

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 Geffen, Attorney ID No. 310134

Public Interest Law Center

1500 JFK Blvd., Suite 802

Philadelphia, PA 19102

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

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. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perer 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 alstencia 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 Geffen, Attorney ID No. 310134

Public Interest Law Center

1500 JFK Blvd., Suite 802

Philadelphia, PA 19102

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

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

Counsel for Petitioners

IN THE SUPREME COURT OF PENNSYLVANIA

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

Petitioners,

v.

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

Respondents.

No.

PETITION FOR REVIEW
ADDRESSED TO THE COURT'S ORIGINAL JURISDICTION

INTRODUCTION

1. The COVID-19 crisis has changed every aspect of American life. It has changed the way we work. It has changed the way we walk. And it has changed the way we vote.

2. Because voting in person will pose grave risks to people's health and lives throughout 2020, Americans will turn in unprecedented numbers to voting by mail instead. Already in Pennsylvania, applications to vote by mail in the upcoming June primary have skyrocketed across the Commonwealth. But the rules for mail voting in Pennsylvania—and in particular, the deadline by which county boards of elections must receive completed absentee and mail-in ballots—were written for a pre-pandemic world. Absent judicial intervention, the requirement that absentee and mail-in ballots must be received by the county boards of elections by election day will result in the disenfranchisement of large numbers of Pennsylvanians this year.

3. The deadline for Pennsylvania voters to *apply* for an absentee or mail-in ballot is just one week before election day. For the many voters who apply for a ballot on or near this deadline, a number of things need to happen in the short span of a week for these voters to have their votes counted. First, the county board of elections must process the application, review and approve it, and send the voter a ballot via the U.S. Postal Service (“USPS”). The surge in absentee and mail-in

ballot applications has already begun to overwhelm county boards of elections, many of which are experiencing staff shortages as a result of the pandemic, and the backlogs in processing applications will only increase as election day draws near. On top of these backlogs at the county level, USPS is experiencing its own delays due to the pandemic. As a result, tens or even hundreds of thousands of Pennsylvanians who timely request an absentee or mail-in ballot will receive the ballot only days (or less) before election day. At that point, the voter cannot be sure that if she mails the ballot it will be received by the board of elections by election day.

4. These voters will then face a choice: either mail the absentee or mail-in ballot and risk that it will arrive too late and will not be counted, or vote in person and risk not only their own health and lives, but the health and lives of their families and neighbors. Making matters worse, Pennsylvania law requires anyone who requested an absentee or mail-in ballot and wishes to vote in person to bring that ballot with them to the polling place and spoil it there. Voters who risk their lives to vote in person may still be denied the franchise if they are not aware of this requirement.

5. In these extraordinary, once-in-a-century circumstances, enforcement of the deadline that absentee and mail-in ballots must be received by election day violates the Pennsylvania Constitution. The deadline violates Pennsylvania's Free

and Equal Elections Clause. Elections are not “free” when voters must risk their health and lives to ensure their votes will be counted. And elections are not “equal” when similarly situated citizens who timely request absentee and mail-in ballots may or may not have their votes counted based on factors outside their control, such as variation in mail-delivery schedules across the Commonwealth or application-processing speeds at different county elections boards. The deadline for receipt of absentee and mail-in ballots violates Pennsylvania’s Equal Protection Clause for similar reasons. The deadline also violates Pennsylvania’s Free Expression and Association Clauses by burdening or outright preventing voters from casting a ballot, a form of core political expression for which the Pennsylvania Constitution provides broader protection than its federal counterpart. And the deadline violates Pennsylvania’s Absentee Voting Clause, which requires the legislature to provide voters with physical disabilities and illnesses who cannot appear in person on election day a full opportunity to vote by absentee ballot.

6. This Court can and should prevent these constitutional harms 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 sends it by election day and the county board of elections receives it within seven days of election day.

PARTIES

A. Petitioners

7. Petitioner Disability Rights Pennsylvania (“Disability Rights”) is a 501(c)(3) Pennsylvania nonprofit organization whose members include the over 1.7 million Pennsylvanians with disabilities. For more than 40 years, Disability Rights has engaged in advocacy, legislation, and litigation on behalf of hundreds of thousands of Pennsylvanians with disabilities “so that they may live the lives they choose, free from abuse, neglect, discrimination, and segregation.” Disability Rights is designated by the Commonwealth as the “protection and advocacy system” under various federal laws that empower Disability Rights to protect the rights of and advocate for Pennsylvanians with disabilities. Among other issues, Disability Rights protects and advances the rights of individuals with disabilities with respect to housing, employment, education, public access, and voting.

8. Petitioner Suzanne Erb is a church organist and singer who resides in Philadelphia, Pennsylvania. She also works part-time as a disability rights advocate. Ms. Erb is 64 years old and is blind. She is a longtime board member of Disability Rights and has been Chair of the Board since September 2019. Ms. Erb is a registered Pennsylvania voter who regularly votes in primary and general elections.

9. Petitioner SeniorLAW Center (SeniorLAW) is a nonpartisan, nonprofit organization that seeks justice for older people using the power of the law, community education, and advocacy at the local, state, and national levels. Founded in 1978, SeniorLAW Center has served more than 400,000 older Pennsylvanians through its many diverse programs, including its statewide SeniorLAW HelpLine, which serves seniors in all 67 Pennsylvania counties. SeniorLAW Center addresses critical legal issues affecting the lives of seniors, including elder abuse, family violence and financial exploitation, housing and shelter, grandparents raising grandchildren, consumer protection, health care, advance planning, and civil and voting rights.

10. Petitioner Southeast Asian Mutual Assistance Associations Coalition, Inc. (SEAMAAC) is a nonpartisan, nonprofit organization headquartered in Philadelphia. SEAMAAC's mission is to support and serve immigrants, refugees and other politically, socially, and economically marginalized communities as they seek to advance the condition of their lives in the United States.

11. Petitioner The Barristers' Association of Philadelphia, Inc. (Barristers) is a nonpartisan, nonprofit membership-based organization headquartered in Philadelphia. Members of Barristers encompass lawyers and legal professionals who serve society at the highest positions in both the private and public sectors of the legal profession, and the organization has a

communications reach of approximately 3,000 community stakeholders, in addition to its members. Barristers' mission is to serve the Black legal profession and the Black community by promoting and fostering (i) professional and practice development and excellence; (ii) economic and political empowerment; (iii) charitable and community service; and (iv) justice and equal opportunity. Founded in 1950, as an affiliate of the National Bar Association, Barristers increases citizens' awareness of their rights under the law through community town halls and clinics; provides scholarships to area minority law students; prepares wills and powers of attorney for low-income senior citizens; promotes youth awareness and career opportunities for Black and other minorities in the legal profession; and annually distributes several hundred turkey dinners to needy Philadelphia families for Thanksgiving.

B. Respondents

12. 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.

13. 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

14. 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

15. Pennsylvania law provides for two categories of voters who are permitted to vote by means other than voting in person at a polling location: absentee voters and mail-in voters.

16. “Qualified absentee electors” include, 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 observance of a religious holiday. 25 P.S. § 3146.1.¹

¹ 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

17. Any registered voter who does not qualify as an absentee voter may apply to submit their ballot by mail-in voting, without providing a justification. 25 P.S. §§ 3150.11–3150.12b; *see* Act. of Oct. 31, 2019, P.L. 552, No. 77. Such voters are known as “qualified mail-in electors.” 25 P.S. § 3150.11.

18. As relevant to this case, the same deadlines for requesting and submitting ballots apply to absentee voters and mail-in voters.

19. Voting by absentee ballot or mail-in ballot in Pennsylvania is a multi-step process. A voter must apply for the ballot from the voter’s county board of elections, receive the ballot, and then complete and return it. Each of these steps takes time, often presents logistical challenges for voters in the current COVID-19 crisis, and will involve one to three mailings through USPS.

20. 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).

21. To apply for an absentee or mail-in ballot, Pennsylvania voters have several options.²

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.

² <https://www.votespa.com/Voting-in-PA/Pages/Mail-and-Absentee-Ballot.aspx>.

22. Voters can apply online at [VotesPA.com/ApplyMailBallot](https://www.votespa.com/ApplyMailBallot) or [VotesPA.com/ApplyAbsentee](https://www.votespa.com/ApplyAbsentee). But the online option is available only to applicants who have a Pennsylvania driver's license or non-driver photo identification from the Pennsylvania Department of Transportation (PennDOT). Many registered Pennsylvania voters who vote regularly do not have a PennDOT-issued driver's license or non-driver photo identification and thus cannot apply for a ballot online.³

23. Voters who do not have a PennDOT identification card can download and print an absentee or mail-in ballot application, complete it on paper, and mail it to their county board of elections. But many registered voters do not have access to a printer, especially during the COVID-19 crisis.

24. Voters who do not have a PennDOT identification or access to a printer must call, email, or write a letter to the Department of State or their county board of elections to request an application, and then wait for the application to be mailed and delivered to them.⁴

³ See *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2014 Pa. Commw. Unpub. LEXIS 756, at *94-96 (Pa. Commw. Ct. Jan. 17, 2014).

⁴ Ordinarily, such voters could also go in person and pick up and return a ballot application at their county board of elections, but the relevant offices are not currently open to public walk-ins.

25. 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. *See* 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a)(1).

26. 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).

27. This “received-by” deadline applies irrespective of when a voter applied for her absentee or mail-in ballot, when the county board of elections approved the voter’s application and sent the ballot to the voter, when the voter received the ballot, or when the voter mailed the completed ballot.

28. 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 As a default rule, voters who request an absentee or mail-in ballot may not vote by regular ballot in person on election day, even if

⁵ Under normal circumstances, voters can hand deliver their absentee or mail-in ballots to their county board of elections by 8:00 p.m. on election day. *See* 25 P.S. §§ 3146.6(a), 3150.16(a). But those offices are currently not open for public walk-ins because of the pandemic. Even if they were, voting by hand-delivering a ballot to a county board of elections would similarly require a voter to choose between voting and their safety. Finally, hand-delivering a ballot in person is likely not an option for absentee voters who are outside their county of residence or have a disability that prevents them from traveling to their county board of elections. *See* 25 P.S. §§ 3146.1(j), (l).

they have not cast the absentee or mail-in ballot. 25 P.S. §§ 3146.3(e), 3150.13(e).

If a voter requested an absentee or mail-in ballot but wishes to vote in person on election day, the voter may cast a regular ballot at a polling place 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 sworn statement in substantially the following form:

I hereby declare that I am a qualified registered elector who has obtained an absentee ballot or mail-in ballot. I further declare that I have not cast my absentee ballot or mail-in ballot, and that instead I remitted my absentee ballot or mail-in ballot to the judge of elections at my polling place to be spoiled and therefore request that my absentee ballot or mail-in ballot be voided.

25 P.S. §§ 3146.6(b)(3), 3150.16(b)(3).

29. 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).

30. Thus, a voter who timely requested an absentee or mail-in ballot a week before election day, received the ballot too close to election day to be sure it would be received by election day if mailed, and does not have the wherewithal to bring the absentee or mail-in ballot and accompanying envelope to her polling place will be precluded from voting by regular ballot at a polling place.

B. The Received-By Deadline Makes the Franchise Dependent on the Actions of Third Parties

31. Because of the deadline requiring absentee and mail-in ballots to be received on or before election day, a voter's ability to cast a ballot by mail depends in multiple respects on the actions of third parties:

- a. First, if the voter mails her application for an absentee or mail-in ballot, USPS must deliver the voter's application to the county board of elections.
- b. Second, the county board of elections must process and approve the application, and mail the voter an absentee or mail-in ballot.
- c. Third, USPS must deliver the ballot to the voter.
- d. Fourth, after the voter fills out and mails the ballot, USPS must deliver the completed ballot to the county board of elections by 8 P.M. on election day for it to be counted.

32. Although USPS estimates that standard First Class mail delivery takes one to three business days, USPS does not guarantee its delivery times, and it often takes longer than three days to deliver First Class mail, particularly in times of high volume or shortages of USPS staffing, or for mail sent from a distant location.

Thus, a voter does not know with any degree of certainty the date by which they must mail their absentee or mail-in ballot to be assured it will be counted.

33. In addition, the time it takes for a county board of elections to process applications and send approved voters an absentee or mail-in ballot will vary based on numerous factors, including the number of applications received in that county and the county's staffing and IT resources.

34. Accordingly, the received-by deadline will inevitably result in a substantial number of absentee and mail-in ballots not being counted, even though voters timely requested them.

35. That is especially true given that a substantial percentage of voters submit their vote-by-mail applications close to the relevant deadline. For instance, in the recent Wisconsin primary election, more than 283,000 voters submitted absentee ballot requests in the last four days before the April 3 application deadline. More than 136,000 voters submitted their request in just the last two days before the deadline.⁶

36. A typical example is a Pennsylvania voter who, like many other voters, submits her application for an absentee or mail-in ballot the day before the application deadline (the Tuesday before the election). If the county board of elections takes three days to process the application and send the voter a ballot, and it then takes another two days for the ballot to arrive at the voter's residence via

⁶ See Wisconsin Election Commission, Absentee Voting Statistics, <https://elections.wi.gov/publications/statistics/absentee>.

mail, the voter will not receive the ballot until the Saturday before the election. Even if the voter completes the ballot and sends it back that same day, the voter has no assurance that it will be received by 8:00 P.M. on election day, two business days later. The voter's ballot may not be received by the deadline and accordingly may not be counted. As described below, the time required is multiplied substantially for disabled voters, who may need assistance requesting, receiving, filling out, and submitting their absentee or mail-in ballots.

37. Moreover, as a result of unpredictable variation in USPS's delivery times, two voters who are otherwise identically situated could mail their absentee or mail-in ballots on the exact same day and time and have different outcomes—the voter whose local USPS branch delivers mail faster could have her vote counted while the voter who lives in an area with slower delivery times could have her ballot discarded as too late.

38. In other words, Pennsylvania's received-by deadline treats identically situated voters differently—enfranchising some and disenfranchising others—based on events entirely outside the voters' control, including the time it takes USPS to deliver the mail.

D. The COVID-19 Pandemic

39. The disenfranchisement caused by the received-by deadline for absentee and mail-in ballots will be magnified enormously in the context of the current public health crisis resulting from the COVID-19 pandemic.

40. As of April 27, 2020, the Pennsylvania Department of Health has reported 41,165 confirmed cases of COVID-19 in Pennsylvania.⁷ It has reported 1,550 deaths resulting from those cases.⁸ Nationwide, the Centers for Disease Control and Prevention (“CDC”) has reported 928,619 total cases of COVID-19, resulting in 52,459 deaths.⁹

41. Governor Tom Wolf has issued a statewide “stay-at-home” order to protect the health and safety of the Pennsylvania’s citizens.

42. 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

⁷ See <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

⁸ *Id.*

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

require states to “aggressively re-embrace some of the mitigation strategies that we have determined had impact, particularly social distancing.”¹⁰

43. COVID-19 disproportionately afflicts and kills minorities, people with disabilities, and people over age 60.¹¹ In Pennsylvania, African Americans comprise 31% of the persons who have contracted COVID-19 (for whom racial data is available), even though African Americans comprise just 12% of the total population.¹²

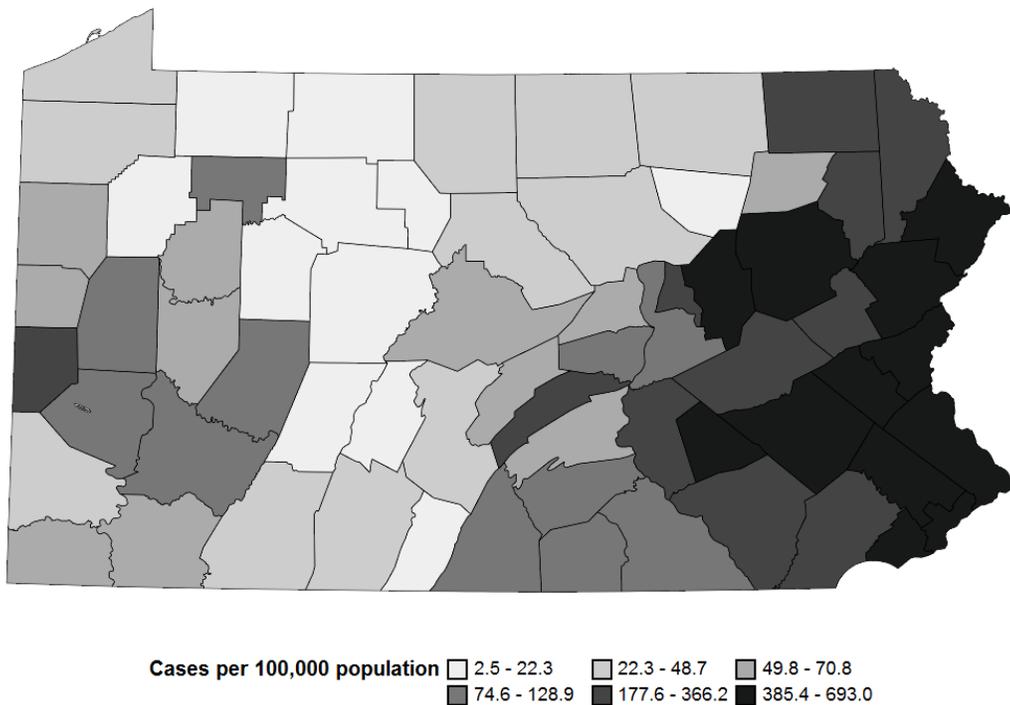
¹⁰ Kashmira Gander, *CDC Director Says There May be Another Coronavirus Wave in Late Fall and a ‘Substantial Portion of Americans’ Will be Susceptible*, Newsweek (Apr. 1, 2020), <https://www.newsweek.com/cdc-director-coronavirus-wave-late-fall-substantial-portion-americans-will-susceptible-1495401>.

¹¹ 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”).

¹² <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>.

44. 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.¹³

INCIDENCE BY COUNTY



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

¹³ *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.¹⁴

46. Given the risks posed by the COVID-19 pandemic, many more Pennsylvania citizens than usual will seek to vote by mail—rather than in person at a polling place—in the upcoming primary and general elections. As of April 23, 2020, the Pennsylvania Department of State reported that more than 600,000 Pennsylvanians had requested an absentee or mail-in ballot for the June 2 primary election, with the primary still six weeks away. By comparison, in the 2016 primary election, officials reported a grand total of 84,000 absentee votes cast.

47. The unprecedented increase in absentee and mail-in ballot applications will predictably result in backlogs in the processing and approval of such applications by county boards of elections. Those backlogs will result in delays in the time between when a voter submits a ballot application and when the county elections board actually sends the ballot to the voter.

48. For example, as of April 17, Allegheny County had processed only 20,000 of the more than 71,000 absentee and mail-in ballot applications it had

¹⁴ See <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>.

already received.¹⁵ As of April 20, the City of Philadelphia alone already had a backlog of more than 10,000 ballot requests that needed to be processed.¹⁶

49. For this and other reasons, the Philadelphia City Commissioners' Chairwoman has advocated changing the deadline for absentee and mail-in ballots to the date that the voter *sends* the ballot, rather than the date that the ballot is *received*, stating that the current system is simply “not designed to handle” the number of absentee and mail-in ballot requests being made due to the pandemic.¹⁷

50. The COVID-19 pandemic is also taxing the mail system, creating further potential for delay. As of April 17, 2020, USPS reported that Priority Mail and First Class packages may temporarily require more time to be delivered due to transportation availability as a result of the pandemic.¹⁸ In addition, residents in

¹⁵ Julian Routh, *Allegheny County will send mail-in ballot applications to all registered voters*, Pittsburgh Post-Gazette, Apr. 17, 2020, <https://www.post-gazette.com/news/politics-local/2020/04/17/Allegheny-County-will-send-mail-in-ballot-applications-to-all-registered-voters/stories/202004170118>.

¹⁶ Press Release, Philadelphia City Commissioners' Chairwoman Lisa Deeley Calls on Governor Wolf and the Legislature to Extend Voted Ballot Return Deadline for the June 2nd Primary, <https://twitter.com/Elaijuh/status/1252298585808535552>.

¹⁷ *Id.*

¹⁸ <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes>

other parts of the country “are experiencing delays in their mail delivery service as [USPS] employees have been directly affected by the coronavirus pandemic.”¹⁹

51. Enforcing the received-by deadline for absentee and mail-in ballots during the pandemic will disenfranchise tens of thousands of Pennsylvanians, and will force a substantial number of others to risk their health and lives, and the health and lives of their families and neighbors, to vote in the upcoming 2020 primary and general elections.

52. First, due to the myriad delays caused by the pandemic, a large number of Pennsylvanians will timely request an absentee or mail-in ballot, and will send their ballot on or before election day, but their ballot will not be counted because it was not received by the election day deadline.

53. Second, some voters who timely request an absentee or mail-in ballot will receive the ballot too close to election day to know whether there is enough time to send the ballot back and have it timely received by election day in order to be counted. The only way these voters can ensure their votes are counted is to vote

¹⁹ Justin P. Hicks, *Mail Service Slows in Michigan as Coronavirus hits Postal Workers*, Gov’t Tech. (Apr. 7, 2020), <https://www.govtech.com/em/safety/Mail-Service-Slows-in-Michigan-as-Coronavirus-hits-Postal-Workers-.html>. And of course there is always the possibility that local post offices will need to shut down temporarily due to COVID-19 causing further mail delays, as happened earlier this month in Chester County, Pennsylvania. https://www.dailylocal.com/news/coronavirus/exton-post-office-temporarily-closed/article_c118f97c-751c-11ea-ab92-2fe3f7f922c5.html

in person. These voters will face a choice between losing their right to vote and risking their lives and the lives of their families and neighbors by voting in person. For those parents without access to child care, they would have to risk their children's health by bringing them to the polls. And the risks of voting in person will be heightened because many polling locations will close due to staffing shortages, resulting in longer lines at the few polling locations that remain open. For instance, Allegheny County is seeking to close more than 85% of its polling locations for the June primary.²⁰

54. Third, even for those voters who choose to risk their health and lives to vote, many will not know that they must bring their absentee or mail-in ballot and accompanying envelope to their polling place and spoil it there in order to vote in person. Voters who are not aware of this requirement and are informed of it at their polling place will only be able to cast a provisional ballot, and many voters will leave rather than casting a provisional ballot.

55. The disenfranchisement resulting from the received-by deadline will not only be enormous in magnitude, but it will also be arbitrary. As explained, enforcement of the received-by deadline inevitably subjects similarly situated voters who request absentee or mail-in ballots on the same day to differential

²⁰ Jamie Martines, *Allegheny County votes to consolidate primary polling locations*, TribLive (Apr. 23, 2020), <https://triblive.com/local/pittsburgh-alleggheny/alleggheny-county-votes-to-consolidate-primary-polling-locations/>.

treatment—some of their votes will be counted and others not—based on factors outside of their control. Those factors, which include the speed of mail delivery by USPS and application processing by county boards of elections, will become more unpredictable and uncontrollable when voters are attempting to vote by mail in record numbers during the pandemic.

56. Further, because of the received-by deadline for absentee and mail-in voting and the health risks of in-person voting, the significant percentage of voters who remain undecided until election day will be forced to vote earlier than they otherwise would, depriving them of any late-developing information that might affect their vote.²¹ Elections regularly feature late-breaking developments that may cause voters to change their minds on the eve of the election or on election day itself. For instance, in the 2016 Presidential election, 15% of Pennsylvanians made their decision in the final week of the election, and those voters swung

²¹ Bob Fredericks, *Super Tuesday Voters Made Last-Minute decisions in fluid 2020 Presidential Race*, N.Y. Post (Mar. 3, 2020), <https://nypost.com/2020/03/03/super-tuesday-voters-made-last-minute-decisions-in-fluid-2020-presidential-race/>; Nate Silver, *The Invisible Undecided Voter*, FiveThirtyEight (Jan. 23, 2017), <https://fivethirtyeight.com/features/the-invisible-undecided-voter/> (reporting 13 percent of voters were undecided on election day in 2016); Brian Brox et al., *Late Deciders in U.S. Presidential Elections*, 20 Am. Rev. of Politics 333 (2009), <http://www.tulane.edu/~bbrox/Brox%26Giammo.pdf> (explaining behavior of late-deciding voters).

decidedly toward President Trump.²² And in 2012, President Obama’s handling of Hurricane Sandy at the end of October raised his poll rating in what had been a close race.²³ Although the Democratic and Republican primaries for President hold little suspense this year, Pennsylvania’s June 2, 2020 primary will decide hotly contested races for both parties, including for seats in the U.S. House, State Senate, and State House. In addition, Democrats statewide will be voting in a contested primary for Pennsylvania Auditor General.

57. In an ordinary election, voters who want to ensure that they have the benefit of all available information before casting their ballot may do so by going to the polls on election day, or by delivering their absentee or mail-in ballot in person on election day to the county board of elections, without concern of getting sick, dying, or infecting their neighbors or families as a result. But the received-by deadline for absentee and mail-in ballots—combined with the COVID-19 pandemic—forces voters to choose between risking their health by going to the

²² Aaron Blake, *How America decided, at the last moment, to elect Donald Trump*, Wash. Post (Nov. 17, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/how-america-decided-at-the-very-last-moment-to-elect-donald-trump/>; see also Nate Silver, *The Comey Letter Probably Cost Clinton The Election*, FiveThirtyEight (May 3, 2017), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election>.

²³ John Cassidy, *How Much Did Hurricane Sandy Help Obama?*, New Yorkers (Nov. 4, 2012), <https://www.newyorker.com/news/john-cassidy/how-much-did-hurricane-sandy-help-obama>.

polls on election day or voting with less than complete information before election day.

58. The received-by deadline will also disproportionately burden and disenfranchise certain groups of Pennsylvanians. For instance, studies in other states have shown that received-by deadlines disproportionately disenfranchise young voters and minority voters.²⁴

E. Lessons Learned from Wisconsin's April 7, 2020 Election

59. Wisconsin's recent primary election illustrates that a substantial number of people will be disenfranchised due to the received-by-election-day deadline for voting by mail in the context of the COVID-19 pandemic.

60. Similar to Pennsylvania's statutes, Wisconsin law requires that absentee ballots must be received by election day in order to be counted.

61. In Wisconsin, the COVID-19 pandemic caused a dramatic uptick in requests for absentee ballots for its April 7, 2020 primary election. On April 13,

²⁴ See, e.g., Expert Report of Stephen Ansolabehere, *Voto Latino v. Hobbs*, No 2:19-cv-05685-DWL, ECF No. 23-1 (D. Ariz.); *Disparities in California's Uncounted Vote-by-Mail Ballots: Youth, Language Preference and Military Status*, Cal. Civic Engagement Project (Oct. 2014); Dr. Daniel A. Smith, *Vote-by-Mail Ballots Cast in Florida* (2018), <https://electionsmith.files.wordpress.com/2016/10/smith-coie-jenner-report-dnc-fdp.pdf>.

2020, the Wisconsin Elections Commission reported that 1,296,071 voters requested absentee ballots—five times more than in the 2016 primary.²⁵

62. “In light of these unprecedented numbers, at least some clerks [had] trouble processing the applications for absentee ballots.” *Democratic Nat’l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *5 (W.D. Wis. Apr. 2, 2020). For instance, “[a]s of March 27, Madison had a backlog of more than 12,000 absentee ballots requests to process, and as a result it was experiencing at least a week-long delay in sending out absentee ballots.” *Id.*

63. On April 2, 2020, a federal district court entered an injunction extending the deadline for absentee ballots, such that they would be counted if received by April 13, 2020, six days after the primary. *Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1638374, at *3.

64. On April 6, 2020, the U.S. Supreme Court modified the injunction, providing that ballots were to be counted if they were postmarked on or before

²⁵ Compare *Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary*, Wisc. Election Comm’n, <https://elections.wi.gov/node/6833> (reporting over 1.28 million absentee ballots requested for April 7, 2020 primary), with Riley Vetterkind, *Absentee Ballot Requests in Wisconsin Already Exceed Number in Recent Spring Elections*, Wisc. State J. (Mar. 18, 2020), https://madison.com/wsj/news/local/govt-andpolitics/absentee-ballot-requests-in-wisconsin-already-exceed-number-in-recent-spring-elections/article_dfb34fc5-6aa8-5428-90c3-26c3f82a1d70.html (noting that just under 250,000 absentee ballots were requested for spring 2016 Wisconsin primary).

election day. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 206 L. Ed. 2d 452, 455 (2020) (per curiam).

65. The injunction as modified by the U.S. Supreme Court—changing the deadline for absentee ballots such that they had to be sent by, rather than received by, election day—permitted more than 100,000 people to vote by mail whose absentee ballots otherwise would have been received too late or who would have been forced to risk their lives by voting in person. According to data released by the Wisconsin Election Commission, nearly 114,000 absentee ballots were recorded as received *after* election date, but by the new April 13 deadline for receipt of ballots.²⁶ These ballots were counted if they were postmarked by election day, but would not have been counted if the received-by-election-day deadline had remained in effect. In the City of Milwaukee alone, roughly 10,000 absentee ballots were counted that were received after election day and would not have been counted if the original received-by deadline had remained in effect.

66. Wisconsin's primary also demonstrates the grave risk of forcing people to vote in person during the pandemic. Milwaukee health officials have

²⁶ *Wisconsin Election Commission, Absentee Voting Statistics*, <https://elections.wi.gov/publications/statistics/absentee> (compare statistics as of the morning of April 8, 2020 to statistics as of the morning of April 21, 2020).

reported that at least 40 people may have contracted COVID-19 from participating in the April 7, 2020 primary.²⁷

67. Enforcement of the received-by deadline will pose the substantially same problems for Pennsylvania's upcoming primary and general elections as existed in Wisconsin.

F. Harm to Petitioners from the Received-By Deadline

Petitioner Suzanne Erb

68. The received-by deadline will injure Petitioner Suzanne Erb by making it difficult for her to ensure that her ballot will be counted for the primary and general elections.

69. Ms. Erb usually votes in person on election day, but in the upcoming June primary and November general elections, Ms. Erb will vote for the first time by mail-in ballot. Ms. Erb will vote by mail-in ballot because (1) she does not feel safe being in a crowd at a polling place in the midst of the COVID-19 pandemic; (2) as a blind person, she has difficulty practicing six-foot social distancing; and

²⁷ Nick Corasaniti, *At Least 7 in Wisconsin Got Coronavirus During Voting, Officials Say*, N.Y. Times (Apr. 21, 2020), <https://www.nytimes.com/2020/04/21/us/politics/wisconsin-election-coronavirus-cases.html>; Teran Powel, *40 Coronavirus Cases In Milwaukee County Linked To Wisconsin Election, Health Official Says*, WUWM 89.7 (Apr. 24, 2020), <https://www.wuwm.com/post/40-coronavirus-cases-milwaukee-county-linked-wisconsin-election-health-official-says#stream/0>.

(3) her regular polling place may not be open and a new polling place may not be accessible for her (as is not uncommon with Philadelphia polling places).

70. Each step in voting by mail will be challenging and time-consuming for Ms. Erb, and enforcement of the received-by deadline will leave Ms. Erb with no way to ensure that her mail-in ballot will be counted. Although she has a passport, Ms. Erb does not have a PennDOT-issued driver's license or non-driver photo identification, and thus she cannot apply for her mail-in ballot online. Ms. Erb will have to download the ballot application from the Department of State website and print it. She does not have a printer and is working on obtaining access to a printer as her usual options are unavailable during the state-wide "stay-at-home" order. Ms. Erb could call or email the Philadelphia County Board of Elections and ask that they mail her an application, but she would need someone to come by her home regularly and read her mail to see if the ballot application had arrived. Because of COVID-19, it will be harder to find someone willing to come to her home. Once Ms. Erb has the paper ballot application form, she will also need to ask someone to help her complete the form and sign it.

71. After Ms. Erb completes and mails back her ballot application, she will again need someone to come to her home periodically and read her mail to see if the ballot has arrived. When the ballot arrives, Ms. Erb will have to ask

someone she trusts to help her complete and sign the ballot. She will then need to mail her ballot back to the Board of Elections.

72. Each of the steps in applying for and completing a mail-in ballot takes time, particularly in the current health crisis. A return deadline of “postmarked by election day” would provide certainty as to when Ms. Erb must mail back her ballot to ensure that her vote will be counted.

73. Moreover, in previous elections, Ms. Erb has often made up her mind about down-ballot races on or slightly before election day, on the basis of information that became available to her very late in the election cycle. This year, Ms. Erb will be voting in a contested Democratic primary for Pennsylvania Auditor General on June 2. She has not yet decided how she will vote in this race. To decide which candidate to support, Ms. Erb will try to learn more information about the candidates. However, campaigns for down-ballot races typically garner little media coverage until close to election day, especially this year as the pandemic dominates the news. Ms. Erb expects that there will be little media coverage of the race until shortly before June 2. Ms. Erb also can have difficulty finding information on down-ballot candidates because not every media source is accessible to her as a blind person.

74. For these reasons, Ms. Erb will have difficulty deciding which candidate to vote for in the Pennsylvania Auditor General race until near or on

election day. But because neither in-person voting nor traveling to Philadelphia City Hall to personally drop off her mail-in ballot on June 2 is a viable option for Ms. Erb, she will have to mark and mail her ballot at least one week before election day to be sure it will arrive on time to be counted, unless the Court grants the requested relief.

Petitioner Disability Rights Pennsylvania

75. Enforcement of the received-by deadline will cause significant harm to Petitioner Disability Rights as an organization and will also cause significant harm to its members, who include all 1.7 million Pennsylvanians with a disability. Many of those Pennsylvanians are registered voters.

76. Disability Rights works to eliminate the many barriers to voting for people with disabilities that impede participation in the voting process. But many barriers to voting remain. For example, while registered voters can apply for absentee and mail-in ballots online, the application requires a voter to have a PennDOT-issued driver's license or non-driver photo identification, which many of Disability Rights' members and clients do not have. Moreover, the process for absentee and mail-in ballots is not accessible to voters who are blind. And similarly, many polling places remain inaccessible to voters with mobility impairments and other disabilities.

77. Congress in the Help American Vote Act of 2002 (HAVA) authorized protection and advocacy systems, including Disability Rights, “to ensure full participation in the electoral process for individuals with disabilities, including registering to vote, casting a vote, and accessible polling places.” 42 U.S.C. § 21061(a). Pursuant to HAVA, Disability Rights engages in extensive efforts to maximize voter participation by its members and clients. Among other things, Disability Rights (1) educates Pennsylvanians with disabilities about the importance of voter participation, how to register to vote, and how to cast ballots; (2) advocates with state and county election officials to assure that in-person polling places are accessible to voters with mobility disabilities and that voting machines are accessible to voters with mobility and visual disabilities; (3) advocates for fully accessible voting processes to assure that people with disabilities have equal access to voting; (4) advocates to assure people with disabilities are not required to use a discriminatory absentee ballot process that imposes additional burdens and potential penalties on them and, instead supports the availability of a vote-by-mail option equally available to voters with and without disabilities; (5) issues alerts to the disability community before election days to advise members of the community about their right to vote and how to address issues that they encounter; and (6) operates hotlines on election days to

handle concerns and complaints by individuals with disabilities about issues they encounter while voting.

78. The COVID-19 pandemic increases voting burdens on people with disabilities. And as a consequence of the pandemic, the mail-in ballot received-by deadline harms Disability Rights because it has caused and will continue to cause Disability Rights to divert resources to ensure that Pennsylvania voters with disabilities are able to cast absentee and mail-in ballots that will actually be counted. Disability Rights has had to divert, and will continue to have to divert, substantial time, money, and resources from its other work to additional voter education to assure that people with disabilities are not disenfranchised. For instance, Disability Rights has conducted additional outreach to disability support and advocacy groups and service providers to educate them about the timelines for receipt of absentee and mail-in ballots, and Disability Rights has published and disseminated materials on these issues to remind voters of the importance of meeting the deadlines and the risk of disenfranchisement if they do not.

79. As a consequence of the pandemic, the received-by deadline for absentee and mail-in ballots will also injure Disability Rights' members, including by preventing many of them from casting a ballot that counts. Some Disability Rights members will face the choice between having their ballot not counted or risking their lives by voting in person. Others, who are unable to vote in person

because the pandemic will render in-person voting impossible for people with certain disabilities, will simply be unable to cast a ballot at all.

80. Individuals with certain disabilities, including those in nursing homes and other institutional settings, are at higher risk of serious illness. Those who are ill may not be able to apply early for absentee and mail-in ballots and certainly will be unable to safely vote in person. All people—but particularly those at high risk of serious infection—are understandably hesitant to even go to the Post Office or the mailbox to submit an absentee or mail-in ballot. Some will delay mailing their ballots as long as possible in the hope that the infection risk will decline with time.

81. In the upcoming elections, many counties will consolidate polling places and eliminate neighborhood polling places due to shortages in staff and protective equipment. This will require most people to travel farther to reach a polling place. For many people with disabilities who do not have transportation or reliable public transit, reaching a polling place may be impossible.

82. Even if people could reach the polling place, they will encounter long lines and lengthy delays that risk exposure to COVID-19. For people with disabilities who are at high risk of serious infection, waiting in such lines is a health risk. In addition, people with disabilities who have difficulty walking or standing will not be able to remain in those lines to vote even if they are willing to risk contracting the virus. Even people with other disabilities—like autism or

anxiety—may find it challenging to vote in those circumstances that are likely to exacerbate the symptoms of their disabilities.

83. The challenges raised by the COVID-19 pandemic mean that voting by absentee and mail-in ballot will be the only real option for many people with disabilities. But voting by absentee ballot or mail-in ballot is a multistep process, each step of which can take substantial time for those with a disability. The requirement that absentee and mail-in ballots must be received by the county boards of elections by election day will result in the disenfranchisement of some of Disability Rights’.

Petitioner SeniorLAW Center

84. Enforcement of the received-by deadline will cause harm to petitioner SeniorLAW as an organization and will also cause significant harm to its constituents, who include all 3 million Pennsylvanians over the age of 60.

85. SeniorLAW Center works to protect the right to vote of older Pennsylvanians, regardless of party, race, culture, or orientation, as a fundamental right and one which older people particularly value. SeniorLAW Center has provided education, outreach, and legal assistance to older Pennsylvanians throughout the Commonwealth to help protect their right of suffrage. It has organized and held pro bono clinics to help older voters and has authored numerous articles and media pieces on the challenges facing Pennsylvania seniors

in voting and the need to remove obstacles. At the invitation of leaders of the Pennsylvania House State Government Committee, SeniorLAW Center testified in legislative hearings on Voter ID legislation, and led the amicus coalition of aging and family advocates in challenging components of the Voter ID law that followed.

86. The over-60 population sits at the unfortunate confluence of voting rights and the COVID-19 pandemic. While older citizens have historically represented one of the largest voting demographics, they also have been the hardest hit by the novel coronavirus.²⁸ Eighty percent of COVID-19 deaths in the U.S. have been Americans aged 65 and older.

87. Older people are particularly at risk during the pandemic if they cannot use the mail-in ballot process to vote in the upcoming elections. To leave their homes to vote at the polls—or even to go to the post office—puts these individuals at great risk. Older Pennsylvanians will need to use the mail-in ballot option in the upcoming elections to exercise their right to vote. Many will face challenges in obtaining mail-in ballots, in posting them, and in meeting the current deadline of receipt by election day. Moreover, because mail-in voting is new for most voters, these older individuals will need assistance in simply understanding

²⁸ Natasha Lindstrom, *Pennsylvania's covid-19 cases crest 40K; 60% of deaths in nursing homes, senior living facilities*, eTrib (Apr. 24, 2020), <https://triblive.com/local/pittsburgh-alleggheny/pennsylvanias-covid-19-cases-crest-40k-statewide-60-of-deaths-in-nursing-homes-senior-living-facilities/>.

the process. The current return-by-election-day deadline injures SeniorLAW Center's constituents, who face unconstitutional burdens on their right to vote.

88. The current return by election day deadline also injures SeniorLAW Center itself because it is already expending resources—including staff and leadership resources—in order to work with aging services and other partners to educate older voters on the mail-in voting process and deadlines. If the deadline for returning mail-in ballots were eased so that ballots were counted so long as they were mailed by election day, SeniorLAW Center would redirect some of these resources toward its other work.

Petitioner SEAMAAC

89. Enforcement of the received-by deadline will cause significant harm to Petitioner SEAMACC as an organization, and will also cause significant harm to its members and constituents, who include at least 10,000 clients every year in Philadelphia, Chester, Delaware, Bucks, and Montgomery Counties, which are among the counties that have been hardest hit by the pandemic.

90. SEAMAAC provides services in areas such as education, health, and community development. It also works on civic engagement, including naturalization, voter registration, and get-out-the-vote activities.

91. In a non-pandemic election cycle, SEAMAAC's civic engagement work in the weeks preceding an election primarily involves outreach to voters in

the communities where SEAMAAC's constituents are concentrated. This work includes phone-banking and door-to-door canvassing. In 2019, SEAMAAC's civic engagement effort reached more than 6,500 people, including face-to-face interactions with more than 1,900 people, and almost 900 completed voter registrations.

92. In non-pandemic election cycles, canvassers carry voter registration forms and applications for absentee ballots. Because many of SEAMAAC's constituents are naturalized United States citizens with limited English proficiency (LEP), SEAMAAC sends bilingual canvassers who can help residents understand the forms. SEAMAAC's clients and canvassers speak a wide variety of languages, ranging from Cantonese to Khmer.

93. Because of the pandemic, SEAMAAC is currently unable to send canvassers to speak face-to-face with residents. Its civic engagement work is thus restricted to making phone calls and sending information via text messages, email, or regular mail.

94. In addition, the pandemic has forced SEAMAAC to temporarily suspend most of its other in-person work, including educational and health programming. SEAMAAC continues to operate programs such as hunger relief, including leaving grocery packages at residents' doors.

95. Face-to-face interactions are crucial for building trust with the communities SEAMAAC serves. Without in-person services and door-to-door canvassing, it is more time-consuming for SEAMAAC to gain the trust of the people it seeks to activate as voters, particularly in the cases of elderly, LEP, or first-time voters.

96. Because SEAMAAC's interactions with voters are now restricted to phone calls and text or email messages, it also takes longer for SEAMAAC to help voters understand and correctly return paperwork, including voter-registration forms and mail-in ballot applications, particularly in the cases of elderly, LEP, or first-time voters.

97. Because SEAMAAC is not currently interacting face-to-face with constituents, its staffers and volunteers cannot hand paper forms directly to voters, and often must rely on the mail, which adds days to the process.

98. Many of the citizens SEAMAAC serves lack access to or the know-how to use web-based applications for voter registration or mail-in ballots.

99. As a result of these changes and delays, some of SEAMAAC's clients will not be able to return absentee or mail-in ballots to their county boards of elections by 8 p.m. on Election Day for the June 2, 2020 primary election.

100. If the pandemic and associated restrictions persist into the summer or resume in the fall, some of SEAMAAC's clients will not be able to return absentee

or mail-in ballots to their county boards of elections by 8 p.m. on Election Day for the November 3, 2020 general election.

101. Because of these pandemic-related challenges and delays, SEAMAAC is currently heavily concentrating its human resources on get-out-the-vote work. It expects to do likewise in the weeks preceding this year's general election. If the deadline for returning absentee and mail-in ballots were eased so that ballots were counted if mailed by election day, SEAMAAC could redirect some of these resources toward its other project areas, including hunger relief, phone-based services for people facing hardships stemming from the pandemic, and assistance for Asian Americans who have experienced discrimination in connection with the pandemic.

Petitioner Barristers

102. Enforcement of the received-by deadline will cause significant harm to petitioner Barristers, whose members include approximately 1,000 lawyers and jurists, many of whom are registered voters.

103. Barristers has been committed throughout its history to protecting the hard-earned right of Black citizens to vote and to fighting electoral devices which unduly burden, deny, dilute or suppress their right to vote. For example, in 1978, Barristers joined other concerned groups in filing an action against the Philadelphia Registration Commission, which resulted in the addition of 50,000 Philadelphians

to the voter registration pools. In 2016, Barristers participated in non-partisan election protection in conjunction with the Octavius V. Catto Initiative, the ACLU, and the Lawyers Committee for Civil Rights Under the Law. In 2018, in addition to hosting a forum on voting rights and registering voters, Barristers participated in the National Bar Association's 2018 Election Protection Initiative and co-sponsored a get-out-the-vote rally in conjunction with clergy and civic leaders. Most recently, in November 2019, Barristers participated in and provided voter education at a non-partisan pre-election prayer breakfast.

104. COVID-19 has disproportionately impacted members of the Black community in Philadelphia. Many members of Barristers as well as the broader Black community in Philadelphia will need to vote by mail in the upcoming June primary and November election to protect their health and the health of their families and communities. The current received-by deadline for absentee and mail-in ballots injures Barristers' members, who face unconstitutional burdens on their right to vote.

G. Act 77's Non-Severability Provision

105. 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.

106. 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.

107. 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 hundreds of thousands of 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, Free Expression and Association Clauses, Equal Protection Clause, and Absentee Voting Clause 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.

108. 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.

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

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

110. 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.”

111. The federal Constitution contains no corresponding provision that expressly guarantees free and equal elections.

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

113. The Free and Equal Elections Clause dates back to the Commonwealth's "first organic charter of governance adopted in 1776, 11 years before the United States Constitution was adopted." *League of Women Voters*, 178 A.3d at 803. The original provision urged that elections "ought to be free," Pa. Const. of 1776, art. I, § VII, but contained "qualifying language" that ostensibly limited that right only to certain Pennsylvanians. *League of Women Voters*, 178 A.3d at 808. The current provision, enacted in 1790 and unchanged since, eliminated "all prior ambiguous qualifying language," stating, "simply and plainly, that 'elections shall be free and equal.'" *Id.* at 808-09. The goal of the provision was "to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived." *Id.* at 808.

114. Consistent with this text and history, this Court has long interpreted Article I, Section 5 broadly. It explained in 1914 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 (emphasis added) (quoting *Winston v. Moore*, 91 A. 520, 523 (1914)).

115. More recently, this Court held that “the plain and expansive sweep of the words ‘free and equal,’” in Article I, Section 5 reflects “the framers’ intent 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.” *League of Women Voters*, 178 A.3d at 804. Thus, “Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives”—it “mandates that all voters have an equal opportunity to translate their votes into representation.” *Id.*

116. Consistent with the Clause’s broad, protective text, this Court will invalidate laws that hinder the exercise of the right to vote or differentiate between voters, regardless of whether the legislature *intended* to impose that burden or discrimination. As this Court has said, the legislature “is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence.” *League of Women Voters*, 178 A.3d at 810.

117. 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 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. Moreover, the deadline will necessarily prevent these elections from being “equal”; voters will not “have an equal opportunity to translate their votes into representation.” *Id.* at 804.

118. *First*, as a direct result of enforcing the received-by deadline, a significant number of Pennsylvanians will not have their votes counted through no fault of their own. The received-by deadline would disenfranchise an inordinate number of people in any election, but the numbers will be staggering amid the COVID-19 crisis. Because of the unprecedented number of mail-in ballot requests, the ensuing backlogs for county boards of elections in processing and distributing ballots, and the slowdowns in postal delivery times, tens of thousands of Pennsylvanians (if not more) who timely request a mail-in ballot will receive their ballot only days before election day. Many of these voters will mail their ballots back but have them arrive after election day, and their votes will not be counted.

119. Other voters will conclude upon receiving their ballot that there is not enough time to realistically return it by election day, and that the only way to ensure their votes are counted will be to risk their health and safety by instead voting in person. Many cannot reasonably run that risk and thus will not vote.

120. Elections are not “free” when voters must risk their lives to vote. Nor are elections free when scores of voters are disenfranchised, even though they followed all of the rules, because ballots they cast before election day missed the deadline to arrive due to the consequences of a global pandemic. In short, in the context of the COVID-19 crisis, Pennsylvania’s current received-by deadline will deny some Pennsylvanians “the right to cast [their] ballot and have it honestly counted,” and for others will make voting “so difficult as to amount to a denial” of the right to vote. *League of Women Voters*, 178 A.3d at 810.

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

122. *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.

123. Two similarly situated individuals could timely request mail-in ballots on the same day, and yet inherent variation in mail-delivery schedules or

application-processing speed could result in one individual having her vote counted, while the other does not.

124. This sort of arbitrary, differential treatment of similarly situated voters 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.*

125. Even if enforcement of the received-by deadline were constitutionally permissible in regular election environments, the deadline’s arbitrary, differential effects are certainly unconstitutional when enforced in the midst of a severe public-health pandemic like the COVID-19 crisis. For example, counties that have been hit particularly hard by the COVID-19 crisis may experience greater delays in processing mail-in applications, and certain areas of the Commonwealth may experience disproportionately long delays in mail delivery.

126. Likewise, 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.

127. 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 a voter based on his ability to withstand—or risk exposure to—a deadly virus. That is especially true because those at greatest risk from COVID-19 include Pennsylvania’s most socially and economically disadvantaged citizens.

128. In short, enforcing the received-by deadline during the COVID-19 pandemic guarantees that the election will treat similarly situated voters unequally, violating the Pennsylvania Constitution’s guarantee that “every voter has the same right as every other voter.” *League of Women Voters*, 178 A.3d at 810.

129. If ballots were instead considered timely when sent by election day, a substantially greater number of voters would have their ballots counted, and similarly situated voters would not experience this differential treatment.

COUNT II
Violation of the Pennsylvania Constitution's
Free Expression and Association Clauses, Art. I, §§ 7, 20

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

131. Article I, Section 7 of the Pennsylvania Constitution provides in relevant part: “The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”

132. Article I, Section 20 provides: “The citizens have a right in a peaceable manner to assemble together for their common good”

133. Pennsylvania’s Constitution “provides protection for freedom of expression that is broader than the federal constitutional guarantee.” *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002). And this “broader protection[] of expression than the related First Amendment guarantee” applies “in a number of different contexts,” including “political” contexts. *DePaul v. Commonwealth*, 969 A.2d 536, 546 (Pa. 2009) (citing *Commonwealth v. Tate*, 432 A.2d 1382, 1391 (Pa. 1981)).

134. The rights of free expression and free association were a vital part of Pennsylvania’s political identity long before the enactment of the federal Bill of Rights in 1791. Pennsylvania’s Constitution, enacted in 1776, was in fact the first

to explicitly protect rights “to freedom of speech” and “to assemble together.”

Seth F. Kreimer, *The Pennsylvania Constitution’s Protection of Free Expression*, 5 U. Pa. J. Const. L. 12, 15 & n.7 (2002). Pennsylvania’s Constitutional Convention of 1790 consolidated the free expression provisions into “the lineal ancestors” of their current form. *Id.* at 17-18.

135. Pennsylvania’s Constitution protects the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to cast a vote. This Court has recognized that “[t]he act of voting is a personal expression of favor or disfavor for particular policies, personalities, or laws.” *Commonwealth v. Cobbs*, 305 A.2d 25, 27 (Pa. 1973). “Each individual voter as he enters the booth is given an opportunity to freely express his will.” *Oughton v. Black*, 61 A. 346, 348 (1905).

136. Voting, moreover, merits special protection because the “expression . . . is political.” *DePaul*, 969 A.2d at 548. “No right is more precious in a free country than that of having a voice in the election of those who make the laws.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, “political belief and association constitute the core of those activities protected by” the freedoms of speech and association. *Elrod v. Burns*, 427 U.S. 347, 356 (1976). “[A]n individual’s right to participate in the public debate through political expression and political association” safeguards the most “basic [right] in our democracy”—

namely “the right to participate in electing our political leaders.” *McCutcheon v. FEC*, 572 U.S. 185, 191, 203 (2014) (plurality opinion). Where, as here, political expression is at stake, the “guarantee of free speech has its fullest and most urgent application.” *Commonwealth v. Wadzinski*, 422 A.2d 124, 129 (Pa. 1980) (quotations omitted).

137. In the context of the COVID-19 pandemic, enforcement of the received-by deadline will significantly burden the political expression of voters in Pennsylvania, and will outright deny many voters the ability to engage in political expression.

138. Many voters who timely request mail-in ballots in compliance with Pennsylvania law and who send their ballots before election day will, by no fault of their own, have their votes discarded. These voters will be denied the ability to express their views through their ballots, and thus will be denied the right to engage in core political speech.

139. In addition, the received-by deadline imposes an unconstitutional condition on the exercise of the right to political expression. Voters who timely request a ballot but who fear that their ballot will not be received by the deadline will face the grave choice between, on one hand, risking their safety to vote in person, and, on the other, placing their ballot in the mail and risking it not counting. For these voters, risking their lives by voting in person will be a

condition of ensuring that they can engage in constitutionally protected expression. The State may not impose this sort of penalty on the exercise of a constitutional right. *See, e.g., Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 674 (1996) (“the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit” (quotation marks omitted)); *Commonwealth v. Bethea*, 379 A.2d 102, 105 (Pa. 1977) (it is “constitutionally impermissible” to punish a defendant for exercising the right to a jury trial).

140. The received-by deadline also burdens the speech of undecided and late-deciding voters. Many voters are undecided about who they wish to vote for and will not decide until very close to election day. In an effort to ensure that their votes are counted, these undecided voters may be forced to commit to voting for a candidate or ballot measure that they otherwise would not have voted for—in other words, to commit to the content of their political expression without all the information that they need to make an informed decision. That harm, too, renders enforcement of the received-by deadline unconstitutional.

141. Enforcement of the received-by deadline during the pandemic violates the Pennsylvania Constitution’s guarantees of political expression under any standard of scrutiny.

142. Even if evaluated as a content neutral “time, place, and manner” restriction, the received-by deadline is unconstitutional as applied during the COVID-19 crisis because it is not “narrowly tailored to serve a significant or substantial government interest” and does not “leave open ample alternative channels of communication.” *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 981 (Pa. Commw. Ct. 1997). The Commonwealth has no compelling interest in effectively silencing the political expression of a large, arbitrarily chosen set of eligible voters who have complied with the statutory deadline for requesting mail-in ballots. Even if it did, any interest in orderly election administration could readily be served through a significantly less restrictive means—namely, imposing a uniform requirement that mail-in ballots be mailed (rather than received) by election day.

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

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

144. Article I, Section 1 of the Pennsylvania Constitution provides: “All men are born equally free and independent, and have certain inherent and inalienable 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.”

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

146. 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.

147. 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.

148. 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.”).

149. 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 inherent, unpredictable variation in delivery and application-processing times. And 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.

150. The Commonwealth has no legitimate interest, let alone a compelling one, in imposing a deadline that will inevitably cause this arbitrary disenfranchisement. 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 send-by deadline, rather than a received-by deadline, imposes any additional administrative burden.

151. 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 fails intermediate scrutiny as well.

152. 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.*

153. Enforcement of the received-by deadline will arbitrarily disenfranchise voters and thus does not pass the rational-basis test. Mail-in applications will skyrocket in the 2020 election cycle, and counties’ current systems are not equipped to handle the flood of requests. Atop the administrative delays at the county levels, USPS has already delayed certain of its services because of the pandemic, and the delays are likely to grow as election day nears.

There is “no rational reason” to disenfranchise certain, arbitrarily selected voters based on these inevitable delays that are entirely outside their control, and to offer, as the only potential recourse, that those voters risk their lives to vote in person. *Curtis*, 666 A.2d at 260.

COUNT IV
Violation of Article VII, Section 14(a) of the Pennsylvania Constitution

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

155. Article VII, § 14(a) of the Pennsylvania Constitution provides: “The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.”

156. Application of a received-by deadline of 8 p.m. on Election Day during the COVID-19 pandemic fails to comply with the requirements of Article VII, § 14(a).

157. Even if enforcement of the received-by deadline is constitutionally permissible in regular election environments, the deadline’s arbitrary, differential effects are certainly unconstitutional when enforced in the midst of a severe public-health pandemic like the COVID-19 crisis. For example, counties that have been hit particularly hard by the COVID-19 crisis may experience greater delays in processing applications for absentee ballots, and certain areas of the Commonwealth may experience disproportionately long delays in mail delivery.

158. Enforcement of the statutory received-by deadline during the COVID-19 pandemic will ensure that many voters who timely request absentee ballots in compliance with the Election Code, and who place their ballots into the mail on or before Election Day will, by no fault of their own, have their votes discarded.

159. Because the COVID-19 pandemic has led to the closure of county boards of elections to walk-in visitors, and because even if these offices were open, many voters would be unable to safely travel to them, the in-person options contemplated by Act 77 for applying for, receiving, and returning absentee ballots are not meaningfully available for many or all qualified electors during the COVID-19 pandemic.

160. The received-by deadline imposed by Act 77 thus fails “to provide a manner in which qualified electors . . . may vote” during the COVID-19 pandemic. Instead, the Election Code, as amended by Act 77, permits widespread

disenfranchisement of qualified electors by imposing an unreasonable deadline by which the qualified electors must submit their absentee ballots during the COVID-19 pandemic.

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; Free Expression and Association Clauses, Art. I, §§ 7, 20; Equal Protection Guarantees, Art. I, §§ 1 and 26; and Absentee Voting Guarantee, Art. VII, § 14.
- 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, 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 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;
 - 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.
 - 4. The ballot contains any other indicia that the Court deems to be reliable indicia that the ballot was mailed by the voter on or before the day of the primary or general election.

Dated: April 27, 2020

Respectfully submitted,

/s/ Benjamin D. Geffen

Mary M. McKenzie
Attorney ID No. 47434
Benjamin D. Geffen
Attorney ID No. 310134
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