

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NAACP PENNSYLVANIA STATE
CONFERENCE,

Petitioner,

v.

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

Respondents.

No. 364 MD 2020

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S
APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A
PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION7

FACTS SUPPORTING INJUNCTIVE RELIEF13

I. THE PANDEMIC, ITS IMPACT IN PENNSYLVANIA, AND ITS RESURGENCE AND THREAT TO CONDUCTING A FREE, FAIR, AND SAFE GENERAL ELECTION IN NOVEMBER13

II. ABSENT JUDICIAL INTERVENTION, PENNSYLVANIANS FACE NEAR CERTAIN DISENFRANCHISEMENT FROM BOTH IN-PERSON VOTING AND MAIL-IN VOTING18

A. Pennsylvania Will Again Limit In-Person Voting for the General Election as it did During the Primary Election.....18

 i. In-person voting increases the risk of infection.....18

 ii. There were unprecedented closures of polling locations during the primary election and there will be repeated closures during the general election.....22

 iii. Increased opportunity costs to voting caused by polling-place consolidation causes disenfranchisement.....25

 iv. Polling-location consolidation disproportionately impacts prospective voters of color.....26

 v. Inadequate notification of polling-location consolidation caused disenfranchisement.....27

B. Pennsylvania Must Expand the Use of Mail-in Ballots to Allow Voters to Safely Participate in the General Election.....29

 i. Pennsylvania’s system of absentee and mail-in voting imposes a multi-step process on absentee and mail-in voters30

 ii. There are multiple problems associated with voting by mail in Pennsylvania during the pandemic31

 iii. Availability of in-person early voting at the county boards of election offices will reduce crowding.....34

C. Petitioner’s Injuries35

LEGAL STANDARD.....38

ARGUMENT38

I.	PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS	38
A.	Respondents’ Failure to Provide Safe, Reliable Means to Exercise the Right to Vote Denies Petitioner’s Members and Many Other Pennsylvanians Their Constitutional Right to a Free and Equal Election	40
i.	Both in-person voting and vote by mail will be severely compromised in the upcoming election	43
ii.	The Commonwealth’s current election regime imposes unequal burdens on African-American and Latino voters.....	47
iii.	The voting regime that Respondents oversee violates equal protection during this public health crisis	51
II.	ABSENT AN INJUNCTION, PETITIONER AND PENNSYLVANIA VOTERS WILL SUFFER IRREPARABLE HARM THAT WOULD SIGNIFICANTLY OUTWEIGH ANY HARM TO THE COMMONWEALTH.....	54
III.	AN INJUNCTION WILL RESTORE THE PARTIES TO THE STATUS QUO PRIOR TO THE RESPONDENTS’ FAILURE TO ADEQUATELY ADDRESS THE PANDEMIC	56
IV.	THE INJUNCTIVE RELIEF THAT PETITIONER SEEKS IS REASONABLY SUITED TO ABATE THE THREAT OF DISENFRANCHISEMENT IN THE NOVEMBER GENERAL ELECTION.....	57
V.	A PRELIMINARY INJUNCTION WILL PROMOTE THE PUBLIC INTEREST	61
VI.	PETITIONER’S REQUEST FOR INJUNCTIVE RELIEF DOES NOT IMPLICATE ACT 77.....	61
	CONCLUSION	62

TABLE OF AUTHORITIES

CASES

<i>Applewhite v. Commonwealth</i> , 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014)	34, 37, 41
<i>Applewhite v. Commonwealth</i> , 54 A.3d 1 (2012)	48
<i>Banfield v. Cortes</i> , 110 A.3d 155 (Pa. 2015)	45, 46
<i>Banfield v. Cortes</i> , 922 A.2d 36 (Pa. Commw. Ct. 2007)	passim
<i>Beaver Cty. ex rel. Beaver Cty. Bd. of Comm’rs v. David</i> , 83 A.3d 1111 (Pa. Commw. Ct. 2014)	54
<i>Council of Alt. Political Parties v. Hooks</i> , 121 F.3d 876 (3d Cir. 1997)	48
<i>Curtis v. Kline</i> , 666 A.2d 265 (Pa. 1995)	47
<i>Democratic Nat’l Comm. v. Bostelmann</i> , 2020 WL 1638374 (W.D. Wis. Apr. 2, 2020)	36
<i>Fla. Democratic Party v. Scott</i> , 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016)	36
<i>Friends of DeVito v. Wolf</i> , 227 A.3d 872 (Pa. 2020)	7
<i>Ga. Coal. for the Peoples’ Agenda, Inc., v. Deal</i> , 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016)	36
<i>In re General Election-1985</i> , 531 A.2d 836 (Pa. Commw Ct. 1987)	35
<i>James v. SEPTA</i> , 477 A.2d 1302 (Pa. 1984)	47

<i>League of Women Voters of Pa. v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018).....	passim
<i>Marks v. Stinson</i> , 1994 WL 47710 (E.D. Pa. Feb. 18, 1994), <i>rev'd in part on other grounds</i> , 19 F.3d 873 (3d Cir. 1994)	48
<i>NAACP of Pa. v. Cortes</i> , 591 F. Supp. 2d 757 (E.D. Pa. 2008).....	35, 54
<i>NAACP of Pa. v. Cortes</i> , No. 08-cv-05048, ECF No. 34 (E.D. Pa. Jan. 29, 2009)	54
<i>Obama for Am. v. Cuyahoga Cty. Bd. of Elections</i> , 1:08-cv-562-PAG (N.D. Ohio Mar. 4, 2008), ECF No. 6.....	36
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	46
<i>SEIU Healthcare Pa. v. Commonwealth</i> , 104 A.3d 495 (Pa. 2014).....	32, 54
<i>Stein v. Cortés</i> , 223 F. Supp. 3d 423, 437-38 (E.D. Pa. 2016)	46
<i>Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.</i> , 828 A.2d 995 (Pa. 2003).....	7
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975).....	50
<i>United States v. Berks County, Pa.</i> , 250 F. Supp. 2d 525 (E.D. Pa. 2003).....	50, 55
<i>William Penn Sch. Dist. v. Pa. Dep't of Educ.</i> , 414, at 458 (Pa. 2017).....	45, 47
<i>Winston v. Moore</i> , 91 A. 520 (Pa. 1914).....	passim
<i>Wolk v. Sch. Dist. of Lower Merion</i> , 228 A.3d 595 (Pa. Commw. Ct. 2020)	32

The York Grp., Inc. v. Yorktowne Caskets, Inc.,
924 A.2d 1234 (Pa. Super. Ct. 2007).....50

STATUTES

25 P.S. § 3146.2a25
25 P.S. § 3146.826
25 P.S. § 3146.655
25 P.S. § 3146.1324
25 P.S. § 3150.1125
25 P.S. § 3150.1225, 55
2019 Pa. Legis. Serv. Act 2019-7755
25 Pa. Stat. Ann. § 2726(a).....23

OTHER AUTHORITIES

PA. CONST. art. I, § 26.....45
PA. CONST. art. I, § 5passim

INTRODUCTION

We are living in truly unprecedented times. Over 17 million people across the world have been infected with the novel coronavirus, and 600,000 of them have already died. The numbers in Pennsylvania are also stark, with 116,000 infections, and recently surging, and over 7,000 deaths. There is no cure or vaccine for COVID-19, the disease that the virus causes. As a result, to limit the spread of the virus, public health officials advise that people wear face coverings, practice social distancing, and limit indoor and outdoor gatherings.

The pandemic has not spared our elections systems. In the declarations, expert reports, and other materials accompanying this brief, Petitioner, NAACP Pennsylvania State Conference (“NAACP PSC”), has exhaustively documented the multiple ways that Pennsylvania has failed to take appropriate steps to protect voters during this public health crisis and has otherwise prevented voters from casting their ballots or having those ballots count. The voting regime that Respondents, Secretary of the Commonwealth Kathy Boockvar and Director of the Bureau of Election Services and Notaries Jessica Mathis, oversee has in many instances put voters in the impossible position of deciding between exercising their constitutional right to vote or safeguarding their health by avoiding crowded polling places without adequate distancing, spacing, or protections against the virus. These are not theoretical concerns. The June 2, 2020 Pennsylvania primary election (“June

primary election”) highlighted the manifold ways in which a substantial number of voters, especially voters of color, were disenfranchised in violation of the Free and Fair Elections Clause and equal protection guarantees of our state constitution.

First, polling places across the state were consolidated or closed with devastating consequences for voters. Unfortunately, many Pennsylvania voters did not learn of these changes until it was too late, or they never learned the correct location of their new polling place at all, and as a result, were unable to cast their votes. These polling place changes occurred without any reasonable criteria or notice to limit their impact. As the virus continues its ceaseless resurgence—with the current number of daily infections greater than it was during the June primary election—and schools across the Commonwealth shift to online-only instruction through the fall, we will certainly be living in this pandemic through November. As a result, the same conditions that led to the closure of many polling places in the June primary election—unavailable poll workers and inadequate or unavailable facilities—are expected to result in substantial closures for the November 3, 2020 General Election (“November general election”). Without judicial intervention, the state’s failure to address these conditions will prevent many Pennsylvanians from exercising their fundamental right to vote—but this time in a critical general election where the entire nation’s eyes are on Pennsylvania.

For those who did find their new polling location, approximately 20 of

Pennsylvania's 67 counties require most or all voters to use electronic ballot-marking devices at polling sites and did not make hand-marked paper ballots available to voters in the June primary election. The coronavirus may be shed onto voting machines, contaminating those glass and plastic surfaces, which are touched by every single voter who uses the machine, as well as by poll workers who set up the machines and assist voters during the course of the day. Adequately cleaning machines between voters takes time and causes long lines. Using paper ballots, on the other hand avoids delays and long lines, and reduces the risk of coronavirus transmission.

Second, Pennsylvania's mail-in voting procedures are wholly inadequate to protect the fundamental right to vote. Because voting in person during the pandemic poses serious risks, Pennsylvanians have turned in unprecedented numbers to mail-in voting—or at least have tried to do so. But the rules for voting by mail in Pennsylvania—and particularly the deadline by which county boards of elections must receive completed absentee and mail-in ballots—overlook the difficulties in voting by mail during this pandemic. For the many voters who applied for a ballot on or near this deadline before the primary election, election officials were unable to process and approve the application and/or send the voter a ballot via the U.S. Postal Service (“USPS”) in time for the election. Due to extreme backlogs at county boards of election and USPS delays, many Pennsylvanians who timely requested an

absentee or mail-in ballot did not receive their ballots in time to return them by mail to be counted and, in many instances, never received a ballot by mail at all. And many voters who received their ballots late and returned them by mail in the few days immediately prior to the election were left uncertain if their ballots were received by the county board of elections in time to be counted. The primary election thus shows that Respondents failed to ensure that Pennsylvanians can easily get mail-in ballot applications and return mail-in ballots to elections officials in person.

Perhaps most troubling for the NAACP-PSC, given its longstanding fight promoting equal rights and against inequality, is that these voting burdens were not, and in the future will not be, shared equally among Pennsylvania voters. For some voters, finding out about relocated polling places depends on Internet access because traveling to the county board of elections during a public health crisis is risky. Likewise, for some voters, relocated polling places means using public transportation to travel longer distances, which increases their risk of coronavirus infection. In both cases, African-American or Latino voters are most likely to shoulder this burden. Thus, while some voters can vote burden-free, African-American and Latino voters are more likely to face an unacceptable and unnecessary threat to their lives and health. In Pennsylvania, like elsewhere, African-American and Latino persons have been disproportionately affected by COVID-19, experiencing higher incidences of infection, hospitalization, and fatalities from the

disease as a result of systemic racism. Thus, the hazards of voting in overcrowded polling place are particularly severe and disparate for these populations, who are already disproportionately being harmed and killed by the virus.

Without judicial intervention before the November general election, Pennsylvania voters who vote in person—either by choice or necessity—will be faced with excessive crowding due to an insufficient number of polling locations, long lines, and potentially contaminated electronic voting machines and other surfaces, all at great risk to their health. And those who, legitimately fearing for their health, try to vote by mail to avoid the risk of traveling to a polling place may never have their vote counted at all or may still be forced to vote in person. These substantial burdens amount to a denial of an individual’s right to vote, undermine free and equal elections, and the equal protection guarantees that our Constitution holds sacrosanct. In short, the current voting regime has needlessly allowed the crisis to disenfranchise Pennsylvanians during the June primary election and the problems are likely to be far worse, given the expected higher interest and turnout in the general election during a presidential year.

To ensure that the June primary election was not a failed dry run for the November general election, NAACP-SPC seeks temporary, emergency injunctive relief and an order:

1. Directing Respondents to ensure that there are a sufficient number of polling places to ensure that no voter must wait more than 30 minutes

to vote;

2. Directing Respondents to require county boards of elections to mail notice to voters of any change in polling place at least three weeks in advance of the General Election, as well as posting at old polling places;
3. Directing Respondents to ensure that Respondents provide for the accessibility of polling locations when reviewing county board of elections applications to consolidate any polling locations and ensure that no voter needs to travel more than 0.5 miles further from their normal polling place;
4. Directing Respondents to require at least two weeks of early in-person absentee and mail-in voting for the November general election in advance of election day and instruct county boards of elections to establish satellite or mobile locations where voters can request, complete, and submit their mail-ballots, in a range of easily accessible locations, and during weekends and evenings;
5. Directing Respondents to require increased access to vote by mail across the Commonwealth, by among other things, directing county boards to automatically send mail-in ballot applications to all registered voters in accordance with their language preferences; requiring each county to provide expanded access to ballot drop boxes, and accepting ballots returned to a drop-box by the close of polls on Election Day;
6. Directing Respondents to instruct county boards of elections to expand the number of ballot drop boxes where voters can returned their voted ballots by the close of polls on Election Day;
7. Directing Respondents to require that all polling places in the Commonwealth use low-touch hand-marked paper ballots as the primary voting method, while retaining at least one accessible voting machine per polling place for those who request one and as required by federal law; and
8. Directing Respondents to require all persons in polling places or in lines outside polling places to wear a mask and ensure that all polling places allow six-foot separation at all stages.

The proposed relief is necessary to compel the Respondents—the Commonwealth’s chief election officers—to act to prevent grave constitutional harms during this pandemic. NAACP-PSC relies on the substantial array of materials attached to this brief, and which will be further amplified at any evidentiary hearing, to support the relief and assist the Court in fashioning an appropriate remedy.

Having satisfied all of the elements for obtaining preliminary relief, Petitioner asks this Court to issue an injunction to avoid irreparable harm to Petitioner, its members, and thousands of other Pennsylvanians who intend to vote in the November general election.

FACTS SUPPORTING INJUNCTIVE RELIEF¹

I. The Pandemic, Its Impact In Pennsylvania, and its Resurgence and Threat to Conducting a Free, Fair, and Safe General Election in November

The COVID-19 pandemic is a once-in-a-generation challenge that has

¹ Petitioner draws these facts from the verified declarations of Dr. Harvey Rubin (“Rubin Decl.”), Carol Jenkins, Ph.D. (“Jenkins Decl.”), Kenneth L. Huston (“Huston Decl.”), Dr. David J. Weber (“Weber Decl.”), Donald Mark Ritchie (“Ritchie Decl.”) and Professor Marc Meredith (“Meredith Decl.”), and documents attached as exhibits to the verified declaration of Sozi Tulante, and described therein, which are referenced herein as Exhibits (“Ex.”). These declarations and attachments are appropriate for consideration on a motion for preliminary injunction. *See, e.g., Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1002 (Pa. 2003). In addition, this Court can take judicial notice of the other factual averments in this memorandum under 225 Pa. Code Rule 201 as these facts are not in reasonable dispute; are generally known within the Commonwealth; and are

impacted us all. Indeed, just as it appeared that cases had waned, there has been a resurgence of new infections across the country and the Commonwealth in recent weeks as the declared state of emergency continues. The impact has been clear—there are more than 4.6 million confirmed cases nationally, and more than 154,000 have died. (Ex. 1.) Pennsylvania has been hard-hit by the virus. (Weber Decl. ¶¶ 37-38; *see also* Rubin Decl. ¶ 33.) It has infected more than 111,000 Pennsylvanians and killed at least 7,200 people. (Ex. 2; *see also* Ex. 3.)

The coronavirus is spread from person to person through respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects. (Rubin Decl. at ¶¶ 15-17; Weber Decl. ¶¶ 27-28.) It may survive on surfaces such as electronic voting machines for hours to days, and aerosols may last in the air for hours. (Ex. 4; Weber Decl. ¶ 33; *see also* Rubin Decl. ¶ 19.) The risk that the coronavirus will spread to another person increases when the infected person sneezes or coughs, or when an infected person is within 6 feet of other people for an extended period of time. (Rubin Decl. ¶ 16.) It can be spread by asymptomatic and pre-symptomatic persons (Weber Decl. ¶¶ 28-32), and also when a person touches a surface or object that has the virus on it and then touches their own mouth, nose, or

drawn from sources—such as reputable news sources—whose accuracy cannot reasonably be questioned. *See also Friends of DeVito v. Wolf*, 227 A.3d 872, 891 (Pa. 2020). In any event, Petitioner is prepared to amplify this record by offering testimony and evidence at an evidentiary hearing.

eyes. (Ex. 4; *see* Rubin Decl. ¶ 17.) Public health experts therefore urge members of the public to practice social distancing (that is, stay at least 6 feet from other people and avoid crowds), wash their hands often, clean and disinfect frequently touched surfaces often, and wear masks when in public. (Weber Decl. ¶¶ 46-47; *see also* Ex. 5.) Once contracted, coronavirus can have a range of effects, from passing without any symptoms at all, to flu-like symptoms, to causing a severe immune system response that can cause fluid to build in the person's lungs and lead to death. (Rubin Decl. ¶¶ 23-25.) In addition to hospitalization and death, a majority of patients who had symptomatic COVID-19 suffered from persistent symptoms that may last for months. (Weber Decl. ¶ 34.)

The COVID-19 pandemic is rising and will not have ended before the November general election; indeed, infections have been rising rapidly in recent weeks and will continue to do so over the following months. (*See* Rubin Decl. ¶ 29; Weber Decl. ¶ 34-38.) A high risk of community spread remains. (Exs. 12-13; *see also* Ex. 15.) The number of cases has risen back to where they were in May, prompting school districts across the Commonwealth, including the thousands of students of the School District of Philadelphia, to begin their semester online for the safety of students, staff, and parents. (Exs. 7-8; *see also* Rubin Decl. ¶ 33; Ex. 3.) The spiking of cases extends across the country, as well, resulting in record number of new infections and hospitalizations in a number of states. (Ex. 9.)

Public health experts, and the Commonwealth itself, almost unanimously project that the crisis will persist at least until the end of 2020, and that the second “wave” of COVID-19, which is expected to occur in Fall 2020, will be even more dire than the initial wave of Spring 2020. (Ex. 10; Rubin Decl. ¶¶ 35-38.) Further, closing portions of Pennsylvania, or the entire state, may again become necessary for the health and safety of Pennsylvanians, as the pandemic is ongoing. (See Ex. 15.) In short, the coronavirus will continue to spread for the foreseeable future as there is no known cure nor available vaccine—which, at best, will not be available until sometime in 2021. (Ex. 16; Rubin Decl. ¶ 28.)

The reality of our country’s deeply rooted systemic racism means that as the pandemic endures, the virus will continue to disproportionately afflict, hospitalize, and kill more African Americans and Latinos than other people: “The disparity is especially stark in Pennsylvania, where African Americans account for just 11.3% of the state’s population but represent almost a third of . . . COVID-19 cases where the race of the patient was recorded.” (Ex. 17; see also Rubin Decl. ¶ 20; Weber Decl. ¶¶ 39-44.) Black Philadelphians, for instance, have accounted for nearly 60% of COVID-19 hospitalizations in the city, more than double all other races combined, despite making up 42.3% of the city’s population. (Ex. 18.) As of July 15, 2020, 3,570 Black patients had to be hospitalized, compared to 2,558 combined for patients of white, Hispanic, Asian, and other ethnicities. (*Id.*; Ex. 19.) In York City, “Latinos

represent 33.3 percent of the population but account for 71.6 percent of the confirmed cases of COVID-19.” (Ex. 20.) Across the country, the rate of coronavirus cases in African-American and Latino patients is three times that of cases in their white peers, and African Americans and Latinos are almost twice as likely to die from the virus as white people. (Ex. 21; *see also* Rubin Decl. ¶ 20.)

Experts have echoed these concerns. The Surgeon General of the United States, Dr. Jerome Adams, has said that these communities have higher rates of infection, illness, and death, because, among other factors, they are more likely to have to work in-person. (Ex. 22.) And Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, has warned that “[t]he coronavirus has been a ‘double whammy’ for black people” because “they are more likely to be exposed to the disease by way of their employment in jobs that cannot be done remotely” and are more vulnerable to severe illness from the coronavirus due to underlying conditions. (Ex. 23.) Contracting coronavirus is thus significantly more dangerous, as well as more costly, for African Americans and Latinos. In Pennsylvania, people without health insurance will have less access to coronavirus testing, and less access to treatment and care once they begin exhibiting symptoms of infection. 10.2% of African Americans are uninsured, as compared with only 6% of White people. (Ex. 24.)

II. Absent Judicial Intervention, Pennsylvanians Face Near Certain Disenfranchisement From Both In-Person Voting and Mail-in Voting

Respondents failed to protect voters during the June primary election. Without judicial intervention, these failures will be exacerbated in the November general election and cause many more voters to lose their ability to vote because of the expected turnout during that election.

A. Pennsylvania Will Again Limit In-Person Voting for the General Election as it did During the Primary Election

i. In-person voting increases the risk of infection

The facility and operational conditions at most polling places during the COVID-19 pandemic are so grossly unsafe that they endanger voters' health and life while voting. (*See* Ex. 25; Rubin Decl. ¶ 39; Weber Decl. ¶¶ 49-50; *see also* Jenkins Decl. ¶¶ 9-10.) Any dense grouping of people might result in person-to-person spread of COVID-19, especially in enclosed spaces. (Rubin Decl. ¶ 42; Weber Decl. ¶ 49.) At many polling places, voters must stand in line close to other voters, often indoors and in confined spaces, sometimes for extended periods of time. (*See* Rubin Decl. ¶ 42.) Once inside the polling location, the typical "flow" involves interacting with multiple poll workers to check in; proceeding to a semi-private voting booth or area that may be quite close to another voter's voting booth; and then interacting with another poll worker to check out. (Weber Decl. ¶ 49.) All of these interactions offer opportunities for an infected voter or poll worker to transmit the coronavirus directly to others. Any additional crowding only enhances these concerns. To that

end, the CDC has encouraged the adoption of “voting methods that minimize direct contact and reduce crowd size,” including mail-in voting and early voting. (Ex. 26.)

Additionally, the coronavirus may be shed onto voting machines, voting booths, and other materials required for voting, contaminating those surfaces. (*Id.*; Rubin Decl. ¶ 46; Weber Decl. ¶ 50.) The virus could remain present on those materials for hours or days. (Exs. 26-27.) Approximately 20 counties in Pennsylvania require most or all voters to vote on repeat-touch electronic voting machines and do not make hand-marked paper ballots available to voters.² (Ritchie Decl. ¶ 30.) Electronic voting machines have glass and plastic components that are touched by every single voter who uses the machine, as well as by poll workers who set up the machines and assist voters when necessary. (*See* Weber Decl. ¶¶ 50, 70-73.) Any bare hand contact with a surface may lead to contracting COVID-19 if the previous person was infected (even if asymptomatic) unless the entire touchable surface was appropriately disinfected. (*Id.* ¶ 50.) In contrast, paper ballots present a lower risk than a touchscreen voting machine because the virus survives for a shorter length of time on paper than on plastic, metal, or other solid surfaces, and because paper ballots are not touched by multiple voters. (*Id.*)

² All other Pennsylvania counties give voters single-use hand-marked paper ballots, while maintaining at least one accessible voting machine per polling place to be available upon request, as required by the federal Help America Vote Act, 52 U.S.C. § 21081(a)(3)(B).

The CDC recommends routine cleaning and disinfection of polling locations and areas, and voting equipment. (Ex. 26.) In particular, with respect to “Shared objects” (such as repeat-touch touchscreens), the CDC urges (1) replacing shared objects with single-use; (2) disinfecting those that cannot be single use; and (3) minimizing use of shared objects. (*Id.*) The third recommendation cannot be satisfied with respect to touchscreen voting machines in any election. And regarding the second recommendation, disinfection between use, disinfecting voting machines between every voter is particularly unrealistic at a crowded polling place at a high-turnout election. The voting machine manufacturer ES&S, which makes voting machines that most or all voters are required to use in 13 counties, specifies in its official manufacturer cleaning instructions that disinfection requires “*30 seconds and 10 minutes [of cleaning] depending on the product.*” (Ex. 29 at 2.) (emphasis added). The manufacturer Unisyn, which makes voting machines that most or all voters are required to use in four counties, provides a multi-step process in which poll workers must first “clean” the touchscreen and other components with one type of cleaning agent, and then separately “disinfect” the equipment with household wipes. (Ex. 67.) Even worse, the manufacturer Dominion, which makes voting machines that most or all voters are required to use in Warren County, urges poll workers to power down the machine as part of the cleaning process. (Ex. 68 (emphasis in original).) These manufacturers also have warned that failure to clean

the machines according to their instructions may cause damage. (Ex. 29; Weber Decl. ¶ 55.)

If a polling place follows the CDC’s standard of disinfecting shared objects between voters, and does so according to the manufacturers’ own instructions, then the voting process will slow down substantially. (Weber Decl. ¶ 60.) Cleaning each machine properly takes time. (Weber Decl. ¶ 57.) Even setting aside Dominion’s requirement to actually power down the machine before each cleaning, and Unisyn’s two distinct steps, the ES&S cleaning process requires between 30 seconds and *10 minutes* per surface. At minimum, this adds *at least* a full minute between voters, which will exacerbate lines. Even in normal times, the bipartisan Presidential Commission on Election Administration “concluded that, as a general rule, no voter should have to wait more than half an hour in order to have an opportunity to vote.” (See Ex. 71 at 14.) But in the pandemic, the longer lines pose an additional risk: an increased risk of person-to-person transmission.

Conversely, if the machine is not cleaned properly after each person casts a ballot, the coronavirus and other pathogens will remain on the machine’s surfaces, such as the screen or keypad.³ (Weber Decl. ¶ 5.) The only safe option is to comply with the CDC’s first recommendation, by replacing shared touchscreen machines

³ In fact, the coronavirus may remain on the surface even *after* the manufacturers’ recommended cleaning processes. (Ex. 67.)

with single-use pens and paper ballots. Crawford and Luzerne Counties already made this change for the primary election, and appear set to continue on this course for the general election, for precisely this reason. (Exs. 69-70.)

ii. There were unprecedented closures of polling locations during the primary election and there will be repeated closures during the general election

Anticipating the impact of the coronavirus on polling locations, the CDC has issued clear guidance to election officials: “[m]aintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance,” and “[u]nless there is no other option, *do not increase the number of potential registered voters assigned to each polling place.*” (Ex. 26 (emphasis added).) Pennsylvania did the exact opposite of what our country’s leading public health agency advises. Specifically, on March 27, 2020, Governor Wolf signed Senate Bill 422, also known as Act 12 (Ex. 31), which provides that:

Two or more polling places may be consolidated, except that the consolidation of polling places may not result in more than a 60% reduction of polling place locations in the county, except for necessitous circumstances and as approved by the Department of State. Two or more polling places may be located in the same building.

25 Pa. St. § 3582(a)(3).

Multiple Pennsylvania counties, including those with the highest concentration of African-American and Latino residents, consolidated their polling places. (*See, e.g.*, Ex. 32.) Some counties consolidated polling places at the 60%

threshold. (Ex. 33.) At least four counties asked Respondents to grant exemptions for the reduction of polling places by more than 60% and Respondents agreed to do so. (*Id.*) Respondents authorized Philadelphia to reduce polling places from 850 to 190, and they authorized Allegheny County to reduce polling places from 830 to 211. (Ex. 34 at 32.) As a result, about 60 percent of registrants in Philadelphia and 70 percent of registrants in Pittsburgh experienced a change in their polling location that increased the distance between their residence and their polling location. (Meredith Decl. ¶ 34(a).)

Act 12 further provided that the polling place for an election district could be moved to any other election district anywhere in the county.⁴ But in consolidating polling places, election officials were not required to consider whether the new locations were accessible to voters, within a reasonable distance from the old polling place, or easily reachable by public transportation. Indeed, there was no requirement that election officials consider community input or seek input from legislators when selecting new locations. Further, Act 12 did not require county election boards to consider different municipalities' populations to determine whether there should be a larger number of polling places based on the number of registered voters in the areas.

⁴ 25 Pa. St. § 3582(a)(1). Each of Pennsylvania's 67 counties exceeds 100 square miles in land area, and ten of them exceed 1,000 square miles.

Counties were also not required to provide any evidence as to why they decided to consolidate or close down certain polling places, or make findings that reducing the number of polling locations would be safer. Nor were they required to provide evidence that the consolidation plan included an adequate number of polling places to allow for social distancing, time for disinfecting polling machines and other surfaces, and otherwise keep voters safe. Nor was any consideration given to whether polling places were reduced at a vastly disproportionate rate to any reduction in in-person voting, thereby increasing crowding of voters at the polling site—which, in turn, increases the chances of voter lines and the number of voters in each location, expanding the public health risk.

Not surprisingly, the consolidated polling places caused traffic jams around the polling sites. In Penn Hills, the parking lot became full and some voters could not walk one quarter mile to “[t]he nearest parking [that] was down a hill with no sidewalk.” (Ex. 35.) The problem of the reduced number of polling places was exacerbated by reduced numbers of poll workers, who tend to be older individuals, typically retired, and therefore in the most vulnerable demographic should they contract COVID-19. Some counties actually affirmatively encouraged older and more high-risk election workers not to volunteer for the June primary election. Some counties reported that they were missing over 30 percent, if not more, of their poll workers on Election Day. (Exs. 36-37.)

Pennsylvania's reduction of polling places resulted in long lines and overcrowding at polling places that made it impossible for voters to practice necessary social-distancing measures to prevent the risk of transmission of COVID-19. (¶ 8.) At a Philadelphia site that consolidated 12 divisions, poll workers were shoulder to shoulder and could not maintain six-foot distance, and by the time that many voters entered the voting place, it was impossible for them to stay six feet apart. (Jenkins Decl. ¶ 10.) Additionally, given long lines and confusion, some voters gave up and left.⁵ (Ex. 38; Jenkins ¶ 9.) Ultimately, consolidation of polling locations disenfranchised tens of thousands of Pennsylvanians in the June 2020 primary. (Meredith Decl. ¶ 53.)

iii. Increased opportunity costs to voting caused by polling-place consolidation causes disenfranchisement

Studies show that in-person voting on Election Day drops when a potential voter is assigned to vote at a new polling location. (*Id.* ¶ 30.) It likewise drops when a registrant faces greater opportunity costs to reach their polling location. (*Id.* ¶ 31.) Roughly 80 percent of Philadelphia County registrants and 90 percent of Allegheny County registrants experienced a change in their polling location, many of which caused a registrant to travel more than 0.5 miles further than normal. (*Id.*) Someone

⁵ On July 21, 2020, the Philadelphia City Council Committee on Legislative Oversight held a public hearing with testimony to examine issues that arose during the primary election and to make recommendations for the general election. *See* Ex. 39.

walking three miles per hour will spend an additional 10 minutes walking 0.5 miles. (*Id.* ¶ 35, n.56.) Data show that roughly two percent of registrants experiencing a change in their polling location abstained from voting because of the increased burden generated by this polling-location change. (*Id.* ¶ 53.) While Allegheny County and Philadelphia County consolidated more polling locations than most other counties in Pennsylvania, polling-location consolidation occurred all over the state. (*Id.* ¶ 31.)

iv. Polling-location consolidation disproportionately impacts prospective voters of color

The impact of polling-place consolidation in the primary election was felt the most by prospective voters of color. As an initial matter, racial and ethnic minorities are more likely to be disenfranchised by increased burdens of in-person voting, such as time spent traveling to the polling location and waiting in line. (*Id.* ¶ 1.) Thus, having a polling location closer to a potential voter's residence is more consequential for turnout in less-White and lower-income neighborhoods. (*Id.* ¶ 31.) Counties with proportionately more registrants of color were also the counties that consolidated the most polling locations. (Meredith Decl. ¶ 54.) At least in Allegheny County, registrants of color were more likely to experience a polling location change than White registrants, and this was likely to happen in any other county that did not factor in a municipality's population when allocating polling locations to that municipality. (*Id.*) While some potential voters respond to

increased burdens of voting in-person on Election Day by switching to mail ballots or early in-person voting, racial and ethnic minorities, and especially African-Americans, will be more likely than Whites to hold a strong preference for casting an in-person ballot. (*Id.* ¶¶ 28, 32.) Polling-location changes caused registrants in other counties to vote less frequently than they would have, if their polling location had remained the same. (*Id.* ¶ 53.) As a result of these polling-site closures, and given that people of color are less likely to vote by mail, minority registrants were more negatively affected by changes to their polling location than White registrants. (*Id.* ¶ 54.)

v. Inadequate notification of polling-location consolidation caused disenfranchisement

Many Pennsylvania voters did not learn of the change in their regular polling place for the primary election until it was too late, or they never learned the correct location of their new polling place at all, and as a result, were unable to cast their votes. The reason: Pennsylvania has not established state-wide deadlines or procedures sufficient to notify voters of changed or consolidated polling places. Notice of changes in polling locations was required to be posted only 15 days before the elections and only at the county board of elections office and on the Internet. (Ex. 31.) These notice methods were insufficient for persons unable to travel to the county board of elections office or without access to the Internet, persons who are disproportionately African American, Latino, and low-income Americans. (Exs. 40-

42.)

As evidenced by voters' experiences during the June primary election, these notice procedures failed to alert many people of the changes in their polling place and caused great confusion. (Ex. 43; Jenkins Decl. ¶¶ 12-13.) Many people showed up at their old polling location and were confused about the location of their new polling place. (Exs. 37, 38, 44.) Others only learned about their new polling place after standing in line at polling places that "lacked signs directing people to new sites." (Ex. 45.) At the West Philadelphia High School polling location, the site lacked adequate information about polling changes: There was nothing posted to notify voters who have historically voted at the high school about their new location. (Ex. 38.) Voters reportedly left this site "in tears because they were so frustrated." (*Id.*) Some voters waited in line only to find out their polling location had changed—but by the time they could reach the new location, polls would have closed. (*Id.*)

While Act 12 was limited to the primary election, there is no question that resurgence of the pandemic all but ensures that there will be continued consolidation of polling places for the November general election with neither adequate notice to voters nor fair and reasonable criteria for consolidation decisions, unless this Court acts. (*See, e.g.*, Jenkins Decl. ¶¶ 15-18.) Specifically, with inadequate safety measures at polling places, poll workers will likely continue to be absent, and many voting sites, such as senior centers and privately-owned properties, are unsuitable,

boarded up, or too small or otherwise unfit for social distancing. (Ex. 46; Jenkins Decl. ¶¶ 16-17.) In any event, even after Act 12, the Election Code continues to provide county boards of elections legal authority to move polling places for the November general election “at any time, for any reason that may seem proper to” the county board. *See* 25 Pa. Stat. Ann. § 2726(a).

B. Pennsylvania Must Expand the Use of Mail-in Ballots to Allow Voters to Safely Participate in the General Election

Because voting in person poses grave risks to people’s health and lives while coronavirus is in our communities, in the primary election, Pennsylvanians understandably sought to vote by mail in unprecedented numbers. (Meredith Decl. ¶ 27; Ex. 47.) Applications to vote by mail for the June 2020 primary skyrocketed across the Commonwealth with around 1.9 million Pennsylvanians requesting a mail-in or absentee ballot. (Ex. 34 at 11, 19; *see also* Exs. 49-50.) Philadelphia voters alone requested more mail-in ballots than voters across the entire state did in 2016. (Ex. 50.) Ultimately, approximately 1.5 million mail-in ballots were actually cast – accounting for more than half of the 2.8 million total Pennsylvanian voters in the June primary election. (Ex. 34 at 9-10.) While 1.09 million out of 1.8 million, or 90%, of voters who requested mail ballots three weeks before the primary election ultimately voted, only 545,000 out of 713,000, about 76%, of those who requested ballots within three weeks of the election—two out of five mail-in voters—ended up voting. (Ex. 48.) The later a voter’s mail-ballot application was processed, the

lower the chance that voter ultimately cast a successful ballot by any method. (*Id.*)

Pennsylvania will undoubtedly see an unprecedented number of mail-ballot requests in the general election as many voters are drawn to the safety and convenience of voting by mail. However as the primary election demonstrated, the rules for mail voting in Pennsylvania—and particularly, the deadline by which county boards of elections must receive completed absentee and mail-in ballots—do not account for difficulties in voting by mail during a pandemic.

i. Pennsylvania’s system of absentee and mail-in voting imposes a multi-step process on absentee and mail-in voters

On October 31, 2019, the General Assembly enacted legislation to modify and expand voting by mail in Pennsylvania. *See* Act of Oct. 31, 2019, P.L. 552, No. 77 (“Act 77”). Pursuant to Act 77, two categories of Pennsylvania voters may vote by mail: (1) absentee voters, who must provide one of several specified reasons for voting by mail, 25 P.S. § 3146.13; and (2) mail-in voters, who need not offer a justification, 25 P.S. §§ 3150.11–3150.12b.⁶ As relevant to this case, the same deadlines for requesting and submitting ballots apply to both absentee voters and mail-in voters.

For both absentee and mail-in voters, voting is a multi-step process. *First*, the

⁶ All references to absentee and mail-in voters throughout this brief, application, and proposed order refer to non-military and overseas voters, who currently must return their ballots by election day.

voter must apply for an absentee or mail-in ballot by 5:00p.m. on the first Tuesday prior to the day of any primary or election. 25 P.S. §§ 3146.2a(a), 3150.12a(a). A voter with a driver's license or non-driver photo ID from the Pennsylvania Department of Transportation (PennDOT) may apply online. If, like many Pennsylvanians, the voter lacks a PennDOT identification, she may download and print an absentee or mail-in ballot application, complete it on paper, and mail it to her county board of elections. If she is unable to go in person to their local office, the voter must email, call, or write a letter to the Department of State or county board of elections to request an application, and then wait for the application to be mailed and delivered to her. *Second*, after receiving the voter's application, the county board of elections must manually review and process it, and then mail the ballot to qualifying voters. 25 P.S. §§ 3146.2a(a.3)(3), 3150.12b(a), (a)(1). *Third*, after receiving the ballot, the voter must complete it and send it back to the county board of elections. To be counted, irrespective of when a voter applied for her absentee or mail-in ballot, the ballot must be received by the board "on or before eight o'clock P.M. the day of the primary or election." 25 P.S. §§ 3146.6(c), 3146.8(g)(1)(ii), 3150.16(c).

ii. There are multiple problems associated with voting by mail in Pennsylvania during the pandemic

Pennsylvania officials have encouraged as many Pennsylvanians as possible to vote by mail. (Ex. 52.) However, Pennsylvania's expansion of mail-in voting

does not remedy the burdens and public health concerns created by polling place consolidation. For many Philadelphia voters in the primary election, “their experience with voting-by-mail was a nightmare,” and “[m]any were not able to vote for the first time in their adult life,” because they did not receive their ballots in time. (Ex. 53.)

Once a voter submits an application, the voter’s ability to timely cast a ballot depends in multiple respects on the actions of third parties—namely, county boards of elections (which must process applications) and the USPS (which must deliver the application, deliver the blank ballot to the voter, and deliver the completed ballot back to the county elections board by 8:00 p.m. on election day). As acknowledged by Jonathan Marks, the Deputy Secretary for Elections and Commissions for Pennsylvania, due to the impact of COVID-19, in the event of significant backlogs in applications, county-election offices would be unable to keep up with the applications. (Ex. 54 ¶¶ 49, 51-52.) USPS has acknowledged a slowdown of mail delivery in the Philadelphia area because of the impact of COVID-19 on its operations, the greater volume of mail, and USPS’s own labor policies. (Ex. 56.) USPS delays could extend mailing times during the pandemic, and will in turn result in delays at all steps of the mail-in voting process. (Ex. 54 ¶¶ 44, 48-49.)

In the primary election, the county-elections officers received tremendous increases in applications to vote by mail beyond numbers received in previous

elections (Ex. 34 at 11, 19), while at the same time facing staff shortages and logistical challenges in light of office closures and social-distancing requirements. For county election offices that were able to process and send out a large percentage of mail-in ballots for approved applicants by May 19, 2020, only about 21% of ballots mailed out had been received as voted ballots by the county-election offices. (*Id.* ¶ 32.) Many voters who timely requested an absentee or mail-in ballot one week before Election Day were precluded from voting in the June primary election because they did not have sufficient time to receive and return the ballot to the board of elections by Election Day. (Ex. 57.) Unsurprisingly, over 75,000 mail-in ballots arrived in the week after the June primary election, including 14,600 in Philadelphia and 9,400 in Allegheny County. (Ex. 51.) While some of those were counted in the primary election because of the Governor’s one-time executive order (Ex. 72),⁷ including 6,800 of the 9,400 from Allegheny County, many others were not counted. (*Id.*) 42,674 more voters who applied to vote by mail were forced to use provisional ballots at the polls instead. (Ex. 34 at 22.) For a large portion of those voters who did not receive their ballots or were unable to mail them back in time, the insufficient number of polling places open on the primary election day, and the fact that their

⁷ That executive order, on its terms, applied only to the primary election. There is no order that has been issued to extend the date to allow for the counting of ballots in the general election under similar circumstances.

new polling place might be far away or not easily accessible, interfered with voters' capacity to safely vote by regular ballot in person.

Without judicial intervention, the challenges that county boards faced in the primary election will persist and worsen in the general election given the overwhelming number of Pennsylvanians who will wish to vote by mail due to the COVID-19 pandemic and because more people cast ballots in general elections than primary elections. County board of elections and mail delivery delays will lead to disenfranchisement for Pennsylvania voters who timely request an absentee or mail-in ballot, yet are unable to receive, cast, and mail their ballot and guarantee its receipt by Election Day.

iii. Availability of in-person early voting at the county boards of election offices will reduce crowding

A critical measure for reducing the risk of coronavirus exposure is physical distancing and prevention of overcrowding. (See Rubin Decl. ¶¶ 30, 40-41, 45; Weber Decl. ¶¶ 46-47; Ex. 26.) One opportunity to diminish this crowding is through early voting under Act 77. While Pennsylvania does not have in-person early voting at a polling place, under Act 77, voters may apply for and request a mail-in or absentee ballot in person at a county-elections office—referred to as early voting centers when used in this capacity—and cast their ballot at that time up until 8:00 p.m. on Election Day. (Ex. 58.)

County-elections offices are often located in a single, not necessarily

conveniently accessible location, which may be considerably more difficult to access than local polling places. As Professor Meredith notes, moving local polling places even just 0.5 miles further from voters' residences can make it substantially more difficult for voters—particularly voters of color—to vote. (Meredith Decl. ¶¶ 30, 32, 40-49.) *A fortiori*, offering early voting at a single central county office substantially reduces the likelihood that voters—particularly voters of color—will be able to make use of it. And this affects all voters: Every voter who is unable to or dissuaded from voting at an early voting center is more likely to vote at the more-crowded polling place, thus posing a risk of transmitting the coronavirus to other voters.

During the primary election, some counties failed to operate offices that would allow voters to cast their ballot at the county offices as Act 77 permits. (*See* Ex. 59.) These offices should be uniformly expanded in number based on the number of voters, and placed in easily accessible locations that are accessible to all voters. Furthermore, they should be required to be open at least two weeks before the election and during weekends and evenings. (*See id.*) Pennsylvania's current failure to uniformly expand its early in-person absentee or mail-in voting unnecessarily put lives of voters at risk during the primary election, runs afoul of CDC regulations, and will do so again during the general election.

C. Petitioner's Injuries

Petitioner, NAACP-PSC is a non-partisan organization operating in

Pennsylvania and is affiliated with the National Association for Advancement of Colored People operating across the United States. NAACP-PSC has approximately 10,000 members in 44 branches across the state. (*See* Huston Decl. at 2.) Among other organizational missions, the NAACP-PSC Political Action Committee is dedicated to ensuring that all eligible Pennsylvania citizens are given a full and equal opportunity to exercise their fundamental right to vote. (*Id.* at 2.) As such, NAACP-PSC conducts voter registration, education, and turnout efforts. (*Id.*) It also has been involved in voting rights litigation in the Commonwealth and has sought to prevent efforts to suppress or disenfranchise African American voters. (*Id.*)

The COVID-19 pandemic has greatly impacted how NAACP-PSC communicates with its members, stakeholders, and other communities. (*Id.* at 3.) Therefore, besides mailing information to individuals, it also has to use social media, emails, and telephone conference as additional efforts to disseminate information. (*Id.*) For the general election, NAACP-PSC will have to divert substantial resources away from traditional voter registration and get-out-the-vote efforts to educate and assist voters in applying for mail-in voting, submitting mail-in ballots, locating polling places, and traveling to polling places. (*See generally* Huston Decl.)

NAACP-PSC also has members who will be injured by the election regime that Respondents oversee. (*See id.* at 3-5.) The opportunity to use mail-in ballots is invaluable to NAACP-PSC's members because many voters of color, because of

their age or preexisting medical conditions, face real risk to their health if they attempt to vote in person. (*Id.* at 5-6.) However, many NAACP-PSC members have a deep history of voting in person; thus during the primary election, they did not vote by mail nor did they feel comfortable doing so. (*Id.* at 6.) Automatically sending mail-in-ballot applications would help such members who otherwise would not request an application. (*Id.*) Many NAACP-PSC members who planned to vote in person in the June primary election did not have enough advanced notice about whether their polling place would be closed and could not get updated information about where to vote. (*Id.* at 3-4.) Polling place closures created tremendous stress, frustration, and confusion for NAACP-PSC members. (*Id.* at 4.) Even then, for those members who knew where their polling places were, those who lacked transportation or reliable public transit could not reach a new polling place that was too far from their homes. (*Id.* at 4.) The lack of notice or criteria relating to any polling-place closures in November will create even more confusion among NAACP-PSC members given the likelihood of greater turnout in a presidential election, and challenges accessing consolidated polling locations will persist. (*Id.*) Thus, reducing polling places and restricting access to mail-in ballots will injure NAACP-PSC members who will face unreasonable burdens on their right to suffrage.

LEGAL STANDARD

A preliminary injunction is warranted where: “(1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury will result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) a clear right to relief; (5) the injunction is reasonably suited to abate the alleged harm; and (6) issuance of an injunction will not adversely affect the public interest.” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 610 (Pa. Commw. Ct. 2020); *accord SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014).

As demonstrated below, Petitioner has established each of these factors and is entitled to a preliminary injunction.

ARGUMENT

I. Petitioner is Likely to Succeed on the Merits of its Claims

NAACP-PSC is likely to succeed on the merits of its claims. Article I, Section 5 of the Pennsylvania Constitution provides: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Pa. Const. art. I, § 5. This clause requires that *all* elections must be “free and equal.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018) (quoting Pa. Const. art. I, § 5). Elections are “free and

equal” only when “the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.” *Winston v. Moore*, 91 A. 520, 523 (Pa. 1914). The guarantee of a “free and equal” election also requires that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Id.*; *see also League of Women Voters*, 178 A.3d at 811-12. That is, the Commonwealth must ensure that elections to maintain a “voter’s right to equal participation in the electoral process.” *Id.* at 804. The clause prevents interference with the exercise of the right to vote “even if the interference occurs by inadvertence.” *League of Women Voters*, 178 A.3d at 811 (citing *In re New Britain Borough Sch. Dist.*, 145 A. 597, 599 (Pa. 1929)). Thus, the clause guarantees that “each voter under the law has the right to cast his ballot and have it honestly counted.” *Banfield v. Cortes*, 922 A.2d 36, 48 (Pa. Commw. Ct. 2007) (quotation omitted).

Moreover, courts have broad authority when enforcing the Free and Equal Elections Clause because it “strike[s] . . . at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise.” *Id.* at 809 (quotation and citation omitted); *see also id.* at 822. As we approach the general election, Respondents’ response to the current and widespread pandemic threatens the fundamental right of thousands of Pennsylvanians “to cast

[their] ballots and have [them] honestly counted.” *Banfield*, 922 A.2d at 48. As a result, in accordance with the Free and Equal Elections Clause, Respondents must be directed to take remedial action to safeguard the right to vote in Pennsylvania. *See Applewhite v. Commonwealth*, 2014 WL 184988, at *18, 23 (Pa. Commw. Ct. Jan. 17, 2014).

A. Respondents’ Failure to Provide Safe, Reliable Means to Exercise the Right to Vote Denies Petitioner’s Members and Many Other Pennsylvanians Their Constitutional Right to a Free and Equal Election

The Commonwealth has the duty, and courts have the authority, to put in place emergency measures to avert the massive disenfranchisement that occurred in the June primary election. Despite the difficulties COVID-19 presents for running the general election, Respondents are all the more required to take action to operate elections that safeguard the fundamental right to vote. *Winston*, 91 A. at 523. The constitutional right to vote will be endangered on November 3, without issuance of a preliminary injunction. These are extraordinary times that demand extraordinary relief for an election that will be held in the shadow of a deadly pandemic.

Petitioner’s proposed relief here is no more than what other courts have put in place in less emergent circumstances. For instance, the Monongahela River flooded during a statewide general election, causing local officials to declare a state of emergency, the trial court suspended the election for two weeks. *In re General Election-1985*, 531 A.2d 836, 838 (Pa. Commw Ct. 1987). In affirming the polling-

place closures and election rescheduling, this Court reasoned that permitting an election to go on under these extreme circumstances, “where members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, would be inconsistent with the purpose of the election laws.” *Id.* at 839. And approximately a week before the 2008 presidential election, the U.S. District Court for the Eastern District of Pennsylvania issued an injunction that compelled election officials to adopt appropriate contingency plans in advance in case electronic voting machines malfunctioned. *NAACP of Pa. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008). At the time the order issued, the election was still a week away—yet the court held that at least some machines “undoubtedly fail” on Election Day, and “this is not a matter we can decide through hindsight after the election has concluded.” *Id.* at 765. Faced with this “real danger” threatening to create unacceptably long lines, the court recognized that the constitutional right to vote required the Commonwealth to implement safeguards to ensure that voters have a viable alternative. *Id.*

Courts across the country have also taken necessary action to protect voting rights in response to emergencies or unforeseen events, similar to the current pandemic. *See, e.g., Democratic Nat’l Comm. v. Bostelmann*, 2020 WL 1638374, at *22 (W.D. Wis. Apr. 2, 2020) (issuing a preliminary injunction permitting tens of thousands of voters to cast their absentee ballots by extending the deadline for their

receipt to six days after Election Day); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) (crafting injunctive relief to extend voter registration deadline when a hurricane impacted voter registration processes); *Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (ordering Governor and Secretary of State to extend voter registration deadline); *Obama for Am. v. Cuyahoga Cty. Bd. of Elections*, 1:08-cv-562-PAG, (N.D. Ohio Mar. 4, 2008), ECF No. 6 (ordering county boards to extend precinct operating hours after severe weather and ballot shortages prevented voters from reaching polls and casting ballots).

Preliminary relief is warranted here because Petitioner's members and many other Pennsylvanians face the denial of their constitutional right to a "free and equal" election. In *Banfield v. Cortes*, the plaintiffs established that Direct Recording Electronic voting systems (DREs) made it "likely that a significant number of votes will not be counted accurately," and that voters in some counties with DREs were less likely to have their votes counted as compared to voters in paper counties. 922 A.2d at 48. This Court held that such a threat to voting constituted a "free and fair election" violation because Pennsylvanian voters "[had] no way of knowing whether their votes [would] be honestly counted." *Id.* Given Pennsylvania's handling of the primary election, Petitioner's members and many other Pennsylvania voters are likewise at greater risk of not having their votes counted due to extreme polling

location consolidation, and limited drop box locations and early voting centers, depending on which the county they live in. (*See supra* Facts Supporting Injunctive Relief (“Facts”) Section II.) Voters will lack reasonable and safe access to in-person voting, and lack reasonable assurance that their mail ballots will be delivered to their county boards on time. (*See, e.g.,* Huston Decl. at 4-7.). This threat to the right “to cast [one’s] ballot and have it honestly counted,” controverting the guarantee that “every voter has the same right as any other voter,” is undoubtedly a “constitutional injury.” *Banfield*, 922 A.2d at 48.

Because Pennsylvania has not adapted to the realities of the COVID-19 crisis (*see supra* Facts Section II), voters will be forced to make the untenable choice between their health and their vote—and this too “amount[s] to a denial” of the right to vote. *Winston*, 244 Pa. 455. “Disenfranchising voters ‘through no fault of the voter himself’ is plainly unconstitutional.” *Applewhite*, 2014 WL 184988, at *23 (quoting *Norwood*, 116 A.2d at 553) (alteration omitted).

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

The experiences of Pennsylvania voters in the June primary election is just a preview of what will happen, absent judicial intervention, during the November general election, given that greater numbers of voters are likely to vote in the presidential election and the second wave of COVID-19 is expected by health experts to be far worse. (*See* Rubin Decl. ¶¶ 35-38.) If a voter cannot complete a

mail-in ballot safely at home (for any reason) and also cannot safely vote in person (because of the conditions of the polling place), then their vote has effectively been denied. Putting voters to that choice violates the Free and Equal Elections Clause.

Pennsylvania's November general election will not be "free" within the meaning of Article I, § 5 if there are inadequate safeguards to ensure reasonable access to in person voting. As observed with the June primary election, a dramatic reduction in the number of polling places means voters have to travel longer distances to cast ballots. It also means congregating more voters into fewer polling places, increasing their contact with others and the risk of spreading the coronavirus. Potential voters may end up not voting at all given these risks and challenges. (*See, e.g., Meredith Decl.* ¶ 1.) Polling-place consolidation will likely occur in the November general election, absent injunctive relief. (*See supra* Facts Section II(A)(ii).) In addition, changing polling-place locations causes voter confusion. (*See supra* Facts Section II(A)(ii); *see also* Ex. 38 at 1-2; Ex. 66.)

What is more, Respondents' measures taken in the June primary election did not, and will not, alleviate all risks of in-person voting, especially to vulnerable populations, or in the event of crowding at polling places. On June 2, a number of polling places experienced significant crowding, and social distancing was not maintained. (*See, e.g., Ex. 38* at 3.) In some instances, polling places lacked markings on the floor for social distancing and workers neglected to wear masks,

forcing voters to feel unsafe and leave before casting votes. (*See, e.g., id.*; Exs. 62-63.) In other instances, voters reported “crowded” polling rooms and “voice[d] concerns about the safety of voting . . . during a pandemic.” (Ex. 37 at 2; *see also* Jenkins Decl. ¶¶ 9-10; *see generally* Facts Section II(A)(ii).)

Pennsylvania’s upcoming general election will not be “free” within the meaning of Article I, § 5 if absentee ballot applications are not automatically sent to all registered voters. The deadlines for mail-in applications and submission of mail-in ballots proved to be unworkable for the primary election. Voters were advised that they may apply for mail-in ballots up until one week before the election. But many voters waited until that deadline or close to that deadline because the Pennsylvania election scheme only requires that voters receive 15 days’ notice of a change in polling places—a change that will be dispositive of many voters’ voting methods. By then, the right to vote depended on the actions of third parties, and there was insufficient time to resolve logistical challenges.⁸ (*See supra* Facts Section II(A)(ii).) The challenges seen in the primary election will be magnified by the likelihood of an even greater number of requests for mail ballots in the General Election. There will be a substantial number of mail ballot requests made in the November general election that will not be fulfilled and marked ballots that will not

⁸ According to the National Association of Letter Carriers, as of mid-April, 900 postal workers tested positive for the coronavirus, 600 additional workers were presumed positive, and more than 8,000 were in quarantine. (Ex. 64 at 4.)

be delivered in time.

Many voters who receive their absentee or mail-in ballot close to November 3 will conclude that there is not enough time to mail the ballot back and have it arrive by election day, or at least that there is a risk it will not arrive by election day. (*See supra* Facts Section II(B)(ii); Huston Decl. at 6-7.) These voters will conclude that the only way to ensure their votes are counted is to vote in person, and therefore will face a stark choice. (*See, e.g., id.*) They can either risk losing their right to vote by mailing the ballot, or they can endanger their health and lives by voting in person (where they will only be able to cast a provisional ballot). (*See, e.g., id.* at 5-7.) However, if the Court directs Respondents to instruct the county boards of election to expand drop boxes and locations where voters may leave their completed mail-in ballots, then these voters will have a greater opportunity to freely and safely vote, as the constitution entitles them to.

Elections cannot be “free” when voters must risk their lives to vote. Requiring voters to vote on multi-use touchscreen voting machines at overcrowded polling stations in which poll workers and voters are not required to wear masks or engage in social distancing violates the recommendations of the CDC and other health experts and unreasonably places voters’ health and lives at risk. This choice will make voting “so difficult as to amount to a denial” of the right to vote for many Pennsylvanians. *League of Women Voters*, 178 A.3d at 810 (quoting *Winston*, 91

A. at 523); *accord Applewhite*, 2014 WL 184988, at *19. Elections are not “free” when legions of voters who followed the rules are disenfranchised due to Respondents’ failure to address to the consequences of a global pandemic. “Disenfranchising voters ‘through no fault of the voter himself’ is plainly unconstitutional.” *Applewhite*, 2014 WL 184988, at *23 (quoting *Norwood*, 116 A.2d at 553) (alteration omitted). The Commonwealth’s voting system will deny these voters their right under the Free and Equal Elections Clause “to cast [their] ballot and have it honestly counted.” *Banfield*, 922 A.2d at 48 (quotation omitted). In short, in the context of the COVID-19 crisis, Pennsylvania’s current voting system violates the Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 804.

ii. The Commonwealth’s current election regime imposes unequal burdens on African-American and Latino voters

Equally problematic under the Free and Equal Elections Clause is that the burdens and risks faced by voters who must or prefer to vote in person during the pandemic are substantially and unjustifiably increased as compared to voters who can easily vote by mail. These burdens and risks will fall disproportionately and more severely on African-American and Latino voters. (*See Meredith Decl.* ¶¶ 34(c), 54.) Potential voters who are racial and ethnic minorities, and especially Black potential voters, will be more likely than White potential voters to hold a strong preference for casting an in-person ballot (*Id.* ¶ 28), and face greater

difficulties in voting by mail than the general population. (*See* Ex. 65 at 4.) Across all U.S. census racial and ethnic classifications, African Americans are least likely to use vote-by-mail options. During the 2018 midterm elections, only about 11 percent of African-American voters cast ballots by mail, compared with 23.5 percent of White voters.

For people without private means of transportation or reliable public transit, reaching a polling place further from home may be impossible. (*See, e.g.*, *Huston Decl.* at 4.) In-person voting drops when a registrant has to pay higher travel opportunity costs to reach their polling location. (*Meredith Decl.* ¶ 30.) African-American and Latino voters, especially in urban areas like Philadelphia, are less likely to have access to private means of transportation and are more likely to rely on public transportation. (*Ex.* 41.) Thus, it is more difficult for African-American and Latino voters to travel farther distances to vote at consolidated polling locations, or return their mail-in ballots at county election offices, and such voters may be discouraged from attempting to do so, should they be unable to return the ballot by mail. Additionally, because early in-person voting is not uniformly expanded in Pennsylvania for those potential voters who prefer to vote in person, the consequences of consolidating polling locations is particularly severe. (*Meredith Decl.* ¶ 33.) As a result, African-American and Latino voters are severely and disproportionately impacted by consolidation of polling places, especially without

adequate mail-in protections.

This disproportionate burden on the voting rights of persons of color is not speculative: registrants of color were disproportionately harmed in the June primary election because of the consolidation of polling places, and are likely to be disenfranchised in the general election if polling locations are consolidated again in a similar manner. (Meredith Decl. ¶ 34(c); *supra* Facts Section II(A)(iv).) A majority of registrants in Allegheny and Philadelphia Counties experienced an increase in the distance between their residence and their assigned polling location in the June primary election relative to the 2018 general election. (Meredith Decl. ¶ 35.) Yet White registrants in Allegheny County were less likely than registrants of color to have to travel further in the June primary election to reach their assigned polling location than they did in the 2018 general election. (*Id.* ¶ 37.) And in Philadelphia, a majority of registrants of color were assigned to vote at a polling location further from their residence in the June primary election than in the 2018 general election. (*Id.* ¶ 38.) While White registrants were more likely to be assigned to a new polling location in Philadelphia County, they were more likely to offset this by shifting to mail ballots than registrants of color. (*Id.* ¶ 48.) Thus, as a result of polling place consolidation in the June primary election, there was reduced turnout among minority potential voters in Allegheny and Philadelphia counties. (*Id.* § VII.) Additionally, counties in which registrants of color disproportionately live were also

the counties that consolidated the most polling location, (*id.* ¶ 54), causing registrants to face longer travel times (Ex. 37 at 2), and longer lines than other areas as a result. (Ex. 57 at 2; *see also* Jenkins Decl. ¶ 9.) At one overcrowded polling location in Philadelphia, for example, many prospective voters, who were predominantly African American, left without voting. (Jenkins Decl. ¶ 9.)

Far from equalizing access, the burdens and risks faced by voters who must or prefer to vote in person are substantially and unjustifiably increased as compared to voters who can easily vote by mail. These burdens and risks will fall disproportionately and more severely on African-American and Latino voters. (*See supra* Facts Section II(A)(iv).) The Pennsylvania Constitution requires Respondents to remedy these disparities because the Free and Equal Elections Clause requires that elections be “equal.” Pa. Const. art. I, § 5. Under the clause, “every voter has the same right as any other voter.” *Banfield*, 922 A.2d at 48. This clause requires “that the power of [an individual’s] vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens.” *League of Women Voters*, 178 A.3d at 817. Faithful adherence to the Free and Equal Elections Clause mandates that “inconveniences [of voting regulations] if any bear upon all in the same way under similar circumstances.” *Winston*, 91 A. at 523. Because the Free and Fair Elections Clause protects “a voter’s individual right to an equal, nondiscriminatory electoral process,” *League of Women Voters*, 178 A.3d at 810,

“open to all qualified electors alike,” *Winston*, 91 A. at 523, onerous burdens on some people’s right to vote are impermissible. In addition, the Pennsylvania Constitution’s Equal Protection Clause prohibits the Commonwealth or any of its political subdivisions from “discriminat[ing] against any person in the exercise of any civil right.” Pa. Const. art. I, § 26.

iii. The voting regime that Respondents oversee violates equal protection during this public health crisis

Applying Pennsylvania’s current voting regime in the midst of a global pandemic would also violate the Pennsylvania Constitution’s equal protection guarantees. Art. I, §§ 1, 26. Article I, section 1 states that “[a]ll men are born equally free and independent, and have certain inherent and inalienable rights.” And Article I, section 26 provides that “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

Strict scrutiny applies when a state law provides for differential treatment of citizens in their exercise of “a fundamental right,” *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 414, at 458 (Pa. 2017). The “right to vote” is a “fundamental” right. *Banfield v. Cortes*, 110 A.3d 155, 176 (Pa. 2015). Pennsylvania’s election scheme is subject to strict scrutiny because it disproportionately burdens some individuals in connection with their fundamental right to vote. Reducing polling places and restricting access to mail-in and early voting will necessarily result in differential

treatment of similarly situated voters—some disenfranchised and some not. And enforcement of the election scheme amid the COVID-19 pandemic necessarily will give rise to another, more pernicious form of differential treatment. The ability of citizens to cast their votes will depend on their capacity and willingness to risk their health and safety by voting in person as an alternative to submitting a timely requested mail-in ballot that otherwise would not be counted. This burden is severe, as “[t]he right to vote necessarily includes the right to have the vote fairly counted.” *Stein v. Cortés*, 223 F. Supp. 3d 423, 437-38 (E.D. Pa. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964).

Although the state may enact “reasonable, non-discriminatory restrictions” on voting “to ensure honest and fair elections that proceed in an orderly and efficient manner,” *Banfield*, 110 A.3d at 176-77, the Commonwealth’s voting regime is neither reasonable in this context nor non-discriminatory. The Commonwealth has no legitimate interest, let alone a compelling one, in reducing polling places and restricting access to mail-in and early voting that will inevitably cause this arbitrary disenfranchisement. The abstract goal of ensuring that elections are orderly and administered uniformly is not sufficient to support widespread, arbitrary and discriminatory disenfranchisement in the face of a public-health crisis. And even if it were, reducing polling places and restricting access to mail-in and early voting is not necessary to further that interest.

Even if strict scrutiny did not apply, the challenged provisions would be subject to an “intermediate” (or “heightened”) standard of review because they unquestionably involve an “important” right. *William Penn Sch. Dist.*, 170 A.3d at 458. For a law to pass intermediate scrutiny, “the government interest [must] be an ‘important’ one” and “the classification be drawn so as to be closely related to the objectives of the legislation.” *James v. SEPTA*, 477 A.2d 1302, 1307 (Pa. 1984). Reducing polling places and restricting access to mail-in and early voting amid the COVID-19 pandemic fail intermediate scrutiny as well.

Even absent heightened scrutiny, enforcing the challenged scheme during the COVID-19 crisis would violate equal protection under this Court’s rational-basis test. “[T]reating people differently under the law” must further a legitimate state interest and must be reasonably related to that interest rather than arbitrary. *Curtis v. Kline*, 666 A.2d 265, 268 (Pa. 1995). Reducing the number of polling places, without access to early voting or sufficient access to mail-in voting, will arbitrarily disenfranchise voters and thus does not pass the rational-basis test. *See supra* Facts Sections II(A)(ii)-(v). There is “no rational reason” to disenfranchise certain, arbitrarily selected voters based on these inevitable delays that are entirely outside their control, and to offer, as the only potential recourse, that those voters risk their lives to vote in person and repeatedly touch surfaces touched by strangers and wait in crowded lines for excessive time. *Id.* at 260.

II. Absent an Injunction, Petitioner and Pennsylvania Voters Will Suffer Irreparable Harm That Would Significantly Outweigh Any Harm to the Commonwealth

Petitioner and thousands of Pennsylvania voters face irreparable harm: they will be forced to choose between risking their health and safety and/or foregoing their constitutional right to vote. (*See generally supra* Facts Section II; *see also* Huston Decl. at 5-7.) It is well settled that the denial of constitutional rights, including disenfranchisement, constitutes irreparable injury. *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *see also Marks v. Stinson*, 1994 WL 47710, at *13-14 (E.D. Pa. Feb. 18, 1994), *rev'd in part on other grounds*, 19 F.3d 873 (3d Cir. 1994); *Applewhite v. Commonwealth*, 54 A.3d 1, 6 (2012) (Todd, J., dissenting). The failure to implement adequate safeguards to protect the right to vote and ensure a free and equal election threatens to disenfranchise Petitioner's members and untold numbers of Pennsylvania voters.

Requiring voters to “endanger[] their health” by going to crowded polls without adequate social distancing is the type of cognizable injury that “supplie[s] the irreparable harm requirement.” *Fischer*, 439 A.2d at 1174. Disenfranchisement due to inadequate notice of polling location consolidation, or inability to reasonably access new polling locations will also cause irreparable harm, as it will leave thousands of voters unable to make it to their polling locations to vote. (*See generally supra* Facts Section II(A)(ii); *see also* Meredith Decl. ¶¶ 53-55.)

Requiring voters in approximately 20 counties to use unsafe touchscreen voting machines will cause irreparable harm by forcing them to risk their health in order to exercise their fundamental right to vote. (*See supra* Facts Section II(A)(i).) The mail-in voting deadlines will also cause irreparable harm to voters who choose to vote in person rather than risk that their mail ballot will arrive too late. (*See supra id.* II(B).) And those who are disenfranchised entirely by county administrative delays and mailing delays beyond their control will undoubtedly suffer irreparable harm. (*See id.*) These injuries also unquestionably “suppl[y] the irreparable harm requirement,” *Fischer*, 439 A.2d at 1174. Because of all the ways in which the Commonwealth’s voting regime will harm individual voters (*see supra* Facts Section II), this will cause irreparable harm to Petitioner who will divert resources to help Pennsylvanians vote under the constraints of the Commonwealth’s voting regime—resources they could use for other purposes, including other election-related purposes, if the requested relief were granted. (*See* Huston Decl. at 3, 6.)

Furthermore, the severe burdens imposed on voters, and the potential disenfranchisement of Petitioner’s members and thousands like them across Pennsylvania, far outweigh any potential injury to Respondents or any other interested parties. (*See supra* Facts Section II.) Pennsylvanians face a catch-22 whereby they must risk their health to submit a ballot in person and face excessive crowding, long lines, contaminated surfaces, and transportation costs due to

consolidated polling locations, or mail their ballots from the safety of their own homes and risk not having their vote counted at all. (*See id.*; *see also* Huston Decl. at 5-7.) Neither administrative convenience nor unsupported fears of fraudulent activity can justify these outcomes. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975); *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003).

III. An Injunction Will Restore the Parties to the Status Quo Prior to the Respondents' Failure to Adequately Address the Pandemic

The status quo in the Commonwealth has been upended by the COVID-19 pandemic and the inadequate and counter-productive steps Respondents have taken to address it. The June primary election made clear that Pennsylvania's current electoral infrastructure cannot ensure the right to vote in the middle of the COVID-19 pandemic. (*Supra* Facts Section II.) "The status quo to be maintained by a preliminary injunction is the legal status that preceded the pending controversy." *The York Grp., Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1244 (Pa. Super. Ct. 2007) (emphasis added). For the purposes of this action, the legal status that preceded the controversy here was that elections in Pennsylvania (in the pre-pandemic world) guaranteed the right to vote for all Pennsylvania citizens in accordance with the Pennsylvania Constitution. Before COVID-19, voters did not need to risk their lives to ensure their votes would be counted. That is no longer true with the onset of COVID-19 and its interaction with the mail-in ballot deadlines,

consolidated polling locations, and other difficulties with in person voting. Petitioner's requested relief will restore to thousands of Pennsylvanians the opportunity to participate in a free and equal election, and to exercise their right to vote—and to have their votes counted—as guaranteed to them by the Pennsylvania Constitution. Pa. Const. art. I, §§ 1, 26.

IV. The Injunctive Relief That Petitioner Seeks is Reasonably Suited to Abate The Threat Of Disenfranchisement in The November General Election

Injunctive relief is also appropriate because the relief requested is reasonably tailored to ensure access to a free and equal election and to protect the constitutional right to vote. (*See supra* at 5-6.) The requested relief provides an opportunity to vote for those who otherwise would have inadequate notice of a change in polling location, and ensures that there will be sufficient polling locations to avoid overcrowding and a heightened risk of contracting COVID-19. Expanded early voting would reduce crowding at the polls and thus help reduce the spread of COVID-19 because some voters who otherwise would have crowded into polling places on Election Day would naturally stagger their voting over multiple days or weeks. At least several days of early voting could dramatically reduce the number of voters congregating in polling places at any one time. By requiring polling places to use hand-marked paper ballots rather than repeat-touch electronic machines as the primary voting method, the requested relief also reduces the risk of coronavirus transmission at polling sites. (Ritchie Decl. ¶ 26.) Hand-marked paper ballots will

also expedite voting wait times and reduce congestion at polling locations because (1) the process of hand-marking paper ballots is generally faster, and (2) poll workers will not have to repeatedly clean electronic machines which would cause longer wait times. (*Id.* ¶¶ 23-25.)⁹ Additionally, expanded access to mail-in voting is critical in the pandemic for those people who cannot or prefer not to vote in person. The requested relief provides an opportunity to vote for those who would otherwise be hamstrung by administrative and mailing delays, as it would mitigate the risk of large-scale disenfranchisement from these mail service disruptions and ballot processing delays during the COVID-19 pandemic. Thus, the relief requested will remedy the Free and Equal Elections Clause violations described above. *League of Women Voters*, 178 A.3d at 804. For these same reasons, the relief requested will alleviate the disparate treatment resulting from consolidated polling locations.

But the relief Petitioners seek is not unlimited. Moreover, the proposed criteria can be administered without difficulty; for example, New York State and others have automatically sent absentee ballot applications to all registered voters for elections during the COVID-19 pandemic. (Ex. 61.) Numerous states permit

⁹ This relief will not be undermined by the continued availability of at least one accessible voting machine per polling place, because the increased time spent on voting on, and disinfecting, that machine will only apply to the small fraction of voters who request such a machine.

early voting;¹⁰ expanding access to early in-person by-mail voting would require additional staffing, a reasonable change that will greatly increase the safety of the voting process.

Hand-marked paper ballots can be administered with greater ease than electronic voting machines because paper ballots do not require repeated cleaning, and because electronic machines require additional poll workers to set up and manage. (Ritchie Decl. ¶¶ 24-26, 28.) Additionally, equipment changes would be limited and feasible. (*See id.* ¶¶ 30-32.) Indeed, as noted above, two Pennsylvania counties have already decided to switch from touchscreen machines to hand-marked paper ballots starting with the primary, without any notable difficulties. (Exs. 69-70.) Furthermore, the increased interest in absentee and mail-in ballots means that the counties that normally use touchscreen voting machines will already need to increase orders and capacity for paper ballots anyway.

But even setting these points aside, the Secretary is already subject to a statewide injunction (still in effect) that requires every polling place to be prepared to switch to hand-marked paper ballots based on a contingency that could occur without warning on Election Day. *See Ex. 73, NAACP of Pa. v. Cortes*, No. 08-cv-

¹⁰ *See, e.g.*, Alaska - AS §15.20.064, 15.20.045; North Dakota - NDCC §16.1-07-15; Florida - Fla. Stat. §101.657; Georgia - GA Code §21-2-380 and §21-2-382; North Carolina - N.C.G.S.A. §163A-1300 to §163A-1304; Maryland - Election Law §10-301.1.

05048, ECF No. 34 (Order Granting Permanent Injunction) (E.D. Pa. Jan. 29, 2009); *NAACP of Pa. v. Cortes*, 591 F. Supp. 2d 757, 767 (E.D. Pa. 2008) (granting the preliminary injunction). In that case, *NAACP of Pa. v. Cortes*, the federal court issued to the Petitioner here a permanent injunction ordering the Secretary of the Commonwealth to “direct forthwith all the County Boards of Elections throughout Pennsylvania” that “[i]f 50% of electronic voting machines in a precinct are inoperable,” then emergency backup paper ballots must be distributed immediately to eligible voters. Ex. 73, No. 08-cv-05048, ECF No. 34. Any county that is prepared to comply with the Secretary’s directive required by the permanent injunction in *NAACP v. Cortes* based on an event that could occur in the middle of the day on November 3 is also prepared to make that exact same change now, and must be able to prepare to comply with that directive with *three full months’ notice*. Since the Court generally presumes that government entities will comply with judicial injunctions, the Court should likewise assume that the same entities will be able to meet the requirements of a similar injunction imposed with significantly more advance notice.

For these reasons, the proposed injunction hews closely to “the offending activity” and, at minimum, is “reasonably tailored” to that activity, which is all that is necessary to support an injunction. *SEIU*, 104 A.3d at 509; *accord, Beaver Cty. ex rel. Beaver Cty. Bd. of Comm’rs v. David*, 83 A.3d 1111, 1119 (Pa. Commw. Ct.

2014).

V. A Preliminary Injunction Will Promote The Public Interest

Finally, the public interest favors procedures that protect the constitutional rights to vote and to participate in a free and equal election. The Pennsylvania Supreme Court has recognized that there is no right more fundamental under the Pennsylvania Constitution than the right to vote. *Bergdoll*, 731 A.2d at 1268. Therefore, an injunction requiring Respondents to ensure that elections are conducted in compliance with Pennsylvania’s Constitution “so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.” *Berks Cty.*, 250 F. Supp. 2d at 541.

VI. Petitioner’s Request for Injunctive Relief Does Not Implicate Act 77

Petitioner does not seek to enjoin the receipt deadline, nor would its requested relief prevent election officials from enforcing the deadline on any ballots delivered in-person, or on all mail ballots in elections that occur outside of the pandemic. *See* 25 P.S. §§ 3146.6(c), 3150.16(c). While Act 77 expanded the right to vote by mail to all eligible voters, 25 P.S. § 3150.12(a), and extended the deadline by which mail ballots must be received, the non-severability clause that the Act attaches to these provisions is neither triggered nor enforceable in this action. *See* 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its motion for special relief in the form of a preliminary injunction, and issue an Order granting the relief Petitioners have requested. (*Supra* at 5-6.)

Dated: August 6, 2020

By: /s/ Sozi Pedro Tulante

Sozi Pedro Tulante (Pa. 202579)

Julia Chapman (Pa. 315959)

Tiffany Engsell (Pa. 320711)

Craig Castiglia (Pa. 324320)

DECHERT LLP

Cira Centre

2929 Arch Street

Philadelphia, PA 19104

215.994.4000

Neil Steiner (admitted *pro hac vice*)

DECHERT LLP

Three Bryant Park

1095 Avenue of the Americas

New York, NY 10036

212.698.3822

Ronald Fein (*pro hac vice pending*)

John Bonifaz (*pro hac vice pending*)

Ben Clements (*pro hac vice pending*)

Free Speech For People

1320 Centre Street #405

Newton, MA 02459

617.244.0234

*Attorneys for Petitioner NAACP
State Conference of Pennsylvania*

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellee has complied with the 14,000 word limit set forth in Pa. R.A.P. 2135(a)(1). According to the Word Count feature in Microsoft Office Word 2013, Petitioner's Brief contains 13,771 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

Date: August 6, 2020

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (Pa. 202579)

CERTIFICATION

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.

Date: August 6, 2020

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (Pa. 202579)

CERTIFICATE OF SERVICE

I, Sozi Pedro Tulante, hereby certify that on August 6, 2020, I caused a true and correct copy of the foregoing document titled Petitioners' Brief in Support of Application for Special Relief in the Form of a Preliminary Injunction, together with all supporting exhibits and declarations thereto, to be served via electronic filing to all counsel of record.

Date: August 6, 2020

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (Pa. 202579)