

**IN THE SUPREME COURT OF PENNSYLVANIA**

DISABILITY RIGHTS  
PENNSYLVANIA, *et al.*,

Petitioners,

v.

KATHY BOOCKVAR, in her capacity  
as Secretary of the Commonwealth of  
Pennsylvania, *et al.*,

Respondents.

No. 83 MM 2020

**RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION FOR  
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

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Respondents, Secretary of the Commonwealth Kathy Boockvar and Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State, submit the following Memorandum of Law in response to Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction.

## **I. INTRODUCTION**

Petitioners argue that the Commonwealth of Pennsylvania's statutory deadline for return of absentee and mail-in ballots is going to cause electoral calamity. The deadline, they say, combined with the effects of the ongoing COVID-19 crisis, is putting "tens or even hundreds of thousands" of Pennsylvania voters at risk of having their ballots go uncounted in the June 2, 2020, primary election. Memorandum in Support of Petitioners' Application ("Br.") at 35. Petitioners contend that the pandemic will cause a surge in applications that will cause county boards of elections to fall hopelessly behind in issuing mail-in and absentee ballots, that the U.S. Postal Service ("USPS") will experience pandemic-related slowdowns in its deliveries of ballots and ballot applications, and that these delays will combine to cause unconstitutional impediments to voters' ability to return their ballots on time.

Petitioners cannot, however, back up their claims with evidence. Their Application contains no declaration from a county election official (or anyone else

involved in election management) to show that the insurmountable backlogs Petitioners allege exist in reality. It presents no basis, other than speculation, to believe that a surge in applications is coming that is large enough to overwhelm counties' processing abilities. And the Application gives no evidence that the USPS is experiencing, or expects to experience, unusual delays in its delivery of first class mail. Petitioners present no evidence because, at present, none of the developments Petitioners claim to fear have happened. Large number of voters are not, it appears, delaying their applications for absentee and mail-in ballots; counties are managing their application flows; and the USPS appears to be keeping up with first class mail. Because Petitioners have not presented enough evidence to make out a *prima facie* showing of a right to relief (and, as of this moment, such evidence does not exist), this Court should deny their Application on the papers, without proceeding to a preliminary injunction hearing.

Respondents do not claim that running a primary election in the midst of a pandemic is going to be easy. They are taking the situation very seriously, are deeply aware of the high stakes involved, and are focused on anticipating and mitigating risks. Indeed, election management officials in the Department of State (the "Department") and across the Commonwealth have worked day and night for months to ensure that the election runs as smoothly and as safely as possible, and will continue to do so. But challenging circumstances, without proof of an actual

or likely Constitutional violation, do not provide a basis for a court to override election rules that the General Assembly has put in place. Unless and until the factual circumstances support a conclusion that the ballot receipt deadline is likely to violate anyone’s rights, the Court must let the deadline stand.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Background of the Statutory Deadline at Issue**

#### **1. Act 77 of 2019 Provides for Mail-In Balloting and an Extended Return Deadline**

Until late 2019, the Pennsylvania Election Code provided for two methods of voting: in-person voting on election day, or, for electors who were unable to vote in person for various reasons, voting by absentee ballot. The deadline for applying for absentee ballots was 5:00 p.m. on the Tuesday before an election, and the deadline for returning completed absentee ballots was 72 hours later, 5:00 p.m. on the Friday before the election. On October 31, 2019, Governor Thomas Wolf signed into law Act 77 of 2019, which made significant changes to many aspects of the Election Code. *See* Declaration of Jonathan Marks ¶ 1 (May 11, 2020) (“Marks Decl.”). Among other changes, Act 77 provided for mail-in ballots, available to any voter who did not meet the criteria for an absentee ballot. *Id.* ¶ 2. The deadline for applying for absentee ballots remained at 5:00 p.m. on the Tuesday before the election, with mail-in ballot applications due at the same time. *Id.* ¶ 3. Act 77 extended the deadline for receipt of voted ballots, however, by

more than four days, from 5:00 p.m. on the Friday before the election to 8:00 p.m. on the day of the election. *Id.* ¶ 4.

After Act 77 took effect, the Department and Pennsylvania’s county boards of elections (the “counties”) expected that many voters would take advantage of the new mail-in ballot option. Throughout the winter of 2019-20, they accordingly prepared for a large increase in the number of ballots that voters would mail or deliver to the counties. *Id.* ¶ 6. The mail-in and absentee ballot options, however, took on a new importance when the COVID-19 crisis reached Pennsylvania.

## **2. The General Assembly Amends the Election Code a Second Time to Respond to the COVID-19 Crisis**

In March 2020, as Pennsylvania suffered its first COVID-19 deaths and emergency measures took hold, Pennsylvania’s executive and legislative branches considered steps to protect voters in the primary election, then scheduled for April 28, 2020. On March 27, 2020, the Governor signed into law Act 12 of 2020, which amended the Election Code to, among other things, postpone the primary election for five weeks to June 2, 2020. *Id.* ¶¶ 7-9; Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 16, § 1804-B(a), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West). Act 12 also provided that in the 2020 primary election, counties would have greater flexibility than usual in relocating and consolidating polling places and recruiting poll workers. Marks Decl. ¶ 10. The new statute also included permanent provisions designed to ease the processing of absentee and mail-in

ballots; for example, counties are now permitted to begin pre-canvassing those ballots at 7 a.m. on election day, rather than after the polls close. *Id.* Act 12 did not, however, make any changes to the deadline for returning absentee and mail-in ballots.

**B. The Department and the Counties' Efforts to Protect Voters and the Voting Process in the Face of the Crisis**

**1. The Statewide Efforts to Ease In-Person Voting and Encourage Voting by Mail**

The Department, the counties, and many others have worked nonstop to ensure that voting in the primary election will be as safe and as convenient as possible, despite the challenges posed by the health risks involved. The intensity of these efforts varies by region, because in recent weeks, COVID-19 has taken hold at different levels in different areas of the Commonwealth. On May 8, 2020, as part of a phased reopening plan, Governor Wolf lifted portions of the COVID-19 restrictions that had been imposed on 24 of the Commonwealth's 67 counties, and announced that restrictions would be lifted in 13 additional counties on May 15, 2020. See Decl. of M. Hangle, Exs. 1 and 2.<sup>1</sup> Assuming that infection patterns do not take a turn for the worse, by primary election day, portions of the

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<sup>1</sup> <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Coronavirus.aspx>; <https://www.governor.pa.gov/newsroom/gov-wolf-announces-13-counties-will-move-to-yellow-phase-of-reopening-on-may-15/>.

Commonwealth will have relaxed their stay-at-home rules, while full stay-at-home restrictions will be in effect in other regions.

Counties have for some time been planning ways to adapt in-person election day voting to the constraints caused by the pandemic. They are consolidating polling places to allow for reductions in the numbers of available poll workers and are facilitating social distancing and personal protection for poll workers and voters. The Department is assisting with these measures, and has provided counties with \$13 million in sub-grants of federal funds for necessary staff and equipment. Marks Decl. ¶¶ 11-15.

The Department, the counties, and third parties are also attempting to ease crowding at polling places by encouraging voters to vote by mail-in or absentee ballot. *Id.* ¶ 16. The Commonwealth has made a range of options available for voters to request these ballots. Voters with drivers' licenses or other state-issued identification can apply for these ballots electronically on the Department's website. Other voters can download and print their own applications or request them by mail, email, or telephone from their county election office or from the Department. *Id.* ¶ 17. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and submit them in one visit. *Id.* Some counties, such as Allegheny and Luzerne Counties, are mailing applications to every registered voter. *Id.* ¶ 22. Third parties, such as

nonprofits, public officials, and political campaigns, are also making applications available. *Id.* ¶¶ 18-19.

The Commonwealth is not simply making mail-in and absentee ballots available; it is engaging in an unprecedented campaign to encourage voters to take advantage of these procedures by applying for and returning their ballots promptly. The Commonwealth is educating citizens about the availability of and deadlines for mail-in and absentee ballots with, for example, Governor Wolf's COVID-19 updates; postcards mailed to all registered primary voters (voters registered as Democrats or Republicans); email notifications to voters; bilingual statewide television, radio, and streaming online broadcasts; communications from various Pennsylvania agencies; and Commonwealth websites. *Id.* ¶¶ 19-22. Individual counties have also bombarded their registered voters with information by mail and/or social media. *Id.* ¶ 22. Elected officials, political campaigns, parties, and public interest groups are also participating in these efforts, educating voters and making applications available to them. *Id.* ¶ 23. The Department has assisted with these third party efforts with a Vote Toolkit, which provides a library of templates for materials that third parties can use to educate the public about the upcoming election and the availability of mail-in voting. *Id.* ¶ 19.

## **2. Voters Have Responded to These Efforts to Solicit Ballot Applications**

This push to encourage mail-in and absentee voting has, so far, been highly successful. As of Sunday, May 10 – more than three weeks before election day – *more than 1.2 million people* had applied for a mail-in or absentee ballot. *Id.* ¶ 29. Petitioners interpret the high number of applications as a sign that the election is under threat, Br. at 10; in fact, the opposite is true. Only so many voters can be expected to turn out in a primary election, and the election is still more than three weeks away; if more voters request ballots now, fewer voters will request them toward the end of the application period. Total turnout in the last few federal primary elections has ranged from approximately 1.3 million, in elections with no presidential races, to 1.6 million, in the 2012 election with only one contested presidential race, to 3.4 million, in the 2016 election with two contested nominations. Marks Decl. ¶ 28. Because the June 2020 primary will have no contested races at the top of the ticket, it is fair to assume that the 1.2 million ballots requested already is a significant fraction – more, or perhaps even significantly more, than sixty percent – of what the total mail and in-person turnout for the race will be. *Id.* ¶ 34.

In another encouraging sign, the counties are, so far, keeping pace with ballot applications. They have approved more than 1 million, or approximately 86%, of the applications they have received so far, and have mailed nearly 900,000

ballots to voters. As of May 10, 2020, many counties have mailed ballots in response to more than 99% of the applications they have approved.

Moreover, counties are speeding up their efforts, not slowing down. Some counties are increasing their numbers of processing staff, and others just recently began mailing out ballots. *Id.* ¶¶ 32, 37. Philadelphia, for example, only recently finalized its ballots and began mailing them out, but has moved quickly since then, mailing almost 47,000 ballots so far. *Id.* ¶¶ 32, 39. While some counties will undoubtedly develop backlogs at certain times, the Department is paying close attention to each county’s efforts and will reach out to any county that appears to be falling behind. *Id.* ¶ 40.

**C. Petitioners’ Unsupported Allegations That the Mail-In and Absentee Balloting Process Is Breaking Down**

**1. Petitioners Present No Admissible Evidence to Back Up Their Dire Predictions of a Balloting Catastrophe**

Petitioners state with great certainty that the COVID-19 crisis is overwhelming the counties’ ability to keep up with mail-in and absentee ballot applications. They paint a picture of an “exponential explosion” in applications in the coming weeks, Br. at 10, with counties “falling behind daily” and developing backlogs, *id.* at 12, and the United States Post Office (“USPS”) “invariably” facing delays, *id.* at 12. But these allegations are purely theoretical. Petitioners have failed to present *any* testimony or other evidence that would allow the Court to

conclude that these delays are likely to occur in any part of the Commonwealth – let alone everywhere in the Commonwealth. Instead, they cast about for something to back up their predictions, but provide only anecdotes, out-of-context hearsay, and misapplied data.

First, Petitioners point to the fact that, more than a month before the primary election, “applications to vote by mail for the June 2 primary ha[d] skyrocketed.” Br. at 10. This is true, but it is a sign that things are going according to plan, not that they are out of control. The high numbers, at this stage, mean that the Commonwealth’s efforts to encourage voters to apply early for mail-in and absentee ballots are working. If applications have skyrocketed now, in early May, they are less likely to skyrocket later. Petitioners toss about the term “exponential,” Br. at 10, but do not explain, mathematically, how an “exponential” increase between now and May 26 could happen, when more than half of expected voters have already submitted ballot applications, and at least some of those voters will choose to vote in person.<sup>2</sup>

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<sup>2</sup> For example, Petitioners quote an election official’s testimony that “Wisconsin’s [ballot application] numbers multiplied 10 times during the three weeks prior to their primary.” Br. at 10-11. As discussed *infra* Section III.A.1.b, however, Wisconsin’s primary occurred under very different circumstances, just after COVID-19 lockdowns went into place. If Pennsylvania’s application numbers multiplied 10 times during the next three weeks, they would exceed 11 million – which would exceed Pennsylvania’s *total primary voter registration* by nearly 3.5 million and would be nearly four times the turnout of any recent primary election. Marks Decl. ¶¶ 25, 28.

Second, Petitioners assert that Pennsylvania’s county boards of elections are losing control of the application process and have developed backlogs that “will only grow as the primary draws nearer.” Br. at 12. Curiously, however, Petitioners are unable to produce any witnesses to testify about these allegedly growing backlogs. Petitioners have not submitted a single declaration from a single official or employee of any of the 67 counties’ boards of elections, or anyone else with knowledge of those counties’ progress. Instead, they provide out-of-context quotes from out-of-date public statements that, if anything, indicate that counties are rising to the challenges before them. For example:

- Exhibit A to Petitioners’ Memorandum is state Senate testimony from April 30, 2020 – more than a week ago, and more than a month before the primary election – by election officials from Mercer, Lehigh, and Lawrence Counties. The officials comment on the challenges that increased ballot applications pose to counties in general – not necessarily to the officials’ own counties<sup>3</sup> – and, say, vaguely, that “if we triple or quadruple [the 800,000 applications received statewide at that point], many counties will be in trouble.” Br. Ex. A at 2. The officials do not mention absentee or mail-in ballot deadlines and do not suggest that the ballot receipt deadline should be extended.
- Testimony from the same hearing by a representative of the County Commissioners’ Association of Pennsylvania – a group that might be

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<sup>3</sup> At present, there is no evidence that ballot processing in Mercer, Lehigh, or Lawrence Counties is delayed. According to the Commonwealth’s statistics, as of May 10, Lawrence County had received 6,740 applications, approved 6,252 of them, and mailed out 6,243 ballots; Lehigh County had received 33,534 applications, approved 25,191 of them, and mailed out 23,082 ballots; and Mercer County had received 8,033 applications, approved 5,892 of them, and mailed out 5,194 ballots. Marks Decl. ¶ 39.

presumed to be aware of impending backlogs – does not mention the ballot receipt deadline at all. Br. Ex. S.

- In another statement from the April 30 hearing, Philadelphia Board of Elections Chair Lisa Deeley describes the “huge effort” that Philadelphia has taken to encourage voters to apply for mail-in ballots, Br. Ex. L at 1, the “large number” of applications it has received, *id.*, and its steps to speed processing by reassigning and increasing staff, *id.* In this statement, Commissioner Deeley requests various steps from the legislature, including increased funding and an extension in the ballot receipt deadline. *Id.* at 2. She does not predict an applications backlog in Philadelphia, however, and points out that Philadelphia prefers a legislative solution rather than a “confusing” court order.<sup>4</sup>
- Finally, Petitioners attach a newspaper article from more than two weeks ago about Allegheny County’s efforts to encourage mail-in and absentee voting. According to the article, more than five weeks before the primary election, Allegheny County had received nearly 90,000 applications – “about half of the number of voters who typically turnout in [a] presidential election year with a noncompetitive primary,” had approved 30,000 of them, and would be able to process 10,000 applications a day.<sup>5</sup> Br. Ex. W.

The third prong of Petitioners’ argument that voters will be disenfranchised is that anticipated delays in USPS service will unduly delay application and ballot mailings. *See* Br. at 12-13, 21-22. But Petitioners present no evidence from which a Court could conclude that the delivery times for first class mail are likely to be any slower than usual between now and June 2. The president of the Pennsylvania

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<sup>4</sup> According to the Commonwealth’s statistics, as of May 10, Philadelphia had received 109,602 applications, approved 99,662 of them, and mailed out 46,902 ballots. Marks Decl. ¶ 39.

<sup>5</sup> According to the Commonwealth’s statistics, Allegheny County has continued to keep pace with its applications. As of May 10, it had received 168,983 applications, approved 151,981 of them, and mailed out 132,602 ballots.

State Association of Letter Carriers, who has provided Petitioners with a declaration on other subjects, says nothing about service delays. *See* Decl. of Paul Rozzi. Petitioners point to a USPS announcement from more than three weeks ago that states that due to the pandemic, certain mail products – Priority Mail two and three day service and First-Class Package Service – might require more time to be delivered. *See* Br. Ex. R. Ballots travel by a different service, however – First Class mail – and Petitioners do not disclose that on the same day that the USPS issued the announcement they highlight, it also announced that “There is no impact to First-Class letters and flats.” *See* Decl. of M. Hangley, Ex. 3.<sup>6</sup> Nothing in the USPS’s published service alerts indicates a delay in domestic First Class mail, *see* Decl. of M. Hangley, Ex. 4<sup>7</sup>, and the Department, which works closely with USPS, has not received information indicating that such a delay is possible.<sup>8</sup>

Finally, Petitioners point to the disastrous Wisconsin primary election that took place on April 7, 2020, and try to persuade the Court that because Wisconsin could not keep up with a last-minute crush of absentee ballot applications,

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<sup>6</sup> <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes?r=8&ui-force-components-controllers-recordGlobalValueProvider.RecordGvp.getRecord=1>.

<sup>7</sup> <https://about.usps.com/newsroom/service-alerts/residential/welcome.htm>

<sup>8</sup> In their Response to Respondents’ Preliminary Objections, Petitioners argue that the fact that a certified mail envelope was made “available for pickup” at a Harrisburg post office is somehow relevant to ballot delivery times. But the fact that USPS held a certified mail envelope – presumably because no one was available to sign for it – has no relevance to ballots, which should not be delivered by certified mail.

Pennsylvania is bound to the same fate. Br. at 10-11, 14, 20, 23, 37. But, as discussed below, *see infra* § III.A.1.b, the situations are completely different. Wisconsin’s primary election took place as infection rates were sharply increasing, only two weeks after the governor had “issued a ‘Safer-at-Home Order.’” *Democratic Nat’l Comm. v. Bostelmann*, --- F. Supp. 3d ----, 2020 WL 1638374, at \*3 (W.D. Wisc. Apr. 2, 2020). Wisconsin’s leaders and voters thus had no time to prepare for the crisis, and its governor was unable to postpone the primary election. Pennsylvania’s primary election, on the other hand, will take place after infection rates have begun to decline, more than two months after stay-at-home orders went into effect. Pennsylvania’s primary election was to take place three weeks after Wisconsin’s, and has now been postponed for an additional five weeks; as discussed above, Pennsylvania has used the time to put measures in place to avoid a last-minute rush for ballots. In Wisconsin, election officials acknowledged, the day before the ballot return deadline, that they were experiencing significant backlogs and that the deadline was unworkable. In this case, there is no such testimony and, as discussed above, no evidence of such backlogs.

**2. If Problems Do Occur, They Can Likely Be Addressed With More Limited Relief Than That Sought Here**

Petitioners assume not only that the absentee and mail-in ballot system will break down, but that it will break down across the Commonwealth to an extent that will require a seven-day extension everywhere to remedy. Even if circumstances

were to change so sharply that the ballot return deadline would disenfranchise voters in one county, however, there is no reason to conclude that this would also happen in other counties. Each county processes its own ballot applications, sends out its own ballots, runs its own polling places, and allocates its own resources. Social distancing rules have been lifted to a greater extent in some parts of the Commonwealth than in others. Some counties are farther ahead in their ballot processing than others. Marks Decl. ¶¶ 32, 37-40. If a problem develops, it would likely be possible to handle it on a countywide basis, as occurred in Montgomery County in 2016, and with a shorter extension than that proposed here. *See* Br. Ex. V (order of Montgomery County Court of Common Pleas extending ballot return deadline until 8:00 p.m. on election day).

**D. Potential Consequences of a Grant of the Relief Sought**

Petitioners contend that because some other states have ballot receipt requirements that depend on postmarks, rather than receipt dates, the relief they seek is “manageable and impose[s] no significant administrative burden.” Br. at 38. Under current circumstances, however, a statewide, seven-day extension of the ballot receipt deadline could have negative consequences, even beyond the separation of powers concerns that are always implicated when a court sets aside a piece of legislation. First, to grant such an extension now, weeks in advance of the election, could have unintended counterproductive effects. Counties, which have

many pressing responsibilities, might let up on their intense efforts to process applications quickly by reversing staff increases or focusing their efforts on other tasks. Voters might decide to delay requesting or returning their ballots. Marks Decl. ¶ 51.

Second, an extension of the ballot receipt deadline will cause cascading complications and delays in the entire election management process. Counties will have to put in place an entirely new set of processes for making determinations about what postmarks mean and, potentially, allowing for challenges regarding envelopes with illegible or absent postmarks. Marks Decl. ¶¶ 54-55. They will also have to hold off on adjudicating provisional ballots until the seventh day after the election, because they cannot count a provisional ballot until they have determined whether the voter also returned an absentee or mail-in ballot. Accordingly, the seven-day extension requested could turn into a delay of results until more than a week after the primary election. Marks Decl. ¶¶ 58. This delay, in turn, will threaten the following statutory deadlines: The deadline by which proof of identification for absentee and mail-in ballots must be received and verified under 25 P.S. § 3146.8(h); the deadline for counties to submit unofficial election returns to the Secretary of the Commonwealth under 25 P.S. § 3154(f); the deadline for a defeated candidate to request that a recount and recanvass not be made under 25

P.S. § 3154(h); and the deadline for the Secretary of the Commonwealth to order a recount or recanvass under 25 P.S. § 3154(g)(2).

### **III. ARGUMENT**

To obtain a preliminary injunction, a party must satisfy every one of several “essential prerequisites”: (1) “that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest” – that is, “that it is likely to prevail on the merits”; (2) “that an injunction is necessary to prevent immediate and irreparable harm”; (3) that “greater injury would result from refusing an injunction than from granting it”; (4) that “a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct”; (5) that “the injunction ... is reasonably suited to abate the offending activity”; and (6) that “a preliminary injunction will not adversely affect the public interest.” *Summit Towne Centre, Inc. v. Shoe Show of Rock Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). Petitioners here cannot, at this juncture, establish either of the first two (at a minimum) of these necessary elements: There is currently no basis to conclude that enforcement of the received-by deadline will result in an unconstitutional deprivation of the right to vote, and the injury Petitioners allege is not immediate but rather, at most, speculative and hypothetical.

**A. Petitioners Cannot, at this Juncture, Establish the Requisite Likelihood of Success**

**1. As a General Matter, Petitioners Fail to Make Out a Claim of Unconstitutional Deprivation**

**(a) The Principles Governing Petitioners' Constitutional Challenge to the Received-by Deadline**

The standard governing constitutional challenges to a duly enacted statute is well settled.

It is axiomatic that: “[A]ny party challenging the constitutionality of a statute must meet a heavy burden, for [courts] presume legislation to be constitutional absent a demonstration that the statute ‘clearly, palpably, and plainly’ violates the Constitution.” The presumption that legislative enactments are constitutional is strong. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.

*Working Families Party v. Commonwealth*, 209 A.3d 270, 278-79 (Pa. 2019)

(internal citations omitted) (rejecting challenge to statute which prohibited nomination of single candidate by two or more political parties).

There is also a well-developed jurisprudence specifically addressing challenges to statutory election regulations. There is no question “that the right to vote is fundamental and ‘pervasive of other basic civil and political rights.’”

*Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015) (quoting *Bergdoll v. Kane*, 731

A.2d 1261, 1269 (Pa. 1999)). Nonetheless, as explained by the United States

Supreme Court in an opinion often cited by Pennsylvania courts, “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an

active role in structuring elections; ‘as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.’” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); accord *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

These regulations “will invariably impose some burden upon individual voters. Each provision of a code, ‘whether it governs the registration and qualification of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Burdick*, 504 U.S. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Recognizing that these incidental burdens are not typically matters of constitutional dimension, this Court has held that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 177 (citing *In re Nader*, 905 A.2d 450, 459 (Pa. 2006)); accord *Burdick*, 504 U.S. at 434 (“[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify

the restrictions.” (internal quotation marks omitted)), *cited by Banfield*, 110 A.3d at 177.

Petitioners have not shown the statutory provision challenged here – namely, the requirement that mail-in and absentee ballots be received by county election boards by 8:00 p.m. on election day – to be anything other than such a “reasonable, non-discriminatory” regulation. As courts have repeatedly recognized, electoral deadlines directly promote “the public interest in the maintenance of order in the election process.” *Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1335 (S.D. Fla. 2008) (rejecting challenge to registration deadline); *accord, e.g., Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1373-78 (S.D. Fla. 2004) (rejecting challenge to deadline for receipt of absentee ballots by Supervisors of Election); *Mays v. LaRose*, 951 F.3d 775, 791-93 (6th Cir. 2020) (rejecting challenge to deadline for requesting absentee ballot); *Tex. Indep. Party v. Kirk*, 84 F.3d 178, 184-87 (5th Cir. 1996) (rejecting challenges to deadlines for a candidate to declare intent to run for office, for holding nominating conventions, and for filing petitions by minor-party and independent candidates); *see also Burdick*, 504 U.S. at 437 (rejecting challenge to Hawaii’s prohibition on write-in candidates, given that state provided easy access to ballot until two months before the primary, so that any burden from the write-in prohibition “is borne only by those who fail to identify their candidate of choice until days before the primary”). The received-by deadline here promotes the

recognized, important interest in the “‘orderly administration’ of elections,” *see Mays*, 951 F.3d at 787 (quoting *Crawford*, 553 U.S. at 196 (Stevens, J., announcing the judgment of the Court)), and, in particular, ensures that the tabulation of votes and determination of electoral outcomes can proceed immediately upon the conclusion of election day, and will not be delayed by the need to await the arrival of outstanding mail-in and absentee ballots.

Of course, every deadline, by its very nature, operates to deny the ability to vote to those who are unable or unwilling to comply with the timing requirement. But elections must take place at some definite time, and election-administration deadlines are needed to ensure the elections are orderly. Consistent with the principles discussed above, non-discriminatory, generally applicable deadlines with which most voters can easily comply are typically not deemed to impose a significant burden on the right to vote, notwithstanding that they may require some voters to make decisions or take action earlier than they would otherwise be inclined to do. *See id.* at 792 (“Even though this law may eliminate opportunities to vote for electors who fail to register before the deadline, a state’s generally applicable registration cutoff imposes only a minimal burden on the right to vote.” (citing *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973))); *see also Burdick*, 504 U.S. at 437 (noting that the Court’s precedent “gave little weight to the interest ...

in making a late rather than an early decision”);<sup>9</sup> *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (rejecting challenge to statute imposing 11-month restriction on voters who wish to switch parties).

Petitioners here do not dispute that the received-by deadline serves important and legitimate regulatory interests. Indeed, they effectively concede that it is facially valid, asserting only an as-applied challenge based on COVID-19.

Respondents do not dispute that extraordinary events occurring close in time to an election may render a facially valid election deadline unconstitutional as applied, thus warranting judicial intervention. *See, e.g., Bostelmann*, 2020 WL 1638374 (extending deadline for receipt of absentee ballots), *stay granted in part, Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (leaving in place injunction that required election officials to count absentee ballots that were postmarked by statutory deadline, even if they were not received until later); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250 (N.D. Fla. 2016) (extending voter registration deadline based on hurricane that hit Florida five days

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<sup>9</sup> The restriction at issue in *Burdick* was Hawaii’s prohibition of write-in voting in its primary or general elections. The Supreme Court observed that, notwithstanding this prohibition, Hawaii’s electoral system “provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary,” so that, as a practical matter, “any burden on voters’ freedom of choice and association” imposed by the write-in prohibition “is borne only by those who fail to identify their candidate of choice until days before the primary.” *Id.* at 436-37. Citing its statement in *Storer v. Brown*, 415 U.S. 724, 736 (1974), that “the interest [a] candidate and his supporters may have in making a later rather than an early decision to seek independent ballot status” is entitled to “little weight,” the Court concluded that “the same reasoning applies” to the write-in prohibition in *Burdick*. 504 U.S. at 437.

before deadline). Such circumstances may impose severe burdens on voters' ability to comply with the deadline at issue, if not effectively preclude them from doing so.<sup>10</sup> At the same time, the last-minute nature of the crisis may effectively preclude any legislative response, leaving courts as the only institution realistically able to assess the situation and fashion any appropriate relief.

But in evaluating an as-applied constitutional challenge to an election regulation that, like the one at issue here, is plainly valid on its face, courts must scrupulously observe the distinction between a revision of the regulation that might be desirable as a policy matter and one *required as a matter of constitutional law*.

*See Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 798 A.2d 1277, 1283 (Pa.

2002) (“Manifestly, absent constitutional infirmity the courts of this

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<sup>10</sup> In their Memorandum of Law in support of their Motion to Intervene, Joseph B. Scarnati III, President Pro Tempore of the Pennsylvania Senate, and Jake Corman, Majority Leader of the Pennsylvania Senate, appear to argue that statutory restrictions cannot be deemed unconstitutional where the burdens they impose are the result of “unforeseen contingencies connected with the pandemic” – such as health risks potentially associated with in-person voting or potential inordinate delays in processing or delivering mail-in ballot applications or ballots – rather than “legislative action in response to the pandemic.” Memorandum of Law in Support of Motion to Intervene by Joseph B. Scarnati III, President Pro Tempore of the Pennsylvania Senate, and Jake Corman, Majority Leader of the Pennsylvania Senate ¶¶ 9-11 (May 6, 2020). The Memorandum cites no authority in support of this proposition, which is plainly incorrect. As illustrated by the cases cited above (and many others), a law that is constitutional on its face may impose an impermissible burden on constitutional rights when applied to a particular set of factual circumstances, whether or not those circumstances were contemplated by the legislature – indeed, that is the very premise of an “as applied” challenge. *See Watt v. W.C.A.B.*, 123 A.3d 1155, 1164-65 (Pa. Commw. Ct. 2015) (“a facial challenge seeks to invalidate [a statutory] section entirely, whereas an as-applied challenge seeks to prevent application of the section under the factual circumstances before the Court”) (citing *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298 (Pa. 1992)). If the law were otherwise, individuals would be deprived of protection against unconstitutional burdens on their rights in any set of circumstances unforeseen by the legislature.

Commonwealth may not refuse to enforce on grounds of public policy that which the Legislature has prescribed.”); *Finucane v. Pa. Milk Mktg. Bd.*, 582 A.2d 1152, 1154 (Pa. Commw. Ct. 1990) (“[T]he power of judicial review must not be used as a means by which the court might substitute its judgment as to public policy for that of the legislature.’ The role of the judiciary is not to question the wisdom of the action of a legislative body, but only to see that it passes constitutional muster.” (quoting and citing *Parker v. Children’s Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978))). As applied here, this fundamental principle requires Petitioners to do much more than show that an extended received-by deadline might, on balance, be preferable for the June primary election. To obtain injunctive relief, Petitioners must establish a likelihood that, in the absence of such an extension, the deadline will result in a burden on the right to vote that “clearly, palpably, and plainly” violates the Constitution. As shown below, at the present moment in time, Petitioners cannot make this showing.

**(b) Petitioners Cannot, at Present, Show a Likelihood That Applying the Facially Valid Received-by Deadline Will Effect a Constitutional Deprivation**

Unsurprisingly, Petitioners lean heavily on the Wisconsin primary election that took place on April 7, 2020, suggesting that it is a harbinger of what will occur in connection with Pennsylvania’s forthcoming election scheduled for June 2, 2020 – and that Petitioners are thus entitled to relief that they characterize as “similar” to

that “approved” by the U.S. Supreme Court in the Wisconsin litigation. Br. at 37; *see id.* at 10-11 (discussing “explosion[]” of applications for absentee ballots in the period immediately before Wisconsin’s primary); *id.* at 14 (relying on “[r]ecent experience in Wisconsin”); *id.* at 20, 23, 37. But this case is emphatically *not* the Wisconsin case. In fact, the two scenarios are starkly different, and the differences make clear that, at this juncture, there is no basis for granting the relief Petitioners seek.

The first crucial difference concerns the timing of the respective elections relative to the onset of the COVID-19 pandemic. The April 7 Wisconsin election was scheduled to occur just after the pandemic began to take hold in mid-March. Only two weeks before the election, Wisconsin’s governor had “issued a ‘Safer-at-Home Order,’ requiring all Wisconsinites to shelter in place to slow the spread of COVID-19.” *Bostelmann*, 2020 WL 1638374, at \*3. Not only had voters and election officials had little time to come to grips with “the emerging ... health crisis,” *id.* at 1, but the infection rate was, at that point, still sharply increasing. *See id.* at \*3 (“While Wisconsin and other parts of the country are taking steps to ‘flatten the curve,’ it is clear that the outbreak in Wisconsin is still somewhat near the beginning of that curve, with evidence of increasing community spread.”). As the severity of the crisis came into focus, Governor Evers and the Wisconsin legislature could not agree to postpone the election date. *See* Exec. Order No. 74,

at 3, [https://evers.wi.gov/Documents/COVID19/EO074-](https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf)

[SuspendingInPersonVotingAndSpecialSession2.pdf](https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession2.pdf). On the very eve of the election, Governor Evers issued an executive order purporting to postpone the election unilaterally, *see id.*, but the Wisconsin Supreme Court invalidated that order later the same day, *Wisc. Legislature v. Evers*, No. 2020AP608-OA (Wisc. Apr. 6, 2020) (amended order enjoining executive order in its entirety), [https://www.wicourts.gov/news/docs/2020AP608\\_2.pdf](https://www.wicourts.gov/news/docs/2020AP608_2.pdf).

The response of Pennsylvania’s political branches could not have been more different. On March 27, 2020 – six days *before* the federal district court’s order granting injunctive relief in Wisconsin – Pennsylvania enacted Act 12, which, in direct response to the COVID-19 crisis, moved the Commonwealth’s primary election from April 28, 2020 to June 2, 2020. Act of Mar. 27, 2020 (P.L. 41, No. 12), sec. 16, § 1804-B(a), 2020 Pa. Legis. Serv. Act 2020-12 (S.B. 422) (West); *see Marks Decl.* ¶ 9. Put differently, in Pennsylvania, the Legislature and Governor deliberated and responded to the challenges posed by the pandemic by giving voters and the election apparatus time to plan for and address these challenges and giving public health officials and the citizenry time to “flatten the curve.”

Notably, the same section of the statute that moved the election date specifies that the deadline for receipt of absentee ballots is 8:00 p.m. on election

day. Act of Mar. 27, 2020, sec. 16, § 1804-B(b)(1); *see* 25 P.S. § 3150.16(c). In other words, unlike in Wisconsin, Petitioners are asking this Court to overrule a regulatory scheme agreed upon by the political branches in their specific statutory response to the pandemic.

Second, there is, at present, good reason to believe that, in contrast to what happened in Wisconsin, Pennsylvania counties will be able to process ballot applications and deliver mail-in and absentee ballots to voters in a timely manner. In Wisconsin, the fact that the public began to appreciate the gravity of the emerging pandemic only in the two or three weeks immediately preceding the election date (indeed, as noted above, it was only on March 24 that Governor Evers issued a stay-at-home directive) led to a last-minute explosion of absentee ballot applications. *See Bostelmann*, 2020 WL 1638374, at \*1 (“In the weeks leading up to the election, the extent of the risk of holding that election has become increasingly clear, and Wisconsin voters have begun to flock to the absentee ballot option in record numbers.”). As a result of both the unanticipated volume and timing of absentee ballot applications, certain Wisconsin jurisdictions were, on the eve of the election, experiencing significant delays in processing applications. *See, e.g., id.* at \*5 (“As of March 27, Madison ... was experiencing at least a week-long delay in sending out absentee ballots.”). Furthermore, the Wisconsin court had testimony from “the Madison City Clerk ... that ‘the 8:00 p.m. election day

deadline for receipt of absentee ballots is completely unworkable.’” *Id.* Indeed, at the preliminary injunction hearing on April 1 – the day before Wisconsin’s deadline for receipt of absentee ballot applications, and only six days before its election – the Administrator of the Wisconsin Election Commission (“WEC”) “acknowledged that approximately 27,500 voters[’] absentee ballots will be received *after* the receipt deadline of 8:00 p.m. on the day of the election, April 7, 2020, and, therefore, will not be counted.” *Id.* Notably, “[n]o doubt at least in part for this reason, the WEC informed the court on March 31, 2020, that it no longer objects to any absentee ballot postmarked by April 7, 2020, and received by 4:00 p.m. on April 13, 2020, being counted in the election.” *Id.*

In Pennsylvania, by contrast, Act 12 has, in response to the pandemic, given Pennsylvania citizens more than two additional months (relative to their Wisconsin counterparts) to submit absentee and mail-in ballot applications. Moreover, Pennsylvania officials have made a concerted effort not only to make it as easy as possible for Pennsylvania voters to submit an application (allowing them to do so electronically through the Department of State’s website, by downloading and printing a paper application, or by requesting one in person or by phone, email, or letter), but also actively to inform voters about the availability of absentee and mail-in voting options and to encourage voters to promptly apply for and return absentee or mail-in ballots. Marks Decl. ¶¶ 17, 20-21. The educational efforts of

state officials have been joined by county boards of elections, candidates, and public interest groups. *Id.* ¶¶ 22, 23. As a result, there is good reason to believe that Pennsylvania will *not* see a last-minute explosion of ballot applications on the scale of what happened in Wisconsin. Oddly, Petitioners point to the number of applications that Pennsylvania has *already* received as an indication of a future problem. To the contrary, the fact that Pennsylvania counties have already received more than 1.2 million applications is powerful evidence that these concerted efforts have been successful and that there will be no crushing last-minute explosion of applications. *See id.* ¶ 29.

The significant notice and education provided to Pennsylvania voters is relevant in another way. Not only does it diminish the probability of a last-minute explosion of applications that might overwhelm the counties' processing capacity, but it also empowers voters to avoid any risk of missing the received-by deadline by submitting their ballot application before the last possible date. In this regard, it is important to note that Petitioners' claims arise from the fact that the deadline for applying for an absentee or mail-in ballot is only a week before the deadline for receipt of the completed ballot by the county board of elections. Moving the application deadline closer to the received-by deadline allows voters who would otherwise have missed the opportunity to vote by mail (because they would have failed to meet an earlier application deadline) to do so. But this benefit involves a

tradeoff: a voter who applies at the last minute will have little time to complete and return her ballot – if she does not complete her ballot quickly, she will have to deliver it in person rather than by mail, and if she does not return her ballot by election day, it will not count at all.

The point is that all deadlines involve a balancing between certain tradeoffs, and the particular balance struck by the legislature in setting a non-discriminatory, generally applicable deadline is not typically a matter of constitutional moment. Again, Respondents acknowledge that it is not impossible that events between now and election day could result in ballot-processing or postal-service delays sufficient to warrant the relief Petitioners seek. But Petitioners' application provides no evidence that counties will be unable to process any current backlogs between now and the May 26 application deadline, and no evidence that counties' processing of any last-minute applications will be unduly delayed. Nor do Petitioners offer any evidence that there will be delays in the postal service's delivery of ballots. Much of Petitioners' evidence consists simply of information about the scope and gravity of the COVID-19 pandemic. *See, e.g.*, Glock Decl. Exs. B-K. But the Legislature and Governor were, of course, aware of the scope and gravity of the pandemic when they moved the election date, and Petitioners identify no material change in information or expectations occurring between then and now.

The discussion above underscores another noteworthy difference between the Wisconsin case and the present posture of this case: the judicial decisions in Wisconsin were issued on the very eve of the election, when it was clear and undisputed that there would be an inordinate delay, due to volume-induced backlogs, in the mailing out of absentee ballots to voters. Put differently, the timing of those decisions reduced the need for the courts to speculate about whether an injury of constitutional magnitude would occur in the absence of extending the deadline for receipt of ballots. As noted above, Respondents cannot rule out the possibility that, as election day approaches, some level of judicial relief may ultimately be warranted. What Respondents can say, however, is that there are good reasons, at present, to believe that Pennsylvania's circumstances will not resemble Wisconsin's; concomitantly, there is not currently any non-speculative basis for this Court to override the judgment of the political branches – which, again, was made in direct response to the public health crisis – regarding the appropriate deadline for receipt of absentee and mail-in ballots. Importantly, while this Court can forbear for the moment without foreclosing its ability to extend the deadline on the eve of the election (if circumstances at that time warrant such relief), it will not be able to roll back a premature extension in the event Petitioners' fears fail to materialize. That reality weighs further in favor of judicial restraint.

**(c) That Voters Who Elect to Vote in Person After Requesting a Mail-in Ballot Will Need to Complete a Provisional Ballot Is Irrelevant**

Throughout the Memorandum supporting their preliminary injunction application, Petitioners emphasize that voters who choose to vote at a polling place<sup>11</sup> after requesting an absentee or mail-in ballot will need to cast a provisional ballot rather than a regular ballot. *See* 25 P.S. § 3146.6(b)(2). This requirement serves the important purpose of ensuring that voters do not cast two ballots in the same election; the ballot cast in person is not counted until it is confirmed that the voter did not also submit an absentee or mail-in ballot. Petitioners, however, repeatedly suggest that the fact that “anyone who requests an absentee or mail-in ballot can vote in person only by provisional ballot,” somehow works a constitutionally cognizable injury because such voters supposedly “face uncertainty whether their vote will be counted.” *See* Br. at 23-24 (emphasis omitted). This argument is unfounded. As noted above, the provisional ballot rule protects against double-voting (whether intentional or otherwise). Once election officials have confirmed that a voter has not, in fact, submitted an absentee or

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<sup>11</sup> As Petitioners note, voters in the June primary election are not required to vote by absentee or mail-in ballot. They can also vote in person at polling places as they did before Act 77 and Act 12 took effect. Pennsylvania election officials have taken advantage of the additional time afforded by Act 12’s postponement of the primary to provide resources and information that will facilitate social distancing at polling places and otherwise protect the health and safety of in-person voters. Marks Decl. ¶¶ 13-15. These preparations represent another important distinction between Wisconsin’s April 7 election and the Pennsylvania election scheduled for June 2.

mail-in ballot, a properly completed provisional ballot will be counted (assuming the voter is otherwise qualified to vote). Petitioners provide no basis to conclude otherwise.<sup>12</sup>

## **2. Petitioners Are Unlikely to Succeed on Any of Their Specific Constitutional Theories**

For the reasons discussed above, Petitioners cannot, at present, establish a likelihood of success on any of their constitutional claims. There is currently no non-speculative basis for the Court to override the judgment of the political branches – embodied in Act 12 and made in direct response to the COVID-19 crisis – that a received-by deadline of 8:00 p.m. on June 2 is appropriate. For

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<sup>12</sup> Petitioners’ assertion that “only 69 percent of provisional ballots were counted nationwide in presidential election years” is irrelevant. *See* Br. at 22 n.11. Voters are given provisional ballots in a host of different circumstances, the specifics of which depend on the law of the jurisdiction at issue. Petitioners provide no reason to believe that a voter who would have been eligible to cast a regular ballot at her polling place, but for the fact that she requested an absentee or mail-in ballot, will not have her provisional ballot counted once it is determined that she did not, in fact, return an absentee or mail-in ballot.

*U.S. Student Ass’n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008), the only case Petitioners cite on this point, is inapposite. *Land* involved a request for a preliminary injunction preventing Michigan election officials from rejecting a voter’s registration when that voter’s identification card was returned to elections officials as undeliverable. A federal district court granted the injunction, and the Court of Appeals – in the decision cited by Petitioners – denied the state officials’ motion to stay the injunction. The Court of Appeals was unpersuaded by the officials’ argument that the challenged registration-rejection practice should remain in place on the grounds that, “even if an individual is wrongly purged from the poll books due to the undeliverable-voter-ID-card practice, he or she will still be able to cast a provisional ballot, and thus no disenfranchisement occurs.” *Id.* at 388. The Court noted that “Michigan law ... allows for some provisional ballots to go uncounted.” *Id.* As noted, Petitioners provide no basis to believe that the provisional ballots at issue here will go uncounted (assuming the voters were, in fact, eligible to vote in person at the polling place).

purposes of completeness, however, Respondents will address each of the specific constitutional provisions invoked by Petitioners.

**(a) Petitioners Are Not Likely to Succeed on the Merits of Their Claim Under the Free and Equal Elections Clause**

Article I, Section 5 of the Pennsylvania Constitution provides that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. Petitioners have not shown, at this juncture, that enforcement of Act 12’s deadline for the receipt of mail-in and absentee ballots will render the primary election either unfree or unequal within the meaning of this provision.

Statutes regulating elections will be invalidated under the Free and Equal Elections Clause only “in a case of plain, palpable and clear abuse of the [General Assembly’s] power [to promulgate laws governing elections] which actually infringes the rights of the electors.” *League of Women Voters v. Commonwealth*, 178 A.3d 737, 809 (Pa. 2018)). As this Court discussed in *League of Women Voters*, the history of the Clause shows it was concerned, at least primarily, with preventing exclusion of particular classes of people from the franchise and prohibiting regulations that diluted the political power of some voters based on their geographical location (for example, regulations that gave greater political power to counties and thus disenfranchised voters living in western,

unincorporated regions and underrepresented voters in the City of Philadelphia (historically) or regulations gerrymandering districts (more recently)). *See id.* at 804-09; *see also id.* at 808-09 (concluding that the Free and Equal Elections Clause “must be understood ... as a salutary effort ... to end ... 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, and the religious and political beliefs to which they adhered”). Those concerns are not implicated by the received-by deadline.

Petitioners cite no cases in which a court has invalidated a non-discriminatory, generally applicable regulation of a discrete aspect of election mechanics – like the received-by deadline here – under the Free and Equal Elections Clause. The case law indicates that the Clause does not prohibit such regulations, at least not unless they impose a substantial burden on the right to vote. As this Court explained in *Shankey v. Staisey*, 257 A.2d 897 (Pa. 1969):

In a general way it may be said 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 any 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, ... and when no constitutional right of the qualified elector is subverted or denied him.

*Id.* at 899. Under the present circumstances, enforcing the received-by deadline would not deny any of these protections. The deadline applies generally and to all.

Petitioners’ argument is that the deadline could leave voters who apply for mail-in or absentee ballots at the last minute, *i.e.*, just before the application deadline, with little time to complete and return their ballots. As discussed above, Petitioners provide no basis at present to conclude that it would be *impossible* for any such voter, let alone substantial numbers of such voters, to timely return their completed ballot. Moreover, and significantly, it is within the power of voters to address this concern – and they have been encouraged by election officials to do so (*see* Marks Decl. ¶¶ 21-22) – by requesting their ballots earlier than the last minute. *See Burdick*, 504 U.S. at 436-37 (upholding election regulation because “any burden on voters’ freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary,” and decisional authority gives “little weight to the interest the candidate and his supporters may have in making a late rather than an early decision”) (internal quotation marks omitted)).

In the words of this Court, “[i]t is not possible, nor does the Constitution require, that th[e] freedom and equality of election shall be a perfect one.... Individuals may experience difficulties, and some may even lose their suffrages by the imperfection of the system; but this is no ground to pronounce a law unconstitutional, unless it is a clear and palpable abuse of the power [to regulate elections] in its exercise.” *Patterson v. Barlow*, 60 Pa. 54, 76 (1869); *see also*

*League of Women Voters*, 178 A.3d at 809-10 (noting that this Court “has not retreated from [*Patterson*’s] interpretation of the Free and Equal Elections Clause”). Put simply, a non-discriminatory, generally applicable deadline for all voters to return their mail-in and absentee ballots is not an egregious partisan gerrymander designed to dilute the electoral power of voters who associate with particular parties. Petitioners have not shown that enforcing the received-by deadline in the June election would offend the Free and Equal Elections Clause.

**(b) Petitioners Are Not Likely to Succeed on the Merits of Their Claim Under the Free Expression and Association Clauses**

Nor have Petitioners shown that such enforcement would violate the Free Speech and Association Clauses. Like Appellants in *Working Families Party v. Commonwealth*, who asserted that Pennsylvania laws regulating ballot access infringed upon their free speech and association rights, Petitioners “cite to several cases in which Pennsylvania courts highlight the importance of protecting speech and association, [but] only one, *DePaul*, relates even tangentially to elections.” 209 A.3d at 285 (citing *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009)). And, as in *Working Families*, *DePaul* is inapposite. “In *DePaul*, this Court held that Section 1513 of the Race Horse Development and Gaming Act, 4 Pa.C.S. § 1513, which prohibited certain classes of persons associated with licensed gaming in Pennsylvania from making political contributions to candidates for

public office in Pennsylvania, to any political party committee in Pennsylvania or any group or association organized to support a candidate in Pennsylvania, violated Article I, Section 7 of [the Pennsylvania] Constitution.” *Working Families*, 209 A.3d at 285. Significantly, this Court held that “[f]or purposes of Article I, Section 7, ... political contributions are a form of non-verbal, protected expression.” *DePaul*, 969 A.2d at 548. Accordingly, the statute invalidated in *DePaul* was a direct ban on the ability of certain classes of persons to engage in political expression. *See id.* The received-by deadline here is, of course, of a fundamentally different nature. It is not a blanket ban on the political expression of anyone; it is simply a non-discriminatory, generally applicable regulation specifying the time by which absentee and mail-in ballots must be received.

To the extent the Free Speech and Association Clauses protect rights that are implicated by the Commonwealth’s enforcement of the received-by deadline during the June primary, Petitioners identify the wrong standard for evaluating whether enforcement of this regulation will violate those rights, and application of the correct standard makes clear that these claims are currently unfounded.

Petitioners rely on *DePaul* for the proposition that “[l]aws that burden protected political expression are subject to strict scrutiny under the Pennsylvania Constitution.” Br. at 28. But the application of strict scrutiny in *DePaul* derived from the fact that, as discussed above, the regulation in *DePaul* was a direct ban on

political contributions, a recognized form of protected political expression. In applying Sections 7 and 20 of the Pennsylvania Constitution to election regulations that do *not* constitute direct bans on protected expression, this Court, consistent with jurisprudence applying the First Amendment to the United States Constitution, has not applied strict scrutiny. *See Working Families Party*, 209 A.3d at 286 (rejecting challenge to anti-fusion laws, which prohibit two or more political organizations from placing the same candidate on the ballot in a general election for the same office, as violative of Article I, Sections 7 and 20 of the Pennsylvania Constitution, without applying strict scrutiny; reaffirming that “First Amendment authority remains instructive in construing Article I, Section 7” (citing *Timmons*, 520 U.S. at 359)). Indeed, as the United States Supreme Court observed in *Timmons*, “States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” 520 U.S. at 358. Although these laws “will invariably impose some burden upon individual voters,” “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest,” as Petitioners here suggest, “would tie the hands of States seeking to assure that elections are operated equitably and efficiently,” *Burdick*, 504 U.S. at 433, and “compel ... courts to rewrite ... electoral codes.” *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). “The Constitution does not require that result.” *Id.*

Instead, to determine if a particular election regulation violates the Free Speech and Association Clauses of the Pennsylvania Constitution, courts “weigh the character and magnitude of the burden imposed by the provisions against the interests proffered to justify that burden.” *Working Families Party v. Commonwealth*, 169 A.3d 1247, 1260 (Pa. Commw. Ct. 2017), *aff’d*, 209 A.3d 270 (Pa. 2019). And it is well-settled that “the state may enact substantial regulation containing reasonable, non-discriminatory restrictions” – such as the received-by deadline at issue here – “to ensure honest and fair elections that proceed in an orderly and efficient manner.” *Banfield*, 110 A.3d at 176-77. As discussed above, *see supra* Section III.A, Petitioners’ speculative contentions that a different deadline would improve upon the current scheme for mail-in voting are insufficient to establish a “clear, palpable, and plain” violation of the Pennsylvania Constitution, as necessary to justify judicial intervention. *See Working Families*, 209 A.3d at 286. In the absence of a showing that any right will actually be unduly burdened by enforcement of the received-by deadline during the June primary, Petitioners cannot establish a likelihood of success on the merits.

**(c) Petitioners Are Not Likely to Succeed on the Merits of Their Equal Protection Claim**

Petitioners claim that the received-by deadline for absentee and mail-in votes violates two equal protection provisions of the Pennsylvania Constitution, Article I, Sections 1 and 26. But, once again, Petitioners apply the wrong standard

of scrutiny, fundamentally undermining their arguments. Petitioners are unlikely to succeed on the merits of their equal protection claim.

“The equal protection provisions of the Pennsylvania Constitution are analyzed by this Court under the same standards used by the United States Supreme Court when reviewing equal protection claims under the Fourteenth Amendment to the United States Constitution.” *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1139 (Pa. 1991). Generally, there are three types of classifications that prompt equal protection review:

classifications which implicate a “suspect” class or a fundamental right; (2) classifications implicating an “important” though not fundamental right or a “sensitive” classification; and (3) classifications which involve none of these. Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a “compelling” governmental purpose[.]

*Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1117–18 (Pa. 2014) (citation omitted).

Petitioners assert that strict scrutiny applies because the received-by deadline is a classification that implicates both (1) a suspect class and (2) a fundamental right. *See* Br. at 31–32. Petitioners are wrong on both fronts, however, as strict scrutiny does not apply here at all.

First, Petitioners’ suspect class analysis misses the mark by ignoring that the received-by deadline is facially neutral. Petitioners do not contend – nor could they – that the received-by deadline facially discriminates against a suspect class;

on its face, the statute applies equally to all voters. Instead, Petitioners assert that received-by deadline “disfavors particular groups,” but only “amid the COVID-19 pandemic.” *See id.* (emphasis added). When a facially neutral regulation, like the one at-issue here, “is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of [suspect] considerations.” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982); *see also Applewhite v. Com.*, No. 330 M.D. 2012, 2014 WL 184988, at \*25 (Pa. Commw. Ct. Jan. 17, 2014) (stating that it was challenger’s burden to establish neutral law with purportedly discriminatory effect “was enacted at least in part because of its adverse effects upon identifiable groups” (citation omitted)). Petitioners have not presented any evidence that the received-by deadline was intended to discriminate against a suspect class, thus ending the inquiry.

Second, Petitioners’ fundamental right argument is similarly misdirected. Rather than reflexively applying strict scrutiny, when reviewing voting regulations subject to equal protection fundamental right challenges, this Court has repeatedly applied or cited approvingly to the framework developed in *Burdick*, *Anderson*, and their progeny, which Respondents have discussed above in the context of Petitioners’ free-expression and -association claims. *See, e.g., Petition of Berg*, 713 A.2d 1106, 1109 (Pa. 1998) (citing *Burdick*, 504 U.S. 428); *In re Nader*, 905

A.2d 450, 459 (Pa. 2006) (citing *Burdick* and *Anderson*, 460 U.S. 780); *Banfield v. Cortes*, 110 A.3d 155, 176-77 (Pa. 2015) (citing *Burdick*). These cases reaffirm that *Burdick* and its progeny provide the proper flexible standard for addressing Petitioners’ fundamental right argument – and that strict scrutiny is not appropriate in this case.

As discussed above, when applying the proper *Burdick* standard, it is clear that Petitioners are unlikely to succeed on the merits. Perhaps recognizing the weakness of their strict-scrutiny position, Petitioners contend that even applying “some lesser standard of review,” the received-by date is impermissible because it will “arbitrarily disenfranchise voters.” Br. at 32. But Petitioners offer nothing more than speculation about the “character and magnitude” of their purported injury. *Burdick*, 504 U.S. at 432. As set forth more fully above, the situation here is decidedly different from that in Wisconsin, *see supra* Section III.A.1.(b), and Petitioners provide no evidence that Pennsylvania counties will be unable to timely process ballot applications, or that the postal service’s delivery of ballots to voters will be delayed. *See supra* Section II.C.

Moreover, the Commonwealth’s interest in uniform administration of elections weighs in favor of leaving the received-by deadline in place. Where, as here, “a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the . . . rights of voters, ‘the State’s important regulatory interests

are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. at 788). As already discussed, the received-by deadline is generally applicable and merely regulates the mechanics of absentee and mail-in voting. The deadline is thus a quintessential example of a regulation aimed at ensuring that "some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 433; *see also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) ("[T]he State's interests in ensuring a fair and honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs' right to vote. Like the election laws in *Burdick* and *Rosario*, Florida's 7 p.m. deadline of returning ballots on election day does not disenfranchise a class of voters.").

Because Petitioners are wrong to apply strict scrutiny and in any event have not demonstrated, beyond naked speculation, that the received-by deadline will unduly burden the right to vote, they are unlikely to succeed on their equal protection claim.

**(d) Petitioners Are Not Likely to Succeed on the Merits of Their Claim Under the Absentee Ballot Clause**

For all of the reasons that Petitioners have failed to establish a likelihood of success on the merits of their other constitutional claims, Petitioners likewise have not met their burden with regard to their Absentee Ballot Clause claim. Article VII, Section 14(a) of the Pennsylvania Constitution provides that "[t]he Legislature

shall ... provide a manner in which ... qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence,” for any of several enumerated reasons, “may vote.” As this Court has clarified, the right to an absentee ballot is subject to the condition “that the voter must be a ‘qualified elector.’” *Ray v. Commonwealth*, 276 A.2d 509 (Pa. 1971)); *see also Martin v. Haggerty*, 548 A.2d 371, 374 (Pa. Commw. Ct. 1988). In other words, the Absentee Ballot Clause simply constitutionalizes the right of certain categories of persons to vote by absentee ballot. It does not impose any restrictions, in addition to the ones imposed by other constitutional provisions discussed above, on the *regulation* of elections that allow for those categories of persons to vote by absentee ballot. Thus, if it does any work at all, Petitioners’ claim under the Absentee Ballot Clause merely reasserts, specifically on behalf of absentee voters, Petitioners’ general claim that the received-by deadline constitutes an unconstitutional burden on the right to vote. As discussed at length herein, Petitioners have not established a likelihood of success on the merits of that claim. As their Absentee Ballot Clause claim does not assert an additional, distinct basis for that or any other cognizable claim, it too is likely to fail.

**B. Petitioners Cannot, at this Juncture, Establish the Requisite Irreparable Injury**

Just as Petitioners cannot currently establish a likelihood of success on the merits, they cannot satisfy the separate requirement of showing that a preliminary

injunction is necessary to avoid immediate, irreparable injury. “Actual proof of irreparable harm” is a “threshold evidentiary requirement to be met before a preliminary injunction may issue.” *Reed v. Harrisburg City Council*, 927 A.2d 698, 704 (Pa. Commw. Ct. 2007) (citing *New Castle Orthopedic Assocs. v. Burns*, 393 A.2d 1383 (Pa. 1978)). “In order to meet this burden, a plaintiff must present ‘concrete evidence’ demonstrating ‘actual proof of irreparable harm.’ The plaintiff’s claimed ‘irreparable harm’ cannot be based solely on speculation and hypothesis.” *City of Allentown v. Lehigh Cnty. Auth.*, 222 A.3d 1152, 1160 (Pa. Super. Ct. 2019); *accord Summit Towne Ctr.*, 828 A.2d at 1002 (holding that trial court properly denied preliminary injunction where evidence supporting claim of irreparable harm was “no[t] concrete” and “rested almost entirely on speculation and hypothesis”). Indeed, “[i]t is established that ... ‘speculative considerations ... cannot form the basis for issuing [a preliminary injunction].’” *Novak v. Commonwealth*, 523 A.2d 318, 320 (Pa. 1987) (quoting *Berkowitz v. Wilbar*, 206 A.2d 280, 282 (Pa. 1965)) (second omission and alteration in *Novak*); *accord Reed*, 927 A.2d at 704 (“proof of injury” that is “speculative and conjectural” does not support an injunction (citing *Samerica Corp. of Market Street v. Goss*, 295 A.2d 277 (Pa. 1972))).

As shown above, *see supra* Section III.A.1, Petitioners’ claim that irreparable constitutional injury will occur unless the received-by deadline is

extended is, at this juncture, entirely speculative, conjectural, and hypothetical. Petitioners assume that, on the eve of the election, Pennsylvania voters will face the same burdens as Wisconsin voters faced in early April – despite the fact that Pennsylvania moved its primary election specifically in response to the types of challenges that arose in Wisconsin; that Pennsylvania state and county officials (and others) have been hard at work in the interim educating voters and preparing for an influx of mail-in applications and socially-distanced in-person voting; and that Pennsylvania voters, aware of the challenges posed by the pandemic well in advance of the rescheduled election date, have already submitted a substantial number of mail-in ballot applications. Petitioners’ speculation and conjecture cannot, as a matter of law, establish the essential prerequisite of immediate, irreparable harm. For this reason, too, their application for a preliminary injunction should be denied – or, at the very least, deferred.

**C. If the Court Were Nonetheless to Grant the Requested Preliminary Injunction, the Non-Severability Clause Would Be Inapplicable, or, in the Alternative, Unenforceable**

If the Court denies the injunction – as it should – then there is no need to reach the issue of severability at all. Act 77’s non-severability provision states “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.” Act of Oct.

31, 2019 (P.L. 552, No. 77), § 11, 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West). And here, for all of the foregoing reasons, Petitioners’ claims are likely to fail on their merits, meaning the Court should not determine that any provision of Act 77 is likely invalid.

If, however, the Court concludes that injunctive relief is warranted, there are at least two reasons that the Court should not apply the non-severability provision to invalidate Act 77.<sup>13</sup> First, the non-severability provision should not apply in this case because Petitioners’ challenge to Act 77 is a narrow as-applied, rather than facial, challenge. As described in Respondents’ Preliminary Objections, Act 77 resulted from complex negotiations between the executive and legislative branches. It is nearly inconceivable, therefore, that the legislature intended to nullify the entirety of its historic compromise in the event of a one-time determination that, only because of an unprecedented and unforeseen global health crisis, a single, discrete administrative provision of Act 77, the received-by deadline, was unconstitutional in the context of a single primary election in which both the Republican and Democratic presidential nomination races are uncontested – and unconstitutional only in the sense that it must be extended by a few days.

*See Commonwealth v. Maguigan*, 511 A.2d 1327, 1337 (Pa. 1986) (“We are bound

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<sup>13</sup> Respondents take no position on the effect of paragraph 108 of the Petition for Review, in which Petitioners represent that they “would withdraw their claims without seeking any relief if the non-severability provision were going to apply.” (Pet. ¶ 108.)

under the rules of our Statutory Construction Act to avoid such absurd results and to promote public policy.”). Indeed, this Court has previously refused to apply a statutory non-severability clause to void a statute, despite determining that a portion of the statute was unconstitutional on an as-applied basis, because the law was “still valid as applied to” others prospectively. *Pa. Fed’n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751, 754 (Pa. 1984). The same is true here: although a final determination would render the received-by deadline invalid for purposes of this single primary election, it would still be “valid as applied to” all future, non-pandemic afflicted, elections. *Id.*

Second, should the Court agree with Petitioners and hold that applying the received-by deadline during the COVID-19 pandemic would disenfranchise voters and be unconstitutional, applying the non-severability provision to void *all of Act 77* would similarly be unconstitutional. Invalidating Act 77 would also undercut the entire purpose of the Petition, which is to *extend* the receipt deadline for mailed votes. Without Act 77, the Court would have to rescind the entire “no-excuse” mail-in voting regime. Doing so would be contrary to constitutional rights sought to be vindicated by Petitioners’ case and would be catastrophic; it would force millions of voters to vote in-person (despite COVID-19) or not at all, and it would call into question the validity of votes already sent in by mail-in voters. In the event the Court rules in favor of Petitioners’ constitutional challenge, applying the

non-severability provision would lead to an undeniably absurd result – one that would itself be, by the very logic sustaining Petitioners’ challenge, unconstitutional.

For all of the foregoing reasons, in the event the Court grants Petitioners’ requested relief, it should refuse to apply the non-severability provision here.

#### IV. CONCLUSION

For the foregoing reasons, Petitioners' Application should be denied or, in the alternative, deferred.

HANGLEY ARONCHICK SEGAL  
PUDLIN & SCHILLER

Dated: May 11, 2020

By: /s/ Michele D. Hangle

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**CERTIFICATION REGARDING PUBLIC ACCESS POLICY**

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

Dated: May 11, 2020

/s/ Michele D. Hangle  
Michele D. Hangle



This Act made significant changes to Pennsylvania's Election Code.

2. Among other reforms, Act 77 provided that electors who were not eligible for absentee ballots would be permitted to vote with mail-in ballots.

Before Act 77 was passed, voters who did not qualify for absentee ballots were required to vote in person at their polling places on election day.

3. Act 77 did not change the deadline for applying for non-emergency absentee ballots; this deadline is still 5:00 p.m. on the Tuesday before the election. The same deadline now applies for mail-in ballot applications.

4. Act 77 extended the deadline for receipt of voted ballots, however, from 5:00 p.m. on the Friday before the election to 8:00 p.m. on the day of the election.

5. Act 77 also included provisions to ensure that counties will begin sending absentee and mail-in ballots to eligible voters as soon as the ballot is certified and official ballots are available.

6. As a result of Act 77, the Department and Pennsylvania's county boards of elections (the "counties") anticipated that counties would have to deal with a large increase in the number of ballots they would receive by mail. Even before the current COVID-19 emergency, the Department and the counties were preparing for this increase.

## **The Ongoing Efforts to Mitigate the Impact of the COVID-19 Emergency on the Primary Election**

7. As the Court is undoubtedly aware, the COVID-19 pandemic is causing real and constantly evolving challenges to every aspect of Pennsylvania personal, commercial, and civic life, and presents special challenges to those administering the primary election.

8. In March 2020, as the severity of the crisis became clear, the Department, together with the counties and the General Assembly, began taking steps to mitigate these challenges.

9. The General Assembly took a critical step toward mitigation on March 27, 2020, when it passed Act 12 of 2020, which postponed the primary election from April 28 to June 2, 2020.

10. Act 12 also included provisions to give counties flexibility in recruiting poll workers and relocating polling places, for the primary election, and allowed counties to begin pre-canvassing absentee and mail-in ballots at 7:00 a.m. on election day.

11. The Department and the counties are using the five extra weeks Act 12 provided to minimize the effect of the COVID-19 pandemic on mail-in, absentee, and in-person voting.

12. First, the Department has taken steps aimed at smoothing the process of in-person voting on election day.

13. The Department is assisting counties with planning for reductions in numbers of poll workers and available polling places, and advising counties about how they can set up their polling places to facilitate social distancing.

14. The Department has provided counties with \$13 million in sub-grants—which the Commonwealth received from the federal government—for the counties to use towards additional staff, purchasing equipment, and otherwise ensuring the primary is administered as seamlessly as possible.

15. The Department has also procured 6,000 safety kits to provide to counties, which include masks, gloves, and other supplies for safely administering in-person voting.

16. Second, in order to alleviate crowding at polling places, the Department, the counties, and third parties are making efforts to encourage as many Pennsylvania voters as possible to vote by mail-in or absentee ballot.

17. The Department and counties have put many mechanisms in place to allow voters to request absentee or mail-in ballots. Most registered voters may sign up online on the Department's website, and any registered voter may get an application by downloading and printing one; requesting one in person at the voter's county election office; or calling, emailing, or writing to the Department or the voter's county election office. In counties where election offices have reopened to the public, voters can also request ballots in person, fill them out, and

submit them in one visit.

18. Many third parties, including nonprofits, government officials, and political candidates, are also delivering applications to potential voters.

19. The Department has created and posted on its website a toolkit that third parties can use to educate their constituents. The Ready to Vote toolkit includes templates for posters, flyers, palm cards, and other educational materials.

20. The Department and the Governor's office have devoted significant resources to educating members of the public about the availability of absentee and mail-in ballot options. For example,

- Governor Wolf has encouraged voters to apply for ballots during his frequent COVID-19 updates;
- The Department has mailed postcards to all households with registered primary voters (voters registered to either major political party), informing voters about the changed primary date and the availability of absentee and mail-in voting options;
- The Department has provided email updates to registered voters;
- The Department is also conveying this information to voters using bilingual statewide TV, radio, and streaming online broadcasts; and
- Other Pennsylvania departments have emailed updates from the Department to their own email lists.

21. In these communications, the Department has emphasized the need to apply for and return absentee and mail-in ballots promptly and has communicated the deadlines for requesting ballots and returning them.

22. Many county boards of elections have also made significant efforts to educate the public about these options for voting and encourage voters to promptly apply for ballots. For example, as Petitioners note in their Application, Allegheny County sent pre-stamped mail-in ballot applications to all registered voters at the end of April; Luzerne County has also mailed applications to voters. Other counties have communicated with their registered voters through social media and mail.

23. Elected officials, political parties, candidates, and public interest groups, including Common Cause and the League of Women Voters, have joined the effort, alerting their constituents and contacts to the new mail-in voting option and the application process.

### **The Current Status of the Ballot Application Process**

24. It appears that the efforts to encourage the public to apply for mail-in and absentee ballots have, so far, been successful.

25. The Commonwealth has 7,477,057 registered primary voters. Only a certain percentage of these, however, can be expected to vote in any particular primary election.

26. Primary turnout is typically lowest in elections with no contested major party presidential race and no high-profile statewide races.

27. The June 2, 2020 primary will be such an election; neither presidential

primary is contested, and the statewide races have not captured a great deal of the public's attention.

28. Statewide turnout in the last several primary elections in which federal offices were on the ballot was as follows:

- 2018: 1,563,373
- 2016 (contested races for both major party presidential nominations): 3,416,283
- 2014: 1,370,815
- 2012 (contested race for one major party presidential nomination): 1,608,341
- 2010: 1,885,648

29. As of Sunday, May 10, 2020, the counties have received more than one million applications for absentee and mail-in ballots – 1,209,289, to be exact.

30. The counties have approved 1,041,078, or approximately 86%, of the applications.

31. The counties have mailed 894,811 ballots, or approximately 86% of the applications approved so far, to voters.

32. The counties have received 139,901 voted ballots, which accounts for approximately 13% of applications approved so far. Because several counties, including Philadelphia, began mailing out their ballots very recently, I expect this number to increase rapidly.

33. The Department receives real-time updates of ballot application

statistics, and, if the Court would find it useful, can provide updated figures as the primary election approaches.

34. Because this is the first election in which the Commonwealth offers the option of mail-in voting, and because the effect on turnout of the COVID-19 pandemic is uncertain, it is difficult to predict exactly how many voters will seek mail-in or absentee ballots. It is unlikely, however, that this number will exceed 2 million. Therefore, it is reasonable to assume that more than 60% of the mail-in and absentee ballots that will be requested for the primary election have already been requested.

35. Based on the Department's experience to date, I do not currently expect an overwhelming surge of last-minute applications.

36. While managing the application process during the COVID-19 crisis has certainly presented challenges for individual counties, so far, the counties appear to be rising to the challenge.

37. Over recent weeks, the counties have been adding extra personnel to help process applications and other election tasks more quickly. Many counties have also procured additional print and mailing services to streamline preparation and delivery of balloting materials.

38. There is, of course, significant variation among counties. As of May 10, 2020, some counties had mailed ballots in response to more than 99% of their

approved applications.

39. Of the counties identified in Petitioner's Application, as of May 10,

- Allegheny County had received 168,983 applications, rejected 13,203 of them, approved 151,981, and mailed out 132,602 ballots;
- Lawrence County had received 6,740 applications, rejected 412 of them, approved 6,252, and mailed out 6,243 ballots;
- Lehigh County had received 33,534 applications, rejected 2,206 of them, approved 25,191, and mailed out 23,082 ballots;
- Mercer County had received 8,033 applications, rejected 486 of them, approved 5,892, and mailed out 5,194 ballots; and
- Philadelphia County had received 109,602 applications, rejected 1,766 of them, approved 99,662 of them, and mailed out 46,902 ballots.

40. The Department is paying close attention to each county's efforts, and will reach out to any county that appears to be falling behind to offer assistance and advice.

41. Based on the counties' progress, and assuming there are no dramatic surges in infections, weather events, or other unexpected events, I expect that the counties will be able to timely process any current backlogs and handle additional applications that arrive.

### **The United States Post Office**

42. Petitioners speculate that the United States Post Office ("USPS") is experiencing delays in processing of first-class mail that will extend mail times

beyond the typical one to three business days.

43. As part of preparations for the June 2 primary election, the Department has been in close contact with representatives of the USPS for several months.

44. The Department and the counties have worked with the USPS to ensure that the envelopes used for mailing blank and returned ballots are formatted to work with the USPS's automated equipment, thereby ensuring that ballots reach their destinations as quickly as possible.

45. Envelopes containing ballots are clearly marked as such and are segregated from other mail using "green tags," which allows the USPS to prioritize them as official election mail and expedite them to the extent possible.

46. The USPS has not informed the Department that it expects any unusual delays in first class mail delivery times in Pennsylvania before the primary election.

### **The Relief Petitioners Request**

47. From a purely policy perspective, I agree with Petitioners that extending the deadline for receipt of ballots may be good policy under the circumstances, and, as with any extension, would increase the number of votes that are timely returned. This might well increase voters' confidence in the midst of a crisis.

48. I also agree that in the event of significant backlogs in application processing, a breakdown in the postal service, or other developments, an extension of the ballot receipt deadline might be necessary to avoid an undue burden on the right to vote.

49. Based on the information available at this time, the Department does not predict significant impediments to voters' ability to timely return mail-in ballots.

50. Given the unpredictable nature of the pandemic, of course, this situation could change, and the relief Petitioners seek could become more appropriate. If problems develop, however, it is more likely than not that they will not affect the entire Commonwealth, or that they will not require a full seven-day extension.

51. Granting a full seven-day, statewide extension at this point could have the undesired consequence of encouraging counties to turn their attention away from ballot application processing, or encouraging voters to delay requesting or mailing their ballots.

52. If significant problems develop shortly before or on the day of the election, a court could consider an extension of the ballot receipt deadline that is tailored to those problems.

53. Pennsylvania statute requires counties to retain all absentee and mail-

in ballots they receive – even those received after the deadline – for a period of two years. Therefore, late-received ballots will not be discarded before a court has the opportunity to consider whether the deadline should be extended.

54. If the Court extends the deadline for receipt of ballots, it will cause complications and delays in counties' canvassing processes.

55. First, for ballots received after election day, counties will have to put in place a new procedure for examining postmarks and, potentially, allowing for challenges regarding envelopes with illegible or absent postmarks.

56. Second, during the canvassing process, counties examine each provisional ballot envelope to determine whether the elector was eligible to vote. If the county determines that the elector who submitted the provisional ballot was duly registered to cast a primary vote in that district and that the elector did not also submit an absentee or mail-in ballot, the provisional ballot will be counted. If the county determines that the elector submitted an absentee or mail-in ballot, the provisional ballot will not be counted.

57. Thus, a county cannot count a voter's provisional ballot until it has confirmed that the voter did not also return an absentee or mail-in ballot. Therefore, counties will not be able to process provisional ballots until after the last day for receipt of absentee ballots.

58. Accordingly, a seven-day extension of the ballot receipt deadline

could delay counting of all ballots until eight days or more after the election.

59. This delay, in turn, would interfere with the following deadlines, which the Court should consider extending if it extends the ballot return date: The deadline by which proof of identification for absentee and mail-in ballots must be received and verified under 25 P.S. § 3146.8(h); the deadline for counties to submit unofficial election returns to the Secretary of the Commonwealth under 25 P.S. § 3154(f); the deadline for a defeated candidate to request that a recount and recanvass not be made under 25 P.S. § 3154(h); and the deadline for the Secretary of the Commonwealth to order a recount or recanvass under 25 P.S. § 3154(g)(2).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 11, 2020.



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Jonathan Marks

**IN THE SUPREME COURT OF PENNSYLVANIA**

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DISABILITY RIGHTS	:	
PENNSYLVANIA, <i>et al.</i> ,	:	
	:	
Petitioners,	:	
v.	:	No. 83 MM 2020
	:	
KATHY BOOCKVAR, in her capacity	:	
as Secretary of the Commonwealth of	:	
Pennsylvania, <i>et al.</i> ,	:	
	:	
Respondents.	:	

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**DECLARATION OF MICHELE D. HANGLEY IN SUPPORT OF  
RESPONDENTS’ RESPONSE IN OPPOSITION TO APPLICATION FOR  
SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

I, Michele D. Hangley, declare under the penalty of perjury pursuant to 18 Pa.C.S. § 4902 that:

1. I am a shareholder of the law firm of Hangley Aronchick Segal Pudlin & Schiller, counsel for Respondents, Secretary of the Commonwealth Kathy Boockvar and Jessica Mathis, Director of the Bureau of Election Services and Notaries of the Pennsylvania Department of State. I make this declaration in support of Respondents’ Response in Opposition to Petitioners’ Application for Special Relief in the Nature of a Preliminary Injunction.

2. Attached as Exhibit 1 is a true and correct copy of the Pennsylvania Department of Health’s webpage regarding Covid-19, including “The Latest Guidance,” which includes an overview of and a link to Governor Wolf’s phased

reopening plan. *See*

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

(last visited on May 11, 2020).

3. Attached as Exhibit 2 is a true and correct copy of a Press Release, “Gov. Wolf Announces 13 Counties will Move to Yellow Phase of Reopening on May 15,” <https://www.governor.pa.gov/newsroom/gov-wolf-announces-13-counties-will-move-to-yellow-phase-of-reopening-on-may-15> (last visited on May 11, 2020).

4. Attached as Exhibit 3 is a true and correct copy of the United States Postal Service’s webpage entitled “Coronavirus Updates: Expected Delivery Changes,” <https://faq.usps.com/s/article/USPS-Coronavirus-Updates-Expected-Delivery-Changes?r=8&ui-force-components-controllers-recordGlobalValueProvider.RecordGvp.getRecord=1> (last visited on May 11, 2020).

5. Attached as Exhibit 4 is a true and correct copy of the United States Postal Service’s webpage regarding Service alerts and residential service disruptions, <https://about.usps.com/newsroom/service-alerts/residential/welcome.htm> (last visited on May 11, 2020)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 11, 2020.

/s/ Michele D. Hangle

# **EXHIBIT 1**

# Coronavirus(COVID-19)

Page last updated May 11, 2020 - 12:00 p.m.

## 57,154 total COVID-19 cases in Pennsylvania

### county and zip code maps of cases

View the [county and zip code maps of cases](#) or view

### county data in table form

[\(/topics/disease/coronavirus/Pages/Cases.aspx\)](#)

### Pre-register for COVID-19 testing

[\(/topics/disease/coronavirus/Pages/Public%20Testing.aspx\)](#)

at Mohegan Sun

Pocono Arena at Casey Plaza.

#### Symptoms & Testing

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### Stop the Spread

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### FAQs & Resources

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### Pennsylvania Data

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### Hospital Data

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### Press Releases

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### Translated Materials

<https://www.health.pa.gov/topics/diseases/coronavirus>

#### American Sign Language

<https://www.health.pa.gov/topics/diseases/coronavirus>

## The Latest Guidance

Pennsylvania counties in the red phase are under a

[Stay at Home Order](https://www.pa.gov/guides/responding-to-covid-19/#StayatHomeOrder)

Stay at Home Order

through June

4. Beginning at 12:01 a.m., Friday, May 15, 13 counties will move from red to

**yellow, including: Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Fulton, Greene, Indiana, Somerset, Washington and Westmoreland.**

24 counties are currently in yellow and include: Bradford, Cameron, Centre, Clarion, Clearfield, Clinton, Crawford, Elk, Erie, Forest, Jefferson, Lawrence, Lycoming, McKean, Mercer, Montour, Northumberland, Potter, Snyder, Sullivan, Tioga, Union, Venango, and Warren.

Pennsylvania is utilizing a three-phase matrix to determine when counties and/or regions are ready to begin easing some restrictions on work, congregate settings, and social interactions. View

(<https://www.pa.gov/guides/responding-to-covid-19/#PhasedR>

Governor's Wolf's [phased reopening plan](#) for

(</topics/disease/coronavirus/Pages/Testing-Strategy.aspx>)

Pennsylvania. View the [testing](#) and

(</topics/disease/coronavirus/Pages/Contact-Tracing.aspx>)

[contact tracing](#) plans.

Stay home as much as possible. Try to get groceries once per week instead of daily. Freedom of travel remains, but please refrain from non-essential travel. Essential travel includes things like commuting to an essential job, picking up supplies like groceries and medicine, and checking on family and pets in other households. Do not host or attend gatherings.

Schools are closed until further notice.

### **Life-sustaining businesses**

(<https://www.scribd.com/document/452553026/UPDATED-2-30pm-March-24-2020-Industry-Operation-Guidance>)



and services

may continue to maintain in-person operations. View

[frequently asked questions about Governor Wolf's order for businesses](#)

(<https://www.scribd.com/document/452553495/UPDATED-2-00pm-March-24-2020-Life-Sustaining-Business-FAQs>)

It is important that as many people as possible wear a nonmedical or homemade mask when leaving their homes. View

[instructions for how to make a homemade mask](#)

(</topics/disease/coronavirus/Pages/Stop-the-Spread.aspx>)

## **Get Help**

[Pennsylvania COVID-19 guide](#)

The (<https://www.pa.gov/guides/responding-to-covid-19/>)

was created as a place for

Pennsylvanians to quickly find the resources they need during the COVID-19 pandemic.

## **County and Zip Code Maps**

Use the maps below to see the number of COVID-19 cases in each county and by zip code. These numbers are updated daily at noon after being verified by the Department of Health. **To view the zip code-level data, please click the Zip Code Data tab below the map.** Having difficulty viewing the map below on mobile?

[View as a clickable county or zip code level map on mobile](#) 

(<https://experience.arcgis.com/experience/bc92e33cfd5d417795f7a7a1a5cb3b1d/>)

[number of cases by county](#)

You also can view the  [\(/topics/disease/coronavirus/Pages/Cases.aspx\)](/topics/disease/coronavirus/Pages/Cases.aspx)

in table format.

*Zip codes with case counts smaller than 5 have been redacted for patient privacy.*

# It Takes All of Us to Fight COVID-19

We're sure you've been hearing health care experts say that we need to "flatten the curve." What does that mean? It means we all need to act now and take precautions to keep the number of COVID-19 cases at a manageable level.

Why flatten the curve?



The more people who get sick at the same time, the more resources we will need quickly. Our health care system can only handle so many cases at a time. If medical professionals become overwhelmed, lives that otherwise could have been saved will be lost.

[Learn about what you can do to save lives.](#)

(/topics/disease/coronavirus/Pages/Stop-the-Spread.aspx)

[Help spread the word on social media.](#)

(/topics/disease/coronavirus/Pages/Social-Media.aspx)

## Questions About COVID-19?

[list of frequently asked questions](#)

First, check out our [\( /topics/disease/coronavirus/Pages/FAQs.aspx \)](#)

. If you still

[1-877-724-3258](tel:1-877-724-3258) 

have a question that needs answered, call us at 1-877-PA-HEALTH (tel:1-877-724-3258)

).

**LIVE** daily briefings from the PA Department of Health:

[pacast.com/live/doh](https://pacast.com/live/doh) 

(<https://pacast.com/live/doh>)

[www.governor.pa.gov/live/](http://www.governor.pa.gov/live/)

OR (<https://www.governor.pa.gov/live/>)

or [watch on Facebook](https://www.facebook.com/pennsylvaniadepartmentofhealth/)  [\(https://www.facebook.com/pennsylvaniadepartmentofhealth/\)](https://www.facebook.com/pennsylvaniadepartmentofhealth/)

or Español:

[pacast.com/live/es](https://pacast.com/live/es) 

(<https://pacast.com/live/es>)

[View the PA Dept. of Health coronavirus archives](#)

(</topics/disease/coronavirus/Pages/Archives.aspx>)

([/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Situation%20Rep](/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Situation%20Reports/20200510nCoVSituationReportExt.pdf)

[View the COVID-19 daily report](#) [orts/20200510nCoVSituationReportExt.pdf](/topics/Documents/Diseases%20and%20Conditions/COVID-19%20Situation%20Reports/20200510nCoVSituationReportExt.pdf))

## **EXHIBIT 2**

## Gov. Wolf Announces 13 Counties will Move to Yellow Phase of Reopening on May 15

May 08, 2020

### Press Release, Public Health

Today Governor Tom Wolf announced 13 Pennsylvania counties will move to the yellow phase of reopening at 12:01 a.m. on Friday, May 15. Those counties include Allegheny, Armstrong, Bedford, Blair, Butler, Cambria, Fayette, Fulton, Greene, Indiana, Somerset, Washington and Westmoreland.

On May 1, the governor announced the 24 counties moving into the yellow phase of reopening beginning today. And, last evening, he and Secretary of Health Dr. Rachel Levine signed new orders – one for yellow phase reopening and one to extend the red phase counties' stay-at-home order, which was set to expire last night, to June 4. The red phase stay-at-home order extension does not mean that other counties won't move to the yellow phase in advance of June 4.

"The reopening plan prioritizes the health and welfare of Pennsylvanians by using a combination of factors to gauge how much movement a location can tolerate before the 2019 novel coronavirus becomes a threat," Gov. Wolf said. "I'd like to emphasize that this plan is not a one-way route. We are closely monitoring the 24 counties in the yellow phase and will re-impose restrictions if danger arises."

Gov. Wolf reminded residents and business owners that yellow means caution and that everyone needs to continue to be mindful of their actions and how they affect not only themselves, but their families, friends and community.

"Every contact between two people is a new link in the chain of potential transmission," Wolf said. "And if the new case count begins to climb in one area, restrictions will need to be imposed to prevent local medical facilities from becoming overwhelmed. So, Pennsylvanians should continue to make good choices."

Law enforcement remains focused on achieving voluntary compliance through education, but citations are possible for violators depending on the specific circumstances of an investigation.

In addition to the possible criminal penalties levied by law enforcement, there may be additional licensing consequences for violators, in part, through complaints filed by employees on the Department of Health portal that allows any employee who feels their employer is not providing a safe work environment to fill out an online form.

The Department of Health vets the complaints and investigates internally or sends the complaint to the appropriate state agency for investigation. For example, restaurant complaints are handled by the Department of Agriculture, which inspects those facilities; complaints about nursing homes are handled by the Department of Health, which inspects and licenses those facilities. Other involved agencies are the departments of State and Labor & Industry.

Concerns about a business reopening that may be in violation of stay-at-home or yellow phase orders should be made to local law enforcement non-emergency numbers or a local elected official.

Read Gov. Wolf's Plan for PA [here](#).

Read business guidance [here](#).

Read CDC guidance for child care centers [here](#).

Read FAQs [here](#).

View the Carnegie Mellon University Risk-Based Decision Support Tool [here](#).



# **EXHIBIT 3**

# How can we help?

Search for a topic

[FAQs Home](#) » [Sending Mail & Packages](#) » [Mail & Shipping Services](#)

## USPS® Coronavirus Updates: Expected Delivery Changes

USPS products and packages may require more time to be delivered due to limited transportation availability as a result of the ongoing COVID-19 impacts.

© Apr 17, 2020 · FAQ

### Article Number

000004253

### Customer Information

#### I understand some of my mail delivery may be delayed? Why?

Postal Service Priority Mail® products and First-Class® packages may temporarily require more time to be delivered due to limited transportation availability as a result of the Coronavirus (COVID-19) pandemic.

#### When will this happen?

This change is effective April 17, 2020.

#### How will this affect delivery of Priority Mail?

Priority Mail's two-day and three-day service commitments will be extended to three days and four days, respectively. Customers will continue to receive improved product tracking and as much as \$50 in free insurance.

Feedback

## Will this affect delivery of Priority Mail Express®?

Priority Mail Express service, which guarantees overnight service, and one-day service commitments for Priority Mail will not change.

## Will First-Class Mail be delayed too?

There is no impact to First-Class letters and flats. However, First-Class Package Service® two and three day service commitments will be extended to three and four days respectively.

## Will this affect delivery of my medicine?

Medication remains a priority in all areas of transportation, processing and delivery.

## Is mail still being sent to other countries?

Global Express Guaranteed® Services also have been altered. For a full list of international and domestic updates, refer to *usps.com*.

[Back to Top](#)

Feedback

## Related Information

[Sending Mail & Packages](#)

[Mail & Shipping Services](#)

[Featured Tracking](#)

## Related Articles

[USPS® Coronavirus Updates for Residential Customers](#)

[USPS® Coronavirus Updates for Business Customers](#)

[Informed Delivery® - The Basics](#)

[Mail Service Alerts and Updates](#)

[U.S. Passports - The Basics](#)

## Trending Articles

[USPS Tracking® - The Basics](#)

[Where is my package?](#)

WHERE IS MY PACKAGE:

Informed Delivery® - The Basics

Delayed mail and packages?

Missing Mail - The Basics

Feedback

# **EXHIBIT 4**



## Service alerts

# Residential service disruptions

Select one of the entries below to display disruption information for that location or event.

[Georgia](#)

5-8, 2:30 p.m. ET

[New Mexico](#)

5-4, 2 p.m. ET

[Alabama](#)

5-1, 8:30 a.m. ET

[District of Columbia](#)

4-30, 5:30 p.m. ET

[New Jersey](#)

4-23, 7:30 p.m. ET

[South Carolina](#)

4-19, 10 p.m. ET

[Arkansas](#)

4-17, 5 p.m. ET

[Mississippi](#)

4-16, 10 a.m. ET

[Nevada](#)

4-16, 8:30 a.m. ET

[Virginia](#)

4-15, 4:30 p.m. ET

[California](#)

4-10, 5 p.m. ET

[New York](#)

4-8, 2:30 p.m. ET

[Minnesota](#)

4-6, 3:30 p.m. ET

[Florida](#)

4-6, 3:30 p.m. ET

[Arizona](#)

4-4, 2 p.m. ET

[Alaska](#)

4-3, 1 p.m. ET

[Maryland](#)

4-2, 8 p.m. ET

[North Carolina](#)

4-2, 8 p.m. ET

[Louisiana](#)

4-2, 1 p.m. ET

[Texas](#)

4-1, 7 p.m. ET

[Utah](#)

3-19, 3 p.m. ET

[Colorado](#)

3-16, 5 p.m. ET

[Massachusetts](#)

2-6, 11 a.m. ET

[Puerto Rico](#)

1-17, 5 p.m. ET

[Hawaii](#)

1-14, 4:30 p.m. ET

[Connecticut](#)

11-22, 5 p.m. ET

### Do you have mail coming from or going to another country?

Visit our [International alerts page](#).

### Related links

- [Change of address](#)
- [Holding mail](#)
- [Contact us](#)
- [Postal holidays](#)