

Elisabeth S. Theodore*
Daniel F. Jacobson*
R. Stanton Jones*
David P. Gersch *
Samuel F. Callahan*
Kolya D. Glick*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
*Not admitted in Pennsylvania,
admitted in the District of Columbia.
Pro hac vice motion to be filed.

Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
Claudia De Palma
Attorney ID No. 320136
Public Interest Law Center
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA MATHIS, IN HER
CAPACITY AS DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND NOTARIES OF THE
PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No.

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days, or within the time set by order of the court, after this petition for review and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claims or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Dauphin County Bar Association
Lawyer Referral Service
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted treinta (30) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objections a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

Lleva esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

Colegio de Abogados de
Condado de Dauphin
Abogado Servicio de Referencia
213 North Front Street
Harrisburg, PA 17101
(717) 232-75

Elisabeth S. Theodore*
Daniel F. Jacobson*
R. Stanton Jones*
David P. Gersch *
Samuel F. Callahan*
Kolya D. Glick*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
*Not admitted in Pennsylvania,
admitted in the District of Columbia.
Pro hac vice motion to be filed.

Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
Claudia De Palma
Attorney ID No. 320136
Public Interest Law Center
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA MATHIS, IN HER
CAPACITY AS DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND NOTARIES OF THE
PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No.

TO:

Secretary Kathy Boockvar

Pennsylvania Department of State
Office of the Secretary
302 North Office Building, 401 North Street
Harrisburg, PA 17120

Director Jessica Mathis

Pennsylvania Department of State
Bureau of Election Services and Notaries
210 North Office Building, 401 North Street
Harrisburg, PA 17120

NOTICE TO PLEAD

You are hereby notified to file a written response to the enclosed Petition for Review within thirty (30) days from service hereof or a judgment may be entered against you.

BY: /s/ Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
Claudia De Palma
Attorney ID No. 320136
Public Interest Law Center
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

Counsel for Petitioners

Elisabeth S. Theodore
Daniel F. Jacobson
R. Stanton Jones
David P. Gersch
Samuel F. Callahan
Kolya D. Glick
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
Claudia De Palma
Attorney ID No. 320136
Public Interest Law Center
1500 JFK Blvd., Suite 802
Philadelphia, PA 19102

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners,

v.

KATHY BOOCKVAR, IN HER CAPACITY AS
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA; AND JESSICA MATHIS, IN HER
CAPACITY AS DIRECTOR OF THE BUREAU OF
ELECTION SERVICES AND NOTARIES OF THE
PENNSYLVANIA DEPARTMENT OF STATE,

Respondents.

No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

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

2. Things have changed. The Department of State now *admits* that all of the problems it previously characterized as speculative have come to pass. In a declaration dated May 22, 2020, just days ago, the Deputy Secretary for Elections and Commissions, Jonathan Marks, confirmed that “[s]ome counties ... are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest.” Suppl. Decl. of Jonathan Marks (“Marks 5/22 Decl.”) ¶ 4, *Crossey v. Boockvar*,

No. 266 MD 2020 (Commw. Ct.).¹ Deputy Secretary Marks asserted that “these obstacles”—which include “delays” in mail delivery, “backlogs” in processing applications, and “COVID-19 related staffing shortages and technical difficulties”—“could result in significant delays in voters’ receipt of ballots.” Marks 5/22 Decl. ¶¶ 4, 11, 13, 14, 18, 19. Given the new facts admitted by the Department, it is undeniable that tens or hundreds of thousands of voters will be unable to return their ballots by the June 2 deadline for the upcoming primary.

3. Regarding mail delays, Deputy Secretary Marks’ May 22 declaration indicates that delivery times have slowed in some areas: “for reasons not within Montgomery County’s control, *many ballots that the county has mailed have been delayed* in arriving at voters’ homes.” Marks 5/22 Decl. ¶ 12 (emphasis added). According to Marks, “[t]hese delays may make it more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” *Id.* The Chair of the Montgomery County Board of Elections has confirmed that “*mail delivery times have been slower than normal.*”²

¹ Marks filed this declaration in a separate case pending in the Commonwealth Court. The respondents and the proposed intervenors there have all argued that the Commonwealth Court lacks jurisdiction because the Pennsylvania Supreme Court has exclusive jurisdiction over matters relating to mail ballots under Act 77.

² *Montgomery County Announces Five Secure Ballot Drop-Off Box Locations for June 2 Primary Election*, May 22, 2020, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/5174> (emphasis added).

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

- Statewide, just 11 days before the primary, **241,270** voters had submitted an application for an absentee or mail-in ballot but had not yet been sent a ballot by their county board of elections. Marks 5/22 Decl. ¶ 4.
- As of May 21, Philadelphia had a backlog of **36,705** applications that either had not been processed or for which the voter had not been sent a ballot despite their application being approved. Making matters worse, the County “recently began receiving a surge of paper ballot applications.” Marks 5/22 Decl. ¶ 13. “Because these applications take longer to process than online applications, and because of COVID-19 related staffing shortages and social distancing rules, *Philadelphia’s staff will face difficulties in promptly processing all of the outstanding applications.*” *Id.* (emphasis added).
- Delaware County had a backlog of **31,139** ballot applications—an astounding 40% of the total applications received—that either had not been processed or for which the voter had not yet been sent a ballot despite their application being approved. Marks 5/22 Decl. ¶ 16.
- Allegheny County had a backlog of over 17,000 applications that had been approved but for which the voter had not yet been sent a ballot. Marks 5/22 Decl. ¶ 16.
- An unidentified “small number of other counties” likewise “may face challenges” processing applications and sending ballots to votes due to “COVID-19 related staffing shortages and technical difficulties.” Marks 5/22 Decl. ¶ 18.

5. It is readily apparent why these substantial backlogs developed (and why they will continue to grow in the coming days leading up to the primary).

Deputy Secretary Marks' May 22 declaration shows that the number of absentee and mail-in ballot applications has continued to grow exponentially as the May 26

application deadline draws near. In just the four days from May 17 to 21, more than **214,000** voters across the Commonwealth submitted applications.

6. In light of these new developments, there can no longer be any serious claim that it is “speculative” that the received-by-election-day deadline for absentee and mail-in ballots will disenfranchise a staggering number of Pennsylvania voters and force many other voters to risk their health and lives to vote. Given the existing backlogs in county boards of elections and delays in mail delivery, it is a factual certainty that tens of thousands of voters, if not more, will receive their absentee or mail-in ballots on the Saturday or Monday before the election, or even on election day. Because of the received-by deadline, these voters will then face a perilous choice: either mail the ballot and risk that it will arrive too late, or risk their lives and the lives of their families to vote in person. For many of the voters who choose to mail their ballots, the ballots will arrive too late and will not be counted. Voters who choose to vote in person will be taking a grave risk. Indeed, the risk will be especially pronounced for voters in the southeastern counties that have the largest COVID-19 outbreaks, which not coincidentally are the same counties experiencing the greatest backlogs and delays.

7. Petitioners are 11 Pennsylvania voters who are experiencing precisely these harms. Each Petitioner applied for an absentee or mail-ballot—anywhere

from twelve weeks ago to today—but has not yet received their ballot and now faces the prospect of disenfranchisement next week.

8. The problems that are manifesting for the June 2 primary will spiral even further out of control in the November 3 general election. Turnout in the general election will be at least double that in the primary, and the Centers for Disease Control and Prevention (CDC) predict that the nation will face a second wave of mass spread of COVID-19 in the fall. Meanwhile, the compounding effects of the pandemic—including the cascade of budget cuts and hiring freezes it has triggered—will only intensify barriers to voting as the year wears on. For all of these reasons, the mail delays and application-processing backlogs in county boards of elections will be far worse than they are now, and hundreds of thousands of Pennsylvania voters will face the prospect of mass disenfranchisement due to the received-by deadline in one of the most important elections in our lifetimes.

9. In these extraordinary circumstances, enforcement of the received-by deadline violates the Pennsylvania Constitution. The deadline violates Pennsylvania’s Free and Equal Elections Clause. Elections are not “free” when tens or hundreds of thousands of Pennsylvania voters are disenfranchised due to the consequences of a pandemic or must risk their lives to ensure their votes will be counted. And elections are not “equal” when voters in one region of the Commonwealth—southeast Pennsylvania—face grossly disparate

disenfranchisement and burdens on their right to vote because they have the misfortune of living in the region that has been hit hardest by a deadly virus. The received-by deadline for absentee and mail-in ballots violates Pennsylvania's Equal Protection Guarantees in the present circumstances for similar reasons.

10. No longer able to deny that the received-by deadline will disenfranchise many thousands of voters, the Department of State has suggested recently that any relief from the deadline should be limited only to particular counties, and should be granted through individual petitions filed in the relevant Courts of Common Pleas.³ But establishing different deadlines in different counties—when there are statewide elections on the ballot—is not a tenable solution. Among other issues, such a result would undoubtedly invite a new rash of litigation in federal courts from those who oppose easing any restrictions on voting, arguing that having different deadlines for different counties violates the federal Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98 (2000).

11. This Court can and should prevent the constitutional injuries to Petitioners and voters across the Commonwealth by enjoining enforcement of the received-by-election-day deadline for the 2020 primary and general elections, and ordering that any absentee or mail-in ballot must be counted so long as the voter

³ *See* Resp. Br. in Supp. of Jurisdictional POs at 8 n.5, *Crossey*, No. 266 MD 2020.

mails it by election day and the county board of elections receives it within seven days of election day.

12. Attached to this Petition, Petitioners have filed an Emergency Application for Special Relief in the Nature of a Preliminary Injunction, seeking injunctive relief for the June 2, 2020 primary.

PARTIES

A. Petitioners

13. Petitioner Melinda deLisle is a 59-year-old registered voter in Montgomery County. Ms. deLisle does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. deLisle applied for a mail-in ballot on May 3, 2020. Ms. deLisle subsequently received a ballot for the primary on or around May 21, but she erroneously received a ballot for the Republican primaries, despite being a registered Democrat. Ms. deLisle has attempted to contact the Montgomery County Board of Elections to receive a new ballot for Democratic primaries, but as of this filing she has not been able to reach anyone there. Ms. deLisle currently intends to vote by mail-in ballot for the November 2020 general election.

14. Petitioner Jacques deLisle is a 58-year-old registered voter in Montgomery County. Mr. deLisle does not wish to vote in person during the

COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Mr. deLisle applied for a mail-in ballot on May 23, 2020. According to the Department of State's tracking information, as of this filing, the Montgomery County Board of Elections has not yet mailed him his ballot. Mr. deLisle currently intends to vote by mail-in ballot for the November 2020 general election.

15. Petitioner Adam deLisle is a 23-year-old registered voter in Montgomery County. Mr. deLisle does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Mr. deLisle applied for a mail-in ballot on May 3, 2020. According to the Department of State's tracking information, the Montgomery County Board of Elections approved Mr. deLisle's application on May 14 and mailed his ballot on May 15, but Mr. deLisle still has not received his ballot as of this filing—eleven days after it was mailed and more than three weeks after Mr. deLisle submitted his application. Mr. deLisle currently intends to vote by mail-in ballot for the November 2020 general election.

16. Petitioner Bryan Irwin is a 71-year-old registered voter in Delaware County. Mr. Irwin does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Mr. Irwin applied for a mail-in ballot on May

19, 2020. According to the Department of State's tracking information, as of this filing, the Delaware County Board of Elections has not yet mailed him his ballot. Mr. Irwin currently intends to vote by mail-in ballot for the November 2020 general election.

17. Petitioner Charles Cella is a 61-year-old registered voter in Delaware County. Mr. Cella does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Mr. Cella applied for a mail-in ballot on May 21, 2020. While Mr. Cella received email confirmation that his application had been submitted, the Department of State's tracking database does not contain any information on the status of his application, and as of this filing he has not received his ballot. Mr. Cella currently intends to vote by mail-in ballot for the November 2020 general election.

18. Petitioner Deborah Cella is a 57-year-old registered voter in Delaware County. Ms. Cella does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. Cella applied for a mail-in ballot on May 24, 2020. According to the Department of State's tracking information, as of this filing, the Delaware County Board of Elections has not yet mailed her ballot. Ms.

Cella currently intends to vote by mail-in ballot for the November 2020 general election.

19. Petitioner Mary Cay Curran is a 68-year-old registered voter in Delaware County. Ms. Curran does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. Curran applied for a mail-in ballot on March 3, 2020. While Ms. Curran received email confirmation that her application had been submitted, the Department of State's tracking database does not contain any information on the status of her application, and she has not received her ballot as of this filing, nearly three months after submitting her application. Ms. Curran currently intends to vote by mail-in ballot for the November 2020 general election.

20. Petitioner Eliza Hardy Jones is a 39-year-old registered voter in Philadelphia County. Ms. Jones is immunocompromised and does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. Jones applied for a mail-in ballot on April 24, 2020. Last week, the Department of State's tracking database indicated that Ms. Jones's application had been processed, but not yet mailed. Ms. Jones twice attempted to get in touch with Philadelphia County Board of Elections last week by telephone but was unable to

get through. On May 23 at 6 p.m., Ms. Jones received an email indicating that her ballot had been rejected because of a duplicate request, despite the fact that Ms. Jones sent only one mail-in ballot application. Ms. Jones checked the Department of State tracking database again after receiving that email, and the website indicated that her application was received on May 23 and processed on May 23, but was not yet mailed. As of this filing, Ms. Jones has not received her ballot. Ms. Jones currently intends to vote by mail-in ballot for the November 2020 general election.

21. Petitioner Krista Nelson is a 60-year-old registered voter in Philadelphia County. Ms. Nelson does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. Nelson applied for a mail-in ballot on May 25, 2020. As of this filing, Ms. Nelson has not yet received her ballot. Ms. Nelson currently intends to vote by mail-in ballot for the November 2020 general election.

22. Petitioner Eileen McGovern is a 68-year-old registered voter in Philadelphia County. Ms. McGovern does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Ms. McGovern applied for a mail-in ballot on May 24, 2020. As of this filing, Ms. McGovern has not yet

received her ballot. Ms. McGovern currently intends to vote by mail-in ballot for the November 2020 general election.

23. Petitioner Cedric Hardy is a 38-year-old registered voter in Montgomery County. Mr. Hardy does not wish to vote in person during the COVID-19 pandemic because of the health risks of being in a crowded location like a polling place. For the June 2, 2020 primary, Mr. Hardy applied for a mail-in ballot on May 24, 2020. As of this filing, Mr. Hardy has not yet received his ballot. Mr. Hardy currently intends to vote by mail-in ballot for the November 2020 general election.

B. Respondents

24. Respondent Kathy Boockvar is the Secretary of the Commonwealth and is sued in her official capacity only. In that capacity, she supervises and administers Pennsylvania's elections and election law.

25. Respondent Jessica Mathis is the Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State and is sued in her official capacity only. In that capacity, she supervises and administers Pennsylvania's elections and electoral process.

JURISDICTION

26. The Court has original jurisdiction over this Verified Petition for Review pursuant to Section 13 of the Act of Oct. 31, 2019, P.L. 552, No. 77 ("Act

77”), which provides: “The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of,” *inter alia*, sections 1302, 1302.1, 1302.2, and 1308 of the 2019 Omnibus Amendments to the Pennsylvania Election Code.

FACTUAL ALLEGATIONS

A. Voting by Mail in Pennsylvania

27. Pennsylvania law provides for two categories of ballots that may be submitted via mail: “absentee” ballots and “mail-in” ballots. Absentee ballots are available to, among others, people who are unable to vote in person due to a physical disability or illness, people who expect to be absent from the municipality of their residence on election day due to work, and people who cannot vote in person because of a religious holiday. 25 P.S. § 3146.1.⁴ Any registered voter who does not qualify for an absentee ballot may vote by “mail-in” ballot, without providing a justification. 25 P.S. §§ 3150.11–3150.12b; *see* Act of Oct. 31, 2019 (“Act 77”), P.L. 552, No. 77. As relevant to this case, the same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters.

⁴ Military and overseas voters may also vote by absentee ballot. The deadline for such voters to return their ballots is different from all other absentee voters, *see* 25 Pa.C.S. § 3511 (deadline for military and overseas voters), and Petitioners do not challenge the deadline for military and overseas voters in this case. All references to absentee and mail-in voters throughout this Petition refer to non-military and overseas voters who currently must return their ballots by election day.

28. The deadline for voters to apply for an absentee ballot or a mail-in ballot is “five o’clock P.M. [on] the first Tuesday prior to the day of any primary or election.” 25 P.S. §§ 3146.2a(a), 3150.12a(a).

29. If a voter submits an application and the county board of elections determines that the voter meets the statutory requirements for an absentee ballot or a mail-in ballot, the board sends the absentee or mail-in ballot to the voter via U.S. Postal Service mail. *See* 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a)(1).

30. The voter must then complete and return the ballot. To be counted, the voter’s absentee or mail-in ballot must be received by the county board of elections “on or before eight o’clock P.M. the day of the primary or election.” 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

31. Voters who timely request an absentee or mail-in ballot but do not receive the ballot with sufficient time before election day face significant hurdles in exercising their right to vote.⁵

⁵ Some voters can personally hand deliver their own ballot to their County Board of Elections office by 8 p.m. on election day. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But voting by hand-delivering a ballot to a county board of elections similarly forces voters to risk their health, as those offices are usually located in public buildings that can be highly trafficked, particularly on election day. Even if a county board of elections places a secure drop box for ballots outside their physical office, hand-delivering a ballot to such a drop box also presents barriers. The county board of elections can be a long distance from voters’ residences, not easily or safely accessible by public transportation in a pandemic, and are not accessible to absentee voters who are outside their county of residence or have a disability that prevents them from traveling. *See* 25 P.S. §§ 3146.1(j), (l).

32. For the June 2, 2020 primary, a voter who requested an absentee or mail-in ballot may only cast a provisional ballot at a polling place, even if the voter has not voted the absentee or mail-in ballot. Act 77 §§ 1306(b)(2), 1306-D(b)(2).

33. For the November 3, 2020 elections and beyond, a voter who requested an absentee or mail-in ballot may cast a regular ballot at a polling place, but only if the voter brings the absentee or mail-in ballot to the polling place (along with the envelope that came with it), “remits” (or “spoil[s]”) the absentee or mail-in ballot, and submits a lengthy sworn statement. 25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3). If the voter does not bring the absentee or mail-in ballot and the accompanying envelope to the polling place, the voter may cast only a provisional ballot. 25 P.S. §§ 3146.3(e), 3150.16(b)(2).

B. The COVID-19 Pandemic

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

35. As of May 25, 2020, the Pennsylvania Department of Health has reported 68,186 cases of COVID-19 in Pennsylvania, resulting in 5,139 deaths.⁶ At current rates, by the end of this week Pennsylvania’s COVID-19 death toll will

⁶ See <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

exceed the combined deaths from the September 11 terrorist attacks and the surprise attack on Pearl Harbor.

36. Dr. Robert Redfield, the Director of the CDC, has stated that “most likely” there will be a second wave of mass infection in the fall, as the November general election draws near. Dr. Redfield explained that a second wave will require states to “aggressively re-embrace some of the mitigation strategies that we have determined had impact, particularly social distancing.”⁷

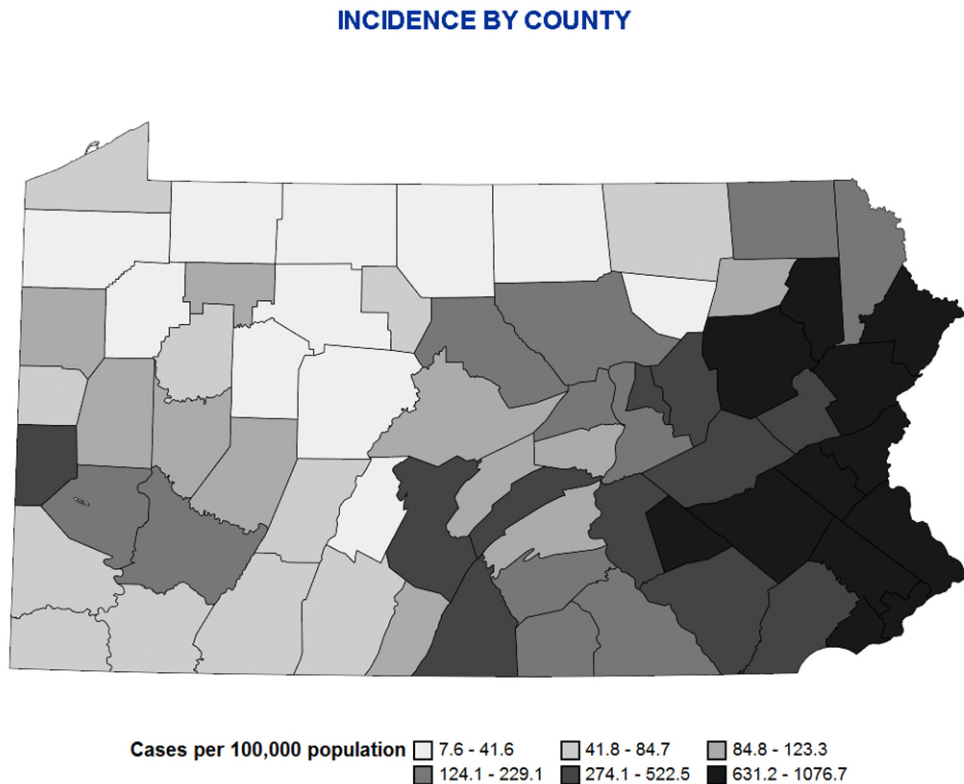
37. COVID-19 disproportionately afflicts and kills minorities, people with disabilities, and people over 60.⁸ In Pennsylvania, African Americans comprise

⁷ Kashmira Gander, *CDC Director Says There May be Another Coronavirus Wave in Late Fall and a ‘Substantial Portion of Americans’ Will be Susceptible*, Newsweek (Apr. 1, 2020), <https://www.newsweek.com/cdc-director-coronavirus-wave-late-fall-substantial-portion-americans-will-susceptible-1495401>.

⁸ See, e.g., Kat Stafford et al., *Racial Toll of Virus Grows Even Starker as More Data Emerge*, AP (Apr. 18, 2020), <https://apnews.com/8a3430dd37e7c44290c7621f5af96d6b> (reporting that, of the 196 COVID-19 related deaths in Philadelphia, 126 of them were African Americans); CDC, *People Who Need Extra Precautions: People with Disabilities*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-disabilities.html>; CDC, *Severe Outcomes Among Patients with Coronavirus Disease 2019* (Mar. 17, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm>; Ron Southwick, *In coronavirus crisis, Pa. should be prepared ‘to be in this for the long haul’: Gov. Tom Wolf*, Patriot News (Mar. 26, 2020), <https://www.pennlive.com/coronavirus/2020/03/gov-wolf-health-secretary-provide-update-on-coronavirus-in-pa-watch-live.html> (detailing virus’s effects on elderly population and noting that “[a]mong those who have been hospitalized, 46 percent are over 65”).

30% of the persons who have contracted COVID-19 (for whom racial data is available), but African Americans comprise just 12% of the total population.⁹

38. The virus has also disproportionately affected communities in eastern Pennsylvania. The following map produced by the Pennsylvania Department of Health shows that counties in the eastern part of the Commonwealth have by far the highest number of known cases per capita:¹⁰



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

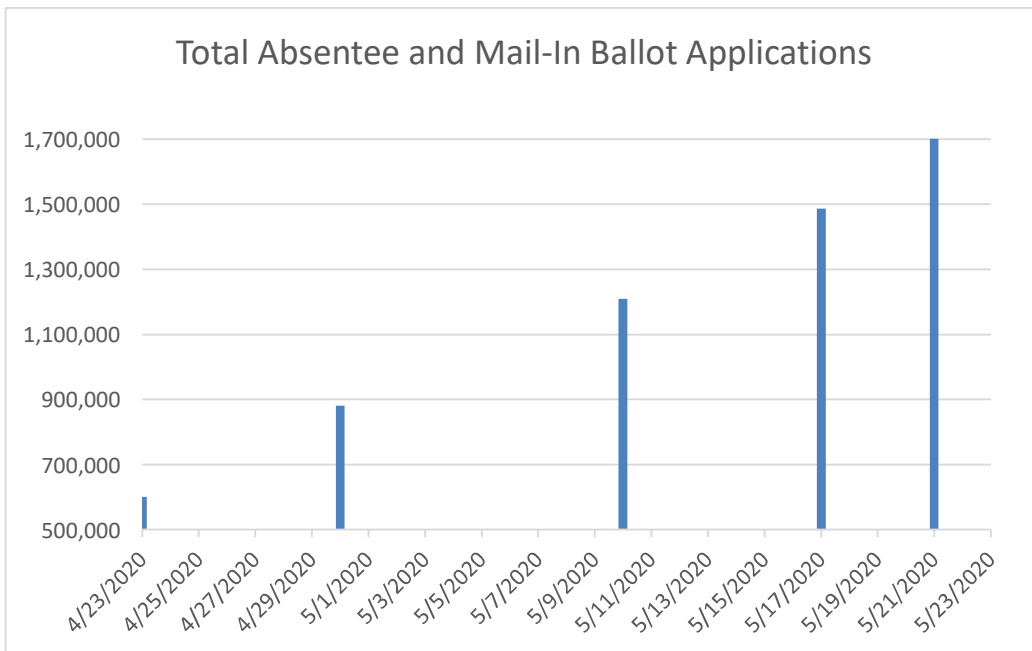
⁹ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

¹⁰ *Id.*

has encouraged the adoption of “voting methods that minimize direct contact with other people and reduce crowd size,” including mail-in voting and early voting.¹¹

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

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



¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

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

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

43. The unprecedented increase in absentee and mail-in ballot applications has resulted in extreme backlogs and delays in the county boards of elections in approving applications and then sending approved applicants their blank ballots.

44. On May 22, 2020, Deputy Secretary Marks submitted a declaration in a separate matter pending in the Commonwealth Court¹² admitting that “[s]ome

¹² As mentioned, the respondents and the proposed intervenors in *Crossey* have argued that the Commonwealth Court lacks jurisdiction because the Pennsylvania Supreme Court has exclusive jurisdiction over these matters pursuant to Act 77.

counties, ... are facing obstacles, especially those in areas where the prevalence of COVID-19 is highest.” Marks 5/22 Decl. ¶ 4.

45. Deputy Secretary Marks’ declaration detailed that, as of May 21, 2020, counties had received 1,701,141 applications for absentee and mail-in ballots, but had processed and approved only 1,528,212 of them and had actually mailed ballots to only 1,459,871 of these voters. Marks 5/22 Decl. ¶ 4. In other words, 11 days before the June 2 primary, **241,270** voters have applied for an absentee or mail-in ballot but have not yet been sent the ballot by their county.

46. Deputy Secretary Marks explained that the “backlogs,” “delays,” and various other “difficulties” are particularly extreme in the counties in southeastern Pennsylvania that have been ravaged by COVID-19.

47. “Philadelphia County recently began receiving a surge of paper ballot applications,” which “take longer to process than online applications.” Marks 5/22 Decl. ¶ 13. Because of this recent surge in paper applications and “COVID-19 related staffing shortages and social distancing rules, Philadelphia’s staff will face difficulties in promptly processing all of the outstanding applications.” *Id.* Making matters worse, “[a] recent outage in Philadelphia’s Verizon connection, which covered the network connection with the election database, further impeded Philadelphia’s progress.” *Id.* ¶ 14.

48. “[A]s of May 21, Philadelphia County had received 181,655 applications, rejected 2,114 of them, approved 159,772, and mailed out 142,836 ballots.” Marks 5/22 Decl. ¶ 15. In other words, just 11 days before the primary, Philadelphia had not even processed 19,769 applications, and there were an additional 16,939 applications that had been approved but for which voters had not yet been sent their ballots, making for a total backlog of **36,705** applications in just this single county. The backlog will only increase as Philadelphia receives more mail ballot applications between May 22 and the May 26 deadline.

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

50. As of May 21, Allegheny County had approved 222,757 applications but mailed out only 205,656, making for a backlog of **over 17,000** ballots that had

not yet been sent to voters. Marks 5/22 Decl. ¶ 16. The backlog will only increase as Allegheny receives more mail ballot applications between May 22 and the May 26 deadline.

51. Thus, while the Department of State asserted in the previous litigation before this Court that “there is nothing ‘concrete’ about Petitioners’ predictions of backlogs” in the county boards of elections, *Disability Rights*, DOS Br. in Supp. of POs at 12, the evidence of such backlogs is now entirely concrete. The backlogs are here and not going away, and there is nothing remotely speculative about them.

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

53. Worse yet, there is now undisputed evidence that there are mail delays in delivering ballots. Deputy Secretary Marks attested in his May 22 declaration that “for reasons not within Montgomery County’s control, ***many ballots that the county has mailed have been delayed in arriving at voters’ homes,***” and that

“[t]hese delays may make it *more difficult for voters* who requested ballots well in advance of the application deadline to return those ballots on time.” Marks 5/22 Decl. ¶ 12 (emphases added).

54. On May 22, 2020, the Chair of the Montgomery County Board of Elections confirmed that “[c]oncerns over the spread of COVID-19 have created a high demand for mail-in voting *and mail delivery times have been slower than normal.*”¹³ While Montgomery County announced that it will create drop-off boxes in light of these mail delays, it will only have five drop-off locations across the entire county, and voters without access to a car will face particular difficulties reaching those locations.

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

56. Given the now-admitted, extreme backlogs in processing absentee and mail-in ballot applications in certain counties, and the now-admitted delays in mail

¹³ *Montgomery County Announces Five Secure Ballot Drop-Off Box Locations for June 2 Primary Election*, May 22, 2020, <https://www.montcopa.org/ArchiveCenter/ViewFile/Item/5174> (emphasis added).

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

57. Indeed, the burdens of voting in person will be particularly great because polling places for the June 2 primary have been consolidated all around Commonwealth due to the COVID-19 crisis. For example, “[t]he state’s two most populous counties, Philadelphia and Allegheny, alone are shifting from the more than 2,100 polling places they open in a typical election to fewer than 500—3 in 4 regular locations in these jurisdictions will not be open on June 2.”¹⁴ Similarly, Montgomery County officials have reduced the number of polling places by 60%

¹⁴ <https://seventy.org/media/press-releases/2020/05/13/massive-polling-place-consolidation-announced-for-the-june-2-primary>.

for the June 2 primary election in response to the COVID-19 outbreak¹⁵ and in Delaware County there will be 238 fewer polling places.¹⁶

58. The disenfranchisement and severe burden on the right to vote resulting from the received-by deadline will recur—and be even worse—in the November 2020 general election. In 2016, more than six million people voted in Pennsylvania in the general election, which was roughly double the turnout from that year’s primaries. If the number of absentee and mail-in ballot requests in the 2020 general election is double that in this year’s primaries, that means roughly four million people will be seeking to vote by mail this November. And that estimate is highly conservative, as turnout is expected to be larger this year than 2016 with voter enthusiasm at record levels.

59. The problems that have now manifested in the June 2020 primary demonstrate that, through no fault of their own, many counties simply will be unable to process this level of applications in a timely manner. And COVID-19 will remain a grave threat to voters’ lives in November, as the CDC predicts a second wave in the fall and there is no realistic prospect that a vaccine will be

¹⁵ https://www.pottsmmerc.com/news/montgomery-county-officials-reduce-polling-places-under-pandemic-election-plan/article_925f3e3e-93a8-11ea-8c91-2369be893bb1.html.

¹⁶ https://www.delcotimes.com/news/coronavirus/pandemic-forces-dramatic-changes-in-delco-election-procedures/article_389603b4-90a2-11ea-a4c4-1b7d54d5ea21.html.

widely available by then. The received-by deadline thus will once again force Pennsylvania voters to choose between their health and their right to vote, and will disenfranchise hundreds of thousands of voters in one of the most consequential elections in our lifetimes.

C. Act 77’s Non-Severability Provision

60. Act 77 contains a non-severability provision that purports to require the invalidation of all of its provisions, including by purporting to withdraw the availability of no-excuse mail-in voting across the entire Commonwealth, if any portion of the Act is held unconstitutional.

61. Act 77’s non-severability provision does not bind the Court and is unenforceable and unconstitutional in the context of this case. Even in the absence of COVID-19, Act 77’s non-severability provision—which contains boilerplate language that “sets forth no standard for measuring nonseverability” and “simply purports to dictate to the courts how they must decide severability—would not be an “inexorable command” that binds this Court. *Stilp v. Commonwealth*, 905 A.2d 918, 972-74 (Pa. 2006) (declining to apply identically worded non-severability provision). The ultimate question for the Court, regardless of the non-severability provision, is whether the valid provisions of the statute are “essentially and inseparably connected with” and “depend upon” the invalid received-by deadline. *Id.* at 973 (quoting 1 Pa. C.S. § 1925). Nothing in Act 77 “depends upon” the

received-by deadline; the remainder of Act 77, including its provision for mail voting, is “easily capable of being executed” under a regime that requires voters to mail their ballots by election day. *Id.* And enforcement of the non-severability provision would “intrude upon the independence of the judiciary and impair the judicial function,” because the provision’s effect would be to prevent judicial review and coerce this Court to permit the General Assembly to impose an unconstitutional condition on the exercise of the franchise. *Id.* at 980.

62. Moreover, in the context of the COVID-19 pandemic, applying the non-severability provision would itself be unconstitutional. Invalidating Act 77’s no-excuse mail-in voting scheme and its expanded absentee voting provisions in the middle of the pandemic would disenfranchise a massive number of Pennsylvanians, and would disproportionately burden voters of certain ages, African-American voters, and voters with disabilities. It would force nearly every Pennsylvanian—millions of citizens—to choose between voting and risking their lives, including the 1.7 million and counting Pennsylvania voters who have already submitted mail-in ballot applications for the June primary. Invalidating all of Act 77’s provisions therefore would violate Pennsylvania’s Free and Equal Elections Clause, Suffrage Clause, and equal protection guarantees in its own right. Put differently, if Petitioners are correct that the received-by deadline for absentee and mail-in ballots violates the Pennsylvania Constitution by abridging

Pennsylvanians' ability to vote during the pandemic, then eliminating all no-excuse mail voting in a pandemic necessarily would violate the Pennsylvania Constitution as well. A non-severability clause cannot be applied to produce an unconstitutional result, particularly one that compounds the unconstitutionality of the substantive provision that was challenged in the first place.

63. To be clear, Petitioners do not seek any ruling or relief that would trigger Act 77's non-severability provision, and Petitioners would withdraw their claims without seeking any relief if the non-severability provision were going to apply. But this Court can and should hold that Act 77's received-by deadline for absentee and mail-in ballots is unconstitutional in the context of the COVID-19 pandemic and sever the provision from the remainder of the Act as applied in these circumstances.

D. Act 77's Purported Statute of Limitations

64. Act 77's 180-day statute of limitations cannot constitutionally apply to this action.

COUNT I
Violation of the Pennsylvania Constitution's
Free and Equal Elections Clause and Suffrage Clause, Art. I, § 5

65. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

66. 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.”

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

68. The Free and Equal Elections Clause and the Suffrage Clause protect the right to vote, which “[t]he Commonwealth recognizes ... as ‘fundamental’ and pervasive of other basic civil and political rights.” *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2014 WL 184988, at *18 (Pa. Commw. Ct. Jan. 17, 2014) (quoting *Bergdoll v. Kane*, 731 A.2d 1261, 1269 (Pa. 1999)). “[T]he right of suffrage is the most treasured prerogative of citizenship” and “*may not be impaired or infringed upon in any way except through the fault of the voter himself.*” *Norwood Election Contest Case*, 116 A.2d 552, 553 (Pa. 1955) (emphasis added).

69. In light of the fundamental imperative of safeguarding the right to vote, the “plain and expansive sweep of the words ‘free and equal,’” and the

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

70. This Court has held that elections “are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; *when every voter has the same right as every other voter*; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, *or make it so difficult as to amount to a denial*; and when no constitutional right of the qualified elector is subverted or denied him.” *League of Women Voters*, 178 A.3d at 810 (emphases added) (quoting *Winston v. Moore*, 91 A. 520, 523 (1914)); *see also DeWalt v. Bartley*, 24 A. 185, 186 (1892) (“The test is whether legislation

denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial.”).

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

72. Enforcing the received-by deadline will violate the Free and Equal Elections Clause by inflicting both of the constitutional injuries that the Clause was designed to prevent. The received-by deadline will ensure that the upcoming primary and general elections are not “free”; the elections will not be “open and unrestricted, ... to the greatest extent possible” and voting for many citizens will be “so difficult as to amount to a denial.” *League of Women Voters*, 178 A.3d at 804, 810. The deadline will also necessarily prevent these elections from being “equal”; voters will experience grossly disparate burdens in their ability to cast an effective ballot based on “the region of the state in which they live[.]” *Id.* at 808-09.

73. *First*, for voters across the Commonwealth, elections will not be “free” because of the received-by deadline. Based on the latest data reported by the Department of State, as of May 21, 2020, there were 241,270 voters across the

Commonwealth who had submitted an application for an absentee or mail-in ballot for the June 2 primary but had not yet been sent a ballot by their county board of elections. Marks 5/22 Decl. ¶ 4.

74. These backlogs are particularly acute in the counties that have been hardest by COVID-19, in which the alternative of voting in person poses the greatest risks. Philadelphia is experiencing the dual problems of a last-minute “surge of paper ballot applications” and “COVID-19 related staffing shortages and social distancing rules,” which the Department of State admits will cause “difficulties in promptly processing all of the outstanding applications.” Marks 5/22 Decl. ¶¶ 13-15. Because of these problems, Philadelphia has a backlog of 36,705 applications and growing. *Id.* Delaware County has an alarming backlog of 31,139 applications—40% of the total applications thus far received—that have not been processed or for which the voter has not yet been sent a ballot. *Id.* ¶ 16.

75. Moreover, the Department of State and the Montgomery County Board of Elections now state that Montgomery County is experiencing mail delays that are preventing voters from timely receiving their absentee and mail-in ballots. According to the Department of State, in Montgomery County, “many ballots that the county has mailed have been delayed in arriving at voters’ homes,” making it “more difficult for voters who requested ballots well in advance of the application deadline to return those ballots on time.” Marks 5/22 Decl. ¶ 12.

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

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

78. The received-by deadline will also render elections during the pandemic not free given the sheer number of voters who will be disenfranchised because they choose to mail their ballots back and the ballot arrives too late.

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

79. For similar reasons, the received-by deadline will violate the Suffrage Clause of Article I, Section 5, because the government’s delays in processing absentee and mail-in ballots and sending voters their ballots, along with the delays in mail delivery, will burden or outright prevent the free exercise of the franchise through no fault of the voter.

80. If absentee and mail-in ballots were instead considered timely if sent by election day, this widespread abridgement of the right to vote would not occur.

81. Second, enforcing the received-by deadline violates the Free and Equal Elections Clause because it gives Pennsylvania voters an unequal opportunity to have their votes counted, including based on the geographic area where they live.

82. As described, the application-processing backlogs and mail-delivery delays now recognized by the Department of State are largely centered in southeastern Pennsylvania—in counties such as Montgomery, Philadelphia, and Delaware Counties. Not coincidentally, Montgomery, Philadelphia, and Delaware Counties are in the region of the Commonwealth hit hardest by the COVID-19 pandemic. As Deputy Secretary Marks acknowledges in his May 22 declaration, the counties experiencing the greatest problems are “in areas where the prevalence of COVID-19 is highest.” Marks 5/22 Decl. ¶ 4.

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

84. The arbitrary, differential treatment of voters of different races and in different regions of the Commonwealth is precisely what the Free and Equal

Elections Clause was written to “end, once and for all.” *League of Women Voters*, 178 A.3d at 808. Indeed, one of the very reasons for the Clause’s adoption was the history of disparate treatment of voters based on their location within the Commonwealth. *Id.*

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

86. The disparate burdens and rates of disenfranchisement created by the received-by deadline for voters of different regions, races, and other characteristics will be even greater for the November 2020 general elections than it is for the June 2020 primary, as the number of applications for absentee and mail-in ballots will multiply and the differences in application-processing delays and mail delays across different counties will be even more pronounced.

87. The framers of Pennsylvania’s Constitution sought to eradicate “laws that discriminated against a voter based on his social or economic status, geography of his residence, or his religious and political beliefs.” *League of*

Women Voters, 178 A.3d at 808. It is unfathomable to think that these same framers would have countenanced disfavoring voters based on whether they live in a region whether the outbreak of a deadly virus has been more prevalent, or whether the voter is ability to withstand—or risk exposure to—the virus. That is especially true because those at greatest risk from COVID-19 include Pennsylvania’s most socially and economically disadvantaged citizens.

88. In short, the undisputed facts now show that in the context of the COVID-19 pandemic, the received-by deadline will treat voters unequally in whether their votes are counted and the burdens they face in ensuring their votes are counted, violating the Pennsylvania Constitution’s guarantee that citizens across the Commonwealth have “an equal right, on par with every other citizen, to elect their representatives.” *League of Women Voters*, 178 A.3d at 804.

89. If ballots were instead considered timely when sent by election day, the differential treatment of similarly situated voters would be greatly reduced and potentially eliminated entirely.

COUNT II
Violation of the Pennsylvania Constitution’s
Equal Protection Guarantees, Art. I, §§ 1 and 26

90. Petitioners hereby incorporate all foregoing paragraphs as if they were fully set forth herein.

91. Article I, Section 1 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.”

92. Article I, Section 26 provides: “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right.”

93. These equal protection guarantees are not coterminous with those of the federal Equal Protection Clause. *See League of Women Voters*, 178 A.3d at 784 n.54.

94. This Court applies three standards of scrutiny depending on the type of government classification at issue. *See William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 457-58 (Pa. 2017). Enforcement of the received-by deadline violates equal protection under any of this Court’s standards.

95. When “a fundamental right has been burdened,” this Court applies “strict scrutiny.” *William Penn Sch. Dist.*, 170 A.3d at 458. And the “right to vote” is a “fundamental” right. *Banfield v. Cortés*, 110 A.3d 155, 176 (Pa. 2015); *In re Nader*, 858 A.2d 1167, 1181 (Pa. 2004) (“[W]here the fundamental right to vote is at issue, a strong state interest must be demonstrated.”); *Smith v. City of*

Phila., 516 A.2d 306, 311 (Pa. 1986) (“The most protected rights, fundamental rights, are those which have their source, explicitly or implicitly, in the Constitution.”).

96. The received-by deadline is subject to strict scrutiny because it differentiates between and classifies individuals with respect to their fundamental right to vote. Enforcement of the received-by deadline will necessarily result in differential treatment of similarly situated voters—some disenfranchised and some not—based on variations in mail-delivery and application-processing times. As described, voters in southeastern Pennsylvania will be disproportionately disenfranchised based on the now-established application-processing delays and/or mail-delivery delays in the area. Allowing for differential treatment of citizens in their ability to exercise their fundamental right to vote based on whether they live in a county that has been hit hardest by a pandemic offends any conception of equal protection.

97. Enforcement of the deadline amid the COVID-19 pandemic necessarily will give rise to another, more pernicious form of differential treatment: The ability of citizens to cast their votes will depend on their capacity and willingness to risk their health and safety by voting in person as an alternative to submitting a timely requested mail-in ballot that otherwise would not be counted.

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

99. Even if strict scrutiny did not apply, the challenged provisions would be subject to an “intermediate” (or “heightened”) standard of review because they unquestionably involve an “important” right. *William Penn Sch. Dist.*, 170 A.3d at 458. For a law to pass intermediate scrutiny, it must be true “that the government interest be an ‘important’ one” and “that the classification be drawn so as to be closely related to the objectives of the legislation.” *James v. SEPTA*, 477 A.2d 1302, 1307 (Pa. 1984). Enforcing the received-by deadline amid the COVID-19 pandemic, especially in light of the massive application-processing delays and other problems recently acknowledged by Respondents, fails intermediate scrutiny as well.

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

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

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Honorable Court enter judgment in their favor and against Respondents, and:

- a. Declare that enforcement of the received-by deadline is unconstitutional and invalid, as applied during the duration of the public health emergency related to COVID-19, because it violates the rights of Petitioners and all voters in Pennsylvania under the

Pennsylvania Constitution's Free and Equal Elections Clause, Art. I, § 5; and the Equal Protection Guarantees, Art. I, §§ 1 and 26.

- b. Declare that Act 77's non-severability clause is unenforceable, in the context of the public health emergency related to COVID-19, and that the invalidated received-by deadline is severed from the remainder of Act 77, which remains in full force and effect.
- c. Enjoin Respondents, their agents, officers, and employees from enforcing the received-by deadline in the 2020 primary or general elections, and enjoin Respondents to direct county boards of elections not to enforce the received-by deadline in the 2020 primary or general elections, based on the public health emergency related to COVID-19.
- d. Enjoin Respondents, their agents, officers, and employees, for the 2020 primary or general elections, to consider timely any absentee or mail-in ballot, and to direct county boards of elections to consider timely any absentee or mail-in ballot, if:
 - 1. The ballot is received in the office of the county board of elections by 8 p.m. on the day of the primary or general election;
 - 2. The ballot is postmarked on or before the day of the primary or general election, and is received in the office of the county

board of elections no later than seven days after the day of the primary or general election. A “postmark” shall be any type of mark applied by the USPS or any delivery service to the return envelope, including but not limited to a bar code or any tracking marks, which demonstrates that a ballot was mailed on or before election day;

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

Dated: May 25, 2020

Respectfully submitted,

/s/ Mary M. McKenzie

Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
Claudia De Palma
Attorney ID No. 320136
Public Interest Law Center
1500 JFK Blvd., Suite 802
Philadelphia PA 19102
Telephone: +1 215.627.7100
Facsimile: +1 215.627.3183
mmckenzie@publintlaw.org.

Elisabeth S. Theodore*
Daniel F. Jacobson*
R. Stanton Jones*
David P. Gersch*
Kolya Glick*
Samuel F. Callahan*
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: +1 202.942.5000
Facsimile: +1 202.942.5999
elisabeth.theodore@arnoldporter.com
* Not admitted in Pennsylvania,
admitted in the District of Columbia.
Pro hac vice motion to be filed.

Counsel for Petitioners