh. “C-1”), at p. 213:2-25; 08/19/2020 Dep. Tr. of J. Marks (App. Exh. “A-1”), pp. 151:12-14; 154:5-11; 162:17 – 165:16. Furthermore, in his deposition, Deputy Secretary Marks acknowledged that pictures obtained by Plaintiffs from newspapers and social media posts confirm several instances of non-disabled voters placing more than one ballot into the drop-boxes that were used by some counties during the 2020 Primary Election. *See* 08/19/2020 Dep. Tr. of J. Marks (App. Exh. “A-1”), pp. 162:17 – 165:16; J. Marks Dep. Exhs. 24 (App. Exh. A-8), 25 (App. Exh. A-9), & 26 (App. Exh. A-10). Moreover, Secretary Boockvar re-posted one of those pictures on her Twitter page within the last week in an attempt to promote Pennsylvania’s absentee and mail-in voting scheme. *See* 08/21/2020 Dep. Tr. of K. Boockvar (App. Exh. “C-1”), p. 217:18 – 218:6; *see also* Secretary Boockvar’s Tweet (App. Exh. “E”) and a larger version of the picture she tweeted that Plaintiffs produced during discovery as P002078 (App. Exh. “F”). Further, video surveillance from Elk County<sup>7</sup> shows several instances where voters returned more than one ballot at a time to drop-boxes. *See* screenshots from the Elk County produced video (marked collectively as App. Exh. “G”).

22. Further, in neither piece of guidance dated August 19, 2020, and produced just over 48 hours before this Court’s August 23, 2020 Order was entered does Secretary Boockvar or the Pennsylvania Department of State make any mention of procedures that the County Election

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J. Marks (App. Exh. “A-1”), pp. 55:9 – 72:9; J. Marks Dep. Exhs. 7 (App. Exh. A-14), 8 (App. Exh. A-15), & 9 (App. Exh. A-16).

<sup>7</sup> Several counties which used video surveillance or cameras on their drop-boxes during the 2020 Primary Election reported in discovery that they did not retain or keep copies of the digital images or video from such unmanned monitoring.

Boards must follow to avoid the commingling and counting of absentee and mail-in ballots that are mailed or delivered in-person to their main office as opposed to returned or collected through drop-boxes. Nor have Secretary Boockvar and the County Election Boards adopted any procedures to prevent the commingling and counting of non-disabled voters' absentee and mail-in ballots that are delivered in-person by someone other than the electors. Finally, neither Secretary Boockvar nor the County Election Boards have adopted any procedures which avoid the commingling and counting of absentee and mail-in ballots that lack an inner secrecy envelope or contain marks, text, or symbols thereon. Indeed, both sets of the Department of State's August 19, 2020 guidance are completely devoid of any such procedures.

**D. Without Judicial Intervention, Illegally Cast Ballots Will Be Irretrievably Commingled With Validly Cast Ballots.**

21. Under the Election Code, counties are required to begin delivering absentee and mail-in ballots to approved non-military and overseas applicants "as soon as a ballot is certified and the ballots are available" but "not later than the second Tuesday prior to the primary or election." *See* 25 P.S. §§ [3146.5\(b\)\(1\)](#) & [3150.15](#). Counties must process absentee and mail-in ballot applications at least fifty days before an election, *see* 25 P.S. §§ [3146.2a](#) & [3150.12a](#), which means that ballots could be mailed to voters as soon as September 14, 2020, if not earlier. In fact, if a county board of elections "determines that it would be appropriate to its operational needs," it may process absentee ballot applications and mail ballots before September 14. *Id.* As a result, the window for action to protect Plaintiffs' constitutional rights is closing fast.

22. Moreover, at least one county (Delaware County) has announced plans to install by October 1, 2020, fifty (50) drop-boxes for the return and collection of absentee and mail-in ballots within their county. *See* 01/17/20 Email message from K. Lehman (bate-stamped as PADOS000609.000001-5 and attached as App. Exh. "T").

23. Because Defendants do not have any procedures in place to segregate the absentee and mail-in ballots which Plaintiffs contend will be illegally cast during the November 3, 2020 General Election, those ballots will become irretrievably commingled with absentee and mail-in ballots that have been properly cast.

24. Unless Defendants isolate and refrain from pre-canvassing and canvassing the potentially illegally cast absentee and mail-in ballots, it will be impossible for any court or other trier of fact to identify which of the ballots were illegally cast or to otherwise provide any relief to Plaintiffs if they are successful with their challenge concerning the validity of such ballots that were cast or counted under such constitutionally questionable procedures.

## **II. LEGAL STANDARD.**

25. “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and that an injunction is in the public interest.” [\*Winter v. NRDC, Inc.\*, 555 U.S. 7, 20 \(2008\)](#).

26. “It is well-established that district courts are to engage in a balancing test to determine whether there is an overall need for a preliminary injunction.” [\*Pierce v. Allegheny County Bd. of Elections\*, 324 F. Supp. 2d 684, 704 \(W.D. Pa. 2003\)](#) (citation omitted).

## **III. ARGUMENT.**

### **A. Modification Of The August 23, 2020 Stay Is Warranted.**

27. As this Court explained in its Opinion in support of its August 23, 2020 Order, this Court “made [no] factual findings based on the review of any evidence,” but instead accepted as true the allegations in Plaintiffs’ July 27, 2020 amended complaint in deciding to abstain under the *Pullman* doctrine. See 08/23/2020 Opinion (ECF #409), p. 4, n. 2.

28. As this Court further noted, Plaintiffs’ complaint was premised upon certain guidance that Secretary Boockvar had promulgated to the County Election Boards in the months

leading up to the 2020 Primary Election, including on January 10 and 30, 2020, March 5, 2020, and May 28, 2020. *See* 08/23/2020 Opinion (ECF #409), pp. 5-8.

29. In her July 31, 2020 supporting memorandum to her Rule 12 Motion, Secretary Boockvar explained that “the Commonwealth has not finalized or publicized its General Election policies” and “certain of the procedures for the upcoming General Election [we]re not yet finalized.” *See* Secretary Boockvar’s Memorandum of Law in Support of Motion to Dismiss Amended Complaint (ECF # 264), pp. 9-10 & 15.

30. On August 10, 2020, Secretary Boockvar repeated this assertion in her response to Plaintiffs’ written discovery requests, stating that either “[f]urther guidance is forthcoming that may address, modify or supersede prior guidance” or “additional guidance is forthcoming that may address, modify or supersede prior guidance in advance of the November 3, 2020 election.” *See* Secretary Boockvar’s Objections and Responses to Plaintiffs’ Interrogatories and Request for Production of Documents (attached as App. Exh. “J”), Answer to Interrogatory ## 1-15.

31. The additional “guidance” published by the Pennsylvania Department of State was not formally submitted to Plaintiffs until August 21, 2020, when, twenty minutes before the start of her deposition, Secretary Boockvar supplemented her August 10, 2020, responses to Plaintiffs’ written discovery requests with the production of the two sets of guidance dated August 19, 2020. *See* App. Exhs. B-1 - B-3.

32. Although Plaintiffs were working on a motion to amend their pleadings and to seek appropriate injunctive relief from the Court based on the two sets of August 19, 2020, guidance, this Court entered its August 23, 2020 Order, staying the proceedings without prejudice to any party to request that the Court lift the stay if the Pennsylvania state courts resolved the issues of state law or there were a “prolonged delay by the state courts,” which the Court defined as

occurring if there were not a state court decision on the unsettled issues of state law by October 5, 2020. *See* 08/23/2020 Order (ECF # [410](#)), p. 2.

33. Because the two sets of August 19, 2020 guidance define the policies Secretary Bookvar and the Pennsylvania Department of State have put in place for the November 3, 2020, General Election regarding the return and collection of absentee and mail-in ballots to drop-boxes and the counting of ballots which lack an inner secrecy envelope, because Plaintiffs' contend that this guidance is contrary to the General Assembly's dictates as pronounced in the Pennsylvania Election Code, and because those ballots may be irretrievably commingled with validly cast ballots absent an injunction from this Court, modification of this Court's August 23, 2020 Order is warranted to grant limited preliminary injunctive relief to protect Plaintiffs' fundamental rights and other interests. [Pierce, 324 F. Supp. 2d at 704](#) ("Notwithstanding a decision to abstain on the merits, this court is still obliged to consider plaintiffs' request for preliminary relief").

34. Because ballot designs may be certified and available as early as September 14, 2020 and ballots may start being delivered at any point thereafter, Plaintiffs further believe that waiting until the Court's initial October 5, 2020, date to entertain lifting the stay will result in substantial prejudice to Plaintiffs and their claims.

35. Accordingly, it is appropriate for this Court to grant the limited preliminary injunctive relief sought by Plaintiffs in this Motion and to modify the stay entered by this Court on August 23, 2020 to change the "prolonged delay" date from October 5, 2020 to September 14, 2020.

**B. Limited Preliminary Injunctive Relief Is Proper.**

36. The *Pullman* doctrine "requires retention of jurisdiction ... for the obvious purpose of preserving the plaintiffs' choice of forum for the vindication of federal rights clearly infringed by the state construction ultimately adopted." *See*



*Bible Presbyterian Church v. New Jersey State Board of Higher Education*, 654 F.2d 868, 885 (3d Cir. 1981).

37. Although this Court has determined that *Pullman* abstention is warranted, and Plaintiffs are not challenging that determination by this Motion, this Court still has a “continuing duty to consider plaintiffs’ request for preliminary relief.” *Pierce*, 324 F. Supp. 2d at 704.

38. Plaintiffs are entitled to limited preliminary injunctive relief because a balancing of the four preliminary injunction factors weighs in Plaintiffs’ favor.

**1. *Plaintiffs Have A Reasonable Probability That Their Claims Will Succeed On The Merits.***

39. To find that one seeking preliminary injunctive relief is likely to prevail on the merits, “it is not necessary that the moving party’s right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a prima facie case showing a *reasonable probability* that it will prevail on the merits.” *Pierce*, 324 F. Supp. 2d at 705 (quoting *Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975)) (emphasis added).

40. To succeed with their claims, Plaintiffs must prove that: “(1) the government acted; (2) in a manner that burdens their fundamental right to vote; and (3) the action was not narrowly tailored to serve a compelling governmental interest.” *Pierce*, 324 F. Supp. 2d at 705 (citing *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir. 1998)).

41. Although this Court has chosen to refrain from interpreting what it has characterized as “unsettled state-law issues,” Plaintiffs have a reasonable probability of succeeding on the merits of their constitutional claims because even without a state court decision in their favor, Plaintiffs have demonstrated that the Defendants lack uniformity in their handling of

illegally cast ballots.<sup>8</sup> Moreover, even if a state court were to determine that drop-boxes were proper, the fact that not all counties employ them raises a constitutional concern. As this Court noted in its August 23, 2020 Opinion, Plaintiffs' interpretations of the pertinent Election Code provisions are reasonable. Moreover, several County Election Boards have stipulated to follow Plaintiffs' interpretations if they are accepted by the courts, whereas others believe Secretary Boockvar's interpretations are correct. Accordingly, like this Court found in *Pierce*, Plaintiffs have a likelihood of succeeding on the merits sufficient to warrant limited preliminary injunctive relief. See [Pierce](#), 324 F. Supp. 2d at 705-6.

**2. Absent Injunctive Relief, Plaintiffs Will Suffer Irreparable Harm.**

42. "Irreparable harm means that the moving party will be injured in such a way that adequate compensatory or other corrective relief will not be available at a later date in the ordinary course of litigation." [Pierce](#), 324 F. Supp. 2d at 706 (quoting [Oburn](#), 521 F.2d at 151).

43. Under the Election Code, absent a challenge, all absentee and mail-in ballots are commingled, and once that occurs, there is no way to discern which, or how many, of those ballots were cast in the manner being challenged by Plaintiffs. [Pierce](#), 324 F. Supp. 2d at 706.

44. Because the comingling and canvassing of ballots will preclude County Election Boards from later segregating absentee and mail-in ballots by their means of delivery (*i.e.*, U.S. mail, elector in-person delivery to county election office, elector in-person delivery to drop-box,

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<sup>8</sup> For example, despite the Pennsylvania Supreme Court's 2004 pronouncement that non-disabled voters' absentee ballots delivered by third-persons are void and cannot be counted, several counties have continued to permit third-party delivery and have counted such ballots. See 08/19/2020 Dep. Tr. of J. Marks (App. Exh. "A-1"), pp. 55:9 – 72:9; J. Marks Dep. Exhs. 7 (App. Exh. A-14), 8 (App. Exh. A-15), & 9 (App. Exh. A-16). Further, despite the Secretary's pronouncement on May 28, 2020, concerning the counting of absentee and mail-in ballots that lack inner secrecy envelopes, Lawrence County still properly rejected over 440 such ballots. J. Marks Dep. Exh. 37 (App. Exh. A-17); K. Boockvar Dep. Exh. 12 (C-6).

and third-party delivery to county election office or drop-box) or by whether they include an inner secrecy envelope with or without marks, text, or symbols on that envelope, the commingling or processing of absentee ballots prior to the resolution of this case would inflict irreparable harm on Plaintiffs. [Pierce, 324 F. Supp. 2d at 707.](#)

**3. *As The Ballots Are Merely Being Segregated For Future Challenge, No Harm To Others Exists. Moreover, The Public Interest Of A Fair And Free Election Is Being Preserved.***

45. When the relief being sought would simply separate ballots out as part of a potential challenge, there exists no harm to others. [Pierce, 324 F. Supp. 2d at 707.](#)

46. Further, this injunction would protect the public interest because, as this Court noted years ago, “the idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative.” [Pierce, 324 F. Supp. 2d at 707](#) (quoting [Moore v. Ogilvie, 394 U.S. 814, 819 \(1969\)](#)).

47. Accordingly, Plaintiffs ask this Court to

- (a) Grant Plaintiffs limited, preliminary injunctive relief ordering Defendants to segregate and maintain intact all cast absentee and mail-in ballots that (i) are returned or collected through drop-boxes, (ii) lack an inner secrecy envelope or contain marks, text, or symbols thereon, or (iii) constitute non-disabled voters’ absentee and mail-in ballots that have been delivered in-person by someone other than the non-disabled voters;
- (b) Grant Plaintiffs limited, preliminary injunctive relief ordering Defendants to refrain from pre-canvassing or canvassing all cast absentee and mail-in ballots that (i) are returned or collected through drop-boxes, (ii) lack an inner secrecy envelope or contain marks, text, or symbols thereon, or (iii) constitute non-disabled voters’ absentee and mail-in ballots that have been delivered in-person by someone other than the non-disabled voters until further order of this Court;
- (c) Granting Plaintiffs limited, preliminary injunctive relief ordering Defendants to retain and make available for periodic review all digital images or video to the extent any video security surveillance system or internal camera is available and used to monitor drop-boxes or other sites and locations, including a county election office, used for the return and collection of cast absentee and mail-in ballots; and

- (d) Modify the stay entered on August 23, 2020, to permit it to be lifted on September 14, 2020, rather than October 5, 2020, with respect to all settled state-law issues.

48. These measures would strike a fair balance between the constitutional issues raised in this case and the need for the public to ensure free, fair, and transparent elections.

## V. CONCLUSION.

While they understand the Court's decision to abstain and do not seek to challenge that decision in this Motion, Plaintiffs do believe that the evidence obtained through discovery supports modification of this Court's August 23, 2020 Order to provide both limited, preliminary injunctive relief and a modification of the October 5, 2020 date. A proposed Order is attached.

Respectfully submitted,

PORTER WRIGHT MORRIS & ARTHUR LLP

Date: August 28, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Motion to be filed on August 28, 2020, via ECF, which system will serve notice of same on all parties registered to receive same via the ECF system. For any party who has yet to enter an appearance, the undersigned certifies that a copy of the foregoing filing will be served on that party via First Class Mail and a copy sent to the County Solicitor, if known, via email or fax.

Respectfully submitted,

PORTER WRIGHT MORRIS & ARTHUR LLP

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DONALD J. TRUMP FOR	)	
PRESIDENT, INC.; <i>et al.</i> ,	)	<i>Electronically Filed</i>
	)	
Plaintiffs,	)	Civil Action
	)	
v.	)	No.: 2-20-CV-966
	)	
KATHY BOOCKVAR; <i>et al.</i> ,	)	
	)	Judge J. Nicholas Ranjan
Defendants.	)	

**ORDER OF COURT**

AND NOW THIS \_\_\_\_\_ day of \_\_\_\_\_, 2020, upon consideration of Plaintiffs' Motion to Modify and/or Lift Stay Order (ECF # [410](#)) and Motion for Limited Preliminary Injunctive Relief, and all filings related thereto, the Court hereby finds that in balancing the four factors to determine whether there is an overall need for a preliminary injunction, it is appropriate for this Court to issue a limited, preliminary injunction that preserves the rights of voters to challenge, consistent with the procedures set forth in the Election Code, absentee and mail-in ballots that may subsequently be determined to be illegally cast. Also, because of the impending deadline of when the ballot for the November 3, 2020 General Election may be certified and available for printing and delivery to voters, it is appropriate for this Court to modify the August 23, 2020 Order's stay lifting date on all settled state-law issues from October 5, 2020, to mid-September 2020. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that the Motion is GRANTED.

It is further ORDERED, ADJUDGED, and DECREED that the August 23, 2020 Order is modified as follows:

1. Defendants are enjoined from commingling and counting (either during a pre-canvass or canvass) cast absentee and mail-in ballots that (a) are returned or collected through drop-boxes, (b) lack an inner secrecy envelope or contain marks, text, or symbols thereon, and/or (c) constitute non-disabled voters' absentee and mail-in ballots that have been delivered in-person by someone other than the non-disabled voters, and all such ballots are deemed challenged and shall be segregated and set aside in a secure location at the offices of each of the Defendant County Elections Boards.

2. All challenged ballots that are subject to Paragraph 1 of this Order shall not be pre-canvassed or canvassed but instead shall be resolved consistent with 25 P.S. 3146.8(f) and (g)(5) in the same manner and subject to the same procedures and appeal rights as other challenges under that law, and that Plaintiffs or any other challenger shall post \$10.00 per challenged vote.

3. To enable Plaintiffs and any other challenger to assert its challenge, the Defendant County Election Boards shall produce to Plaintiffs and any other challenging party and/or their representatives or attorneys a list of all electors, by precinct, whose ballots have been segregated and are being challenged under this Order as soon as Defendants have compiled such list but no later than Thursday, November 5, 2020, which list shall also be made available to the public. At that point, Plaintiffs and/or any other challenger shall post the requisite \$10.00 per challenged vote.

4. Also, to the extent any video surveillance system or internal camera is used to monitor any drop-boxes and/or other sites or locations, including a county election office, for the return and collection of absentee and mail-ballots, the Defendant County Election Boards shall retain and make available for periodic review upon request by Plaintiffs and any other challenging party and/or their representatives or attorneys all digital images and/or video captured by such system or camera from the day absentee and mail-in ballots are first returned and until the pre-

canvass and canvass are completed. If any copies are requested, Plaintiffs and any other challenging party shall reimburse the County Election Boards the cost for making any such reproductions of the video and/or digital images.

4. The stay lifting date on all settled state-law issues shall be September 14, 2020.
5. In all other respects, the August 23, 2020 Order remains in full force and effect.

BY THE COURT:

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J. Nicholas Ranjan  
United States District Judge



# **EXHIBIT H**



Caution

As of: September 7, 2020 1:26 PM Z

## Stapleton v. Thirteenth Judicial Dist. Court

Supreme Court of Montana

May 27, 2020, Decided

OP 20-0293

### Reporter

2020 Mont. LEXIS 1577 \*

COREY STAPLETON, in his official capacity as Montana Secretary of State, Petitioner, v. THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY, HON. DONALD L. HARRIS, Presiding, Respondent.

good cause to avoid voter confusion and disruption of election administration.

**Subsequent History:** Corrected by [Stapleton v. Thirteenth Judicial Dist. Court, 2020 Mont. LEXIS 1588 \(Mont., May 28, 2020\)](#)

### Outcome

Injunction stayed in part. Petition for writ of supervisory control denied.

## Core Terms

election, ballots, deadline, election-day, voters, injunction, supervisory

## LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

### [HN1](#) [down arrow] Remedies, Injunctions

Orders granting injunctions are immediately appealable. Mont. R. App. P. 6(3)(e). Where appeal is an adequate remedy, the Supreme Court of Montana will decline its discretion to exercise supervisory control. Mont. R. App. P. 14(3).

Governments > State & Territorial Governments > Elections

### [HN2](#) [down arrow] State & Territorial Governments, Elections

Status quo means the last actual, peaceable, noncontested condition which preceded the pending

## Case Summary

### Overview

**HOLDINGS:** [1]-Where the district court granted a preliminary injunction in an underlying proceeding challenging the constitutionality of the 2017 Montana Ballot Interference Prevention Act, the court declined to exercise supervisory control over the order because orders granting injunctions were immediately appealable, Mont. R. App. P. 6, and an appeal was an adequate remedy here; [2]-However, the court stayed the district court's order prohibiting the enforcement of the election-day receipt deadline, [Mont. Code Ann. §§ 13-13-201\(3\)](#), [13-13-211\(3\)](#), and [13-19-106\(5\)\(b\)](#), because it was appropriate to maintain the status quo pending consideration of the issues, and there was

controversy. That condition, in place for many years, is that ballots cast by mail must be received in the election administrator's office by 8:00 p.m. on election day.

**Judges:** [\*1] Beth Baker, Laurie McKinnon, James Jeremiah Shea, Ingrid G. Gustafson, James Rice, Justice.

## Opinion

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### ORDER

Montana Secretary of State Corey Stapleton, by and through the Montana Attorney General, seeks a writ of supervisory control and immediate partial stay of an order entered on Friday, May 22, 2020, by the Thirteenth Judicial District Court, the Hon. Donald L. Harris, presiding, in that court's Cause No. DV 20-408. We have amended the caption to reflect the appropriate parties to a supervisory control petition. Stapleton has filed a separate notice of appeal from the District Court's preliminary injunction and requests this Court to either entertain the petition or set an expedited briefing schedule on the appeal.

The petition arises from an action filed in mid-March by Robyn Driscoll, the Montana Democratic Party, and the Democratic Senatorial Campaign Committee challenging the constitutionality of two provisions of Montana law, the [2017 Montana Ballot Interference Prevention Act, §§ 13-35-701 through 13-35-705, MCA](#), and the election-day receipt deadline for absentee ballots set forth in [§ 13-13-201\(3\), MCA](#). The plaintiffs filed a motion for preliminary injunction six weeks later. In the meantime, Governor Steve Bullock entered a statewide directive [\*2] on March 25, permitting counties to conduct all-mail-ballot elections to protect against public health threats from the novel coronavirus. In response, every county in Montana implemented a mail-ballot election for the 2020 election cycle.

After receiving all parties' briefs and affidavits, and upon their waiver of a hearing, the District Court entered findings of fact, conclusions of law, and an order granting the preliminary injunction. The court determined the plaintiffs had made out a prima facie case and were likely to prevail on the merits of their

claims that both provisions were unconstitutional as neither advances a legitimate state interest and both place significant burdens on the fundamental right to vote. The District Court entered its preliminary injunction ten days before the June 2, 2020 primary election and two weeks after election administrators mailed ballots to all Montana voters. Those ballots include instructions to voters in three separate places that ballots must be *received* by the election office by 8:00 p.m. on Election Day, June 2.

The Secretary of State does not challenge the District Court's preliminary injunction against the [Ballot Interference Prevention Act](#) [\*3], only its order prohibiting enforcement of the election-day receipt deadline. The court's order temporarily invalidates three separate statutes: [§§ 13-13-201\(3\), 13-13-211\(3\), and 13-19-106\(5\)\(b\), MCA](#), each of which imposes the election-day receipt deadline for absentee or mail-in ballots. The court directed in relevant part that 101 absentee ballots postmarked on or before election day shall be counted, if otherwise valid, provided such ballots are received by the deadline for federal write-in ballots for military and overseas voters[.]"

The petition argues that this Court's exercise of supervisory control is appropriate because the District Court's ruling is a mistake of law with urgent statewide ramifications that make direct appeal an inadequate remedy. Should the Court choose to have the case proceed on appeal, the petition seeks an immediate stay of the order enjoining the election-day receipt deadline. The Secretary of State includes a copy of the motion for stay he filed in the District Court on the day its order was entered, along with the affidavit of Elections Director Dana Corson explaining the effect the order will have on other statutory deadlines and why a stay is necessary to prevent increased public confusion [\*4] of voters regarding the essential timelines for casting ballots. Corson's affidavit also explains that the District Court's order did not address ballot deadlines for disabled voters in [§ 13-13-246\(2\)\(c\) and \(d\), MCA](#), creating disparity in administration of the election. Notwithstanding the filing of his motion, the Secretary of State seeks immediate relief here given the impending primary election.

[HN1](#)[↑] As the Secretary of State recognizes, orders granting injunctions are immediately appealable. M. R. App. P. 6(3)(e). [State v. BNSF Ry. Co., 2011 MT 108, ¶ 15, 360 Mont. 361, 254 P.3d 561](#). Where appeal is an adequate remedy, this Court will decline its discretion to exercise supervisory control. M. R. App. P. 14(3). The

Court determines that the ordinary course of appeal, with an expedited briefing schedule, affords adequate time to address the issues the Secretary of State presents with the benefit of the record and full development of the arguments by both parties. The Court agrees with the Secretary of State, however, that it is appropriate to stay the District Court's order enjoining enforcement of the election-day receipt deadline in order to maintain the status quo pending consideration of the issues.

[HN2](#) Status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy." [Weems v. State, 2019 MT 98, ¶ 26, 395 Mont. 350, 440 P.3d 4](#) (internal [\*5] quotations and citations omitted). That condition, in place for many years, is that ballots cast by mail must be received in the election administrator's office by 8:00 p.m. on election day. This year's all-mail-ballot primary election is a first for Montana and presents an unusual situation. Election administrators have responded swiftly to ensure that ballots were timely mailed to voters across Montana. Because those ballots include express directive that they will not be counted unless received by the 8 p.m. election-day deadline, we conclude that there is good cause to maintain the election-day deadline for this primary election in order to avoid voter confusion and disruption of election administration.

IT IS THEREFORE ORDERED that the District Court's order enjoining the Secretary of State and others acting in concert with him from enforcing the election-day receipt deadline for absentee and mail ballots is hereby STAYED pending this Court's consideration of the merits of the legal issues presented. That portion of the court's order preliminarily enjoining the enforcement of the [Ballot Interference Prevention Act, § 13-35-701, MCA](#), is undisturbed and remains in effect without objection by the [\*6] Secretary of State.

IT IS FURTHER ORDERED that the petition for writ of supervisory control is DENIED. The matter shall proceed under this Court's Cause No. DA 20-0495 with submission of briefs in accordance with M. R. App. P. 13. Notwithstanding that the District Court record has yet to be transmitted, Appellant Corey Stapleton's Opening Brief shall be due within thirty days of the date of this Order. It is the Court's intent to have briefing completed by mid-August to allow sufficient time for consideration and ruling in advance of preparations for the November general election. To that end, extensions will not be granted.

The Clerk is directed to provide immediate notice of this Order to all counsel of record in Yellowstone County Cause No. DV 20-408 and to the Thirteenth Judicial District Court, the Hon. Donald L. Harris, presiding.

Dated this 27 day of May, 2020.

/s/ Beth Baker

/s/ Laurie McKinnon

/s/ James Jeremiah Shea

/s/ Ingrid G. Gustafson

/s/ James Rice

Justice

Given the fundamental right of voting, I would not grant a stay. This is a unique situation of course, as there has never been an all-mail election in Montana. More significantly, we have not had all of the usual polling places closed. Allowing [\*7] ballots to be counted in the same manner as military ballots is not a significant distinction from the current system.

/s/ Mike McGrath

Chief Justice

Justice Dirk Sandefur would join Chief Justice McGrath in denying the stay.

/s/ Dirk Sandefur

Justice

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End of Document

# **EXHIBIT I**

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

KIRK NIELSEN et al.,

Plaintiffs,

v.

CONSOLIDATED

CASE NO. 4:20cv236-RH-MJF

RON DESANTIS et al.,

Defendants.

---

**ORDER DENYING A PRELIMINARY  
INJUNCTION ON ALL ISSUES BUT ONE**

The plaintiffs in these consolidated actions challenge Florida voting procedures. Three sets of plaintiffs have filed separate motions for a preliminary injunction. This order denies the motions on all issues but one and provides an abbreviated explanation. A more complete explanation is unnecessary because trial is imminent. Findings of fact and conclusions of law will be announced after the trial.

**I. Governing Standard**

As a prerequisite to a preliminary injunction, a plaintiff must establish a substantial likelihood of success on the merits, that the plaintiff will suffer

irreparable injury if the injunction does not issue, that the threatened injury outweighs whatever damage the proposed injunction may cause a defendant, and that the injunction will not be adverse to the public interest. *See, e.g., Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

## II. Likelihood of Success

This order addresses likelihood of success on the merits for only some of the claims and expresses no opinion on the others. The parties should draw no inference one way or the other about likely success on items not addressed in this section of this order. The ruling does not limit the evidence that may be presented or foreclose a contrary ruling at the forthcoming trial on the merits.

First, the plaintiffs are not likely to succeed on their claim that the defendants must provide postage for mailing in a ballot. The Twenty-Fourth Amendment prohibits a state from denying or abridging the right to vote in a federal election by reason of failure to pay “any poll tax or other tax.” The amendment means what it says. *See Jones v. DeSantis*, No. 4:19cv300, 2020 WL 2618062 at \*27-29 (N.D. Fla. May 24, 2020). Postage charged by the United States Postal Service—like the fee charged by any other courier or the bus fare for getting to the polls to vote in person—is not a tax prohibited by the Twenty-Fourth

Amendment. And the requirement to pay postage also does not violate any other federal provision.

Second, the plaintiffs have not established that they are likely to succeed on their challenge to the election-day deadline for receipt of a mailed ballot. *See VoteVets Action Fund v. Detzner*, No. 4:18-cv-524-MW/CAS (N.D. Fla. Nov. 16, 2018); *see also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1376-77 (S.D. Fla. 2004). The plaintiffs say a Supervisor of Elections should accept ballots postmarked on or before election day, even if received later at the Supervisor's office. A state could reasonably so provide; some do. But at least as shown by this record, a state could also reasonably decide, as Florida has, to require receipt on or before election day. This eliminates the problem of missing, unclear, or even altered postmarks, eliminates delay that can have adverse consequences, and eliminates the remote possibility that in an extremely close election—Florida has had some—a person who did not vote on or before election day can fill out and submit a ballot later.

Third, the Williams plaintiffs have not established likely success on some of the many items on their list of challenged provisions. *See* ECF No. 68 (also docketed in Case No. 1:20cv67 as ECF No. 108). This is so for items 1, 2, 3, 4, 5, 6, 7, 15, 17, 18, 25, 30, and 33. The Williams plaintiffs have not established likely success on items 3, 4, and 5 because the claims are unlikely to succeed on the



merits based on the existing declarations of the covid-19 emergency, and the possibility of a different emergency declaration is too speculative to constitute an injury in fact.

### **III. Irreparable Harm to the Plaintiffs**

The relevant time frame for analyzing irreparable harm is from now until issuance of a ruling after the July 20 trial. With one exception addressed below, the plaintiffs have failed to show that they will suffer irreparable harm during that period in the absence of a preliminary injunction. Part of the explanation is that no elections will occur during that period—with the possible exception of one local election the plaintiffs have not even mentioned—and the plaintiffs can work around the alleged registration deficiencies.

This is an alternative basis for the denial of a preliminary injunction on the claims for which, as set out in section II above, the plaintiffs have not shown likely success on the merits. This is the sole basis for the denial of a preliminary injunction on other claims. This makes it unnecessary to address the other prerequisites to a primary injunction: damage the proposed injunction may cause a defendant and the public interest.

The exception is the claim that blind individuals have a right to cast a remote secret ballot. The Grubb plaintiffs say at least 45 days will be required for the State to order and put in place the system they say is necessary to redress the denial of

this right. The defendants have not yet responded to the Grubb motion. This order expresses no opinion on any of the four prerequisites to a preliminary injunction on this claim.

#### **IV. Conclusion**

For these reasons,

IT IS ORDERED:

1. The Williams plaintiffs' preliminary-injunction motion, ECF No. 86, is denied in part and remains pending in part.
2. The Nielsen plaintiffs' preliminary-injunction motion, ECF No. 89, is denied.
3. The Grubb plaintiffs' preliminary-injunction motion, ECF No. 230, remains pending.

SO ORDERED on June 24, 2020.

s/Robert L. Hinkle  
United States District Judge

**EXHIBIT J**



5. As a Pennsylvania qualified registered elector who votes in-person, I do not want my vote diluted or cancelled by votes that are cast in a manner contrary to the requirements enacted by the Pennsylvania General Assembly.

6. I believe that, to ensure the integrity of elections, all voters in Pennsylvania must follow the rules established by the General Assembly in the Election Code. For voters who cast absentee or mail-in ballots, this includes, without limitation, using an inner secrecy envelope without any marks, text, or symbols which identify the person who voted the ballots, and filling in, signing, and dating the declaration on the outside envelope. Also, voters who cast absentee or mail-in ballots must mail or personally deliver their own ballots to the county election board office rather than depositing them in unmonitored and unsecured drop-boxes. Further, non-disabled voters should not be allowed to have third-parties deliver their absentee or mail-in ballots.

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

Affiant sayeth nothing further.

Executed on September 8<sup>th</sup>, 2020

  
Melanie Stringhill Patterson



**EXHIBIT K**





- b. The Leadership Committee of the State Party;
- c. The State Party Finance Committee;
- d. Republican County Committees, as defined in §2837 of the Election Code (the “County Committees”), and such subordinate committees of a County Committee as the rules of a County Committee shall provide;
- e. Such Committees of the State Party as may from time to time be recognized by the State Party Chairman;
- f. The six (6) Regional Republican Caucuses of the State Party as defined in Rule 9.1, below; and
- g. All validly registered Republican electors in the Commonwealth of Pennsylvania.

5. The RPP supports and seeks to uphold free and fair elections for all Pennsylvanians.

6. The RPP has a substantial and particularized interest in ensuring that Pennsylvania carries out free and fair elections consistently throughout the Commonwealth.

7. The RPP, on behalf of itself and its members, including its voters, nominates, promotes, and assists Republican candidates seeking election or appointment to federal, state, and local office in Pennsylvania.

8. Additionally, the RPP devotes substantial resources toward educating, mobilizing, assisting, and turning out voters in Pennsylvania.

9. In conjunction with its Election Day Operations (“EDO”), the RPP devotes substantial time and resources toward the recruitment and training of poll workers, poll watchers, and volunteers throughout the 67 counties of the Commonwealth to assist voters on election day.

10. As part of its EDO, the RPP also devotes substantial time and resources toward the recruitment and training of a “ground team” of lawyers throughout the Commonwealth who stand ready on Election Day to assist poll workers, poll watchers, and volunteers should questions arise as to elections laws or the voting process within the Commonwealth.

11. The RPP has devoted substantial time and resources in mobilizing and educating voters in Pennsylvania in the past many election cycles and continues to do so again in 2020. In this regard, the RPP, among other things, routinely publishes a newsletter entitled “PA GOP Morning.”

12. Each of the RPP’s EDO, training programs, and voter education efforts relies upon, utilizes, and is built upon the clear language of the Election Code.

13. The recent enactment of Act 77, which fundamentally changes the manner in which Pennsylvania are permitted to vote, most notably by providing a new universal mail-in voting regime, has required the RPP to significantly update and alter its EDO, training programs, and voter education programs.

14. In particular, the RPP has substantially increased the amount of its time and resources dedicated to educating voters, poll workers, poll watchers, volunteers, and its legal teams throughout Pennsylvania's 67 counties regarding the provision of Act 77.

15. I am aware of the relief sought by Petitioners in this litigation as well as guidances promulgated by Secretary Boockvar regarding Act 77 (the "Boockvar Guidances"). Copies of the Boockvar Guidances are collectively attached hereto as **Exhibit 1**.

16. I understand that the Boockvar Guidances are intended to advise each of the Commonwealth's 67 County Boards of Elections as to the manner in which each may conduct elections in each county. Because the Boockvar Guidances purport to grant discretion to County Boards of Elections on certain election administration issues, the manner of voting in Pennsylvania may vary from county to county if the Boockvar Guidances are upheld and implemented.

17. Both the relief sought in this litigation and the Boockvar Guidances differ and depart from the statutory language of Act 77 as well as the clear dictates of Article VII, Section 4 of the Pennsylvania Constitution, upon which the RPP has relied in undertaking its EDO, training programs, and voter education programs.

18. Should this Court grant the relief sought in this litigation or should the Secretary be permitted to implement changes to Act 77 via the Boockvar

Guidances, the resources and efforts which the RPP have expended on its EDO, training programs, and voter education programs will have been wasted.

19. Indeed, should this Court grant the relief sought in this litigation or should the Secretary be permitted to implement changes to Act 77 via the Boockvar Guidances, the RPP will be required to expend substantial new additional resources and effort on overhauling its EDO, training programs, and voter education programs to reflect the changes in Pennsylvania's election laws and election administration scheme.

20. Moreover, if Act 77's received-by deadline for absentee and mail-in ballots is extended, the RPP will need to devote significant new resources to recruiting, organizing, and training additional poll workers, poll watchers, lawyers, and volunteers to attend and observe the expanded number of days on which election officials will receive, open, and count absentee and mail-in ballots.

21. Furthermore, should the Boockvar Guidances be permitted to become effective, the manner in which Pennsylvanians will vote may differ from county to county. Such an outcome would significantly complicate, and require the RPP to devote even more substantial new additional resources to, its EDO, training programs, and voter education efforts.

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

Affiant sayeth nothing further.

Executed on September 8, 2020

  
\_\_\_\_\_  
Vonne Andring

COMMONWEALTH OF PENNSYLVANIA      SS.  
COUNTY OF ARMSTRONG

Before me, a notary public, in and for said county and state personally appeared Vonne Andring, who swore that the information contained in the foregoing Affidavit is true and correct based upon her personal knowledge.

IN WITNESS WHEREOF, I have hereto set my hand and seal on this 8<sup>th</sup> day of September, 2020.

  
\_\_\_\_\_  
Notary Public

Commonwealth of Pennsylvania - Notary Seal  
Elizabeth A. Gribik, Notary Public  
Butler County  
My commission expires March 2, 2022  
Commission number 1254623  
Member, Pennsylvania Association of Notaries

# **EXHIBIT 1**

TLP: WHITE



# Pennsylvania

## Absentee and Mail-in Ballot Return Guidance

Date: August 19, 2020

Version: 1.0

TLP: WHITE

**BACKGROUND**

Under Pennsylvania law, in addition to using the mail, voters may return their own voted absentee or mail-in ballot in-person. The ballot may be returned to each county election board’s primary office as well as to other offices and locations designated by the board to receive ballots (hereinafter referred to as “Ballot Return Sites”), including secure ballot return receptacles (commonly referred to as “drop-boxes”) that are easily identifiable.

This document provides guidance on how each county should establish a ballot return and collection plan for their county prior to each election.

<b>Guidance Contents</b>	
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1.2	Location of Ballot Return Sites..... 3
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<b>4</b>	<b>Processing of Collected Ballots ..... 8</b>



TLP: WHITE

# 1 ESTABLISHING A BALLOT RETURN AND COLLECTION PLAN

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## 1.1 BALLOT RETURN SITES

For each election, county boards of elections should establish a plan and adopt procedures for how voters in their county may return their own voted absentee and mail-in ballots to the county board of elections. The initial plan should be submitted to the Department of State on or before 45 days prior to the election.

County boards of elections may establish multiple ballot return locations where voters may return their own voted ballot. At these sites, the county may provide voters with access to a secure ballot return receptacle for this purpose.

## 1.2 LOCATION OF BALLOT RETURN SITES

### 1.2.1 Location of Ballot Return Sites

Sites may include, but are not limited to, city and municipal facilities, public libraries, county facilities, or other locations designated by the board to receive ballots. When choosing a location, counties should consider, at a minimum, the following:

- locations that serve heavily populated urban/suburban areas, as well as rural areas.
- locations near heavy traffic areas such as commercial corridors, large residential areas, major employers and public transportation routes.
- locations that are easily recognizable and accessible within the community.
- locations in areas in which there have historically been delays at existing polling locations, and areas with historically low turnout.
- proximity to communities with historically low vote by mail usage.
- proximity to language minority communities.
- proximity to voters with disabilities.
- proximity to communities with low rates of household vehicle ownership.
- proximity to low-income communities.
- access to accessible and free parking.
- the distance and time a voter must travel by car or public transportation.

### 1.2.2 Hours of Operation

Business hours for sites do not have to be limited to weekdays or normal business hours. Counties are encouraged to offer business hours outside of these time frames, including weeknights or weekend hours to enable maximum flexibility and convenience to voters.

## TLP: WHITE

### 1.3 PROVIDING NOTICE OF LOCATION OF COUNTY ELECTION OFFICES AND BALLOT RETURN SITES

A list of the ballot return sites and county election offices, including the dates and hours they are open, should be made public as early as possible. At least 7-10 days after submission of the plan to the Department of State, the county board of elections should provide notice of the county's ballot return plan by posting a notice in the county elections office and in a highly visible location on the county's website. The board may also post copies of the notice at such other locations it deems appropriate for the efficient notification of voters. The notification should also be included in absentee and mail-in voting materials sent to voters. At a minimum, the notice should include the following:

- ballot return deadline.
- list of county election offices and ballot return sites, including building names and street address.
- days and hours of operation, including election day hours.
- contact information for the county board of elections.
- accessibility information.

The list posted on the county's website should be in a format that is accessible for people with disabilities. In the event of any changes to site location operations, the county board of elections should post the updated information on the official election website within 24 hours.

### 1.4 CONFIRMATION OF PLAN READINESS

A county's initial absentee and mail-in ballot return plan should be submitted to the Department of State, Bureau of Election Security and Technology ("BEST") no later than 45 days before an election. If the Bureau of Election Security and Technology requests modifications to a plan, the county election office should submit a modified plan within 7 days of the request. If the county board of elections determines that it is in the best interest of their voters to alter their plan or increase/decrease the number of ballot return sites they may submit a supplemental plan to BEST no later than 25 days before the election with notice to the public within 5 days of submission.

## 2 BALLOT RETURN SITE DESIGN AND REQUIREMENTS

---

### 2.1 TYPES OF BALLOT RETURN SITES

County boards of elections may establish sites where voters may return their own voted ballot. The site should provide voters access to a ballot return receptacle that is secure.

All return sites should be accessible at least during regular business hours beginning not less than 30 days before the day of the election, and on the day of the election. Return sites should have the same features, and be of substantially similar design, color scheme, and signage to facilitate identification by the public.

## TLP: WHITE

## 2.2 SECURE RECEPTACLES (“DROP-BOXES”)

Each ballot return site should have a secure receptacle that permits voters to return their own voted ballot. A postage stamp is not needed on the return envelope when depositing a ballot at a ballot return site. The receptacle should be designed to function as follows:

- hardware should be operable without any tight grasping, pinching, or twisting of the wrist.
- hardware should require no more than 5 lbs. of pressure for the voter to operate.
- receptacle should be operable within reach-range of 15 to 48 inches from the floor or ground for a person utilizing a wheelchair.

Other design requirements include:

- The drop-box should provide specific points identifying the slot where ballots are inserted. The drop-box may have more than one ballot slot (e.g. one for drive-by ballot return and one for walk-up returns).
- To ensure that only ballot material can be deposited and not be removed by anyone but designated county board of election officials, the opening slot of a drop-box should be too small to allow tampering or removal of ballots.
- The opening slot should also minimize the ability for liquid to be poured into the drop-box or rainwater to seep in.

The county boards of election should determine receptacle size based on the use and needs of the location. The receptacle should be securely fastened to a stationary surface, to an immovable object, or placed behind a counter.

## 2.3 SIGNAGE

In determining the design and functions of ballot return sites, county boards of elections should design them in such a way that they are official and secure. To this end, the county board of elections must ensure each return site is marked with official signage (“Official Ballot Return Site” or “Official Ballot Return.”) Counties should not display traditional “Vote Here” signs at designated ballot return sites. Signage should adhere to the following:

- Signage should be in all languages required under the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10503).
- Signage should display language stating that counterfeiting, forging, tampering with, or destroying ballots is a second-degree misdemeanor pursuant to sections 1816 and 1817 of the Pennsylvania Election Code (25 P.S. §§ 3516 and 3517).
- Signage should also provide a statement that third-party return of ballots is prohibited unless the person returning the ballot is rendering assistance to a disabled voter or an emergency absentee voter. Such assistance requires a declaration signed by the voter and the person rendering assistance.

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- Signage should provide a statement requesting that the designated county elections official should be notified immediately in the event the receptacle is full, not functioning, or is damaged in any fashion, and should provide a phone number and email address for such purpose.

## 2.4 ACCESSIBILITY OF BALLOT RETURN SITES

County boards of elections should ensure that ballot return sites are accessible to voters with disabilities, and should also ensure the following:

- If a site has only one ballot return receptacle, the design and placement of that site should meet the accessibility requirements.
- At a site with multiple drop-boxes, if not all drop-boxes meet the accessibility requirements outlined in this subdivision, then each inaccessible return site should have directional signage indicating the location of an accessible drop-box.

## 2.5 SECURITY

County boards of election must ensure the following when establishing ballot return sites:

- Only personnel authorized by the county board of elections should have access to the ballots inside of a drop-box.
- Drop-boxes should be secured in a manner to prevent their unauthorized removal.
- All drop-boxes should be secured by a lock and sealed with a tamper-evident seal. Only authorized election officials designated by the county board of elections may access the keys and/or combination of the lock.
- Drop-boxes should be securely fastened in a manner as to prevent moving or tampering, such as fastening the drop-box to concrete or an immovable object.
- During the hours when the staffed return site is closed or staff is unavailable, the drop-box should be placed in a secure area that is inaccessible to the public and/or otherwise safeguarded.
- The county boards of election should ensure adequate lighting is provided at all ballot return sites when the site is in use.
- When feasible, ballot return sites should be monitored by a video security surveillance system, or an internal camera that can capture digital images and/or video. A video security surveillance system can include existing systems on county, city, municipal, or private buildings. Video surveillance should be retained by the county election office through 60 days following the deadline to certify the election.
- To prevent physical damage and unauthorized entry, the drop-box at a ballot return site located outdoors should be constructed of durable material able to withstand vandalism, removal, and inclement weather.

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### 3 BALLOT COLLECTION AND CHAIN OF CUSTODY PROCEDURES

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The county board of elections should develop ballot collection and chain of custody procedures for ballots returned to a county election office or a ballot return site. These procedures may not be inconsistent with Pennsylvania law or Department of State directives.

#### 3.1 BALLOT COLLECTION AT BALLOT RETURN SITES

- Ballots should be collected from ballot return sites only by personnel authorized by the county board of elections and at times determined by the board of elections, at least every 24 hours, excluding Saturdays and Sundays.
- The county board of elections should designate at least two election officials to collect voted ballots from a ballot return site. Each designated election official should carry identification or an official designation that identifies them as an election official authorized to collect voted ballots.
- Election officials designated to collect voted ballots by the board of elections should sign a declaration declaring that he or she will timely and securely collect and return voted ballots, will not permit any person to tamper with a ballot return site or its contents, and that he or she will faithfully and securely perform his or her duties.
- The designated election officials should retrieve the voted ballots from the ballot return site and place the voted ballots in a secure ballot transfer container.
- The designated election officials should note on *Ballot Return Site Collection Forms* the site and unique identification number of the ballot return site and the date and time of retrieval.

#### 3.2 TRANSPORT AND RECEIPT OF RETRIEVED BALLOTS TO THE BOARD OF ELECTIONS

- Ballots collected from any ballot return site should be immediately transported to the county board of elections.
- Upon arrival at the office of the county board of elections, the county board of elections, or their designee(s), should note the time of arrival on the same form, as described above.
- The seal number should be verified by a county election official or a designated representative.
- The county board of elections, or their designee(s), should inspect the drop-box or secure ballot transfer container for evidence of tampering and should receive the retrieved ballots by signing the retrieval form and including the date and time of receipt. In the event tampering is evident, that fact must be noted on the retrieval form.
- The completed collection form should be maintained in a manner prescribed by the board of elections to ensure that the form is traceable to its respective secure ballot container.
- The county elections official at the county election office or central count location should note the number of ballots delivered on the retrieval form.

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### 3.3 ELECTION DAY AND POST-ELECTION PROCEDURES

- The county board of elections should arrange for authorized personnel to retrieve ballots on election night and transport them to the county board of elections for canvassing of the ballots.
- Authorized personnel should be present at ballot return sites immediately prior to 8:00 p.m. or at the time the polls should otherwise be closed.
- At 8:00 p.m. on election night, or later if the polling place hours have been extended, all ballot return sites, and drop-boxes must be closed and locked.
- Staff must ensure that no ballots are returned to ballot return site after the close of polls.
- After the final retrieval after the closing of the polls, the drop-box must be removed or locked and/or covered to prevent any further ballots from being deposited, and a sign shall be posted indicating that polling is closed for the election.

## 4 PROCESSING OF COLLECTED BALLOTS

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Any ballots collected from a return site should be processed in the same manner as mail-in ballots personally delivered to the central office of the county board of elections official by the voter and ballots received via the United States Postal Service or any other delivery service.

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Version History:

Version	Date	Description	Author
1.0	8.19.2020	Initial document release	Bureau of Election Security and Technology

TLP: WHITE



Pennsylvania  
Guidance for Missing Official Election Ballot Envelopes  
("Naked Ballots")

Date: August 19, 2020

Version: 1.0

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“Naked Ballot” is the term used when a voter fails to insert their ballot in the inner secrecy envelope before casting their mail-in or absentee ballot.

It is the Department’s position 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. For these reasons, no voter should be disenfranchised for failing to place their ballot in the official election ballot envelope before returning it to the county board of elections.

In order to promote consistency across the 67 counties, the county board of elections should develop a process for counting naked ballots that are discovered during the pre-canvass or canvass. Such a process should include placing and sealing the naked ballot into an empty official election ballot envelope (“Secrecy Envelope”) and then placing the secured ballot with the other removed official election ballot envelopes so that it may be tabulated.

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Version History:

Version	Date	Description	Author
1.0	8.19.2020	Initial document release	Bureau of Election Security and Technology