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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Crossey, Dwayne Thomas, Irvin
Weinreich, Brenda Weinreich, and the
Pennsylvania Alliance for Retired Americans,

Petitioners,

v.

Kathy Boockvar, Secretary of the
Commonwealth, and Jessica Mathis, Director
of the Bureau of Election Services and
Notaries,

Respondents.

No. 266 MD 2020

**MEMORANDUM IN SUPPORT OF PETITIONERS' APPLICATION FOR
PRELIMINARY INJUNCTION**

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I. INTRODUCTION

With less than a month remaining before the June 2 primary, county boards of elections (“county boards”) across the Commonwealth are sounding the alarm with increasing urgency. As election officials prepare to conduct the Commonwealth’s first major election in the midst of the global pandemic, poll workers are quitting in droves and leaving little time to hire replacements. *See Exs. A-D*. Polling locations are in short supply as fewer senior centers, churches, and schools are willing to open their doors to crowds of voters and poll workers during a public health crisis, and some locations that previously agreed to serve as polling sites are reconsidering. *See id.* The primary solution advanced to facilitate in-person voting is to consolidate polling places—packing more voters into fewer, more crowded venues—and some local officials have rightfully questioned the wisdom and public health ramifications of this strategy. *See Ex. A.*¹ At least a dozen counties have proposed conducting the primary entirely by mail, signaling that they may not be prepared to handle in-person voting, Exs. A-E, while others have said so explicitly, Ex. C. At the same time, the coronavirus continues to spread through the Commonwealth: as of this filing, more than 52,000 Pennsylvanians have been infected and 3,416 have died. Needless to say, in-person voting will be severely restricted or entirely inaccessible for many Pennsylvanians in the upcoming election.

The alternative, vote-by-mail, has not fared much better in the COVID-19 pandemic. Mail voting currently operates through a network of county board staff and mail service providers—in most cases the United States Postal Service (“USPS”)—which is beginning to unravel. Pennsylvanians have already requested nearly 1,000,000 mail ballots—a number that is certain to rise over the next several weeks and is significantly more than the short-staffed county boards are prepared to handle—and the USPS is facing an unprecedented budgetary and operational crisis,

¹ All citations to Exhibits are materials attached to the Declaration of Adam C. Bonin.

which has resulted in reduced staff, limited capacity, and significant delays in mail delivery. To make matters worse, all mail ballots must be received at the county board offices no later than 8:00 p.m. on Election Day in order to be counted (“ballot receipt deadline”), and outside of a few rare exceptions, Pennsylvania law prohibits voters from seeking assistance from others, including family members and caregivers, in delivering their mail ballots (“delivery assistance ban”). 25 P.S. §§ 3146.6(c), 3150.16(c). The chances that a voter who seeks to cast a mail ballot will be disenfranchised by inevitable delays in the mail voting cycle—either in county boards processing their ballot request or in USPS’s delivery of their ballot—is exceedingly high given the absence of adequate safeguards to protect their right to vote.²

If this story sounds familiar, it is because the nation watched a similar scenario unfold last month during Wisconsin’s April 7 primary election. Voters congregated in seemingly never-ending lines at consolidated polling places, and tens of thousands of delayed ballots—and potentially more by some estimates—were delivered to election officials after Election Day. Thousands more never even made it from the local clerks to the voters who had requested them. If not for a federal court ruling extending the ballot receipt deadline for ballots post-marked by Election Day—a remedy which the U.S. Supreme Court left intact—those tens of thousands of ballots would have been rejected, and the voters disenfranchised. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020).

Wisconsin’s experience illustrates that the glaring holes and systemic defects in the vote-by-mail system will not resolve themselves; and in-person voting *by itself* is not the answer—

² Petitioners do not challenge the ballot receipt deadline, 25 P.S. §§ 3146.6(c), 3150.16(c), nor do they seek any relief that would require application of Act 77’s non-severability clause. *See infra* Part IV.A.5. To the extent the Court determines that any portion of Petitioners’ requested relief would indeed require it to apply the non-severability clause, Petitioners withdraw that request.

indeed, dozens of voters and poll workers who participated in the Wisconsin primary have since tested positive for the coronavirus. *See* Ex. F. Governor Tom Wolf, to his credit, has urged residents to stay home, practice social distancing, and, come June 2, to vote by mail. *See* Ex. G. But neither the Governor's encouragement nor Pennsylvanians' enthusiasm for mail ballots will be enough to protect the right to vote. The Commonwealth, even in times of emergency, has a constitutional obligation to ensure that all citizens have access to a free and equal election, yet the June 2 primary will be anything but that.

Petitioners filed this lawsuit and now seek emergency injunctive relief because the Commonwealth has failed to provide sufficiently safe, reliable paths to voting in the upcoming election, as required by the Pennsylvania Constitution. Instead, Petitioners and many other Pennsylvanians must pick their poison: cast a ballot in person and subject themselves to the risk of COVID-19 infection, or submit their ballots to the vagaries of a mail delivery service which is currently under siege, and subject themselves to risk of arbitrary disenfranchisement. *But see Bergdoll v. Kane*, 557 Pa. 72, 85 (1999) ("The right [to vote] is pervasive of other basic civil and political rights, and is the bed-rock of our free political system."). Because neither option is acceptable under the Pennsylvania Constitution, Petitioners ask this Court to grant their request for injunctive relief and order Respondents to implement the following procedures, much of which are already in place for certain categories of Pennsylvania voters living overseas: (1) provide emergency write-in ballots for all voters who request mail ballots, designate all ballots submitted by mail as emergency ballots, and count all emergency ballots if postmarked by Election Day and

received by the seventh day after the election; and (2) preliminarily enjoin 25 P.S. §§ 3146.6(a), 3150.16(a) to the extent that it prohibits third-parties from delivering any voter's ballot.³

Just as overseas voters may deliver ballots to Pennsylvania officials up to seven days after Election Day, 25 P.S. § 3511(a), and may submit write-in ballots when they do not receive their mail ballots in a timely manner, 52 U.S.C. § 20303, Petitioners and Pennsylvanians living stateside are entitled at the very least to the same allowances, during a global pandemic no less.⁴

II. BACKGROUND

The COVID-19 pandemic has upended virtually all aspects of daily life. Schools and businesses are closed; most people are sheltering in their homes; more than 22 million Americans have lost their jobs; and more than 75,000 have died.⁵ The Commonwealth has not been spared. The virus has infected more than 52,000 Pennsylvanians and has claimed at least 3,416 lives. Amid the crisis, Governor Wolf issued a state-wide stay-at-home order, which remains in place at the time of this motion.⁶ But even after the order is lifted, COVID-19's devastation will not subside any time soon and certainly not before the June 2 primary election; to the contrary, infections are projected to rise steadily over the next several weeks, reaching about 3,000 daily deaths nationally by June 1. Ex. J.

³ The term "postmark" refers to any type of imprint applied by the USPS to indicate the location and date the Postal Service accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks. Where a ballot does not bear a postmark date, it should be presumed to have been mailed on or before election day unless the preponderance of the evidence demonstrates it was mailed after Election Day.

⁴ Petitioners do not challenge the constitutionality of 52 U.S.C. § 20303, 25 P.S. § 3511(a), or any other federal or state law setting forth voting procedures for military or overseas voters.

⁵ Center for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Cases in the U.S. (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁶ The stay-at-home order is set to expire on June 4, 2020. Ex. H. The state will gradually reopen in three phases with the third phase operating as a "return to a 'new normal.'" Ex. I.

A. In-person voting will be severely restricted because of COVID-19.

On March 27, citing the “best interests of voters, poll workers and county election officials,” Governor Wolf signed Senate Bill 422 (“Act 12”) into law. 25 P.S. § 3584(a); Ex. G. Act 12 postponed the Commonwealth’s primary election from April 28 to June 2, and introduced emergency measures that authorized counties to consolidate polling places, and eased rules regarding the relocation and staffing of polling places in light of the COVID-19 pandemic. 25 P.S. § 3582. Noting counties’ concerns about “a potential shortage of poll workers and appropriate polling place locations,” the Governor has proactively encouraged Pennsylvania voters to vote by mail. Ex. G.

But neither Act 12 nor the Governor’s encouragement has alleviated the concerns of many counties across the Commonwealth. At least a dozen counties, including Montgomery County, Chester County, Fayette County, Union County, and Huntingdon County, have asked Governor Wolf to transition the primary into an all-mail election. Exs. A, C, E. These counties and others have highlighted several concerns about their ability to conduct in-person voting in the June 2 primary.

1. *Loss of poll workers.*

Counties across the Commonwealth are rapidly losing their poll workers, most of whom are elderly and vulnerable to severe COVID-19 symptoms. Many of Montgomery County’s poll workers have informed the county that “they will not work on Election Day in any capacity.” Ex. A. Huntingdon County, similarly, has “already lost most of [its] poll workers,” but does not yet know the full scope of their staffing shortage for the June 2 primary. Ex. B. That uncertainty “makes it impossible” for the county to plan because it does not know just how many vacancies it will have to fill. Ex. B. The elections directors of Fayette and Allegheny Counties have also had poll workers cancel or express concerns about their health. Exs. C, D.

Although Act 12 and subsequent guidance from the Department of State attempt to solve this problem by allowing fewer poll workers to staff polling locations, the emergency legislation does not (and could not) reduce the number of poll workers *necessary* to operate a polling place safely and efficiently. Even if counties consolidated polling locations as Act 12 permits, operating those consolidated sites “will still require the use of a substantial number of . . . poll workers.” Ex. A. In fact, combining polling locations increases the “potential for confusion” and introduces “greater . . . logistical challenges” in “ensuring that people are being directed to the correct precinct to sign in, are given the proper ballot, and are casting that ballot in the correct scanner.” Ex. A. Thus, even with the increase flexibility under Act 12 to deploy poll workers to locations across the county, Montgomery County believes its “polling places will be inadequately staffed or not staffed at all” simply because it “will not have enough people who are eligible and willing to do it.” Ex. A. And the elections director of Fayette County has said that his county, too, is not prepared to host in-person elections in part because the county does not have a sufficient number of commitments from poll workers. Ex. C.

These shortages would be alarming as it is, but this is also the first election where many counties are transitioning to new voting machines, which will require more in-person training than usual. Huntingdon County cancelled six training sessions it had scheduled during the month of March. Ex. B. Fayette County has also been forced to cancel trainings for new voting equipment. Ex. C. And even if election officials were able to begin training poll workers now, and could somehow complete that training before June 2, they also have “logic and accuracy testing to complete, supplies to pack, equipment to deliver to polling places, 300 poll workers to train, and . . . vendors who are flying in from other states to provide support for [their] equipment at each stage of the process.” Ex. B.

2. *Loss of polling locations.*

Counties also lack access to the space needed to facilitate standard in-person voting. Montgomery County is “already hearing from established polling places that they do not wish to participate in this election” and believes “[t]he probability of convincing new locations to volunteer is slim.” Ex. A. In Huntingdon County, “many of [its] polling sites are considering asking [the county] to find a new place to host the election.” Ex. B. Those polling locations include “many churches and senior centers” that are “rightfully concerned about the health and safety of their own staff and patrons.” Ex. B. Fayette County has also complained of a lack of access to polling locations. Ex. C.

Consolidating polling places will not solve this problem. For Montgomery County, consolidating within the bounds of what Act 12 permits still requires the county to find 170 polling sites. Ex. A. “Buildings suitable for housing multiple polling locations are limited,” and even fewer are willing to host crowds of voters during a public health crisis. Ex. A. Even if the counties were able to find suitable locations, it raises questions about the wisdom of this practice during a global pandemic, and some counties are struggling to “justify[] a decision to concentrate larger numbers of poll workers and voters into fewer spaces.” Ex. A. Huntingdon County officials have expressed fears that combining polling locations “jeopardize[s] the lives of [its] residents by asking them to congregate in large numbers.” Ex. B.

3. *Risk of infection.*

Perhaps most importantly, county boards are concerned about the safety of their voters and their poll workers. Exs. A, C, K. Montgomery County officials have expressed reservations about “[i]nviting millions of voters to what would amount to thousands of mass gatherings across the state.” Ex. A. The elections director of Lycoming County is concerned about “the moral implications” of asking poll workers, “knowing their age, and their vulnerability,” to serve during

the COVID-19 pandemic. Ex. C. Some counties are even struggling to obtain the tools necessary to mitigate the risk of infection: the Fayette County Elections Director “can’t locate hand sanitizer anywhere.” Ex. C.

But the risk of infection is not limited to voters and poll workers. As Montgomery County noted in its letter to Governor Wolf, hosting in-person voting risks contributing to the spread of COVID-19 “in every step of the process.” Ex. A. Election staff will interact with voting machine vendors; delivery truck drivers will spend hours at 352 separate locations, potentially including senior living communities and schools, setting up voting equipment; additional county staff will be called in to address issues that arise on Election Day, including traveling to polling locations across the county to troubleshoot; and, of course, approximately 2,500 poll workers will interact with voters. Ex. A. “A positive test for any of the people involved in any step of this process could cause a ripple effect that would require quarantines and would effectively cripple our ability to function.” Ex. A.

Because of these concerns, a few counties have taken matters into their own hands to encourage the widespread transition to vote by mail. In Lycoming County, for instance, the County Elections Director took out a full-page newspaper ad urging all residents to vote by mail. Ex. C. And Allegheny County has announced that it will send mail-in ballot applications to all registered voters with prepaid postage. Ex. D.

B. Voting by mail will also present serious challenges during the pandemic.

As a result of recent election reforms, Act 77 of 2019, the June 2 primary will be the first election in which all Pennsylvania voters have the option to vote by mail. 25 P.S. § 3150.11(a). In the 2016 general election, 96 percent of voters cast their ballots in person. Ex. L. Election officials transmitted only 292,191 absentee ballots statewide—but that number could be ten times larger this year. Meredith Decl. ¶ 24. Nearly 1,000,000 eligible voters have already requested mail ballots

with the election several weeks away, and the remaining millions of registered voters still have 18 days to do so. *See* Exs. M, N.

1. *United States Postal Service delays*

The inevitable surge of voting by mail will put an unprecedented strain on a postal system currently hampered by severe budgetary shortfalls, staffing shortages, and reduced capacity. Meredith Decl. ¶¶ 29-35; Ex. O. To be clear, USPS has struggled for some time with budget shortages and downsizing. McCool Decl. ¶¶ 29-31; Ex. P. In 2009, USPS identified 677 post offices for possible closure, and in 2012 USPS began closing offices in Pennsylvania. McCool Decl. ¶ 30; Ex. Q. The closures have brought increased mail delays to many Pennsylvanians, especially those living in rural communities whose mail now travels hundreds of miles to the closest processing facility, only to boomerang back to the intended recipient. McCool Decl. ¶ 29; Thomas Decl. ¶ 6. But USPS's past struggles pale in comparison to the devastation that COVID-19 has brought onto the agency. Ex. R. The virus has ravaged USPS's workforce, with more than 1,600 confirmed cases among postal workers, and another 9,000 workers quarantined. *See* Exs. S, T, U; Meredith Decl. ¶ 30. These disruptions come at a critical time when USPS is facing unprecedented demand, and the agency is no longer able to deliver mail within its normal two-to-three-day timeline. Ex. V. Worse still, agency officials and members of Congress have warned that the agency may be forced to shutter in a matter of months due to the coronavirus's effects. Exs. O, W; Meredith Decl. ¶ 30.

Mail delivery delays will lead to disenfranchisement for Pennsylvania voters who, by no fault of their own, will be unable to receive, cast, and mail their ballot and guarantee its receipt by Election Day. The process of voting by mail necessarily touches USPS several times: a voter may request a mail ballot by mailing an application, a county responds by mailing the voter a ballot, the voter can then mail the ballot back to the county board office. But the pandemic's effects on

USPS means that each step in this process is inordinately delayed: Counties are receiving a significantly increased volume of mail-in ballot applications later, adding to a processing bottleneck that appears almost impossible to clear, and further delaying the process of merely approving a voter's mail ballot application. Exs. M, N; Meredith Decl. ¶ 35. For example, Montgomery County officials are facing delays in distributing mail ballots because of the length of time USPS is taking in processing routine requests. Sisler Decl. ¶ 6. As more completed ballots return, they expect delivery times to lengthen. *Id.*

For any applications that the county can process, the county must then mail the voter a ballot with enough time for the voter to complete the ballot and then mail it back to the county board for counting. But, as already evidenced in Wisconsin, USPS's delays have meant that voters are not receiving ballots until just days before Election Day, *if at all*. Meredith Decl. ¶¶ 31-21 (explaining that Wisconsin voters who were issued ballots more than 10 days prior to the election never received those ballots, and reports confirm that entire batches of ballots were never delivered).⁷ There is no doubt that voters who receive their ballots on or after Election Day are disenfranchised in Pennsylvania, *see* 25 P.S. 3146.6(c), 3150.16(c), but voters who receive their ballot too close to Election Day are equally at risk because USPS's operational difficulties mean that ballots may take *more than ten days* to reach the county board. Meredith Decl. ¶ 51. Thus, a process that pre-pandemic would have taken a week may now take several weeks, ensuring that potentially tens if not hundreds of thousands of Pennsylvanians could be disenfranchised this year if forced to rely on USPS to deliver their ballots by Election Day. McCool Decl. ¶ 30 (states

⁷ *See, e.g.,* Daphne Chen, Marcia Robiou, Elizabeth Mulvey, Kacey Cherry and June Cross, *Voter Suppression at its finest: Wisconsin citizens say missing ballots kept them from being counted in election*, MILWAUKEE JOURNAL SENTINEL (Apr. 13, 2020), <https://www.jsonline.com/story/news/politics/elections/2020/04/13/wisconsin-election-missing-ballots-long-lines-kept-many-voting/2979975001/>.

experiencing similar restructuring acknowledge mail delays have operated to disenfranchise their electorate).

2. County board delays

Election officials are struggling to manage the unprecedented volume of absentee and mail-in ballot requests, and this will likely lead to unfulfilled requests and voters scrambling to reassess their options to vote on Election Day. Meredith Decl. ¶¶ 25-28. Nearly 1,000,000 eligible voters have already requested mail ballots for an election that is still several weeks away. Ex. M. Requests are expected to continue, especially as counties like Allegheny are sending mail ballot request forms to all eligible voters. Meredith Decl. ¶ 23. This is in sharp contrast to the 2016 elections where only 84,000 absentee ballots were cast statewide for the primary and fewer than 300,000 absentee ballots were cast for the general election. Meredith Decl. ¶¶ 23-24.

Some counties have indicated that they are not equipped to handle the crushing load of mail ballot requests in part due to staffing shortages created by the pandemic, but also because of shrinking budgets. Exs. A, K. These shortages will eventually lead to endless backlogs of mail ballot requests during a time when counties must *also* start preparing for in-person Election Day voting. Meredith Decl. ¶¶ 25-28. The Chairwoman of the Philadelphia Board of Elections has observed that while elections officials are working to process the “mountain of requests,” the “rules were not designed to handle ten times the number of applications that we typically see in a presidential general election.” Ex. K. Indeed, Philadelphia has been forced to reassign staff and bring back a greater number of employees to process the nearly 70,000 requests that had arrived as of April 30, a third of which are still pending. Exs. K, X. Delaware County election officials began falling behind processing absentee and mail-in ballot requests seven weeks before the June 2 primary. Ex. L. Montgomery County officials are working on the weekends and evenings to keep up with the demand for absentee and mail-in ballots even as their office faces serious staffing

challenges. Sisler Decl. ¶¶ 3–4. Already, they have received 83,000 applications for mail ballots and expect to receive 120,000 by the May 26 deadline. *Id.* ¶ 3. And the election director for Mercer County has warned that the spike in mail-in voting is creating problems. Ex. M. Although the counties anticipated “some difficulty and some hiccups,” administering elections this year during the COVID-19 pandemic is going to be like “expecting 30 inches of snow,” when what you get is “the equivalent of 10 feet.” Ex. M. Several county officials have acknowledged that they “miscalculated the fallout from massive scaling up of mail voting because there was one bottle neck we couldn’t avoid—processing applications.” Ex. Y. And they are understandably concerned about the coming weeks when mail ballot requests will multiply. Ex. Y.

C. Recent elections in Wisconsin and Ohio foreshadow the problems Pennsylvania voters will encounter unless Respondents implement additional safeguards.

Wisconsin’s April 7 election demonstrates the consequences of the State’s failure to implement safeguards to ensure access to reliable, safe voting options, including vote by mail, in response to the COVID-19 pandemic. Last month, the nation was horrified by images of thousands of Wisconsin citizens forced to stand in long lines for hours in order to cast their ballots, many wearing masks, gloves, and other protective gear as they congregated together to vote. Ex. Z. Those lines were due in large part to severe poll worker shortages—the same shortages Pennsylvania now faces—which required cities across the state to consolidate their usual polling locations on Election Day. Exs. AA, BB.

Equally alarming was the breakdown in Wisconsin’s absentee-voting process. The system unraveled largely because of delays in processing and delivering absentee ballots. *First*, Wisconsin election officials were confronted with a surge of absentee ballots requests and were unable to fulfill them all even with employees in some jurisdiction working almost around the clock. Ex. CC. Madison staffers, for instance, were working 110 hours a week “but still had a week’s worth

of backlogs by mid-March.” *Id. Second*, USPS struggled to deliver ballots to voters, resulting in some ballots being delayed or, even worse, never arriving at all. *Id.*; Ex. DD. As described above, Pennsylvania election officials are facing these same issues.

As a result of that breakdown, thousands of Wisconsin voters did not receive their requested ballots in time to vote. That is because Wisconsin—like Pennsylvania—requires voters to return mail ballots by 8 p.m. on Election Day. Wisc. Stat. § 6.87(6). According to statistics from the Wisconsin Election Commissions, as of April 7, there were 1,282,762 absentee ballot applications but only 1,273,374 absentee ballots issued—meaning 9,388 absentee ballots may not have been mailed to the requesting voters by the time the voters were required to return them. Ex. EE.

Because of judicial intervention, and with the approval of the U.S. Supreme Court, Wisconsin’s absentee ballot receipt deadline was extended. Five days before the election, a federal district court judge in Wisconsin enjoined the state “from enforcing the requirement . . . that absentee ballots must be received by 8:00 p.m. on election day to be counted,” and extended that deadline by six days, provided that such ballots were mailed and postmarked on or before election day. *See Democratic Nat’l Comm. v. Bostelmann*, Civ. No. 20-cv-249-wmc, 2020 WL 1638374, at *5 (W.D. Wis. Apr. 2, 2020), *stayed in part sub nom. Democratic Nat’l Comm. v. Republican Nat’l Comm.*, Nos. 20-1538 & 20-1546 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). A few days later, the United States Supreme Court approved the receipt deadline extension, *see Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 2020 WL 1672702, at *2, resulting in tens of thousands, and possibly more than 100,000, ballots being counted that would otherwise have been rejected and, by extension, voters who would have been disenfranchised. Meredith Decl. ¶ 50.

But those were the lucky Wisconsin voters. Because the State failed to act sooner, other voters were either forced to go to the polls during the pandemic and risk exposure to COVID-19 or were disenfranchised altogether. One political scientist estimates that the City of Milwaukee “saw nearly 16,000 fewer votes than it should have.” Ex. FF. Similarly, in the City of Green Bay, voter turnout was reportedly down 50 percent from the 2016 presidential primary election and down 25 percent from a 2019 mayoral race. Ex. GG. Even worse, the Wisconsin Department of Health Services has reported that 52 people who voted in person or worked the polls on April 7 have tested positive for COVID-19 thus far. Ex. F.

Ohio’s April 28 election reveals that what happened in Wisconsin was no anomaly. The Ohio Secretary of State reported that election officials in the state were experiencing “missed mail deliveries” as well as delivery times “in excess of ten days” for first class mail. Ex. HH. The fact that Ohio experienced delays similar those voters experienced in Wisconsin further highlights the systemic issues affecting USPS’s ability to meet its service commitments. Meredith Decl. ¶ 33. And the same issues are likely to plague Pennsylvania’s upcoming primary election.

Through all the confusion about how to proceed with the June 2 primary, one thing is clear: Pennsylvania must act now to implement safeguards before the election to avoid the large-scale disenfranchisement observed in the Wisconsin primary, and to ensure that all voters have access to a free and equal election.

III. LEGAL STANDARD

Violations to fundamental rights, including the right to vote, constitute immediate and irreparable harm and merit a preliminary injunction. *See Pa. State Educ. Ass’n ex rel. Wilson v. Commonwealth., Dep’t of Cmty. & Econ. Dev., Office of Open Records*, 981 A.2d 383, 386 (Pa. Commw. Ct. 2009) (granting preliminary injunction to prevent public disclosure of employee’s

home addresses, a threat to constitutionally protected privacy rights), *aff'd*, 606 Pa. 638 (2010). Such relief is appropriate when the moving party can establish the following factors: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest. *SEIU Healthcare Pa. v. Commonwealth*, 628 Pa. 573, 578 (2014) (citing *Warehime v. Warehime*, 580 Pa. 201, 209–10 (2004)). As demonstrated below, Petitioners have established each of these factors and are entitled to a preliminary injunction.

IV. ARGUMENT

A. Petitioners are likely to succeed on the merits of their Free and Equal Elections Clause and Equal Protection Clause claims.

Pennsylvania’s Constitution imposes a clear and unambiguous duty on the Commonwealth to ensure that *all* elections are “free and equal.” *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 100 (2018); Pa. Const. art. I, § 5. This affirmative right, which “has no federal counterpart” and outstrips the protections in the federal constitution, protects voters against “regulation[s] of the right to exercise the franchise [that] deny the franchise itself, or make it so difficult as to amount to a denial.” Elections are “free and equal” only when “no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 244 Pa. 447, 457 (1914). The guarantee of a “free and equal” election also requires that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 244 Pa.

at 457; *see also League of Women Voters*, 645 Pa. at 113. And it applies with equal force even if voting rights are denied or impeded “by inadvertence.” *Id.* at 111 (citing *In re New Britain Borough Sch. Dist.*, 295 Ps. 478, 485 (1929)).

The Pennsylvania Supreme Court has further recognized that the Free and Equal Elections Clause reaches “all aspects of the electoral process, to the greatest degree possible.” *Id.* at 100. Courts, thus, have broad authority when enforcing its provisions because the Clause “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 108–09 (quotation and citation omitted); *see also id.* at 130 (“[O]ur Court possesses broad authority to craft meaningful remedies when required.”). The COVID-19 related disruptions to daily life in the Commonwealth, and to the electoral process specifically, have left Pennsylvanians with a dearth of reasonably accessible options for voting in the upcoming primary. And if the Free and Equal Elections Clause is to have any meaning, it must require, at the very least, that state officials adopt reasonable safeguards to prevent large-scale disenfranchisement in the midst of the current public health emergency. *Applewhite v. Commonwealth*, 2014 WL 184988, at *23 (Pa. Commw. Ct. Jan. 17, 2014) (“Disenfranchising voters ‘through [no] fault of the voter himself’ is plainly unconstitutional.” (quoting *Appeal of Norwood*, 382 Pa. 547, 549 (1955))).

1. *Both in-person voting and vote by mail will be severely compromised in the upcoming election.*

Notwithstanding the Commonwealth’s constitutional obligations, Pennsylvania’s election officials have all but acknowledged that in-person voting will be severely restricted in the June 2 primary, and mail-in voters may not fare much better. To date, at least a dozen counties, which serve more than a third of the Commonwealth’s registered voters, have asked Governor Wolf to transition the June primary into an all-mail election, effectively conceding that they lack the

resources to administer in-person elections successfully given the challenges of preparing for an election during a public health crisis. Ex. A, B, C, E. While Petitioners do not seek relief that would eliminate in-person voting,⁸ the counties' requests reflect serious concerns about the Commonwealth's ability to ensure sufficient access to the franchise. *See supra* Part II.A.

The Commonwealth's current mail-in voting system has its own troubles, which threaten to disenfranchise untold numbers of Pennsylvanians—many of whom are voting by mail for the first time in response to the Governor's and county officials' recommendations. *See supra* Part II.B.2. All eligible Pennsylvanians are now entitled to vote by mail—following Act 77's recent sweeping reforms—but in the COVID-19 pandemic, many voters have no reliable, safe means by which they can obtain and submit a mail ballot with reasonable assurance that it will be counted. As explained above, counties have struggled to respond to the unprecedented number of absentee and mail-in ballot requests, *see supra* Part II.B.2, and the USPS's operations and capacity to deliver mail in a timely manner have been decimated by COVID-19, *see supra* Part II.B.1; Meredith Decl. ¶¶ 29-35; McCool Decl. ¶¶ 29-30; Ex. DD. The rapid expansion of mail ballots, which would have clogged Pennsylvania's mail system under normal circumstances could potentially bring the agency to a halt. Ex. U; Meredith Decl. ¶ 30.

Thus, while Pennsylvania law requires that all mail-in or absentee ballots must be received in the office of the county board by 8:00 p.m. on Election Day, 25 P.S. §§ 3146.6(c), 3150.16(c), neither election officials (who must send ballots to voters) nor voters (who must return ballots to county boards to be counted) have any reasonable assurance that the ballots mailed via USPS will be delivered with enough time to allow voters to meet this deadline. Thomas Decl. ¶ 6, Crossey

⁸ Indeed, Petitioners are not advocating for an all-mail election in Pennsylvania because Pennsylvania must provide for both mail and in-person voting options for its electorate.

Decl. ¶ 4.⁹ And the failure to address these systemic breakdowns could spell disaster as an unprecedented number of Pennsylvanians will rely on mail delivery to exercise their right to vote.

Beyond mail delivery, the only other option for returning mail ballots is in-person delivery at a local board of elections office, which is neither an accessible nor safe alternative for many voters. The Governor has urged Pennsylvanians, and correctly so, to stay home and observe social distancing guidelines. Ex. II. Voters venturing out *en masse* to deliver mail ballots introduces the same health risks that the stay-at-home order seeks to avoid, particularly for seniors and other voters who are vulnerable to serious illness from COVID-19, and for voters who must rely on public transportation to reach a county board office that, in some instances, is located dozens of miles farther than the voters' usual polling place. McCool Decl. ¶ 21. As Drs. McCool and Meredith explain in their expert reports, even small changes to polling places—including changes related to consolidation and increased distance—can increase the cost of voting and reduce turnout. McCool Decl. ¶¶ 10, 26-27, Meredith Decl. ¶¶ 13-17.

2. *Compounding the barriers to in-person and mail voting, Pennsylvania prohibits voters from obtaining assistance to deliver their ballots.*

What would have been a safer, reliable alternative for Petitioners and other vulnerable members of the population to submit their ballots—seeking assistance from a third party—is foreclosed by the Election Code. Pennsylvania law allows only *voters* to submit their ballots by mail or in person to the county board, 25 P.S. §§ 3146.6(a); 3150.16(a), unless the voter is disabled or hospitalized. *DiPietrae v. City of Phila.*, 666 A.2d 1132 (Pa. Commw. Ct. 1995). Thus, in all but the rarest cases, voters must rely on a beleaguered postal service or risk their health to venture out and return their ballots in person. *See In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen.*

⁹ Petitioner Michael Crossey requested his absentee ballot weeks ago and has yet to receive it. Crossey Decl. ¶ 4.

Election, 577 Pa. 231 (2004) (interpreting the Election Code to prohibit third party hand delivery of absentee ballots). Any election conducted under these circumstances, without adequate safeguards for the hundreds of thousands of Pennsylvanians who must vote by mail to participate in the political process, will violate their most basic and fundamental constitutional right to a free and equal election.

3. *The failure to provide safe, reliable means to exercise the right to vote denies Petitioners and many other Pennsylvanians their constitutional right to a free and equal election.*

Despite COVID-19's impact on preparations for the primary, the Commonwealth nonetheless must provide its citizens with a free and equal election. Its "regulation[s] of the right to exercise the franchise" should not "deny the franchise itself, or make it so difficult as to amount to a denial," nor should any "constitutional right of the [voter be] subverted or denied." *Winston*, 244 Pa. at 457. The pandemic does not exempt the Commonwealth from these constitutional mandates; to the contrary, the Commonwealth has the duty, and courts have the authority, to enforce the Free and Equal Elections Clause and all other constitutional rights that protect the franchise, even when it requires election officials to depart from standard procedures and implement emergency measures in response to unforeseen events.

For instance, when rain "caused flooding along the Monongahela River" during a statewide general election, prompting the Washington County commissioners to declare a state of emergency, the Court of Common Pleas of Washington County suspended the election, forcing polling places to close with voting at those locations to resume two weeks later. *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw. Ct. 1987). In affirming the polling place closures and election rescheduling, this Court reasoned that permitting an election to go on under these extreme circumstances, "where members of the electorate could be deprived of their opportunity

to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.” *Id.* at 839.

Years later, approximately a week before the 2008 presidential election, the U.S. District Court for the Eastern District of Pennsylvania issued an injunction that forced election officials to adopt appropriate contingency plans in advance in case electronic voting machines malfunctioned. *NAACP of Pa. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008). The Court’s Order required the Secretary of the Commonwealth to direct all county boards to distribute paper ballots if 50 percent of electronic voting machines in any given precinct became inoperable in the upcoming election. *Id.* At the time the order issued, no precincts had reported machine failures—because the election was still a week away—yet the court held that at least some machines “undoubtedly fail” on Election Day, and “this is not a matter we can decide through hindsight after the election has concluded.” *Id.* at 765. Faced with “a real danger that a significant number of machines [would] malfunction” and create unacceptably long lines, the court recognized that the constitutional right to vote required the Commonwealth to implement safeguards to ensure that voters have a viable alternative, explaining that “we cannot allow our decision to be based on hope.” *Id.*

Then, in 2016, when thousands of voters in Montgomery County had not received their absentee ballots within days of the election because election officials faced “unprecedented demand” and “problems with the postal service,” a Pennsylvania court extended the absentee ballot receipt deadline by four days and instructed the Montgomery County Board of Elections to accept all absentee ballots that were received by the new deadline. Exs. JJ, KK.

Pennsylvania courts are not alone in crafting remedies to protect voting rights in response to emergencies or unforeseen events that disrupt elections. Recently, a federal district court in Wisconsin granted relief enabling tens of thousands of voters to cast their absentee ballots by

extending the deadline for their receipt to six days after Election Day, as long as the ballots were mailed or postmarked on or before the election. *See Bostelmann*, 2020 WL 1638374, at *22. Notably, the U.S. Supreme Court approved the extension of the ballot receipt deadline and left that portion of the remedy intact, even after issuing a stay of other portions of the district court's injunction that would have allowed election officials to count ballots that were mailed or postmarked after Election Day. *Democratic Nat'l Comm.*, 2020 WL 1672702, at *4.

Other courts have granted similar relief in the face of extreme weather events and delivery delays that upended the smooth functioning of electoral processes. When Hurricane Matthew swept through Florida and Georgia, disrupting voter registration processes in the middle of the 2016 general election, federal courts crafted remedies to extend registration deadlines to protect “the right of aspiring eligible voters to register and to have their votes counted.” *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) In Florida, the court ordered the Secretary of State to direct supervisors of elections to extend the voter registration deadline. *Id.*; *see also Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (ordering Governor and Secretary of State to extend voter registration deadline). Similarly, a court ordered several county boards of elections to extend precinct operating hours after unexpected severe weather and ballot shortages prevented voters from reaching the polls and, once there, casting their ballots. *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008), ECF No. 6. Another court extended the receipt deadline for overseas ballots by 10 days after considering evidence that officials had sent many ballots too late for timely delivery and return to meet the statutory deadline. *Doe v. Walker*, 746 F. Supp. 2d 667, 681–83 (D. Md. 2010). The court ordered the state board of elections to count those late-arrived ballots as validly cast and to direct local boards to accept and canvass them. *Id.* at 683. And when an election

official’s “miscalculation” resulted in absentee ballots arriving after the statutory deadline, a Michigan court affirmed a lower court’s order that the ballots were entitled to be counted to prevent disenfranchisement. *Stamos v. Genesee Cty. Bd. of Canvassers*, 46 Mich. App. 636, 645–46 (1973).

Because of the COVID-19 pandemic, Petitioners and many other Pennsylvania voters do not have reasonable access to in-person voting, nor do they have any reasonable assurance that their mail ballots will be delivered to their county boards on time in light of the current mail service disruptions. *See, e.g.*, Thomas Decl. ¶ 4; Crossey Decl. ¶ 4. Their only other alternative, to seek assistance from others in submitting their ballots, is prohibited by Pennsylvania law. 25 P.S. §§ 3146.6(a); 3150.16(a). At every turn, Pennsylvania voters will encounter barriers to the franchise that, collectively, “amount to a denial” of the right to vote. *Winston*, 244 Pa. 455.

4. *The Commonwealth’s failure to adopt adequate safeguards for in-person and mail voting imposes unequal burdens on voters.*

Equally problematic under the Free and Equal Elections Clause is the fact that these barriers—and the Commonwealth’s failure to implement adequate safeguards—impose disproportionate costs and heightened burdens on certain demographic groups. The health risks of in-person voting or personal delivery of mail ballots bear most heavily on medically vulnerable individuals, including Pennsylvania’s senior population, which is one of the State’s largest voting blocs, comprising approximately 24 percent of all eligible voters. The Centers for Disease Control and Prevention (“CDC”), among others, recommends that people who are over the age of 65 or who have underlying health conditions avoid crowded areas where social distancing is not possible. Indeed, after Wisconsin held its primary election, at least 52 new cases of COVID-19 were reported among poll workers or individuals who voted in person. Ex. F.

For voters who opt to cast mail ballots, the severe burdens imposed by delayed mail delivery and the lack of access to third-party delivery assistance fall disproportionately on poor, minority, and rural communities. These populations generally have even less access to reliable postal services, live in areas with limited access to public transportation, and are less able to bear the costs of traveling to a county board office, or the increased risk of exposure to COVID-19 in order to submit a mail ballot in person. McCool Decl. ¶ 21. Low-income voters or voters in rural areas, in particular, tend to face longer travel distances to their county board office. *Id.* Ballot delivery assistance is essential to equalize the disadvantages of relying on a vote-by-mail process plagued with systemic defects. *Id.*

The Pennsylvania Constitution requires election officials to address these glaring disparities in access. Faithful adherence to the Free and Equal Elections Clause mandates that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 244 Pa. at 457; *see also League of Women Voters*, 645 Pa. at 113 (Free and Equal Elections Clause “equalize[s] the power of voters in our Commonwealth’s election process”). Far from equalizing access, the current voting procedures are ill-suited to address the election administration challenges posed by COVID-19, and, as a result, they impose severe burdens on the franchise that fall most heavily on voters who are least equipped to overcome them.

In order to provide the free and equal election mandated by the Pennsylvania Constitution, election officials must implement safeguards, in advance, to ensure that voters are able to cast mail ballots and minimize the risk of arbitrary disenfranchisement for reasons outside the voters’ control.

5. *Petitioners' requested relief does not require application of Act 77's non-severability clause.*

To be clear, Petitioners do not challenge the deadline for the receipt of absentee or mail-in ballots as set forth under Act 77. *See* 25 P.S. §§ 3146.6(c), 3150.16(c). While Act 77 expanded the right to vote by mail to all eligible voters, 25 P.S. § 3150.12(a), and extended the deadline by which mail ballots must be received (from 5:00 p.m. on the Friday before Election Day under the prior law to 8:00 p.m. on Election Day) the non-severability clause that the Act attaches to these provisions is neither triggered nor enforceable in this action. *See* 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421). Petitioners have not sought an injunction of the receipt deadline, nor would their requested relief prevent election officials from enforcing the deadline on any ballots delivered in-person, or on all mail ballots in elections that occur outside of the pandemic. What Petitioners seek here is a temporary, emergency ballot for Pennsylvanians who are voting by mail that supplements, rather than supplants, existing procedures.

Moreover, the current public health emergency and its demonstrated impact on USPS's operational capacity warrants such relief. Absent this Court's intervention, Pennsylvanians will be forced to choose between subjecting themselves to the health risks of COVID-19 or submitting their ballot to the vagaries of a decimated mail delivery service, leaving no reliable, safe option to vote in violation of the Pennsylvania Constitution. Indeed, courts have implemented comparable relief in response to election-related emergencies. *See supra* Part IV.A.3. And just as an emergency extension of a precinct's hours does not render the statutory voting hours void, *Obama for Am.*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008), ECF No. 6, and the temporary cessation of voting on Election Day, to be rescheduled weeks later, does not invalidate Election Day as we know it, *In re General Election-1985*, 531 A.2d at 838, Petitioners' claims do not render any portion of Act 77 invalid. Instead, Petitioners ask this Court to enforce the Free and Equal Election Clause, which

demands that the Commonwealth provide its citizens, who are impacted by an extraordinary public health emergency, with a reasonably accessible and reliable voting option—even if it must create one.

Finally, even if Petitioners sought to enjoin the ballot receipt deadline, Pennsylvania Supreme Court precedent and long-held rules of statutory construction have made clear that non-severability clauses are not “inexorable commands.” *Stilp v. Commonwealth*, 588 Pa. 539, 629 (2006); *see also* 1 Pa.C.S. § 1925 (“The provisions of every statute shall be severable.”). Severance is presumed where “a statute can stand alone absent the invalid provision.” *Stilp*, 588 Pa. at 626. Ultimately, the court does not “deem[] nonseverability clauses to be controlling in all circumstances . . . but instead [it] will effectuate [its] independent judgment concerning severability.” *Id.* at 642. By including the non-severability provision, Act 77 purports to bind the ballot receipt deadline to independent provisions that do not rely in any way on the deadline’s enforcement. The rest of Act 77, including the provisions addressing no-excuse mail-in voting, “can stand alone absent” the ballot receipt deadline, which is illustrated by the fact that applying the non-severability provision would lead to an absurd and unconscionable result. *Id.* at 626. That is, in finding unconstitutional the failure to count mail ballots delivered after Election Day, the Court would be required as a remedy to eliminate mail-in ballots (or no-excuse absentee voting) entirely, making the cure significantly worse than the disease, and contravening the statute’s overarching purpose. The Commonwealth’s long-held rules of statutory interpretation and Pennsylvania Supreme Court precedent counsel against enforcing a non-severability provision that would strip the right to vote from nearly a million Pennsylvanians who have already requested, received, or perhaps even returned a mail ballot under Act 77’s no-excuse mail-in ballot

provisions. In all cases, the Court’s “goal must be to enfranchise and not to disenfranchise.” *In re Luzerne Cty. Return Bd.*, 447 Pa. 418, 420 (1972) (citing *Appeal of James*, 377 Pa. 405 (1954)).

6. *The prohibition on third-party mail ballot delivery assistance violates the Equal Protection Clauses of the Pennsylvania Constitution.*

Pennsylvania’s prohibition on third-party ballot delivery assistance is unconstitutional for the independent reason that it imposes an undue burden on the right to vote during the COVID-19 pandemic in violation of the equal protection provisions of the Pennsylvania Constitution. This burden, which falls most heavily on the most vulnerable members of the electorate, is not only severe, thus triggering strict scrutiny, but it also cannot be justified by any sufficient State interest.

Two separate provisions of the Pennsylvania Constitution protect the right to equal protection of the law. Article I, section 1 states that “[a]ll 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.” And Article I, section 26 provides that neither the Commonwealth nor any other political subdivision can deny to any person “the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

In considering constitutional challenges to laws affecting the right to vote, Commonwealth courts apply the same standards adopted by “the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 528 Pa. 320, 325 (1991) (citing *James v. Se. Pa. Transp. Auth.*, 505 Pa. 137 (1984)). This analysis, commonly referred to as the *Anderson-Burdick* test, requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . 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 plaintiffs’ rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also *In re Zulick*, 832 A.2d 572, 580 (Pa. Commw. Ct. 2003) (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), which in turn cites the *Anderson-Burdick* balancing test). Where the restrictions are severe, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But all burdens, “[h]owever slight” they may appear, “must be justified by relevant and []legitimate state interests sufficiently weighty to justify the limitation.” *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quotation marks omitted).

The Commonwealth’s ban on third-party delivery assistance leaves voters with little choice but to submit their ballots to the vagaries of mail delivery during the COVID-19 pandemic, which, given the USPS’s well-documented operational difficulties, subjects voters to an impermissible risk of arbitrary disenfranchisement. See *supra* Part II.B.1; see also *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1034 (9th Cir. 2020) (en banc) (concluding that a ballot collection and delivery ban posed an undue hardship on voters—even before the rise of the current health crisis); Thomas Decl. at ¶¶ 5–6. Recent elections in other jurisdictions, and prior elections in Pennsylvania, demonstrate that thousands of voters, if not more, stand to have their ballots rejected if forced to rely on mail delivery. In the 2018 general election alone, before the expansion of mail-in voting to all eligible citizens and before COVID-19, 8,162 mail ballots were delivered after Election Day, a number that will most certainly multiply in the upcoming election, just as it did in Wisconsin. And courts have repeatedly found that laws affecting far fewer voters than the number of Pennsylvanians that stand to be disenfranchised during the pandemic nonetheless imposed a severe burden on the franchise. See, e.g., *Ne. Ohio Coal. for the Homeless (“NEOCH”) v. Husted*,

696 F.3d 580, 597 (6th Cir. 2012) (disqualifying provisional ballots that constituted less than 0.3 percent of total votes inflicted “substantial” burden on voters); *Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1264 (N.D. Ga. 2018) (finding severe burden where 3,141 individuals ineligible to register); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding severe burden when less than 100 qualified voters were disenfranchised).

This burden is severe, as “[t]he right to vote necessarily includes the right to have the vote fairly counted,” and denying voters ballot delivery assistance during a pandemic will naturally result in the rejection of late-delivered ballots or in some voters abstaining from the electoral process entirely. *Stein v. Cortes*, 223 F. Supp. 3d 423, 437–38 (E.D. Pa. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). Making matters worse, the denial of delivery assistance also falls heavily and disproportionately on certain members of the electorate. This includes seniors, who in addition to being medically vulnerable to the effects of COVID-19, often lack access to reliable transportation or mail service, particularly those residing in community homes or assisted living communities, and rural voters who typically live in communities that are farther away from county board offices or have even less access to reliable mail service or public transportation.

The delivery assistance ban also imposes heightened barriers for financially vulnerable and minority voters who, in addition to lacking reliable mail service or transportation, are especially burdened by the postage fee associated with submitting mail ballots through USPS. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1216-20 (N.D. Fla. 2018) (explaining that disparate impact “matters” in the balancing test to evaluate whether the effects of law are unevenly distributed across identifiable groups). For voters who do not already possess stamps,

the cost of mailing a ballot is not simply limited to the \$0.55 single stamp fee; these voters must either venture out in search of a retailer that will sell a single stamp, or purchase stamps online at the USPS retail store, which currently sells stamps only in units of 20 or more—that translates to a minimum purchase of \$11.00. Meredith Decl. ¶ 63.¹⁰ And even after navigating these procedural and monetary barriers, the USPS’s operational difficulties and service delays may prevent timely delivery by Election Day, resulting in the ballots’ rejection. *See, e.g., Serv. Emps. Int’l Union, Local 1 v. Husted*, 906 F. Supp. 2d 745, 750 (S.D. Ohio 2012) (“To disenfranchise a single voter is a matter for grave concern.”).

Because disenfranchisement is unquestionably a severe burden on the right to vote, the restriction on third-party mail ballot delivery assistance is subject to strict scrutiny, and ultimately fails this test because it is not narrowly tailored to advance a compelling interest. *See, e.g., Fla. Democratic Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016) (“If disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then this Court is at a loss as to what does.”). But even if the Court found that the burdens at issue are less than severe, they nonetheless must be justified by “sufficiently weighty” state interests to justify the restriction. *Obama for Am. v. Husted*, 697 F.3d 423, 433 (6th Cir. 2012); *see also League of Women Voters of Fla., Inc.*, 314 F. Supp. 3d at 1215–16 (“However slight that burden may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’”). And here, too, the delivery assistance ban falls short as no governmental interest can justify its continued enforcement during a public health emergency.

¹⁰ Although the Petition for Declaratory and Injunctive Relief challenges the Commonwealth’s failure to provide pre-paid postage for mail ballots, Petitioners’ application for preliminary injunction does not seek relief on these grounds.

The only conceivable rationale—preventing voting fraud—is a canard: there is no evidence that ballot delivery assistance in Pennsylvania, which is already permitted for certain categories of voters, has opened the door to fraud. Prior expansive research efforts to measure the incidence of fraud confirm this. When the Heritage Foundation, a conservative think tank, created a compendium of notable voter fraud cases around the country, including in Pennsylvania, arising out of any local, state, and national elections from 1998 to 2018, it found an exceedingly small number of isolated incidents. McCool Decl. ¶ 16. Out of the 55 million votes cast over these 11 election cycles—including even minute, private home-owners association elections—the Foundation uncovered only 22 cases of fraud, *none* of the which involved illegal absentee ballot delivery. *Id.*

States that allow delivery assistance have the same or fewer cases of voter fraud than states that prohibit the practice. For example, Alabama instituted a ban on third party mail ballot collection assistance, *see, e.g.*, Ala. Code § 17-11-18, and still reported 19 cases of voter fraud. McCool Decl. ¶ 18. On the other hand, Mississippi, Michigan, and Wyoming allow ballot delivery assistance and reported only 31, 11, and 3 cases of voter fraud, respectively. *Id.* Notably, these are the *total* cases of voter fraud across all races statewide for several election cycles, which means that allowing or prohibiting mail ballot delivery assistance makes no appreciable difference in the amount of voter fraud cases. There is simply no data to suggest that easing the burden on voters to assist them in returning their mail ballots on time will result in fraud.

Recognizing the risks of in-person voting, the Governor and local election officials were correct to encourage Pennsylvanians to vote by mail, as opposed to congregating in fewer, consolidated polling places. Yet the right to vote is unconstitutionally impaired by defects in the mail voting system. Voters should not be forced to choose between risking their health by casting

a ballot in-person, or their constitutional right to vote by turning their ballot over to the vagaries of mail delivery during the COVID-19 pandemic. The Commonwealth's unreasonable ban on delivery assistance imposes a significant burden on the franchise that cannot be justified by any sufficient state interest, and thus violates the Pennsylvania Constitution's Equal Protection Clauses.

B. Absent an injunction, Petitioners and other Pennsylvania voters will suffer irreparable harm that would significantly outweigh any harm to the Commonwealth.

It is well settled that the denial of constitutional rights, including disenfranchisement, constitutes irreparable injury. *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997) (infringement on voting rights “cannot be alleviated after the election”); *see also Obama for Am.*, 697 F.3d at 436; *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (voters “would certainly suffer irreparable harm if their right to vote were impinged upon”); *Marks v. Stinson*, No. Civ. A. 93-6157, 1994 WL 47710, at *13–14 (E.D. Pa. Feb. 18, 1994) (violation of right to vote in free and fair election constituted irreparable harm), *rev'd in part on other grounds*, 19 F.3d 873 (3d Cir. 1994); *Applewhite v. Commonwealth*, 617 Pa. 563, 572 (2012) (Todd, J., dissenting) (explaining that “the disenfranchisement of a substantial number of eligible, qualified, registered voters, many of whom, have been proudly voting for decades” is “irreparable harm of constitutional magnitude”). The failure to implement adequate safeguards to protect the right to vote and ensure a free and equal election threatens to disenfranchise Petitioners and untold numbers of Pennsylvania voters.

Furthermore, the severe burdens imposed on voters, and the potential disenfranchisement of Petitioners and thousands like them across Pennsylvania, far outweigh any potential injury to Respondents or any other interested parties. *See supra* Part IV.A.6. And enjoining provisions “that are seemingly incapable of being administered without resulting in *de facto* disenfranchisement

preserves the integrity of our elections.” *Applewhite*, 2014 WL 184988, at *26. Here, thousands of ballots are likely to arrive after the ballot receipt deadline in light of USPS’s operational difficulties, forcing Pennsylvanians into a catch-22 whereby they must risk their health to submit a ballot in person and avoid unpredictable mail delivery during a global pandemic, or mail their ballots from the safety of their own homes and subject themselves to a significant risk of disenfranchisement. Neither administrative convenience nor unsupported fears of fraudulent activity can justify either result. *See supra* II.B.1; *see also Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (“administrative convenience” cannot justify practices that impinge upon fundamental rights); *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003) (“Although these reforms may result in some administrative expenses for Defendants, such expenses are likely to be minimal and are far outweighed by the fundamental right at issue.”).

C. An injunction will restore the parties to their status as it existed before the COVID-19 pandemic upended Pennsylvania’s elections.

The ongoing COVID-19 pandemic has wreaked havoc on Pennsylvania’s electoral infrastructure. *Supra* Part II.B.2. There is currently no end in sight. According to Governor Wolf, “We cannot flip a switch and reopen the commonwealth.” Ex. LL. The status quo has been upended by the COVID-19 pandemic and the resulting disruptions to daily life both in Pennsylvania and across the country. Petitioners’ requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, and to exercise their right to vote—and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 26.

D. Petitioners’ requested injunction is reasonably suited to abate the elevated threat of disenfranchisement in the upcoming elections.

Petitioners’ requested relief is reasonably tailored to ensure access to a free and equal election and to protect the constitutional right to vote. First, Petitioners seek an injunction requiring

election officials to provide emergency write-in ballots to all voters who request a mail ballot, to designate all ballots submitted by mail as emergency ballots, and to count all emergency ballots if postmarked by Election Day and received by the county board office within seven days after Election Day. The requested relief provides an opportunity to vote for those affected by the delayed delivery of mail ballots—from local election officials to voters, and from voters back to the county boards—and minimizes the risk of large-scale disenfranchisement from mail service disruptions and ballot processing delays during the COVID-19 pandemic. It also aligns with the relief currently available to Pennsylvania voters submitting ballots from overseas. *See* 52 U.S.C. § 20303, 25 P.S. § 3511(a).

The administrative burden to election officials, on the other hand, is minimal, as Pennsylvania law, under normal circumstances, requires election officials to accept and count mail ballots from overseas voters up to seven days after Election Day. 25 P.S. § 3511(a). Petitioners' requested relief would, at most, require county boards to count more ballots, *see* Sisler Decl. ¶ 7, and the prospect of enfranchising more voters, which in this case is a constitutional obligation, counsels in favor of, not against, granting relief. It also leaves election officials with sufficient time to complete all post-election duties. County boards have seven days after Election Day to examine provisional ballots. *Id.* § 3050(a.4)(4). Challenges and appeals to provisional ballots can last another nine days. *Id.* a § 3050(a.4)(4)(ii), (v). And Pennsylvania officials need not certify election results to the Secretary until 20 days after Election Day. *Id.* § 2642(k). Thus, the requested seven-day window would simply grant voters in Pennsylvania the same allowance provided to voters overseas, while imposing a cut-off date well in advance of the canvassing deadlines.

Petitioners also seek to enjoin the enforcement of Pennsylvania law prohibiting third-party assistance in delivering mail ballots. 25 P.S. §§ 3146.6(a), 3150.16(a). Such relief is reasonably

tailored to provide voters, particularly those who are most vulnerable to severe illness caused by COVID-19, a safe alternative to delivering ballots in person, without risking their health or subjecting their votes to the uncertainty of USPS delivery. *See, e.g.*, Thomas Decl. ¶ 7; Crossey Decl. ¶ 6; McCool Decl. ¶ 21. Given the dearth of identifiable instances of fraud involving the *delivery* of sealed absentee ballots on behalf of voters who require assistance, the requested injunction imposes minimal burdens, if any, on the Commonwealth, while expanding a method of delivering mail ballots that is already currently available to limited categories of voters. *DiPietrae*, 666 A.2d at 1135 (holding that disabled voters may appoint a person of their choosing to deliver their completed absentee ballot).

E. A preliminary injunction will promote the public interest.

Finally, the public interest favors procedures that protect the constitutional rights to vote and to participate in a free and equal election. The Pennsylvania Supreme Court has recognized that the right to vote is “pervasive of other basic civil and political rights” and that voting rights are “the bedrock of our free political system.” *Bergdoll*, 557 Pa. at 85 (quotation omitted). Therefore, an injunction requiring Respondents to conduct elections in compliance with Pennsylvania’s Constitution “so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.” *Berks Cty., Pa.*, 250 F. Supp. 2d at 541.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant their motion for preliminary injunction, and issue an Order instructing Respondents to: (1) provide emergency write-in ballots to all voters who request a mail ballot, designate all ballots submitted by mail as emergency ballots, and require that all emergency ballots shall be counted if they are postmarked by Election Day and received up to seven days after the election; and (2) permit voters to obtain

assistance from third-parties in mailing and delivering their *sealed* mail ballots to county boards, and require that all such ballots delivered by third parties shall be counted if otherwise eligible.

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By:  _____

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